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

22 April 2026

ARBITRAL TRIBUNAL:

Judge Jin-Hyun Paik (President)
Judge Boualem Bouguetaia
Judge Alonso Gómez-Robledo
Professor Alexander Vylegzhanin
Professor Vaughan Lowe KC

REGISTRY:

Permanent Court of Arbitration

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GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

1957 UN Memorandum	Secretariat of the UN, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, in Official Records of the UN Conference on the Law of the Sea, Vol. I (Preparatory Documents), 30 September 1957
1958 Geneva Convention	Convention on the Territorial Sea and the Contiguous Zone, done in Geneva on 29 April 1958
1960 Statute	Statute on the Protection of the State Border of the Union of Soviet Socialist Republics adopted 5 August 1960
1992 Fisheries Agreement	Agreement between the Government of Ukraine and Government of the Russian Federation on Cooperation in the Fisheries Sector dated 24 September 1992
AIS	Automatic Identification System
Award Concerning Preliminary Objections	Award Concerning the Preliminary Objections of the Russian Federation dated 21 February 2020
Azov/Kerch Cooperation Treaty	Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done in Kerch on 24 December 2003
Chicago Convention	Convention on International Civil Aviation, done in Chicago on 7 December 1944
CMAS	*Conféderation mondiale des activités subaquatiques* (World Underwater Federation)
Convention *or* UNCLOS	UN Convention on the Law of the Sea, done in Montego Bay on 10 December 1982
Counter-Memorial	Counter-Memorial of the Russian Federation dated 14 October 2022
Crimean CNG	Republic of Crimea State Unitary Enterprise Chornomornaftogas
Declaration No. 4450	Declaration containing the decree of the USSR Council of Ministers dated 15 January 1985 approving a list of geographical coordinates defining the position of baselines for measuring the breadth of the territorial sea, the exclusive economic zone and the continental shelf of the USSR off the continental coast and islands of the Arctic Ocean and the Baltic and Black seas
DPR	Donetsk People's Republic
EIA	Environmental Impact Assessment
EM Reports	Quarterly Environmental Monitoring Reports on the Kerch Strait bridge's impact on the environment drafted by the Institute of Ecology
EM Summaries	Brief Summaries of the EM Reports compiled by the Taman Highways Administration

Explanatory Report to the Valletta Convention	Council of Europe, Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised), ETS No. 143, 16 January 1992
Federal Law No. 73-FZ	Federal Law No. 73-FZ "On Cultural Heritage Objects (Historical and Cultural Monuments) of the Peoples of the Russian Federation" dated 25 June 2002
Federal Law No. 221-FZ	Federal Law No. 221-FZ "On Aspects of the Regulation of Certain Legal Relations Arising in Connection with the Construction and Upgrading of Transport Infrastructure Facilities of Federal and Regional Significance Designed to Provide Transport Links between the Taman and Kerch Peninsulas and Utility Infrastructure Facilities of Federal and Regional Significance on the Taman and Kerch Peninsulas, and on Amendments to Certain Legislative Acts of the Russian Federation" dated 1 July 2015
Friendly Relations Declaration	UN General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations dated 24 October 1970
Glavgosekspertiza	Russian Federal Agency tasked with reviewing and approving design documentation for construction projects
Hearing	Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility held from 23 September to 5 October 2024
Hearing on Preliminary Objections	Hearing on the Russian Federation's Preliminary Objections held from 10 to 14 June 2019
IA RAS	Institute of Archaeology of the Russian Academy of Sciences
ICJ	International Court of Justice
ICOMOS	International Council on Monuments and Sites
ILC	International Law Commission
ILC Articles on State Responsibility	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts
IMO	International Maritime Organization
Institute of Ecology	Institute of Land-Use Ecology LLC
ITLOS	International Tribunal for the Law of the Sea
JDRs	Jack-up Drilling Rigs
Joint Statement of 24 December 2003	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
MAC	Maximum Allowable Concentrations
Memorial	Memorial of Ukraine dated 19 February 2018

Manila Declaration	UN General Assembly Resolution 37/10, Manila Declaration on the Peaceful Settlement of International Disputes dated 15 November 1982
NATO	North Atlantic Treaty Organization
Notification and Statement of Claim	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
PCA *or* Registry	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Rejoinder	Rejoinder of the Russian Federation dated 8 December 2023
Reply	Reply of Ukraine dated 24 March 2023
Revised Memorial	Revised Memorial of Ukraine dated 20 May 2021
Rosneft	Rosneft Oil Company OJSC
Rosprirodnadzor	Russian Federal Service for Supervision of Natural Resource Use
RUC	Russian-Ukrainian Commission on Fisheries in the Sea of Azov (*see also* "URC")
Rules of Procedure	Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal dated 18 May 2017
Russian Federation's Preliminary Objections	Preliminary Objections of the Russian Federation dated 19 May 2018
Russian Federation's Reply on Jurisdiction	Reply to the Written Observations and Submissions of Ukraine on Jurisdiction dated 28 January 2019
SEER	State Environmental Expert Review
SFRY	Socialist Federal Republic of Yugoslavia
Soviet Union *or* USSR	Union of Soviet Socialist Republics
Soyuzmorniiproekt	[Russian] Design, Survey, and Research Institute of Sea Transport "Soyuzmorniiproekt"
State Border Treaty	Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, done in Kiev on 28 January 2003
UCH	Underwater Cultural Heritage
UCH Code of Ethics	UNESCO Code of Ethics for Diving on Submerged Archaeological Sites
UCH Convention	UNESCO Convention on the Protection of the Underwater Cultural Heritage, done in Paris on 2 November 2001
UCH Rules	Rules Concerning Activities Directed at Underwater Cultural Heritage, Annex, UCH Convention

Ukraine's Final Submissions	Final Submissions of Ukraine made at the Hearing on 3 October 2024
Ukraine's Rejoinder on Jurisdiction	Rejoinder of Ukraine on Jurisdiction dated 28 March 2019
Ukraine's Written Observations	Written Observations and Submissions of Ukraine on Jurisdiction dated 27 November 2018
UN	United Nations
URC	Ukrainian-Russian Commission on Fisheries in the Sea of Azov (s*ee also* "RUC")
Valletta Convention	European Convention on the Protection of Archaeological Heritage, done in Valletta on 16 January 1992
VCLT	Vienna Convention on the Law of Treaties, done in Vienna on 23 May 1969
VTS	Vessel Traffic Systems
Water Agency	Russian Federation Federal Agency for Water Resources
WPI	Water Pollution Index

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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. This Arbitration concerns disputes between the Parties regarding the events that have occurred in the Black Sea, the Sea of Azov, and the Kerch Strait since 2014. In their submissions, the Parties characterise these events in different ways.

3. The Black Sea and the Sea of Azov span an area of approximately 461,000 square kilometres. Littoral States include Bulgaria, Georgia, Romania, the Russian Federation, Türkiye, and Ukraine. The Black Sea is connected to the Sea of Azov by the Kerch Strait. The Black Sea, the Sea of Azov, and the Kerch Strait have together served for centuries as an important trade route and as a home to diverse marine life.

4. Ukraine asserts that the Russian Federation has breached its obligations under the Convention by undermining freedom of navigation and transit passage, jeopardising the marine environment, and mistreating cultural heritage in the Black Sea, the Sea of Azov, and the Kerch Strait. Ukraine's submissions can be broadly grouped into four categories.

5. First, Ukraine has asked the Arbitral Tribunal to declare that the Russian Federation has violated the Convention by:

   (a) constructing a bridge across the Kerch Strait that restricts navigation and more specifically permanently impedes the ability of some vessels to exercise a right of transit passage through the Kerch Strait;

   (b) stopping and inspecting Ukrainian and third-State vessels in the Kerch Strait and Sea of Azov traveling to and from Ukrainian ports;

   (c) unlawfully seizing and re-flagging two Ukrainian-flagged jack-up drilling rigs (hereinafter "JDRs").

6. Second, Ukraine contends that the Russian Federation has violated its obligations to protect and preserve the environment by engaging in construction projects in the Kerch Strait without appropriately considering the environmental impact of such projects, and by failing to cooperate

and share information concerning the environmental impact of these construction projects with Ukraine and other States. Ukraine also asks the Arbitral Tribunal to declare that the Russian Federation violated its environmental obligations by failing to notify and cooperate with Ukraine in respect of an oil spill in the Black Sea that reportedly occurred on 8 May 2016.

7. Third, Ukraine asks the Arbitral Tribunal to resolve a dispute between the Parties concerning unique underwater archaeological and historical objects in the Black Sea, the Kerch Strait, and the Sea of Azov. Ukraine asserts that the Russian Federation has violated its duty to protect underwater cultural heritage by allowing unqualified persons to explore and excavate numerous items of archaeological and historic interest in the Black Sea, the Kerch Strait, and the Sea of Azov, many of which, Ukraine claims, have been removed from the seabed.

