

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 -

*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*

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AWARD CONCERNING THE PRELIMINARY OBJECTIONS  
OF THE RUSSIAN FEDERATION

21 February 2020

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ARBITRAL TRIBUNAL:

Judge Jin-Hyun Paik (President)  
Judge Boualem Bouguetaia  
Judge Alonso Gómez-Robledo  
Judge Vladimir Golitsyn  
Professor Vaughan Lowe QC

REGISTRY:

Permanent Court of Arbitration



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## GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

<b>Azov/Kerch Cooperation Treaty</b>	Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003
<b>Convention <i>or</i> UNCLOS</b>	United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982
<b>Four Categories</b>	The four categories of disputes enumerated in Annex VIII, Article 1, of the Convention
<b>Geneva Convention</b>	Convention on the Territorial Sea and the Contiguous Zone, done at Geneva on 29 April 1958
<b>Hearing</b>	Hearing on preliminary objections held from 10 to 14 June 2019 at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands
<b>ICJ</b>	International Court of Justice
<b>ILC Articles on State Responsibility</b>	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts
<b>ITLOS</b>	International Tribunal for the Law of the Sea
<b>Joint Statement</b>	Joint Statement by the President of the Russian Federation and the President of Ukraine on the Sea of Azov and the Kerch Strait, dated 24 December 2003
<b>Notification and Statement of Claim</b>	Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based of Ukraine, dated 14 September 2016
<b>PCA</b>	Permanent Court of Arbitration
<b>Russian Federation's Reply</b>	Reply to the Written Observations and Submissions of Ukraine on Jurisdiction, dated 28 January 2019
<b>Rules of Procedure</b>	Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal, dated 18 May 2017
<b>Russian Federation's Preliminary Objections</b>	Preliminary Objections of the Russian Federation, dated 19 May 2018
<b>State Border Treaty</b>	Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done at Kiev on 28 January 2003
<b>Ukraine's Memorial</b>	Memorial of Ukraine, dated 19 February 2018
<b>Ukraine's Rejoinder</b>	Rejoinder of Ukraine on Jurisdiction, dated 28 March 2019

<b>Ukraine's Written Observations</b>	Written Observations and Submissions of Ukraine on Jurisdiction, dated 27 November 2018
<b>UNGA</b>	United Nations General Assembly
<b>USSR</b>	Union of Soviet Socialist Republics

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## I. PROCEDURAL HISTORY

### A. INTRODUCTION

1. Ukraine and the Russian Federation are States Parties to the United Nations Convention on the Law of the Sea (hereinafter the “Convention” or “UNCLOS”), having ratified the Convention on 26 July 1999 and 12 March 1997, respectively.
2. The present case has arisen in the wake of events that occurred in 2014 in Crimea, a peninsula surrounded by the Black Sea to the west and south, and the Sea of Azov to the northeast. The Black Sea and the Sea of Azov are connected by the Kerch Strait. In their pleadings, the Parties characterise these events in different ways.
3. Ukraine takes the view that, in 2014, “the Russian Federation invaded and occupied the Crimean Peninsula, and then purported to annex it.”<sup>1</sup>
4. The Russian Federation “categorically denies” such allegations.<sup>2</sup> Instead, the Russian Federation points out that a “referendum on the future of the [Crimean] peninsula”<sup>3</sup> was held on 16 March 2014 in response to a “*coup d’état* in Kiev in February 2014,” which “provoked deep division in the Ukrainian society.”<sup>4</sup> The Russian Federation states that since “the majority of voters [...] opted for reunification with [the Russian Federation],” “Crimea declared its independence on 17 March 2014 and on 18 March it concluded an international treaty on accession to [the Russian Federation].”<sup>5</sup>
5. The Russian Federation adds that following Crimea’s accession, it “assumed all the rights and duties of the coastal State in relation to the waters adjacent to the peninsula” and that “[i]nternationally, Russia unconditionally affirmed its status as a coastal State in relation to waters surrounding Crimea.”<sup>6</sup>

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<sup>1</sup> Memorial of Ukraine (hereinafter “Ukraine’s Memorial”), 19 February 2018, para. 102.

<sup>2</sup> Preliminary Objections of the Russian Federation (hereinafter “Russian Federation’s Preliminary Objections”), 19 May 2018, para. 10.

<sup>3</sup> Russian Federation’s Preliminary Objections, para. 11.

<sup>4</sup> Russian Federation’s Preliminary Objections, paras 10-11.

<sup>5</sup> Russian Federation’s Preliminary Objections, para. 11.

<sup>6</sup> Russian Federation’s Preliminary Objections, para. 12.

6. Ukraine denies that those events have the legal character and effect attributed to them by the Russian Federation.<sup>7</sup> According to Ukraine, the referendum of 16 March 2014 “was held on Ukrainian territory in violation of Ukrainian law.”<sup>8</sup> Ukraine states that it occurred in the aftermath of “Russia’s unlawful use of force in Ukraine,”<sup>9</sup> and that the Russian Federation’s actions “have been rejected as unlawful and invalid by the international community.”<sup>10</sup> In particular, Ukraine points out that the United Nations General Assembly, on 27 March 2014, adopted a resolution in which it, *inter alia*, underscored that the above referendum had “no validity” and “cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol.”<sup>11</sup>
7. In the present Arbitration, Ukraine alleges that various “unauthorized activities” of the Russian Federation occurring subsequently to these events “violate Ukraine’s rights under the United Nations Convention on the Law of the Sea of 10 December 1982.”<sup>12</sup>

## **B. INSTITUTION OF THE PROCEEDINGS**

8. This Arbitration was instituted by Ukraine on 16 September 2016 when it served on the Russian Federation a Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of the Claim and Grounds on which it is Based, dated 14 September 2016 (hereinafter the “Notification and Statement of Claim”), in respect of a “Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait.”
9. In its Notification and Statement of Claim, Ukraine requested the Arbitral Tribunal to adjudge and declare the following:
  - a. Ukraine has the exclusive right to engage in, authorize, and regulate exploration and exploitation of natural resources, including drilling related to hydrocarbons, in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine’s jurisdiction and rights prior to February 2014; any such activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
  - b. The Russian Federation’s Federal Law 161-FZ of 29 June 2015, and the Decree of 31 August 2015 (#916), are not compatible with the Convention and constitute

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<sup>7</sup> Written Observations and Submissions of Ukraine on Jurisdiction (hereinafter “Ukraine’s Written Observations”), 27 November 2018, para. 6.

<sup>8</sup> Ukraine’s Written Observations, para. 6.

<sup>9</sup> Ukraine’s Written Observations, para. 6.

<sup>10</sup> Ukraine’s Memorial, para. 102.

<sup>11</sup> Ukraine’s Written Observations, para. 27 *citing* United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), para. 5 (**Annex UA-129**).

<sup>12</sup> Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based (hereinafter “Notification and Statement of Claim”), 14 September 2016, para. 1.

internationally wrongful acts for which the Russian Federation bears international responsibility;

- c. Ukraine has the exclusive right to authorize and regulate fishing in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014; any fishing activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
- d. The Russian Federation shall refrain from preventing Ukrainian vessels from exploiting in a sustainable manner the living resources in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014; any efforts by the Russian Federation to interfere with Ukrainian vessels in these areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
- e. Order #273 of the Ministry of Agriculture of the Russian Federation is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;
- f. Ukraine has the right to passage through the Kerch Strait; any restrictions placed by the Russian Federation on Ukrainian transit through the Kerch Strait is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;
- g. The Russian Federation shall cooperate with Ukraine in the regulation of the Kerch Strait, including pilotage along the canal in the Kerch Strait; the Russian Federation's failure to cooperate is not compatible with the Convention and constitutes an internationally wrongful act for which the Russian Federation bears international responsibility;
- h. The Russian Federation may not lay a submarine cable, construct a bridge, or construct a pipeline through and across the Kerch Strait from Russian territory to the Crimean Peninsula without Ukraine's consent; any such activities engaged in or authorized by the Russian Federation are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility;
- i. The Russian Federation is required to provide all due cooperation to Ukraine in the prevention and preservation of the marine environment, including supplying information relating to any oil spill or other pollution incident in the areas of the Black Sea and Sea of Azov where the Russian Federation did not challenge Ukraine's jurisdiction and rights prior to February 2014, including the reported oil spill in the Black Sea near Sevastopol in May 2016;
- j. The Russian Federation may not without Ukraine's consent and cooperation remove from the seabed or otherwise disrupt or disturb archaeological, historical, or cultural objects or heritage found in Ukraine's territorial sea and contiguous zone, including the sunken Byzantine ship located in the Black Sea near Sevastopol and any artifacts associated with it; any such activities engaged in or authorized by the Russian Federation in those areas are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility.<sup>13</sup>

10. Ukraine further requested the Arbitral Tribunal to "order the Russian Federation to immediately cease its internationally wrongful actions in the Black Sea, Sea of Azov, and Kerch Strait, and

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<sup>13</sup> Ukraine's Notification and Statement of Claim, para. 50.

provide Ukraine with appropriate assurances and guarantees of non-repetition of all internationally wrongful acts found by the tribunal”<sup>14</sup> and to “order the Russian Federation to make full reparation to Ukraine for the injury caused by its internationally wrongful actions in the Black Sea, Sea of Azov, and Kerch Strait, including both restitution and monetary compensation in amounts to be set out in detail in Ukraine’s written pleadings.”<sup>15</sup>

### **C. CONSTITUTION OF THE ARBITRAL TRIBUNAL AND INITIAL PROCEDURAL DECISIONS**

11. In its Notification and Statement of Claim, Ukraine appointed Professor Vaughan Lowe QC as member of the Arbitral Tribunal.
12. By *note verbale* dated 12 October 2016, the Russian Federation appointed H.E. Judge Vladimir Vladimirovich Golitsyn as member of the Arbitral Tribunal.
13. Since the Parties were unable to reach agreement within 60 days of receipt by the Russian Federation of the Notification and Statement of Claim on the appointment of the remaining members of the Arbitral Tribunal, on 29 November 2016, Ukraine requested that the Vice-President of the International Tribunal for the Law of the Sea (hereinafter “ITLOS”) make the appointments pursuant to Annex VII, Article 3, subparagraph (d), of the Convention. On 22 December 2016, H.E. Judge Jin-Hyun Paik, H.E. Judge Boualem Bouguetaia, and H.E. Judge Alonso Gómez-Robledo were appointed as members of the Arbitral Tribunal, and H.E. Judge Jin-Hyun Paik was appointed as President of the Arbitral Tribunal.
14. On 12 May 2017, the first procedural meeting with the Arbitral Tribunal and the Parties was held at the headquarters of the Permanent Court of Arbitration (hereinafter the “PCA”) at the Peace Palace in The Hague, the Netherlands. At that meeting, the procedure to be followed in the Arbitration was considered.
15. On 18 May 2017, the Arbitral Tribunal with the concurrence of the Parties adopted Procedural Order No. 1, setting forth the Terms of Appointment of the Arbitral Tribunal, as well as the Rules of Procedure for the Arbitration (hereinafter the “Rules of Procedure”).<sup>16</sup> The Rules of Procedure, *inter alia*, established a timetable for written pleadings and set out the procedure for addressing any preliminary objections.

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<sup>14</sup> Ukraine’s Notification and Statement of Claim, para. 51.

<sup>15</sup> Ukraine’s Notification and Statement of Claim, para. 52.

<sup>16</sup> Rules of Procedure adopted by the Arbitral Tribunal on 18 May 2017.

16. On 18 January 2018, the Arbitral Tribunal, having ascertained the views of the Parties, adopted Procedural Order No. 2 on Confidentiality, addressing, *inter alia*, the definition and treatment of confidential information and restricted information in the context of the present proceedings.

**D. SUBMISSION OF UKRAINE’S MEMORIAL**

17. On 19 February 2018, Ukraine submitted its Memorial (hereinafter “Ukraine’s Memorial”), in accordance with Article 13 of the Rules of Procedure. In its Memorial, Ukraine requested the Arbitral Tribunal to adjudge and declare that:
- a. The Russian Federation has violated Article 2 of the Convention by excluding Ukraine from accessing gas fields in its territorial sea, extracting gas found in such fields, and usurping Ukraine’s exclusive jurisdiction over the hydrocarbons in such fields.
  - b. The Russian Federation has violated Articles 56 and 77 of the Convention by excluding Ukraine from accessing gas fields in its exclusive economic zone and continental shelf, exploring such gas fields, extracting gas found in such fields, and usurping Ukraine’s exclusive jurisdiction over the hydrocarbons in such fields.
  - c. The Russian Federation has violated Articles 2, 56, and 77 by causing proprietary data on the hydrocarbon resources of Ukraine’s territorial sea, exclusive economic zone, and continental shelf to be transferred to Russia and to Russian entities.
  - d. The Russian Federation has violated Articles 2, 56, 58, 77, and 92 of the Convention by unlawfully interfering with Ukraine’s exclusive jurisdiction over, and unlawfully taking possession of, Ukrainian-flagged CNG-UA vessels, including mobile jack-up drilling rigs in Ukraine’s territorial sea, exclusive economic zone, and continental shelf.
  - e. The Russian Federation has violated Articles 2, 56, 60, and 77 of the Convention by unlawfully interfering with Ukraine’s exclusive jurisdiction over, and unlawfully taking possession of, fixed platforms on Ukraine’s territorial sea, exclusive economic zone, and continental shelf.
  - f. The Russian Federation has violated Articles 2 and 21 of the Convention by excluding Ukraine from accessing fisheries within 12 miles of the Ukrainian coastline, by exploiting such fisheries, and by usurping Ukraine’s exclusive jurisdiction over the living resources of its territorial sea.
  - g. The Russian Federation has violated Articles 56, 58, 61, 62, 73, and 92 of the Convention by excluding Ukraine from accessing fisheries within its exclusive economic zone, by exploiting such fisheries, and by usurping Ukraine’s exclusive jurisdiction over the living resources of its exclusive economic zone.
  - h. The Russian Federation has violated Articles 2, 56, 58, 77, and 92 of the Convention by unlawfully interfering with Ukraine’s exclusive jurisdiction over Ukrainian-flagged fishing vessels in Ukraine’s territorial sea, exclusive economic zone, and continental shelf.
  - i. The Russian Federation has violated Articles 2, 21, 33, 56, 58, 73, and 92 of the Convention by unlawfully interfering with the navigation of Ukrainian Sea Guard vessels through Ukraine’s territorial sea and exclusive economic zone.
  - j. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of submarine power cables across the Kerch Strait.

- k. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of a submarine gas pipeline across the Kerch Strait.
- l. The Russian Federation has violated Article 2 of the Convention through its unauthorized and unilateral construction of the Kerch Strait bridge.
- m. The Russian Federation has violated Articles 38 and 44 of the Convention by impeding transit passage through the Kerch Strait as a result of the Kerch Strait bridge.
- n. The Russian Federation has violated Articles 43 and 44 of the Convention by failing to share information with Ukraine concerning the risks and impediments to navigation presented by the Kerch Strait bridge.
- o. The Russian Federation has violated Articles 123, 192, 194, 204, 205, and 206 of the Convention by failing to cooperate and share information with Ukraine concerning the environmental impact of the Kerch Strait bridge.
- p. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention by failing to cooperate with Ukraine concerning the May 2016 oil spill off the coast of Sevastopol.
- q. The Russian Federation has violated Article 2 of the Convention by interfering with Ukraine's attempts to protect archaeological and historical objects in its territorial sea and by usurping Ukraine's right to regulate with regard to such archaeological and historical objects.
- r. The Russian Federation has violated Article 303 of the Convention by unlawfully interfering with Ukraine's exercise of jurisdiction in its contiguous zone and preventing the removal of archaeological and historical objects from the seabed of its contiguous zone.
- s. The Russian Federation has violated Article 303 of the Convention by failing to cooperate with Ukraine concerning archaeological and historical objects found at sea.
- t. The Russian Federation has violated Article 279 of the Convention by aggravating and extending the dispute between the parties since the commencement of this arbitration in September 2016, including by completing construction of the Kerch Strait bridge, expanding its hydrocarbon and fisheries activities in Ukraine's territorial sea, exclusive economic zone, and continental shelf, and continuing to disturb and remove archaeological artifacts found in Ukraine's territorial sea and contiguous zone.<sup>17</sup>

18. On this basis, Ukraine requested the Arbitral Tribunal to order the Russian Federation to:

*Cessation and Restitutio in Integrum*

- a. Cease each of the above violations of the Convention, including by: withdrawing its vessels and personnel from Ukraine's territorial sea, exclusive economic zone, and continental shelf; returning all seized Ukrainian vessels and platforms to Ukraine; returning all proprietary information on Ukrainian hydrocarbon reserves and destroying all copies of such information; and ending its purported exercise of prescriptive jurisdiction over the living and non-living resources found in zones within which the Convention guarantees to Ukraine exclusive jurisdiction over such resources—*i.e.*, its territorial sea, exclusive economic zone, and continental shelf.
- b. Share with Ukraine information on the structure and environmental impact of the Kerch Strait bridge, cooperate in good faith with Ukraine to determine mutually agreeable modifications to the Kerch Strait bridge, and apprise the Tribunal on the progress of such cooperation six months after the date of the Tribunal's Award, so that Ukraine can request further relief as necessary to remedy Russia's violations.

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<sup>17</sup> Ukraine's Memorial, para. 265.

- c. Provide Ukraine with all information the Russian Federation possesses on the May 2016 oil spill near Sevastopol, including its cause and all steps taken to mitigate its harm to the environment
- d. Share with Ukraine information on the location of all objects of an archaeological and historical nature that the Russian Federation or its licensees have discovered or surveyed in the seas within 24 nautical miles of Ukraine's declared baselines around the Crimean coast; restore to Ukraine all archaeological objects that it has removed from Ukraine's territorial sea and contiguous zone; and refrain from any future disturbance of, or licensing of third parties to disturb, any such objects found in Ukraine's territorial sea and contiguous zone.

*Assurances and Guarantees of Non-Repetition*

- e. Provide Ukraine with appropriate public assurances and guarantees of non-repetition with respect to Russia's interference with Ukraine's sovereignty and sovereign rights over the living and non-living resources of Ukraine's territorial sea, exclusive economic zone, and continental shelf, including that Russia will not harass or interfere with individuals or entities licensed by Ukraine to fish or to explore or exploit hydrocarbon resources.
- f. Provide Ukraine with appropriate public assurances and guarantees of non-repetition with respect to Russia's hindrance of transit passage through the Kerch Strait.

*Compensation and Accounting*

- g. Provide Ukraine with a complete accounting of the non-living resources extracted from Ukraine's territorial sea, exclusive economic zone, and continental shelf.
- h. Provide Ukraine with a complete accounting of the living resources taken from Ukraine's territorial sea, exclusive economic zone, and continental shelf.
- i. Pay Ukraine financial compensation of US\$ 1.94 billion, plus pre- and post-award interest, reflecting the value of Russia's publicly announced hydrocarbon extraction from Ukraine's territorial sea, exclusive economic zone, and continental shelf.
- j. Pay Ukraine further financial compensation for all other non-living and living resources taken from Ukraine's territorial sea, exclusive economic zone, and continental shelf.
- k. Pay moral damages to Ukraine in an amount deemed appropriate by the Tribunal.<sup>18</sup>

**E. SUBMISSION OF THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION AND WRITTEN PLEADINGS RELATED THERETO**

- 19. On 21 May 2018, the Russian Federation submitted to the Arbitral Tribunal the "Preliminary Objections of the Russian Federation" dated 19 May 2018 (hereinafter the "Russian Federation's Preliminary Objections") in accordance with Article 10, paragraph 2, of the Rules of Procedure.<sup>19</sup> The Russian Federation requested that its Preliminary Objections be heard in a preliminary phase of the proceedings.

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<sup>18</sup> Ukraine's Memorial, para. 266.

<sup>19</sup> 19 May 2018 being a Saturday, the period for submission of the plea was extended until the first work day which followed, being Monday, 21 May 2018, in accordance with Article 2, paragraph 2, of the Rules of Procedure.

20. On 28 May 2018, the Arbitral Tribunal invited Ukraine to comment on the Russian Federation's request to address its Preliminary Objections in a preliminary phase. Ukraine provided such comments on 18 June 2018.
21. On 20 June 2018, the Arbitral Tribunal invited the Russian Federation to reply to Ukraine's comments of 18 June 2018. The Russian Federation provided such reply on 4 July 2018.
22. On 20 August 2018, the Arbitral Tribunal issued Procedural Order No. 3 Regarding Bifurcation of the Proceedings. The Arbitral Tribunal unanimously decided:
  1. The Arbitral Tribunal considers that the Preliminary Objections of the Russian Federation appear at this stage to be of a character that requires them to be examined in a preliminary phase, and accordingly decides that the Preliminary Objections of the Russian Federation shall be addressed in a preliminary phase of these proceedings.
  2. If the Arbitral Tribunal determines after the closure of the preliminary phase of the proceedings that there are Preliminary Objections that do not possess an exclusively preliminary character, then, in accordance with Article 10, paragraph 8, of the Rules of Procedure, such matters shall be reserved for consideration and decision in the context of the proceedings on the merits.

[...]

The proceedings on the merits were accordingly suspended.

23. On 27 August 2018, having ascertained the views of the Parties, the Arbitral Tribunal issued Procedural Order No. 4 Regarding the Timetable for the Parties' Written Pleadings on Jurisdiction, establishing such timetable in accordance with Article 10, paragraph 5, of the Rules of Procedure.
24. With respect to the Russian Federation's Preliminary Objections, on 27 November 2018, Ukraine submitted its Written Observations and Submissions on Jurisdiction (hereinafter "Ukraine's Written Observations").
25. On 28 January 2019, the Russian Federation submitted its Reply to the Written Observations and Submissions of Ukraine on Jurisdiction (hereinafter the "Russian Federation's Reply").
26. On 28 March 2019, Ukraine submitted its Rejoinder on Jurisdiction (hereinafter "Ukraine's Rejoinder").

#### **F. HEARING CONCERNING THE RUSSIAN FEDERATION'S PRELIMINARY OBJECTIONS**

27. On 8 April 2019, the Arbitral Tribunal, having ascertained the views of the Parties, issued Procedural Order No. 5 Regarding the Schedule for the Hearing on Jurisdiction.

28. From 10 to 14 June 2019, a hearing on Preliminary Objections (hereinafter the “Hearing”) was held at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. The Hearing consisted of two rounds of oral argument, held on 10 and 11 June 2019 and 13 and 14 June 2019. The following persons were present at the Hearing:

**The Arbitral Tribunal**

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

**Ukraine**

H.E. Ms. Olena Zerkal  
Deputy Minister for Foreign Affairs of Ukraine  
*as Agent*

H.E. Mr. Vsevolod Chentsov  
Ambassador Extraordinary and Plenipotentiary of Ukraine to the Kingdom of the  
Netherlands  
*as Co-Agent*

Ms. Marney L. Cheek  
Covington & Burling LLP; member of the Bar of the District of Columbia  
Mr. Jonathan Gimblett  
Covington & Burling LLP; member of the Bars of the District of Columbia and Virginia  
Mr. David M. Zions  
Covington & Burling LLP; member of the Bars of the Supreme Court of the United States  
and the District of Columbia  
Professor Harold Hongju Koh  
Sterling Professor of International Law, Yale Law School; member of the Bars of New York  
and the District of Columbia  
Professor Alfred H. A. Soons  
Emeritus Professor, Utrecht University School of Law; associate member, Institut de Droit  
International  
Professor Jean-Marc Thouvenin  
Professor, University of Paris Nanterre; Secretary-General, Hague Academy of  
International Law; Sygna Partners; member of the Paris Bar  
Ms. Oksana Zolotaryova  
Acting Director, International Law Department, Ministry of Foreign Affairs of Ukraine  
Mr. Nikhil V. Gore  
Covington & Burling LLP; member of the Bars of the District of Columbia, Massachusetts  
and New York  
Ms. Clovis Trevino  
Covington & Burling LLP; member of the Bars of the District of Columbia, Florida and  
New York  
Mr. Volodymyr Shkilevych  
Covington & Burling LLP; member of the Bars of Ukraine and New York  
Ms. Megan O’Neill  
Covington & Burling LLP; member of the Bars of the District of Columbia and Texas  
Mr. George M. Mackie  
Covington & Burling LLP; member of the Bars of the District of Columbia and Virginia  
*as Counsel*

Mr. Taras Kachka  
Adviser to the Foreign Minister, Ministry of Foreign Affairs of Ukraine  
*as Adviser*

Mr. Roman Andarak  
Deputy Head of the Mission of Ukraine to the European Union

Ms. Tamara Cherpakova  
Mission of Ukraine to the European Union

Ms. Svitlana Nizhnova  
Chornomornaftogaz

Mr. Andrii Kondratov  
Chornomornaftogaz

Mr. Ivan Ivanchyk  
Ministry of Infrastructure of Ukraine

Mr. Serhii Lopatiuk  
State Border Guard Service of Ukraine

Mr. Vladyslav Smirnov  
State Border Guard Service of Ukraine  
*as Observers*

Ms. Kateryna Gipenko  
Ministry of Foreign Affairs of Ukraine

Ms. Valeriya Budyakova  
Ministry of Foreign Affairs of Ukraine

Ms. Olga Bondarenko  
Embassy of Ukraine to the Kingdom of the Netherlands

Ms. Sofia Shovikova  
Embassy of Ukraine to the Kingdom of the Netherlands

Ms. Angela Gasca  
Covington & Burling LLP

Ms. Rebecca Mooney  
Covington & Burling LLP

Mr. Iegor Biriukov  
Intern, Government of Ukraine

Mr. Maksym Koliada  
Intern, Government of Ukraine

Mr. Roman Koliada  
Intern, Government of Ukraine

*as Assistants*

### **The Russian Federation**

H.E. Mr. Dmitry Lobach  
Ambassador-at-large, Ministry of Foreign Affairs of the Russian Federation  
*as Agent*

Professor Alain Pellet  
Emeritus Professor, University of Paris Nanterre; former Chairperson, International Law  
Commission; member, Institut de Droit International

Professor Tullio Treves  
Emeritus Professor, University of Milan; Senior International Consultant, Curtis Mallet-  
Prevost, Colt & Mosle LLP; member, Institut de Droit International

Mr. Samuel Wordsworth, QC  
Essex Court Chambers; member of the English Bar, member of the Paris Bar

Mr. Sergey Usoskin  
Member of the Saint Petersburg Bar

Ms. Amy Sander  
Essex Court Chambers; member of the English Bar

Mr. Vasily Torkanovskiy  
Partner, Ivanyan & Partners; member of the Saint Petersburg Bar  
Ms. Tessa Barsac  
Consultant in international law  
Mr. Renato Raymundo Treves  
Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP; member of the New York State Bar  
and Milan Bar  
*as Counsel*

Ms. Svetlana Shatalova  
First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation  
Ms. Sofia Sarenkova  
Senior Associate, Ivanyan & Partners  
Ms. Héloïse Bajer-Pellet  
Member of the Paris Bar  
Ms. Kseniia Soloveva  
Associate, Ivanyan & Partners  
Ms. Ksenia Galkina  
Third Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation  
Ms. Viktoria Goncharova  
Third Secretary, Embassy of the Russian Federation in the Kingdom of the Netherlands  
Ms. Kseniia Kuritcyna  
Junior Associate, Ivanyan & Partners  
*as Advisers*

Ms. Elena Semykina  
Paralegal, Ivanyan & Partners  
*as Assistant*

#### **Registry**

Dr. Dirk Pulkowski  
Senior Legal Counsel, Permanent Court of Arbitration  
Ms. Ashwita Ambast  
Legal Counsel, Permanent Court of Arbitration  
Mr. Juan Ignacio Massun  
Legal Counsel, Permanent Court of Arbitration

#### **Court Reporting**

Ms. Jade King  
Mr. Wong Kwong Wai  
Ms. Bridget Edwards

#### **Interpreters**

Ms. Marie Dalcq  
Mr. Jean-Christophe Pierret

29. After the first round of oral argument, the Arbitral Tribunal put the following questions to the Parties:

To both Parties:

1. Which, if any, elements of the claims in this case do not depend on a prior determination by, or assumption on the part of, the Tribunal as to which State is the coastal State in Crimea?

2. Does UNCLOS determine the extent of the rights and duties of the States concerned in circumstances where there is disagreement as to who exercises coastal State rights in respect of a particular maritime area?

To the Russian Federation:

3. Can the Russian Federation clarify its position in respect of the present status of the Kerch Strait, considering the statements that “both States shared sovereignty over the Sea of Azov” (Transcript of 10 June 2019, 20:10-11) and that, “[a]s concerns the Kerch Strait, the Russian Federation has been exercising sovereignty there since the reintegration of Crimea” (Transcript of 10 June 2019, 20:18-20)?

To Ukraine:

4. Can Ukraine elaborate on its statement that “Ukraine does not accept the general position of Russia, that the internal waters regime is outside the scope of UNCLOS” (Transcript of 11 June 2019, 9:10-12)?<sup>20</sup>

30. The Parties responded to the questions in the course of the second round of oral argument. Their responses are reflected in paragraphs 146 to 149, 211, and 273 of the Award.

## **II. THE PARTIES’ SUBMISSIONS ON JURISDICTION AND ADMISSIBILITY**

31. At the present stage of the proceedings concerning the Russian Federation’s Preliminary Objections, the Parties have made the following submissions to the Arbitral Tribunal.

### **A. SUBMISSIONS OF THE RUSSIAN FEDERATION**

32. In its Preliminary Objections, the Russian Federation submitted:

For the reasons set out in these Preliminary Objections the Russian Federation requests the Tribunal to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.<sup>21</sup>

33. In its Reply, the Russian Federation submitted:

For the reasons set out in the Preliminary Objections of the Russian Federation and this Reply, the Russian Federation requests the Tribunal to dismiss the Submissions of Ukraine made in its Written Observations of 27 November 2018 and to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.<sup>22</sup>

34. At the Hearing, on 13 June 2019, the Russian Federation made the following final submission:

Having regard to the arguments set out in the Preliminary Objections of the Russian Federation, Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction and during the oral proceedings, the Russian Federation requests the

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<sup>20</sup> Letter to Parties, 12 June 2019, pp. 1-2 *citing* Jurisdiction Hearing, 10 June 2019, 20:10-11 (Lobach), 20:18-20 (Lobach); Jurisdiction Hearing, 11 June 2019, 9:10-12 (Zerkal).

<sup>21</sup> Russian Federation’s Preliminary Objections, para. 265.

<sup>22</sup> Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction (hereinafter “Russian Federation’s Reply”), 28 January 2019, para. 182.

Tribunal to adjudge and declare that it lacks jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.<sup>23</sup>

## **B. SUBMISSIONS OF UKRAINE**

### 35. In its Written Observations, Ukraine submitted:

For the foregoing reasons, Russia's Preliminary Objections fail to show that the Tribunal lacks jurisdiction over any aspect of the submissions in Ukraine's Memorial.

Ukraine accordingly:

- a. reiterates and renews the submissions and requests for relief contained in Chapter 7 of its Memorial;
- b. requests that this Tribunal adjudge and declare that its submissions fall within the jurisdiction conferred on the Tribunal pursuant to the Convention; and
- c. requests that the Tribunal award Ukraine its costs for the jurisdictional phase of these proceedings, pursuant to Article 25 of the Rules of Procedure.<sup>24</sup>

### 36. In its Rejoinder, Ukraine submitted:

For the foregoing reasons, Ukraine reiterates and renews the submissions and requests for relief contained in Chapter Seven of its Memorial and Chapter Six of its Written Observations on Jurisdiction.<sup>25</sup>

### 37. At the Hearing, on 14 June 2019, Ukraine made the following final submissions:

1. Ukraine respectfully requests that the Tribunal:
  - a. Reject the Preliminary Objections submitted by the Russian Federation in its submission dated 19 May 2018;
  - b. Adjudge and declare that it has jurisdiction over each of the submissions and requests for relief contained in Chapter 7 of Ukraine's Memorial, which are hereby renewed; or
  - c. In the alternative, adjudge and declare, in accordance with the provisions of Article 10, paragraph 4, of the Rules of Procedure that the objections submitted by the Russian Federation do not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits.
2. Ukraine requests that the Tribunal award Ukraine its costs for the jurisdictional phase of these proceedings, pursuant to Article 25 of the Rules of Procedure.<sup>26</sup>

## **III. BASIS OF THE ARBITRAL TRIBUNAL'S JURISDICTION**

### 38. Article 287, paragraph 1, of the Convention provides that, "[w]hen signing, ratifying or acceding to this Convention [...] a State shall be free to choose, by means of a written declaration, one or

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<sup>23</sup> Jurisdiction Hearing, 13 June 2019, 97:25-98:16 (Lobach).

<sup>24</sup> Ukraine's Written Observations, paras 182-83.

<sup>25</sup> Rejoinder of Ukraine on Jurisdiction (hereinafter "Ukraine's Rejoinder"), 28 March 2019, para. 166.

<sup>26</sup> Jurisdiction Hearing, 14 June 2019, 103:4-19 (Zerkal).

more of the [subsequently enumerated] means for the settlement of disputes concerning the interpretation or application of this Convention.”<sup>27</sup>

39. Upon ratification of the Convention on 26 July 1999, Ukraine declared that, “in accordance with article 287 of the United Nations Convention on the Law of the Sea of 1982, it chooses as the principal means for the settlement of disputes concerning the interpretation or application of this Convention an arbitral tribunal constituted in accordance with Annex VII.”<sup>28</sup> This declaration mirrors the wording of the declaration made by the Ukrainian Soviet Socialist Republic upon signature of the Convention, on 10 December 1982.
40. The Russian Federation did not make any declaration in accordance with Article 287 of the Convention upon ratification. The Russian Federation, however, regards itself as the continuator State of the Union of Soviet Socialist Republics (hereinafter the “USSR”). Upon signature of the Convention, on 10 December 1982, the USSR declared that, “under article 287 of the United Nations Convention on the Law of the Sea, it chooses an arbitral tribunal constituted in accordance with Annex VII as the basic means for the settlement of disputes concerning the interpretation or application of the Convention.”<sup>29</sup>
41. The Arbitral Tribunal notes that the Parties have chosen an arbitral tribunal constituted in accordance with Annex VII to the Convention as the “principal” or “basic” means for the settlement of disputes concerning the interpretation or application of the Convention. Pursuant to Article 287, paragraph 4, of the Convention, such disputes may be submitted to an arbitral tribunal constituted in accordance with Annex VII. The Arbitral Tribunal consequently finds that the dispute was submitted to it in accordance with the Convention and the declarations made by the Parties. The Arbitral Tribunal in this regard takes note of the Russian Federation’s objection that certain aspects of the present dispute should have been submitted to a special arbitral tribunal constituted in accordance with Annex VIII to the Convention, which the Arbitral Tribunal addresses in detail below (*see* Chapter VIII).
42. The specific preliminary objections to aspects of the Arbitral Tribunal’s jurisdiction raised by the Russian Federation will be addressed in the following chapters.

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<sup>27</sup> UNCLOS, Art. 287, para. 1.

<sup>28</sup> Declaration by Ukraine upon Ratification of UNCLOS, 26 July 1999 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 32 (**Annex UA-8**).

<sup>29</sup> Declaration by the USSR upon Signature of UNCLOS, 10 December 1982 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 28 (**Annex UA-8**).

#### **IV. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER UKRAINE'S SOVEREIGNTY CLAIM**

43. The Russian Federation submits that the Arbitral Tribunal has no jurisdiction over Ukraine's claims because "the dispute in this case concerns Ukraine's claim to sovereignty over Crimea"<sup>30</sup> and a "dispute over territorial sovereignty is not a dispute concerning the 'interpretation or application of the Convention' pursuant to Article 288(1) of UNCLOS."<sup>31</sup>
44. For its part, Ukraine submits that the dispute before the Arbitral Tribunal concerns the interpretation or application of the Convention and the Arbitral Tribunal thus has jurisdiction over it.<sup>32</sup>
45. The Arbitral Tribunal notes that the Parties hold different views as to: the nature or characterisation of the dispute before the Arbitral Tribunal; the scope of the jurisdiction of the Arbitral Tribunal under Article 288 of the Convention; and the existence *vel non* of a sovereignty dispute over Crimea. The Arbitral Tribunal will examine the arguments of the Parties on these issues in turn.

#### **A. CHARACTERISATION OF THE DISPUTE BEFORE THE ARBITRAL TRIBUNAL**

##### **1. Position of the Russian Federation**

46. The Russian Federation notes that, in order to determine whether the dispute concerns the "interpretation or application of this Convention," the Arbitral Tribunal must characterise the dispute before it.<sup>33</sup> The Russian Federation contends that the Arbitral Tribunal is not bound in this regard by Ukraine's characterisation of this dispute.<sup>34</sup>
47. The Russian Federation observes that Ukraine characterises the dispute as a dispute concerning its "coastal State rights in the Black Sea, Sea of Azov and Kerch Strait."<sup>35</sup> The Russian Federation argues that an answer to the question whether or not Ukraine has "coastal State rights" requires a

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<sup>30</sup> Russian Federation's Preliminary Objections, para. 22.

<sup>31</sup> Russian Federation's Preliminary Objections, para. 47.

<sup>32</sup> Ukraine's Written Observations, paras 13-15.

<sup>33</sup> Russian Federation's Preliminary Objections, paras 5, 21; Jurisdiction Hearing, 10 June 2019, 58:1-5 (Wordsworth).

<sup>34</sup> Russian Federation's Preliminary Objections, paras 4, 24 *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (hereinafter "*South China Sea*"), Award on Jurisdiction and Admissibility of 29 October 2015, para. 153 (**Annex UAL-3**); PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (hereinafter "*Chagos*"), Award of 18 March 2015, para. 211 (**Annex UAL-18**).

<sup>35</sup> Russian Federation's Preliminary Objections, para. 3.

prior determination by the Arbitral Tribunal of which State is in fact sovereign in the relevant maritime zones.<sup>36</sup> Such a determination depends entirely on whether or not Ukraine is sovereign over the land territory of Crimea.<sup>37</sup>

48. According to the Russian Federation, the central nature of the sovereignty issue in the current claim is reflected in Ukraine's Notification and Statement of Claim, contemporaneous statements of Ukraine, and its Memorial.<sup>38</sup>
49. The Russian Federation observes that Ukraine's Notification and Statement of Claim is entitled "*Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*" and that Ukraine asserts therein that it "institutes this arbitration under Annex VII of the Convention to vindicate *its coastal State rights* under the Convention."<sup>39</sup> The Russian Federation also points out that Ukraine alleges "an unlawful use of force in blatant violation of the U.N. Charter and fundamental norms of international law" and contends that "[s]ince the seizure of Crimea, the Russian Federation has persistently and flagrantly violated the Convention through its actions in areas of the Black Sea, Sea of Azov, and Kerch Strait where *Ukraine's sovereignty, sovereign rights, and right to exercise jurisdiction* are indisputable."<sup>40</sup> The Russian Federation notes that Ukraine asserts that "the Russian Federation's actions in the Black Sea, Sea of Azov, and Kerch Strait are inconsistent with Ukraine's rights under the Convention, including *its coastal state rights* and violate *Ukraine's sovereignty, sovereign rights, and rights to exercise jurisdiction at sea.*"<sup>41</sup>
50. Further, the Russian Federation contends that contemporaneous statements by the President, the Foreign Minister and government officials of Ukraine in the context of the filing of Ukraine's Notification and Statement of Claim refer to a dispute concerning sovereignty over land territory.<sup>42</sup> According to the Russian Federation, this claim has been presented by Ukraine "as a response to alleged Russian aggression, and as aimed at securing the 'restoration' and 'return' of Crimean sovereignty to Ukraine."<sup>43</sup> The Russian Federation refers to a 6 December 2015 statement by the President of Ukraine that he "*will do everything to return Crimea through*

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<sup>36</sup> Russian Federation's Preliminary Objections, paras 4, 27; Jurisdiction Hearing, 10 June 2019, 26:18-21 (Wordsworth).

<sup>37</sup> Russian Federation's Preliminary Objections, paras 4, 25; Jurisdiction Hearing, 10 June 2019, 9:23-10:2 (Lobach), 24:8-12 (Wordsworth).

<sup>38</sup> Russian Federation's Preliminary Objections, para. 26.

<sup>39</sup> Russian Federation's Preliminary Objections, para. 28 [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 10:4-8 (Lobach).

<sup>40</sup> Russian Federation's Preliminary Objections, para. 28 [emphasis added by the Russian Federation].

<sup>41</sup> Russian Federation's Preliminary Objections, para. 29 [emphasis added by the Russian Federation].

<sup>42</sup> Russian Federation's Preliminary Objections, paras 31-36; Jurisdiction Hearing, 10 June 2019, 29:10-13 (Wordsworth).

<sup>43</sup> Russian Federation's Preliminary Objections, para. 36.

*international legal mechanisms, judicial decisions and political mechanisms and diplomatic means.”<sup>44</sup> The Russian Federation further refers to a statement of the Foreign Ministry of Ukraine of 14 September 2016 that “Ukraine has instituted arbitration proceedings against the Russian Federation under [the Convention] to vindicate its rights as the coastal state in maritime zones adjacent to Crimea in the Black Sea, Sea of Azov, and Kerch Strait. Since the Russian Federation’s illegal acts of aggression in Crimea, Russia has usurped and interfered with Ukraine’s maritime rights in these zones.”<sup>45</sup>*

51. The Russian Federation also quotes the following statement delivered by Ukraine on 20 February 2018 before a United Nations Committee:

*The armed aggression against Ukraine was launched by one of the permanent members of the Security Council. Instead of fulfilling its obligation to maintain peace and security, it continues to temporarily occupy the Autonomous Republic of Crimea [...] we are resorting to all means available to UN Members States to resolve the situation that arose as the result of the Russian military aggression against Ukraine [...] Just yesterday, Ukraine filed its Memorial in arbitration proceedings against the Russian Federation under [the Convention]. The Memorial establishes that Russia has violated Ukraine’s sovereign rights in the Black Sea, Sea of Azov, and Kerch Strait.<sup>46</sup>*

52. Finally, the Russian Federation relies on a statement by the President of Ukraine of 14 September 2016, which in its view shows that the allegations of violations of Ukraine’s coastal State rights are necessarily based on allegations of aggression and annexation by the Russian Federation:<sup>47</sup>

*[t]he lawsuit is filed due to the gross violation of the international law by Russia, aggression against Ukraine, annexation of Crimea, violation of Ukraine’s right to natural resources in the Black and Azov Seas [...] the launch of that process would facilitate the restoration of*

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<sup>44</sup> Russian Federation’s Preliminary Objections, para. 32 *citing* President of Ukraine Official Website, President: We Will Do Everything to Return Crimea via International Legal Mechanisms, 6 December 2015, available at <[www.president.gov.ua/en/news/zrobimo-vse-dlya-togo-shob-shlyahom-mizhnarodnih-pravovih-me-36441](http://www.president.gov.ua/en/news/zrobimo-vse-dlya-togo-shob-shlyahom-mizhnarodnih-pravovih-me-36441)> (**Annex RU-38**) [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 31:5-14 (Wordsworth).

<sup>45</sup> Russian Federation’s Preliminary Objections, para. 33 *citing* Ministry of Foreign Affairs of Ukraine Official Website, Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea, 14 September 2016, available at <[www.mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsyko-go-prava](http://www.mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsyko-go-prava)> (**Annex RU-44**) [emphasis added by the Russian Federation].

<sup>46</sup> Russian Federation’s Preliminary Objections, para. 35 *citing* Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization United Nations, 20 February 2018, available at <[www.ukraineun.org/en/press-center/303-statement-of-the-delegation-of-ukraine-at-the-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengt\[...\]](http://www.ukraineun.org/en/press-center/303-statement-of-the-delegation-of-ukraine-at-the-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengt[...]>)> (**Annex RU-49**) [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 30:8-31:4 (Wordsworth).

<sup>47</sup> Jurisdiction Hearing, 10 June 2019, 30:4-7 (Wordsworth).

*full control over the maritime area of Ukraine and reimbursement of damages suffered by Ukraine as a result of the Russian armed aggression.*<sup>48</sup>

53. Turning to Ukraine’s Memorial in the present Arbitration, the Russian Federation contends that the Memorial is predicated on the argument that Ukraine is the coastal State in the relevant areas.<sup>49</sup> The Russian Federation notes that Ukraine asserts that “[a]s a littoral State of the Black Sea, Sea of Azov and Kerch Strait, Ukraine enjoys the rights and bears the responsibilities accorded to coastal States by [the Convention].”<sup>50</sup> The Russian Federation points out that Ukraine alleges that the Russian Federation (a) excluded Ukraine from accessing and using its own maritime zones; (b) explored and exploited the natural resources of Ukraine’s maritime areas in violation of Ukraine’s sovereign rights; and (c) usurped Ukraine’s authority to regulate Ukrainian maritime entitlements.<sup>51</sup> The Russian Federation highlights that Ukraine devotes Chapter 3 of its Memorial to its exercise of duties and responsibilities as the coastal State,<sup>52</sup> and introduces Chapter 4 of its Memorial by stating:

Across an expanse of sea extending out from Crimea west towards Odesa, east toward Mariupol, and south toward Anatolia, the Russian Federation is systematically and brazenly violating Ukraine’s coastal State rights, in violation of the Convention. [...] Russia’s violations of the Convention began in 2014—*i.e.* at the time that the Russian Federation invaded and occupied the Crimean peninsula, and then purported to annex it.<sup>53</sup>

54. The Russian Federation further highlights that Ukraine’s claims with respect to hydrocarbon resources (pursuant to Articles 2, 56, 60, 77, and 92 of the Convention), to living resources (pursuant to Articles 2, 21, 33, 56, 58, 61, 62, 73, and 77 of the Convention), to the Kerch Strait (pursuant to Article 2 of the Convention), and to the underwater cultural heritage (pursuant to Articles 2 and 303 of the Convention) are based on Ukraine’s alleged rights as a coastal State.<sup>54</sup>

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<sup>48</sup> Russian Federation’s Preliminary Objections, para. 34 *citing* President of Ukraine Official Website, President Instructed Foreign Ministry to File a Lawsuit Against Russia to International Arbitration, 14 September 2016, available at <[www.president.gov.ua/en/news/prezident-doruchiv-mzs-podati-pozov-proti-rosiyi-do-mizhnaro-38147](http://www.president.gov.ua/en/news/prezident-doruchiv-mzs-podati-pozov-proti-rosiyi-do-mizhnaro-38147)> (**Annex RU-45**) [emphasis added by the Russian Federation]. The President’s Facebook page dated 23 December 2016 stated that “[i]n September, upon my instructions the MFA of Ukraine initiated a dispute on the violation by Russia of the UN Convention on the Law of the Sea. Ukraine is ready to prove in this arbitration that the aggressor bluntly violates the sovereign rights of Ukraine to use its guaranteed rights in its maritime areas and on the continental shelf in the maritime zones adjacent to the Autonomous Republic of Crimea” (available at <[www.facebook.com/petroporoshenko/](https://www.facebook.com/petroporoshenko/)>) (**Annex RU-46**); Jurisdiction Hearing, 10 June 2019, 29:17-30:7 (Wordsworth).

<sup>49</sup> Russian Federation’s Preliminary Objections, para. 37.