8. Fourth, Ukraine asks the Arbitral Tribunal to declare that the Russian Federation has violated the Convention by aggravating and extending the dispute between the Parties since the commencement of this Arbitration in September 2016. In support of this claim, Ukraine contends that the Russian Federation has intensified its construction activities in the Kerch Strait without conducting environmental impact assessments (hereinafter the "EIAs") or implementing monitoring programmes, has continued to impede navigation to and from Ukrainian ports, has continued to risk permanent damage to underwater cultural artefacts during the pendency of these proceedings, and has unilaterally claimed exclusive sovereignty over the Sea of Azov.

9. The Russian Federation maintains that the Arbitral Tribunal lacks jurisdiction over Ukraine's claims and should reject them as "unreasonable and unsubstantiated" in any event. Specifically, the Russian Federation contends that the Sea of Azov and the Kerch Strait are internal waters as a historic bay based on historic title, which triggers the Russian Federation's declarations under Article 298, paragraph 1(a)(i), of the Convention to exclude disputes involving historic bays or titles from the compulsory dispute resolution procedures under the Convention. The Russian Federation further contends that internal waters are not regulated by the Convention.

10. The Russian Federation also points to certain factual developments in the regions of Donetsk, Lugansk, Zaporozhye, and Kherson,[1] as a result of which, it claims, Ukraine no longer qualifies as a coastal State in relation to the Sea of Azov. In respect of these new developments, the Russian

[1] The Arbitral Tribunal notes that Ukraine refers to the same regions as Donetsk, Luhansk, Zaporizhzhia, and Kherson. In this Award, the Arbitral Tribunal will apply the spelling of the Party to whose argument reference is being made in the specific instance.

Federation also objects to the Arbitral Tribunal's jurisdiction over Ukraine's claims on the ground that they implicate issues of the Russian Federation's territorial sovereignty.

11. Alternatively, the Russian Federation requests the Arbitral Tribunal to reject Ukraine's claims. The Russian Federation maintains that it has not violated the Convention and that Ukraine's allegations lack merit.

12. The Arbitral Tribunal organised a preliminary phase of the proceedings to address the Russian Federation's objections to the Arbitral Tribunal's jurisdiction. On 21 February 2020, the Arbitral Tribunal issued its Award Concerning the Preliminary Objections of the Russian Federation (hereinafter the "Award Concerning Preliminary Objections") which addressed the Russian Federation's objections. The Arbitral Tribunal upheld the Russian Federation's objection to its jurisdiction over Ukraine's claims to the extent that a ruling of the Arbitral Tribunal on the claims would require it to decide, directly or implicitly, on the sovereignty of Crimea. It also concluded 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 the Kerch Strait did not possess an exclusively preliminary character, and thus decided to reserve this matter for consideration and decision in the proceedings on the merits. In light of these conclusions, the Arbitral Tribunal requested Ukraine to submit a revised version of its Memorial, taking into account the scope and limits of the Arbitral Tribunal's jurisdiction.

13. This Award deals with issues of jurisdiction and admissibility that remained outstanding or have arisen after the Award Concerning Preliminary Objections, as well as the merits of those of Ukraine's claims over which the Arbitral Tribunal has jurisdiction. The Award is structured as follows.

14. This Chapter sets out the procedural history of the Arbitration. It focuses on the procedural events following the Arbitral Tribunal's Award Concerning Preliminary Objections.

15. **Chapter II** sets out the Parties' requests for relief.

16. **Chapter III** addresses the Arbitral Tribunal's jurisdiction over the dispute.

17. **Chapter IV** addresses Ukraine's claims relating to the Russian Federation's alleged interference with navigation in the Black Sea, the Sea of Azov, and the Kerch Strait.

18. **Chapter V** addresses Ukraine's claims relating to the Russian Federation's alleged failure to protect the marine environment.

19. **Chapter VI** addresses Ukraine's claims relating to the Russian Federation's alleged failure to protect underwater cultural heritage.

20. **Chapter VII** addresses Ukraine's claims relating to the Russian Federation's alleged aggravation of the dispute.

21. **Chapter VIII** addresses Ukraine's claims relating to its entitlement to relief.

22. **Chapter IX** sets out the Arbitral Tribunal's formal decisions.

23. The following Sections recount the procedural history of this Arbitration, focusing on the procedural events that occurred after the Arbitral Tribunal issued the Award Concerning Preliminary Objections.[2]

B. INITIATION OF THE ARBITRATION

24. Ukraine initiated this Arbitration on 16 September 2016 by 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"). It 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 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

[2] A detailed recounting of the procedural history of this Arbitration through the Award Concerning Preliminary Objections may be found in Chapter I of that Award.

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.[3]

25. Ukraine further requested the Arbitral Tribunal to "order the Russian Federation to immediately cease its internationally wrongful actions in the Black Sea, the Sea of Azov, and the Kerch Strait, and provide Ukraine with appropriate assurances and guarantees of non-repetition of all internationally wrongful acts found by the tribunal"[4] 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, the Sea of Azov, and the Kerch Strait, including both restitution and monetary compensation in amounts to be set out in detail in Ukraine's written pleadings."[5]

3 Notification and Statement of Claim, para. 50.
4 Notification and Statement of Claim, para. 51.
5 Notification and Statement of Claim, para. 52.

C. CONSTITUTION OF THE ARBITRAL TRIBUNAL, APPOINTMENT OF THE PCA AS REGISTRY, AND INITIAL PROCEDURAL STEPS

26. As recounted in the Award Concerning Preliminary Objections, Ukraine appointed Professor Vaughan Lowe KC as member of the Arbitral Tribunal in accordance with Article 3, subparagraph (b), of Annex VII to the Convention. The Russian Federation appointed H.E. Judge Vladimir V. Golitsyn as a member of the Arbitral Tribunal in accordance with Article 3, subparagraph (c), of Annex VII to the Convention. The Vice-President of the International Tribunal for the Law of the Sea (hereinafter "ITLOS") appointed H.E. Judge Jin-Hyun Paik, H.E. Judge Boualem Bouguetaia, and H.E. Judge Alonso Gómez-Robledo as members of the Arbitral Tribunal in accordance with Article 3, subparagraph (d), of Annex VII to the Convention. H.E. Judge Jin-Hyun Paik was appointed as President of the Arbitral Tribunal.

27. On 26 January 2017, the President of the Arbitral Tribunal informed the Secretary-General of the Permanent Court of Arbitration (hereinafter the "PCA") that the Parties had agreed to request the PCA to act as registry in the present Arbitration (hereinafter the "Registry").

28. The Arbitral Tribunal held the first procedural meeting with the Parties on 12 May 2017 at the PCA's headquarters at the Peace Palace in The Hague, the Netherlands. Following the meeting, the Arbitral Tribunal, with the concurrence of the Parties, adopted Procedural Order No. 1 on 18 May 2017. Procedural Order No. 1 sets forth the Terms of Appointment of the Arbitral Tribunal and the Rules of Procedure for the Arbitration (hereinafter the "Rules of Procedure").

29. 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.

30. On 26 March 2023, the PCA was informed that Judge Golitsyn had passed away on the same date, resulting in a vacancy on the Arbitral Tribunal. Accordingly, on 31 March 2023, the President of the Arbitral Tribunal invited the Russian Federation to appoint a substitute arbitrator pursuant to Article 6, paragraph 1, of the Rules of Procedure by 2 May 2023, if possible, and no later than 30 May 2023.

31. By letter dated 30 May 2023, the Russian Federation appointed Professor Alexander N. Vylegzhanin, a national of the Russian Federation, as the substitute member of the Arbitral Tribunal, thus constituting the present Arbitral Tribunal.

D. WRITTEN PLEADINGS BEFORE THE AWARD CONCERNING PRELIMINARY OBJECTIONS

32. Ukraine submitted its Memorial on 19 February 2018 (hereinafter "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.[6]

33. 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.

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.

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6 Memorial, para. 265.

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.[7]

E. BIFURCATION OF PROCEEDINGS

34. On 21 May 2018, in accordance with Article 10, paragraph 2, of the Rules of Procedure, the Russian Federation submitted the "Preliminary Objections of the Russian Federation" dated 19 May 2018 (hereinafter the "Russian Federation's Preliminary Objections").

35. 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

[7] Memorial, para. 266.

> 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.

36. 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. The Parties submitted their written pleadings in accordance with the timetable established by the Arbitral Tribunal.

F. HEARING ON THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

37. 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 and scheduled the Hearing on Preliminary Objections for 10-14 June 2019 (hereinafter the "Hearing on Preliminary Objections"). The Hearing on Preliminary Objections was held at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands and consisted of two rounds of oral argument by the Parties held on 10 and 11 June 2019 and 13 and 14 June 2019 respectively. The Award Concerning Preliminary Objections contains the list of attendees. The transcripts of this hearing were subsequently shared with the Parties and published on the Registry's website.

G. THE AWARD CONCERNING THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

38. On 21 February 2020, the Arbitral Tribunal issued its Award Concerning Preliminary Objections. The Arbitral Tribunal unanimously upheld the Russian Federation's objection to the Arbitral Tribunal's jurisdiction over Ukraine's claims to the extent that they required it to rule on the sovereignty of either Party over Crimea and found that its objection to Ukraine's claims concerning activities in the Sea of Azov and the Kerch Strait were not of an exclusively preliminary character. In the *dispositif*, the Arbitral Tribunal:

> 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.

H. WRITTEN PLEADINGS AFTER THE AWARD CONCERNING THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

39. On 21 February 2020, the Arbitral Tribunal issued Procedural Order No. 6 Regarding the Procedural Timetable for Further Proceedings, resuming the proceedings on the merits and fixing the procedural timetable for further proceedings.

40. On 4 November 2020, Ukraine made an application requesting the Arbitral Tribunal to modify the procedural timetable to permit Ukraine to submit its Revised Memorial on or before 20 May 2021. In response to Ukraine's request, the Russian Federation stated that it did not object to Ukraine's application.

41. On 17 November 2020, the Arbitral Tribunal issued Procedural Order No. 7 Regarding the Revised Procedural Timetable for Further Proceedings, modifying the procedural timetable in response to Ukraine's request.

42. On 20 May 2021, Ukraine submitted its Revised Memorial (hereinafter the "Revised Memorial") in accordance with the revised procedural timetable set out in Procedural Order No. 7.

43. On 24 November 2021, the Russian Federation made an application to modify the procedural timetable to permit it to submit its Counter-Memorial on or before 22 August 2022. In response to the Russian Federation's request, Ukraine stated that it deferred to the Arbitral Tribunal's procedural discretion in deciding whether to grant the request.

44. On 13 December 2021, the Arbitral Tribunal issued Procedural Order No. 8 Regarding the Revised Procedural Timetable for Further Proceedings, modifying the procedural timetable according to the Russian Federation's request.

45. On 7 July 2022, the Russian Federation made an application requesting the Arbitral Tribunal to modify the procedural timetable to permit it to submit its Counter-Memorial on or before 22 December 2022. In response to the Russian Federation's request, Ukraine requested that the Arbitral Tribunal deny the Russian Federation's request.

46. On 20 July 2022, the Arbitral Tribunal issued Procedural Order No. 9 Regarding the Revised Procedural Timetable for Further Proceedings, modifying the procedural timetable and extending the time for the Russian Federation to file its Counter-Memorial until 24 October 2022.

47. On 14 October 2022, the Russian Federation submitted its Counter-Memorial (hereinafter the "Counter-Memorial") in accordance with the revised procedural timetable set out in Procedural Order No. 9.

48. On 24 March 2023, Ukraine submitted its Reply (hereinafter the "Reply") in accordance with the revised procedural timetable set out in Procedural Order No. 9.

49. On 25 April 2023, the Russian Federation requested a suspension of the arbitral proceedings under Article 6, paragraph 2, and Article 26, paragraph 3, of the Rules of Procedure "until the circumstances warrant[ed] revision of such decision," noting, *inter alia*, that "the proceedings should be suspended pending the process of the appointment of a replacement arbitrator to fill in the vacancy of the late Judge Golitsyn." The Russian Federation also observed that the substitute member of the Arbitral Tribunal would need time to become familiar with the record and history of the Arbitration.

50. On 27 April 2023, the Arbitral Tribunal invited Ukraine to reply to the Russian Federation's request for suspension of the proceedings of 25 April 2023. On 3 May 2023, Ukraine replied, requesting that the Arbitral Tribunal reject the Russian Federation's request, noting, *inter alia*, that Article 6, paragraph 2, of the Rules of Procedure did not indicate that the proceedings should be suspended during the period required for the appointment of the substitute member of the Arbitral Tribunal. Ukraine further noted that the substitute member would have almost three months to read the existing pleadings before receiving the Russian Federation's Rejoinder and an additional period to prepare in advance of a hearing.

51. On 15 May 2023, the Arbitral Tribunal, *inter alia*, noted that upon the appointment of the substitute member of the Arbitral Tribunal, "the President and the other members of the Arbitral Tribunal expect to resume the proceedings in accordance with Article 6(2) of the Rules of Procedure, including by discussing with the new colleague the steps needed to allow him or her to become familiar with the proceedings" and that "[a]ny other issues raised in the Parties' communications may be brought to the attention of the Arbitral Tribunal once fully constituted."

52. On 30 May 2023, after appointing Professor Vylegzhanin as the substitute member of the Arbitral Tribunal, the Russian Federation reiterated its request to suspend the arbitral proceedings to afford

Professor Vylegzhanin "sufficient time to study this case's record and procedural history before these proceedings go any further." The Russian Federation therefore sought suspension of these proceedings "until the newly appointed arbitrator [had] become fully familiar with the case."

53. On 2 June 2023, the Arbitral Tribunal invited Ukraine to reply to the Russian Federation's request for suspension of the proceedings of 30 May 2023. Ukraine provided its reply, dated 8 June 2023, requesting that the Arbitral Tribunal reject the Russian Federation's request. Ukraine reiterated that Professor Vylegzhanin had sufficient time to study the case record and that Article 6, paragraph 2, of the Rules of Procedure did not imply that the time limits applicable to the Parties would be suspended during (or after) the replacement of an arbitrator.

54. On 26 June 2023, the Arbitral Tribunal issued Procedural Order No. 10 Regarding the Revised Procedural Timetable for Further Proceedings, denying the Russian Federation's request for suspension of the Arbitration. At the same time, in the interest of affording Professor Vylegzhanin sufficient time to familiarise himself with the record of the proceedings, the Arbitral Tribunal revised the procedural timetable, extending the time limits for filing of the Russian Federation's Rejoinder and Ukraine's Rejoinder to any Reply on jurisdiction and/or admissibility and on any counter-claim submitted by the Russian Federation by two months each to 24 October 2023 and 27 January 2024 respectively.

55. On 11 September 2023, the Russian Federation made an application requesting the Arbitral Tribunal to modify the procedural timetable to permit it to submit its Rejoinder on or before 24 January 2024. By letter dated 18 September 2023, Ukraine requested that the Arbitral Tribunal deny the Russian Federation's request.

56. On 29 September 2023, the Arbitral Tribunal issued Procedural Order No. 11 Regarding the Revised Procedural Timetable for Further Proceedings, modifying the procedural timetable and extending the time for the Russian Federation to file its Rejoinder, including a Reply to any Response on jurisdiction and/or admissibility and on any counter-claim submitted by Ukraine, until 8 December 2023 and for Ukraine to file its Rejoinder to any Reply on jurisdiction and/or admissibility and on any counter-claim submitted by the Russian Federation (if any) until 8 March 2024.

57. On 8 December 2023, the Russian Federation submitted its Rejoinder (hereinafter the "Rejoinder").

58. On 26 December 2023, Ukraine notified the Arbitral Tribunal that it would not submit a Rejoinder to any Reply on jurisdiction and/or admissibility and on any counter-claim submitted by the Russian Federation pursuant to Procedural Order No. 11, requested that the Arbitral Tribunal proceed to schedule a hearing at the earliest availability, and reserved the right to supplement the record in advance of the hearing in response to new evidence submitted by the Russian Federation.

I. PREPARATION OF HEARING ON THE MERITS AND REMAINING ISSUES OF JURISDICTION AND ADMISSIBILITY

59. By letter dated 27 December 2023, the Arbitral Tribunal invited the Parties to provide their views on preliminary matters regarding the scheduling of a hearing by 10 January 2024. Upon request by the Russian Federation dated 28 December 2023, the Arbitral Tribunal, by letter dated 29 December 2023, extended this time until 19 January 2024.

60. The Parties each provided their views on the preliminary matters regarding the scheduling of the hearing on 19 January 2024. While the Parties agreed on reserving a period of two weeks for the hearing and on the Peace Palace in The Hague, the Netherlands as the preferred venue, they were unable to agree on dates for the hearing. In its letter dated 19 January 2024, Ukraine also expressed its intention to present expert and fact witnesses at the hearing and reserved its right to supplement the record with further evidence responding to the Russian Federation's new exhibits and statements by witnesses and experts submitted along with the Russian Federation's Rejoinder. In its letter dated 19 January 2024, the Russian Federation stated that it did not intend to present any fact or expert witnesses for examination at the hearing, but reserved its right to do so in accordance with Article 16, paragraph 4, of the Rules of Procedure, should the circumstances and further developments in the Arbitration so warrant. It further reserved its right to object to the admissibility of any further evidence supplied by Ukraine.