<sup>50</sup> Jurisdiction Hearing, 10 June 2019, 24:24-25:2 (Wordsworth).

<sup>51</sup> Russian Federation’s Preliminary Objections, para. 38; Jurisdiction Hearing, 10 June 2019, 25:9-19 (Wordsworth).

<sup>52</sup> Russian Federation’s Preliminary Objections, para. 39.

<sup>53</sup> Russian Federation’s Preliminary Objections, para. 40; Jurisdiction Hearing, 10 June 2019, 25:20-23 (Wordsworth), 26:9-11 (Wordsworth).

<sup>54</sup> Russian Federation’s Preliminary Objections, para. 42(a)-(c).

55. This is also true, in the Russian Federation’s view, of the relief requested by Ukraine.<sup>55</sup> The Russian Federation notes that Ukraine has requested that the Arbitral Tribunal declare, *inter alia*, that “Russia is violating *Ukraine’s sovereignty and sovereign rights*” and that “Russia has interfered with *Ukraine’s sovereignty*,” while claiming moral damages to “*vindicate Ukraine’s national sovereignty*.”<sup>56</sup> The Russian Federation notes that Ukraine has also sought from it “public assurances and guarantees of non-repetition” with respect to “Russia’s interference with *Ukraine’s sovereignty and sovereign rights*” and has requested the Arbitral Tribunal to require the Russian Federation to withdraw vessels and personnel from Ukraine’s maritime areas and end “its purported exercise of prescriptive jurisdiction over the living and non-living resources” found in Ukraine’s maritime zones.<sup>57</sup>
56. Citing repeated references in Ukraine’s Memorial to an alleged “annexation” and “unlawful invasion,” the Russian Federation “vigorously challenges and denies those accusations” and contends that the core of Ukraine’s claim is rooted in “a pre-supposition of unlawful conduct by Russia in Crimea in 2014.”<sup>58</sup> The Russian Federation stresses that the “key—indeed defining — issue of disputed land sovereignty cannot somehow be bypassed by asserting that Russia is an aggressor,”<sup>59</sup> and that such issue falls outside the scope of Article 288, paragraph 1, of the Convention.<sup>60</sup> The Russian Federation points out that, in setting out its claimed entitlement to relief, Ukraine has concluded that “[c]ollectively, [the alleged violations] amount to a sweeping, comprehensive displacement of *Ukraine’s coastal State rights* within a majority of Ukraine’s exclusive economic zone and continental shelf, as well as long stretches of its territorial sea.”<sup>61</sup> In the view of the Russian Federation, “this only serves to reinforce Russia’s position that the objective of Ukraine’s claim is to secure a favourable determination on the sovereignty of Crimea.”<sup>62</sup>
57. The Russian Federation thus submits that “the claim as advanced by Ukraine would require the [Arbitral] Tribunal first to render a decision on sovereignty over Crimea, either expressly or

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<sup>55</sup> Russian Federation’s Preliminary Objections, para. 43.

<sup>56</sup> Russian Federation’s Preliminary Objections, paras 44-45 *citing* Ukraine’s Memorial, paras 251, 252, 254, 264 [emphasis added by the Russian Federation].

<sup>57</sup> Russian Federation’s Preliminary Objections, para. 46.

<sup>58</sup> Russian Federation’s Preliminary Objections, para. 7.

<sup>59</sup> Russian Federation’s Preliminary Objections, para. 7.

<sup>60</sup> Russian Federation’s Preliminary Objections, para. 7.

<sup>61</sup> Russian Federation’s Preliminary Objections, para. 45 *citing* Ukraine’s Memorial, para. 254 [emphasis added by the Russian Federation].

<sup>62</sup> Russian Federation’s Preliminary Objections, para. 45.

implicitly, while the actual objective of Ukraine's claims is in fact to advance its position in the Parties' disputes over Crimean sovereignty."<sup>63</sup>

## 2. Position of Ukraine

58. Ukraine contends that "[t]he dispute before the Tribunal is one that concerns the interpretation or application of UNCLOS."<sup>64</sup> According to Ukraine, its claim is that "through a campaign of exclusion, exploitation, and usurpation across the Black Sea, the Sea of Azov, and the Kerch Strait, Russia has violated rights guaranteed to Ukraine under the Convention."<sup>65</sup>
59. Ukraine submits that in its Memorial it presents 20 submissions that concern the legal consequences under the Convention of the Russian Federation's actions in a large and important maritime area.<sup>66</sup> In particular, Ukraine explains that the actions of the Russian Federation in the Black Sea, the Sea of Azov, and Kerch Strait violate Ukraine's rights as a coastal State, a flag State, and a littoral State in relation to two semi-enclosed seas and an international strait.<sup>67</sup>
60. Ukraine notes that the Russian Federation points to Ukraine's references to "coastal State" and "sovereignty" in its written submissions.<sup>68</sup> According to Ukraine, it cannot be faulted for using these terms, which appear in the provisions of the Convention.<sup>69</sup> In Ukraine's view, its usage of "coastal State" and "sovereignty" confirms that this dispute concerns the interpretation and application of the Convention.<sup>70</sup> Moreover, Ukraine argues that its references to "coastal State" do not imply that the dispute concerns the identity of the coastal State, and maintains that "here, Ukraine is undeniably the coastal State."<sup>71</sup>
61. In response to the Russian Federation's reference to statements of various Ukrainian officials expressing a desire to end the Russian Federation's armed aggression against Ukraine, Ukraine takes the view that it has not brought the "illegal occupation of Ukrainian territory" before the Arbitral Tribunal.<sup>72</sup> Rather, in the present proceedings, "the only point in discussion" is Ukraine's wish that the Russian Federation, "*inter alia* [...] stop stealing its living and non-living maritime

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<sup>63</sup> Russian Federation's Preliminary Objections, para. 25.

<sup>64</sup> Ukraine's Written Observations, para. 17.

<sup>65</sup> Ukraine's Written Observations, para. 17.

<sup>66</sup> Ukraine's Written Observations, para. 21; Jurisdiction Hearing, 11 June 2019, 6:5-7 (Zerkal).

<sup>67</sup> Ukraine's Written Observations, para. 22.

<sup>68</sup> Ukraine's Written Observations, para. 55.

<sup>69</sup> Ukraine's Written Observations, para. 55.

<sup>70</sup> Ukraine's Written Observations, para. 55; Jurisdiction Hearing, 14 June 2019, 8:10-16 (Thouvenin).

<sup>71</sup> Ukraine's Written Observations, para. 55; Jurisdiction Hearing, 14 June 2019, 6:20-7:21 (Thouvenin).

<sup>72</sup> Ukraine's Written Observations, para. 56.

resources [...] stop disturbing its underwater cultural heritage, and [...] end its harassment of vessels *en route* to Ukrainian ports.”<sup>73</sup>

62. Ukraine explains that the “sole actual objective” of its claims is the interpretation and application of the Convention in relation to the Russian Federation’s actions in the Black Sea, Sea of Azov, and the Kerch Strait.<sup>74</sup> Ukraine notes that even an express ruling by this Arbitral Tribunal reaffirming Crimea’s status as a part of Ukraine “would not materially improve Ukraine’s legal position on that settled matter.”<sup>75</sup>

## **B. SCOPE OF THE JURISDICTION OF THE ARBITRAL TRIBUNAL UNDER ARTICLES 286 AND 288 OF THE CONVENTION**

63. Article 286 of the Convention provides:

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.

64. Article 288, paragraph 1, of the Convention reads:

A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

### **1. Position of the Russian Federation**

65. The Russian Federation notes that the jurisdiction of the Arbitral Tribunal is defined and limited by Article 288, paragraph 1, of the Convention.<sup>76</sup> According to the Russian Federation, “[a] dispute over territorial sovereignty is not a dispute concerning the ‘interpretation or application of the Convention’ pursuant to Article 288(1) of UNCLOS, the sole jurisdictional basis invoked by Ukraine.”<sup>77</sup>
66. Interpreting the provision in accordance with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties,<sup>78</sup> the Russian Federation submits that the ordinary meaning of the provision restricts the jurisdiction of an arbitral tribunal to disputes “concerning the interpretation

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<sup>73</sup> Ukraine’s Written Observations, para. 56.

<sup>74</sup> Ukraine’s Written Observations, para. 58; Jurisdiction Hearing, 11 June 2019, 15:20-23 (Koh), 17:12-18 (Koh).

<sup>75</sup> Ukraine’s Written Observations, para. 58.

<sup>76</sup> Russian Federation’s Preliminary Objections, para. 6.

<sup>77</sup> Russian Federation’s Preliminary Objections, para. 47.

<sup>78</sup> Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, 1155 U.N.T.S. 331, Art. 31 (**Annex UAL-43**).

or application of [the Convention].”<sup>79</sup> The Russian Federation observes that the Convention contains no provisions regarding sovereignty over land territory and that there is no *renvoi* in any provisions of the Convention that allows the application of provisions regarding sovereignty over land to be imported from other treaties or from customary international law.<sup>80</sup>

67. The Russian Federation rejects Ukraine’s argument that the word “any” in Article 288, paragraph 1, of the Convention grants broad scope to an arbitral tribunal’s jurisdiction.<sup>81</sup> The Russian Federation argues that the word “any” in Article 288, paragraph 1, is modified by the critical words “dispute concerning the interpretation or application of this Convention.”<sup>82</sup>
68. The Russian Federation considers that its reading of Article 288, paragraph 1, of the Convention is supported by the context of that provision.<sup>83</sup> According to the Russian Federation, Article 288, paragraph 2, establishes “supplemental jurisdiction” that is “doubly limited” to disputes “concerning the interpretation or application of an international agreement,” which must be “related to the purposes of the Convention.”<sup>84</sup>
69. The Russian Federation also notes that the first preambular paragraph of the Convention states that States Parties were “prompted by the desire to settle all issues relating to the law of the sea.”<sup>85</sup>
70. The Russian Federation further argues that the absence of an opt-out mechanism for disputes regarding sovereignty over land, equivalent to that for maritime boundary delimitations in Article 298, paragraph 1, of the Convention, confirms that jurisdiction under Part XV was never intended to extend to disputes concerning sovereignty over land territory.<sup>86</sup> According to the Russian Federation, it would be inconceivable that the Convention does not contain an opt-out mechanism if disputes regarding sovereignty over land could be brought within the scope of Article 288, paragraph 1.<sup>87</sup> The Russian Federation relies on the ruling in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (hereinafter “*Chagos*”) to the same effect.<sup>88</sup>

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<sup>79</sup> Russian Federation’s Preliminary Objections, para. 50.

<sup>80</sup> Russian Federation’s Preliminary Objections, para. 50.

<sup>81</sup> Jurisdiction Hearing, 13 June 2019, 8:8-13 (Wordsworth).

<sup>82</sup> Jurisdiction Hearing, 13 June 2019, 8:13-21 (Wordsworth).

<sup>83</sup> Jurisdiction Hearing, 10 June 2019, 32:14-15 (Wordsworth).

<sup>84</sup> Jurisdiction Hearing, 10 June 2019, 32:16-33:5 (Wordsworth).

<sup>85</sup> Jurisdiction Hearing, 10 June 2019, 33:6-13 (Wordsworth).

<sup>86</sup> Russian Federation’s Preliminary Objections, para. 51.

<sup>87</sup> Russian Federation’s Preliminary Objections, para. 51; Jurisdiction Hearing, 10 June 2019, 34:9-35:1 (Wordsworth).

<sup>88</sup> Russian Federation’s Preliminary Objections, para. 55 *citing Chagos*, cit., n. 34, paras 216-19 (**Annex UAL-18**); Jurisdiction Hearing, 10 June 2019, 35:2-36:8 (Wordsworth).

71. The Russian Federation notes that the States Parties to the Convention, in Article 297, paragraph 1, have “expressly and materially restricted the types of disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction under the Convention.”<sup>89</sup> It is thus “not tenable,” the Russian Federation states, “to consider that State parties would agree to such a restriction on settlement of disputes concerning the exercise of coastal State rights or jurisdiction, and yet agree at the same time to jurisdiction over the anterior and more fundamental question as to whether [...] the given State asserting sovereign rights or jurisdiction was the coastal State.”<sup>90</sup>
72. The Russian Federation asserts that the consequences of accepting Ukraine’s claim would be that, whenever one of the 64 articles of the Convention that refer to the term “coastal State” is invoked by a State, a court or tribunal under Part XV would have jurisdiction to resolve all or any territorial sovereignty disputes to determine whether a State is indeed a “coastal State.”<sup>91</sup> The Russian Federation submits that this was not the intention of the drafters of the Convention.<sup>92</sup>
73. The Russian Federation also argues that the object and purpose of the Convention to establish “‘a legal order for the seas and oceans’ (not with respect to abutting coastal territory)” supports its position that arbitral jurisdiction does not extend to sovereignty over land.<sup>93</sup> Addressing Ukraine’s counter-argument that, according to the *Virginia Commentary*, in the view of many States, the provisions of the Convention would be acceptable only if their interpretation and application were subject to expeditious, impartial, and binding decisions, the Russian Federation points out that the provisions of the Convention “do not contain rules on matters such as use of force and the right to self-determination, which inevitably arise under Ukraine’s claim.”<sup>94</sup> In addition, the Russian Federation notes that Part XV of the Convention was a matter of intense debate and States looking for compulsory jurisdiction on key matters such as maritime delimitation were not successful.<sup>95</sup>

## **2. Position of Ukraine**

74. Turning to the interpretation of Articles 286 and 288 of the Convention, Ukraine contends that these provisions contain a “broad jurisdictional grant” that is designed to establish a legal order

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<sup>89</sup> Russian Federation’s Preliminary Objections, para. 52.

<sup>90</sup> Russian Federation’s Preliminary Objections, para. 52; Jurisdiction Hearing, 10 June 2019, 33:19-34:8 (Wordsworth).

<sup>91</sup> Russian Federation’s Reply, para. 35.

<sup>92</sup> Russian Federation’s Preliminary Objections, para. 60.

<sup>93</sup> Russian Federation’s Preliminary Objections, para. 53.

<sup>94</sup> Jurisdiction Hearing, 13 June 2019, 8:1-4 (Wordsworth).

<sup>95</sup> Jurisdiction Hearing, 13 June 2019, 8:4-7 (Wordsworth).

capable of settling “all issues relating to the law of the sea” and ensuring that no significant problems of interpretation persist without a final ruling.<sup>96</sup>

75. According to Ukraine, the broad scope of the Arbitral Tribunal’s jurisdiction under these provisions is clear from the phrase “any dispute” in Article 286, together with its carefully crafted restrictions.<sup>97</sup> Ukraine suggests that the term “‘any’ means any;” it reflects the Convention’s object and purpose to grant broad scope to the arbitral tribunal’s jurisdiction under this provision.<sup>98</sup>
76. Ukraine notes that compulsory jurisdiction was the “pivot upon which the delicate equilibrium of the compromise [of the Convention] must be balanced.”<sup>99</sup> The Convention, in Ukraine’s view, was intended “to settle, in the spirit of mutual understanding and cooperation, all issues relating to the law of the sea.”<sup>100</sup> Ukraine argues that the *Virginia Commentary* recounts that the States Parties to the Convention considered that its provisions would be acceptable only if their interpretation and application were subject to expeditious, impartial, and binding decisions.<sup>101</sup>
77. With respect to the question whether the Arbitral Tribunal has jurisdiction to address the issue of territorial sovereignty, Ukraine draws attention to the finding of the arbitral tribunal in *Chagos* that, “where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it.”<sup>102</sup> In Ukraine’s view, therefore, “a respondent State’s assertion of a sovereignty claim cannot automatically defeat jurisdiction under Articles 286 and 288, and that, in at least some cases, a tribunal acting pursuant to those articles may resolve a predicate sovereignty dispute.”<sup>103</sup>

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<sup>96</sup> Ukraine’s Written Observations, para. 14.

<sup>97</sup> Ukraine’s Written Observations, para. 14; Jurisdiction Hearing, 11 June 2019, 23:13-18 (Koh).

<sup>98</sup> Jurisdiction Hearing, 11 June 2019, 23:19-22 (Koh).

<sup>99</sup> Ukraine’s Written Observations, para. 14 *citing South China Sea*, cit., n. 34, para. 225.

<sup>100</sup> Jurisdiction Hearing, 11 June 2019, 23:3-8 (Koh).

<sup>101</sup> Jurisdiction Hearing, 11 June 2019, 23:8-12 (Koh).

<sup>102</sup> Ukraine’s Rejoinder, para. 42 *citing Chagos*, cit., n. 34, para. 220.

<sup>103</sup> Ukraine’s Rejoinder, para. 42.

## C. EXISTENCE *VEL NON* OF A SOVEREIGNTY DISPUTE OVER CRIMEA

### 1. General Argument

#### (a) Position of the Russian Federation

78. Applying its interpretation of Article 288, paragraph 1, of the Convention to the dispute before the Arbitral Tribunal, the Russian Federation submits that this Arbitral Tribunal lacks jurisdiction to determine “the key territorial sovereignty dispute on which Ukraine’s case depends.”<sup>104</sup> According to the Russian Federation, Ukraine cannot avoid the “basic point” that both Parties consider themselves sovereign over Crimea and are thus engaged in a dispute over this “critical issue of sovereignty.”<sup>105</sup>
79. The Russian Federation contends that, should the Arbitral Tribunal engage in a determination of the sovereignty dispute, it would have to consider issues that fall outside the scope of Article 288, paragraph 1, such as the circumstances in which Crimea was transferred to Ukraine in 1954, Ukraine’s proclamation of independence in 1991, the legitimacy of Ukraine’s abolition of the Crimean constitution and abrogation of the post of President of Crimea in 1995, the scope of the right to self-determination and its application to this case, the legality of the change in government in Ukraine’s capital in February 2014, the Crimean referendum in March 2014, and the alleged unlawful use of force.<sup>106</sup>
80. The Russian Federation also points out that Ukraine’s claimed relief, including the requests for declaratory relief and moral damages to vindicate Ukraine’s national sovereignty, would require the Arbitral Tribunal to first determine that Ukraine is indeed sovereign in Crimea.<sup>107</sup> According to the Russian Federation, they are “not the sort of consequences that follow from a dispute” concerning “the ‘interpretation and application’ of [the Convention].”<sup>108</sup>
81. The Russian Federation contests Ukraine’s assertion that it was the Russian Federation that introduced the topic of sovereignty into the Arbitration. The Russian Federation underlines that it was Ukraine that framed its case with respect to coastal State rights, thus raising the issue of who

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<sup>104</sup> Jurisdiction Hearing, 10 June 2019, 27:8-10 (Wordsworth).

<sup>105</sup> Russian Federation’s Preliminary Objections, para. 61.

<sup>106</sup> Jurisdiction Hearing, 10 June 2019, 36:9-37:11 (Wordsworth).

<sup>107</sup> Russian Federation’s Preliminary Objections, paras 45, 46 *citing* Ukraine’s Memorial, para. 266; Jurisdiction Hearing, 10 June 2019, 26:11-17 (Wordsworth).

<sup>108</sup> Russian Federation’s Preliminary Objections, para. 59.

is sovereign over Crimea, and that it was Ukraine that “elected to deal at the earliest possible opportunity” with the issue of sovereignty.<sup>109</sup>

82. In addition to these general considerations, the Russian Federation addresses Ukraine’s contentions that the Russian Federation’s objection premised on a dispute over territorial sovereignty over Crimea is inadmissible; that the objection is implausible; and that, even if there were a predicate territorial sovereignty dispute, the primary issue in the dispute is, and the relative weight of the dispute lies with, the interpretation or application of the Convention. These arguments are addressed in sections 2 to 4 below.

**(b) Position of Ukraine**

83. Ukraine emphasises that each of its submissions in this Arbitration seeks a ruling upon the interpretation or application of one or more provisions of the Convention.<sup>110</sup> Specifically, Ukraine notes that its submissions “implicate” Parts II, V, and VI (including in connection with the Russian Federation’s violations of Ukraine’s rights under Articles 2, 56, and 77), Part III (in connection with the Russian Federation’s violations of Articles 38 and 44), Parts IX and XII (including in connection with the environmental dangers posed by the Russian Federation’s construction activities in the Kerch Strait and its failure to appropriately respond to the oil spill off the coast of Sevastopol), and Part XVI (in connection with the Russian Federation’s interference with Ukraine’s attempts to preserve underwater cultural heritage pursuant to Article 303).<sup>111</sup>
84. Ukraine contends that a dispute concerning the interpretation or application of the Convention does not lose that character simply because the respondent State asserts a claim to land territory.<sup>112</sup> According to Ukraine, the Russian Federation is acting contrary to the purposes of the Convention and Articles 286 and 288 by asserting that Crimea is subject to competing claims and that this territorial dispute is the subject of the dispute before the Arbitral Tribunal.<sup>113</sup>
85. Ukraine notes that the Russian Federation contends that Ukraine’s Memorial draws a causal link between “Russia’s invasion of the Crimean Peninsula” and the Russian Federation’s alleged violations of the Convention.<sup>114</sup> Ukraine argues, however, that the former is “simply a matter of background and context” and not a part of Ukraine’s claims.<sup>115</sup> In Ukraine’s view, its

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<sup>109</sup> Jurisdiction Hearing, 13 June 2019, 2:14-4:7 (Wordsworth).

<sup>110</sup> Ukraine’s Written Observations, para. 23.

<sup>111</sup> Ukraine’s Written Observations, para. 23; Jurisdiction Hearing, 11 June 2019, 17:22-18:23 (Koh).

<sup>112</sup> Ukraine’s Written Observations, Chapter 2(II)(B)(1).

<sup>113</sup> Ukraine’s Written Observations, para. 39.

<sup>114</sup> Ukraine’s Written Observations, para. 57.

<sup>115</sup> Ukraine’s Written Observations, para. 57.

“unquestioned sovereignty over Crimea” should be regarded as an “internationally recognised background fact” that the Arbitral Tribunal may rely upon in making its determinations.<sup>116</sup> Ukraine also argues that the Russian Federation has offered no evidence for why the Arbitral Tribunal should treat the Russian Federation and not Ukraine as the lawful coastal State.<sup>117</sup> Referring to the statement of counsel for the Russian Federation that, since 2014, the Russian Federation has formally put forward its position on sovereignty in Crimea in a number of *fora*, Ukraine points out that none has accepted any alteration in Crimea’s status.<sup>118</sup>

86. In addition to these general considerations, Ukraine maintains that the Russian Federation’s objection premised on a dispute over territorial sovereignty over Crimea is inadmissible; that its objection is implausible; and that, even if there were a predicate territorial sovereignty dispute, the primary issue in dispute is, and the relative of the weight of the dispute lies with, the interpretation or application of the Convention. These arguments are addressed at sections 2 to 4 below.

## **2. Inadmissibility**

### **(a) Position of the Russian Federation**

87. The Russian Federation rejects Ukraine’s argument that the Russian Federation’s claim regarding the altered legal status of Crimea “is inadmissible and should not be entertained by the [Arbitral] Tribunal.”<sup>119</sup> In this regard, the Russian Federation stresses that it “is making no claims of any kind before the tribunal.”<sup>120</sup> The Russian Federation notes that Ukraine’s submission on alleged inadmissibility is based on the obligation of non-recognition under customary international law, as reflected in Article 41 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the “ILC Articles on State Responsibility”).<sup>121</sup> Article 41 states that “[n]o state shall recognise as lawful a situation created by a serious breach within the meaning of article 40,”<sup>122</sup> defined as “a gross or systematic failure”

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<sup>116</sup> Jurisdiction Hearing, 11 June 2019, 32:24-33:7 (Koh), 36:23-37:2 (Koh), 37:9-14 (Koh).

<sup>117</sup> Jurisdiction Hearing, 11 June 2019, 33:17-22 (Koh).

<sup>118</sup> Jurisdiction Hearing, 11 June 2019, 37:20-38:4 (Koh).

<sup>119</sup> Russian Federation’s Reply, para. 22; Jurisdiction Hearing, 10 June 2019, 45:18-25 (Wordsworth).

<sup>120</sup> Jurisdiction Hearing, 10 June 2019, 45:24-25 (Pellet).

<sup>121</sup> Jurisdiction Hearing, 13 June 2019, 29:4-8 (Sander).

<sup>122</sup> Jurisdiction Hearing, 13 June 2019, 29:9-12 (Sander).

to fulfil an obligation “arising under a peremptory norm of general international law.”<sup>123</sup> According to the Russian Federation, Ukraine’s argument, however, suffers from “three flaws.”<sup>124</sup>

88. First, the Russian Federation claims that the Arbitral Tribunal does not have jurisdiction to determine whether there has in fact been a “gross or systematic” breach of a *jus cogens* obligation.<sup>125</sup>
89. In the view of the Russian Federation, the Arbitral Tribunal cannot circumvent that conclusion by—as Ukraine argues—simply “defer[ring]” to relevant United Nations General Assembly (hereinafter “UNGA”) resolutions on the basis that they present a “consensus” or “determination” on that point.<sup>126</sup> The Russian Federation observes that Ukraine notably relies on UNGA Resolution 68/262, which *inter alia*:

Calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of [Crimea] [...]

and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.<sup>127</sup>

The Russian Federation notes, however, that 69 States elected not to vote in favour of UNGA Resolution 68/262, with 58 States abstaining and 11 States voting against the Resolution.<sup>128</sup> The Russian Federation also points to a “notable dwindling” in support for subsequent UNGA resolutions on this issue;<sup>129</sup> “in a recent resolution only 65 States voted in favour of the resolution and 27 States voted against it, with 70 States abstaining.”<sup>130</sup>

90. Further, the Russian Federation states, referring to the text and drafting history of the United Nations Charter and the practice of the International Court of Justice (hereinafter the “ICJ”), that the UNGA is a political body, not entrusted with general power to make determinations binding on the Arbitral Tribunal on disputed issues of international law.<sup>131</sup> It underscores that UNGA

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<sup>123</sup> Jurisdiction Hearing, 13 June 2019, 29:13-17 (Sander).

<sup>124</sup> Jurisdiction Hearing, 13 June 2019, 29:19 (Sander).

<sup>125</sup> Jurisdiction Hearing, 13 June 2019, 29:21-30:5 (Sander); Jurisdiction Hearing, 10 June 2019, 47:7-9 (Wordsworth).

<sup>126</sup> Jurisdiction Hearing, 13 June 2019, 30:6-10 (Sander).

<sup>127</sup> Jurisdiction Hearing, 10 June 2019, 47:1-5 (Wordsworth).

<sup>128</sup> Russian Federation’s Reply, para. 26; Jurisdiction Hearing, 13 June 2019, 30:11-20 (Sander).

<sup>129</sup> Russian Federation’s Reply, para. 26.

<sup>130</sup> Russian Federation’s Reply, para. 26.

<sup>131</sup> Russian Federation’s Reply, para. 24; Jurisdiction Hearing, 10 June 2019, 47:6-10 (Wordsworth), 48:2-6 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 30:21-31:4 (Sander).

Resolution 68/262 is not binding,<sup>132</sup> and neither are the statements of third States and international organisations to which the Russian Federation is not a party.<sup>133</sup>

91. While the Russian Federation acknowledges that the ICJ may refer to UNGA resolutions as evidence of the existence of *opinio juris*, or as reflecting obligations arising separately under international law, it emphasises that the weight to be accorded by a given tribunal to a UNGA resolution is entirely context-dependent.<sup>134</sup> The Russian Federation observes that, in contrast, what Ukraine asks the Arbitral Tribunal to do in the present case is to “blindly defer” to the UNGA resolutions as “a determination on the disputed question as to whether there has in fact been a serious breach of *jus cogens* by Russia with respect to Crimea.”<sup>135</sup> In the Russian Federation’s view, the General Assembly, however, has no authority to do so.<sup>136</sup>
92. In any case, the Russian Federation contends that UNGA Resolution 68/262 is not framed as a requirement or a decision, as it merely “calls upon” States, international organisations, and specialised agencies to act or refrain from acting in a certain way.<sup>137</sup>
93. Second, the Russian Federation submits that the obligation of non-recognition is an obligation under international law of the State, not an Annex VII arbitral tribunal.<sup>138</sup> The Russian Federation maintains that the addressees of a non-binding UNGA resolution cannot “magically broaden” the identity of the entities bound by the obligation of non-recognition.<sup>139</sup> Further, according to the Russian Federation, UNGA Resolution 68/262 is directed at “States, international organisations and specialized agencies,”<sup>140</sup> and not at an adjudicative body such as this Arbitral Tribunal.<sup>141</sup> To illustrate its point, the Russian Federation explains that an international court or tribunal would not be deprived of jurisdiction by virtue of UNGA Resolution 68/262 over a dispute in which the Russian Federation was putting forth a positive case regarding its sovereignty over Crimea.<sup>142</sup>
94. Third, the Russian Federation underlines that, while UNGA Resolution 68/262 calls upon States, international organisations, and specialised agencies “not to recognize any alteration of the status

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<sup>132</sup> Russian Federation’s Reply, para. 24; Jurisdiction Hearing, 10 June 2019, 47:10-12 (Wordsworth).

<sup>133</sup> Russian Federation’s Reply, para. 27.

<sup>134</sup> Jurisdiction Hearing, 10 June 2019, 47:14-25 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 31:5-32:12 (Sander).

<sup>135</sup> Jurisdiction Hearing, 13 June 2019, 32:13-25 (Sander).

<sup>136</sup> Jurisdiction Hearing, 13 June 2018, 32:25-33:3 (Sander).

<sup>137</sup> Russian Federation’s Reply, para. 24.

<sup>138</sup> Jurisdiction Hearing, 13 June 2019, 33:15-21 (Sander).

<sup>139</sup> Jurisdiction Hearing, 13 June 2019, 33:22-25 (Sander).

<sup>140</sup> Jurisdiction Hearing, 10 June 2019, 49:1-6 (Wordsworth).

<sup>141</sup> Russian Federation’s Reply, para. 24; Jurisdiction Hearing, 13 June 2019, 34:1-7 (Sander).

<sup>142</sup> Jurisdiction Hearing, 10 June 2019, 49:7-13 (Wordsworth).

of [Crimea],” “[t]he issue of whether or not the legal status of Crimea has in fact altered is not one that Russia asks this tribunal to determine.”<sup>143</sup> The Russian Federation contends that an acknowledgement by the Arbitral Tribunal of the “inescapable reality of the fact” of the Russian Federation’s claims of sovereignty over Crimea cannot “somehow be characterised as an action that might be interpreted as recognising an ‘altered status’” under the terms of UNGA Resolution 68/262.<sup>144</sup>

95. Specifically, the Russian Federation points out that it does not ask the Arbitral Tribunal to recognise the “altered legal status of Crimea” as sovereign territory of the Russian Federation (an issue which it considers would fall outside the jurisdiction of the Arbitral Tribunal).<sup>145</sup> Rather, as one aspect of its objections to jurisdiction, the Russian Federation relies on the fact of a “hotly contested dispute as to the status of Crimea,” whose existence is not contested.<sup>146</sup>
96. The Russian Federation further underscores that the obligation of non-recognition is not concerned with the recognition of facts, but with their legitimation.<sup>147</sup> Recognition of the fact of a dispute between Ukraine and the Russian Federation concerning sovereignty over Crimea “is not to recognise or make a determination that either party’s claim is or is not lawful.”<sup>148</sup> The Russian Federation argues that this position is consistent with the approach of arbitral tribunals that have accepted jurisdiction in investment claims brought against the Russian Federation in relation to Crimea, who in doing so did not imply recognition that the Russian Federation’s position regarding Crimea is lawful.<sup>149</sup>
97. The Russian Federation also contends that the obligation of non-recognition is not as “all-encompassing” as Ukraine suggests.<sup>150</sup> The Russian Federation notes Ukraine’s point that the obligation of non-recognition may extend to acts that imply a recognition of lawfulness, but submits that this obligation has no application to the present case.<sup>151</sup> The Russian Federation further notes that the ICJ has drawn a distinction between the application of a procedural rule

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<sup>143</sup> Jurisdiction Hearing, 10 June 2019, 49:14-19 (Wordsworth).

<sup>144</sup> Russian Federation’s Reply, para. 25(b); Jurisdiction Hearing, 10 June 2019, 49:25-50:8 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 35:19-22 (Sander).

<sup>145</sup> Russian Federation’s Reply, paras 25(b), 28; Jurisdiction Hearing, 10 June 2019, 45:24-25 (Wordsworth), 49:17-24 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 35:11-19 (Sander).

<sup>146</sup> Jurisdiction Hearing, 10 June 2019, 46:1-6 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 35:20-24 (Sander), 36:9-18 (Sander).

<sup>147</sup> Jurisdiction Hearing, 13 June 2019, 35:25-36:8 (Sander).

<sup>148</sup> Jurisdiction Hearing, 13 June 2019, 36:13-16 (Sander).

<sup>149</sup> Jurisdiction Hearing, 13 June 2019, 38:17-39:18 (Sander).

<sup>150</sup> Jurisdiction Hearing, 13 June 2019, 37:17-37:19 (Sander).

<sup>151</sup> Jurisdiction Hearing, 13 June 2019, 36:16-37:11 (Sander).

impacting the scope of a court's jurisdiction and an act that could imply the recognition of a situation as unlawful.<sup>152</sup>

98. Finally, the Russian Federation contests Ukraine's argument that the Russian Federation is bound by principles of good faith and estoppel to respect Ukraine's borders as they stood at the time of its independence.<sup>153</sup> The Russian Federation argues that a State may take a new position in response to a new set of facts<sup>154</sup> and in response to evolving circumstances.<sup>155</sup>

**(b) Position of Ukraine**

99. Ukraine contends that the Russian Federation's "claim that the legal status of Crimea has been altered, and the objection that is premised on that claim, should be considered inadmissible in this proceeding."<sup>156</sup> Ukraine notes that the Russian Federation had formerly accepted that Crimea is part of Ukraine, but now asserts that this "settled status" has changed, and that the Russian Federation has acquired sovereignty over Crimea.<sup>157</sup> According to Ukraine, the "international consensus" on this point, however, "dictates that this tribunal should deny Russia's illegal 'claim' all legal effect under the principle of non-recognition."<sup>158</sup>
100. Specifically, Ukraine relies on UNGA Resolution 68/262, reaffirmed in subsequent UNGA Resolutions 73/263, 71/205, and 72/190, which (a) recalled specific commitments made by the Russian Federation to respect the territorial integrity of Ukraine's existing borders, including in Crimea; (b) recalled the obligations of all States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state;" (c) reaffirmed the principle that the "territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that any attempt aimed at the partial or

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<sup>152</sup> Jurisdiction Hearing, 13 June 2019, 37:17-38:16 (Sander). *See also Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, para. 93 (**Annex RUL-86**), which reads: "The Rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State[...] For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility."

<sup>153</sup> Jurisdiction Hearing, 10 June 2019, 51:3-11 (Wordsworth).

<sup>154</sup> Jurisdiction Hearing, 10 June 2019, 51:12-21 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 40:15-41:2 (Sander).

<sup>155</sup> Jurisdiction Hearing, 13 June 2019, 41:3-13 (Sander).

<sup>156</sup> Ukraine's Written Observations, paras 18, 33; Jurisdiction Hearing, 11 June 2019, 7:10-13 (Zerkal), 24:20-25:1 (Koh); Jurisdiction Hearing, 14 June 2019, 14:8-15 (Thouvenin).

<sup>157</sup> Ukraine's Written Observations, para. 26; Jurisdiction Hearing, 11 June 2019, 26:22-27:3 (Koh).

<sup>158</sup> Jurisdiction Hearing, 11 June 2019, 24:20-25:1 (Koh); *see also* Ukraine's Rejoinder, para. 18; Jurisdiction Hearing, 11 June 2019, 7:12-17 (Zerkal).

total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter;” (d) noted that the referendum of 16 March 2014 was not authorised by Ukraine, had no validity, and “cannot form the basis of any alteration in the status of the Autonomous Republic of Crimea or of the city of Sevastopol;” and (e) called upon States, international organisations, and specialised agencies “not to recognize any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol [...] and to refrain from any action or dealing that might be interpreted as recognizing such altered status.”<sup>159</sup> Ukraine notes that the non-recognition principle is re-affirmed by UNGA Resolution 73/194 dated 17 December 2018, “calling on the Russian Federation to take specific actions to end its temporary occupation of Ukraine’s territory without delay.”<sup>160</sup>

101. Ukraine submits that the UNGA resolutions, all of which passed with “overwhelming support,” codify a “powerful consensus of the international community” regarding Ukraine’s sovereignty in Crimea.<sup>161</sup> Ukraine notes that the number of abstentions does not affect the validity of the UNGA resolutions.<sup>162</sup> According to Ukraine, even those States that voted against one or more of the UNGA resolutions have explained their votes in a way that does not undermine the international consensus on the non-recognition of the Russian Federation’s “attempted annexation.”<sup>163</sup> Ukraine points out that the UNGA resolutions have been echoed by a number of States and international organisations.<sup>164</sup>
102. Ukraine argues that “international tribunals have consistently accorded weight to General Assembly resolutions, particularly those like the Assembly’s resolutions on Crimea that expressly state and apply legal principles under the UN Charter and international law.”<sup>165</sup> In Ukraine’s view, the Convention, through its Article 293, contemplates that “this tribunal would account for such rules of international law,” just as the ICJ has given weight to UNGA resolutions “in the Nuclear

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<sup>159</sup> Ukraine’s Written Observations, para. 27 *citing* United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014) (**Annex UA-129**); United Nations General Assembly Resolution 71/205 U.N. Doc No. A/RES/71/205 (19 December 2016) (**Annex UA-464**); United Nations General Assembly Resolution 72/190, U.N. Doc. No. A/RES/72/190 (19 December 2017) (**Annex UA-465**); Ukraine’s Rejoinder, para. 14; Jurisdiction Hearing, 11 June 2019, 27:12-28:3 (Koh) *citing* United Nations General Assembly Resolution 72/263, U.N. Doc. No. A/RES/72/263 (22 December 2018) (**Annex UA-550**).

<sup>160</sup> Jurisdiction Hearing, 11 June 2019, 28:10-14 (Koh) *citing* United Nations General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194 (17 December 2018) (**Annex UA-549**).

<sup>161</sup> Ukraine’s Written Observations, para. 28; Ukraine’s Rejoinder, para. 16; Jurisdiction Hearing, 11 June 2019, 29:1-4 (Koh).

<sup>162</sup> Jurisdiction Hearing, 11 June 2019, 29:16-3 (Koh).

<sup>163</sup> Jurisdiction Hearing, 11 June 2019, 30:4-9 (Koh); Ukraine’s Rejoinder, para. 22.

<sup>164</sup> Ukraine’s Written Observations, para. 29; Ukraine’s Rejoinder, para. 14; Jurisdiction Hearing, 11 June 2019, 29:4-15 (Koh).

<sup>165</sup> Jurisdiction Hearing, 11 June 2019, 30:10-14 (Koh).

Weapons, Jerusalem Wall, South West Africa, and Chagos Advisory Opinion proceedings, among others.”<sup>166</sup>

103. Ukraine recalls that the ICJ, in *Legal Consequences of the Separation of the Chagos Archipelago*, confirmed that the resolutions of the UNGA draw weight from the UNGA’s unique role in the United Nations Charter system and from the legal principles embedded in them.<sup>167</sup> Ukraine argues that as the ICJ, as the principal judicial organ of the United Nations, could not contradict the UNGA resolutions<sup>168</sup> and ITLOS would not contradict the UNGA resolutions on account of its close relations with the United Nations, evidenced in the Agreement on Cooperation and Relationship,<sup>169</sup> an Annex VII arbitral tribunal likewise must not ignore the UNGA resolutions because all forums available under UNCLOS are “expected to follow the same judicial approach.”<sup>170</sup>
104. Ukraine argues that, accordingly, the Arbitral Tribunal should not “contravene a determination made five times by the [UNGA],” given the unique role that the UNGA plays in “coordinating the international law obligation of non-recognition.”<sup>171</sup> Were the Arbitral Tribunal nonetheless to refuse to exercise jurisdiction over this dispute based on the Russian Federation’s territorial claim, it would imply that the status of Crimea as being a part of Ukraine has been altered, “directly contradicting” the UNGA resolutions.<sup>172</sup>
105. Ukraine submits that, in rejecting the Russian Federation’s preliminary objection, the Arbitral Tribunal would not decide on the merits of the Russian Federation’s sovereignty claim but merely defer to the UNGA resolutions.<sup>173</sup> Upholding the Russian Federation’s preliminary objection, on the other hand, would require the Arbitral Tribunal to recognise an alteration in Crimea’s status because it would require an acknowledgement that “Crimea could be Russian.”<sup>174</sup>
106. In response to the Russian Federation’s argument that “the General Assembly’s call applies only to formal recognition of [the Russian Federation] sovereignty over Crimea, something that [the Russian Federation] states it does not seek in this case,”<sup>175</sup> Ukraine contends that the UNGA’s call for non-recognition prohibits not only formal recognition of the sovereignty of the Russian

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<sup>166</sup> Jurisdiction Hearing, 11 June 2019, 30:15-21 (Koh).

<sup>167</sup> Ukraine’s Rejoinder, para. 21.

<sup>168</sup> Jurisdiction Hearing, 14 June 2019, 17:10-18 (Thouvenin).

<sup>169</sup> Jurisdiction Hearing, 14 June 2019, 17:19-18:16 (Thouvenin).

<sup>170</sup> Jurisdiction Hearing, 14 June 2019, 16:17-17:9 (Thouvenin).

<sup>171</sup> Jurisdiction Hearing, 11 June 2019, 28:15-25 (Koh); Ukraine’s Rejoinder, para. 19.

<sup>172</sup> Ukraine’s Rejoinder, para. 17; Jurisdiction Hearing, 11 June 2019, 31:2-11 (Koh).

<sup>173</sup> Jurisdiction Hearing, 14 June 2019, 20:10-23 (Thouvenin).

<sup>174</sup> Jurisdiction Hearing, 14 June 2019, 18:21-15 (Thouvenin).

<sup>175</sup> Ukraine’s Rejoinder, para. 16.

Federation over Crimea, but also acts which would imply such recognition.<sup>176</sup> Noting that the obligation of collective non-recognition applies to all States, including the responsible State, Ukraine further submits that the Russian Federation “cannot seek to consolidate” a legal position that is contrary to the obligation of collective non-recognition.<sup>177</sup>

107. Finally, Ukraine considers that the Russian Federation is bound by its own past commitments regarding Ukraine’s borders as set out in various international instruments.<sup>178</sup> Ukraine notes that, after the dissolution of the USSR, the President of the Russian Federation “recognized Crimea as part of the Ukrainian territory *de facto* and *de jure*.”<sup>179</sup> Ukraine contends that principles of good faith, *pacta sunt servanda*, and estoppel render inadmissible the Russian Federation’s present claims, which are inconsistent with its past representations regarding the status of Crimea.<sup>180</sup>

### 3. Implausibility

#### (a) Position of the Russian Federation

108. The Russian Federation contests Ukraine’s argument that the Russian Federation’s claim regarding the altered status of Crimea is implausible.<sup>181</sup>
109. The Russian Federation submits that Ukraine introduces an unsupported and unworkable “plausibility” test by claiming that circumstances described by the Russian Federation in its preliminary objections would not produce a legally plausible claim to have acquired sovereignty over Crimea.<sup>182</sup> In the Russian Federation’s view, Ukraine has been unable to point to any legal authority, or any basis in Part XV of or Annex VII to the Convention, for its plausibility test.<sup>183</sup> To support its position, the Russian Federation notes that Article 298, paragraph 1, subparagraph (a)(i), of the Convention, in permitting States to exclude any dispute that “necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over

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<sup>176</sup> Ukraine’s Rejoinder, para. 16 *citing* United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), para. 6 (**Annex UA-129**); Jurisdiction Hearing, 11 June 2019, 31:12-16 (Koh).

<sup>177</sup> Ukraine’s Rejoinder, para. 23.

<sup>178</sup> Ukraine’s Rejoinder, para. 24; Jurisdiction Hearing, 11 June 2019, 26:6-21 (Koh).

<sup>179</sup> Jurisdiction Hearing, 11 June 2019, 26:1-5 (Koh) *citing* Address by the President of the Russian Federation (18 March 2014), p. 4 (**Annex UA-462**).

<sup>180</sup> Ukraine’s Rejoinder, para. 25; Jurisdiction Hearing, 11 June 2019, 32:1-10 (Koh).

<sup>181</sup> Russian Federation’s Reply, para. 19(c).

<sup>182</sup> Russian Federation’s Reply, para. 30.

<sup>183</sup> Russian Federation’s Reply, para. 32; Jurisdiction Hearing, 10 June 2019, 53:11-16 (Wordsworth).

continental or insular land territory” from compulsory conciliation, does not require the land sovereignty dispute to be “plausible” for it to be excluded.<sup>184</sup>

110. The Russian Federation points out that plausibility tests have been developed to test whether the allegations made by a claimant are plausible. The Russian Federation argues that the test is “consistent with, and indeed supports, the fundamental rule on the need for consent to jurisdiction”.<sup>185</sup> It is the claimant State that asserts jurisdiction, and the respondent State that must be protected against jurisdiction being asserted in respect of a claim that is not within the scope of the treaty invoked by the claimant State.<sup>186</sup> For similar reasons, the Russian Federation finds irrelevant to the present case Ukraine’s reliance on the Separate Opinions of Judge Ranjeva and Judge Shahabuddeen in *Oil Platforms (Islamic Republic of Iran v. United States of America)* (hereinafter “*Oil Platforms*”).<sup>187</sup>
111. The Russian Federation also contests Ukraine’s argument that the ICJ’s decision in the *Fisheries Jurisdiction (Spain v. Canada)* (hereinafter “*Fisheries Jurisdiction*”) case establishes a presumption in favour of a claimant State’s characterisation of a dispute and thus supports the application of a plausibility test to preliminary objections raised by a respondent State.<sup>188</sup> The Russian Federation notes that the ICJ in fact stated that it was for the Court to “determine on an objective basis the dispute dividing the parties.”<sup>189</sup>
112. The Russian Federation argues that the standard of plausibility applied by ITLOS in *M/V “Saiga” (No. 1) (St. Vincent and the Grenadines v. Guinea)* (hereinafter “*M/V Saiga*”) is not relevant to the present case because the plausibility test in that case was applied in the specific context of prompt release proceedings under Article 292 of the Convention.<sup>190</sup>
113. In response to Ukraine’s argument that if a plausibility test were not to apply, a respondent State could easily defeat jurisdiction over any claim by fabricating a baseless territorial dispute,<sup>191</sup> the

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<sup>184</sup> Jurisdiction Hearing, 13 June 2019, 23:5-21 (Wordsworth).

<sup>185</sup> Russian Federation’s Reply, para. 31(b); Jurisdiction Hearing, 10 June 2019, 54:16-55:2 (Wordsworth).

<sup>186</sup> Jurisdiction Hearing, 10 June 2019, 55:3-12 (Wordsworth).

<sup>187</sup> Jurisdiction Hearing, 10 June 2019, 53:18-25 (Wordsworth); Russian Federation’s Reply, para. 39.

<sup>188</sup> Russian Federation’s Reply, para. 36.

<sup>189</sup> Russian Federation’s Reply, para. 36 citing *Fisheries Jurisdiction*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432, pp. 448-49, paras 30-31 (**Annex RUL-22**).