61. On 18 February 2024, the Arbitral Tribunal, having ascertained the views of the Parties, set the dates of the hearing on the merits and remaining issues of jurisdiction and admissibility (hereinafter the "Hearing") from 23 September to 4 October 2024.

62. On 19 June 2024, the Registrar held a pre-hearing videoconference with the Parties to discuss the modalities of the Hearing.

63. On 26 June 2024, Ukraine requested that the Arbitral Tribunal exclude "certain untimely evidence" filed by the Russian Federation with its Rejoinder from the record. Ukraine argued that the evidence in question was produced in support of arguments that the Russian Federation could

and should have raised in its Counter-Memorial, but that it chose not to raise until its final written submission. In the view of Ukraine, this was prejudicial to Ukraine. Alternatively, Ukraine requested leave to provide limited new, "responsive evidence in order to restore equality of arms," including approximately 40 factual exhibits and one limited expert report in response to the Russian Federation's expert report on underwater cultural heritage (hereinafter "UCH").

64. On 27 June 2024, the Arbitral Tribunal invited the Russian Federation to submit any comments it wished to make on Ukraine's request by 4 July 2024.

65. On 4 July 2024, the Russian Federation objected to Ukraine's request dated 26 June 2024, qualifying it as "unsolicited and untimely" and requesting the Arbitral Tribunal to dismiss it.

66. On 12 July 2024, after careful consideration of the Parties' positions, the Arbitral Tribunal decided that the evidence submitted by the Russian Federation with its Rejoinder was to remain in the record. It permitted Ukraine to submit into the record, by 19 July 2024, and without accompanying argument, the factual exhibits referred to in its letter dated 26 June 2024, but not the requested additional expert report. It further allowed the Russian Federation to submit, by 16 August 2024, and without accompanying argument, any additional factual exhibits it wished to introduce into the record in response to the new factual exhibits submitted by Ukraine.

67. On 19 July 2024, Ukraine submitted its additional factual exhibits.

68. On 30 July 2024, the Arbitral Tribunal issued Procedural Order No. 12 Regarding the Opening of the Hearing, setting the hearing at the Peace Palace, The Hague, the Netherlands, from 23 September to 5 October 2024.

69. On 9 August 2024, the Parties communicated their initial notifications of the witnesses and experts they intended to present for direct examination pursuant to Article 16, paragraph 4, of the Rules of Procedure.

70. On 13 August 2024, the Russian Federation requested an extension of the 16 August 2024 deadline for the submission of any additional factual exhibits in response to the factual exhibits submitted by Ukraine on 19 July 2024 by two weeks, *i.e.*, until 30 August 2024. It argued that this extension was justified in view of the time period available to Ukraine for gathering its supplementary evidence and given the volume of the evidence submitted on 19 July 2024. Additionally, the Russian Federation stated that its legal team's work had been constrained by the workload for a parallel hearing between the Parties before the International Court of Justice

(hereinafter the "ICJ"). Finally, according to the Russian Federation, the deadline coincided with the summer vacation period, causing delays in consulting with its experts.

71. By letter dated 14 August 2024, the Arbitral Tribunal informed the Parties of its decision to grant the Russian Federation an extension until 26 August 2024 to submit any additional factual exhibits it wished to introduce into the record in response to the factual exhibits submitted by Ukraine.

72. On 15 August 2024, Ukraine requested that the Russian Federation be limited to submitting no more than 40 exhibits, to ensure a commensurate volume to the exhibits submitted by Ukraine. It further requested that the Russian Federation identify the topic of the exhibits along with the factual exhibits of Ukraine to which its exhibits were intended to respond, in the same way as done by Ukraine in its submission of exhibits on 19 July 2024.

73. On 19 August 2024, the Arbitral Tribunal reminded the Russian Federation that any new exhibits it submitted were to be responsive to the additional exhibits submitted by Ukraine, with proper indication as to which of Ukraine's new exhibits they responded to.

74. On 26 August 2024, the Russian Federation submitted its additional factual exhibits in response to the factual exhibits submitted by Ukraine on 19 July 2024.

75. On the same date, pursuant to Article 16, paragraph 4, of the Rules of Procedure, the Parties submitted their respective final notifications of witnesses, including expert witnesses, they intended to present for direct examination at the Hearing. In its notification, the Russian Federation informed the Arbitral Tribunal that the in-person attendance of some of its witnesses and experts remained uncertain and requested that the Registry provide the relevant technical support to facilitate their online participation in the Hearing.

76. On 28 August 2024, Ukraine requested the Arbitral Tribunal to direct the Russian Federation to promptly declare which of its witnesses and experts would need to testify remotely and why, so that Ukraine could further consider its position on the appropriateness of any remote testimony that the Russian Federation's witnesses and experts might wish to offer.

77. On 29 August 2024, the Arbitral Tribunal acknowledged receipt of the Parties' final notifications of witnesses and experts, as well as Ukraine's letter dated 28 August 2024. The Arbitral Tribunal invited the Russian Federation to clarify, by 2 September 2024, which of its witnesses or experts might not be able to attend the Hearing in person and why they might not be able to do so.

78. On 2 September 2024, the Russian Federation clarified "that its indication [...] that 'in-person attendance of some of its witnesses and experts may not be possible' was inserted as a fallback, in case any of the witnesses or experts found practical or visa-related difficulties to appear in person at the hearings."

79. On 3 September 2024, in accordance with Article 16, paragraph 5, of the Rules of Procedure, the Arbitral Tribunal proposed to the Parties a procedure for the examination of witnesses and experts at the Hearing and invited the Parties to submit any comments by 9 September 2024.

80. On 5 September 2024, in accordance with Article 16, paragraph 4, of the Rules of Procedure, the Parties submitted their respective notifications of additional witnesses, including expert witnesses they wished to call for cross-examination at the Hearing. The Russian Federation informed the Arbitral Tribunal that it did not intend to cross-examine any of Ukraine's experts or witnesses whose presence had not been included in Ukraine's final notification of 26 August 2024. Ukraine notified the Arbitral Tribunal that it wished to call two additional experts of the Russian Federation on UCH for cross-examination at the Hearing. As these experts were to testify together, Ukraine requested that one expert be designated the lead expert, to whom all questions would be directed and who would decide which expert would answer which questions or, alternatively, that the Russian Federation be required to designate in advance of the Hearing which aspects of the expert report would be handled by which expert by 16 September 2024.

81. On 7 September 2024, Ukraine responded to the Russian Federation's correspondence of 2 September 2024 concerning the in-person attendance of its fact witness at the Hearing.

82. On the same date, in accordance with the Parties' agreement reached at the pre-hearing conference on 19 June 2024, the Parties submitted their respective additional legal authorities.

83. Also on 9 September 2024, the Parties each expressed their agreement with the procedure for examining witnesses and experts during the Hearing proposed by the Arbitral Tribunal on 3 September 2024.

84. On 13 September 2024, the Arbitral Tribunal noted that, the time limits in Article 16, paragraph 4, of the Rules of Procedure having expired, there would be no additional notifications of witnesses, including expert witnesses, for examination at the Hearing. The Arbitral Tribunal invited the Russian Federation to notify a final list of those witnesses and experts that would attend the hearing in-person and those that would attend remotely by 17 September 2024 and informed the Parties that it had instructed the Registry to make the necessary arrangements to facilitate the

remote examination of any witnesses or experts that were unable to attend the hearing in-person. Finally, the Arbitral Tribunal requested the Russian Federation to indicate which aspects of the expert report on UCH would be dealt with by which expert also by 17 September 2024.

85. On 17 September 2024, the Russian Federation confirmed which of its witnesses and experts would be able to attend the Hearing in-person or remotely. Concerning its expert witnesses on UCH, the Russian Federation stated that only one of the two experts would be able to provide testimony at the Hearing remotely, and designated the sole participating expert on UCH as the "lead expert" as per the scheme of examination proposed by Ukraine in its letter dated 5 September 2024.

86. By letter dated 19 September 2024, Ukraine requested that if the Russian Federation failed to produce both experts on UCH for examination in person, the joint expert report be struck from the record and the Russian Federation be precluded from relying on it.

87. On 20 September 2024, the Arbitral Tribunal informed the Parties that it was not inclined to strike the expert report authored by the Russian Federation's experts on UCH from the record even if the Russian Federation only presented one expert for remote cross-examination. It stated that the Arbitral Tribunal would determine the relevance, materiality, and weight of the evidence offered taking into account all relevant circumstances, including the unavailability of one of the two experts who authored the report and the modalities of the examination.