<sup>190</sup> Russian Federation’s Reply, para. 38 referring to *M/V Saiga*, Judgment, ITLOS Reports 1997, paras 30-31, 36, 60 (**Annex UAL-48**); Jurisdiction Hearing, 10 June 2019, 56:2-19 (Wordsworth).

<sup>191</sup> Russian Federation’s Reply, para. 33; Jurisdiction Hearing, 10 June 2019, 56:20-24 (Wordsworth).

Russian Federation maintains that a State would be prevented from manufacturing a territorial dispute to defeat jurisdiction by the rules governing abuse of rights and process.<sup>192</sup>

114. The Russian Federation further submits that its position in this Arbitration is not abusive.<sup>193</sup> The Russian Federation recalls that it has, since 2014 and well before the present proceedings, put forward its position on sovereignty in Crimea in a range of *fora* and continues to exercise day-to-day sovereignty over the territory.<sup>194</sup> The issues of territorial sovereignty underlying this matter could not have been fabricated in order to defeat this Arbitral Tribunal's jurisdiction.<sup>195</sup>

**(b) Position of Ukraine**

115. Ukraine argues that even if the Russian Federation's claim regarding the altered status of Crimea is found to be admissible, it is not plausible and therefore should be rejected.<sup>196</sup>
116. Ukraine notes that the Arbitral Tribunal has been seised by Ukraine of a dispute concerning the interpretation and application of the Convention; both Parties recognise the jurisdiction of an Annex VII arbitral tribunal to resolve such a dispute; however, the Russian Federation "tries to escape its own consent to the jurisdiction of the [Arbitral Tribunal] by claiming that the legal status of the applicant's territory has been altered in Crimea."<sup>197</sup>
117. According to Ukraine, a respondent State's assertion of a claim over territory cannot automatically divest an arbitral tribunal of jurisdiction over a maritime dispute, unless such an assertion is at least plausible.<sup>198</sup> Ukraine submits that the plausibility requirement strikes an appropriate balance in the application of Articles 286 and 288 of the Convention.<sup>199</sup> If a respondent State could defeat the jurisdiction of an arbitral tribunal by asserting a frivolous sovereignty claim, this would render the dispute settlement provisions of the Convention illusory and without effect.<sup>200</sup> Ukraine argues, therefore, that the Arbitral Tribunal should undertake a plausibility analysis of the Russian Federation's assertion that the status of Crimea as a part of Ukraine has been altered.<sup>201</sup>

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<sup>192</sup> Russian Federation's Reply, para. 34.

<sup>193</sup> Jurisdiction Hearing, 10 June 2019, 57:21-22 (Wordsworth).

<sup>194</sup> Jurisdiction Hearing, 10 June 2019, 58:23-59:11 (Wordsworth).

<sup>195</sup> Russian Federation's Reply, para. 34(a)-(b).

<sup>196</sup> Jurisdiction Hearing, 11 June 2019, 7:18-22 (Zerkal), 25:2-5 (Koh), 40:10-12 (Thouvenin).

<sup>197</sup> Jurisdiction Hearing, 11 June 2019, 44:23-45:25 (Thouvenin).

<sup>198</sup> Ukraine's Written Observations, para. 19; Ukraine's Rejoinder, para. 27; Jurisdiction Hearing, 11 June 2019, 46:1-9 (Thouvenin).

<sup>199</sup> Ukraine's Written Observations, para. 46.

<sup>200</sup> Ukraine's Rejoinder, para. 28.

<sup>201</sup> Ukraine's Written Observations, para. 46.

118. Ukraine acknowledges that a court or tribunal that is seised of an alleged dispute by an applicant, the existence and characterisation of which is contested by the respondent State, must exercise its jurisdiction to verify the existence of the alleged dispute, its subject matter, and whether the dispute pre-existed the seising of the court or tribunal.<sup>202</sup> Ukraine submits that a court or tribunal is not competent to decide “the existence or non-existence of an alleged dispute that is not brought to it by the applicant and which does not fall under the instrument that govern[s] its jurisdiction.”<sup>203</sup>
119. Ukraine asserts that the ICJ has used the standard of plausibility to determine whether claims fall within the scope of the dispute resolution provisions of specific treaties.<sup>204</sup> Ukraine relies on Judge Shahabuddeen’s observations in *Oil Platforms* that “as a general matter, there is no dispute within the meaning of the law where the claim lacks any reasonably arguable legal basis or where it is manifestly frivolous or unsupportable.”<sup>205</sup> Ukraine also cites the observations of Judge Ranjeva in *Oil Platforms* that, in the event of “conflicting propositions” put forward by the Parties, the Court “must establish the plausibility of each of them in relation to the benchmark provisions which are the text of the Treaty and its Articles.”<sup>206</sup>
120. Ukraine considers that the Russian Federation misconstrues *Chagos* and the *South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)* (hereinafter “*South China Sea*”), which, unlike this case, involved longstanding sovereignty disputes, implicating competing claims to sovereignty that no State had suggested were inadmissible or implausible.<sup>207</sup> The UNGA had not in the above cases taken a view on the inadmissibility of one set of claims.<sup>208</sup> Unlike *Chagos*, this case does not require the Arbitral Tribunal to resolve a longstanding dispute over territorial sovereignty, and therefore, Ukraine submits, the test articulated by the majority in *Chagos* is inapplicable.<sup>209</sup>

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<sup>202</sup> Jurisdiction Hearing, 11 June 2019, 42:21-44:6 (Thouvenin).

<sup>203</sup> Jurisdiction Hearing, 11 June 2019, 42:17-20, 44:10-19 (Thouvenin); Jurisdiction Hearing, 14 June 2019, 12:1-11 (Thouvenin).

<sup>204</sup> Ukraine’s Written Observations, paras 43-44 *citing* Peter H.F. Bekker, ‘Oil Platforms (Iran v. U.S.), Preliminary Objection, Judgment’ (1997) 91 A.J.I.L. p. 518 at p. 521 (**Annex UAL-45**); *referring to Ambatielos case (merits: obligation to arbitrate)*, Judgment of 19 May 1953, I.C.J. Reports 1953, pp. 10, 19 (**Annex UAL-46**); *Interhandel Case*, Judgment of 21 March 1959, I.C.J. Reports, p. 6 at p. 24 (**Annex UAL-47**).

<sup>205</sup> Ukraine’s Written Observations, para. 45 *citing Oil Platforms*, *cit.*, n. 204, Separate Opinion of Judge Shahabuddeen, p. 822 at p. 832 (**Annex UAL-52**).

<sup>206</sup> Ukraine’s Written Observations, para. 44 *citing Oil Platforms*, *cit.*, n. 204, Separate Opinion of Judge Ranjeva, p. 842 at p. 844 (**Annex UAL-51**).

<sup>207</sup> Ukraine’s Written Observations, paras 20, 51.

<sup>208</sup> Ukraine’s Written Observations, para. 51.

<sup>209</sup> Ukraine’s Written Observations, para. 51.

121. Ukraine recalls that, in *South China Sea*, the arbitral tribunal concluded that the Philippines' claim did not require it to resolve any disputes concerning land sovereignty, because China lacked the necessary maritime entitlements to support its actions even if all sovereignty claims were assumed in its favour.<sup>210</sup> Ukraine points out that if the Russian Federation were able to "escape its consent to arbitrate" by making a "bare assertion that Crimea has lost its settled status as part of Ukraine," thus creating a "dispute" over land territory, China could have altered the result of *South China Sea* by asserting invented sovereignty claims to islands in the Philippine archipelago.<sup>211</sup>
122. Ukraine argues that the ICJ in *Fisheries Jurisdiction* also noted that the "formulation of the dispute by the [claimant State]" would only be rebutted through objective support for a contrary characterisation.<sup>212</sup> Ukraine submits that, to support its alternative formulation of the claim, the Russian Federation must first establish the plausibility of its argument that the settled status of Crimea has been altered.<sup>213</sup>
123. Addressing the Russian Federation's proposition that the plausibility test is typically used to assess arguments of a claimant State, Ukraine underscores that ITLOS in *M/V Saiga* applied the plausibility test to claims made by the respondent State.<sup>214</sup> In any event, according to Ukraine, there is no principled reason why the plausibility test should only be applied to a claimant State, while a respondent State is taken at its word.<sup>215</sup> Instead, Ukraine argues that the plausibility test may be used to assess a legal claim introduced by either party to a dispute.<sup>216</sup> According to Ukraine, the plausibility test has a common rationale that is to give no legal effect to the non-plausible claims of one party that could, if taken at face value, harm the other party's rights.<sup>217</sup>
124. Ukraine observes that the Russian Federation agrees that there must be a limiting principle for sovereignty claims made to defeat jurisdiction but the Russian Federation suggests that it must be the lowest possible threshold.<sup>218</sup> Ukraine further observes that, in place of a plausibility test, the Russian Federation appears to propose an "abuse of process/rights" test under which a respondent State's territorial sovereignty claim over a relevant coastal area would always defeat an arbitral tribunal's jurisdiction unless the sovereignty claim (a) post-dates the commencement of legal

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<sup>210</sup> Ukraine's Written Observations, para. 41 citing *South China Sea*, Award of 12 July 2016, para. 153 (**Annex UAL-11**).

<sup>211</sup> Ukraine's Written Observations, para. 41.

<sup>212</sup> Ukraine's Written Observations, para. 42 citing *Fisheries Jurisdiction*, cit., n. 189, pp. 448-49, paras 30-31 (**Annex UAL-42**).

<sup>213</sup> Ukraine's Written Observations, para. 42.

<sup>214</sup> Ukraine's Rejoinder, para. 32.

<sup>215</sup> Ukraine's Rejoinder, para. 32.

<sup>216</sup> Ukraine's Rejoinder, para. 32; Jurisdiction Hearing, 11 June 2019, 47:8-15 (Thouvenin).

<sup>217</sup> Jurisdiction Hearing, 11 June 2019, 47:15-19 (Thouvenin).

<sup>218</sup> Jurisdiction Hearing, 14 June 2019, 22:5-8 (Thouvenin).

proceedings; and (b) has never been articulated to the other party outside the context of the dispute resolution proceedings.<sup>219</sup> Ukraine rejects such standard because it would permit States to defeat an arbitral tribunal's jurisdiction (and therefore the object and purpose of the Convention) based on a prior sovereignty claim, irrespective of how frivolous that sovereignty claim might be.<sup>220</sup>

125. Applying its plausibility test set out above, Ukraine contends that the Russian Federation's claim to have acquired sovereignty over Crimea is not plausible,<sup>221</sup> and that there is no land sovereignty issue that precludes the jurisdiction of the Arbitral Tribunal over the present dispute.<sup>222</sup> First, Ukraine argues that, as described above, the consensus of the international community as reflected in the UNGA resolutions has rejected the Russian Federation's claim.<sup>223</sup> Second, Ukraine argues that the Russian Federation's claim contravenes a number of international agreements that bind the Russian Federation and recognise the territory of Crimea as Ukrainian.<sup>224</sup> Third, Ukraine contends that the Russian Federation does not put forward sufficient evidence to support its claim.<sup>225</sup> According to Ukraine, the Russian Federation's sole basis for claiming that Crimea's status has changed is the referendum of 16 March 2014.<sup>226</sup> Ukraine highlights that there is no basis in international law for the validity of a referendum held in violation of the law of the State in which it takes place.<sup>227</sup> Ukraine reiterates that, therefore, the circumstances described by the Russian Federation would not produce a legally plausible claim to have acquired sovereignty over Crimea.<sup>228</sup>

#### **4. The Relative Weight of the Dispute**

##### **(a) Position of the Russian Federation**

126. The Russian Federation rejects Ukraine's argument that, even if there exists a predicate territorial sovereignty dispute, the Arbitral Tribunal nonetheless has jurisdiction to make a determination on

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<sup>219</sup> Ukraine's Rejoinder, para. 29.

<sup>220</sup> Ukraine's Rejoinder, para. 30.

<sup>221</sup> Jurisdiction Hearing, 11 June 2019, 52:1-2 (Thouvenin).

<sup>222</sup> Ukraine's Written Observations, Chapter 2(II)(B)(2); Ukraine's Rejoinder, para. 40.

<sup>223</sup> Ukraine's Written Observations, para. 47; Ukraine's Rejoinder, para. 38; Jurisdiction Hearing, 11 June 2019, 53:1-8 (Thouvenin).

<sup>224</sup> Jurisdiction Hearing, 11 June 2019, 53:9-19 (Thouvenin).

<sup>225</sup> Ukraine's Written Observations, para. 48; Ukraine's Rejoinder, para. 38.

<sup>226</sup> Ukraine's Written Observations, paras 49-50; Jurisdiction Hearing, 11 June 2019, 53:20-54:1 (Thouvenin).

<sup>227</sup> Ukraine's Written Observations, paras 49-50 *citing* United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014) (**Annex UA-129**); Council of Europe, European Commission for Democracy through Law (Venice Commission) Opinion No. 762/2014 (21 March 2014), paras 27-28 (**Annex UA-505**); Jurisdiction Hearing, 11 June 2019, 54:2-15 (Thouvenin).

<sup>228</sup> Ukraine's Written Observations, para. 49.

such predicate dispute because the primary issue in dispute is, or the relative of the weight of the dispute lies with, the interpretation or application of the Convention.<sup>229</sup>

127. Relying on the award in *Chagos*, the Russian Federation suggests that the Arbitral Tribunal, in characterising the dispute before it, should focus on where “the relative weight of the dispute lies” and should consider whether “the Parties’ dispute primarily [is] a matter of the interpretation and application of the term ‘coastal State,’ with the issue of sovereignty forming one aspect of the larger question” or whether “the Parties’ dispute primarily concern[s] sovereignty.”<sup>230</sup>
128. The Russian Federation argues that Ukraine mischaracterises *Chagos* when it states that the majority in that arbitration “decided to attach jurisdictional consequences to a situation where the asserted sovereignty issue significantly outweighed, both objectively and subjectively, in view of both parties, the UNCLOS issues in dispute.”<sup>231</sup> In the Russian Federation’s view, it is an attempt to add “a series of qualifications to the test which are not to be found in the award.”<sup>232</sup>
129. The Russian Federation also refers to the award in *South China Sea* in which the arbitral tribunal examined:

whether (a) the resolution of the [claimant State’s] claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the [claimant State’s] claims was to advance its position in the Parties’ dispute over sovereignty.<sup>233</sup>

The Russian Federation considers that it is not necessary for both of the above conditions to be met, cumulatively, to conclude that a claim relates to land sovereignty issues.<sup>234</sup>

130. Applying the criteria in *Chagos* and *South China Sea* to the present Arbitration, the Russian Federation argues that territorial sovereignty lies at “the very heart of the dispute.”<sup>235</sup> According to the Russian Federation, it is not possible to drive a “jurisdictional wedge” between the contested issue of territorial sovereignty and the sovereign rights of a coastal State claimed by Ukraine<sup>236</sup> because “the territorial sovereignty dispute is in no way ancillary to a law of the sea

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<sup>229</sup> Russian Federation’s Preliminary Objections, paras 24-25.

<sup>230</sup> Russian Federation’s Preliminary Objections, para. 24 citing *Chagos*, cit., n. 34, para. 211 (**Annex UAL-18**); Jurisdiction Hearing, 10 June 2019, 38:23-39:3 (Wordsworth).

<sup>231</sup> Jurisdiction Hearing, 13 June 2019, 11:19-12:2 (Wordsworth).

<sup>232</sup> Jurisdiction Hearing, 13 June 2019, 11:25-12:2 (Wordsworth).

<sup>233</sup> Russian Federation’s Preliminary Objections, para. 24 citing *South China Sea*, cit., n. 34, para. 153 (**Annex UAL-3**).

<sup>234</sup> Jurisdiction Hearing, 13 June 2019, 12:3-13:15 (Wordsworth).

<sup>235</sup> Russian Federation’s Preliminary Objections, para. 56.

<sup>236</sup> Jurisdiction Hearing, 10 June 2019, 28:14-17 (Wordsworth).

dispute” but is “the broader dispute, which entirely subsumes the dispute as to who is and can exercise the rights of the coastal State.”<sup>237</sup>

131. The Russian Federation notes that the meaning of the term “coastal State” is not contested by the Parties; the only issue before the Arbitral Tribunal is who can exercise the coastal State rights.<sup>238</sup> The Russian Federation notes that a number of Ukraine’s claims and the remedies it seeks are based on its alleged rights as a coastal State.<sup>239</sup> Under the characterisation tests developed in *Chagos* and *South China Sea*,<sup>240</sup> the Russian Federation notes that although Ukraine claims that it does not to seek any ruling on territorial sovereignty, it (a) has presented its claim on the basis of an alleged infringement of its rights as a coastal State; (b) bases its claims on Ukraine being found to be the coastal State in Crimea; and (c) states that the relief would “vindicate Ukraine’s national sovereignty.”<sup>241</sup> According to the Russian Federation, the issue of whether Ukraine is the coastal State in Crimea is at “the front and centre” of the matter before this Arbitral Tribunal and “[t]he weight of the dispute thus lies squarely with territorial sovereignty.”<sup>242</sup>
132. The Russian Federation notes that Ukraine seeks to distinguish *Chagos* and *South China Sea* from this Arbitration on the basis that the former cases involved longstanding sovereignty disputes with no question as to the plausibility of the claims on either side.<sup>243</sup> In the Russian Federation’s view, whether the claims in *Chagos* and *South China Sea* were plausible or whether sovereignty disputes were longstanding is irrelevant because the present case unquestionably involves a sovereignty dispute of which there is a clear record and that had crystallised long before the commencement of these proceedings.<sup>244</sup>
133. The Russian Federation argues that Ukraine cannot distinguish *Chagos* from this Arbitration on the basis that in *Chagos*, the claimant State sought relief to change the *status quo* on land.<sup>245</sup> According to the Russian Federation, Ukraine also seeks to change the *status quo* on land where

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<sup>237</sup> Jurisdiction Hearing, 10 June 2019, 28:5-10 (Wordsworth).

<sup>238</sup> Jurisdiction Hearing, 10 June 2019, 39:4-11 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 15:11-18 (Wordsworth).

<sup>239</sup> Jurisdiction Hearing, 10 June 2019, 40:2-22 (Wordsworth).

<sup>240</sup> Russian Federation’s Preliminary Objections, para. 24.

<sup>241</sup> Russian Federation’s Reply, paras 46-47.

<sup>242</sup> Jurisdiction Hearing, 10 June 2019, 41:5-42:13 (Wordsworth).

<sup>243</sup> Russian Federation’s Reply, para. 43.

<sup>244</sup> Russian Federation’s Reply, para. 44; Jurisdiction Hearing, 10 June 2019, 42:24-43:6 (Wordsworth).

<sup>245</sup> Jurisdiction Hearing, 10 June 2019, 43:10-14 (Wordsworth).

the Russian Federation has exercised sovereignty in Crimea, including in its maritime zones, since 2014.<sup>246</sup>

134. Further, the Russian Federation notes that *Chagos* cannot be distinguished from this Arbitration on the basis that Mauritius had anticipated that the relief it sought from that arbitral tribunal would have consequences for the Chagos land territory.<sup>247</sup> The Russian Federation points out that Ukraine has sought declarations that the Russian Federation “is violating Ukraine’s sovereignty and sovereign rights” and “has interfered with Ukraine’s sovereignty” on the basis that Ukraine is the coastal State in Crimea and has also sought to “vindicate Ukraine’s national sovereignty.”<sup>248</sup> Accordingly, in the Russian Federation’s view, the question of who is sovereign over the land territory is again central.<sup>249</sup>
135. Finally, the Russian Federation denies that the sovereignty dispute over Crimea is ancillary to a dispute concerning the interpretation and application of the Convention.<sup>250</sup> If it were, an arbitral tribunal constituted under Part XV of the Convention would have jurisdiction to resolve the territorial sovereignty dispute in any case involving the breach of coastal State rights where the identity of the coastal State was contested.<sup>251</sup>

#### **(b) Position of Ukraine**

136. Ukraine argues that even if there exists a predicate territorial sovereignty dispute, as the Russian Federation suggests, the Arbitral Tribunal has jurisdiction to make determinations on predicate issues of law that are necessary to perform the functions assigned to it by the Convention.<sup>252</sup>
137. In this regard, Ukraine recalls that the majority of the arbitral tribunal in *Chagos* found that “where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it,” including on matters

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<sup>246</sup> Jurisdiction Hearing, 10 June 2019, 43:15-22 (Wordsworth); Jurisdiction Hearing, 13 June 2019, 17:22-18:6 (Wordsworth).

<sup>247</sup> Jurisdiction Hearing, 10 June 2019, 43:23-44:2 (Wordsworth).

<sup>248</sup> Jurisdiction Hearing, 10 June 2019, 44:2-10 (Wordsworth).

<sup>249</sup> Jurisdiction Hearing, 13 June 2019, 44:11-12 (Wordsworth).

<sup>250</sup> Jurisdiction Hearing, 10 June 2019, 44:20-24 (Wordsworth).

<sup>251</sup> Jurisdiction Hearing, 10 June 2019, 45:5-13 (Wordsworth).

<sup>252</sup> Ukraine’s Rejoinder, para. 41; Jurisdiction Hearing, 11 June 2019, 25:6-14 (Koh).

of territorial sovereignty, provided that the dispute was primarily about claims arising out of the Convention.<sup>253</sup>

138. According to Ukraine, the majority in *Chagos* “decided to attach jurisdictional consequences to a situation where the asserted sovereignty issue significantly outweighed, both objectively and subjectively, in the view of both parties, the [Convention] issues in dispute.”<sup>254</sup> In order to determine whether the dispute before it concerned the Convention, Ukraine recalls that the majority of the *Chagos* arbitral tribunal examined where “the relative weight of the dispute lies,” and noted that it could rule upon a dispute “primarily [concerning] a matter of the interpretation and application of the term ‘coastal State’, with the issue of [land] sovereignty forming one aspect of a larger question.”<sup>255</sup> In its analysis, Ukraine underlines, the *Chagos* arbitral tribunal looked at the object of Mauritius’ claims, and relied on Mauritius’ submission that it sought, through the arbitration, to compel the “British [to] leave” the Chagos islands, so that “[t]he former residents of the Chagos Archipelago who wish to return finally will be free to do so and their exile will come to an end.”<sup>256</sup>
139. Ukraine further points out that two arbitrators of the *Chagos* arbitral tribunal argued in their Dissenting Opinion that, so long as the underlying dispute concerned the interpretation or application of the Convention, it was permissible for an arbitral tribunal under the Convention to resolve a territorial sovereignty question that is necessary to resolve a question regarding the Convention.<sup>257</sup> Ukraine notes that the minority in *Chagos* considered that any other reading of Article 288 of the Convention would “introduce a new limitation to the jurisdiction” of “tribunals acting under Part XV” and “change the balance achieved at the Third [United Nations] Conference on the Law of the Sea.”<sup>258</sup>
140. Ukraine submits that the *Chagos* arbitral tribunal was therefore unanimous that a respondent State’s assertion of sovereignty “cannot automatically defeat jurisdiction” under Articles 286 and 288 and that an arbitral tribunal constituted under the Convention may in some cases resolve a

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<sup>253</sup> Ukraine’s Written Observations, para. 36 *citing Chagos*, cit., n. 34, paras 211, 220-21 (**Annex UAL-18**); Jurisdiction Hearing, 11 June 2019, 55:12-23 (Thouvenin); Jurisdiction Hearing, 14 June 2019, 24:15-25:19 (Thouvenin).

<sup>254</sup> Jurisdiction Hearing, 11 June 2019, 57:6-10 (Thouvenin).

<sup>255</sup> Ukraine’s Written Observations, para. 52 *citing Chagos*, cit., n. 34, para. 211 (**Annex UAL-18**); Jurisdiction Hearing, 11 June 2019, 57:11-58:4 (Thouvenin).

<sup>256</sup> Ukraine’s Written Observations, para. 52 *citing Chagos*, cit., n. 34, para. 211 (**Annex UAL-18**).

<sup>257</sup> Ukraine’s Written Observations, para. 36 *citing Chagos*, cit., n. 34, Dissenting and Concurring Opinion of Judge James Kateka and Rüdiger Wolfrum, paras 44-45 (**Annex UAL-18**); Jurisdiction Hearing, 11 June 2019, 56:17-25 (Thouvenin).

<sup>258</sup> Jurisdiction Hearing, 11 June 2019, 57:1-5 (Thouvenin).

predicate sovereignty dispute.<sup>259</sup> According to Ukraine, the *Chagos* arbitral tribunal sought to guard against an abuse of jurisdiction in cases where a territorial sovereignty dispute is “dressed up” as one pertaining to the law of the sea.<sup>260</sup>

141. Ukraine notes that the arbitral tribunal in *Chagos* accorded particular weight to the fact that Mauritius had specifically anticipated that the relief it sought from the arbitral tribunal would have consequences for the Chagos land territory and had formulated its understanding of the dispute on this basis.<sup>261</sup>
142. Ukraine also notes that, like the *Chagos* arbitral tribunal, the *South China Sea* arbitral tribunal also recognised that there existed a dispute between the parties concerning land sovereignty.<sup>262</sup> According to Ukraine, however, the *South China Sea* arbitral tribunal distinguished the case before it from *Chagos* on the basis that, while the majority in *Chagos* considered that “a decision on Mauritius’ [...] submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius’ claims,” that was not the case in *South China Sea*.<sup>263</sup> Consequently, Ukraine observes that the *South China Sea* arbitral tribunal could proceed to hear the case, noting that “[t]here are no grounds to ‘decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.’”<sup>264</sup>
143. Applying these findings to the present Arbitration, Ukraine submits that the relevant question is who is entitled to exercise coastal State rights under the Convention and whether this issue is ancillary to Ukraine’s claims under the Convention.<sup>265</sup> Ukraine submits that its claim concerns a series of “serious and pervasive violations, and the corresponding damage to Ukraine and third-party rights under the Convention.”<sup>266</sup> On the other hand, according to Ukraine, the question of who is entitled to exercise coastal State rights is “not the primary issue in dispute,” given the factors presented by Ukraine in its inadmissibility and implausibility arguments.<sup>267</sup>
144. Distinguishing *Chagos* from the present case, Ukraine first submits that, unlike in *Chagos*, in this Arbitration the land sovereignty claim has been introduced by the respondent State, the Russian

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<sup>259</sup> Ukraine’s Rejoinder, para. 42; Jurisdiction Hearing, 11 June 2019, 56:12-15 (Thouvenin).

<sup>260</sup> Ukraine’s Rejoinder, para. 43.

<sup>261</sup> Ukraine’s Rejoinder, para. 47; Jurisdiction Hearing, 11 June 2019, 59:5-13 (Thouvenin).

<sup>262</sup> Jurisdiction Hearing, 11 June 2019, 59:13-25 (Thouvenin).

<sup>263</sup> Jurisdiction Hearing, 11 June 2019, 60:1-9 (Thouvenin).

<sup>264</sup> Jurisdiction Hearing, 11 June 2019, 59:13-19 (Thouvenin).

<sup>265</sup> Jurisdiction Hearing, 14 June 2019, 25:21-26:10 (Thouvenin).

<sup>266</sup> Jurisdiction Hearing, 14 June 2019, 28:14-29:2 (Thouvenin).

<sup>267</sup> Jurisdiction Hearing, 14 June 2019, 29:7-9, 29:16-30:23 (Thouvenin).

Federation.<sup>268</sup> Second, Ukraine argues that, unlike *Chagos*, the present dispute is a “well-evidenced” one that implicates several aspects of the Convention.<sup>269</sup> Third, Ukraine argues that, unlike in *Chagos*, there is “no serious issue of land sovereignty to be resolved” in the present case.<sup>270</sup> Ukraine notes that Crimea’s status as a part of Ukraine is “settled” and that the Russian Federation has failed to demonstrate the existence of a competing plausible claim with *prima facie* legal seriousness.<sup>271</sup> Fourth, Ukraine contends that, unlike the claimant State in *Chagos*, it does not seek relief that changes the *status quo* on land.<sup>272</sup>

145. Therefore, Ukraine submits that sovereignty over land is not the “real dispute” in the present case, nor where the relative weight of the dispute lies.<sup>273</sup> Ukraine maintains that its “actual objective” in this Arbitration is to protect its maritime rights.<sup>274</sup>

#### **D. REPLY TO THE ARBITRAL TRIBUNAL’S QUESTIONS**

##### **1. Reply of the Russian Federation**

146. In response to the first question posed to the Parties by the Arbitral Tribunal at the Hearing (*see* paragraph 29 of this Award), the Russian Federation submits that the great majority of the claims advanced by Ukraine depend on a prior determination by, or assumption on the part of, the Arbitral Tribunal as to which State is the coastal State in Crimea.<sup>275</sup> The claims that do not so depend, in the Russian Federation’s view, are: the submissions advanced at paragraphs 265 (m) and (n) of Ukraine’s Memorial with respect to transit passage and navigation and the submissions advanced at paragraphs 265 (o) and (p) of Ukraine’s Memorial with respect to a failure to cooperate concerning environmental issues, including the May 2016 oil spill.<sup>276</sup> The Russian Federation states that Ukraine’s claim pursuant to Article 92 of the Convention is advanced on the basis that it is the coastal State.<sup>277</sup> Further, according to the Russian Federation, Ukraine’s reliance on Article 279, to the extent that it is invoked on the basis that the relevant conduct occurred in

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<sup>268</sup> Jurisdiction Hearing, 11 June 2019, 3:5-9, 6:23-7:3 (Zerkal), 60:10-15 (Thouvenin); Jurisdiction Hearing, 14 June 2019, 11:19-25 (Thouvenin).

<sup>269</sup> Ukraine’s Rejoinder, para. 48; Jurisdiction Hearing, 11 June 2019, 60:16-61:4 (Thouvenin).

<sup>270</sup> Ukraine’s Rejoinder, para. 49; Jurisdiction Hearing, 14 June 2019, 30:24-31:4 (Thouvenin).

<sup>271</sup> Ukraine’s Written Observations, para. 53; Jurisdiction Hearing, 11 June 2019, 61:5-13 (Thouvenin).

<sup>272</sup> Ukraine’s Rejoinder, para. 50; Jurisdiction Hearing, 11 June 2019, 61:14-22 (Thouvenin).

<sup>273</sup> Ukraine’s Rejoinder, para. 51; Jurisdiction Hearing, 11 June 2019, 25:15-18 (Koh); Jurisdiction Hearing, 11 June 2019, 61:23-62:7 (Thouvenin).

<sup>274</sup> Ukraine’s Written Observations, para. 54; Ukraine’s Rejoinder, para. 49.

<sup>275</sup> Jurisdiction Hearing, 13 June 2019, 5:24-6:6 (Wordsworth).

<sup>276</sup> Jurisdiction Hearing, 13 June 2019, 6:5-12 (Wordsworth).

<sup>277</sup> Jurisdiction Hearing, 13 June 2019, 6:13-21 (Wordsworth).

maritime areas claimed to be Ukraine's, depends on a prior determination by the Arbitral Tribunal as to which State is the coastal State in Crimea.<sup>278</sup>

147. In response to the second question posed by the Arbitral Tribunal to the Parties,<sup>279</sup> the Russian Federation submits that the Convention does not determine the extent of the rights and duties of the States concerned in circumstances where there is disagreement as to who exercises coastal State rights in respect of a particular maritime area.<sup>280</sup> The Russian Federation maintains that the absence of legal standards in the Convention for the determination of this issue, particularly compared to the fact that the Convention does make provision for steps to be taken when States Parties cannot agree to maritime delimitation under Articles 74 and 83, highlights that disputed issues of land sovereignty do not fall within Article 288 of the Convention.<sup>281</sup>

## **2. Reply of Ukraine**

148. In response to the first question posed to the Parties by the Arbitral Tribunal (*see* paragraph 29 of this Award), Ukraine submits that the Russian Federation's violations of the following articles of the Convention do not depend on a prior determination by, or assumption on the part of, the Arbitral Tribunal as to which State is sovereign over Crimea: Articles 38, 43, 44, 92 (which applies to the exclusive economic zone by way of Article 58), 123, 192, 194, 198, 199, 204, 205, 206, 279, and 303.<sup>282</sup> Ukraine clarifies that its argument pursuant to Article 92 is not forwarded on the basis that Ukraine is the coastal State and notes that the violations therefore do not depend on whether they occurred in Ukraine's exclusive economic zone.<sup>283</sup> Ukraine further clarifies that its argument regarding the aggravation of the dispute pursuant to Article 279 does not depend on Ukraine's coastal State rights.<sup>284</sup>
149. In response to the second question posed by the Arbitral Tribunal to the Parties, Ukraine states that the Convention governs the rights and obligations of parties that are in disagreement as to who exercises the coastal State rights in respect of a particular area.<sup>285</sup> If this were not the case,

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<sup>278</sup> Jurisdiction Hearing, 13 June 2019, 6:22-7:5 (Wordsworth).

<sup>279</sup> *See* paragraph 29 of this Award.

<sup>280</sup> Jurisdiction Hearing, 13 June 2019, 9:19-10:11 (Wordsworth).

<sup>281</sup> Jurisdiction Hearing, 13 June 2019, 10:2-11:8 (Wordsworth).

<sup>282</sup> Jurisdiction Hearing, 14 June 2019, 94:12-22 (Koh).

<sup>283</sup> Jurisdiction Hearing, 14 June 2019, 95:4-9 (Koh).

<sup>284</sup> Jurisdiction Hearing, 14 June 2019, 95:10-16 (Koh).

<sup>285</sup> Jurisdiction Hearing, 14 June 2019, 23:22-24:14 (Thouvenin).

according to Ukraine, the mere existence of an “artificial disagreement” regarding who is entitled to exercise coastal State rights would nullify the rights and obligations under the Convention.<sup>286</sup>

## **E. ANALYSIS OF THE ARBITRAL TRIBUNAL**

150. The Russian Federation’s first preliminary objection that the Arbitral Tribunal lacks jurisdiction over Ukraine’s sovereignty claim raises several questions. The Arbitral Tribunal will proceed to address them *seriatim*.

### **1. Nature or Characterisation of the Dispute before the Arbitral Tribunal**

151. The first question the Arbitral Tribunal has to address is the nature or character of the dispute brought before it by the Applicant. As the arbitral tribunal in *South China Sea* stated, “[t]he nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention.”<sup>287</sup> In addressing this question, the Arbitral Tribunal needs to examine the positions of the Parties, while giving particular attention to the formulation of the dispute chosen by Ukraine as Applicant.<sup>288</sup> However, it is ultimately for the Arbitral Tribunal itself to determine on an objective basis the nature of the dispute dividing the Parties by “[isolating] the real issue in the case and [identifying] the object of the claim.”<sup>289</sup>

152. The Arbitral Tribunal notes that, while Ukraine formulates its dispute with the Russian Federation in terms of the alleged violation of its rights under the Convention, thus as a dispute concerning the interpretation or application of the Convention, many of its claims in the Notification and Statement of Claim are based on the premise that Ukraine is sovereign over Crimea, and thus the “coastal State” within the meaning of the various provisions of the Convention it invokes. Ukraine itself acknowledges this and, as will be seen below, submits that this premise must be accepted by the Arbitral Tribunal because the Russian Federation’s claim of sovereignty over Crimea is inadmissible and implausible. However, unless the premise that Crimea belongs to Ukraine is to be taken at face value, the claims as advanced by Ukraine cannot be addressed by the Arbitral Tribunal without first examining and, if necessary, rendering a decision on the question of sovereignty over Crimea.

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<sup>286</sup> Jurisdiction Hearing, 14 June 2019, 23:25-24:9 (Thouvenin).

<sup>287</sup> *South China Sea*, cit., n. 34, para. 150 (**Annex UAL-3**)

<sup>288</sup> *Fisheries Jurisdiction*, cit., n. 189, p. 448, para. 30 (**Annex RUL-22**).

<sup>289</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 at p. 262, para. 29 (**Annex UAL-100**).

153. The Arbitral Tribunal also notes that Ukraine emphasises that it asks for “absolutely no relief” relating to the situation in Crimea, and that the sole objective of Ukraine’s claims is the interpretation and application of the Convention in relation to the Russian Federation’s actions in the Black Sea, the Sea of Azov, and the Kerch Strait. In the view of the Arbitral Tribunal, however, even if that is the real objective of Ukraine’s claims, the fact remains that a significant part of Ukraine’s claims under consideration rests on the premise that Ukraine is sovereign over Crimea, the validity of which is challenged by the Russian Federation.
154. Consequently, if the legal status of Crimea, contrary to Ukraine’s assumption, is not settled in the sense that it forms part of Ukraine’s territory, but is disputed as the Russian Federation contends, the Arbitral Tribunal would not be able to decide the claims of Ukraine insofar as they are premised on the settled status of Crimea as part of Ukraine without first addressing the question of sovereignty over Crimea. The Arbitral Tribunal therefore considers that the question as to which State is sovereign over Crimea, and thus the “coastal State” within the meaning of several provisions of the Convention invoked by Ukraine, is a prerequisite to the decision of the Arbitral Tribunal on a significant part of the claims of Ukraine. For the purposes of determining the jurisdiction of the Arbitral Tribunal, this characterisation of the dispute before it raises two questions: first, the scope of the jurisdiction of the Arbitral Tribunal under Article 288, paragraph 1, of the Convention; and second, the existence *vel non* of a sovereignty dispute over Crimea. The Arbitral Tribunal will now examine these two questions in turn.

## **2. Scope of the Jurisdiction of the Arbitral Tribunal under Article 288(1) of the Convention**

155. Article 288, paragraph 1, of the Convention reads:

A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

156. Thus, the jurisdiction of a court or tribunal referred to in Article 287, including this Arbitral Tribunal, is confined to “any dispute concerning the interpretation or application of this Convention.” The question the Arbitral Tribunal should address is whether a dispute that involves the determination of a question of territorial sovereignty would fall within the jurisdiction of a court or tribunal under Article 288, paragraph 1, of the Convention. While the text of the Convention provides no clear answer to this question, the Arbitral Tribunal is of the view that, in light of Article 297, which carves out certain categories of disputes relating to the exercise of sovereign rights and jurisdiction in the exclusive economic zone, and Article 298, paragraph 1,

which allows States to exclude three categories of disputes, such as disputes concerning such sensitive matters as the delimitation of maritime boundaries, from compulsory dispute settlement procedures, a sovereignty dispute, which is mentioned in neither provision, may not be regarded a dispute concerning the interpretation or application of the Convention. The fact that a sovereignty dispute is not included either in the limitations on, or in the optional exceptions to, the applicability of compulsory dispute settlement procedures supports the view that the drafters of the Convention did not consider such a dispute to be “a dispute concerning the interpretation or application of the Convention.”

157. The Arbitral Tribunal recalls in this regard that the question as to whether a court or tribunal referred to in Article 287 of the Convention has jurisdiction to decide upon a sovereignty dispute has been the subject of scrutiny by arbitral tribunals in previous cases. Those arbitral tribunals were circumspect and generally answered the above question in the negative, except for a situation where a sovereignty issue is “ancillary” to a dispute concerning the interpretation or application of the Convention.

158. For example, the arbitral tribunal in *Chagos* stated:

As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it [...] Where the “real issue in the case” and the “object of the claim” [...] do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).<sup>290</sup>

159. The arbitral tribunal further stated that it “does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.”<sup>291</sup>

160. In *South China Sea*, the arbitral tribunal examined whether “either (a) the resolution of the Philippines’ claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines’ claim was to advance its position in the Parties’ dispute over sovereignty.”<sup>292</sup> It found that neither of these situations was present in the case at hand. The arbitral tribunal went on to state:

The Convention, however, does not address the sovereignty of States over land territory. Accordingly, this Tribunal has not been asked to and does not purport to make any ruling as

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<sup>290</sup> *Chagos*, cit., n. 34, para. 220 (**Annex UAL-18**).

<sup>291</sup> *Chagos*, cit., n. 34, para. 221 (**Annex UAL-18**).

<sup>292</sup> *South China Sea*, cit., n. 34, para. 153 (**Annex UAL-3**).

to which State enjoys sovereignty over any land territory in the South China Sea, in particular with respect to the disputes concerning sovereignty over the Spratly Islands or Scarborough Shoal. None of the Tribunal's decisions in this Award are dependent on a finding of sovereignty, nor should anything this Award understood to imply a view with respect to questions of land sovereignty.<sup>293</sup>

161. The Arbitral Tribunal does not consider that there exists a serious disagreement between the Parties regarding the interpretation of Article 288, paragraph 1, of the Convention *per se*. While Ukraine seems to favour a broad interpretation of the jurisdiction of a court or tribunal under this provision, it does not go as far as to assert that such jurisdiction should extend to making a decision on any sovereignty dispute. As the Arbitral Tribunal sees it, the essence of the position of Ukraine is not that this Arbitral Tribunal is competent under Article 288, paragraph 1, of the Convention to decide any sovereignty dispute, but that there is no sovereignty dispute between the Parties over Crimea. In the alternative, Ukraine argues that, even if a sovereignty dispute exists over Crimea, this Arbitral Tribunal has jurisdiction to decide it because the sovereignty dispute is ancillary to the dispute concerning the interpretation or application of the Convention. On the other hand, the Russian Federation contends that a predicate dispute on sovereignty over Crimea exists and that such dispute is not ancillary to, but at the heart of, the dispute before the Arbitral Tribunal. In the view of the Arbitral Tribunal, therefore, the real issue of contention between the Parties in the present case is whether there exists a sovereignty dispute over Crimea, and if so, whether such dispute is ancillary to the determination of the maritime dispute brought before the Arbitral Tribunal by Ukraine.

### **3. Existence *vel non* of a Sovereignty Dispute over Crimea**

162. The Arbitral Tribunal now turns to the question of whether a sovereignty dispute over Crimea exists between the Parties. The Parties disagree on whether or not such a dispute exists.

#### **(a) General Considerations**

163. The Arbitral Tribunal notes that the concept of “dispute” is well-established in the jurisprudence of international courts and tribunals. According to widely accepted jurisprudence, a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties.<sup>294</sup> In order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed

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<sup>293</sup> *South China Sea*, cit., n. 210, para. 5 (**Annex UAL-11**).

<sup>294</sup> *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* (hereinafter “*Mavrommatis Palestine Concessions*”), Judgment, P.C.I.J. Series A, No. 2, p. 11 (**Annex RUL-2**).

by the other and that the two sides must ‘hold clearly opposite views’ concerning the question of the performance or non-performance of certain international obligations.”<sup>295</sup>

164. The Arbitral Tribunal further notes that the “determination of the existence of a dispute is a matter of substance, and not a question of form or procedure,” and that whether a dispute exists is a matter for “objective determination.”<sup>296</sup> In other words,

It is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.<sup>297</sup>

165. In the present proceedings, the Russian Federation submitted several documents and statements relating to its claim to sovereignty over Crimea, which it made in various *fora*, including the United Nations and the International Maritime Organization since March 2014. This claim of the Russian Federation has been positively and repeatedly opposed by Ukraine, and the Parties therefore hold clearly opposite views on the question of sovereignty over Crimea. The documents submitted by the Russian Federation to support its claim to sovereignty over Crimea are not as abundant as in *Chagos*, as the present proceedings are confined to the jurisdiction of the Arbitral Tribunal whereas in *Chagos* the question of jurisdiction was joined with that of the merits. On the record before the Arbitral Tribunal, however, it is clear that the Parties are in disagreement on various points of law and facts relating to the question as to which State is sovereign over Crimea, and thus who is the “coastal State” within the meaning of various provisions of the Convention invoked by Ukraine.

166. This finding would seem to be sufficient for a conclusion that a sovereignty dispute exists between the Parties but for Ukraine’s argument that the Russian Federation’s claim to sovereignty is inadmissible and implausible, to which the Arbitral Tribunal now turns.

**(b) Inadmissibility**

167. Ukraine contends that the Russian Federation’s claim that the legal status of Crimea has been altered is inadmissible and cannot be entertained in this proceeding. The Arbitral Tribunal notes

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<sup>295</sup> *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (hereinafter “*Nuclear Arms and Disarmament*”), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at p. 269, para. 34 (**Annex UAL-90**).

<sup>296</sup> *Nuclear Arms and Disarmament*, cit., n. 295, p. 270, paras 35-36 (**Annex UAL-90**).

<sup>297</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (hereinafter “*South West Africa Cases*”), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, p. 328.

that Ukraine justifies its contention by invoking the international law principle of non-recognition, the relevance of which to the situation in Crimea, according to Ukraine, has been reaffirmed by several resolutions adopted by the UNGA and other international organisations since 2014, as well as the principles of good faith and estoppel. The Russian Federation contests the applicability and implications of the principle of non-recognition to the present case. It also denies the relevance of the principles of good faith and estoppel.

168. The obligation of non-recognition is reflected in Article 41 of the ILC Articles on State Responsibility, the relevant part of which reads:

No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

169. Article 40, in turn, provides:

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

[...]

170. The obligation of non-recognition under Article 41 thus imposes upon all States an obligation not to recognise as lawful a situation created by a gross or systematic failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law.<sup>298</sup> According to Ukraine, UNGA resolutions, in particular Resolution 68/262 of 27 March 2014, reaffirmed this principle with respect to the situation in Crimea, by calling upon “all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.”<sup>299</sup> While the Russian Federation recognises the principle of non-recognition as a rule of customary international law, it contests its applicability to the present case by pointing out three “flaws” in Ukraine’s argument, summarised above in paragraphs 88 to 98.

171. The Arbitral Tribunal notes that at the centre of the contention between the Parties are the legal effect and meaning of the UNGA resolutions. Ukraine contends that the UNGA resolutions to which it refers reflect the consensus of the international community regarding the territorial status

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<sup>298</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 (**Annex UAL-33**), p. 115.

<sup>299</sup> United Nations General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014) (**Annex UA-129**).

of Crimea, to which the Arbitral Tribunal operating under the Convention must defer. According to Ukraine, therefore, the Arbitral Tribunal need not take any position on the “illegality of any of [the Russian Federation’s] actions,” and need only treat Ukraine’s acknowledged sovereignty over its own territory as “just one of many internationally recognized background facts” that form the background against which the Arbitral Tribunal should conduct the present Arbitration. The Russian Federation denies that such legal effect should be accorded to the relevant UNGA resolutions. It also disagrees with Ukraine’s interpretation of the UNGA resolutions.

172. Under the Charter of the United Nations, the General Assembly is empowered to take decisions with legally binding effect in certain enumerated circumstances, related to the functioning of the United Nations.<sup>300</sup> In other respects, the General Assembly may make “recommendations,”<sup>301</sup> which are not formally binding under international law. The Arbitral Tribunal recalls the statement of the ICJ in the *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* that UNGA resolutions “are not binding, but only recommendatory in character,” and that “[t]he persuasive force of Assembly resolutions can indeed be very considerable,” yet “[i]t operates on the political not the legal level: it does not make these resolutions binding in law.”<sup>302</sup>

173. The Arbitral Tribunal considers that, while UNGA resolutions are not binding *per se*, they can be relevant for ascertaining the existence and contents of a rule of customary international law. In this regard, the Arbitral Tribunal further recalls the statement of the ICJ that:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether *opinio juris* exists as to its normative character.<sup>303</sup>

174. Thus, the effect of factual and legal determination made in UNGA resolutions depends largely on their content and the conditions and context of their adoption. So does the weight to be given to such resolutions by an international court or tribunal. In this regard, the Arbitral Tribunal draws attention to the fact that there have been cases in which the ICJ expressly found that it should not accept determinations made in UNGA resolutions. For example, in its Advisory Opinion in respect of *Kosovo*, referring to the statement of the UNGA that the unilateral declaration of

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<sup>300</sup> These matters notably concern questions of membership in the United Nations (Articles 4, 5, 6), elections (Articles 23, paragraph 2, 61, 86, 97), agreements entered into by the United Nations (Articles 63 and 85), the budget of the United Nations (Article 17), and subsidiary organs (Article 22).

<sup>301</sup> Charter of United Nations, Art. 10.

<sup>302</sup> *South West Africa Cases*, Second Phase, Judgment, I.C.J. Reports 1966, p. 6 at p. 51, para. 98 (**Annex UAL-85**).

<sup>303</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 at p. 254, para. 70 (**Annex UAL-89**).

independence had been adopted by the Provisional Institutions of Self-Government of Kosovo, the ICJ held that “[i]t would be incompatible with the proper exercise of the judicial function for the Court to treat that matter [*i.e.*, the identity of the authors of the declaration of independence] as having been determined by the General Assembly.”<sup>304</sup> Likewise, in the *East Timor Case (Portugal v. Australia)* (hereinafter “*East Timor*”), with respect to Portugal’s argument that United Nations resolutions, which affirmed the status of East Timor as that of a non-self-governing territory and Portugal’s capacity as the administering power of that territory, “can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory, and [...] to deal only with Portugal,” the ICJ stated that, “[w]ithout prejudice to the question whether the resolution under discussion could be binding in nature, [...] they cannot be regarded as ‘givens’ which constitute a sufficient basis for determining the dispute between the Parties.”<sup>305</sup>

175. The Arbitral Tribunal notes that the UNGA resolutions in question are framed in hortatory language. The Arbitral Tribunal further notes that they were not adopted unanimously or by consensus but with many States abstaining or voting against them.
176. Regarding the meaning of UNGA resolutions, the Arbitral Tribunal notes that it has the power to interpret the texts of documents of international organisations, including the resolutions of the UNGA. Ukraine’s argument that the Arbitral Tribunal must defer to the UNGA resolutions and need only treat Ukraine’s sovereignty over Crimea as an internationally recognised background fact is equivalent to asking the Arbitral Tribunal to accept the UNGA resolutions as interpreted by Ukraine. Apart from the question of the legal effect of the UNGA resolutions, if the Arbitral Tribunal were to accept Ukraine’s interpretation of those UNGA resolutions as correct, it would *ipso facto* imply that the Arbitral Tribunal finds that Crimea is part of Ukraine’s territory. However, it has no jurisdiction to do so.
177. Furthermore, the Arbitral Tribunal does not consider that the UNGA resolutions to which Ukraine refers can be read to go as far as prohibiting it from recognising the existence of a dispute over the territorial status of Crimea. In the Arbitral Tribunal’s view, such a reading would be incompatible with the proper exercise of its judicial function. Without prejudice to the meaning of the phrase “not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol,” the mere recognition of the objective fact of the existence of a dispute

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<sup>304</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 at p. 424, para. 52.

<sup>305</sup> *East Timor Case (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90 at p. 104, para. 32 (**Annex UAL-87**).

over Crimea in the sense that the claim of one party is positively opposed by the other party cannot be considered to contravene the UNGA resolutions.

178. It must be stressed that the Arbitral Tribunal's recognition of the existence of a dispute over the territorial status of Crimea in no way amounts to recognising any alteration of the status of Crimea from the territory of one Party to the other, or to "any action or dealing that might be interpreted as recognizing any such altered status." Neither would it imply that the Russian Federation's actions toward and in Crimea were lawful. In fact, the Russian Federation has not asked the Arbitral Tribunal to find that Crimea belongs to the Russian Federation, nor that it acted lawfully with respect to Crimea. On the contrary, the Russian Federation simply asks the Arbitral Tribunal to recognise the reality that it claims sovereignty over Crimea, which claim is disputed and opposed by Ukraine. The Arbitral Tribunal recognises this reality without engaging in any analysis of whether the Russian Federation's claim of sovereignty is right or wrong. In this regard, the Arbitral Tribunal recalls the statement of the ICJ in *East Timor* that Portugal, similarly to the Russian Federation in this case, "has, *rightly or wrongly*, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute."<sup>306</sup>

179. The next question the Arbitral Tribunal needs to examine concerns Ukraine's argument that the Russian Federation's claim of sovereignty is inadmissible as a consequence of the principles of good faith and estoppel because such claim contradicts the Russian Federation's own legally binding commitment to Ukraine's sovereignty over Crimea. These principles, according to Ukraine, bar the Russian Federation from now advancing claims entirely inconsistent with its prior undertakings.

180. The Arbitral Tribunal recalls the statement made by ITLOS in the *Dispute Concerning Delimitation of the Maritime Boundary in Bay of Bengal* (hereinafter "*Bay of Bengal*") that:

In international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. 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.<sup>307</sup>

181. The Russian Federation does not contest that before March 2014 it had recognised Ukraine's sovereignty over Crimea. However, it argues that there was a change in the situation of Crimea and that its claim of sovereignty was a response to that change. The Arbitral Tribunal considers that the principles of good faith and estoppel do not operate so as to bar the Russian Federation

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<sup>306</sup> *East Timor*, cit., n. 305, p. 100, para. 22 (**Annex UAL-87**) [emphasis added by the Arbitral Tribunal].

<sup>307</sup> *Bay of Bengal*, Judgment, ITLOS Reports 2012, p. 4 at p. 42, para. 124 (**Annex UAL-63**).

from maintaining that a dispute concerning sovereignty over Crimea has arisen since March 2014, as the basis of the earlier statements has been substantially and materially changed by developments upon which the Arbitral Tribunal has no jurisdiction to adjudicate.

182. The Arbitral Tribunal accordingly does not accept Ukraine's argument that the Russian Federation's claim of sovereignty is inadmissible.

**(c) Implausibility**

183. The Arbitral Tribunal now turns to the argument advanced by Ukraine that the Russian Federation's claim of sovereignty is implausible. According to Ukraine, in order to defeat the Arbitral Tribunal's jurisdiction, it is not sufficient for the Russian Federation to put forward a claim to sovereignty, but its claim must be at least plausible. Ukraine contends that the Russian Federation's claim of sovereignty fails the plausibility test and, therefore, must be rejected.
184. While the Russian Federation acknowledges that there must be some form of threshold for accepting a party's claim in order to protect the other party from an abuse of judicial process, the Russian Federation rejects the plausibility test to this end and instead submits that the appropriate threshold should be that of abuse of process or abuse of right.
185. In exercising its jurisdiction under Article 288, paragraph 1, of the Convention, the Arbitral Tribunal needs to assess the Russian Federation's claim of sovereignty to the extent necessary to determine the existence *vel non* of a dispute over land sovereignty in Crimea, as the claims submitted by Ukraine in its Notification and Statement of Claim rest on the premise that the territorial status of Crimea is settled.
186. The power of the Arbitral Tribunal to undertake such assessment stems from the legal principle that the Arbitral Tribunal has competence to decide its own jurisdiction, as reflected in Article 288, paragraph 4, of the Convention. The Arbitral Tribunal cannot simply take the Russian Federation's assertion at face value, just as it cannot accept Ukraine's premise as "just one of many internationally recognized background facts." However, neither should the Arbitral Tribunal engage in a full evaluation of the sovereignty claims of the Parties, as it has no such competence under Article 288, paragraph 1, of the Convention. The exercise of the Arbitral Tribunal's jurisdictional power in this regard should be limited to assessing the Russian Federation's claim of sovereignty for the sole purpose of verifying whether there exists a dispute as to which State has sovereignty over Crimea.

187. The Arbitral Tribunal is not convinced by the plausibility test as advanced by Ukraine. Even if such a test exists, Ukraine has failed to state the content or standard of such a test in sufficiently clear terms. The Arbitral Tribunal also considers that the context and circumstances of the previous cases referred to by Ukraine, in which Ukraine argues that the plausibility test has been applied, differ considerably from those of the present case. On the other hand, neither does the Arbitral Tribunal find the threshold of the abuse of rights as presented by the Russian Federation relevant in this regard.
188. In the view of the Arbitral Tribunal, the key question upon which it should focus is whether a dispute as to which State has sovereignty over Crimea exists. The Arbitral Tribunal already referred in paragraphs 163 and 164 to the various formulations employed by the Permanent Court of International Justice and the ICJ for the determination of the existence of a dispute. The Arbitral Tribunal considers that those formulations are flexible enough to leave considerable room for judgment on its part in verifying the existence of a dispute. The Arbitral Tribunal further considers that the jurisprudence of international courts or tribunals also shows that the threshold for establishing the existence of a dispute is rather low. Certainly a mere assertion would be insufficient in proving the existence of a dispute. However, it does not follow that the validity or strength of the assertion should be put to a plausibility or other test in order to verify the existence of a dispute.
189. The Arbitral Tribunal does not consider that the Russian Federation’s claim of sovereignty is a mere assertion or one which was fabricated solely to defeat its jurisdiction. The Arbitral Tribunal notes that since March 2014, both Parties have held opposite views on the status of Crimea, and this situation persists today. The Parties have engaged in the controversy regarding sovereignty before and outside these proceedings, including in various international *fora* such as in debates at the UNGA. Even if the Arbitral Tribunal applied an additional element—as the ICJ did in *Nuclear Arms and Disarmament* by stating that “evidence must show that [...] the respondent was aware, or could not have been unaware,”<sup>308</sup> of a position—the Arbitral Tribunal’s finding on the existence of a sovereignty dispute over Crimea would not change.
190. For this reason, the Arbitral Tribunal does not accept Ukraine’s argument that the Russian Federation’s claim of sovereignty is implausible.

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<sup>308</sup> *Nuclear Arms and Disarmament*, cit., n. 295, p. 271, para. 38 (**Annex UAL-90**).

**(d) Relative Weight of the Dispute**

191. The next question the Arbitral Tribunal has to address is related to the argument advanced by Ukraine that, even if it were assumed that there is a legal dispute concerning sovereignty over Crimea that would have to be resolved before addressing Ukraine's claims under the Convention, in the circumstances of the present case the Arbitral Tribunal's jurisdiction would extend to making any determinations of law as are necessary to resolve the UNCLOS dispute presented to it. In this regard, Ukraine argues that sovereignty over land is neither the real dispute in the present case, nor where the relative weight of the dispute lies.
192. For its part, while the Russian Federation does not contest the test articulated by the arbitral tribunal in *Chagos*, it maintains that in the present case the territorial sovereignty issue is not ancillary to the law of the sea dispute but at "the front and centre" of the matter before the Arbitral Tribunal. According to the Russian Federation, the weight of the dispute lies squarely with territorial sovereignty.
193. The Arbitral Tribunal notes that the arbitral tribunal in *Chagos* implied a possibility that its jurisdiction could be extended to ruling upon an ancillary issue of territorial sovereignty, when it stated:
- As a general matter, [...] where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it [...] The Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.<sup>309</sup>
194. In the view of the Arbitral Tribunal, the key question it should address, therefore, is whether a sovereignty dispute over Crimea in the present case is an issue ancillary to a dispute concerning the interpretation or application of the Convention, to which its jurisdiction could be extended. The Arbitral Tribunal considers that this question essentially touches upon that of how the dispute before it should be characterised. The Arbitral Tribunal already addressed this question above in paragraphs 151 to 154.
195. The Arbitral Tribunal is of the view that, in the present case, the Parties' dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the

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<sup>309</sup> *Chagos*, cit., n. 34, paras 220-21 (**Annex UAL-18**).

Convention. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the “coastal State” within the meaning of provisions of the Convention invoked by Ukraine.

196. The Arbitral Tribunal therefore cannot accept Ukraine’s argument that even if there exists a predicate territorial sovereignty dispute, the Arbitral Tribunal has jurisdiction to address it because the relative weight of the dispute lies with the interpretation or application of the Convention.

#### **4. Conclusion**

197. In light of the foregoing, the Arbitral Tribunal concludes that pursuant to Article 288, paragraph 1, of the Convention, it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine’s claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea. As a result, 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.
198. This conclusion affects many, but not all, of the claims articulated in different forms in Ukraine’s Notification and Statement of Claim and Ukraine’s Memorial. Since the Russian Federation is “entitled to know precisely the case advanced against it,”<sup>310</sup> it is in the interest of procedural fairness and expedition for Ukraine to revise its Memorial so as to take full account of the scope of, and limits to, the Arbitral Tribunal’s jurisdiction as determined in the present Award, before the Russian Federation is called upon to respond in a Counter-Memorial.

#### **V. THE RUSSIAN FEDERATION’S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER CLAIMS CONCERNING ACTIVITIES IN THE SEA OF AZOV AND IN THE KERCH STRAIT**

199. The Russian Federation submits that “[i]ndependently of the lack of jurisdiction to decide the question of sovereignty over Crimea, this Tribunal also does not have jurisdiction over any of Ukraine’s claims pertaining to the Sea of Azov and the Kerch Strait.”<sup>311</sup> The Sea of Azov and the Kerch Strait, according to the Russian Federation, were historically internal waters of the Russian Empire, and later the USSR, and, since 1991, the common internal waters of Ukraine and the

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<sup>310</sup> *Methanex Corp. v. United States of America*, Partial Award on Jurisdiction and Admissibility of 7 August 2002, para. 162.

<sup>311</sup> Russian Federation’s Preliminary Objections, para. 66.

Russian Federation. The Russian Federation contends that the Convention does not regulate the regime of internal waters and concludes that issues concerning the Sea of Azov and the Kerch Strait are accordingly not issues concerning the interpretation or application of the Convention pursuant to Article 288, paragraph 1, of the Convention.

200. Ukraine submits that the Arbitral Tribunal should reject the second preliminary objection of the Russian Federation. According to Ukraine, the Sea of Azov and the Kerch Strait are not internal waters; rather, the Sea of Azov is an enclosed or semi-enclosed sea within the meaning of the Convention, containing a territorial sea and exclusive economic zone, and the Kerch Strait is a strait used for international navigation. Ukraine also argues that the second objection of the Russian Federation does not have an exclusively preliminary character, and should be deferred to the merits phase.
201. The Arbitral Tribunal notes that the Parties hold different views as to the status of the Sea of Azov and the Kerch Strait; the applicability of the Convention to the waters of the Sea of Azov and the Kerch Strait; and the exclusively preliminary character of the present objection. The Arbitral Tribunal will examine the various arguments of the Parties on these issues below.

#### **A. STATUS OF THE SEA OF AZOV AND THE KERCH STRAIT BEFORE 1991 AND DEVELOPMENTS FOLLOWING THE DISSOLUTION OF THE USSR**

##### **1. Position of the Russian Federation**

202. The Russian Federation considers that the Parties agree that the Sea of Azov and the Kerch Strait had the status of internal waters prior to the dissolution of the USSR.<sup>312</sup> It notes that the Russian Empire exercised sovereignty over the Sea of Azov and the Kerch Strait,<sup>313</sup> and that the Sea of Azov was part of the Russian Empire's internal waters.<sup>314</sup> The Russian Federation points to legislation of the USSR treating the Sea of Azov as internal waters.<sup>315</sup> Such legislation was also applicable to the Soviet Socialist Republic of Ukraine, pursuant to the terms of the 1924

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<sup>312</sup> Jurisdiction Hearing, 10 June 2019, 100:12-15 (Treves).

<sup>313</sup> Russian Federation's Preliminary Objections, para. 72.

<sup>314</sup> Russian Federation's Preliminary Objections, para. 72; Jurisdiction Hearing, 10 June 2019, 100:12-15 (Treves).

<sup>315</sup> Russian Federation's Preliminary Objections, para. 73 *referring to* General Instructions for Interaction of the USSR Authorities with Foreign Military and Merchant Ships at Peacetime, approved by Order of the Revolutionary Military Council of the USSR No. 641, 22 June 1925, Art. 2 (**Annex RU-2**); Act No. 431, Concerning the Use of Radio Equipment for Foreign Vessels Within the Territorial Waters of the Union, 24 July 1928 in Laws and Regulations on the Regime of the High Seas, Vol. I (1951) pp. 121-22, paras 1-14 (**Annex 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 in Laws and Regulations on the Regime of the High Seas, Vol. I (1951) pp. 124-28 at paras 1-26, pp. 129-30 (**Annex RU-4**).

Constitution of the USSR.<sup>316</sup> According to the Russian Federation, the status of the Sea of Azov as internal waters was not protested by other States and was recognised in Soviet international law doctrine.<sup>317</sup>

203. The Russian Federation argues that, when the USSR ratified the Geneva Convention on the Territorial Sea and the Contiguous Zone (hereinafter the “Geneva Convention”), on 22 November 1960, the Sea of Azov and the Kerch Strait satisfied the requirements of a bay set out in Article 7 given that the shape of the Sea of Azov met the description of a bay and the opening of the bay, the Kerch Strait, was less than 24 miles wide.<sup>318</sup> Once a closing line was drawn, according to the Russian Federation, the Sea of Azov was considered internal waters pursuant to Article 7, paragraph 4, of the Geneva Convention.<sup>319</sup>
204. The Russian Federation maintains that “the participation of the USSR in the Geneva Convention and the drawing of baselines across the mouth of the Kerch Strait confirmed the customary internal waters status of the Sea of Azov and the Kerch Strait and established a treaty obligation for the other parties [to that Convention] to recognise such status.”<sup>320</sup>
205. The Russian Federation submits that the internal waters status of the Sea of Azov and the Kerch Strait remained unchanged after the dissolution of the USSR and the independence of Ukraine.<sup>321</sup> In the view of the Russian Federation, there is no basis to assume that the Russian Federation and Ukraine intended to change the internal waters status of the Sea of Azov and the Kerch Strait and consequently lose rights that they had formerly enjoyed in those waters.<sup>322</sup>
206. The Russian Federation notes that there has been no waiver on the part of the Russian Federation and Ukraine in respect of their rights.<sup>323</sup> It submits that any waiver or renunciation of a State’s rights must either be express or unequivocally implied by the conduct of the State.<sup>324</sup> To the contrary, according to the Russian Federation, Ukraine and the Russian Federation “expressly confirmed that the Sea of Azov and the Kerch Strait retain their internal water status, *inter alia*,

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<sup>316</sup> Russian Federation’s Preliminary Objections, para. 75.

<sup>317</sup> Russian Federation’s Preliminary Objections, paras 74, 76.

<sup>318</sup> Russian Federation’s Preliminary Objections, para. 77; Jurisdiction Hearing, 10 June 2019, 100:15-20 (Treves).

<sup>319</sup> Russian Federation’s Preliminary Objections, para. 77.

<sup>320</sup> Russian Federation’s Preliminary Objections, para. 79.

<sup>321</sup> Russian Federation’s Preliminary Objections, para. 84; Jurisdiction Hearing, 10 June 2019, 101:5-10 (Treves).

<sup>322</sup> Russian Federation’s Preliminary Objections, para. 85.

<sup>323</sup> Russian Federation’s Preliminary Objections, para. 85; Russian Federation’s Reply, para. 67.

<sup>324</sup> Russian Federation’s Preliminary Objections, para. 85; Jurisdiction Hearing, 13 June 2019, 44:25-45:2 (Treves).

in the State Border Treaty of 28 January 2003 and in the Treaty<sup>325</sup> and Joint Statement of 24 December 2003.”<sup>326</sup>

207. The Russian Federation contests Ukraine’s argument that a sea surrounded by more than one State generally cannot be claimed as internal waters.<sup>327</sup> It denies the existence of any “strong norm” to this effect.<sup>328</sup> Relying notably on the International Law Commission’s commentary to what became Article 7, paragraph 1, of the Geneva Convention, the Russian Federation argues that “Articles 7(1) of the Geneva Convention and 10(1) of UNCLOS do not prohibit the establishment of internal waters in bays with more than one riparian State;” they simply do not address this issue.<sup>329</sup> Accordingly, in the Russian Federation’s view, it cannot be said that the Convention “disfavours” pluri-State internal waters.<sup>330</sup> Furthermore, the Russian Federation asserts that it would be contrary to the spirit of the Convention as “a coastal-oriented instrument” to suggest, as Ukraine does, that upon the dissolution of the USSR, the Sea of Azov and the Kerch Strait became “free for all States” without the agreement of the coastal States.<sup>331</sup>
208. The Russian Federation relies on several international cases for the proposition that bays with more than one coastal State can constitute internal waters.<sup>332</sup> The Russian Federation refers to the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (hereinafter “*Gulf of Fonseca*”), in which the ICJ held that the Gulf of Fonseca, an historic bay comprising internal waters, was held in sovereignty by three riparian States.<sup>333</sup>
209. The Russian Federation points out that the arbitral tribunal in the *Arbitration Between the Republic of Croatia and the Republic of Slovenia (Croatia/Slovenia)* (hereinafter “*Croatia/Slovenia*”) found that the Bay of Piran formerly constituted the internal waters of the Socialist Federal Republic of Yugoslavia,<sup>334</sup> and that it remained so after the “dissolution, and the

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<sup>325</sup> Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003 (**Annex RU-20**); Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003 (**Annex UA-19**).

<sup>326</sup> Russian Federation’s Preliminary Objections, para. 85; Jurisdiction Hearing, 13 June 2019, 44:25-45:2 (Treves).

<sup>327</sup> Russian Federation’s Preliminary Objections, paras 82-83; Russian Federation’s Reply, para. 60.

<sup>328</sup> Russian Federation’s Reply, para. 61; Jurisdiction Hearing, 10 June 2019, 105:10-14 (Treves).

<sup>329</sup> Russian Federation’s Reply, paras 62-66.

<sup>330</sup> Jurisdiction Hearing, 13 June 2019, 43:9-17 (Treves).

<sup>331</sup> Jurisdiction Hearing, 10 June 2019, 110:8-15 (Treves).

<sup>332</sup> Russian Federation’s Preliminary Objections, para. 87.

<sup>333</sup> Russian Federation’s Preliminary Objections, para. 88 citing *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 604, para. 412, p. 616, para. 432 (**Annex RUL-19**).

<sup>334</sup> Russian Federation’s Preliminary Objections, para. 90 citing *Croatia/Slovenia*, Award of 29 June 2017, para. 880 (**Annex RUL-41**); Jurisdiction Hearing, 10 June 2019, 111:20-112:1 (Treves).

ensuing transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States.”<sup>335</sup> The *Croatia/Slovenia* arbitral tribunal also stated, according to the Russian Federation, that Article 7, paragraph 1, of the Geneva Convention and Article 10 of UNCLOS do not exclude “the existence of bays with the character of internal waters, the coasts of which belong to more than one State.”<sup>336</sup>

210. Similarly, the Russian Federation notes that, in 1988, Tanzania and Mozambique agreed on a line closing the Rovuma Bay such that “[a]ll waters on the landward side of this line constitute the internal waters of the two countries.”<sup>337</sup> The Russian Federation also relies on other bilateral agreements that follow a similar approach, including the Maritime Delimitation Treaty between Brazil and France of 30 January 1981<sup>338</sup> and the Treaty between Uruguay and Argentina of 19 November 1973.<sup>339</sup>
211. As regards the present situation, the Russian Federation explains that, while it exercises sovereignty jointly with Ukraine in the Sea of Azov, it exercises exclusive sovereignty over the waters of the Kerch Strait.<sup>340</sup> In response to the question posed to it by the Arbitral Tribunal (*see* paragraph 29), the Russian Federation clarified its position on the Kerch Strait and stated that “it has been exercising exclusive sovereignty over the waters of the Kerch Strait since it has been exercising its sovereignty on both sides of the strait.”<sup>341</sup> Nevertheless, the Russian Federation recognises certain rights of Ukraine related to the Kerch Strait, such as freedom of navigation for Ukrainian ships and a right to free passage for foreign non-military vessels sailing to and from Ukrainian ports, by virtue of the Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003 (hereinafter the “Azov/Kerch Cooperation Treaty”).<sup>342</sup>

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<sup>335</sup> Russian Federation’s Preliminary Objections, para. 92 *citing* *Croatia/Slovenia*, cit., n. 334, para. 883 (**Annex RUL-41**).

<sup>336</sup> Russian Federation’s Preliminary Objections, para. 93 *citing* *Croatia/Slovenia*, cit., n. 334, para. 884 (**Annex RUL-41**).

<sup>337</sup> Russian Federation’s Preliminary Objections, para. 89 *citing* Agreement between the Government of the United Republic of Tanzania and the Government of the People’s Republic of Mozambique regarding the Tanzania/Mozambique Boundary, done at Maputo on 28 December 1988, Article 2, available at <[www.un.org/depts/los/legislationandtreaties/pdffiles/treaties/tza-moz1988tm.pdf](http://www.un.org/depts/los/legislationandtreaties/pdffiles/treaties/tza-moz1988tm.pdf)> (**Annex RU-13**); Russian Federation’s Reply, para. 72(a).

<sup>338</sup> Russian Federation’s Reply, para. 72(b) *citing* Maritime Delimitation Treaty Between the Federative Republic of Brazil and the French Republic (French Guyana), done at Paris on 30 January 1981, Article 1, available at <[www.un.org/Depts/los/legislationandtreaties/pdffiles/treaties/bra-fra1981md.pdf](http://www.un.org/Depts/los/legislationandtreaties/pdffiles/treaties/bra-fra1981md.pdf)> (**Annex RU-54**).

<sup>339</sup> Russian Federation’s Reply, para. 72(c) *citing* Eduardo Jiménez de Aréchaga, ‘Argentina-Uruguay, Report Number 3-2’, in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries*, (Vol. I, Nijhoff 1993), p. 757 (**Annex RUL-57**).

<sup>340</sup> Jurisdiction Hearing, 13 June 2019, 58:22-59:2 (Treves).

<sup>341</sup> Jurisdiction Hearing, 13 June 2019, 58:22-59:2 (Treves).

<sup>342</sup> Jurisdiction Hearing, 10 June 2019, 20:20-21:2 (Lobach); Jurisdiction Hearing, 13 June 2019, 59:3-11 (Treves).

## 2. Position of Ukraine

212. Ukraine submits that prior to 1991 the USSR claimed the Sea of Azov and the Kerch Strait as internal waters on the basis that those waters were entirely surrounded by a single State.<sup>343</sup> According to Ukraine, since the dissolution of the USSR, however, these maritime spaces have been bordered by two States, and can no longer qualify as internal waters.<sup>344</sup>
213. Ukraine contends that the Sea of Azov is now an “enclosed or semi-enclosed sea” namely “a gulf, basin or sea surrounded by two or more States [the Parties] and connected to another sea or the ocean [the Black Sea] by a narrow outlet [the Kerch Strait] or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states,” within the meaning of Article 122 of the Convention.<sup>345</sup>
214. Ukraine notes that the “Convention distinguishes between enclosed and semi-enclosed seas surrounded by two or more States” (Article 122 of the Convention) and “bays the coasts of which belong to a single State” (Article 10 of the Convention).<sup>346</sup> In Ukraine’s view, only the latter may classify as internal waters whereas the former remains “subject to the normal regime of the territorial sea, the exclusive economic zone, and the continental shelf.”<sup>347</sup>
215. Ukraine maintains that the Sea of Azov “comprises the territorial seas and exclusive economic zones” of the Parties.<sup>348</sup> In light of the status of the Sea of Azov as an enclosed or semi-enclosed sea comprised of territorial seas and exclusive economic zones, Ukraine submits that the Kerch Strait is an international strait, pursuant to Article 37 of the Convention, connecting “one part of [...] an exclusive economic zone” in the Sea of Azov to “an exclusive economic zone” in the Black Sea.<sup>349</sup>
216. According to Ukraine, the Convention reflects the “strong and long-standing norm” that a sea surrounded by more than one State cannot be considered internal waters.<sup>350</sup> Ukraine argues that Articles 8 and 10 of the Convention, read together, only contemplate internal waters claims with respect to a single State, not shared claims among two or more States.<sup>351</sup> At a minimum, Ukraine contends that, in light of the way the Convention is written and structured, the notion of pluri-

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<sup>343</sup> Ukraine’s Written Observations, para. 64.

<sup>344</sup> Ukraine’s Written Observations, para. 64.

<sup>345</sup> Ukraine’s Written Observations, para. 65; Jurisdiction Hearing, 11 June 2019, 68:25-69:6 (Soons).

<sup>346</sup> Ukraine’s Written Observations, para. 66.

<sup>347</sup> Ukraine’s Written Observations, para. 66.

<sup>348</sup> Ukraine’s Written Observations, para. 67.

<sup>349</sup> Ukraine’s Written Observations, para. 67; Jurisdiction Hearing, 11 June 2019, 69:10-13 (Soons).

<sup>350</sup> Ukraine’s Written Observations, para. 68.

<sup>351</sup> Ukraine’s Rejoinder, para. 54; Jurisdiction Hearing, 11 June 2019, 68:9-15 (Soons).

State internal waters should be regarded as “disfavoured and highly exceptional.”<sup>352</sup> For Ukraine, the Russian Federation’s claim to common internal waters is in tension with the Convention’s object and purpose,<sup>353</sup> because pluri-State internal waters claims for which no rule exists in the Convention “may upset th[e] careful balance” established by UNCLOS and undermine the predictability and regularity that it intended to provide.<sup>354</sup>

217. Ukraine argues that the Russian Federation places disproportionate weight on a few rare instances in which an exception to the rule against pluri-State bays have been recognised.<sup>355</sup> According to Ukraine, the *Gulf of Fonseca* case predates the entry into force of the Convention.<sup>356</sup> Moreover, neither the ICJ in the *Gulf of Fonseca* case nor the arbitral tribunal in the *Croatia/Slovenia* case “were subject to the Article 293 rule giving priority to the Convention.”<sup>357</sup>
218. Ukraine submits that, even if the Arbitral Tribunal could recognise that exceptions to the rule against pluri-State bays exist, the conditions for pluri-State internal waters have not been met in this case.<sup>358</sup> Ukraine takes the view that the exceptional status of pluri-State bays has only been recognised where: (a) the body of water is small and not large enough to contain an exclusive economic zone, (b) there is a clear agreement between all bordering States to establish a pluri-State internal waters regime, and (c) third States are not prejudiced by the claim.<sup>359</sup> (The Parties’ positions in respect of these three criteria set forth by Ukraine will be summarised in the following sections.)
219. Finally, Ukraine argues that the Russian Federation has “contradicted its pleadings,” asserting on the one hand that the Sea of Azov and the Kerch Strait constitute common internal waters and claiming on the other hand that the Kerch Strait is under the full sovereignty of the Russian

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<sup>352</sup> Jurisdiction Hearing, 11 June 2019, 68:20-24 (Soons).

<sup>353</sup> Jurisdiction Hearing, 11 June 2019, 69:14-15 (Soons).

<sup>354</sup> Jurisdiction Hearing, 11 June 2019, 70:4-8 (Soons).

<sup>355</sup> Ukraine’s Written Observations, para. 69.

<sup>356</sup> Ukraine’s Written Observations, para. 69.

<sup>357</sup> Ukraine’s Written Observations, para. 69.

<sup>358</sup> Ukraine’s Written Observations, para. 63.

<sup>359</sup> Ukraine’s Written Observations, para. 70; Ukraine’s Rejoinder, para. 55; Jurisdiction Hearing, 11 June 2019, 70:19-71:2 (Soons).

Federation.<sup>360</sup> Ukraine notes that the Russian Federation has only recently claimed that the Kerch Strait “is a Russian strait” and is not “subject to any regulation by international law.”<sup>361</sup>

## **B. POSITIONS AND PRACTICE OF THE PARTIES REGARDING THE STATUS OF THE SEA OF AZOV AND THE KERCH STRAIT**

### **1. Position of the Russian Federation**

220. The Russian Federation rejects Ukraine’s argument that, following the dissolution of the USSR, the Sea of Azov and the Kerch Strait no longer constituted internal waters because there was no agreement between Ukraine and the Russian Federation to hold these waters in common.<sup>362</sup> The Russian Federation states that there is no need for an agreement between the States in this respect, because, upon the dissolution of the USSR, the Sea of Azov and the Kerch Strait automatically continued to be internal waters.<sup>363</sup> For the Russian Federation, a clear, expressed intention was only required if the Parties wished to change the internal waters status of the bodies of water.<sup>364</sup>
221. The Russian Federation argues that under the doctrine of State succession, when the Russian Federation and Ukraine replaced the USSR as coastal States in the Sea of Azov, “they succeeded in the [USSR]’s rights on that sea.”<sup>365</sup> Therefore, the Russian Federation maintains that upon the dissolution of the USSR there was no need to create an internal waters regime in the Sea of Azov.<sup>366</sup> In effect, in the view of the Russian Federation, such an internal waters regime already existed in the Sea of Azov and was “well established.”<sup>367</sup> The Russian Federation submits that “[t]o change [the internal waters regime] would have required, as it still requires, the agreement of both Russia and Ukraine.”<sup>368</sup>

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<sup>360</sup> Ukraine’s Written Observations, para. 87 *citing Foreign Ministry: Kyiv’s Draft Law on the Maritime Territory is Not Applicable to the Sea of Azov*, RIA News (15 November 2018) (**Annex UA-541**); *Russian Prevents 3 Ukrainian Naval Ships from Passing Through Kerch Strait, Sinking Civilian Bunk Carrier under Crimean Bridge*, Interfax News (25 November 2018) (**Annex UA-496**); Jurisdiction Hearing, 14 June 2019, 41:23-42:9 (Soons).

<sup>361</sup> Ukraine’s Written Observations, para. 87 *citing Foreign Ministry Sergey Lavrov’s Remarks and Answers to Media Questions at a Joint News Conference Following Talks with Italian Minister of Foreign Affairs and International Cooperation Enzo Moavero Milanesi in Rome* (23 November 2018) (**Annex UA-470**).

<sup>362</sup> Russian Federation’s Reply, para. 80.

<sup>363</sup> Russian Federation’s Reply, para. 82; Jurisdiction Hearing, 10 June 2019, 110:16-25 (Treves); Jurisdiction Hearing, 13 June 2019, 44:20-22 (Treves).

<sup>364</sup> Russian Federation’s Reply, paras 83-84, 89.

<sup>365</sup> Jurisdiction Hearing, 10 June 2019, 110:16-21 (Treves).

<sup>366</sup> Russian Federation’s Reply, para. 83.

<sup>367</sup> Jurisdiction Hearing, 10 June 2019, 112:12-13 (Treves).

<sup>368</sup> Jurisdiction Hearing, 10 June 2019, 112:13-15 (Treves).

222. In this regard, the Russian Federation notably points to the finding of the *Croatia/Slovenia* arbitral tribunal, in respect of the Bay of Piran, that:

the Bay was internal waters before the dissolution of the [Socialist Federal Republic of Yugoslavia] in 1991, and it remained so after that date. The dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status.

[...]

In any case, the effect of the dissolution of the [Socialist Federal Republic of Yugoslavia] is a question of State succession. The Tribunal thus determines that the Bay remains internal waters within the pre-existing limits.<sup>369</sup>

223. Together with the *Croatia/Slovenia* award, the Russian Federation relies on the *Gulf of Fonseca* judgment. According to the Russian Federation, these two cases are the only ones that dealt with the status of the waters of a bay previously held by only one riparian State and that, through State succession, became surrounded by two or more States.<sup>370</sup> The Russian Federation submits that in both cases the decision was “that the internal water status of the bay was maintained as common internal waters of the [S]tates replacing the former coastal [S]tate.”<sup>371</sup>

224. Regarding Ukraine’s reliance on the example of the Gulf of Riga, with respect to which Estonia and Latvia concluded an agreement delimiting their territorial seas and exclusive economic zones, the Russian Federation submits that the example does not support Ukraine’s position.<sup>372</sup> The Russian Federation argues that Estonia’s rejection of the proposal by Latvia to declare the Gulf of Riga an historic bay comprised of internal waters does not mean that an agreement between successor riparian States is necessary for the establishment of a common internal waters regime.<sup>373</sup> According to the Russian Federation, Estonia’s rejection of the internal waters regime for the Gulf of Riga was due to the reasons connected to “its policy of not being considered a successor to the Soviet Union.”<sup>374</sup> The Russian Federation notes that, after the dissolution of the USSR and before Estonia and Latvia agreed to delimitation, the Gulf of Riga was considered by Latvia as the “enclosed joint internal waters of Estonia and Latvia.”<sup>375</sup>

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<sup>369</sup> Russian Federation’s Preliminary Objections, paras 92-93; Jurisdiction Hearing, 10 June 2019, 111:20-112:1 (Treves) *citing* *Croatia/Slovenia*, cit., n. 334, paras 883, 885 (**Annex RUL-41**).

<sup>370</sup> Jurisdiction Hearing, 10 June 2019, 103:18-22 (Treves).

<sup>371</sup> Jurisdiction Hearing, 10 June 2019, 103:23-104:1 (Treves).

<sup>372</sup> Russian Federation’s Reply, para. 78.

<sup>373</sup> Jurisdiction Hearing, 13 June 2019, 49:20-24 (Treves).

<sup>374</sup> Jurisdiction Hearing, 13 June 2019, 49:24-50:2 (Treves).

<sup>375</sup> Jurisdiction Hearing, 13 June 2019, 50:6-18 (Treves) *citing* Alexander Lott, *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage* (Brill 2018), p. 129, n. 549 (**Annex RUL-78**).

225. In any event, the Russian Federation contends that Ukraine and the Russian Federation have agreed that the Sea of Azov and the Kerch Strait constitute internal waters.<sup>376</sup> According to the Russian Federation, the Parties' negotiations over years were predicated on the Sea of Azov being internal waters.<sup>377</sup> The Russian Federation submits that in their exchanges, negotiations, and joint statements, the Parties agreed that the Sea of Azov constitute their common internal waters.<sup>378</sup>
226. Specifically, the Russian Federation refers to the Minutes of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation of 14 August 1996.<sup>379</sup> It also refers to the draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area,<sup>380</sup> which led to the Azov/Kerch Cooperation Treaty.<sup>381</sup>
227. The Russian Federation acknowledges that, during these negotiations, Ukraine insisted on the need "for a delimitation of the state border in the Sea of Azov."<sup>382</sup> However, according to the Russian Federation, Ukraine expressed its belief that such delimitation would not have impacted the internal waters status of the Sea of Azov,<sup>383</sup> and did not see delimitation as a condition to the existence of common internal waters.<sup>384</sup> The Russian Federation points out in this regard that Article 5 of the Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border of 28 January 2003 (hereinafter the "State Border Treaty") states that "[n]othing in this [State Border Treaty] shall prejudice the positions of the Russian Federation and Ukraine with respect to the status of the Sea of Azov and the Kerch Strait as internal waters of the two States."<sup>385</sup>
228. The Russian Federation argues that the Parties agreed in the Azov/Kerch Cooperation Treaty and in the Joint Statement by the President of the Russian Federation and the President of Ukraine on

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<sup>376</sup> Russian Federation's Preliminary Objections, para. 95.

<sup>377</sup> Russian Federation's Reply, para. 86.

<sup>378</sup> Russian Federation's Reply, paras 86, 90, 91.

<sup>379</sup> Russian Federation's Preliminary Objections, para. 98 *citing* Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 14 August 1996, para. 4 (**Annex RU-16**); Minutes of the Second Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997 (**Annex RU-17**).

<sup>380</sup> Russian Federation's Preliminary Objections, para. 109 *citing* 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* from Ukraine to the Russian Federation No. 12/42-994, Article 1 (19 October 1995) (**Annex RU-15**).

<sup>381</sup> Russian Federation's Preliminary Objections, para. 109.

<sup>382</sup> Russian Federation's Reply, para. 87.

<sup>383</sup> Russian Federation's Reply, paras 88-89 *citing* Transcript of the Statements of A.A. Chaly, 42nd Plenary Session of the Verkhovna Rada of Ukraine (13 July 1994) (**Annex RU-61**).

<sup>384</sup> Russian Federation's Reply, para. 93; Jurisdiction Hearing, 10 June 2019, 117:19-23 (Treves).

<sup>385</sup> Russian Federation's Preliminary Objections, para. 96 *citing* Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done at Kiev on 28 January 2003 (without Annexes), Article 5 (**Annex RU-19**); Russian Federation's Reply, para. 99.

the Sea of Azov and the Kerch Strait of 24 December 2003 (hereinafter the “Joint Statement”) that “the Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine.”<sup>386</sup> In the Russian Federation’s view, these instruments confirm that the Parties, in the course of their negotiations, regarded the Sea of Azov and the Kerch Strait as internal waters, without prejudice to future agreements regarding delimitation.<sup>387</sup>

229. The Russian Federation asserts that Ukraine’s practice, since independence, supports the internal waters status of the Sea of Azov and the Kerch Strait.<sup>388</sup>
230. The Russian Federation states that Ukraine relies on a single episode that is inconsistent with Ukraine’s general conduct concerning the treatment of the Sea of Azov and the Kerch Strait as internal waters—the deposit of a list of coordinates with the United Nations to measure the width of territorial waters, exclusive economic zone, and continental shelf of the Sea of Azov<sup>389</sup>—and submits that this incident “could at best be seen as an anomaly in a consistent pattern.”<sup>390</sup>

## 2. Position of Ukraine

231. Ukraine denies the existence of any rule of international law by which successor States automatically hold formerly internal waters of a single State unit as joint, pluri-State waters. Rather, it argues, internal waters generally lose their status following the breakup of the surrounding State.<sup>391</sup> Therefore, in Ukraine’s view, the proper presumption to be made upon the

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<sup>386</sup> Russian Federation’s Preliminary Objections, para. 97 *citing* Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003 (**Annex RU-20**); Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch on 24 December 2003 in Law of the Sea Bulletin, Vol. 54, p. 131 (2004) (**Annex RU-21**); Russian Federation’s Reply, paras 94, 97.

<sup>387</sup> Russian Federation’s Reply, paras 95, 103; Jurisdiction Hearing, 10 June 2019, 118:13-18 (Treves).

<sup>388</sup> Russian Federation’s Preliminary Objections, paras 106-11 *referring to* Order of the Ministry of Transport of Ukraine No. 721, Rules of Navigation by Ships Through the Kerch-Enikalskiy Channel and the Approach Channels to It, 9 October 2002 (excerpts) (**Annex RU-18**); *Note Verbale* from Ukraine to the Russian Federation, No. 610/22-110-1132 (29 July 2015) (**Annex UA-233**); Russian Federation’s Reply, paras 51, 108, 112 *citing* Decree of the President of Ukraine No. 320/2018, 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, para. 2(4) (**Annex RU-80**); Law of Ukraine No. 2630-VIII on Approval of the Decree of the President of Ukraine No. 393, On Imposition of Martial Law in Ukraine, 26 November 2018 (**Annex RU-82**); Russia is Opposed to the Whole World, Blocking the Freedom of Navigation in the Ukrainian Territorial Waters—President in the Interview to Fox News, President of Ukraine Official Website, 8 December 2018, available at <[www.president.gov.ua/en/news/rosiya-protistoyit-vsomu-svitu-blokuyuchi-svobodu-sudnoplavs-51902](http://www.president.gov.ua/en/news/rosiya-protistoyit-vsomu-svitu-blokuyuchi-svobodu-sudnoplavs-51902)> (**Annex RU-85**).

<sup>389</sup> Russian Federation’s Preliminary Objections, para. 113; Jurisdiction Hearing, 10 June 2019, 113:24-114:9 (Treves).

<sup>390</sup> Russian Federation’s Preliminary Objections, paras 114, 116; Jurisdiction Hearing, 10 June 2019, 114:12-16 (Treves).

<sup>391</sup> Ukraine’s Written Observations, para. 73; Ukraine’s Rejoinder, para. 72; Jurisdiction Hearing, 11 June 2019, 74:4-8 (Soons).

dissolution of “a single State bordering a body comprised of internal waters” is that such waters are no longer internal.<sup>392</sup> Such presumption can only be overturned if “[a]ll interested States wishing to preserve an internal waters regime [...] manifest an express, clear, and consistent agreement on the communal nature of the regime they wish to create.”<sup>393</sup>

232. Ukraine is of the view that it is more reasonable to assume that a State which no longer controls the entire coastline of a sea should lose some of the rights it formerly enjoyed, rather than to suppose that “a newly independent State occupying part of that coastline should be denied fundamental rights such as the ability to safeguard trade and commerce on an equal footing with other sovereign States.”<sup>394</sup> According to Ukraine, it would be inconsistent with the principle of sovereign equality of States to require a newly independent State to seek approval of the State from which it has just separated in order to “escape a common internal waters regime.”<sup>395</sup>
233. In support of its position, Ukraine points out that, immediately upon the dissolution of the USSR, Latvia sought Estonia’s affirmative agreement to treat the Gulf of Riga as pluri-State internal waters.<sup>396</sup> According to Ukraine, the Russian Federation’s own source for this episode recounts that Estonia rejected Latvia’s endeavours, which was possible because “each of the new coastal States needs to recognise the continuous historical status of the bay.”<sup>397</sup> Eventually, the Gulf of Riga was acknowledged by Estonia and Latvia to comprise the territorial seas and exclusive economic zones of the two States.<sup>398</sup>
234. Ukraine argues that the ICJ in *Gulf of Fonseca* found that the Gulf of Fonseca was internal waters by affirmative agreement of the three littoral States, with all three States “act[ing] jointly to claim historic title to a bay.”<sup>399</sup> In Ukraine’s view, the *Gulf of Fonseca* case confirms that the internal waters status of a body of water is not automatically transferred to multiple States by virtue of principles of State succession.<sup>400</sup>
235. Ukraine finally distinguishes the case of the Bay of Piran from the Sea of Azov and the Kerch Strait on the basis that the arbitration agreement barred the *Croatia/Slovenia* arbitral tribunal from

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<sup>392</sup> Ukraine’s Written Observations, para. 77.

<sup>393</sup> Ukraine’s Written Observations, para. 77; Ukraine’s Rejoinder, para. 63.

<sup>394</sup> Jurisdiction Hearing, 14 June 2019, 47:8-15 (Soons).

<sup>395</sup> Jurisdiction Hearing, 14 June 2019, 46:15-21 (Soons).

<sup>396</sup> Ukraine’s Rejoinder, para. 68.

<sup>397</sup> Ukraine’s Rejoinder, para. 68.

<sup>398</sup> Ukraine’s Written Observations, para. 74; Jurisdiction Hearing, 11 June 2019, 76:14-17 (Soons).

<sup>399</sup> Ukraine’s Rejoinder, para. 64 *citing Gulf of Fonseca*, cit., n. 333, p. 593, para. 394 (**Annex UAL-58**); Jurisdiction Hearing, 11 June 2019, 74:9-24 (Soons).