88. By letter dated 21 September 2024, Ukraine stated that it continued to object to the Russian Federation not presenting one of its fact witnesses for in-person testimony and requested that the Arbitral Tribunal similarly determine the relevance, materiality, and weight of the fact witness' evidence taking into account the modalities of the cross-examination.

89. On 22 September 2024, the Arbitral Tribunal reaffirmed that it would determine the relevance, materiality, and weight of all evidence offered, including the witness and expert testimonies at the upcoming hearing, taking into account all relevant circumstances, including the modalities of examinations. It further circulated a remote examination protocol, inviting comments from the Parties on it by 24 September 2024.

J. HEARING ON THE MERITS AND REMAINING ISSUES OF JURISDICTION AND ADMISSIBILITY

90. The Hearing took place from 23 September to 5 October 2024 at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. The following were present at the Hearing:

The Arbitral Tribunal

Judge Jin-Hyun Paik, President
Judge Boualem Bouguetaia
Judge Alonso Gómez-Robledo
Professor Alexander Vylegzhanin
Professor Vaughan Lowe KC

Ukraine

H.E. Mr. Anton Korynevych
Ambassador-at-Large, Ministry of Foreign Affairs of Ukraine
as Agent

Ms. Oksana Zolotaryova
Director General for International Law, Ministry of Foreign Affairs of Ukraine
as Co-Agent

Ms. Marney L. Cheek
Covington & Burling LLP; member of the Bars of the Supreme Court of the United States and the District of Columbia
Mr. Jonathan Gimblett
Covington & Burling LLP; member of the Bars of the District of Columbia and the State of Virginia; solicitor of the Senior Courts of England and Wales
Mr. Nikhil V. Gore
Covington & Burling LLP; member of the Bars of the District of Columbia, the Commonwealth of Massachusetts, and the State of New York
Mr. Minwoo Kim
Covington & Burling LLP; member of the Bars of the District of Columbia and the State of New York
Professor Harold Hongju Koh
Yale Law School, member of the Bars of the District of Columbia and the State of New York Professor Alfred H.A. Soons
Utrecht University School of Law; member, Institut de Droit International
Professor Jean-Marc Thouvenin
University of Paris Nanterre; member, Institut de Droit International; Sygna Partners; member of the Paris Bar
as Advocates

Mr. Leonid Zaliubovskyi
Naval Forces of Ukraine
Mr. Viktor Komorin
Ukrainian Scientific Center of Ecology of Sea
Mr. Vladyslav Smirnov
State Border Guard Services of Ukraine
Mr. Serhii Lopatiuk
State Border Guard Services of Ukraine
Ms. Sviltana Iskorostenska
State Hydrographic Service of Ukraine
Mr. Yurii Smirnov
State Hydrographic Service of Ukraine
as Observers

H.E. Mr. Oleksandr Karasevych
Ambassador of Ukraine to the Kingdom of the Netherlands
Ms. Mariia Bezdieniezhna
Embassy of Ukraine to the Kingdom of the Netherlands
Mr. Denys Krymov
Department of International Law, Ministry of Foreign Affairs of Ukraine
Ms. Kateryna Gipenko
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Mr. Gabriel Gates
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Ms. Ariel Rosenbaum
Covington & Burling LLP; member of the Bars of the District of Columbia and the State of New York
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Covington & Burling LLP; solicitor of the Senior Courts of England and Wales
as Counsel

Mr. John G. Aronson
Professor Ahmet E. Kideys
Mr. Brian K. McJury
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LexOceana
Mr. Kirill Udovichenko
Partner, Monastyrsky, Zyuba, Stepanov & Partners
Mr. Sergey Korolev
Counsel, Monastyrsky, Zyuba, Stepanov & Partners
Mr. Konstantin Kosorukov
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as Advocates

Mr. Yury Andryushkin
First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation
Ms. Ksenia Galkina
First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation
Mr. Ruslan Kantur
Second Secretary, Permanent Representation of the Russian Federation to the Organisation for the Prohibition of Chemical Weapons
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Mr. Artem Lupandin
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Registry

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Registrar and Senior Legal Counsel, Permanent Court of Arbitration
Ms. Jinyoung Seok
Legal Counsel, Permanent Court of Arbitration
Mr. Scott Graber
Assistant Legal Counsel, Permanent Court of Arbitration
Dr. Stefan Schäferling
Assistant Legal Counsel, Permanent Court of Arbitration
Ms. Khadija Ahmed
Assistant Legal Counsel, Permanent Court of Arbitration

Court Reporting

Mr. Trevor McGowan

Interpreters

Ms. Karine Dreyfus
Mr. Manuel Malherbe
Mr. Jean-Christophe Pierret
Mr. Hildo Bos
Ms. Irina van Erkel
Ms. Ludmila Davis
Ms. Irina Morgan

91. Oral presentations on behalf of Ukraine were made by H.E. Mr. Anton Korynevych, Ms. Oksana Zolotaryova, Ms. Marney L. Cheek, Mr. Jonathan Gimblett, Mr. Nikhil Gore, Mr. Minwoo Kim, Professor Harold Hongju Koh, Professor Alfred H.A. Soons, and Professor Jean-Marc Thouvenin.

92. Oral presentations on behalf of the Russian Federation were made by H.E. Mr. Gennady Kuzmin, Dr. Alfredo Crosato Neumann, Mr. Lesther Antonio Ortega Lemus, Mr. Kirill Udovichenko, Mr. Sergey Korolev, and Mr. Konstantin Kosorukov.

93. On 27 September 2024, having taken into account the Parties' comments on the draft remote examination protocol submitted on 24 and 26 September 2024 respectively, the Arbitral Tribunal adopted the remote examination protocol, as revised, by consent and circulated it to the Parties.

94. On 1 October 2024, Ukraine sought leave to submit certain additional exhibits and a legal authority into the record. On 2 October 2024, the Russian Federation requested that the request be denied and, alternatively, leave to also submit certain further exhibits and legal authorities into the record. On 2 October 2024, having carefully reviewed the Parties' requests, the Arbitral Tribunal granted both Parties leave to submit the documents referenced in their respective requests into the record.

95. On 4 October 2024, the Russian Federation further requested leave to submit certain additional documents into the record. On the same date, Ukraine objected to the request. On 5 October 2024, the Arbitral Tribunal decided that the documents would not be admitted into the record.

K. POST-HEARING PROCEEDINGS

96. On 24 December 2024, after the Parties had an opportunity to propose corrections and footnotes to the hearing transcript and to comment on each other's proposed corrections, the Registry circulated corrected transcripts, which reflected the Parties' agreed corrections and, where no agreement was reached, the Arbitral Tribunal's decisions.

L. DEPOSITS FOR COSTS OF THE ARBITRATION

97. Article 26 of Rules of Procedure states that the Registry may request each Party to deposit equal amount as advance for the costs of the Arbitration. The Parties were requested to make payment towards the deposit on six occasions.

98. Due to the lack of funds arising from the delay in payment by one Party compounded by difficulties in transmitting funds, the Arbitral Tribunal decided internally to suspend the proceedings from 11 July 2025 until 17 December 2025.

99. The deposit has covered the fees and expenses of the members of the Arbitral Tribunal, the Registry, as well as all other expenses, including those for hearings and meetings, catering, court reporters, translations, information technology support, archiving, couriers, communications, correspondence, and publishing of the Awards.

II. RELIEFS REQUESTED AND SUBMISSIONS

100. The Parties have made the following submissions to the Arbitral Tribunal.

A. SUBMISSIONS OF UKRAINE

101. In its Revised Memorial, Ukraine requested the Arbitral Tribunal to adjudge and declare that:

a. The Russian Federation has violated Articles 38, 43, and 44 of the Convention by: constructing a bridge across the Kerch Strait that permanently impedes the ability of vessels that previously transited the Strait or foreseeably may have transited the Strait from doing so; failing to share information as to threats to safe navigation caused by the bridge; delaying passage through the Strait for vessels that are navigating to and from Ukrainian ports and inspecting such vessels; and restricting the navigation of all foreign governmental vessels through the Strait for a period of over six months.

b. The Russian Federation has violated Articles 2, 58, and 87 of the Convention by stopping and inspecting Ukrainian and third-State vessels in the Sea of Azov traveling to and from Ukrainian ports.

c. The Russian Federation has violated Articles 58 and 92 of the Convention by stopping and inspecting Ukrainian-flagged vessels in the Sea of Azov travelling to and from Ukrainian ports.

d. The Russian Federation has violated Articles 2(3) and 91 of the Convention by unlawfully seizing and re-flagging two Ukrainian-flagged JDRs.

e. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention by failing to assess, monitor, and protect against potential adverse effects on the marine environment caused by its construction activities in the Kerch Strait.

f. The Russian Federation has violated Articles 123, 192, 194, 204, 205, and 206 of the Convention by failing to cooperate and share information with Ukraine and other potentially-affected States concerning the environmental impact of its construction activities in the Kerch Strait.

g. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention by failing to communicate or cooperate with Ukraine concerning the May 2016 oil spill off the coast of Sevastopol.

h. The Russian Federation has violated Article 303 of the Convention by failing to protect unique archaeological and historical objects found at sea.

i. The Russian Federation has violated Articles 279 and 300 of the Convention by aggravating and extending the dispute between the parties since the commencement of this arbitration in September 2016.[8]

102. Ukraine further requested the Arbitral Tribunal to order the Russian Federation to:

a. Cease immediately all efforts to stop, delay, or otherwise impede free navigation and transit passage of Ukrainian and third-State vessels through the Kerch Strait and in the Sea of Azov.

b. Provide appropriate assurances and guarantees of non-repetition with regard to its violations of the rights to transit passage, free navigation, and exclusive flag State jurisdiction, including specific commitments that Russia will not hamper or impede transit passage in the Kerch Strait or interfere with the navigation of vessels traveling to or from Ukraine's Sea of Azov ports.

c. Provide appropriate assurances and guarantees of non-repetition with regard to its violations of the duty to protect and preserve the marine environment and to cooperate with other States to that end, including specific commitments to assess the environmental impact of activities within its jurisdiction that may reasonably be expected to harm the marine environment of the Black Sea, Sea of Azov or Kerch Strait, and to monitor the environmental effects of any such activities in accordance with accepted scientific standards.

d. Provide appropriate assurances and guarantees of non-repetition with regard to its failure to communicate to Ukraine, other potentially-affected States, and competent international organizations, an appropriate assessment of the potential effects on the marine environment of its construction activities in the Kerch Strait, as well as its failure to report the results of any subsequent environmental monitoring.

e. Cease excavating underwater cultural heritage sites until it can guarantee that any further excavation will comply with internationally accepted archaeological standards.

f. Provide appropriate assurances and guarantees of non-repetition with regard to its failure to protect archaeological and cultural objects found at sea.[9]

103. Ukraine also requested the Arbitral Tribunal to order the Russian Federation to:

a. Modify the central span of the Kerch Strait bridge to provide for a height clearance sufficient to restore passage for merchant and other vessels that previously transited the Strait, as well as those that may foreseeably transit the Strait in the future.

b. Release to Ukraine the two Ukrainian-flagged JDRs it unlawfully seized and reflagged so as to re-establish Ukraine's exclusive jurisdiction over the vessels.

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8 Revised Memorial, para. 314.

9 Revised Memorial, para. 315.

c. Withdraw all claims to have re-flagged under the Russian flag the two Ukrainian flagged JDRs it unlawfully seized.

d. Conduct immediately further monitoring and studies of the construction projects undertaken in the Kerch Strait, and their impact on the marine environment of the Black Sea Basin, as are necessary to determine the measures most capable of identifying and repairing any environmental harm resulting from the construction phase of the Kerch Strait construction projects and mitigating any anticipated, continuing impacts associated with operation of the projects. Such monitoring and studies must include, but are not limited to, those identified by Mr. Aronson and described in Chapter Six, Sections II.A.2 and II.A.3 of Ukraine's Revised Memorial.

e. Invite international participation in its environmental monitoring and studies, including by representatives of other littoral states of the Black Sea Basin and relevant regional organizations, and make the results thereof available to the general public.

f. Take account of the monitoring and studies conducted pursuant to paragraphs (d) and (e), above, and implement as soon as practicable reparatory and mitigation measures designed to restore the marine environment of the Black Sea Basin as nearly as possible to its condition prior to the construction projects, and to manage as comprehensively as possible the continuing risks of environmental harm associated with operation of the projects. Such reparatory and mitigation measures must include, but are not limited to, those identified by Mr. Aronson and described in Chapter Six, Sections II.A.2 and II.A.3, of Ukraine's Revised Memorial, to the extent that further monitoring and studies indicate such measures are necessary.

g. Within 15 months of the issuance of the Award in this proceeding, publish and communicate to Ukraine, as well as all other interested States and relevant international organizations, a comprehensive report on the reparatory and mitigation measures it has undertaken since the issuance of the Award and will undertake going forward, pursuant to paragraphs (d), (e), and (f), above.

h. Commence implementation of all reparatory and mitigation measures identified in the report referenced in paragraph (g), above, no later than 18 months after the issuance of the Award in this proceeding.

i. Pay Ukraine financial compensation in an amount to be determined at a later phase of the proceedings.[10]

104. Lastly, Ukraine requested that the Arbitral Tribunal "take into account that several of the specific measures necessary to effect reparation also are necessary to ensure cessation of Russia's violations of the Convention" and requests that the Arbitral Tribunal "amend Article 22 of the Rules of Procedure to increase from six months to 24 months the period in which the Parties may submit requests for interpretation of the final award or concerning a manner of its implementation."[11]

105. In its Reply, Ukraine submitted:

> For the reasons set out in this Reply and as set out in Ukraine's Revised Memorial, Ukraine respectfully reaffirms its Submissions, and requests that the Tribunal award Ukraine its costs for these proceedings pursuant to Article 25 of the Rules of Procedure.

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10 Revised Memorial, para. 316.

11 Revised Memorial, paras 317-18.

Ukraine further requests the Tribunal to adjudge and declare that the Russian Federation has violated Articles 279 and 300 of the Convention by aggravating and extending the dispute between the Parties since the commencement of this arbitration in September 2016, including Russia's further aggravation of this dispute by unilaterally declaring itself the sole sovereign over the entirety of the Sea of Azov.[12]

106. At the Hearing, on 3 October 2024, Ukraine made the following final submissions (hereinafter "Ukraine's Final Submissions"):

1. Ukraine respectfully requests the Tribunal to adjudge and declare that:

   a. The Russian Federation has violated Articles 38, 43, and 44 of the United Nations Convention on the Law of the Sea by: constructing a bridge across the Kerch Strait that permanently impedes the ability of vessels that previously transited the Strait or foreseeably may have transited the Strait from doing so; failing to share information as to threats to safe navigation caused by the bridge; delaying passage through the Strait for vessels that are navigating to and from Ukrainian ports and inspecting such vessels; and restricting the navigation of all foreign governmental vessels through the Strait for a period of over six months.

   b. The Russian Federation has violated Articles 2, 58, and 87 of the Convention by stopping and inspecting Ukrainian and third-State vessels in the Sea of Azov traveling to and from Ukrainian ports.

   c. The Russian Federation has violated Articles 58 and 92 of the Convention by stopping and inspecting Ukrainian-flagged vessels in the Sea of Azov travelling to and from Ukrainian ports.

   d. The Russian Federation has violated Articles 2(3) and 91 of the Convention by unlawfully seizing and re-flagging two Ukrainian-flagged JDRs.

   e. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention by failing to assess, monitor, and protect against potential adverse effects on the marine environment caused by its construction activities in the Kerch Strait.

   f. The Russian Federation has violated 123, 192, 194, 204, 205, and 206 of the Convention by failing to cooperate and share information with Ukraine and other potentially affected States concerning the environmental impact of its construction activities in the Kerch Strait.

   g. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention by failing to communicate or cooperate with Ukraine concerning the May 2016 oil spill off the coast of Sevastopol.

   h. The Russian Federation has violated Article 303 of the Convention by failing to protect unique archaeological and historical objects found at sea.

   i. The Russian Federation has violated Articles 279 and 300 of the Convention by aggravating and extending the dispute between the parties since the commencement of this arbitration in September 2016, including Russia's further aggravation of this dispute by unilaterally declaring itself sovereign over the entirety of the Sea of Azov.