<sup>400</sup> Ukraine’s Rejoinder, para. 66.

considering post-1991 practice as legally relevant, thus rendering the issue of post-dissolution agreement among successor States non-applicable in this case.<sup>401</sup>

236. Turning to the circumstances of the Sea of Azov and the Kerch Strait, Ukraine acknowledges that the Sea of Azov could formerly be classified as internal waters of the USSR as a single-State juridical bay.<sup>402</sup> However, Ukraine denies that this status continued after the dissolution of the USSR as it never consented to treat the Sea of Azov and the Kerch Strait as common internal waters.<sup>403</sup>
237. Ukraine argues that, upon its independence, the application of the Convention was the automatic consequence for all its maritime areas, including the Sea of Azov and the Kerch Strait.<sup>404</sup> Ukraine points out that, following “Ukraine’s establishment as an independent State, [it] made clear its position that the Sea of Azov was subject to the normal rules of the international law of the sea, by depositing ‘baselines for measuring the width of the territorial sea, exclusive economic zone, and continental shelf of Ukraine in the Black Sea and the Sea of Azov’” with the United Nations.<sup>405</sup> Ukraine also relies on a 1992 agreement between the Parties on cooperation in the fisheries sector in the Black Sea and Sea of Azov, which specifically takes into account the Convention and makes no reference to the Sea of Azov having any other status.<sup>406</sup>
238. Ukraine submits that, after the dissolution of the USSR, “Ukraine and Russia would be negotiating on a blank slate rather than inheriting an internal waters status from the Soviet era that could only be changed by agreements between the two successor States.”<sup>407</sup> However, according to Ukraine, the Parties did not reach agreement on the internal waters status of the Sea of Azov and the Kerch Strait.<sup>408</sup>
239. Ukraine argues that, in the course of negotiations for the Azov/Kerch Cooperation Treaty between 1996 and 2002, Ukraine had considered it “imperative that the concept of an internal waters status be tied to delimitation between the States.”<sup>409</sup> Ukraine highlights that it never agreed to a common

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<sup>401</sup> Ukraine’s Rejoinder, para. 69; Jurisdiction Hearing, 11 June 2019, 75:4-10 (Soons).

<sup>402</sup> Ukraine’s Written Observations, para. 64; Ukraine’s Rejoinder, para. 67.

<sup>403</sup> Ukraine’s Written Observations, paras 72, 76; Jurisdiction Hearing, 11 June 2019, 73:21-25 (Soons).

<sup>404</sup> Jurisdiction Hearing, 14 June 2019, 36:22-25 (Soons).

<sup>405</sup> Ukraine’s Written Observations, para. 78; Ukraine’s Rejoinder, para. 73; Jurisdiction Hearing, 11 June 2019, 8:23-9:6 (Zerkal), 78:20-79:2 (Soons).

<sup>406</sup> Jurisdiction Hearing, 14 June 2019, 37:4-16 (Soons) *citing* Agreement Between the Government of Ukraine and the Government of the Russian Federation in the Fisheries Sector on 24 September 1992 (**Annex UA-70**).

<sup>407</sup> Jurisdiction Hearing, 14 June 2019, 46:1-6 (Soons).

<sup>408</sup> Ukraine’s Rejoinder, para. 61; Jurisdiction Hearing, 11 June 2019, 78:17-20 (Soons).

<sup>409</sup> Ukraine’s Written Observations, para. 79 *citing* 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, p. 1

internal waters status without a border;<sup>410</sup> and that delimitation was a condition for the treatment of the Sea of Azov and the Kerch Strait as internal waters.<sup>411</sup> This position is underscored, according to Ukraine, by Article 5 of the State Border Treaty, which, by indicating that the treaty shall not prejudice the Parties’ “positions” regarding the legal status of the Sea of Azov and the Kerch Strait, reflect the two States’ conflicting “positions”—in the plural—on the future legal status of those areas.<sup>412</sup>

240. Ukraine further explains that the Azov/Kerch Cooperation Treaty was concluded against the background of the Russian Federation’s “unilateral construction in the Kerch Strait of a dam in an attempt to connect Tuzla Island—part of Ukraine’s territory—to [the Russia Federation’s] Taman Peninsula.”<sup>413</sup> Ukraine points out that the preamble of that treaty states (in Ukraine’s translation) that the Sea of Azov and the Kerch Strait “*historically constitute internal waters of the Russian Federation and Ukraine,*” that the “Sea of Azov *shall be delimited,*” and that the “[i]ssues concerning the water area of the Kerch Strait *shall be resolved* by agreement between the Parties.”<sup>414</sup> Ukraine therefore considers that the Azov/Kerch Cooperation Treaty supports the view that the Parties had not reached a final agreement regarding the status of the Sea of Azov, and that any final agreement would be contingent on delimitation.<sup>415</sup>
241. Ukraine points out that the Parties continued to negotiate the status of the Sea of Azov and the Kerch Strait following the Azov/Kerch Cooperation Treaty.<sup>416</sup> According to Ukraine, this suggests that the Azov/Kerch Cooperation Treaty was not regarded by the Parties as a final

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(**Annex UA-517**); Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of Delimitation and Determination of Legal Status of the Sea of Azov and the Kerch Strait, 16-17 December 2002, p. 1 (**Annex UA-514**); Ukraine’s Rejoinder, paras 61, 74; Jurisdiction Hearing, 11 June 2019, 79:19-23 (Soons).

<sup>410</sup> Ukraine’s Written Observations, para. 79; Jurisdiction Hearing, 11 June 2019, 80:13-14 (Soons).

<sup>411</sup> Ukraine’s Rejoinder, para. 75.

<sup>412</sup> Jurisdiction Hearing, 14 June 2019, 40:13-41:4 (Soons).

<sup>413</sup> Ukraine’s Written Observations, para. 80; Ukraine’s Rejoinder, para. 79.

<sup>414</sup> Ukraine’s Written Observations, para. 80 *citing* Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003 (**Annex UA-19**) [emphases added by Ukraine]; Jurisdiction Hearing, 11 June 2019, 82:5-18 (Soons).

<sup>415</sup> Ukraine’s Written Observations, para. 81; Ukraine’s Rejoinder, para. 79; Jurisdiction Hearing, 11 June 2019, 81:14-17 (Soons).

<sup>416</sup> Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait, 29-30 January 2004, p. 1 (**Annex UA-531**); Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait, 29-30 January 2004, p. 1 (**Annex UA-531**), Minutes of a Meeting of the Working Group on the Issues of Environmental Protection in the Framework of the 18<sup>th</sup> Round of the Ukrainian-Russian Negotiations on the Issues of Determination of the Legal Status of the Azov Sea and the Kerch Strait, 25-26 March 2004, p. 1 (**Annex UA-532**).

resolution of the matter.<sup>417</sup> Indeed, for Ukraine, what was accomplished by the Azov/Kerch Cooperation Treaty was “only limited and only provisional.”<sup>418</sup>

242. Ukraine denies that it in practice treated the Sea of Azov and the Kerch Strait as “common internal waters” either before or after the execution of the Azov/Kerch Cooperation Treaty.<sup>419</sup> Ukraine contends that not only has it invoked the regime of transit passage in the Kerch Strait, as clearly reflected in the *note verbale* of its Ministry of Foreign Affairs in 2001 and 2002, but “even where it has consented to describe the Sea of Azov and the Kerch Strait as ‘internal waters’, it has claimed a ‘part’ or ‘sector’ of the Sea of Azov and Kerch Strait in which its rights trump Russia’s.”<sup>420</sup>
243. Ukraine recalls in this regard that it protested a Russian decree extending patrols to the entire Sea of Azov, and that it detained fishing vessels of the Russian Federation in its “sector” of the Sea of Azov.<sup>421</sup> Ukraine also recalls that it protested dredging by the Russian Federation in the Ukrainian side of the Kerch Strait.<sup>422</sup>
244. Ukraine contends that the Russian Federation’s practice since 2014 has not been consistent with a common internal waters regime. According to Ukraine, the Russian Federation has seized Ukrainian gas fields in the Sea of Azov, purported to unilaterally nullify Ukrainian licenses for such gas fields, unilaterally built a bridge, cables, and a pipeline across the Kerch Strait, and imposed unilateral limits on the dimensions of vessels that might pass through the strait.<sup>423</sup> Ukraine also contends that the Russian Federation has only recently stopped vessels transiting the Kerch Strait to and from Ukraine’s Sea of Azov ports, on the basis that the Kerch Strait is “under the full sovereignty of [the Russian Federation].”<sup>424</sup>

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<sup>417</sup> Ukraine’s Written Observations, para. 84; Ukraine’s Rejoinder, para. 84.

<sup>418</sup> Jurisdiction Hearing, 14 June 2019, 43:15-17 (Soons).

<sup>419</sup> Ukraine’s Written Observations, para. 86.

<sup>420</sup> Ukraine’s Written Observations, paras 78, n. 124, 86.

<sup>421</sup> Ukraine’s Written Observations, para. 86.

<sup>422</sup> Ukraine’s Written Observations, para. 86.

<sup>423</sup> Ukraine’s Written Observations, para. 87; Ukraine’s Rejoinder, para. 88; Jurisdiction Hearing, 11 June 2019, 67:14-19 (Soons).

<sup>424</sup> Ukraine’s Rejoinder, para. 88.

## C. RIGHTS OF THIRD STATES

### 1. Position of the Russian Federation

245. The Russian Federation denies that any further criteria must be met for the Sea of Azov to be considered pluri-State internal waters.<sup>425</sup> Such further conditions, in the Russian Federation's view, have no basis in the Convention or judicial decisions.<sup>426</sup>
246. The Russian Federation disagrees with Ukraine's proposition that, for the establishment of a pluri-State bay, third States must not be prejudiced.<sup>427</sup> In any case, the Russian Federation argues that this alleged criterion is met in the present case.<sup>428</sup>
247. According to the Russian Federation, third States are subject to the regime inherent in the internal waters status of the Sea of Azov, and "to nothing more."<sup>429</sup> The Russian Federation asserts that third States "never had, and do not have now, navigational rights" in the Sea of Azov and the Kerch Strait, other than those granted to them by the Parties in the Azov/Kerch Cooperation Treaty.<sup>430</sup>
248. The Russian Federation contends that third States have not protested the internal waters status of the Sea of Azov and the Kerch Strait.<sup>431</sup> The Russian Federation regards recent statements by some entities as "politically inspired" and based on the misapprehension that freedom of transit and navigation under the Convention existed in the Sea of Azov and the Kerch Strait, whereas, in reality, these waters were always considered to be internal.<sup>432</sup>

### 2. Position of Ukraine

249. Ukraine argues that the Russian Federation's vision of the Sea of Azov and the Kerch Strait as "common internal waters" would prejudice third States, and would result in harm to international

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<sup>425</sup> Russian Federation's Reply, para. 75.

<sup>426</sup> Russian Federation's Reply, para. 75; Jurisdiction Hearing, 10 June 2019, 106:5-13 (Treves).

<sup>427</sup> Russian Federation's Reply, paras 75(c).

<sup>428</sup> Russian Federation's Reply, paras 75(c), 114.

<sup>429</sup> Russian Federation's Reply, para. 114.

<sup>430</sup> Jurisdiction Hearing, 13 June 2019, 55:4-9 (Treves); Jurisdiction Hearing, 10 June 2019, 129:5-130:4 (Treves).

<sup>431</sup> Russian Federation's Reply, para. 115; Jurisdiction Hearing, 10 June 2019, 20:15-17 (Lobach).

<sup>432</sup> Russian Federation's Reply, paras 116-17; Jurisdiction Hearing, 10 June 2019, 130:13-14 (Treves).

navigation.<sup>433</sup> Ukraine points out that the ICJ in *Gulf of Fonseca* ensured that third States retained the right of innocent passage in the internal waters of the gulf.<sup>434</sup>

250. Ukraine notes that, since April 2018, the Russian Federation has impeded Ukrainian and third-State vessels in the Sea of Azov and the Kerch Strait and obstructed their access to the Ukrainian ports located there.<sup>435</sup> According to Ukraine, by November 2018, the Russian Federation had completely closed the Kerch Strait to navigation, stating that the Kerch Strait is a Russian strait and is not subject to regulation by international law.<sup>436</sup> Ukraine highlights that third States and members of the international community, including Bulgaria, the European Union, Romania, Turkey, and the United States, have protested the Russian Federation's recent actions in the Kerch Strait as an interference with their navigational rights.<sup>437</sup>
251. Ukraine emphasises that third States continue to assert their navigational rights in the Sea of Azov, and the international community has not consented to any common internal waters status.<sup>438</sup> In this regard, Ukraine refers to a UN General Assembly resolution that calls upon the Russian Federation "to refrain from impeding the lawful exercise of navigational rights and freedoms in the Black Sea, the Sea of Azov and the Kerch Strait in accordance with applicable international law, in particular provisions of the [Convention]."<sup>439</sup>

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<sup>433</sup> Ukraine's Written Observations, paras 72, 89.

<sup>434</sup> Ukraine's Written Observations, para. 89 *citing* *Gulf of Fonseca*, cit., n. 333, p. 604, para. 412 (**Annex UAL-58**); Jurisdiction Hearing, 11 June 2019, 88:21-89:2 (Soons).

<sup>435</sup> Ukraine's Written Observations, paras 90-92 *citing* United States Department of State, Press Statement, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov, 30 August 2018 (**Annex UA-543**); European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)) (**Annex UA-544**); *Note Verbale* from Ukraine to the Russian Federation, No. 72/23-194/601-2350 (30 August 2018), p. 1 (**Annex UA-545**); Jurisdiction Hearing, 11 June 2019, 5:15-18 (Zerkal), 87:8-11 (Soons).

<sup>436</sup> Ukraine's Rejoinder, para. 90.

<sup>437</sup> Ukraine's Written Observations, paras 91-92 *citing* European Union Statement by the Spokesperson on the Escalating Tension in the Azov Sea, 25 November 2018 (**Annex UA-486**); Republic of Turkey, Ministry of Foreign Affairs, Press Release Regarding the Tension in the Azov Sea and Kerch Strait, No. 321, 26 November 2018 (**Annex UA-477**); European Parliament, Resolution of 25 November 2018 on the Situation in the Sea of Azov (2018/2870(RSP)), para. G(1) (**Annex UA-544**); Press Statement of the United States Department of Trade, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov, 30 August 2018 (**Annex UA-543**); Jurisdiction Hearing, 11 June 2019, 88:1-3 (Soons).

<sup>438</sup> Ukraine's Written Observations, para. 93; Jurisdiction Hearing, 11 June 2019, 87:10-14 (Soons).

<sup>439</sup> Ukraine's Rejoinder, para. 91 *citing* UN General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194 (17 December 2018) (**Annex UA-549**); Jurisdiction Hearing, 11 June 2019, 87:15-25 (Soons).

## D. RELEVANCE OF THE SIZE OF THE SEA OF AZOV

### 1. Position of the Russian Federation

252. The Russian Federation objects to Ukraine's position in favour of limiting the possibility of internal waters in pluri-State bays to bays not large enough to contain an exclusive economic zone or high seas.<sup>440</sup> Referring to the Gulf of Riga (formerly the internal waters of the USSR) invoked by Ukraine, in which Latvia and Estonia concluded an agreement delimiting their territorial sea and exclusive economic zone after the dissolution of the USSR, the Russian Federation notes that this precedent does not establish that such course of action was required by the size of the Gulf of Riga.<sup>441</sup> Moreover, it adds that there is nothing to suggest that the Gulf of Riga was not pluri-State internal waters between the dissolution of the USSR and the delimitation agreement.<sup>442</sup> The Russian Federation also denies the relevance of the Arab States' claim to the Gulf of Aqaba as common internal waters.<sup>443</sup> According to the Russian Federation, such claim was based on religious grounds, was not made by all the riparian States, and lacked evidence of peaceful and continuous use by the Ottoman Empire of the Gulf of Aqaba to the exclusion of other nations.<sup>444</sup>
253. The Russian Federation argues that, regardless of the specificities of those disputes, both the *Gulf of Fonseca* judgment and the *Croatia/Slovenia* award "accepted without difficulty that there could be internal waters common to two or more States."<sup>445</sup> The Russian Federation points out that the international agreements concerning the Rovuma Bay, the Bay of Oyapock, and the Rio de la Plata established common internal waters of each pair of riparian States, when they drew closing lines.<sup>446</sup> It further notes that no judicial decision states that internal waters established in a bay within one riparian State cannot continue to exist where there is later more than one such State.<sup>447</sup>
254. The Russian Federation rejects Ukraine's assertion that the admission of internal waters large enough to contain an exclusive economic zone would conflict with the text and object and purpose of the Convention.<sup>448</sup> It argues that, under the Convention, only new claims to sovereignty over areas of the high seas and exclusive economic zones would be invalid.<sup>449</sup> By contrast, in the Russian Federation's view, the Convention, as "a consecration of coastal States' claims" and "a

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<sup>440</sup> Russian Federation's Reply, para. 76.

<sup>441</sup> Russian Federation's Reply, para. 78.

<sup>442</sup> Russian Federation's Reply, para. 78; Jurisdiction Hearing, 13 June 2019, 50:6-18 (Treves).

<sup>443</sup> Russian Federation's Reply, para. 79.

<sup>444</sup> Russian Federation's Reply, para. 79.

<sup>445</sup> Jurisdiction Hearing, 10 June 2019, 102:24-103:4 (Treves).

<sup>446</sup> Russian Federation's Reply, para. 72; Jurisdiction Hearing, 10 June 2019, 103:5-8 (Treves).

<sup>447</sup> Russian Federation's Reply, para. 72.

<sup>448</sup> Jurisdiction Hearing, 10 June 2019, 108:1-4 (Treves).

<sup>449</sup> Jurisdiction Hearing, 10 June 2019, 107:1-4 (Treves).

victory of coastal States' interests," does not prevent the maintenance of State sovereignty in areas that were never part of the high seas or exclusive economic zones.<sup>450</sup>

255. The Russian Federation further notes that, while the Convention regulates and endorses the expansion of coastal States' jurisdiction to areas belonging to the high seas, it does not provide for a process through which areas formerly under the sovereignty of a riparian State would become high seas or exclusive economic zones.<sup>451</sup>

## 2. Position of Ukraine

256. Ukraine notes that the Sea of Azov is large enough to contain an exclusive economic zone.<sup>452</sup> In Ukraine's view, the creation of a *sui generis* regime of common internal waters in an area as significant as the Sea of Azov and the Kerch Strait cannot be easily presumed.<sup>453</sup>

257. Ukraine submits that pluri-State internal waters have only been recognised in bodies of water covering smaller geographical areas than the Sea of Azov.<sup>454</sup> Specifically, Ukraine notes that the Gulf of Fonseca is 21 times, and the Bay of Piran is 2,000 times smaller than the Sea of Azov, and both the Gulf of Fonseca and the Bay of Piran are too small to contain an exclusive economic zone or high seas.<sup>455</sup>

258. According to Ukraine, the ICJ found in the *Gulf of Fonseca* case that a small gulf was comprised of pluri-State internal waters, based on hundreds of years of consistent practice demonstrating agreement among the States as to that regime and the acquiescence of third States and navigational protections for those States.<sup>456</sup> Even so, Ukraine notes, the existence of a pluri-State bay was controversial in that case, with Judge Oda dissenting on the basis that "there did not and still does not (or, even, cannot) exist any such legal concept as a 'pluri-State bay' the waters of which are internal waters."<sup>457</sup>

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<sup>450</sup> Jurisdiction Hearing, 10 June 2019, 107:4-7 (Treves), 108:9-11 (Treves).

<sup>451</sup> Jurisdiction Hearing, 10 June 2019, 109:2-7 (Treves).

<sup>452</sup> Ukraine's Written Observations, paras 72-73; Jurisdiction Hearing, 11 June 2019, 71:21-23 (Soons).

<sup>453</sup> Ukraine's Written Observations, para. 77 citing *Bay of Bengal*, cit., n. 307, p. 36, para. 95 (**Annex UAL-63**).

<sup>454</sup> Ukraine's Written Observations, para. 73; Ukraine's Rejoinder, para. 57.

<sup>455</sup> Ukraine's Written Observations, para. 73, Figure 1.

<sup>456</sup> Ukraine's Written Observations, para. 71 citing *Gulf of Fonseca*, cit., n. 333, p. 599, para. 401, p. 601, para. 405, p. 604, para. 412 (**Annex UAL-58**).

<sup>457</sup> Ukraine's Written Observations, para. 71 citing *Gulf of Fonseca*, cit., n. 333, Dissenting Opinion of Judge Oda, p. 732 at p. 745, para. 24 (**Annex UAL-59**).

259. Turning to the example of the Gulf of Aqaba, Ukraine notes that many States objected to the claim of Egypt, Jordan, and Saudi Arabia that its waters were Arab internal waters “by reason *partly of its breadth* and partly of the fact that its shores belong to four different States.”<sup>458</sup>
260. Ukraine notes that the Russian Federation has not to date identified any claim to pluri-State internal waters in a sea as large as the Sea of Azov.<sup>459</sup> Ukraine highlights that the Rovuma Bay and the Bay of Oyapuck, examples of pluri-State internal waters referred to by the Russian Federation, are small enough to be covered by the territorial seas of the coastal States.<sup>460</sup> According to Ukraine, the Rio de la Plata estuary was claimed as a river estuary pursuant to Article 9 of the Convention, and unlike Articles 8 and 10, the drawing of a baseline across river mouths is not limited to bodies of water bordered by a single State.<sup>461</sup> Moreover, Ukraine points out that third States have protested the internal waters status of the Rio de la Plata estuary.<sup>462</sup>
261. Ukraine argues that extending the internal waters regime to larger water bodies would conflict with the text of the Convention, “which renders invalid any claim to sovereignty over areas that would otherwise be subject to the regime of the exclusive economic zone and/or the high seas.”<sup>463</sup> Ukraine adds that the Russian Federation’s attempts to apply the internal waters regime to bodies of water large enough to contain an exclusive economic zone would also contravene the purpose of the Convention, which aims to strike a balance between the jurisdiction of coastal States and those of third States in maritime areas.<sup>464</sup> In Ukraine’s view, permitting such claims would “disturb the careful balance that the Convention strikes between coastal State jurisdiction and third-State rights” and “deprive third States of navigational rights that they would otherwise enjoy, as well as rights to harvest any surplus of the coastal State’s allowable catch.”<sup>465</sup>

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<sup>458</sup> Ukraine’s Written Observations, para. 74 *citing* UNGAOR, 11th Sess., 666th Plenary Meeting, U.N. Doc. No. A/PV.666 (1 March 1957), para. 58 (**Annex UA-512**) [emphasis added by Ukraine].

<sup>459</sup> Ukraine’s Written Observations, para. 75; Jurisdiction Hearing, 11 June 2019, 72:9-12 (Soons).

<sup>460</sup> Ukraine’s Rejoinder, para. 57.

<sup>461</sup> Ukraine’s Rejoinder, para. 57, n. 124; Jurisdiction Hearing, 11 June 2019, 71:24-72:6 (Soons).

<sup>462</sup> Ukraine’s Rejoinder, para. 57.

<sup>463</sup> Ukraine’s Rejoinder, para. 58; Jurisdiction Hearing, 11 June 2019, 73:1-3 (Soons).

<sup>464</sup> Ukraine’s Rejoinder, para. 59; Jurisdiction Hearing, 11 June 2019, 69:20-24 (Soons).

<sup>465</sup> Ukraine’s Rejoinder, para. 59; Jurisdiction Hearing, 11 June 2019, 70:8-9 (Soons), 70:15-18 (Soons).

## E. HISTORIC TITLE ARGUMENT

### 1. Position of the Russian Federation

262. The Russian Federation notes that the Azov/Kerch Cooperation Treaty and Joint Statement recognise the Sea of Azov and the Kerch Strait as “historically internal” waters.<sup>466</sup> According to the Russian Federation, the claim of historically internal waters should be interpreted also as claims that the rights exercised in the Sea of Azov and the Kerch Strait are based on historic title.<sup>467</sup> The Russian Federation observes that these claims to historic bay status, when published in the Law of the Sea Bulletin, did not receive any objections from third States, while the United States elected to protest the Russian Federation’s claim to the Peter the Great Bay.<sup>468</sup>

263. The Russian Federation argues that the concept of historic title is used specifically to refer to historic sovereignty over land or maritime areas. The Russian Federation refers to the United Nations Memorandum on Historic Bays, which states:

[h]istoric rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of *straits*, estuaries and other similar bodies of waters.<sup>469</sup>

264. Therefore, according to the Russian Federation, rights over the Kerch Strait can be based on historic title “if the Kerch Strait were not to be seen as included in the mouth of the historic bay of the Sea of Azov.”<sup>470</sup> The Russian Federation argues that there is no reason why a bay that qualifies as a juridical bay, meeting the requirements set out in the Convention, should not also qualify as an historic bay if it has been recognised as comprising internal waters for a long time without meeting objections from third States.<sup>471</sup>

265. The Russian Federation also argues that Ukraine has implicitly acknowledged historic title over the Sea of Azov by making a declaration under Article 298, paragraph 1, subparagraph (a), of the Convention, excluding “disputes involving historic bays or titles” from the compulsory procedure.<sup>472</sup> According to the Russian Federation, there would be no purpose to this declaration

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<sup>466</sup> Russian Federation’s Preliminary Objections, para. 99; Russian Federation’s Reply, para. 121 [emphasis added by the Russian Federation].

<sup>467</sup> Russian Federation’s Preliminary Objections, para. 102.

<sup>468</sup> Russian Federation’s Preliminary Objections, para. 100; Jurisdiction Hearing, 13 June 2019, 56:18-23 (Treves).

<sup>469</sup> Russian Federation’s Preliminary Objections, para. 103 [emphasis added by the Russian Federation].

<sup>470</sup> Russian Federation’s Preliminary Objections, para. 104.

<sup>471</sup> Jurisdiction Hearing, 13 June 2019, 56:5-14 (Treves).

<sup>472</sup> Russian Federation’s Reply, para. 120.

unless Ukraine, which has no other historic bay, considered that the Sea of Azov and the Kerch Strait were subject to rights of historic title.<sup>473</sup>

## **2. Position of Ukraine**

266. Ukraine rejects the Russian Federation's argument that the Sea of Azov and the Kerch Strait are internal waters by reason of their history.<sup>474</sup>
267. For Ukraine, the fact that the Sea of Azov and the Kerch Strait may have been a juridical bay, and thus subject to the regime of internal waters, does not turn those waters into an historic bay, since such qualification is meant for areas that would not qualify as juridical bays due to their dimensions.<sup>475</sup> Ukraine contends that it cannot be inferred from the lack of objections from third States with respect to a juridical bay that they have acquiesced to such bay obtaining historical title status.<sup>476</sup>
268. Ukraine argues that its declaration pursuant to Article 298, paragraph 1, subparagraph (a)(i), of the Convention cannot be taken as an acknowledgement that the Sea of Azov and the Kerch Strait are subject to rights of historic title because the declaration merely paraphrases the content of Article 298, paragraph 1, subparagraph (a)(i).<sup>477</sup>

## **F. APPLICABILITY OF UNCLOS TO THE WATERS OF THE SEA OF AZOV AND THE KERCH STRAIT**

### **1. Position of the Russian Federation**

269. The Russian Federation argues that, as internal waters, the Sea of Azov and the Kerch Strait are not regulated by the Convention.<sup>478</sup>
270. Specifically, the Russian Federation recalls that Article 8 of the Convention provides that internal waters fall within the landward side of the baseline, and Article 2, paragraph 1, of the Convention provides that "[t]he sovereignty of a coastal State extends, *beyond its land territory and internal waters* [...] to an adjacent belt of sea, described as the territorial sea."<sup>479</sup> Article 2, paragraph 2,

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<sup>473</sup> Jurisdiction Hearing, 13 June 2019, 56:5-14 (Treves).

<sup>474</sup> Ukraine's Written Observations, para. 94; Jurisdiction Hearing, 14 June 2019, 58:14-18 (Soons).

<sup>475</sup> Jurisdiction Hearing, 11 June 2019, 90:20-25 (Soons).

<sup>476</sup> Jurisdiction Hearing, 14 June 2019, 58:9-13 (Soons).

<sup>477</sup> Ukraine's Written Observations, para. 96; Ukraine's Rejoinder, para. 97; Jurisdiction Hearing, 11 June 2019, 90:4-8 (Soons).

<sup>478</sup> Russian Federation's Preliminary Objections, paras 117-18.

<sup>479</sup> Russian Federation's Preliminary Objections, paras 119-20 [emphasis added by the Russian Federation].

of the Convention extends the sovereignty to the airspace above and the bed and sub-soil of the territorial sea, while not addressing sovereignty over internal waters.<sup>480</sup> Furthermore, the Russian Federation points out that the Convention does not regulate the delimitation of internal waters of States whose coasts are opposite or adjacent to each other.<sup>481</sup>

271. The Russian Federation also relies on the Separate Opinion of Judges Cot and Wolfrum in the *ARA Libertad (Argentina v. Ghana)* (hereinafter “*ARA Libertad*”) case, which suggests that internal waters should be equated with land territory, and no limitations can be assumed on the sovereignty of the coastal State over internal waters.<sup>482</sup>
272. The Russian Federation further submits that the Kerch Strait is not a 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,” as defined by Article 37 of the Convention, and is therefore not regulated by the Convention.<sup>483</sup> Accordingly, the Russian Federation argues that disputes concerning activities in the Kerch Strait do not concern the interpretation or application of the Convention.<sup>484</sup>

## 2. Position of Ukraine

273. Ukraine contests the Russian Federation’s allegation that the internal waters regime is outside of the scope of the Convention.<sup>485</sup> In response to the question posed to it by the Arbitral Tribunal (*see* paragraph 29), Ukraine submits that “[q]uestions concerning internal waters regulated by provisions of UNCLOS unquestionably are within the scope of UNCLOS and would also come within the scope of the dispute settlement mechanisms of Part XV of the Convention.”<sup>486</sup>
274. Ukraine notes that the provisions of UNCLOS determine the existence and extent of internal waters.<sup>487</sup> In this regard, Ukraine refers to Article 8, paragraph 1, of the Convention and also to Article 7 of the Convention on straight baselines.<sup>488</sup>

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<sup>480</sup> Russian Federation’s Preliminary Objections, para. 121.

<sup>481</sup> Russian Federation’s Preliminary Objections, para. 121.

<sup>482</sup> Russian Federation’s Preliminary Objections, para. 120 *citing* *ARA Libertad*, Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Jean-Pierre Cot and Rüdiger Wolfrum, ITLOS Reports 2012, p. 332 at p. 363, para. 25 (**Annex RUL-34**).

<sup>483</sup> Russian Federation’s Preliminary Objections, paras 129-30.

<sup>484</sup> Russian Federation’s Preliminary Objections, para. 131.

<sup>485</sup> Jurisdiction Hearing, 11 June 2019, 9:10-12 (Zerkal), 89:21-25 (Soons); Jurisdiction Hearing, 14 June 2019, 61:18-25 (Soons).

<sup>486</sup> Jurisdiction Hearing, 14 June 2019, 61:18-25 (Soons).

<sup>487</sup> Jurisdiction Hearing, 14 June 2019, 62:1-2 (Soons).

<sup>488</sup> Jurisdiction Hearing, 14 June 2019, 62:1-2 (Soons).

275. Referring to Article 8, paragraph 2, of the Convention, Ukraine argues that the right of innocent passage applies to those internal waters created by the establishment of a straight baseline in accordance with Article 7.<sup>489</sup>
276. Ukraine further notes that Article 2 of the Convention confirms that the sovereignty of the coastal State extends to the internal waters as defined by UNCLOS, but that sovereignty must necessarily be exercised subject to the Convention.<sup>490</sup>
277. Ukraine adds that other provisions of the Convention entail the rights and obligations of States with regard to internal waters.<sup>491</sup>

## **G. EXCLUSIVELY PRELIMINARY CHARACTER OF THE OBJECTION**

### **1. Position of the Russian Federation**

278. The Russian Federation disagrees with Ukraine's argument that consideration of this preliminary objection should be deferred to the merits phase.<sup>492</sup>
279. According to the Russian Federation, the purpose of the Preliminary Objections phase is to determine the jurisdiction of the Arbitral Tribunal, and, more specifically, the scope of the Russian Federation's consent to jurisdiction. The Russian Federation contends that, in order to ascertain to which disputes the Russian Federation's consent to jurisdiction under UNCLOS extends, it is necessary to determine whether any dispute concerns the interpretation and application of the Convention. In making this determination, in the Russian Federation's view, the Arbitral Tribunal would not apply the Convention to any set of facts, and thus enter into the merits, but simply determine its scope in order to "avoid that a Party should have to 'give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established'."<sup>493</sup>

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<sup>489</sup> Jurisdiction Hearing, 14 June 2019, 62:9-17 (Soons).

<sup>490</sup> Jurisdiction Hearing, 14 June 2019, 63:5-9 (Soons).

<sup>491</sup> Jurisdiction Hearing, 14 June 2019, 62:21-63:9 (Soons) *citing* Marcelo Kohen, 'Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?' in Lilian Del Castillo (ed), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea*, (Brill 2015) p. 123 (**Annex UAL-67**).

<sup>492</sup> Russian Federation's Reply, para. 122.

<sup>493</sup> Russian Federation's Reply, para. 127.

280. The Russian Federation contends that the Arbitral Tribunal, after reviewing an abundance of material decided in Procedural Order No. 3 that its Preliminary Objections are “of a character that requires them to be examined in a preliminary phase.”<sup>494</sup>

281. The Russian Federation considers that there is nothing that requires the Arbitral Tribunal to reserve this preliminary objection for consideration in the merits phase in accordance with the terms of the operative paragraph 2 of Procedural Order No. 3.<sup>495</sup>

## **2. Position of Ukraine**

282. Ukraine contends that, if the Russian Federation’s objection based on the internal waters status of the Sea of Azov and the Kerch Strait is not rejected, it should be deferred to the merits phase<sup>496</sup> in accordance with Article 10, paragraph 4, of the Rules of Procedure<sup>497</sup> and consistently with Procedural Order No. 3.<sup>498</sup>

283. Ukraine recalls its position on the merits that the Sea of Azov is a semi-enclosed sea that includes maritime zones belonging to Ukraine, that the Kerch Strait includes territorial sea belonging to Ukraine and is a strait used for international navigation, and that the Russian Federation’s actions in both areas have breached the terms of the Convention.<sup>499</sup> Ukraine maintains that the Russian Federation’s assertion of internal waters status goes to the merits of the dispute because it requires the Arbitral Tribunal to make a determination on the merits as to whether Ukraine has rights in the Sea of Azov and the Kerch Strait recognised by the relevant provisions of the Convention, which the Russian Federation has breached.<sup>500</sup>

284. Ukraine adds that the fact that the Russian Federation has behaved entirely inconsistently with its claimed common internal waters status in the Sea of Azov and the Kerch Strait provides yet another reason that its objection cannot be accepted at this stage of the proceedings. In Ukraine’s view, the Arbitral Tribunal cannot uphold the Russian Federation’s claim of common internal waters without first ascertaining whether, as a factual matter, the Russian Federation’s actual

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<sup>494</sup> Russian Federation’s Reply, para. 123.

<sup>495</sup> Russian Federation’s Reply, paras 124, 126; Jurisdiction Hearing, 13 June 2019, 57:14-21 (Treves).

<sup>496</sup> Ukraine’s Written Observations, para. 97; Ukraine’s Rejoinder, para. 98; Jurisdiction Hearing, 14 June 2019, 58:19-24 (Soons).

<sup>497</sup> Ukraine’s Written Observations, para. 100.

<sup>498</sup> Ukraine’s Rejoinder, para. 100.

<sup>499</sup> Ukraine’s Written Observations, para. 98.

<sup>500</sup> Ukraine’s Written Observations, para. 98.

conduct is consistent with that claim.<sup>501</sup> Ukraine thus submits that this determination is properly made in the merits phase of these proceedings.<sup>502</sup>

285. Ukraine notes that the *South China Sea* arbitral tribunal found that the nature and validity of any historic rights claimed by China in the South China Sea was a determination on the merits.<sup>503</sup> Ukraine considers that the Russian Federation has made a “comparable claim” in this Arbitration.<sup>504</sup>

## H. ANALYSIS OF THE ARBITRAL TRIBUNAL

286. Having reviewed the positions of the Parties, the Arbitral Tribunal has to consider whether it has jurisdiction to decide the dispute brought by Ukraine insofar as it extends to events in the Sea of Azov and the Kerch Strait.

287. The Arbitral Tribunal recalls Article 10, paragraph 8, of the Rules of Procedure, which provides:

The Arbitral Tribunal shall give its decision in the form of an award, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Arbitral Tribunal rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

288. Pursuant to this provision, the Arbitral Tribunal, in Procedural Order No. 3, decided:

If the Arbitral Tribunal determines after the closure of the preliminary phase of the proceedings that there are Preliminary Objections that do not possess an exclusively preliminary character, then, in accordance Article 10, paragraph 8, of the Rules of Procedure, such matters shall be reserved for consideration and decision in the context of the proceedings on the merits.

289. The Arbitral Tribunal further recalls that the criteria for ascertaining whether a preliminary objection possesses an exclusively preliminary character were discussed in detail by the Parties in their written pleadings of 18 June 2018 and 4 July 2018 in respect of the Russian Federation’s request to address its preliminary objections in a preliminary phase. Such criteria notably include the risk of the arbitral tribunal prejudging in an award on jurisdiction questions of the merits that, by definition, have not been fully pleaded by the parties at that stage, as well as the related risk of

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<sup>501</sup> Ukraine’s Rejoinder, para. 101; Jurisdiction Hearing, 14 June 2019, 60:11-17 (Soons).

<sup>502</sup> Ukraine’s Rejoinder, para. 101; Jurisdiction Hearing, 11 June 2019, 92:3-10 (Soons).

<sup>503</sup> Ukraine’s Written Observations, para. 99 *citing South China Sea*, cit., n. 34, para. 398 (**Annex UAL-3**); Ukraine’s Rejoinder, para. 99; Jurisdiction Hearing, 14 June 2019, 59:4-9 (Soons).

<sup>504</sup> Ukraine’s Written Observations, para. 100.

the arbitral tribunal considering, and forming a potentially incomplete view of, evidence that is common to jurisdictional and merits questions.

290. The Arbitral Tribunal notes that the Parties do not disagree as to the legal status of the Sea of Azov and the Kerch Strait prior to the dissolution of the USSR, being internal waters of the USSR. However, they disagree as to whether such status has continued after the dissolution of the USSR and Ukraine becoming an independent State.
291. In the view of the Arbitral Tribunal, the legal regime governing the Sea of Azov and the Kerch Strait depends, to a large extent, on how the Parties have treated them in the period following the independence of Ukraine. The positions of the Parties in respect of this question can be found or inferred from the subsequent agreements between them, including the *Azov/Kerch Cooperation Treaty* and the *State Border Treaty*, as well as their actual practice in those maritime areas. In order to determine whether the Sea of Azov and the Kerch Strait constitute internal waters, therefore, the Arbitral Tribunal must examine not only the subsequent agreements between the Parties but also how the Parties have acted vis-à-vis each other or vis-à-vis third States in the above areas. In particular, this would require the Arbitral Tribunal to scrutinize the conduct of the Parties with respect to such matters as navigation, exploitation of natural resources, and protection of the marine environment in the Sea of Azov and the Kerch Strait.
292. The Arbitral Tribunal further notes that the Russian Federation invokes the concept of historical title as an alternative basis for excluding the application of the Convention to the Sea of Azov and the Kerch Strait. Pursuant to that alternative argument, the Arbitral Tribunal must ascertain whether historic title to the waters in question existed, whether such title continued after 1991, and, if so, what the contents of the regime applicable to such waters has been.
293. The Arbitral Tribunal thus considers that the Russian Federation's objection based on the Sea of Azov and the Kerch Strait having the legal status of internal waters is interwoven with the merits of the present dispute, which have yet to be pleaded by the Parties. In the Arbitral Tribunal's view, this objection may not adequately be addressed without touching upon the questions of the merits, which it should not do at this stage of the proceedings.
294. Furthermore, without prejudice to whether the Sea of Azov and the Kerch Strait are internal waters, the Arbitral Tribunal is not entirely convinced by the rather sweeping premise of the Russian Federation's objection that the Convention does not regulate a regime of internal waters and, therefore, a dispute relating to events that occurred in internal waters cannot concern the interpretation or application of the Convention. The Arbitral Tribunal notes in this regard that

what constitutes internal waters is governed by the Convention. In addition, Article 8, paragraph 2, provides that a right of innocent passage shall exist in internal waters where the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such.

295. The Arbitral Tribunal also recalls the statement of ITLOS in *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* that the obligation to protect and preserve the marine environment under Article 192 applies to “all maritime areas.”<sup>505</sup> Such areas, in the Arbitral Tribunal’s view, undoubtedly include internal waters. The Arbitral Tribunal further recalls the observation made by ITLOS in the *ARA Libertad* case that “although article 32 [Immunities of warships and other government ships operated for non-commercial purposes] is included in Part II of the Convention entitled ‘Territorial Sea and Contiguous Zone’, and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in article 29 of the Convention.”<sup>506</sup> ITLOS went on to state that “a difference of opinions exists between [the Parties] as to the applicability of article 32 and thus [...] a dispute appears to exist between the Parties concerning the interpretation or application of the Convention.”<sup>507</sup>
296. Accordingly, the Arbitral Tribunal is not inclined to accept the proposition that a dispute falls entirely outside the scope of the Convention simply because the underlying events occurred in internal waters. Rather, the relevant question for the Arbitral Tribunal appears to be whether a particular issue raised by the Parties’ dispute is regulated by the Convention or whether the particular conduct complained of implicates, or raises questions of the interpretation or application of the Convention.
297. For the above reasons, the Arbitral Tribunal finds that this objection of the Russian Federation relating to Ukraine’s claim concerning activities in the Sea of Azov and the Kerch Strait does not possess an exclusively preliminary character. The Arbitral Tribunal accordingly decides to reserve the above matter for consideration and decision in the context of the proceedings on the merits.

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<sup>505</sup> *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4, at p. 37, para. 120 (**Annex UAL-12**).

<sup>506</sup> *ARA Libertad*, cit., n. 482, p. 341, para. 64 (**Annex RUL-34**).

<sup>507</sup> *ARA Libertad*, cit., n. 482, p. 344, para. 65 (**Annex RUL-34**).

## VI. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION IN LIGHT OF THE PARTIES' DECLARATIONS UNDER ARTICLE 298(1) OF THE CONVENTION

298. Upon ratification of the Convention on 12 March 1997, the Russian Federation made a declaration pursuant to Article 298, paragraph 1, which reads:

The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.<sup>508</sup>

This declaration mirrors in substance an earlier declaration made by the USSR upon signature of the Convention, on 10 December 1982.<sup>509</sup>

299. Upon ratification of the Convention on 26 July 1999, Ukraine made a declaration pursuant to Article 298, paragraph 1, which reads:

Ukraine declares, in accordance with article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes involving historic bays or titles, and disputes concerning military activities.<sup>510</sup>

This declaration mirrors in substance an earlier declaration made by the Ukrainian Soviet Socialist Republic upon signature of the Convention, on 10 December 1982.<sup>511</sup>

300. The Russian Federation argues that, if there was a dispute regarding the interpretation or application of the Convention, the Arbitral Tribunal would be faced with the exceptions to its jurisdiction set out in Article 298, paragraph 1, of the Convention. The Russian Federation submits that the Arbitral Tribunal lacks jurisdiction because the present dispute concerns (a) military activities, (b) law enforcement activities, (c) issues of sea boundary delimitations, and

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<sup>508</sup> Declaration by the Russian Federation upon Ratification of UNCLOS, 12 March 1997 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 28 (**Annex UA-8**).

<sup>509</sup> Declaration by the Russian Federation upon Ratification of UNCLOS, 12 March 1997 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 28 (**Annex UA-8**).

<sup>510</sup> Declaration by Ukraine upon Ratification of UNCLOS, 26 July 1999 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 32 (**Annex UA-8**).

<sup>511</sup> Declaration by Ukraine upon Ratification of UNCLOS, 26 July 1999 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 32 (**Annex UA-8**).

(d) historic bays or titles, in respect of which the Russian Federation has made declarations in accordance with Article 298 of the Convention.

301. Ukraine rejects the Russian Federation's argument that the Arbitral Tribunal's jurisdiction is precluded by the declarations made by the Parties under Article 298, paragraph 1, of the Convention.
302. The Arbitral Tribunal will examine the arguments of the Parties as to the military activities exception, law enforcement activities exception, delimitation exception, and historic bay or title exception below.

## **A. MILITARY ACTIVITIES EXCEPTION**

### **1. Position of the Russian Federation**

303. According to the Russian Federation, if the Arbitral Tribunal were to dismiss the Russian Federation's first preliminary objection<sup>512</sup> on the basis that the Russian Federation "unlawfully used force (*quod non*), [the Arbitral Tribunal] would then necessarily have to admit that the case involves military activities and is thus outside its jurisdiction pursuant to the declarations made under Article 298(1)(b)."<sup>513</sup> The Russian Federation states that "it is because Ukraine has made express and specific allegations of acts of military aggression and unlawful use of force that Russia has raised a jurisdictional objection with respect to the Parties' declarations pursuant to Article 298(1)."<sup>514</sup>
304. While "categorically reject[ing] any allegation that it has engaged in unlawful military activities,"<sup>515</sup> the Russian Federation submits that "the central thrust of Ukraine's claim is the alleged involvement of the Russian military forces in Crimea and all the specific claims concern, whether directly or implicitly, military activities."<sup>516</sup>
305. The Russian Federation maintains that Ukraine cannot, on the one hand, argue that the Russian Federation's "claim to sovereignty over Crimea is in breach of the prohibition on the use of force"

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<sup>512</sup> Chapter IV of this Award.

<sup>513</sup> Russian Federation's Reply, para. 139; Jurisdiction Hearing, 10 June 2019, 71:25-72:8 (Pellet); Jurisdiction Hearing, 13 June 2019, 65:13-19 (Pellet).

<sup>514</sup> Russian Federation's Reply, para. 138.

<sup>515</sup> Russian Federation's Reply, para. 137.

<sup>516</sup> Russian Federation's Preliminary Objections, para. 148.

and, on the other hand, affirm that “the dispute is ‘not about any instance in which [the Russian Federation] has used force’ but that its allegations are purely on civilian matters.”<sup>517</sup>

306. The Russian Federation argues that, in accordance with the ordinary meaning of those terms, “military activities are simply any activity conducted by the armed forces of a State or paramilitary forces.”<sup>518</sup> The Russian Federation contends that this “interpretation is not ‘overly broad’,” noting that there is “widespread agreement that issues concerning military activities must not be interpreted restrictively.”<sup>519</sup>
307. The Russian Federation maintains that the “minimal substantive regulations under [the Convention], along with the optional exclusion covering military activities, are indicative of an intention ‘to retain considerable flexibility in the military uses of the oceans and thereby allow States to pursue their assorted strategic objectives’.”<sup>520</sup>
308. The Russian Federation contends that the *South China Sea* arbitral tribunal adopted a low threshold for the application of Article 298, paragraph 1, subparagraph (b), of the Convention that “can be triggered by the mere involvement of the military forces.”<sup>521</sup> The Russian Federation recalls that the arbitral tribunal applied the military activities exception to the Philippines’ submission concerning Chinese non-military ships preventing the resupply and rotation of the Philippines troops at Second Thomas Shoal, while China’s military vessels were reported to have been in the vicinity.<sup>522</sup> The Russian Federation submits that, according to *South China Sea*, the mere presence of military vessels in the vicinity of the Chinese conduct complained of by the Philippines, which was not military in nature, was enough to make such conduct fall “well within the exception.”<sup>523</sup>
309. The Russian Federation notes that the *South China Sea* arbitral tribunal, on the other hand, found that construction activities at Spratly Islands were not military activities because China had opposed such classification.<sup>524</sup> The Russian Federation points out that “[t]his is the only reason

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<sup>517</sup> Russian Federation’s Reply, para. 139 citing Ukraine’s Written Observations, para. 122.

<sup>518</sup> Russian Federation’s Reply, para. 140.

<sup>519</sup> Russian Federation’s Reply, para. 142.

<sup>520</sup> Russian Federation’s Reply, para. 142 citing Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005), p. 286 (**Exhibit RUL-65**).

<sup>521</sup> Russian Federation’s Preliminary Objections, paras 138-39 citing *South China Sea*, cit., n. 210, paras 1158, 1161 (**Annex UAL-11**).

<sup>522</sup> Russian Federation’s Reply, para. 144 citing *South China Sea*, cit., n. 210, para. 1161 (**Annex UAL-11**).

<sup>523</sup> Jurisdiction Hearing, 10 June 2019, 74:10-16 (Pellet) citing *South China Sea*, cit., n. 210, para. 1161 (**Annex UAL-11**).

<sup>524</sup> Russian Federation’s Reply, para. 145.

leading to the rejection of the 298(1)(b) jurisdictional exception.”<sup>525</sup> According to the Russian Federation, however, Ukraine wrongly relies on this finding to establish that the involvement of military forces is insufficient to trigger the military activities exception.<sup>526</sup>

310. The Russian Federation argues that it “did not consent to the mandatory dispute settlement under the Convention with respect to disputes concerning military activities,”<sup>527</sup> “[y]et [...] Ukraine’s claim is ultimately based on the premise that [the Russian Federation] cannot be sovereign over Crimea because it unlawfully annexed the Peninsula by alleged use of force.”<sup>528</sup> Therefore, the Russian Federation contends that “the dispute is excluded from the [Arbitral] Tribunal’s jurisdiction by Article 298(1)(b).”<sup>529</sup>
311. In addition to its “general military activities objection,”<sup>530</sup> the Russian Federation argues that the specific conduct complained of by Ukraine is military in nature. The Russian Federation submits that the following claims made in Ukraine’s Memorial “directly rely on alleged unlawful uses of force” by the Russian Federation:<sup>531</sup> submissions (a), (b), (f), and (g) are based on the Russian Federation’s alleged usurpation through “physical force” of gas fields and fisheries allegedly appertaining to Ukraine; <sup>532</sup> submissions (d), (e), (h), and (i) concern alleged unlawful interferences with Ukrainian-flagged vessels and fixed platforms “by armed Russian [Federation] FSB guards” that were allegedly issuing threats to Ukrainian vessels, and the alleged seizure and occupation by the Russian Federation military of Ukrainian offshore platforms;<sup>533</sup> submission (m) concerns the Russian Federation’s alleged obstruction of passage through the Kerch Strait, “thus presumably implying that it did this by force”;<sup>534</sup> and submissions (q) and (r) concern the Russian Federation military’s alleged interference with Ukraine’s attempts to protect archaeological and historical objects in Ukraine’s maritime areas.<sup>535</sup>
312. As regards the construction of the Kerch Strait bridge, the Russian Federation accepts, in response to Ukraine’s argument, that the mere construction of that bridge may not be specifically military

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<sup>525</sup> Russian Federation’s Reply, para. 145.

<sup>526</sup> Russian Federation’s Reply, para. 145.

<sup>527</sup> Jurisdiction Hearing, 10 June 2019, 18:14-16 (Lobach).

<sup>528</sup> Jurisdiction Hearing, 10 June 2019, 18:18-23 (Lobach).

<sup>529</sup> Russian Federation’s Reply, para. 137.

<sup>530</sup> Jurisdiction Hearing, 13 June 2019, 68:1-2 (Pellet).

<sup>531</sup> Russian Federation’s Preliminary Objections, para. 147; Jurisdiction Hearing, 10 June 2019, 72:9-14 (Pellet).

<sup>532</sup> Russian Federation’s Preliminary Objections, para. 147 *citing* Ukraine’s Memorial, paras 9, 120; Jurisdiction Hearing, 10 June 2019, 72:15-18 (Pellet).

<sup>533</sup> Russian Federation’s Preliminary Objections, para. 147 *citing* Ukraine’s Memorial, paras 120-23, 159; Jurisdiction Hearing, 10 June 2019, 72:19-73:1 (Pellet).

<sup>534</sup> Russian Federation’s Preliminary Objections, para. 147 *citing* Ukraine’s Memorial, paras 227, 229; Jurisdiction Hearing, 10 June 2019, 73:1-2 (Pellet).

<sup>535</sup> Russian Federation’s Preliminary Objections, para. 147; Jurisdiction Hearing, 10 June 2019, 73:2-5 (Pellet).

in nature.<sup>536</sup> The Russian Federation maintains that the Arbitral Tribunal would nevertheless be prevented from deciding the dispute regarding its construction pursuant to the general context of the dispute, related to allegations on the use of armed force, as described above.<sup>537</sup>

313. The Russian Federation argues that the applicability of the declarations made under Article 298, paragraph 1, subparagraph (b), can be assessed by the Arbitral Tribunal at this jurisdictional phase and need not be deferred to the merits phase.<sup>538</sup> The Russian Federation points out that, unlike China in *South China Sea*, the Russian Federation has specifically availed itself of the Article 298, paragraph 1, subparagraph (b), exception in this Arbitration and has placed sufficient material on the record to enable to Arbitral Tribunal to make its decision.<sup>539</sup>

## 2. Position of Ukraine

314. Ukraine submits that the present dispute does not concern military activities under Article 298, paragraph 1, subparagraph (b), of the Convention.<sup>540</sup>
315. Ukraine considers that the Russian Federation misrepresents its argument that the Russian Federation's infringement of Ukraine's maritime rights occurred "*in the period following* [the Russian Federation's] unlawful acts of aggression and purported annexation of the Crimean Peninsula" to be that the infringement of the Convention "happened *because* of the invasion."<sup>541</sup> Ukraine further notes that the Russian Federation then argues that the "the alleged 'causal link' between Russia's invasion of Crimea and Russia's subsequent violations of [the Convention] implicates Article 298(1)(b) and defeats this [Arbitral] Tribunal's jurisdiction."<sup>542</sup> According to Ukraine, however, this is an "unprecedented and incorrect reading of Article 298(1)(b)."<sup>543</sup>
316. Ukraine contends that the ordinary meaning of the term "concerning" in Article 298, paragraph 1, subparagraph (b), of the Convention is "about" or "in reference to" and, therefore, the military activities exception should only apply where the specific conduct complained of is military in

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<sup>536</sup> Jurisdiction Hearing, 13 June 2019, 67:20-23 (Pellet).

<sup>537</sup> Jurisdiction Hearing, 13 June 2019, 67:24-68:2 (Pellet).

<sup>538</sup> Russian Federation's Reply, para. 147; Jurisdiction Hearing, 13 June 2019, 63:13-17 (Pellet).

<sup>539</sup> Russian Federation's Reply, para. 147.

<sup>540</sup> Ukraine's Written Observations, para. 120; Jurisdiction Hearing, 11 June 2019, 11:12-20 (Zerkal), 95:7-11 (Cheek).

<sup>541</sup> Ukraine's Written Observations, para. 124 [emphasis added by Ukraine].

<sup>542</sup> Ukraine's Written Observations, para. 124.

<sup>543</sup> Ukraine's Written Observations, para. 125.

nature.<sup>544</sup> Ukraine contends that this reading of Article 298, paragraph 1, subparagraph (b), is also supported by *South China Sea*.<sup>545</sup>

317. Ukraine submits that, had the States Parties to the Convention intended that the military activities exception extend to any dispute having a causal link to a military activity, they would have drafted Article 298, paragraph 1, subparagraph (b), so that it covers all disputes “arising out of” or “in connection with” military activities.<sup>546</sup> Ukraine notes that the States Parties have throughout the Convention precisely and intentionally used either broader language, such as “arising from or in connection with,” “arising from” and “arising out of,” or the narrower term “concerning,” to define the scope and extent of a provision.<sup>547</sup>
318. Ukraine maintains that the Russian Federation’s broad reading of Article 298, paragraph 1, subparagraph (b), conflicts with the object and purpose of the Convention to establish a legal order for the seas based on “the settlement of disputes [as] [...] an essential element of the Convention.”<sup>548</sup> Ukraine cautions that the Russian Federation’s “unprecedented” interpretation of Article 298, paragraph 1, subparagraph (b), would make the Convention inapplicable to a broad range of “potentially important” disputes that take place against the backdrop of armed conflict, but of which armed conflict is not the actual subject.<sup>549</sup> According to Ukraine, if the Russian Federation’s line of argument were to be followed, once a State unlawfully uses force against another, “all subsequent violations of [the Convention] by that aggressor would be immunised.”<sup>550</sup>
319. Turning to the specific conduct of the Russian Federation in dispute, Ukraine asks the Arbitral Tribunal to follow the approach in *South China Sea*, wherein the arbitral tribunal declined to characterise activities as military when China had consistently resisted such classification.<sup>551</sup> Ukraine notes that the Russian Federation has denied that it has engaged in military activities.<sup>552</sup> If the Russian Federation denies that its military personnel were involved in the activities that

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<sup>544</sup> Ukraine’s Written Observations, para. 125; Ukraine’s Rejoinder, paras 117, 120; Jurisdiction Hearing, 11 June 2019, 104:8-15 (Cheek).

<sup>545</sup> Ukraine’s Rejoinder, para. 120.

<sup>546</sup> Ukraine’s Written Observations, para. 125; Jurisdiction Hearing, 11 June 2019, 104:15-17 (Cheek).

<sup>547</sup> Ukraine’s Written Observations, para. 126; Ukraine’s Rejoinder, para. 120; Jurisdiction Hearing, 11 June 2019, 104:17-105:3 (Cheek), 105:12-13 (Cheek).

<sup>548</sup> Ukraine’s Written Observations, para. 127; Jurisdiction Hearing, 11 June 2019, 105:14-18 (Cheek).

<sup>549</sup> Ukraine’s Written Observations, paras 121, 127.

<sup>550</sup> Jurisdiction Hearing, 11 June 2019, 98:1-4 (Cheek).

<sup>551</sup> Ukraine’s Written Observations, para. 137 *citing South China Sea*, cit., n. 210, paras 1027-28 (**Annex UAL-11**).

<sup>552</sup> Jurisdiction Hearing, 11 June 2019, 95:15-20 (Cheek).

Ukraine complains of, Ukraine argues that the military activities exception cannot be invoked by the Russian Federation.<sup>553</sup>

320. Ukraine acknowledges that the Russian Federation has “deployed armed men and vessels to protect its civilian activities in the Sea of Azov, Black Sea, and Kerch Strait and to prevent Ukraine from accessing these areas.”<sup>554</sup> However, in Ukraine’s view, the mere presence of armed Russian personnel and governmental vessels does not imply that the present dispute concerns “military activities.”<sup>555</sup> Ukraine recalls in this regard that the *South China Sea* arbitral tribunal found that construction activities carried out by Chinese military forces on a reef were not military activities.<sup>556</sup> Ukraine further relies on a recent ITLOS order,<sup>557</sup> in which, Ukraine submits, ITLOS looked to “the immediate context in the circumstances of that case and concluded that the activity was not military, despite some involvement of military vessels.”<sup>558</sup>
321. Ukraine argues that it is the object of the activities in dispute that must be considered.<sup>559</sup> Thus, Ukraine submits, “[t]o the extent that there was any alleged military involvement, it was used to further civilian ends.”<sup>560</sup> By way of example, Ukraine points to (a) the extraction by a Russian State-owned corporation of fuel allegedly worth nearly USD 2 billion from Ukrainian waters; (b) the increase of fish production in these areas (including for sale into the Russian market); and (c) the construction activities of the Kerch Strait bridge.<sup>561</sup>
322. Ukraine notes that the Russian Federation has (a) purported to license hydrocarbon blocks to profit-seeking private entities, pursuant to laws administered by civilian authorities; (b) extended to Crimea the same civilian legal framework for the exploitation of fisheries as is applicable in the Russian Federation’s legitimate maritime areas; and (c) described its Kerch Strait construction activity as part of a long-term policy of ensuring the sustainable socio-economic development of Crimea, rather than as military activity.<sup>562</sup> Ukraine argues that through such conduct the Russian

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<sup>553</sup> Jurisdiction Hearing, 11 June 2019, 95:21-24 (Cheek).

<sup>554</sup> Ukraine’s Written Observations, para. 135.

<sup>555</sup> Ukraine’s Written Observations, para. 135; Jurisdiction Hearing, 11 June 2019, 96:15-17 (Cheek), 103:7-12 (Cheek).

<sup>556</sup> Ukraine’s Written Observations, para. 135 citing *South China Sea*, cit., n. 210, para. 938 (**Annex UAL-11**); Jurisdiction Hearing, 14 June 2019, 67:9-18 (Zionts).

<sup>557</sup> Jurisdiction Hearing, 14 June 2019, 67:19-22 (Zionts) referring to *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. the Russian Federation)* (hereinafter “*Detention of Ukrainian Naval Vessels*”), Provisional Measures, International Tribunal for the Law of the Sea, Order of 25 May 2019 (**Annex UAL-120**).

<sup>558</sup> Jurisdiction Hearing, 14 June 2019, 68:1-4 (Zionts).

<sup>559</sup> Jurisdiction Hearing, 14 June 2019, 67:6-8 (Zionts).

<sup>560</sup> Ukraine’s Written Observations, para. 138; Jurisdiction Hearing, 11 June 2019, 99:7-13 (Cheek).

<sup>561</sup> Ukraine’s Written Observations, para. 138; Jurisdiction Hearing, 11 June 2019, 100:4-102:3 (Cheek).

<sup>562</sup> Ukraine’s Written Observations, paras 137-38.

Federation has confirmed the civilian nature of its activities.<sup>563</sup> Specifically with regard to the Kerch Strait bridge, Ukraine contends that “Russia has now withdrawn, quite correctly, its suggestion that interference with navigation in the Kerch Strait by the construction of a bridge is a military activity.”<sup>564</sup>

323. Ukraine contends that the *South China Sea* arbitral tribunal held that certain naval activities by China could be adjudicated as part of a claim dependent on a dispute primarily regarding non-military matters.<sup>565</sup> For the same reason, Ukraine submits that its own case concerning archaeological objects at sea does not fall outside the Arbitral Tribunal’s jurisdiction merely because such actions were carried out by the Russian Federation’s navy personnel.<sup>566</sup>
324. Ukraine recalls that the *South China Sea* arbitral tribunal considered that the application of Article 298, paragraph 1, subparagraph (b), of the Convention depends on whether “the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.”<sup>567</sup> Ukraine submits that its submissions (a), (b), (d), (e), (f), (g), (h), (i), (m), (q), and (r), consistently with the findings of the *South China Sea* arbitral tribunal, do not seek adjudication of military issues.<sup>568</sup>
325. Ukraine argues that the Russian Federation misreads the findings in *South China Sea*.<sup>569</sup> For Ukraine, the *South China Sea* arbitral tribunal identified a military activity as one involving a military interaction between the military forces of one side and those of the other.<sup>570</sup> However, in the present case, none of the events described involve “military forces arrayed against one another”<sup>571</sup> nor does any Party allege that a military confrontation occurred in the waters at issue.<sup>572</sup>
326. Finally, Ukraine considers that, to determine the alleged military nature of the Russian Federation’s activities underpinning Ukraine’s claims, the Arbitral Tribunal may have to engage with facts that are “interlinked with the merits and cannot be determined conclusively at this preliminary stage,”<sup>573</sup> insofar as the Arbitral Tribunal would have to assess whether each of the

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<sup>563</sup> Ukraine’s Written Observations, para. 137; Jurisdiction Hearing, 14 June 2019, 68:5-69:5 (Zionts).

<sup>564</sup> Jurisdiction Hearing, 14 June 2019, 65:21-24 (Zionts).

<sup>565</sup> Ukraine’s Written Observations, para. 135.

<sup>566</sup> Ukraine’s Written Observations, para. 136; Jurisdiction Hearing, 11 June 2019, 102:4-11 (Cheek).

<sup>567</sup> Ukraine’s Written Observations, para. 132 *citing South China Sea*, cit., n. 210, para. 1158 (**Annex UAL-11**).

<sup>568</sup> Ukraine’s Written Observations, para. 134; Jurisdiction Hearing, 11 June 2019, 96:23-97:14 (Cheek).

<sup>569</sup> Ukraine’s Written Observations, para. 133.

<sup>570</sup> Jurisdiction Hearing, 11 June 2019, 98:24-99:4 (Cheek).

<sup>571</sup> Ukraine’s Written Observations, para. 134.

<sup>572</sup> Jurisdiction Hearing, 11 June 2019, 99:4-6 (Cheek).

<sup>573</sup> Ukraine’s Written Observations, para. 139; Jurisdiction Hearing, 11 June 2019, 106:14-22 (Cheek).

alleged activities is a military activity based on the evidence submitted by Ukraine.<sup>574</sup> For Ukraine, such assessment could be appropriately deferred to the merits phase.<sup>575</sup>

### 3. Analysis of the Arbitral Tribunal

327. Pursuant to Article 298, paragraph 1, subparagraph (b), of the Convention, a State may choose not to accept the compulsory procedures entailing binding decisions provided for in section 2 of Part XV with respect to “disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service.”
328. The Russian Federation first raises the military activities exception as “a global objection, establishing the impossibility for this Tribunal to decide globally on the Ukrainian submissions, because to do this, the Tribunal would have to decide on [...] the alleged use of force initially vitiating [...] Crimea’s reunification with [the Russian Federation].”<sup>576</sup>
329. The Arbitral Tribunal notes that it is common ground between the Parties that the events occurring in Crimea in 2014 do not as such form part of the dispute submitted to it. The Arbitral Tribunal further notes that it has upheld the Russian Federation’s first preliminary objection to the extent that its ruling on Ukraine’s claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea.<sup>577</sup> The Arbitral Tribunal accordingly finds that the Russian Federation’s global objection has no basis as its premise has not been met.
330. Article 298, paragraph 1, subparagraph (b), of the Convention allows States Parties to exclude from the compulsory jurisdiction of the Convention “disputes concerning military activities.” The Arbitral Tribunal notes that the Convention employs the term “concerning,” in contrast to other terms, such as “arising out of,” “arising from,” or “involving,” used elsewhere in the Convention to characterise disputes.<sup>578</sup> Compared to such other terms, which are open to a more expansive interpretation, the term “concerning” circumscribes the military activities exception by limiting it to those disputes whose subject matter is military activities. In the Arbitral Tribunal’s view, a mere “causal” or historical link between certain alleged military activities and the activities in dispute cannot be sufficient to bar an arbitral tribunal’s jurisdiction under Article 298, paragraph 1, subparagraph (b), of the Convention.

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<sup>574</sup> Ukraine’s Written Observations, paras 140-41.

<sup>575</sup> Ukraine’s Written Observations, para. 139 *citing South China Sea*, cit., n. 34, paras 395-96 (**Annex UAL-3**).

<sup>576</sup> Jurisdiction Hearing, 13 June 2019, 70:12-17 (Pellet).

<sup>577</sup> See paragraphs 197-198 of this Award.

<sup>578</sup> See UNCLOS, Arts 151(8), 289, 297(1), 297(2)(a), 297(2)(b).

331. The Arbitral Tribunal considers that the military activities exception is not triggered in the present case simply because the conduct of the Russian Federation complained of by Ukraine has its origins in, or occurred against the background of, a broader alleged armed conflict. Rather, in the Arbitral Tribunal's view, the relevant question is whether "certain specific acts subject of Ukraine's complaints" constitute military activities.<sup>579</sup>

332. The Arbitral Tribunal will now examine the specific aspects of the dispute that the Russian Federation contends are precluded by the Parties' declarations pursuant to Article 298, paragraph 1, subparagraph (b), of the Convention on the basis that they concern military activities.<sup>580</sup>

333. The Arbitral Tribunal notes that Article 298, paragraph 1, subparagraph (b), of the Convention refers to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service." This indicates that, in order to qualify as "military activities" within the meaning of the above provision, activities need not necessarily be carried out by military vessels and aircraft but, instead, can equally be performed by "government vessels and aircraft engaged in non-commercial service."

334. The Arbitral Tribunal does not consider, however, that mere involvement or presence of military vessels is in and by itself sufficient to trigger the military activities exception. While such factor may be relevant in assessing whether a dispute concerns military activities, it is not conclusive. As the arbitral tribunal in *South China Sea* stated:

Article 298(1)(b) applies to "*disputes concerning* military activities" and not to "military activities" as such. Accordingly, the Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.<sup>581</sup>

335. The Arbitral Tribunal would add that there is no consistent State practice as to the scope of activities that are to be regarded as being exercised by "military" vessels, aircraft, and personnel. Forces that some governments treat as civilian or law enforcement forces may be designated as military by others, even though they may undertake comparable tasks.<sup>582</sup> In addition, many States rely on their military forces for non-military functions, such as disaster relief, evacuations, or the reestablishment of public order.

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<sup>579</sup> Jurisdiction Hearing, 10 June 2019, 67:24-25 (Pellet).

<sup>580</sup> See Russian Federation's Preliminary Objections, para. 147; Jurisdiction Hearing, 10 June 2019, 72:9-73:5 (Pellet).

<sup>581</sup> *South China Sea*, cit., n. 210, para. 1158 (**Annex UAL-11**).

<sup>582</sup> See also *Detention of Ukrainian Naval Vessels*, cit., n. 557, para. 64 (**Annex UAL-120**).

336. Insofar as Ukraine maintains that the Russian Federation has excluded Ukraine from access to and exploitation of hydrocarbon fields and fisheries,<sup>583</sup> the Arbitral Tribunal notes that the Russian Federation argues that the Parties' dispute concerns military activities because Ukraine alleges it has been excluded through "physical force."<sup>584</sup> In the view of the Arbitral Tribunal, however, the alleged use of physical force is insufficient to conclude that an activity is military in nature. Law enforcement forces, for example, are generally authorised to use physical force without their activities being considered military for that reason.<sup>585</sup> Having examined the broader context in which the alleged events took place, the Arbitral Tribunal notes that in the maritime areas in dispute the Russian Federation has granted offshore hydrocarbon licenses to civilian commercial companies,<sup>586</sup> and regulates under a civilian legal framework the exploitation of fisheries resources.<sup>587</sup> Taking into account this larger context, the Arbitral Tribunal finds that the use of physical force alleged by Ukraine does not turn the dispute into one concerning military activities; rather such alleged force appears to have been directed towards maintaining civilian activities such as the exploitation of hydrocarbons and fisheries.
337. Insofar as Ukraine contends that the Russian Federation has unlawfully interfered with Ukrainian-flagged vessels and fixed platforms,<sup>588</sup> the Arbitral Tribunal notes that the Russian Federation claims that the Parties' dispute concerns military activities because of the supposed involvement

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<sup>583</sup> Ukraine's Memorial, paras 265(a), 265(b), 265(f), 265(g).

<sup>584</sup> Russian Federation's Preliminary Objections, para. 147(a).

<sup>585</sup> *Detention of Ukrainian Naval Vessels*, cit., n. 557, para. 73 (**Annex UAL-120**).

<sup>586</sup> See License No. 15924 for Golitsynskoye Field (12 November 2015) (**Annex UA-158**); License No. 15929 for Arkhangelskoye Field (12 November 2015) (**Annex UA-165**); License No. 15928 for Odesskoye Field (12 November 2015) (**Annex UA-166**); License No. 15926 for North-Bulganakskoye Field (12 November 2015) (**Annex UA-167**); License No. 15927 for Shtormovoye Field (12 November 2015) (**Annex UA-168**); Order of the Russian Federation No. 1320-r, 27 June 2016 (**Annex UA-160**).

<sup>587</sup> See Order No. 224 of the Russian Federal Fisheries Agency, On Approving the Regulations on the Crimean Territorial Administration of the Federal Fisheries Agency, 31 March 2014 (**Annex UA-171**); Order No. 637 of the Russian Ministry of Agriculture, On Amendments to the Regulations on Territorial Administrations of the Federal Fisheries Agency, 7 October 2016 (**Annex UA-179**); Order No. 273 of the Ministry of Agriculture of the Russian Federation, On Amendments to the Fishing Rules for the Azov-Black Sea Fishing Basin, 14 July 2014 (**Annex UA-180**); Order No. 293 of the Ministry of Agriculture of the Russian Federation, On Approving the Fishing Rules for the Azov-Black Sea Fishery Basin, 1 August 2013 (**Annex UA-181**); Order No. 445 of the Ministry of Agriculture of the Russian Federation, On Approving the Total Permissible Catch of Aquatic Biological Resources in Internal Waters of the Russian Federation, in the Territorial Sea of the Russian Federation, on the Continental Shelf of the Russian Federation, and in the Exclusive Economic Zone of the Russian Federation in the Sea of Azov and the Caspian Sea for 2017, 10 October 2016 (**Annex UA-182**); Order No. 465 of the Ministry of Agriculture of the Russian Federation, On Approving the Total Permissible Catch of Aquatic Biological Resources in Internal Waters of the Russian Federation, in the Territorial Sea of the Russian Federation, on the Continental Shelf of the Russian Federation, and in the Exclusive Economic Zone of the Russian Federation in the Sea of Azov and the Caspian Sea for 2016, 7 October 2015 (**Annex UA-183**); Report by Ministry of Agriculture of the Russian Federation, 1 December 2016 (**Annex UA-184**); Order No. 184 of the Russian Federation, 5 March 2013, amended on 11 January 2017, Clause 1 (**Annex UA-185**).

<sup>588</sup> Ukraine's Memorial, paras 265(d), 265(e), 265(h), 265(i).

of Russian military vessels, aircraft, and personnel.<sup>589</sup> At issue is notably the detention of the captain of a Ukrainian fishing boat by Russian military personnel,<sup>590</sup> the deployment of armed men to oversee the work carried out on an oil platform,<sup>591</sup> and the alleged harassment of Ukrainian vessels by Russian military vessels and aircraft.<sup>592</sup>

338. While it is not clear whether the forces involved in these activities belong to the armed forces, in any case the activities themselves cannot be objectively classified as military in nature. The Arbitral Tribunal considers that the detention, and subsequent release following the payment of a fine,<sup>593</sup> of a captain of a civilian boat may appropriately be classified as a law enforcement activity, rather than a “military activity”; and standing guard and supervising works on oil platforms are not inherently military activities but activities that may be, and frequently are, undertaken by private security contractors. The alleged harassment of Ukrainian vessels appears to have mainly consisted of dangerously close approaches, failures to establish radio communication, and general violations of the rules of safe navigation and seamanship. In the Arbitral Tribunal’s view, the fact that some of the Ukrainian vessels whose navigation was impeded belonged to Ukraine’s navy does not cause the dispute to concern military activities.
339. Insofar as Ukraine challenges the construction of the Kerch Strait bridge and the resulting impediment to navigation through the Kerch Strait,<sup>594</sup> the Arbitral Tribunal takes note of the Russian Federation’s acknowledgement at the Hearing that this aspect of the dispute does not specifically concern military activities.<sup>595</sup>
340. Lastly, insofar as Ukraine contends that the Russian Federation has prevented Ukraine from accessing, and has failed to protect, archaeological and historical objects located in the disputed maritime areas,<sup>596</sup> the Arbitral Tribunal notes that Russian Federation argues that the Parties’ dispute concerns military activities due to the participation of the Russian Federation’s military in the archaeological expeditions in question.<sup>597</sup> However, as noted above, the mere involvement of military vessels or personnel in an activity does not *ipso facto* render the activity military in

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<sup>589</sup> Russian Federation’s Preliminary Objections, para. 147(b).

<sup>590</sup> Complaint of Andrei Aleksandrovich Poprotsky, Administrative Case No. 9930-S/321-17, 20 July 2017, p. 1 (**Annex UA-169**).

<sup>591</sup> Witness Statement of Svetlana Volodymyrivna Nezhnova, 16 February 2018, para. 11.

<sup>592</sup> Witness Statement of Captain Oleksandr Penskyi, 2 November 2018, paras 13-16, 19-20, 33; Witness Statement of Captain Iaroslav Grabovskyi, 15 February 2018, paras 8-10, 12-14.

<sup>593</sup> Complaint of Andrei Aleksandrovich Poprotsky, Administrative Case No. 9930-S/321-1, 20 July 2017, p. 1 (**Annex UA-169**).

<sup>594</sup> Ukraine’s Memorial, para. 265(m).

<sup>595</sup> Jurisdiction Hearing, 13 June 2019, 67:19-68:2 (Pellet).

<sup>596</sup> Ukraine’s Memorial, paras 265(q), 265(r).

<sup>597</sup> Russian Federation’s Preliminary Objections, para. 147(d).

nature. The Arbitral Tribunal considers that the undertaking of archaeological expeditions by the Russian Federation's military (at least in some instances in cooperation with civilians)<sup>598</sup> does not allow the Arbitral Tribunal to find that the dispute between the Parties regarding underwater cultural heritage concerns military activities.

341. For the above reasons, the Arbitral Tribunal rejects the Russian Federation's objection based on the military activities exception under Article 298, paragraph 1, subparagraph (b), of the Convention.

## **B. LAW ENFORCEMENT ACTIVITIES EXCEPTION**

### **1. Position of the Russian Federation**

342. The Russian Federation submits that the Arbitral Tribunal has no jurisdiction over the dispute insofar as it concerns law enforcement activities.<sup>599</sup> The Russian Federation recalls that Article 298, paragraph 1, subparagraph (b), of the Convention exempts from an arbitral tribunal's jurisdiction "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" that are "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3."<sup>600</sup> Article 297, paragraph 3, subparagraph (a) provides, in relevant part, that "the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise."
343. According to the Russian Federation, in *South China Sea*, the arbitral tribunal found that Article 298, paragraph 1, subparagraph (b), of the Convention would "restrict the Tribunal's jurisdiction over fishing and fisheries-related law enforcement in the event that the relevant areas formed part of China's exclusive economic zone" or "the activities took place [...] in an area in which the Parties possess overlapping entitlements to an exclusive economic zone."<sup>601</sup> Referring to *South China Sea*, the Russian Federation submits that the coasts of the Russian Federation and Ukraine can generate maritime entitlements, and that the alleged law enforcement activities took place either in the Russian Federation's exclusive economic zone or in an area in which the

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<sup>598</sup> *Find of the Millennium: Huge Antique Ship Discovered at the Bottom of the Sea in Crimea*, TV Zvezda (26 May 2015) (**Annex UA-228**); Oleg Goryunov, *Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor*, TV Zvezda (7 June 2015) (**Annex UA-231**).

<sup>599</sup> Russian Federation's Preliminary Objections, para. 149; Jurisdiction Hearing, 10 June 2019, 18:14-18 (Lobach), 74:17-18 (Pellet).

<sup>600</sup> Russian Federation's Preliminary Objections, para. 149.

<sup>601</sup> Russian Federation's Preliminary Objections, para. 150 *citing South China Sea*, cit., n. 34, paras 395, 406 (**Annex UAL-3**); Jurisdiction Hearing, 13 June 2019, 77:18-78:3 (Pellet).

Parties' entitlements overlap.<sup>602</sup> The Russian Federation argues that it is the enforcement of rights that the Russian Federation considers to belong to it in its exclusive economic zone of which Ukraine is complaining.<sup>603</sup> Therefore, in the Russian Federation's view, the Arbitral Tribunal is precluded from exercising jurisdiction in relation to its fisheries enforcement measures and the operation of its law enforcement vessels in the Black Sea and Sea of Azov.<sup>604</sup>

344. The Russian Federation submits that the Arbitral Tribunal cannot rule on Ukraine's allegations that the Russian border and fisheries patrols have taken action against Ukrainian-flagged vessels in the territorial sea around Crimea and parts of its exclusive economic zone.<sup>605</sup> In the Russian Federation's view, nor can the Arbitral Tribunal rule on Ukraine's related allegations, regarding the Russian Federation (a) excluding Ukraine from accessing fisheries (in violation of Articles 56, 58, 61, 62, 73, and 92 of the Convention); (b) interfering with Ukraine's exclusive jurisdiction over Ukrainian-flagged vessels in Ukraine's exclusive economic zone (in violation of Articles 56, 58 and 92 of the Convention); and (c) interfering with the navigation of Ukrainian Sea Guard vessels through Ukraine's exclusive economic zone (in violation of Articles 56, 58, 73, and 92 of the Convention).<sup>606</sup>
345. The Russian Federation notes that the law enforcement activities exception is less broad in scope than the one concerning military activities.<sup>607</sup> The Russian Federation also acknowledges that Article 298, paragraph 1, subparagraph (b), of the Convention, read literally with Article 297, paragraph 3, subparagraph (a), only restricts the Arbitral Tribunal's jurisdiction with respect to law enforcement activities in the exclusive economic zone.<sup>608</sup> Even so, the Russian Federation submits that the Arbitral Tribunal's jurisdiction is also precluded insofar as the dispute concerns events in the territorial sea or on the continental shelf because "it would be paradoxical that activities taking place in areas over which the coastal State possesses more (or at least equal) rights as those it has in the [exclusive economic zone], would be submitted to the jurisdiction of the [Arbitral] Tribunal while they are exempted from its jurisdiction when exercised in the [exclusive economic zone]."<sup>609</sup>

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<sup>602</sup> Russian Federation's Preliminary Objections, para. 151.

<sup>603</sup> Jurisdiction Hearing, 10 June 2019, 77:10-12 (Pellet).

<sup>604</sup> Russian Federation's Preliminary Objections, para. 151.

<sup>605</sup> Russian Federation's Preliminary Objections, para. 152.

<sup>606</sup> Russian Federation's Preliminary Objections, para. 152.

<sup>607</sup> Jurisdiction Hearing, 10 June 2019, 74:18-25 (Pellet).

<sup>608</sup> Russian Federation's Preliminary Objections, para. 153; Jurisdiction Hearing, 10 June 2019, 78:4-5 (Pellet).

<sup>609</sup> Russian Federation's Preliminary Objections, para. 153; Jurisdiction Hearing, 10 June 2019, 78:5-11 (Pellet); Jurisdiction Hearing, 13 June 2019, 78:25-79:10 (Pellet).

346. The Russian Federation rejects Ukraine's argument that the law enforcement exception is dependent upon the Arbitral Tribunal acceding to the Russian Federations' first preliminary objection.<sup>610</sup> For the Russian Federation, even if the Arbitral Tribunal were to reject the first preliminary objection, it would have to rule that the law enforcement activities took place either within the Russian Federation's exclusive economic zone, or in an area in which the Parties possess overlapping entitlements.<sup>611</sup>

## 2. Position of Ukraine

347. Ukraine submits that the Russian Federation's objection that the present dispute falls within the optional exception to jurisdiction which covers disputes concerning coastal State law enforcement activities with regard to the exercise of sovereign rights or jurisdiction pursuant to Article 298, paragraph 1, subparagraph (b), of the Convention must fail because it rests on the Russian Federation's "claim" that it is the coastal State in the waters adjacent to Crimea and thus, ultimately, on the Russian Federation's claim that the status of Crimea has been altered.<sup>612</sup> Ukraine reiterates that it regards this claim as inadmissible and implausible.<sup>613</sup>

348. Ukraine submits that if the Russian Federation's objections are based on any maritime entitlements emanating from its own coastline rather than from the Crimean coastline, it is incumbent upon the Russian Federation to articulate this claim and to establish that the conduct underlying Ukraine's claims took place in the Russian Federation's maritime zones.<sup>614</sup>

349. Ukraine states that the Russian Federation cannot raise "Article 297(3) and Article 298(1)(b) law enforcement objections in areas where it enjoys overlapping entitlements with Ukraine" because those exceptions apply only in areas which form part of the exclusive economic zone of the respondent State.<sup>615</sup> Relying on *South China Sea* and *The Arctic Sunrise Arbitration (The Netherlands v. The Russian Federation)*, Ukraine submits that the exception in Article 298, paragraph 1, subparagraph (b), does not apply where a State is alleged to have violated the Convention in respect of another State's exclusive economic zone.<sup>616</sup> Nor, according to Ukraine,

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<sup>610</sup> Jurisdiction Hearing, 13 June 2019, 77:3-6 (Pellet).

<sup>611</sup> Jurisdiction Hearing, 13 June 2019, 78:6-12 (Pellet).

<sup>612</sup> Ukraine's Written Observations, para. 102; Ukraine's Rejoinder, paras 103-04; Jurisdiction Hearing, 11 June 2019, 107:17-21 (Gore).

<sup>613</sup> Ukraine's Written Observations, paras 102, 108; Jurisdiction Hearing, 11 June 2019, 107:21-24 (Gore), 115:25-116:3 (Gore).

<sup>614</sup> Ukraine's Written Observations, paras 108-09; Jurisdiction Hearing, 11 June 2019, 115:10-15 (Gore).

<sup>615</sup> Ukraine's Rejoinder, para. 104; Jurisdiction Hearing, 14 June 2019, 78:13-79:5 (Zionts).

<sup>616</sup> Ukraine's Written Observations, para. 107 citing *South China Sea*, cit., n. 210, para. 695 (**Annex UAL-11**); PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (The Netherlands v. The Russian Federation)*, Award

is it sufficient for a respondent State to refer to possible rights, claimed rights, or disputed rights.<sup>617</sup>

350. In any event, Ukraine asserts that the only entitlements that the Russian Federation has asserted in this Arbitration extend from Crimea, and therefore the Russian Federation's law enforcement objection should be rejected on the same grounds as its first preliminary objection.<sup>618</sup>

351. Ukraine submits that, even if the Russian Federation's conduct had taken place within areas determined to be a part of its exclusive economic zone, Article 297, paragraph 3, and Article 298, paragraph 1, of the Convention would only apply to the Russian Federation's exercise of "sovereign rights with respect to [...] living resources" of the exclusive economic zone and to its enforcement of its fisheries law.<sup>619</sup> Ukraine rejects the Russian Federation's application of its law enforcement objections to matters outside the narrow scope of the relevant articles.<sup>620</sup> In Ukraine's view, those provisions do not shield from scrutiny the Russian Federation's "harassment of civilian and governmental navigation," nor its "violation of the Convention's environmental provisions."<sup>621</sup>

352. Further, Ukraine denies that Article 297, paragraph 3, and Article 298, paragraph 1, subparagraph (b), of the Convention apply in the territorial sea, noting that these provisions make no express reference to the territorial sea.<sup>622</sup> Therefore, according to Ukraine, the Arbitral Tribunal has jurisdiction to consider the Russian Federation's conduct in the Kerch Strait and within 12 nautical miles of the baselines in the Black Sea or the Sea of Azov.<sup>623</sup>

### 3. Analysis of the Arbitral Tribunal

353. Article 298, paragraph 1, subparagraph (b), of the Convention provides, in relevant parts:

a State may [...] declare in writing that it does not accept any one or more of procedures provided for in section 2 with respect to one or more of the following categories of disputes [...] disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

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on Jurisdiction of 26 November 2014, para. 75 (**Annex UAL-69**); Jurisdiction Hearing, 11 June 2019, 115:17-23 (Gore).

<sup>617</sup> Jurisdiction Hearing, 11 June 2019, 117:2-11 (Gore).

<sup>618</sup> Ukraine's Rejoinder, para. 104.

<sup>619</sup> Ukraine's Rejoinder, para. 106.

<sup>620</sup> Jurisdiction Hearing, 11 June 2019, 118:3-5 (Gore).

<sup>621</sup> Ukraine's Rejoinder, para. 106; Jurisdiction Hearing, 11 June 2019, 118:13-22 (Gore).

<sup>622</sup> Ukraine's Rejoinder, para. 107; Jurisdiction Hearing, 11 June 2019, 117:17-118:2 (Gore); Jurisdiction Hearing, 14 June 2019, 80:13-81:1 (Zionts).

<sup>623</sup> Ukraine's Rejoinder, para. 107.

354. Pursuant to Article 297 of the Convention, in turn, “the coastal State shall not be obliged to accept the submission” to binding settlement of certain, enumerated categories of disputes, of which only the category of “disputes related to [a coastal State’s] sovereign rights with respect to living resources in the exclusive economic zone” or the exercise of such rights in Article 297, paragraph 3, subparagraph (a), is relevant here.
355. In its declaration pursuant to Article 298, paragraph 1, made upon ratification of the Convention, the Russian Federation stated that “it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to [...] disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction.”
356. The Arbitral Tribunal notes that, in accordance with the ordinary meaning of the terms<sup>624</sup> of Article 298, paragraph 1, subparagraph (b), second alternative, and Article 297, paragraph 3, subparagraph (a), of the Convention, a court or tribunal pursuant to Part XV of the Convention has no jurisdiction pursuant to section 2 of Part XV over disputes concerning law enforcement activities related to the exercise of sovereign rights of the declaring State in its own exclusive economic zone. The Arbitral Tribunal considers that both the sovereign character of the rights allegedly exercised by the declaring State and the entitlement of the declaring State to the area in question as that State’s exclusive economic zone must be objectively established for the optional exception to apply.
357. In the present case, the Arbitral Tribunal has already found that there objectively exists a dispute between the Parties regarding sovereignty over Crimea. The Arbitral Tribunal has decided that it has no jurisdiction to make a determination in respect of that dispute, or the consequential question of who is the coastal State with respect to the waters adjacent to Crimea. It follows that entitlements to adjacent maritime zones generated by the coast of Crimea, including any exclusive economic zones, cannot be determined. Nor can any claims which depend upon the premise that one or other Party is sovereign over Crimea. The question is whether in these circumstances Article 298, paragraph 1, subparagraph (b), operates to exclude any further categories of claim in this case.
358. The Arbitral Tribunal is of the view that the law enforcement activities alleged by the Russian Federation occurred within an area that cannot be determined to constitute the exclusive economic zone of either the Russian Federation or Ukraine. In the face of such uncertainty, the Arbitral Tribunal considers that the conditions for application of Article 298, paragraph 1,

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<sup>624</sup> Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, 1155 U.N.T.S. 331, Art. 31 (**Annex UAL-43**).

subparagraph (b), second alternative, have not been met and thus rejects the Russian Federation's objection based on the law enforcement exception under that provision.

## C. DELIMITATION EXCEPTION

### 1. Position of the Russian Federation

359. Without prejudice to its first preliminary objection, related to sovereignty, and to its second preliminary objection, based on the alleged internal waters status of the Sea of Azov and the Kerch Strait, the Russian Federation submits that the Arbitral Tribunal has no jurisdiction over aspects of the present dispute related to delimitation.<sup>625</sup>

360. The Russian Federation considers that Article 298, paragraph 1, subparagraph (a)(i), of the Convention excludes from an arbitral tribunal's jurisdiction disputes whose immediate subject matter concerns Articles 15, 74, or 83 of the Convention as well as any dispute having a bearing on the delimitation of the territorial sea, exclusive economic zone, and continental shelf.<sup>626</sup> The Russian Federation argues that the phrases, "concerning" and "related to" in Article 298, paragraph 1, subparagraph (a)(i),<sup>627</sup> mean "in connection with" and cover both the immediate subject of a dispute and connected matters.<sup>628</sup> On that basis, the Russian Federation submits that the phrase "relating to sea boundary delimitations" thus covers "not only disputes involving the determination of sea boundaries but all matters connected with the entire delimitation *process*, including issues of overlapping entitlements."<sup>629</sup>

361. The Russian Federation submits that "[t]he law of the sea envisages delimitation not as an isolated and instantaneous operation but as an integral and systemic process" that "begins with identifying the basis, nature and maximum extent of an entitlement, focuses on weighing the overlapping entitlements, and ends by granting them actual effect."<sup>630</sup> For the Russian Federation, any decision regarding the entitlement of a coastal State is part of the delimitation process and will inevitably affect the results of the delimitation.<sup>631</sup> Therefore, disputes regarding overlapping

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<sup>625</sup> Russian Federation's Preliminary Objections, para. 155; Russian Federation's Reply, para. 130; Jurisdiction Hearing, 10 June 2019, 19:8-13 (Lobach), 64:19-23 (Pellet).

<sup>626</sup> Russian Federation's Preliminary Objections, para. 161; Jurisdiction Hearing, 10 June 2019, 89:10-16 (Pellet).

<sup>627</sup> UNCLOS, Art. 298(1)(a)(i) ("disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations").

<sup>628</sup> Russian Federation's Preliminary Objections, para. 157.

<sup>629</sup> Russian Federation's Preliminary Objections, para. 161 [emphasis added by the Russian Federation].

<sup>630</sup> Russian Federation's Preliminary Objections, para. 162.

<sup>631</sup> Russian Federation's Preliminary Objections, para. 162.

entitlements generally fall within the delimitation process in application of Articles 15, 74, and 83 of the Convention.<sup>632</sup>

362. The Russian Federation relies on the decision in the *Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia* (hereinafter the “*Timor Sea Conciliation*”), in which the Conciliation Commission interpreted the phrase “disputes concerning the interpretation or application of articles 15, 74, and 83” in Article 298, paragraph 1, subparagraph (a)(i), of the Convention as not being confined to disputes over the actual maritime boundary delimitation but also covering “questions implying a determination based on these Articles.”<sup>633</sup>
363. The Russian Federation argues that, if only disputes that turn on the interpretation or application of Articles 15, 74, and 83 can fall within the scope of the Article 298, paragraph 1, subparagraph (a)(i) exclusion, the phrase “relating to sea boundary delimitation” would only state the obvious and be left without any *effet utile*.<sup>634</sup> According to the principle of effectiveness of interpretation, this phrase must add something.<sup>635</sup> The Russian Federation states that “[a]n interpretation of [Article 298, paragraph 1, subparagraph (a)(i)] that fails to give full effect to its language and to a State’s declaration thereof defeats their object and purpose as well as the careful and well-designed balance struck by the Convention between States’ sovereignty and compulsory procedures.”<sup>636</sup>
364. The Russian Federation submits that, in the present case, whilst “[o]stensibly, Ukraine is not requesting the Tribunal to delimit a maritime boundary but to adjudge that Russia has unlawfully interfered with the enjoyment and exercise of its allegedly sovereign rights in the Black Sea, Sea of Azov and Kerch Strait,”<sup>637</sup> such claims presume that Ukraine has entitlements therein that do not overlap with the Russian Federation’s claims.<sup>638</sup> The Russian Federation argues that “the question of Ukraine’s entitlements and related rights is not a settled issue since the delimitation of the territorial sea, the EEZ, and the continental shelf between the Parties, has not been effected by agreement in accordance with the Article 15, 74, 83 of UNCLOS.”<sup>639</sup> The Russian Federation

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<sup>632</sup> Russian Federation’s Preliminary Objections, para. 164; Jurisdiction Hearing, 10 June 2019, 89:19-22 (Pellet).

<sup>633</sup> Russian Federation’s Reply, para. 133 citing PCA Case No. 2016-10: *Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Decision on Australia’s Objections to Competence, 19 September 2016, para. 93 (**Annex RUL-76**).

<sup>634</sup> Russian Federation’s Reply, para. 134.

<sup>635</sup> Russian Federation’s Reply, para. 134.

<sup>636</sup> Russian Federation’s Reply, para. 135.