2. To bring the Russian Federation's conduct in line with its obligations under the Convention and to provide assurance that the violations will not be repeated, Ukraine further requests the Tribunal to order the Russian Federation to:

[12] Reply, paras 414-15.

a. Cease all efforts to stop, delay, or otherwise impede free navigation and transit passage of Ukrainian and third-State vessels through the Kerch Strait and in the Sea of Azov, and cease all activities that violate Ukraine's rights as a flag state.

b. Provide appropriate assurances and guarantees of non-repetition with regard to its violations of the rights to transit passage, free navigation, and exclusive flag State jurisdiction, including specific commitments that Russia will not hamper or impede transit passage in the Kerch Strait or interfere with the navigation of vessels traveling to or from Ukraine's Sea of Azov ports.

c. Provide appropriate assurances and guarantees of non-repetition with regard to its violations of the duty to protect and preserve the marine environment and to cooperate with other States to that end, including specific commitments to assess the environmental impact of activities within its jurisdiction that may reasonably be expected to harm the marine environment of the Black Sea, Sea of Azov or Kerch Strait, and to monitor the environmental effects of any such activities in accordance with accepted scientific standards.

d. Provide appropriate assurances and guarantees of non-repetition with regard to its failure to communicate to Ukraine, other potentially affected States, and competent international organizations, an appropriate assessment of the potential effects on the marine environment of its construction activities in the Kerch Strait, as well as its failure to report the results of any subsequent environmental monitoring.

e. Cease excavating underwater cultural heritage sites until it can guarantee that any further excavation will comply with internationally accepted archaeological standards.

f. Provide appropriate assurances and guarantees of non-repetition with regard to its failure to protect archaeological and cultural objects found at sea.

3. The Russian Federation is required to make reparation in order to, as far as possible, wipe out the consequences of its illegal acts. Accordingly, Ukraine requests that the Tribunal order Russia to:

a. Dismantle and remove the Kerch Strait Bridge to restore passage for existing vessel traffic that previously transited the Strait and reasonably foreseeable vessel traffic.

b. Release to Ukraine the two Ukrainian-flagged JDRs it unlawfully seized and reflagged so as to re-establish Ukraine' exclusive jurisdiction over the vessels.

c. De-register the two Ukrainian-flagged JDRs it unlawfully seized and withdraw all claims to have re-flagged them.

d. Conduct further monitoring and studies of the construction projects undertaken in the Kerch Strait, and their impact on the marine environment of the Black Sea Basin, as are necessary to determine the measures most capable of identifying and repairing any environmental harm resulting from the construction phase of the Kerch Strait construction projects and mitigating and anticipated, continuing impacts associated with operation of the projects. Such monitoring and studies must include, but are not limited to, those identified by Mr. Aronson and described in Chapter Six, Sections II.A.2 and II.A.3 of Ukraine's Revised Memorial.

e. Implement reparatory and mitigation measures designed to restore the marine environment of the Black Sea Basin as nearly as possible to its condition prior to the construction projects, and to manage as comprehensively as possible the continuing risks of environmental harm associated with any future operation of the projects. Such reparatory and mitigation measures must include, but are not limited to, those identified by Mr. Aronson and described in Chapter Six,

Sections II.A.2 and II.A.3, of Ukraine's Revised Memorial, to the extent that further monitoring and studies indicated that such measures are necessary.

f. Within 15 months of the issuance of the Award in this proceeding, publish and communicate to Ukraine, as well as all other interested States and relevant international organizations, a complete and comprehensive report on the reparatory and mitigation measures it has undertaken since the issuance of the Award and will undertake going forward, pursuant to paragraphs (d) and (e), above.

g. Commence implementation of all reparatory and mitigation measures identified in the report referenced in paragraph (f), above, no later than 18 months after the issuance of the Award in this proceeding.

4. Ukraine requests that the Tribunal take into account that several of the specific measures necessary to effect reparation also are necessary to ensure cessation of Russia's violations of the Convention.

5. Ukraine further requests that the Tribunal amend Article 2 of the Rules of Procedure to increase from six to 24 months the period in which the Parties may submit requests for interpretation in the final award or concerning a manner of its implementation.

6. Ukraine requests that the Tribunal award Ukraine its costs for these proceedings pursuant to Article 25 of the Rules of Procedure.

B. SUBMISSIONS OF THE RUSSIAN FEDERATION

107. In its Counter-Memorial, the Russian Federation submitted:

> For the reasons set out in the Counter-Memorial of the Russian Federation, as well as its prior submissions in these arbitral proceedings, the Russian Federation respectfully requests the Tribunal to adjudge and declare that it is without jurisdiction in respect of the claims that Ukraine submitted in its Revised Memorial. Alternatively, the Russian Federation requests the Tribunal to dismiss Ukraine's requests and prayers for relief in their entirety.[13]

108. In its Rejoinder, the Russian Federation submitted:

> For the reasons set out in this Rejoinder, the Russian Federation respectfully requests the Arbitral Tribunal:
>
> a) to find that it is without jurisdiction over all of Ukraine's claims;
>
> b) in the alternative, to dismiss all of Ukraine's claims in their entirety.

109. At the Hearing, on 5 October 2024, the Russian Federation made the following final submissions:

1. The Russian Federation respectfully requests the Arbitral Tribunal:

   a) to find that all of Ukraine's claims are outside of the Arbitral Tribunal's jurisdiction and/or are inadmissible; or

   b) in the alternative, to dismiss all of Ukraine's claims and prayers for relief in their entirety.

[13] Counter-Memorial, para. 616.

2. The Russian Federation also requests the Arbitral Tribunal to award the Russian Federation its costs for these proceedings pursuant to Article 25 of the Rules of Procedure.

III. WHETHER THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

A. INTRODUCTION

110. In the present phase of the proceedings, the Russian Federation raises several objections to the jurisdiction of the Arbitral Tribunal and to the admissibility of the claims made by Ukraine. The Arbitral Tribunal considers that these objections can be divided into two categories: general objections and specific objections. For the purposes of these proceedings, the general objections refer to the Russian Federation's objections relating to the legal status of the Sea of Azov and the Kerch Strait. In addition to these general objections, the Russian Federation also raises more specific objections to certain claims made by Ukraine. The Arbitral Tribunal notes that the questions concerning its jurisdiction and the admissibility of Ukraine's claims are at this stage to be answered with reference to Ukraine's Final Submissions of 3 October 2024, reproduced above.

111. In this Chapter of the Award, the Arbitral Tribunal will address the Russian Federation's general objections that the Arbitral Tribunal lacks jurisdiction over Ukraine's claims regarding activities in the Sea of Azov and the Kerch Strait. The Arbitral Tribunal will address the Russian Federation's specific objections in the relevant Chapters of the Award.

112. The Arbitral Tribunal recalls in this regard that, in its Award Concerning Preliminary Objections, it unanimously found:

> 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.[14]

113. The Russian Federation advances three arguments in support of its general objections. First, according to the Russian Federation, because the Sea of Azov and the Kerch Strait have long been subject to historic title, Ukraine's claims regarding the activities carried out in these waters are excluded from the jurisdiction of the Arbitral Tribunal by the declarations made by the Parties under Article 298, paragraph 1(a)(i), of the Convention.[15] Second, in the alternative, the Russian

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14 Award Concerning Preliminary Objections, para. 492.

15 Hearing, 28 September 2024, 14:5-13 (Crosato Neumann).

Federation argues that since the Sea of Azov and the Kerch Strait have remained internal waters following the dissolution of the Union of Soviet Socialist Republics (hereinafter the "Soviet Union" or "USSR"), and "[s]ince UNCLOS does not regulate, except residually, the regime applicable to internal waters, disputes relating to certain activities in such waters do not concern 'the interpretation or application of [the] Convention' within the meaning of Article 288(1)."[16] Third, the Russian Federation submits that, in light of change in circumstances after 30 September 2022, the Arbitral Tribunal has no jurisdiction over Ukraine's claims relating to the Sea of Azov and the Kerch Strait due to the new sovereignty dispute over the Donetsk, Kherson, and Zaporozhye regions.[17]

114. In response, Ukraine rejects all three objections raised by the Russian Federation. First, Ukraine maintains that the Sea of Azov and the Kerch Strait are not a historic bay or waters subject to historic title.[18] Therefore, in Ukraine's view, the Sea of Azov and the Kerch Strait are not covered by the Parties' declarations made under Article 298, paragraph 1(a)(i), of the Convention. Second, Ukraine submits that following the dissolution of the Soviet Union, the Sea of Azov and the Kerch Strait ceased to qualify as "a single-State juridical bay," as they are now bordered by two States. As such, they are subject to the general regime of the law of the sea.[19] Third, Ukraine asserts that the Russian Federation's argument regarding a change in circumstances violates two basic legal principles: first, it ignores the notion of critical date, which requires that the Arbitral Tribunal's jurisdiction be assessed based on the situation as it existed on the date the application was filed;[20] and second, it relies on actions that are legally inconsistent with an order of the ICJ, and, therefore, should be treated as an assertion without legal consequence.[21]

115. The Arbitral Tribunal will now consider the Russian Federation's three general objections and Ukraine's responses in detail.

B. THE RUSSIAN FEDERATION'S FIRST GENERAL OBJECTION

116. Article 298, paragraph 1(a)(i), of the Convention reads:

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it

16 Hearing, 28 September 2024, 14:14-21 (Crosato Neumann); Rejoinder, para. 83.
17 Counter-Memorial, paras 27-29.
18 Reply, para. 13.
19 Revised Memorial, para. 61.
20 Reply, para. 78.
21 Reply, para. 80.

does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

[...].