<sup>637</sup> Russian Federation’s Preliminary Objections, para. 165.

<sup>638</sup> Russian Federation’s Preliminary Objections, para. 166.

<sup>639</sup> Russian Federation’s Preliminary Objections, para. 167.

points out that in the present case it is “unavoidable” that the Parties’ respective entitlements overlap, and that these overlaps “necessarily call for the impossibility of carrying out the delimitation.”<sup>640</sup>

365. The Russian Federation notes that Ukraine has presented itself as “the coastal State for purposes of determining maritime entitlements appertaining to the Crimean Peninsula”<sup>641</sup> and seeks to affirm its “entitlements” in the Black Sea, Sea of Azov, and Kerch Strait.<sup>642</sup> According to the Russian Federation, the Arbitral Tribunal would have to apply Article 298, paragraph 1, subparagraph (a), of the Convention to determine “whether Ukraine effectively enjoys the rights which it claims to possess.”<sup>643</sup> Yet, even if the Arbitral Tribunal were to construe Article 298, paragraph 1, subparagraph (a), in the “strictest sense,” it would be forbidden to apply Articles 15, 74, and 83.<sup>644</sup>

366. The Russian Federation submits that the Arbitral Tribunal would have to identify and resolve the Parties’ overlapping entitlements by delimiting the maritime zones belonging to each Party in order then to rule on Ukraine’s claims as to its rights relating to hydrocarbons, fisheries, and other natural resources, protection of the marine environment, and preservation of maritime archaeological objects and sites.<sup>645</sup> The Russian Federation points out that these rights claimed by Ukraine are “inextricably linked to delimitation.”<sup>646</sup>

367. The Russian Federation considers that Ukraine’s claims in many respects are similar to the Philippines’ claims in *South China Sea*, where the arbitral tribunal found that because it

has not been requested to—and will not—delimit a maritime boundary between the Parties, the Tribunal will be able [to] address those of the Philippines’ Submissions based on the premise that certain areas of the South China Sea form part of the Philippines’ exclusive economic zone or continental shelf *only if the Tribunal determines that China could not possess any potentially overlapping entitlement in that area.*<sup>647</sup>

368. The Russian Federation notes that the arbitral tribunal in *South China Sea* found that the premise of the Philippines’ submissions was that no overlapping entitlements existed because only the

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<sup>640</sup> Jurisdiction Hearing, 13 June 2019, 75:10-13 (Pellet).

<sup>641</sup> Russian Federation’s Preliminary Objections, para. 166 *citing* Ukraine’s Notification and Statement of Claim, para. 3.

<sup>642</sup> Russian Federation’s Preliminary Objections, para. 166.

<sup>643</sup> Jurisdiction Hearing, 10 June 2019, 89:23-90:4 (Pellet).

<sup>644</sup> Jurisdiction Hearing, 10 June 2019, 89:23-25 (Pellet).

<sup>645</sup> Russian Federation’s Preliminary Objections, para. 168; Russian Federation’s Reply, para. 131.

<sup>646</sup> Russian Federation’s Preliminary Objections, para. 168.

<sup>647</sup> Russian Federation’s Preliminary Objections, para. 170 *citing* *South China Sea*, *cit.*, n. 34, para. 157 (**Annex UAL-3**) [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 83:17-23 (Pellet); Jurisdiction Hearing, 13 June 2019, 75:5-9 (Pellet).

Philippines possesses an entitlement to an exclusive economic zone in the relevant area.<sup>648</sup> However, had there been any resulting overlaps of entitlements between China and the Philippines, the arbitral tribunal would have been prevented from assessing the submission.<sup>649</sup> The Russian Federation highlights in this regard the position of the *South China Sea* arbitral tribunal that

the Tribunal could only address this Submission if the respective maritime entitlements of the Parties could be established and if no overlap requiring delimitation were found to exist. [...] The relevant areas can *only* constitute the exclusive economic zone and continental shelf of the Philippines. Accordingly, the Philippines—and not China—possesses sovereign rights with respect to resources in these areas.<sup>650</sup>

369. The Russian Federation argues that, in the present case, the relevant areas cannot only constitute the exclusive economic zone and continental shelf of Ukraine; the Russian Federation does possess entitlements in the Black Sea overlapping with those of Ukraine.<sup>651</sup> The Russian Federation submits that the determination of the Parties' respective rights and obligations would unequivocally involve, as an indispensable prerequisite, the delimitation of their maritime boundaries.<sup>652</sup> In order to determine the content and potential violations of the Parties' respective rights and obligations regarding hydrocarbons and living resources, archaeological and historical objects, as well as freedom of navigation, the Arbitral Tribunal will be required to define and delimit the maritime zones at stake, which is outside the Arbitral Tribunal's jurisdiction as a result of the Parties' declarations under Article 298, paragraph 1, subparagraph (a)(i), of the Convention.<sup>653</sup>

## 2. Position of Ukraine

370. Ukraine contests the Russian Federation's argument that Article 298, paragraph 1, subparagraph (a)(i), of the Convention excludes not only disputes whose immediate subject matter is Articles 15, 74, or 83 of the Convention, but also any dispute having a "bearing on the delimitation" and "all matters connected" with the delimitation process.<sup>654</sup>

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<sup>648</sup> Russian Federation's Preliminary Objections, para. 171.

<sup>649</sup> Russian Federation's Preliminary Objections, para. 171 *citing South China Sea*, cit., n. 34, paras 402, 405, 406 (**Annex UAL-3**).

<sup>650</sup> Russian Federation's Preliminary Objections, para. 172 *citing South China Sea*, cit., n. 210, para. 697 (**Annex UAL-11**) [emphasis added by the Russian Federation]; Jurisdiction Hearing, 10 June 2019, 84:2-14 (Pellet).

<sup>651</sup> Russian Federation's Preliminary Objections, para. 173; Jurisdiction Hearing, 10 June 2019, 84:21-24 (Pellet); Jurisdiction Hearing, 13 June 2019, 75:3-4 (Pellet).

<sup>652</sup> Russian Federation's Preliminary Objections, para. 173.

<sup>653</sup> Russian Federation's Preliminary Objections, paras 174-75; Jurisdiction Hearing, 10 June 2019, 82:9-19 (Pellet), 84:24-85:2 (Pellet).

<sup>654</sup> Ukraine's Written Observations, para. 112.

371. Ukraine argues that, while overlapping entitlements are a precondition for the existence of a delimitation dispute, they are not sufficient to engage the jurisdictional exception in Article 298, paragraph 1, subparagraph (a)(i), of the Convention. Ukraine points out in this regard that the arbitral tribunal in *South China Sea* distinguished “a dispute concerning the existence of an entitlement to maritime zones” from “a dispute concerning the delimitation of those zones in an area where the entitlements of Parties overlap.”<sup>655</sup> Only the latter type of dispute, Ukraine contends, is excluded by Article 298, paragraph 1, subparagraph (a).<sup>656</sup> Ukraine recalls in this respect that, according to the award in *South China Sea*, although delimitation “may entail consideration of a wide variety of potential issues [...] [i]t does not follow [...] that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself.”<sup>657</sup>
372. Ukraine denies that the decision of the *Timor Sea Conciliation* Commission supports the Russian Federation’s “expansive reading” of Article 298, paragraph 1, subparagraph (a)(i), of the Convention.<sup>658</sup> According to Ukraine, the Conciliation Commission only indicated that the phrase “disputes concerning the interpretation or application of articles 15, 74, and 83” covers disputes concerning the interpretation and application of Article 74, paragraph 3, and Article 83, paragraph 3, which provides for the establishment of provisional arrangements of a practical nature pending delimitation.<sup>659</sup> Ukraine maintains that this is consistent with its view that Article 298, paragraph 1, subparagraph (a)(i), applies to disputes that require the interpretation or application of these three articles.<sup>660</sup>
373. Ukraine denies that its interpretation renders the phrase “relating to” in Article 298, paragraph 1, subparagraph (a)(i), of the Convention without effect.<sup>661</sup> Ukraine states that, in its reading, the phrase “relating to” excludes from the exception, *inter alia*, disputes as to whether the preconditions to a delimitation exercise are met.<sup>662</sup>
374. Turning to the present case, Ukraine takes the view that Article 298, paragraph 1, subparagraph (a)(i), of the Convention only applies if the Russian Federation can establish that

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<sup>655</sup> Ukraine’s Written Observations, para. 114.

<sup>656</sup> Ukraine’s Written Observations, para. 114 *citing* *South China Sea*, *cit.*, n. 34, para. 156 (**Annex UAL-3**); *Bay of Bengal*, Judgment, *cit.*, n. 307, p. 105, para. 397 (**Annex UAL-63**); Ukraine’s Rejoinder, para. 109; Jurisdiction Hearing, 11 June 2019, 111:21-24 (Gore); Jurisdiction Hearing, 14 June 2019, 77:6-13 (Zionts).

<sup>657</sup> Ukraine’s Written Observations, para. 114 *citing* *South China Sea*, *cit.*, n. 34, para. 155 (**Annex UAL-3**).

<sup>658</sup> Ukraine’s Rejoinder, para. 113.

<sup>659</sup> Ukraine’s Rejoinder, para. 113.

<sup>660</sup> Ukraine’s Rejoinder, para. 113.

<sup>661</sup> Ukraine’s Rejoinder, para. 114.

<sup>662</sup> Ukraine’s Rejoinder, para. 114.

the Arbitral Tribunal is required to interpret or apply Articles 15, 74, or 83 in connection with the delimitation of overlapping areas of entitlement.<sup>663</sup> Ukraine contends that the Russian Federation has failed to establish that this is the case.<sup>664</sup> Ukraine recalls that it has not asked the Arbitral Tribunal to delimit its territorial sea, exclusive economic zone, or continental shelf pursuant to Articles 15, 74, or 83,<sup>665</sup> nor would the Arbitral Tribunal be required to do so to decide on Ukraine's submissions.<sup>666</sup>

375. Ukraine further argues that the Russian Federation could not have any legal entitlement to most of the areas at issue in this dispute, which lie to the west or immediate south of Crimea and are not within 200 nautical miles of the Caucasus region of the Russian Federation.<sup>667</sup> In fact, according to Ukraine, the existence of overlapping entitlements in these areas is conceivable only if the Russian Federation could claim entitlements extending from the coast of Crimea.<sup>668</sup> Ukraine points out that the Russian Federation's assertion of coastal State entitlements extending from Crimea, in turn, depends on the Russian Federation's view that "it has a claim to Crimea capable of having legal effects at the international level."<sup>669</sup>

### **3. Analysis of the Arbitral Tribunal**

376. Pursuant to Article 298, paragraph 1, subparagraph (a), of the Convention, a State may choose not to accept the procedures provided for in section 2 of Part XV with respect to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations."

377. The Arbitral Tribunal notes that it is common ground between the Parties that the dispute between them is not explicitly a delimitation dispute. Ukraine has not requested the Tribunal to delimit the Parties' maritime areas, and none of Ukraine's submissions refer to Articles 15, 74, or 83 of the Convention.<sup>670</sup> Rather, in the view of the Arbitral Tribunal, the question is whether, in the course of deciding the dispute before it, the Arbitral Tribunal would implicitly have to delimit maritime

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<sup>663</sup> Ukraine's Written Observations, para. 115; Jurisdiction Hearing, 11 June 2019, 109:12-16 (Gore).

<sup>664</sup> Ukraine's Written Observations, para. 115.

<sup>665</sup> Ukraine's Written Observations, para. 116; Jurisdiction Hearing, 11 June 2019, 109:17-21 (Gore).

<sup>666</sup> Jurisdiction Hearing, 11 June 2019, 109:21-22 (Gore).

<sup>667</sup> Ukraine's Written Observations, para. 118.

<sup>668</sup> Ukraine's Written Observations, para. 118.

<sup>669</sup> Jurisdiction Hearing, 11 June 2019, 110:3-21 (Gore).

<sup>670</sup> Ukraine's Written Observations, para. 111; Russian Federation's Reply, para. 131; Jurisdiction Hearing, 10 June 2019, 81:17-18 (Pellet); Jurisdiction Hearing, 11 June 2019, 109:17-21 (Gore).

areas over which the Parties' entitlements overlap; and whether in such event the optional exception from arbitral jurisdiction is triggered.

378. Article 298, paragraph 1, subparagraph (a)(i), of the Convention refers to “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitation.” Articles 15, 74 and 83, in turn, respectively address the delimitation of the territorial sea, the exclusive economic zone, and the continental shelf between States with opposite or adjacent coasts. The Arbitral Tribunal notes that the Parties have extensively engaged with the question of the scope of the delimitation exception under Article 298, paragraph 1, subparagraph (a)(i), of the Convention, in particular how the terms “concerning” and “relating to” should be interpreted in this regard. However, in the Arbitral Tribunal’s view, the interpretation of the terms “concerning” and “relating to” does not necessarily clarify the question whether the optional exception is triggered only by a dispute directly implicating the three enumerated articles and involving a delimitation exercise or, alternatively, also by a dispute that necessarily implies a delimitation, partial or full, of maritime areas, or a finding that a specific location belongs to one or other Party.

379. The Arbitral Tribunal notes that the determination of the existence and extent of maritime entitlements is one of the first matters to be addressed in the delimitation of a maritime boundary. If there exists an area where the entitlements of parties overlap, the question of delimitation arises. On the other hand, if there exists no such area, no question of delimitation ensues.

380. In this regard, the Arbitral Tribunal recalls the statement of ITLOS in the *Bay of Bengal* judgment:

Delimitation presupposes an area of overlapping entitlements. Therefore, the first step in any delimitation is to determine whether there are entitlements and whether they overlap.

While entitlements and delimitation are two distinct concepts addressed respectively in articles 76 and 83 of the Convention, they are interrelated.<sup>671</sup>

381. The Arbitral Tribunal considers that for the purpose of determining the applicability of the delimitation exception under Article 298, paragraph 1, subparagraph (a), of the Convention, one of the key questions is whether there are entitlements and whether there is an area of overlapping maritime entitlements. If such area exists, the question of delimitation inevitably arises and the delimitation exception may be triggered.

382. In the present case, the Arbitral Tribunal has decided that it cannot rule on any claims of Ukraine which would require it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea. The Arbitral Tribunal therefore cannot determine whether there are entitlements of either

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<sup>671</sup> *Bay of Bengal*, cit., n. 307, p. 105, paras 397-98 (**Annex UAL-63**).

Party to the maritime areas around Crimea, let alone whether such entitlements overlap. Such determinations are not within the jurisdiction of the Arbitral Tribunal in any event, and there is accordingly no jurisdiction in relation to which the exception under Article 298, paragraph 1, subparagraph (a), could be established. With respect to Ukraine's claim concerning activities in the Sea of Azov and the Kerch Strait, the Arbitral Tribunal has decided to reserve the Russian Federation's objection to its jurisdiction for consideration and decision in the context of the proceedings on the merits.

383. In light of these decisions, and taking into account the location of the maritime areas Ukraine's claims relate to, the Arbitral Tribunal does not consider that the delimitation exception under Article 298, paragraph 1, subparagraph (a), of the Convention is applicable in the present case and accordingly rejects the objection of the Russian Federation based on this provision.

#### **D. HISTORIC BAYS OR TITLES EXCEPTION**

##### **1. Position of the Russian Federation**

384. Separately, and in addition to its internal waters objection,<sup>672</sup> the Russian Federation submits that this Arbitral Tribunal "cannot exercise jurisdiction over the submissions of Ukraine relating to the Sea of Azov and Kerch Strait" as a consequence of the Parties' declarations upon ratification of the Convention pursuant to Article 298, paragraph 1, subparagraph (a), of the Convention, which exclude disputes "involving historic bays or titles" from binding dispute settlement.<sup>673</sup>

385. In response to Ukraine's argument that the Russian Federation's historic bays or titles objection overlaps completely with its internal waters objection, the Russian Federation argues that even though it may have the same consequences as the internal waters objection, this objection is separate and intended to apply if, *quod non*, the Arbitral Tribunal were to dismiss the internal waters objection. In the Russian Federation's view, there is no reason why a bay that qualifies as a juridical bay (meeting the requirements of the Geneva Convention and UNCLOS) cannot also qualify as "historic" because it has been recognised as including internal waters for a long time without meeting any objections from third States.<sup>674</sup>

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<sup>672</sup> Jurisdiction Hearing, 10 June 2019, 56:3-7 (Treves).

<sup>673</sup> Russian Federation's Preliminary Objections, paras 178-79; Jurisdiction Hearing, 10 June 2019, 90:5-11 (Pellet).

<sup>674</sup> Jurisdiction Hearing, 13 June 2019, 56:3-14 (Treves).

## 2. Position of Ukraine

386. Ukraine rejects the Russian Federation's argument that the Sea of Azov and the Kerch Strait should be considered an historic bay and an area subject to historic title pursuant to Article 298, paragraph 1, subparagraph (a)(i), of the Convention.<sup>675</sup>
387. Ukraine submits that the Russian Federation's historic bays or titles objection overlaps completely with its internal waters objection and must fail because the Sea of Azov and the Kerch Strait do not in fact have the status of internal waters, as a matter of historic title or otherwise.<sup>676</sup> Ukraine submits that the Russian Federation's historical bays or titles objection only differs from its internal waters objection insofar as, to prevail on the former objection, the Russian Federation must prove not only that the Sea of Azov and the Kerch Strait are internal waters, but also that the Sea of Azov and the Kerch Strait are internal waters by virtue of having the status of an historic bay or title.<sup>677</sup>

## 3. Analysis of the Arbitral Tribunal

388. The Arbitral Tribunal considers that the Russian Federation's objection that the Arbitral Tribunal has no jurisdiction over disputes involving historic bays or titles is closely intertwined with the Russian Federation's arguments concerning historical title in support of its internal waters objection. As explained at Chapter V of this Award, in order to assess the Russian Federation's arguments regarding historic bays or titles, the Arbitral Tribunal must ascertain, *inter alia*, whether historic title to the waters in question existed, whether such title continued after 1991, and, if so, what the contents of the regime applicable to such waters has been.
389. The Arbitral Tribunal thus considers that the Russian Federation's objection that the Arbitral Tribunal has no jurisdiction over disputes involving historic bays or titles is interwoven with the merits of the present dispute and does not possess an exclusively preliminary character. The Arbitral Tribunal accordingly decides to reserve the objection for consideration and decision in the context of the proceedings on the merits.

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<sup>675</sup> Ukraine's Written Observations, para. 94; Jurisdiction Hearing, 14 June 2019, 58:14-18 (Soons).

<sup>676</sup> Ukraine's Rejoinder, para. 96; Jurisdiction Hearing, 11 June 2019, 90:10-14 (Soons). *See* paragraphs 266-268 of this Award.

<sup>677</sup> Jurisdiction Hearing, 14 June 2019, 58:5-9 (Soons).

## VII. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER FISHERIES CLAIMS IN LIGHT OF ARTICLE 297(3)(A) OF THE CONVENTION

390. Article 297, paragraph 3, subparagraph (a), of the Convention reads:

Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

### A. POSITION OF THE RUSSIAN FEDERATION

391. The Russian Federation argues that, if the Arbitral Tribunal were to hold that there exists a dispute concerning the interpretation or application of the Convention under Article 288, paragraph 1, of the Convention, it would be faced with the limitation to dispute settlement set out in Article 297, paragraph 3, subparagraph (a).<sup>678</sup>

392. The Russian Federation submits that disputes concerning living resources within 200 nautical miles of the coastline are excluded from the jurisdiction of an arbitral tribunal.<sup>679</sup> According to the Russian Federation, during the negotiations for the Convention, disputes over fisheries were excluded from binding dispute settlement in the interest of reaching agreement among negotiating States.<sup>680</sup> The Russian Federation explains that the arbitral tribunal in *South China Sea* only found that Article 297, paragraph 3, of the Convention posed no obstacle to its jurisdiction because the relevant areas of the South China Sea could only constitute the exclusive economic zone of the Philippines.<sup>681</sup> According to the Russian Federation, “a straightforward answer is not possible in the present case,” because the areas in issue do not constitute the exclusive economic zone of only Ukraine but appertain to the Russian Federation as a coastal State as well.<sup>682</sup>

393. The Russian Federation further submits that a dispute can be said to “relate to” sovereign rights when “there is a connection between the dispute and the existence, scope, or exercise of the sovereign rights in question.”<sup>683</sup> The Russian Federation notes that the present dispute exists

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<sup>678</sup> Russian Federation's Preliminary Objections, para. 180.

<sup>679</sup> Russian Federation's Preliminary Objections, paras 182-83 citing *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (hereinafter “*Southern Bluefin Tuna*”), Award on Jurisdiction and Admissibility of 4 August 2000, RIAA Vol. XXIII, p. 45 at paras 61-62 (**Annex RUL-24**).

<sup>680</sup> Russian Federation's Preliminary Objections, para. 183.

<sup>681</sup> Russian Federation's Preliminary Objections, para. 184.

<sup>682</sup> Russian Federation's Preliminary Objections, para. 185; Russian Federation's Reply, para. 129.

<sup>683</sup> Russian Federation's Preliminary Objections, para. 186.

because the Russian Federation's conception of its sovereign rights conflicts with Ukraine's understanding of its own rights.<sup>684</sup> Therefore, according to the Russian Federation, "[t]he two are intertwined and are excluded from compulsory settlement."<sup>685</sup>

394. In order to support its view, the Russian Federation relies on the award in *Chagos*, in which the arbitral tribunal declined to draw a distinction between:

disputes regarding the sovereign rights of the coastal State with respect to living resources, and disputes regarding the rights of other States in the exclusive economic zone (with only the former excluded from compulsory settlement). In nearly any imaginable situation, a dispute will exist precisely because the coastal State's conception of its sovereign rights conflicts with the other party's understanding of its own rights.<sup>686</sup>

395. The Russian Federation also cites the following observations of the arbitral tribunal in *Barbados v. The Republic of Trinidad and Tobago*:<sup>687</sup>

Taking fishing activity into account in order to determine the course of the boundary is [...] not at all the same thing as considering fishing activity in order to *rule upon the rights and duties of the Parties in relation to fisheries within waters that fall*, as a result of the drawing of that boundary, *into the* [exclusive economic zone] *of one or other Party*. Disputes over such rights and duties *fall outside the jurisdiction of this Tribunal* because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal 'any dispute relating to [the coastal State's] sovereign rights with respect to the living resources in the exclusive economic zone' [...].<sup>688</sup>

396. The Russian Federation notes that the provisions invoked by Ukraine concern the existence and exercise of sovereign rights of the coastal State with respect to the living resources in the exclusive economic zone. In particular, Article 56, paragraph 1, subparagraph (a), provides for the right to explore, exploit, conserve and manage the living resources; Article 58, paragraph 3, stipulates the obligation of other States to have due regard to the rights and duties of the coastal State and to comply with the laws and regulations adopted by the coastal State; Article 61, paragraph 1, concerns the determination of the allowable catch; and Article 62 deals with the harvesting capacity and allocation of surpluses to other States.<sup>689</sup> The Russian Federation points out that all these rights are precisely the rights excluded from compulsory jurisdiction by Article 297, paragraph 3, subparagraph (a), of the Convention.<sup>690</sup>

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<sup>684</sup> Russian Federation's Preliminary Objections, para. 186.

<sup>685</sup> Russian Federation's Preliminary Objections, para. 186.

<sup>686</sup> Russian Federation's Preliminary Objections, para. 186 *citing Chagos*, cit., n. 34, para. 297 (**Annex UAL-18**).

<sup>687</sup> Russian Federation's Preliminary Objections, para. 187.

<sup>688</sup> Russian Federation's Preliminary Objections, para. 187 *citing* PCA Case No. 2004-02: *Barbados v. The Republic of Trinidad and Tobago*, Award of 11 April 2006, RIAA Vol. XXVII, p. 147, at p. 224, para. 276 (**Annex RUL-28**) [emphases added by the Russian Federation].

<sup>689</sup> Russian Federation's Preliminary Objections, para. 190.

<sup>690</sup> Russian Federation's Preliminary Objections, para. 191.

397. The Russian Federation notes that, as to the alleged violation of Articles 73 and 92 of the Convention, Ukraine’s allegations fall “both within the law enforcement exception under Article 298(1)(b), and within Article 297(3)(a) which covers ‘the terms and conditions established [by the coastal State] in its conservation and management laws and regulations’, including the determination of sanctions in cases of non-compliance.”<sup>691</sup> The Russian Federation states that “[t]his notably excludes the [Arbitral] Tribunal’s jurisdiction as regards Russia’s extension of its laws and regulations on fisheries to the maritime areas around Crimea and their enforcement in said zones.”<sup>692</sup> The Russian Federation states that, although Article 297, paragraph 3, of the Convention only excludes the jurisdiction of an arbitral tribunal over claims concerning living resources in the exclusive economic zone, this exclusion should equally apply to claims concerning the territorial sea.<sup>693</sup> In support of this argument, the Russian Federation notes that the Convention reaffirms the sovereignty of the coastal State over its internal waters and the territorial sea, and consequently its absolute right to control fishing therein.<sup>694</sup> In addition, the States Parties to the Convention could not have intended to allow the “complex and balanced fisheries regime” negotiated for the exclusive economic zone to be “undermined from within” by claims to fish in internal waters and the territorial sea.<sup>695</sup> On this basis, the Russian Federation submits that the Arbitral Tribunal lacks jurisdiction to decide on submissions of Ukraine concerning the alleged violation of the Convention as a result of the exercise by the Russian Federation of its sovereign rights with respect to the living resources in the Black Sea.<sup>696</sup>

## **B. POSITION OF UKRAINE**

398. Ukraine submits that the Russian Federation’s objection should be dismissed.<sup>697</sup> Ukraine argues that the plain language of Article 297, paragraph 3, subparagraph (a), of the Convention makes it clear that it only applies with respect to “any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone,” *i.e.*, disputes concerning rights or discretion granted by the Convention to the coastal State within its own coastal zones.<sup>698</sup>

399. Ukraine highlights that the arbitral tribunal in *South China Sea* found that the provision did not affect its jurisdiction over Chinese interference with petroleum exploration, seismic surveys, and

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<sup>691</sup> Russian Federation’s Preliminary Objections, para. 192.

<sup>692</sup> Russian Federation’s Preliminary Objections, para. 192.

<sup>693</sup> Russian Federation’s Preliminary Objections, para. 195.

<sup>694</sup> Russian Federation’s Preliminary Objections, para. 196.

<sup>695</sup> Russian Federation’s Preliminary Objections, para. 196.

<sup>696</sup> Russian Federation’s Preliminary Objections, para. 197.

<sup>697</sup> Ukraine’s Written Observations, para. 102.

<sup>698</sup> Ukraine’s Written Observations, paras 103-04; Jurisdiction Hearing, 11 June 2019, 104:5-12 (Gore).

fishing activities in the Philippines' exclusive economic zone because it only serves to limit an arbitral tribunal's jurisdiction "where a claim is brought against a State's exercise of its sovereign rights in respect of living resources in its *own* exclusive economic zone" and not "where a State is alleged to have violated the Convention in respect of the exclusive economic zone of another State."<sup>699</sup> Ukraine recalls that it claims that the Russian Federation has violated Ukraine's sovereign rights in respect of living resources in Ukraine's exclusive economic zone.<sup>700</sup>

400. Ukraine submits that, to be successful, it is incumbent upon the Russian Federation to show that it is entitled to an exclusive economic zone in the waters in issue.<sup>701</sup> Ukraine asserts that this objection must fail because the Russian Federation's claim that the status of Crimea has been altered is inadmissible and implausible.<sup>702</sup> In Ukraine's view, it is the Russian Federation's obligation to show that its objections are based on any maritime entitlements emanating from its own coastline rather than from the Crimean coastline.<sup>703</sup>

### C. ANALYSIS OF THE ARBITRAL TRIBUNAL

401. The Arbitral Tribunal considers that the limitations on the applicability of section 2 provided for in the above provision apply to "any dispute relating to [...] sovereign rights [of the coastal State] with respect to the living resources in [its] exclusive economic zone or their exercise [...]."

402. As noted by the Arbitral Tribunal in the context of the analysis of the Russian Federation's preliminary objection pursuant to Article 298, paragraph 1, subparagraph (b), second alternative, of the Convention,<sup>704</sup> however, the interference by the Russian Federation with fisheries activities alleged by Ukraine occurred within an area that cannot be determined to constitute the exclusive economic zone of the Russian Federation or Ukraine. In light of such uncertainty, the Arbitral Tribunal considers that the conditions for the application of Article 297, paragraph 3, subparagraph (a), of the Convention have not been met in the present case. The Arbitral Tribunal accordingly rejects the Russian Federation's objection based on that provision.

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<sup>699</sup> Ukraine's Written Observations, para. 105 *citing South China Sea*, cit., n. 210, para. 695 (**Annex UAL-11**).

<sup>700</sup> Ukraine's Written Observations, para. 105.

<sup>701</sup> Ukraine's Written Observations, para. 102; Jurisdiction Hearing, 11 June 2019, 110:13-19 (Gore).

<sup>702</sup> Ukraine's Written Observations, paras 102, 108.

<sup>703</sup> Ukraine's Written Observations, para. 109.

<sup>704</sup> See paragraphs 353-357 of this Award.

**VIII. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER FISHERIES, PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT, AND NAVIGATION IN LIGHT OF ANNEX VIII**

403. The Russian Federation contends that the present Arbitral Tribunal, constituted under Annex VII to the Convention, lacks jurisdiction over Ukraine's claims concerning fisheries, protection and preservation of the marine environment, and navigation on the ground that such claims are to be addressed by an Annex VIII special arbitral tribunal. The Russian Federation refers in this regard to the Parties' declarations made in accordance with Article 287 of the Convention.

404. The declaration made by the USSR upon signature of the Convention on 10 December 1982 reads:

The Union of Soviet Socialist Republics declares that, under article 287 of the United Nations Convention on the Law of the Sea, it chooses an arbitral tribunal constituted in accordance with Annex VII as the basic means for the settlement of disputes concerning the interpretation or application of the Convention. It opts for a special arbitral tribunal constituted in accordance with Annex VIII for the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping. It recognizes the competence of the International Tribunal for the Law of the Sea, as provided for in article 292, in matters relating to the prompt release of detained vessels and crews.<sup>705</sup>

As noted above, the Russian Federation, which regards itself as the continuator State of the USSR, did not make any declaration pursuant to Article 287 of the Convention upon ratification of the Convention.

405. The declaration made by the Ukrainian Soviet Socialist Republic upon signature of the Convention on 10 December 1982 reads:

The Ukrainian Soviet Socialist Republic declares that, in accordance with article 287 of the United Nations Convention on the Law of the Sea, it chooses as the principal means for the settlement of disputes concerning the interpretation or application of this Convention an arbitral tribunal constituted in accordance with Annex VII. For the consideration of questions relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping, the Ukrainian SSR chooses a special arbitral tribunal constituted in accordance with Annex VIII. The Ukrainian SSR recognizes the competence, as stipulated in article 292, of the International Tribunal for the Law of the Sea in respect of questions relating to the prompt release of detained vessels or their crews.<sup>706</sup>

406. The declaration made by Ukraine upon ratification of the Convention on 26 July 1999 reads:

Ukraine declares that, in accordance with article 287 of the United Nations Convention on the Law of the Sea of 1982, it chooses as the principal means for the settlement of disputes concerning the interpretation or application of this Convention an arbitral tribunal constituted

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<sup>705</sup> Declaration by the USSR upon Signature of UNCLOS, 10 December 1982 in Law of the Sea Bulletin, Vol. 5, p. 23 (1985) (**Annex RU-11**).

<sup>706</sup> Declaration by the USSR upon Signature of UNCLOS, 10 December 1982 in Law of the Sea Bulletin, Vol. 5, p. 23 (1985) (**Annex RU-11**).

in accordance with Annex VII. For the consideration of disputes concerning the interpretation or application of the Convention in respect of questions relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping, Ukraine chooses a special arbitral tribunal constituted in accordance with Annex VIII.<sup>707</sup>

407. Ukraine contests the Russian Federation’s argument that Ukraine’s claims regarding fisheries, protection and preservation of the marine environment, and navigation are outside the jurisdiction of the Arbitral Tribunal. Ukraine submits that the Arbitral Tribunal has competence to hear the present dispute in its entirety.

#### **A. POSITION OF THE RUSSIAN FEDERATION**

408. The Russian Federation submits that even if the Arbitral Tribunal were to find that the present dispute concerned the interpretation or application of the Convention, and that its jurisdiction was not precluded pursuant to Articles 298, paragraph 1, of the Convention and not limited under Article 297, paragraph 3, subparagraph (a), the Arbitral Tribunal nonetheless could not rule on Ukraine’s claims related to fisheries, protection and preservation of the marine environment, or navigation since such claims belong to the jurisdictional domain of Annex VIII special arbitral tribunals.<sup>708</sup> Specifically, the Russian Federation argues that this Arbitral Tribunal has no jurisdiction over the dispute insofar as Ukraine’s submissions (f), (g), (m), (n), (o), and (p) are concerned.<sup>709</sup> The Russian Federation points out that this objection is additional and complementary to its other objections.<sup>710</sup>

409. The Russian Federation considers that Article 287 of the Convention presents States Parties with a “menu” of dispute settlement options.<sup>711</sup> Under Article 287, paragraph 4, if the States Parties have accepted the same procedure for the settlement of disputes, a dispute may only be submitted to that agreed procedure unless otherwise agreed by the parties to the dispute.<sup>712</sup>

410. The Russian Federation notes that the Parties have both chosen as the “basic” or “principal” means for the settlement of disputes concerning the interpretation or application of the Convention an Annex VII arbitral tribunal; however, they have also both opted for a special arbitral tribunal constituted in accordance with Annex VIII to the Convention for the consideration of specific

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<sup>707</sup> Declaration by Ukraine upon Ratification of UNCLOS, 26 July 1999 in Multilateral Treaties Deposited with the Secretary-General, Ch. XXI, No. 6, p. 32 (**Annex UA-8**).

<sup>708</sup> Russian Federation’s Preliminary Objections, para. 198; Russian Federation’s Reply, para. 150.

<sup>709</sup> Jurisdiction Hearing, 10 June 2019, 97:17-98:1 (Pellet).

<sup>710</sup> Jurisdiction Hearing, 10 June 2019, 63:24-64:4 (Pellet).

<sup>711</sup> Russian Federation’s Preliminary Objections, para. 206.

<sup>712</sup> Russian Federation’s Preliminary Objections, para. 206; *see also* Jurisdiction Hearing, 10 June 2019, 96:17-97:5 (Pellet).

categories of disputes.<sup>713</sup> The Russian Federation further notes that “no order of preference has explicitly been given by either [the Russian Federation] or Ukraine.”<sup>714</sup> In the Russian Federation’s view, “[t]he general procedure provided for in Annex VII will apply only to disputes that do not fall under the jurisdiction of Annex VIII tribunals.”<sup>715</sup> The Russian Federation maintains that the use of the Annex VIII procedure for disputes concerning the four categories enumerated in Annex VIII, Article 1, of the Convention is a condition that forms an integral part of the Russian Federation’s expressed consent to arbitration.<sup>716</sup>

411. The Russian Federation submits that the Parties’ declarations pursuant to Article 287 of the Convention do not limit the jurisdiction of an Annex VIII special arbitral tribunal.<sup>717</sup> While the Russian Federation recognises that Ukraine’s declaration under Article 287 upon ratification of the Convention does not track the language of Article 1 of Annex VIII but uses the additional phrase “in respect of questions,” which is not found in the text of Article 1, it argues that this phrase does not make the scope of Ukraine’s declaration more restrictive than the wording of Article 1 of Annex VIII.<sup>718</sup> On the contrary, according to the Russian Federation, the term “questions” is broader than the notion of “dispute” and includes issues on which States Parties have not yet formulated opposing positions, and which therefore do not rise to the level of a “dispute.”<sup>719</sup>
412. With respect to its own declaration under Article 287 of the Convention, the Russian Federation recalls the statement made by the delegate of the USSR at the Third United Nations Conference on the Law of the Sea that “[t]he nature of the procedure [...] should be determined by the nature of the dispute.”<sup>720</sup> In the Russian Federation’s view, it is clear from its choice that “what matters is the nature of the dispute, and that ‘the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping’ is reserved for Annex VIII arbitration.”<sup>721</sup>
413. Turning to the negotiating history of the Convention, the Russian Federation also recalls that several delegations at the Third United Nations Conference on Law of the Sea shared the view that disputes of widely differing range and character as may arise under the Convention could not

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<sup>713</sup> Russian Federation’s Preliminary Objections, para. 203.

<sup>714</sup> Russian Federation’s Preliminary Objections, para. 205.

<sup>715</sup> Russian Federation’s Preliminary Objections, para. 205.

<sup>716</sup> Jurisdiction Hearing, 10 June 2019, 93:4-7 (Pellet).

<sup>717</sup> Russian Federation’s Reply, para. 155.

<sup>718</sup> Russian Federation’s Reply, para. 156.

<sup>719</sup> Russian Federation’s Reply, para. 156.

<sup>720</sup> Russian Federation’s Reply, para. 159.

<sup>721</sup> Russian Federation’s Reply, para. 160.

all be accommodated satisfactorily by a single mode of dispute settlement.<sup>722</sup> Such delegations considered recourse to qualified experts to be most effective for disputes involving technical matters such as fisheries, marine pollution, scientific research, and navigation.<sup>723</sup>

414. The Russian Federation submits that the doctrine of *lex specialis* dictates that precedence be given to special arbitral tribunals constituted in accordance with Annex VIII to the Convention over the general jurisdiction conferred upon Annex VII arbitral tribunals.<sup>724</sup> In addition, the Russian Federation contends that the special expertise that can be provided by an Annex VIII special arbitral tribunal may be relevant or required to address, for example, the alleged adverse impact of the construction of the bridge in the Kerch Strait on the marine environment and to rule on Ukraine's claims with regard to the Russian Federation's exploitation of living resources and the alleged impact of the construction of the bridge on navigation in the Kerch Strait.<sup>725</sup>
415. The Russian Federation denies that Annex VIII special arbitration is an "exceptional" method of dispute resolution with a strictly limited role.<sup>726</sup> The Russian Federation also rejects Ukraine's distinction between "limited categories of disputes" and "complex and multi-faceted disputes," stating that an Annex VIII special arbitral tribunal may decide only matters that the Parties have specifically agreed to refer to it.<sup>727</sup> The Russian Federation submits that difficulties with respect to fitting a particular dispute within a particular category should not result in the vitiation of the Parties' consent to the jurisdiction of an Annex VIII special arbitral tribunal and in depriving the provisions of Annex VIII of any effect.<sup>728</sup>
416. According to the Russian Federation, the Convention necessitates the "dissect[ion]" of issues and the "categorisation of different kinds of dispute[s]" in order to determine the proper mode of dispute settlement.<sup>729</sup> The Russian Federation argues that the drafters of the Convention were aware of the practical disadvantages that could result from the fragmentation of disputes caused by the use of the special procedures in Annex VIII, but nevertheless included Annex VIII in the Convention.<sup>730</sup>

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<sup>722</sup> Russian Federation's Preliminary Objections, para. 207.

<sup>723</sup> Russian Federation's Preliminary Objections, para. 207.

<sup>724</sup> Russian Federation's Preliminary Objections, para. 211 *citing Mavrommatis Palestine Concessions*, cit., n. 294, p. 32 (**Annex RUL-2**); Jurisdiction Hearing, 10 June 2019, 96:10-96:16 (Pellet).

<sup>725</sup> Russian Federation's Preliminary Objections, para. 212.

<sup>726</sup> Russian Federation's Reply, para. 152; Jurisdiction Hearing, 10 June 2019, 97:6-14 (Pellet).

<sup>727</sup> Russian Federation's Reply, para. 151.

<sup>728</sup> Russian Federation's Reply, para. 153.

<sup>729</sup> Russian Federation's Reply, para. 153.

<sup>730</sup> Jurisdiction Hearing, 10 June 2019, 94:14-95:10 (Pellet).

417. In any event, the Russian Federation notes that in the present case the only issue closely interlinked with Ukraine's claims related to fisheries, protection and conservation of the marine environment, and navigation is the Parties' sovereignty dispute, which the Russian Federation considers is outside the jurisdiction of any arbitral mechanism.<sup>731</sup>
418. The Russian Federation rejects Ukraine's argument that this objection should be dismissed because it was raised only after the Russian Federation had already participated in the constitution of this Arbitral Tribunal under Annex VII to the Convention.<sup>732</sup> According to the Russian Federation, it is the essence of preliminary objections that they are to be raised after the constitution of the Arbitral Tribunal which is to rule on them.<sup>733</sup>
419. The Russian Federation denies that it has waived recourse to Annex VIII to the Convention in the context of the Parties' August 2016 meeting because, as Ukraine concedes, the Russian Federation had not agreed to submission of any dispute to any form of third-party dispute settlement and instead proposed negotiation at the time.<sup>734</sup>

## **B. POSITION OF UKRAINE**

420. Ukraine denies that the present dispute falls within the competence of an Annex VIII special arbitral tribunal. In Ukraine's view, it should be heard in its totality by an Annex VII arbitral tribunal.<sup>735</sup>
421. Ukraine argues that in accordance with the ordinary meaning of the terms of Article 287 and Annex VIII, Article 1, of the Convention, Annex VIII special arbitral tribunals only have jurisdiction over disputes that fall entirely within one or more of four enumerated categories, namely, (a) fisheries, (b) the marine environment, (c) marine scientific research, or (d) navigation. Conversely, Annex VIII special arbitral tribunals are not competent to hear disputes that extend beyond these categories.<sup>736</sup> According to Ukraine, Annex VII arbitral tribunals have jurisdiction over disputes concerning any part of the Convention, including multi-faceted disputes implicating multiple parts of the Convention.<sup>737</sup>

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<sup>731</sup> Russian Federation's Reply, para. 162.

<sup>732</sup> Jurisdiction Hearing, 13 June 2019, 81:5-18 (Usoskin).

<sup>733</sup> Jurisdiction Hearing, 10 June 2019, 93:17-94:13 (Pellet); Jurisdiction Hearing, 13 June 2019, 81:19-82:2 (Usoskin).

<sup>734</sup> Jurisdiction Hearing, 13 June 2019, 82:24-83:12 (Usoskin).

<sup>735</sup> Ukraine's Written Observations, paras 164, 181.

<sup>736</sup> Ukraine's Written Observations, paras 165-66.

<sup>737</sup> Ukraine's Written Observations, para. 167.

422. Ukraine underlines that Annex VII arbitration is the default method of dispute settlement in Part XV of the Convention, and the Parties in their respective declarations have selected it as the “principal” or “basic” means for the resolution of all but a limited set of disputes under the Convention.<sup>738</sup> Ukraine contends that, while Annex VIII special arbitral tribunals are selected for their special expertise, Annex VII arbitral tribunals are selected for their expertise in all areas of maritime affairs.<sup>739</sup> Ukraine notes that Annex VIII, Article 2, directs the four named organisations to maintain separate lists of experts relating to each of the categories of disputes enumerated in Annex VIII, and Annex VIII, Article 3, permits each party to an Annex VIII dispute to appoint two members of the special arbitral tribunal preferably from these lists of experts.<sup>740</sup> Ukraine highlights that Annex VIII, however, provides no direction regarding the expertise of arbitrators for disputes implicating issues that lie outside the categories enumerated in Annex VIII.<sup>741</sup> Therefore, in Ukraine’s view, the Convention did not intend that Annex VIII special arbitral tribunals would handle disputes extending beyond the four categories enumerated in Annex VIII.<sup>742</sup>
423. Ukraine submits that the *travaux préparatoires* of the Convention support its argument that Annex VIII to the Convention was adopted by negotiating States on the basis that it was optional and strictly limited to four discrete categories of disputes where technical expertise was expected to be particularly relevant.<sup>743</sup> Notwithstanding the USSR’s comments at the Third United Nations Conference on Law of the Sea, Ukraine suggests that the Russian Federation’s acceptance of Annex VII arbitration as the “basic means” for the settlement of disputes under the Convention and its subsequent practice reflect the view that Annex VIII is a mechanism for the resolution of disputes primarily concerning technical and scientific issues.<sup>744</sup>
424. Further, Ukraine refers to academic commentary on the Convention that confirms that Annex VIII special arbitration cannot be invoked in connection with disputes that are not strictly confined to the issues specified in Annex VIII to the Convention.<sup>745</sup>
425. Ukraine further submits that, even if Annex VIII to the Convention were to be read as broadly as the Russian Federation suggests, Ukraine did not consent in its declaration under Article 287 to

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<sup>738</sup> Ukraine’s Rejoinder, para. 161.

<sup>739</sup> Ukraine’s Written Observations, para. 168.

<sup>740</sup> Ukraine’s Written Observations, para. 168.

<sup>741</sup> Ukraine’s Written Observations, para. 168.

<sup>742</sup> Ukraine’s Written Observations, para. 168.

<sup>743</sup> Ukraine’s Written Observations, para. 169.

<sup>744</sup> Ukraine’s Rejoinder, para. 164.

<sup>745</sup> Ukraine’s Rejoinder, para. 157.

the resolution of complex and multi-faceted disputes through Annex VIII proceedings.<sup>746</sup> Ukraine notes that, in its declarations, it selected Annex VII arbitration as the “principal” method of dispute resolution and consented to Annex VIII proceedings only for “disputes concerning the interpretation or application of the Convention in respect of questions relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation.”<sup>747</sup> Ukraine submits that Annex VIII jurisdiction is an exception to Ukraine’s general selection of Annex VII arbitration and that its declarations must be interpreted in accordance with the principle *exceptio est strictissimae applicationis*.<sup>748</sup>

426. Ukraine argues that, unlike the text of Annex VIII to the Convention, “Ukraine’s declaration requires a link between the ‘dispute’ [...] and ‘questions relating to’ one of the four enumerated categories.”<sup>749</sup> In Ukraine’s view, a complex dispute that raises overarching questions, and which is not narrowly focused on fisheries, the environment, marine scientific research, and navigation, cannot fairly be characterised as being a dispute “in respect of questions relating to” those subjects.<sup>750</sup>
427. Ukraine notes that under Article 287, paragraph 4, of the Convention, when assessing the scope of an arbitral tribunal’s jurisdiction, the more restrictive of the parties’ jurisdictional declarations will prevail.<sup>751</sup> Thus, since Ukraine’s declaration is more restrictive than the Russian Federation’s, Ukraine contends that the Arbitral Tribunal need only interpret Ukraine’s Article 287 declaration.<sup>752</sup>
428. Ukraine argues that all claims to which the Russian Federation has objected on the ground that they fall within the jurisdiction of an Annex VIII special arbitral tribunal are factually and legally intertwined with Ukraine’s broader case<sup>753</sup> and cannot be artificially separated from it.<sup>754</sup> Ukraine considers that it has presented a “single, integrated dispute” that touches upon a wide array of legal rights, only some of which intersect with the categories enumerated in Annex VIII.<sup>755</sup>

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<sup>746</sup> Ukraine’s Written Observations, para. 170; Ukraine’s Rejoinder, para. 162.

<sup>747</sup> Ukraine’s Written Observations, para. 171.

<sup>748</sup> Ukraine’s Written Observations, para. 172.

<sup>749</sup> Ukraine’s Written Observations, para. 173.

<sup>750</sup> Ukraine’s Written Observations, para. 173.

<sup>751</sup> Ukraine’s Written Observations, para. 174.

<sup>752</sup> Ukraine’s Written Observations, para. 174.

<sup>753</sup> Ukraine’s Written Observations, para. 177; Ukraine’s Rejoinder, para. 153.

<sup>754</sup> Ukraine’s Written Observations, paras 177-78.

<sup>755</sup> Ukraine’s Written Observations, para. 176; Jurisdiction Hearing, 11 June 2019, 132:19-21(Gimblett), 136:6-9 (Gimblett).

429. By way of example, Ukraine notes that its submissions (f) and (g) require a determination of whether the Russian Federation has violated Ukraine's rights in the territorial sea and exclusive economic zone under Articles 2 and 56 of the Convention.<sup>756</sup> This inquiry, according to Ukraine, has implications well beyond the subjects enumerated in Annex VIII.<sup>757</sup> Ukraine argues that its submissions (m), (n), (o), and (p) also call for non-technical, legal determinations that flow directly from the Arbitral Tribunal's assessment of the overall course of conduct by the Russian Federation described in Ukraine's Memorial.<sup>758</sup> Ukraine submits that any attempt to segregate the above six submissions from the remainder of this dispute would violate the boundary of its consent to the jurisdiction of an Annex VIII special arbitral tribunal.<sup>759</sup>
430. Ukraine maintains that the purpose of Part XV of the Convention is the "fair and efficient resolution of disputes."<sup>760</sup> For Ukraine, segregating the submissions identified by the Russian Federation from the larger context of this case and submitting them to one or more Annex VIII special arbitral tribunals, while a separate Annex VII arbitral tribunal addresses the rest of the dispute, would be "inefficient and expensive" and would pose a significant risk of an Annex VIII special arbitral tribunal ruling on matters outside its competence.<sup>761</sup> Such a segregation could also result in "unjust or inconsistent decisions" in cases such as this one that, in Ukraine's view, requires a holistic approach.<sup>762</sup> Ukraine submits that it cannot be presumed to have consented to forfeiting the possibility of submitting one integrated dispute under the Convention to a competent arbitral tribunal.<sup>763</sup>
431. Moreover, Ukraine maintains that its submissions do not present technical questions and therefore would not benefit from the specialised, non-legal considerations of an Annex VIII special arbitral tribunal.<sup>764</sup>
432. Ukraine asserts that, if the Russian Federation believed that this dispute or parts of it were better suited for an Annex VIII special arbitral tribunal, Article 283 of the Convention requires the Russian Federation to have expressed such a view at the Parties' meeting in August 2016,<sup>765</sup> upon

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<sup>756</sup> Ukraine's Written Observations, para. 177; Jurisdiction Hearing, 11 June 2019, 135:7-19 (Gimblett).

<sup>757</sup> Ukraine's Written Observations, para. 177; Jurisdiction Hearing, 11 June 2019, 135:20-136:5 (Gimblett).

<sup>758</sup> Ukraine's Written Observations, para. 177.

<sup>759</sup> Ukraine's Written Observations, para. 178.

<sup>760</sup> Ukraine's Written Observations, para. 179; Jurisdiction Hearing, 11 June 2019, 134:9-12 (Gimblett).

<sup>761</sup> Ukraine's Written Observations, para. 179; Ukraine's Rejoinder, para. 151; Jurisdiction Hearing, 11 June 2019, 132:21-25 (Gimblett).

<sup>762</sup> Ukraine's Written Observations, para. 179; Ukraine's Rejoinder, para. 149; Jurisdiction Hearing, 11 June 2019, 134:16-19 (Gimblett).

<sup>763</sup> Jurisdiction Hearing, 14 June 2019, 83:19-25 (Zionts).

<sup>764</sup> Ukraine's Written Observations, para. 180.

<sup>765</sup> Jurisdiction Hearing, 11 June 2019, 131:8-17 (Gimblett).

receipt of the Notification and Statement of Claim in September 2016, or during its participation in the process of constituting this Arbitral Tribunal in December 2016.<sup>766</sup> However, according to Ukraine, it did not do that.<sup>767</sup> Ukraine submits that the Russian Federation, by its conduct, has agreed to Annex VII arbitration rather than Annex VIII special arbitration.<sup>768</sup>

### C. ANALYSIS OF THE ARBITRAL TRIBUNAL

433. Pursuant to Article 287, paragraph 1, of the Convention, a State shall be free to choose, for the settlement of disputes concerning the interpretation or application of the Convention, “a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.”

434. Annex VIII, Article 1, of the Convention provides, in relevant part:

[...] any party to a dispute concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping, may submit the dispute to the special arbitral procedure provided for in this Annex.

435. The Arbitral Tribunal first considers that this preliminary objection has been brought by the Russian Federation in a timely fashion and in accordance with Article 10, paragraph 2, of the Rules of Procedure. In the Arbitral Tribunal’s view, a respondent State cannot be expected to raise an objection prior to the institution of proceedings against it, as it is only with the application, or in the case of an Annex VII arbitral tribunal, the notification pursuant to Annex VII, Article 1, of the Convention that the subject matter of the proceedings is circumscribed and a procedure for the settlement of the dispute selected.

436. Article 287, paragraph 1, of the Convention, read together with Annex VIII, Article 1, indicates that the jurisdiction of an Annex VIII special arbitral tribunal is confined to one or more of the four categories enumerated in Annex VIII, Article 1 (hereinafter the “Four Categories”), of the Convention.

437. This is also apparent from the context of Annex VIII, Article 1, of the Convention. Annex VIII, Article 2, paragraph 1, stipulates that “[a] list of experts shall be established and maintained in respect of each of the fields of [the Four Categories].” Paragraph 2 provides that the lists of experts for each of the Four Categories are to be drawn up and maintained by four specialised international

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<sup>766</sup> Jurisdiction Hearing, 14 June 2019, 82:13-24 (Zionts).

<sup>767</sup> Jurisdiction Hearing, 11 June 2019, 131:17 (Gimblett).

<sup>768</sup> Jurisdiction Hearing, 11 June 2019, 132:6-16 (Gimblett).

organisations, each of which is recognised as a repository of expertise in its field. Moreover, paragraph 3 spells out that “[e]very State Party shall be entitled to nominate two experts in each field whose competence [...] is established and generally recognized and who enjoy the highest reputation for fairness and integrity.” These provisions support the view that experts to be appointed to an Annex VIII special arbitral tribunal were not intended to adjudicate matters going beyond or falling outside their particular area of expertise.

438. The Parties’ declarations pursuant to Article 287 of the Convention likewise indicate an intention to limit the jurisdiction of an Annex VIII special arbitral tribunal to matters or questions that exclusively relate to the Four Categories. The Arbitral Tribunal notes, in particular, that the declaration made by Ukraine upon ratification of the Convention requires a link between “disputes concerning the interpretation or application of the Convention” and “questions relating to” one of the Four Categories. The Arbitral Tribunal, therefore, considers that Ukraine’s declaration would not cover a dispute implicating aspects of the Convention that lie beyond the Four Categories.
439. The Arbitral Tribunal notes that the Parties are in agreement that Annex VIII special arbitral tribunals may only hear limited categories of disputes.<sup>769</sup> The Arbitral Tribunal further notes that there is no disagreement between the Parties that the present dispute encompasses wide-ranging issues and is by no means limited to the Four Categories.<sup>770</sup> The key question for the Arbitral Tribunal to address is whether it may exercise jurisdiction over that dispute as a whole (to the extent that none of the Russian Federation’s other objections have been upheld), or whether it must decline to deal with aspects of that dispute that may fall within the Four Categories and leave them to be pursued separately before one or more Annex VIII special arbitral tribunals.
440. The Arbitral Tribunal observes that the dispute before it concerns the maritime rights and obligations of the Parties in the Black Sea, Sea of Azov, and the Kerch Strait. The dispute has many facets, as is evidenced by the claims made by Ukraine in the Notification and Statement of Claim and the Memorial. Ukraine has made allegations regarding *inter alia* Ukraine’s exclusion from access to and use of its fisheries by the Russian Federation,<sup>771</sup> impediments to navigation introduced by the Russian Federation in the Kerch Strait,<sup>772</sup> and the Russian Federation’s failure to cooperate regarding the protection and preservation of the marine environment.<sup>773</sup>

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<sup>769</sup> Russian Federation’s Reply, paras 150-51; Ukraine’s Rejoinder, para. 147.

<sup>770</sup> Russian Federation’s Preliminary Objections, paras 213-14 (specifying only some of Ukraine’s submissions as relating to the Four Categories); Ukraine’s Written Observations, para. 175.

<sup>771</sup> Notification and Statement of Claim, para. 50 (c) and (d); Ukraine’s Memorial, para. 265 (f) and (g).

<sup>772</sup> Notification and Statement of Claim, para. 50 (f) and (g); Ukraine’s Memorial, para. 265 (m) and (n).

<sup>773</sup> Notification and Statement of Claim, para. 50 (i); Ukraine’s Memorial, para. 265 (o) and (p).

441. The Arbitral Tribunal does not consider each of Ukraine's submissions made in the Notification and Statement of Claim and the Memorial to constitute a distinct and separate dispute, but rather to be part of a single, unified dispute that Ukraine has brought before this Arbitral Tribunal. All aspects of Ukraine's case are, as it were, manifestations of a broader disagreement between the Parties, rather than isolated occurrences that happen to be submitted to arbitration in the same instrument. The fact that the Arbitral Tribunal has decided, above, that it does not have jurisdiction over certain aspects of that dispute does not mean that the remaining aspects should be considered in a piecemeal fashion.
442. Accordingly, in the Arbitral Tribunal's view, it is not possible in the present case to isolate from the broader dispute before it those elements that fall exclusively within the jurisdiction of one or more Annex VIII special arbitral tribunals. Nor would it be in the interest of justice for this Arbitral Tribunal to decline jurisdiction over certain aspects of the dispute before it, as requested by the Russian Federation. The fragmentation of the dispute before the Arbitral Tribunal would risk there being inconsistent outcomes from the various arbitral tribunals that are seised of different aspects of the same dispute. It would also increase the costs and time spent on litigation by the Parties.
443. Having found that the dispute before it cannot and should not be split or fragmented, the Arbitral Tribunal rejects the Russian Federation's objection that it has no jurisdiction over the dispute relating to fisheries, protection and preservation of the marine environment, and navigation in light of Annex VIII to the Convention.

#### **IX. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION PURSUANT TO ARTICLE 281 OF THE CONVENTION**

444. Article 281, paragraph 1, of the Convention provides:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

445. The Russian Federation submits that the Arbitral Tribunal lacks jurisdiction with respect to the greater part of Ukraine's claims as a result of Article 281 of the Convention.<sup>774</sup>

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<sup>774</sup> Russian Federation's Preliminary Objections, para. 215.

446. According to the Russian Federation, the relevant agreement of the Parties is contained in the State Border Treaty and the Azov/Kerch Cooperation Treaty.<sup>775</sup>

447. Article 5 of the State Border Treaty provides:

Settlement of questions relating to the adjacent sea areas shall be effected by agreement between the Contracting Parties in accordance with international law.

448. Article 1 of the Azov/Kerch Cooperation Treaty provides:

Settlement of questions relating to the Kerch Strait area shall be effected by agreement between the Parties.

449. For its part, Ukraine submits that Article 281 of the Convention is not relevant to the present dispute and the Russian Federation's objection therefore should be rejected.<sup>776</sup>

#### **A. POSITION OF THE RUSSIAN FEDERATION**

450. The Russian Federation submits that, "[e]ven leaving to one side all the other objections that [the Russian Federation] has raised, the [Arbitral] Tribunal would still lack jurisdiction with respect to the greater part of Ukraine's claims as a result of Article 281" of the Convention.<sup>777</sup> Specifically, it objects to the jurisdiction of the Arbitral Tribunal over "any claims relating to the Sea of Azov, the Kerch Strait or any other adjacent sea areas in the Black Sea or any activities or events in these areas."<sup>778</sup>

451. The Russian Federation maintains that Article 281 of the Convention "imposes conditions to, and limitations on, the jurisdiction of Annex VII tribunals where parties have agreed to resolve disputes by recourse to other means of peaceful dispute settlement."<sup>779</sup> In the present case, according to the Russian Federation, the relevant agreements between the Parties are contained in Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty.<sup>780</sup>

452. The Russian Federation contends that the agreement reflected in the above provisions "defines very broadly the scope of 'questions' that shall be settled by agreement of the Parties," covering disputes relating to Sea of Azov and adjacent sea areas of the Black Sea and questions relating to the Kerch Strait.<sup>781</sup> These provisions, according to the Russian Federation, encompass any

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<sup>775</sup> Russian Federation's Preliminary Objections, para. 217.

<sup>776</sup> Ukraine's Rejoinder, para. 127.

<sup>777</sup> Russian Federation's Preliminary Objections, paras 215-16, 220; Russian Federation's Reply, para. 163.

<sup>778</sup> Russian Federation's Preliminary Objections, para. 264.

<sup>779</sup> Russian Federation's Preliminary Objections, para. 219.

<sup>780</sup> Russian Federation's Preliminary Objections, para. 219.

<sup>781</sup> Russian Federation's Preliminary Objections, para. 225.

dispute concerning, for example, navigation or exploitation of living and non-living resources in the Sea of Azov and Kerch Strait, including any disputes that could have fallen under the Convention were it to be applicable.<sup>782</sup> In particular, the Russian Federation points out that neither the State Border Treaty nor the Azov/Kerch Cooperation Treaty “restrict[s] the scope of questions they encompass to questions under the specific treaty.”<sup>783</sup>

453. The Russian Federation contends that “though both provisions refer to ‘questions’ rather than ‘disputes’, the term used is broader than and encompasses disputes.”<sup>784</sup> The Russian Federation considers that, in Russian and in English, the term “questions” encompasses “not only matters that have already given rise to a ‘dispute’—a disagreement between the parties—but other matters where the parties have not yet formulated opposing positions so as to constitute a dispute, but which they may need to resolve.”<sup>785</sup> In support of this assertion, the Russian Federation points out that Ukraine’s declaration upon its signature of the Convention refers to an Annex VIII special arbitral tribunal for the “*consideration of questions*”—not disputes—“relating to fisheries protection and preservation of the marine environment, marine scientific research and navigation.”<sup>786</sup> Referring to several titles of contentious cases before the ICJ, the Russian Federation notes that the term “questions” is used to refer to “disputes.”<sup>787</sup>
454. The Russian Federation states that the context of negotiations of the State Border Treaty and Azov/Kerch Cooperation Treaty concerning the status of, and border delimitation in, the Sea of Azov and Kerch Strait, goes against Ukraine’s case. If the Parties had wanted to limit the scope of Article 5 of the State Border Treaty and Article 1 of the Azov-Kerch Cooperation Treaty, the Russian Federation argues, they would have referred to “border” or “status” in those provisions. Instead, the provisions refer more broadly to “questions.”<sup>788</sup>
455. The Russian Federation rejects Ukraine’s argument that the provisions relied on by the Russian Federation contain an agreement to negotiate future treaties with respect to their adjacent sea areas and the Kerch Strait.<sup>789</sup> In particular, the Russian Federation denies that the use of the Ukrainian term “угода” (“*ugoda*”) for “agreement” in the relevant provisions implies that Article 5 of the

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<sup>782</sup> Russian Federation’s Preliminary Objections, para. 225.

<sup>783</sup> Russian Federation’s Preliminary Objections, para. 226.

<sup>784</sup> Russian Federation’s Preliminary Objections, para. 227.

<sup>785</sup> Russian Federation’s Preliminary Objections, para. 227; Russian Federation’s Reply, para. 167; Jurisdiction Hearing, 10 June 2019, 139:14-21 (Usoskin).

<sup>786</sup> Russian Federation’s Reply, para. 167 *citing* Declaration by the USSR upon Signature of UNCLOS, 10 December 1982 in Law of the Sea Bulletin, Vol. 5, p. 23 (1985) (**Annex RU-11**) [emphasis added by the Russian Federation].

<sup>787</sup> Jurisdiction Hearing, 10 June 2019, 140:9-20 (Usoskin).

<sup>788</sup> Jurisdiction Hearing, 13 June 2019, 88:2-11 (Usoskin).

<sup>789</sup> Russian Federation’s Reply, paras 165-66.

State Border Treaty is limited to the conclusion of international treaties.<sup>790</sup> The Russian Federation states that “угода” (“*ugoda*”) properly translates into “agreement,” not “treaty,”<sup>791</sup> and that the “agreement” contemplated in Article 5 would be the result of negotiations that the Parties would undertake to resolve a question.<sup>792</sup> The Russian Federation argues that if the Parties had intended the term “agreement” to cover only future maritime boundary agreements, they would have said so.<sup>793</sup>

456. The Russian Federation asserts that the existence of a separate dispute resolution clause in Article 4 of the Azov/Kerch Cooperation Treaty does not mean that Article 1 of that treaty cannot contain any rules on dispute settlement.<sup>794</sup> In this regard, the Russian Federation considers that Article 4 applies to “disputes only and only to disputes concerning the Azov/Kerch Cooperation Treaty” and not the broader category of “questions” referred to in Article 1.<sup>795</sup> Further, the Russian Federation notes that there is no contradiction between the two provisions because Article 4 provides for the “settlement of disputes by ‘negotiations’ and other means of dispute settlement chosen by the Parties—the same means encompassed by the provision of Article 1.”<sup>796</sup>
457. In response to Ukraine’s argument that the provisions in the State Border Treaty and the Azov/Kerch Cooperation Treaty fail to specify any alternate procedure that would apply in place of Part XV, the Russian Federation argues that “consent to settle disputes ‘by agreement’ necessarily requires settlement of disputes by negotiations.”<sup>797</sup> In the Russian Federation’s view, “[w]here a dispute between States is to be resolved by agreement the natural consequence is that the States should engage in negotiations to resolve the dispute.”<sup>798</sup>
458. The Russian Federation also contends that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty cover disputes concerning the interpretation or application of the Convention.<sup>799</sup> In response to Ukraine’s argument that the State Border Treaty and the Azov/Kerch Cooperation Treaty do not trigger Article 281 of the Convention because they do not specifically refer to the resolution of disputes under the Convention, the Russian Federation notes

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<sup>790</sup> Russian Federation’s Reply, para. 168; Jurisdiction Hearing, 10 June 2019, 141:15-142:2 (Usoskin).

<sup>791</sup> Jurisdiction Hearing, 10 June 2019, 142:3-14 (Usoskin).

<sup>792</sup> Russian Federation’s Reply, para. 168.

<sup>793</sup> Jurisdiction Hearing, 10 June 2019, 141:4-14 (Usoskin).

<sup>794</sup> Russian Federation’s Reply, para. 169.

<sup>795</sup> Russian Federation’s Reply, para. 169.

<sup>796</sup> Russian Federation’s Reply, para. 169.

<sup>797</sup> Russian Federation’s Reply, para. 175.

<sup>798</sup> Russian Federation’s Preliminary Objections, para. 229; Jurisdiction Hearing, 10 June 2019, 135:5-14 (Usoskin).

<sup>799</sup> Russian Federation’s Reply, para. 171.

that Article 281 does not require any such express reference to be made,<sup>800</sup> and that requiring such a reference would be contrary to the intentions of the States Parties to the Convention.<sup>801</sup> The Russian Federation submits that ITLOS and the arbitral tribunals in *The MOX Plant Case (Ireland v. United Kingdom)* and *Southern Bluefin Tuna (Australia and New Zealand v. Japan)* (hereinafter “*Southern Bluefin Tuna*”) considered only whether the respective disputes under the Convention fell within the scope of the dispute settlement clauses in the applicable treaties, not whether those clauses contained express references to disputes under the Convention.<sup>802</sup>

459. The Russian Federation notes that Article 281 provides that recourse to Part XV of the Convention is possible if “the agreement between the parties does not exclude any further procedure.”<sup>803</sup> However, the agreement between the parties does not need “expressly” to exclude such recourse.<sup>804</sup> Rather, the Russian Federation points out, “the intention of the States should be established by interpreting the provisions of relevant treaty or treaties.”<sup>805</sup>
460. According to the Russian Federation, the agreement in the State Border Treaty and the Azov/Kerch Cooperation Treaty reflects the Parties’ intention to exclude recourse to further procedures.<sup>806</sup> The Russian Federation argues that the exclusion in the present case is even clearer than that in *Southern Bluefin Tuna* because the treaties in question in the present dispute require any dispute to be settled by agreement—they do not even contemplate the submission of disputes to third-party dispute settlement.<sup>807</sup> The Russian Federation distinguishes *South China Sea*, where the arbitral tribunal found that a reference to dispute settlement by negotiations in a non-binding agreement was insufficient to exclude compulsory dispute settlement under Part XV of the Convention,<sup>808</sup> from the present case, in which the intention to exclude recourse to compulsory dispute resolution is contained in a binding agreement.<sup>809</sup>

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<sup>800</sup> Russian Federation’s Preliminary Objections, para. 253; Russian Federation’s Reply, para. 171; Jurisdiction Hearing, 10 June 2019, 142:15-22 (Usoskin).

<sup>801</sup> Russian Federation’s Preliminary Objections, para. 262; Jurisdiction Hearing, 10 June 2019, 142:23-143:2 (Usoskin).

<sup>802</sup> Russian Federation’s Reply, para. 172 referring to *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 106, paras 48-52 (**Annex UAL-17**); *Southern Bluefin Tuna*, cit., n. 679, paras 53-54. (**Annex RUL-24**); Jurisdiction Hearing, 10 June 2019, 143:10-16 (Usoskin).

<sup>803</sup> Russian Federation’s Preliminary Objections, para. 253.

<sup>804</sup> Russian Federation’s Preliminary Objections, para. 253.

<sup>805</sup> Russian Federation’s Preliminary Objections, para. 253.

<sup>806</sup> Russian Federation’s Preliminary Objections, para. 255.

<sup>807</sup> Jurisdiction Hearing, 10 June 2019, 146:10-14 (Usoskin); Russian Federation’s Preliminary Objections, para. 256.

<sup>808</sup> Russian Federation’s Preliminary Objections, para. 259.

<sup>809</sup> Russian Federation’s Preliminary Objections, para. 259.

461. The Russian Federation argues that Ukraine has failed to engage in genuine negotiations to settle the dispute.<sup>810</sup> The Russian Federation acknowledges that Ukraine has protested against the actions of the Russian Federation by *notes verbales* and statements in international *fora*.<sup>811</sup> However, the Russian Federation contends that Ukraine at no point solicited the Russian Federation's views or sought to engage it in negotiations concerning the respective maritime areas.<sup>812</sup> The Russian Federation points out that the evidence presented by Ukraine in support of the contention that it sought to resolve the dispute with the Russian Federation only concerns the Russian Federation's actions "in connection with the unification of Crimea with Russia" and does not relate to the Convention.<sup>813</sup>
462. The Russian Federation further argues that Ukraine's *notes verbales* rely on Ukraine's alleged sovereign rights as the coastal State in Crimea and its submissions "were made in completely generic terms making it impossible for [the Russian Federation] to investigate and respond to these allegations."<sup>814</sup> The Russian Federation notes that it had proposed a meeting to discuss with Ukraine the "protection of the marine environment" and "utilization of bioresources" and other law of the sea issues, and that proposing such a meeting was a reasonable response from a State facing "abstract allegations."<sup>815</sup>
463. The Russian Federation argues that, at the meeting on 11 August 2016, it was prepared to discuss and address Ukraine's concerns relating to the Sea of Azov, the Kerch Strait, and the Black Sea and that "it was Ukraine that terminated the meeting and refused to continue the discussions further,"<sup>816</sup> which "does not evidence that Ukraine engaged in good faith negotiations."<sup>817</sup> The Russian Federation denies that it failed to articulate a position during the meeting on "whether or not a dispute exists."<sup>818</sup> The Russian Federation explains that it said that the information provided

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<sup>810</sup> Russian Federation's Preliminary Objections, para. 233; Russian Federation's Reply, para. 176.

<sup>811</sup> Russian Federation's Preliminary Objections, para. 233.

<sup>812</sup> Russian Federation's Preliminary Objections, paras 232-33; Jurisdiction Hearing, 10 June 2019, 136:3-9 (Usoskin).

<sup>813</sup> Russian Federation's Preliminary Objections, paras 234-36; Jurisdiction Hearing, 10 June 2019, 136:11-16 (Usoskin).

<sup>814</sup> Russian Federation's Preliminary Objections, paras 237-40 *citing Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-518, 10 March 2015 (**Annex UA-9**); *Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-2276, 9 October 2015 (**Annex UA-10**); Jurisdiction Hearing, 10 June 2019, 136:17-137:8 (Usoskin).

<sup>815</sup> Russian Federation's Preliminary Objections, para. 241; Jurisdiction Hearing, 10 June 2019, 137:9-12 (Usoskin).

<sup>816</sup> Russian Federation's Preliminary Objections, para. 244.

<sup>817</sup> Russian Federation's Preliminary Objections, paras 242-43; Jurisdiction Hearing, 10 June 2019, 137:12-20 (Usoskin).

<sup>818</sup> Russian Federation's Preliminary Objections, para. 243.

by Ukraine would require “thorough analysis” before the Russian Federation could formulate a view on whether a dispute existed and whether such a dispute fell under the Convention.<sup>819</sup>

## **B. POSITION OF UKRAINE**

464. Ukraine argues that the Russian Federation’s objection under Article 281 of the Convention, based on the Azov/Kerch Cooperation Treaty and the State Border Treaty, is directed to only a limited portion of Ukraine’s claims.<sup>820</sup> While the Russian Federation has not identified what portion of the Black Sea it considers to be “adjacent sea areas,”<sup>821</sup> Ukraine submits that “in the context of the State Border Treaty (in which the term appears) ‘adjacent’ can only mean adjacent to the State border codified in the treaty.”<sup>822</sup> In this regard, Ukraine contends that its claims related to bodies of water in the Black Sea lying to the south and west of Crimea are not adjacent to any State border established in the State Border Treaty, and therefore are not implicated by the Russian Federation’s Article 281 objection.<sup>823</sup>
465. Ukraine submits that Article 281 of the Convention gives effect to alternative dispute resolution procedures only if States Parties have agreed to settle UNCLOS disputes through means other than those set out in Part XV of the Convention.<sup>824</sup> According to Ukraine, the State Border Treaty and the Azov/Kerch Cooperation Treaty do not reflect such an agreement between the Parties—the treaties do not purport to “disrupt the operation of [...] Part XV of [the Convention],” nor do they impose a separate negotiation procedure that would serve as a pre-condition to UNCLOS dispute settlement.<sup>825</sup>
466. Ukraine maintains that the State Border Treaty and the Azov/Kerch Cooperation Treaty should be read in line with the context in which they were concluded, which was to narrow the Parties’ differences regarding the Sea of Azov and Kerch Strait.<sup>826</sup> According to Ukraine, Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty are not dispute resolution

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<sup>819</sup> Russian Federation’s Preliminary Objections, para. 243 *citing* Consultations Between Ukraine and Russia on the Interpretation and Application of UNCLOS in Minsk, Belarus, p. 30 (11 July 2016) (**Annex UA-14**).

<sup>820</sup> Ukraine’s Written Observations, para. 144.

<sup>821</sup> See paragraph 450 of the Award.

<sup>822</sup> Ukraine’s Written Observations, para. 144.

<sup>823</sup> Ukraine’s Written Observations, para. 144.

<sup>824</sup> Ukraine’s Written Observations, para. 147.

<sup>825</sup> Ukraine’s Written Observations, paras 148, 151.

<sup>826</sup> Ukraine’s Rejoinder, paras 132-33; Jurisdiction Hearing, 11 June 2019, 121:7-22 (Gimblett), 125:17-23 (Gimblett), 126:17-22 (Gimblett).

procedures, but reflect the Parties' agreement to negotiate further treaties pertaining to the "adjacent sea areas" and the Kerch Strait.<sup>827</sup>

467. Ukraine argues that Article 5 of the State Border Treaty does not refer to disputes or dispute resolution procedures and was merely intended to indicate that the Parties had not agreed on maritime boundaries and that the questions relating to these boundaries were to be the subject of a subsequent agreement.<sup>828</sup> Ukraine argues that it is unlikely that the State Border Treaty would provide for the resolution of maritime disputes that are outside the substantive scope of the treaty (as the Russian Federation suggests), while not making equivalent provision for the resolution of land boundary disputes.<sup>829</sup>
468. Similarly, Ukraine denies that Article 1 of the Azov/Kerch Cooperation Treaty is a dispute resolution provision relating to the Kerch Strait.<sup>830</sup> It notes that the dispute resolution procedure in the Azov/Kerch Cooperation Treaty is set out in Article 4, which addresses "disputes" as opposed to "questions."<sup>831</sup> For Ukraine, Article 4 would have been unnecessary if Article 1 were indeed a dispute resolution provision, as the Russian Federation claims.<sup>832</sup> Ukraine submits that the Russian Federation's reading of Article 1 as being a more all-encompassing dispute resolution provision than Article 4 deprives Article 4 of its legal effect.<sup>833</sup> Moreover, if Article 1 were indeed a dispute resolution provision, Ukraine questions why the Parties referred specifically to "disputes" in Article 4, but to "questions" in Article 1.<sup>834</sup>
469. Ukraine contests the Russian Federation's argument that the term "вопросы" ("questions"), found in the Azov/Kerch Cooperation Treaty and State Border Treaty, according to its ordinary meaning in Russian, includes disputes.<sup>835</sup> Ukraine argues that, in its context, the term refers to the conclusion of a future agreement between the Parties.<sup>836</sup> For Ukraine, the conclusion of such future agreement would be, using the definition relied upon by the Russian Federation, the "situation [...] to be examined" or the "task [...] to be completed."<sup>837</sup> For this reason, Ukraine

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<sup>827</sup> Ukraine's Written Observations, para. 148; Jurisdiction Hearing, 11 June 2019, 120:22-25 (Gimblett), 123:15-21 (Gimblett).

<sup>828</sup> Ukraine's Written Observations, para. 149; Ukraine's Rejoinder, para. 129; Jurisdiction Hearing, 11 June 2019, 121:7-22 (Gimblett).

<sup>829</sup> Jurisdiction Hearing, 11 June 2019, 124:17-22 (Gimblett).

<sup>830</sup> Ukraine's Written Observations, para. 150; Jurisdiction Hearing, 11 June 2019, 125:9-17 (Gimblett).

<sup>831</sup> Ukraine's Written Observations, para. 152.

<sup>832</sup> Ukraine's Written Observations, para. 152; Jurisdiction Hearing, 11 June 2019, 125:24-126:11 (Gimblett).

<sup>833</sup> Ukraine's Rejoinder, para. 133.

<sup>834</sup> Ukraine's Rejoinder, para. 133; Jurisdiction Hearing, 11 June 2019, 126:11-16 (Gimblett).

<sup>835</sup> Ukraine's Written Observations, para. 152.

<sup>836</sup> Ukraine's Written Observations, para. 152.

<sup>837</sup> Ukraine's Written Observations, para. 152; Ukraine's Rejoinder, para. 134.

submits that the ordinary meaning of the word “question,” in the Ukrainian and Russian texts, does not encompass the concept of disputes.<sup>838</sup>

470. Ukraine argues that the equally authentic Ukrainian text of Article 1 of the Azov/Kerch Cooperation Treaty, employing the specific Ukrainian word for “treaty,” demonstrates that the Parties contemplated a future treaty rather than dispute settlement by negotiations.<sup>839</sup> Ukraine rejects the Russian Federation’s argument that the word “угода” means any kind of agreement.<sup>840</sup> In any event, even if “угода” meant “agreement,” Article 1 would be concerned with future agreements and would not be converted into a dispute resolution provision.<sup>841</sup>
471. Even assuming that Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty were dispute resolution provisions, Ukraine submits that these provisions would not have the effect of depriving the Arbitral Tribunal of jurisdiction.<sup>842</sup> Ukraine argues that Article 281 of the Convention is only engaged by dispute resolution clauses that “extend to the resolution of UNCLOS disputes” and that “specify a particular procedure to be followed in addition to, or in lieu of, [...] Part XV [of the Convention].”<sup>843</sup> Ukraine notes that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty make no reference to disputes under the Convention but rather refer to “‘questions’ relating to large, imprecisely-defined maritime areas,” nor do they clearly specify an alternative procedure that would apply in place of Part XV of the Convention.<sup>844</sup>
472. Ukraine points to several authorities that suggest that, to engage Article 281 of the Convention, a dispute resolution clause must prescribe alternative dispute resolution mechanisms.<sup>845</sup> In Ukraine’s view, Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty do not meet this threshold, making only “bare references” to a future agreement.<sup>846</sup> Ukraine argues that the arbitral tribunal in *Southern Bluefin Tuna* found that Part XV of the Convention was excluded because the relevant treaty in that case permitted mandatory dispute resolution only by agreement of the parties and stated that, in the absence of such agreement, parties should continue to seek to resolve their dispute using the means set out in that treaty.<sup>847</sup>

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<sup>838</sup> Ukraine’s Rejoinder, para. 130.

<sup>839</sup> Ukraine’s Written Observations, para. 153.

<sup>840</sup> Ukraine’s Rejoinder, para. 131.

<sup>841</sup> Ukraine’s Rejoinder, para. 131.

<sup>842</sup> Ukraine’s Written Observations, paras 155, 159-60.

<sup>843</sup> Ukraine’s Written Observations, paras 155-56; Ukraine’s Rejoinder, para. 136.

<sup>844</sup> Ukraine’s Written Observations, paras 156-57.

<sup>845</sup> Ukraine’s Rejoinder, para. 140.

<sup>846</sup> Ukraine’s Rejoinder, para. 140.

<sup>847</sup> Ukraine’s Rejoinder, para. 141.

Ukraine notes that the Azov/Kerch Cooperation Treaty and the State Border Treaty contain no comparable language.<sup>848</sup>

473. In addition, in Ukraine's view, the exclusion of Part XV dispute resolution procedures must be express.<sup>849</sup> Ukraine argues that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty lack the specificity to "exclude [...] further procedure" within the meaning of Article 281 of the Convention.<sup>850</sup>
474. Finally, Ukraine objects to the Russian Federation's characterisation of the negotiations between the Parties that took place before the commencement of this Arbitration.<sup>851</sup> According to Ukraine, it sought in good faith to negotiate with the Russian Federation and resolve the dispute, but that the Russian Federation "failed to provide a meaningful reply to" and "consistently ignored" Ukraine's concerns.<sup>852</sup> Ukraine notes that the Parties did exchange views regarding the settlement of the present dispute, but were unable to reach a common view on the procedure to be followed.<sup>853</sup>

### C. ANALYSIS OF THE ARBITRAL TRIBUNAL

475. The question the Arbitral Tribunal needs to address is whether its jurisdiction over those claims relating to the Sea of Azov, Kerch Strait, or any adjacent sea areas, is excluded by the two treaties in light of Article 281 of the Convention. The Arbitral Tribunal notes in this regard that the Parties hold different views as to: whether Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty represent an agreement by the Parties "to seek settlement of the dispute by a peaceful means of their own choice," within the meaning of Article 281 of the Convention; whether Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty cover disputes concerning the interpretation or application of the Convention and exclude recourse to any further procedure; and whether the Parties have engaged in good faith negotiations to settle the disputes.
476. The Arbitral Tribunal first turns to the question whether Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty constitute dispute settlement clauses within the meaning of Article 281 of the Convention.

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<sup>848</sup> Ukraine's Rejoinder, para. 141.

<sup>849</sup> Ukraine's Rejoinder, para. 136.

<sup>850</sup> Ukraine's Written Observations, para. 158.

<sup>851</sup> Ukraine's Written Observations, para. 162; Ukraine's Rejoinder, para. 143.

<sup>852</sup> Ukraine's Written Observations, para. 162; Ukraine's Rejoinder, para. 144.

<sup>853</sup> Jurisdiction Hearing, 11 June 2019, 130:13-22 (Gimblett).

477. The Arbitral Tribunal observes that both Parties, basing themselves on the Ukrainian and Russian language versions, respectively, have translated Article 5 of the State Border Treaty into English as “[s]ettlement of questions relating to the adjacent sea areas shall be effected by *agreement* between the Contracting Parties in accordance with international law.”<sup>854</sup>
478. On the other hand, the Parties have provided slightly different English translations of Article 1 of the Azov/Kerch Cooperation Treaty. According to the Russian Federation, this provision states that the “[s]ettlement of questions relating to the Kerch Strait area shall be effected by *agreement* between the parties.”<sup>855</sup> According to Ukraine, Article 1 of the Azov/Kerch Cooperation Treaty provides that “[i]ssues concerning the water area of the Kerch Strait shall be resolved by *agreement* between the Parties.”<sup>856</sup>
479. The Arbitral Tribunal notes that the terms “questions” or “issues” in English, in accordance with their ordinary meaning, are not necessarily synonyms of the term “disputes.” The notions of “questions” or “issues” refer, more generally, to open points of discussion regarding which there may or may not exist different views, whereas the notion of “disputes” is more specific and refers to a difference of views regarding a particular question or issue in which one or more persons or entities with opposing views on particular questions are engaged with one another. Should the Parties have intended Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty to apply to “disputes” between them, they would have used that term, as they have done in Article 4 of the Azov/Kerch Cooperation Treaty.<sup>857</sup>
480. Turning to the term “agreement,” the Tribunal notes that the Parties have presented different views as to the precise import of the terms in the Azov/Kerch Cooperation Treaty and State Border Treaty translated as “agreement.” While the Russian Federation has emphasised that the terms in the original languages may denote an agreement in the general sense of a common understanding reached, Ukraine has stressed that they may refer to a treaty in the specific sense of a formalised

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<sup>854</sup> Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done at Kiev on 28 January 2003 (without Annexes), Art. 5 (**Annex RU-19**) [emphasis added by the Arbitral Tribunal]; Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done at Kiev on 28 January 2003 (**Annex UA-529**) [emphasis added by the Arbitral Tribunal].

<sup>855</sup> Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003, Art. 1 (**Annex RU-20**) [emphasis added by the Arbitral Tribunal].

<sup>856</sup> Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003, Art. 1 (**Annex UA-19**) [emphasis added by the Arbitral Tribunal].

<sup>857</sup> See Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003, Art. 4 (**Annex RU-20**); Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003, Art. 4 (**Annex UA-19**).

international agreement. Although the Parties have focused their arguments on the term “угода” in the Ukrainian version, in the Arbitral Tribunal’s view, comparable considerations apply to the corresponding term “соглашение” in the Russian version.

481. As far as the Arbitral Tribunal can judge, the terms of Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty are, from a linguistic point of view, capable of sustaining both interpretations proposed by the Parties that questions/issues shall be settled by mutual agreement or through the conclusion of a treaty. In the view of the Arbitral Tribunal, however, there is no need for it to take any definitive view as to the meaning of “угода”/“соглашение” here.
482. The Arbitral Tribunal considers that the notions of “agreement” in the general sense or “treaty” in the sense of a binding instrument under international law are possible “outcomes” of negotiations or any other means of dispute settlement, such as mediation or conciliation. By contrast, dispute settlement provisions would be expected to refer to a “method” or “means” of dispute settlement. Consistently with this distinction, neither the reaching of agreement nor the conclusion of treaties is identified as a means of dispute settlement in Article 33, paragraph 1, of the Charter of the United Nations, whereas “negotiation” is specifically listed in that provision (as are mediation and conciliation).
483. Given that agreement or the conclusion of treaties cannot be regarded as a means of dispute settlement, the Arbitral Tribunal is not convinced by the argument that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty were meant to be dispute settlement clauses. In this regard, the Arbitral Tribunal draws attention to Article 4 of the Azov/Kerch Cooperation Treaty, which the Parties agree is a dispute settlement clause.<sup>858</sup> The Russian Federation translates Article 4 as follows:

Disputes between the Parties related to the interpretation and implementation of this Treaty shall be settled through consultations and negotiations, as well as other peaceful means as may be selected by the Parties.<sup>859</sup>

484. Ukraine’s translation is broadly in line with that of the Russian Federation:

Disputes between the Parties associated with the interpretation and application of this Treaty shall be resolved by means of consultations and negotiations, as well as other amicable means as may be selected by the Parties.<sup>860</sup>

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<sup>858</sup> Russian Federation’s Reply, para. 169; Ukraine’s Rejoinder, para. 133.

<sup>859</sup> Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003, Art. 4 (**Annex RU-20**).

<sup>860</sup> Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003, Art. 4 (**Annex UA-19**).

485. The text of this provision, employing the terms “disputes” and “consultations and negotiations,” stands in stark contrast with those of Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty. Indeed, had the Parties intended Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty to be dispute settlement clauses, they would have employed the clear terms such as “disputes” or “negotiations” in the relevant provisions, as they have done in Article 4 of the Azov/Kerch Cooperation Treaty.<sup>861</sup>
486. In the view of the Arbitral Tribunal, the fact that Article 1 of the Azov/Kerch Cooperation Treaty is not a dispute settlement clause is also supported by the context of the provision. The existence of a dispute resolution clause in Article 4 suggests that Article 1 of the Azov/Kerch Cooperation Treaty was not intended by the Parties also to be a dispute resolution clause. Reading Article 1 as a dispute resolution provision would deprive Article 4 of the Azov/Kerch Cooperation Treaty of any meaningful legal effect.
487. Further, the negotiating history of the conclusion of the Azov/Kerch Cooperation Treaty and the State Border Treaty does not support the view that Article 1 and Article 5, respectively, of those treaties are dispute settlement clauses. The record before the Arbitral Tribunal suggests that, since Ukraine’s independence, the Parties have been engaged in a long-standing discussion regarding the treatment of the Sea of Azov, the Kerch Strait and adjacent waters, and the activities within those waters.<sup>862</sup> The Parties held a number of meetings to discuss the content and language of

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<sup>861</sup> Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done at Kerch on 24 December 2003, Art. 4 (**Annex RU-20**); Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait done at Kerch on 24 December 2003, Art. 4 (**Annex UA-19**).

<sup>862</sup> 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 (**Annex RU-15**).

agreements that concern the Sea of Azov and the Kerch Strait, both before<sup>863</sup> and after<sup>864</sup> the conclusion of the two treaties. Against this backdrop, the Arbitral Tribunal considers that the Parties, through Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty, sought to stipulate that a similar approach, of discussion and agreement on outstanding issues relating to the Sea of Azov, the Kerch Strait, and adjacent waters, would be taken by them in the future.

488. In the Arbitral Tribunal's view, to regard Article 1 of the Azov/Kerch Cooperation Treaty and Article 5 of the State Border Treaty as agreements to continue discussions in respect of future issues is consistent with 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, issued on 24 December 2003 (the same date as that of the Azov/Kerch Cooperation Treaty), to the effect that:

[...] Ukrainian-Russian cooperation, including their common activity in the sphere of navigation, including its regulation and navigation and hydrographical provision, fishing, protection of the maritime environment, environmental safety, search and rescue operations

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<sup>863</sup> 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, 14 August 1996 (**Annex UA-517**); Minutes of the 2nd Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997 (**Annex RU-17**); 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 (**Annex UA-520**); Minutes of the 4th 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, 23 September 1998, p. 1 (**Annex UA-521**); Minutes of the 5th 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, 26 March 1999, p. 2 (**Annex UA-522**); Minutes of the 6th 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, 28 January 2000 (**Annex RU-63**); Minutes of the 7th 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, 12 May 2000 (**Annex 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 (**Annex RU-67**); 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 (**Annex RU-73**); Minutes of the 15th Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of Delimitation (the Position of the Ukrainian Side) and Determination of Legal Status (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait, 16-17 December 2002, pp. 1-2, 16-17 (**Annex UA-514**).

<sup>864</sup> Minutes of the 17th Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait, 29-30 January 2004 (**Annex UA-531**); Minutes of a Meeting of the Working Group on the Issues of Environmental Protection in the Framework of the 18th Round of the Ukrainian-Russian Negotiations on the Issues of Determination of the Legal Status of the Azov Sea and the Kerch Strait, 25-26 March 2004 (**Annex UA-532**); Minutes of the 5th Meeting of the Sub-Commission on the Issues of the Azov-Kerch Settlement of the Sub-Committee for International Cooperation of the Ukrainian-Russian Interstate Commission and the Thirty-Sixth Meeting of the Delegation of Ukraine on Delimitation of the Azov and Black Seas, as well as the Kerch Strait, and the Delegation of the Russian Federation on Delimitation of the Azov and Black Seas, as well as Settlement of Issues Related to the Kerch Strait, 2-3 March 2011 (**Annex UA-533**).

in the Sea of Azov and the Strait of Kerch are guaranteed by *the implementation of existing agreements and the signing of new agreements in the relevant cases*.<sup>865</sup>

489. The Arbitral Tribunal accordingly considers that Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty do not constitute dispute settlement clauses. In light of this finding, it is not necessary for the Arbitral Tribunal, in assessing whether its jurisdiction is excluded pursuant to Article 281 of the Convention, to examine the further questions of whether Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty cover disputes concerning the interpretation or application of the Convention and exclude recourse to dispute settlement under Part XV of the Convention or whether the Parties in good faith pursued negotiations.
490. For the sake of completeness, the Arbitral Tribunal would merely add that its jurisdiction is not excluded by the dispute resolution provision in Article 4 of the Azov/Kerch Cooperation Treaty. The scope of Article 4 is limited to disputes that arise under the Azov/Kerch Cooperation Treaty. In any event, Article 4 states that any dispute associated with the interpretation and application of the Azov/Kerch Cooperation Treaty may be settled by “any other peaceful/amicable means as may be selected by the Parties” and, therefore, does not preclude the settlement of a dispute concerning the Azov/Kerch Cooperation Treaty by different means, such as arbitration pursuant to Annex VII to the Convention.
491. For these reasons, the Arbitral Tribunal rejects the Russian Federation’s objection that it has no jurisdiction pursuant to Article 281 of the Convention.

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<sup>865</sup> Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch on 24 December 2003 in Law of the Sea Bulletin, Vol. 54 p. 131 (2004) (**Annex UA-530**) [emphasis added by the Arbitral Tribunal].

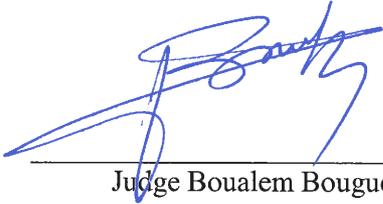
## X. DISPOSITIF

492. For these reasons, 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 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;
- c) *Rejects* the other objections of the Russian Federation to its jurisdiction;
- 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;
- e) *Decides* that each Party shall bear its own costs.

**Done at the Peace Palace, The Hague, the Netherlands, this twenty-first day of February,  
two thousand and twenty:**

For the Arbitral Tribunal:



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Judge Boualem Bouguetaia



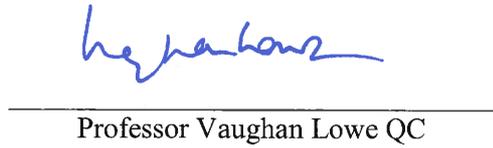
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Judge Alonso Gómez-Robledo



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Judge Vladimir Golitsyn



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Professor Vaughan Lowe QC



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Judge Jin-Hyun Paik  
President

For the Registry:



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Dr. Dirk Pulkowski  
Senior Legal Counsel