1. The Russian Federation's Position

117. The Russian Federation maintains that the Arbitral Tribunal has no jurisdiction over Ukraine's claims, as the Sea of Azov and the Kerch Strait are internal waters under Russian sovereignty because of their status as part of a "historic bay," or because the Russian Federation has historic title over them, and as "the Parties have availed themselves of the exception under Article 298 of the Convention, excluding from compulsory jurisdiction 'disputes [...] involving historic bays or titles.'"[22]

118. The Russian Federation submits that it is undisputed that "both Ukraine and Russia availed themselves of an optional exception to compulsory jurisdiction with respect to disputes 'involving historic bays or titles' under" Article 298, paragraph 1(a)(i), of the Convention.[23] The Russian Federation made its declaration on 12 March 1997, while Ukraine submitted its declaration on 26 July 1999.[24] The Russian Federation considers it "beyond doubt" that an arbitral tribunal constituted under the dispute settlement mechanisms of section 2 of Part XV of the Convention has no jurisdiction over a dispute involving historic bays or historic titles when the State Party to the Convention has filed a valid Article 298 declaration.[25]

119. The Russian Federation argues that the optional exception under Article 298 of the Convention excludes disputes concerning whether historic bays or titles exist.[26] Should the Arbitral Tribunal find otherwise, the Russian Federation submits that it either holds historic title over the Sea of

22 Counter-Memorial, para. 34; Rejoinder, para. 84; Hearing, 28 September 2024, 14:5-14, 37:11-16 (Crosato Neumann).

23 Counter-Memorial, para. 37; Rejoinder, para. 84.

24 Rejoinder, para. 87 *citing* United Nations, Multilateral Treaties Deposited with the Secretary-General, Chapter XXI, No. 6 **(Annex UA-8)**.

25 Rejoinder, para. 88.

26 Hearing, 28 September 2024, 37:19-38:18 (Crosato Neumann). *See also* Rejoinder, para. 91.

Azov and the Kerch Strait, or that the waters have been recognised as a historic bay.[27] The Russian Federation makes three submissions in this regard. First, the Russian Federation asserts that the Sea of Azov is a historic bay, with the Kerch Strait as its opening.[28] Second, the Russian Federation contends that the Parties have previously agreed on the internal waters character of the Sea of Azov and the Kerch Strait.[29] Third, the Russian Federation argues that Ukraine recognised the Sea of Azov as a historic bay in its own Article 298 declaration.[30]

120. The Russian Federation thus concludes that, under either interpretation of Article 298 of the Convention, the Russian and Ukrainian declarations exclude the present dispute from the Arbitral Tribunal's jurisdiction.[31]

a. Scope of Article 298, Paragraph 1(a)(i), of UNCLOS

121. The Russian Federation notes that Article 298, paragraph 1(a)(i), of the Convention does not specify whether the existence of the status of historic bay or historic title must first be established in order for a dispute to be deemed "involving" historic bays or historic titles.[32] As the Parties disagree on the existence of such a bay or title, and the Arbitral Tribunal has deferred the issue to the merits, the Russian Federation suggests that a preliminary question is "whether the Arbitral Tribunal should proceed with an examination of the existence *vel non* of a historic bay or title."[33]

122. The Russian Federation explains that the ordinary meaning of the exception for disputes involving historic bays or titles in Article 298 of the Convention is broad enough to cover "two categories of disputes: first, disputes concerning the existence or otherwise of a historic bay or title; second, disputes concerning activities within a recognised historic bay or other historic waters."[34]

123. In the Russian Federation's view, Ukraine is mistaken that Article 298 of the Convention does not provide an exception for disputes "concerning the existence" of a historic bay or title.[35] The Russian Federation disagrees with Ukraine that the Arbitral Tribunal rejected this interpretation in the Award Concerning Preliminary Objections, noting that the Article 298 objection was joined to the merits without a final decision on interpretation.[36] In contrast, the Russian Federation

27 Counter-Memorial, para. 53.
28 Counter-Memorial, paras 37-43.
29 Counter-Memorial, paras 44-50.
30 Counter-Memorial, paras 51-53.
31 Rejoinder, para. 94; Hearing, 28 September 2024, 40:10-14 (Crosato Neumann).
32 Rejoinder, para. 89.
33 Rejoinder, para. 89.
34 Hearing, 28 September 2024, 38:14-18 (Crosato Neumann). *See also* Rejoinder, para. 91.
35 Hearing, 28 September 2024, 38:19-22 (Crosato Neumann).
36 Hearing, 28 September 2024, 38:23-39:1 (Crosato Neumann).

asserts that Ukraine ignores the broad, plain wording of the provision, which the arbitral tribunal in the *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (hereinafter "*South China Sea*") confirmed covers claims of sovereignty.[37] As "[m]ost disputes relating to a historic bay or title" may concern their very existence, the Russian Federation argues that Ukraine's position would largely nullify the effect of the exception.[38] The Russian Federation contends that, if Ukraine's restrictive interpretation has "frivolous claims to historic title" in mind, the present claim is distinguishable from such claims due to its substantial history, proof, and recognition.[39] The Russian Federation submits that "the present case undoubtedly *involves*" and "concern[s] the existence or otherwise of" a historic bay or title.[40] Consequently, the Russian Federation concludes that the Arbitral Tribunal is not required to make a final determination on the status of the Sea of Azov.[41]

b. Whether the Sea of Azov and the Kerch Strait Were Internal Waters Subject to Historic Title

124. The Russian Federation claims historic title over the Sea of Azov and the Kerch Strait, arguing:

> [...] the "historic bay" nature of the Sea of Azov meets the requirement set out in the ICJ's jurisprudence and relied upon by Ukraine, that: "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title."[42]

125. Referring to the ICJ Chamber's judgment in the 1992 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)* (hereinafter "*Gulf of Fonseca*") concerning the Gulf of Fonseca,[43] the Russian Federation asserts that the formation of a historic title requires three factors: "the authority exercised over the area in question," "the continuity of the exercise of such authority," and "the attitude of third States."[44]

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37 Hearing, 28 September 2024, 39:2-10 (Crosato Neumann) *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 of 12 July 2016, para. 226 (**Annex UAL-11**). The Russian Federation argues that *South China Sea* supports its position. *See, e.g.*, Hearing, 28 September 2024, 38:1-12 (Crosato Neumann).

38 Hearing, 28 September 2024, 39:11-19 (Crosato Neumann).

39 Hearing, 28 September 2024, 39:21-40:9 (Crosato Neumann).

40 Rejoinder, para. 92 [emphasis added by the Russian Federation]; Hearing, 5 October 2024, 27:6-14 (Crosato Neumann).

41 Hearing, 5 October 2024, 27:6-14 (Crosato Neumann).

42 Counter-Memorial, para. 41 *citing Fisheries case (UK v. Norway)*, Judgment, I.C.J. Reports 1951, p. 116 at p. 130 (**Annex UAL-124**); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 588, para. 384 (**Annexes RUL-19**, **UAL-58**).

43 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351 at p. 589, para. 385 (**Annexes RUL-19**, **UAL-58**).

44 Hearing, 28 September 2024, 40:23-41:2 (Crosato Neumann); Rejoinder, para. 99.

126. With regard to the passing of historic title in cases of State succession, the Russian Federation further notes that the ICJ Chamber found that the historic title in *Gulf of Fonseca* "had been established when the Central American countries concerned [...] became independent in 1821."[45] The Russian Federation explains that the Chamber followed the 1917 judgment of the Central American Court of Justice in finding that State succession passes territorial sovereignty from the preceding State to the successor, and "there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States."[46]

127. Regarding the first two factors for establishing historic title—authority exercised over a certain area and continuity of the exercise of such authority—the Russian Federation considers it undisputed that "the Sea of Azov and the Kerch Strait were under the sovereignty of the Russian Empire and later of the USSR and could be considered as internal waters."[47] It adds that this exercise of authority continued for some 200 years.[48] Arguing that the Russian Empire (and later the USSR) exercised undisputed sovereignty, the Russian Federation explains that there is no need to produce historic documents evidencing as much.[49] Responding to Ukraine, the Russian Federation specifically notes that it is unnecessary to produce historical documents evidencing that the Russian Empire claimed sovereignty using the term "historic waters," in order to find the emergence of historic title.[50]

128. The Russian Federation submits that there are numerous references in the literature to the Russian Empire's and the USSR's historic title over the Sea of Azov and the Kerch Strait,[51] including those by Baron Ferdinand de Cussy in 1856,[52] Philip Jessup in 1927, and A.N. Nikolaev in

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45 Rejoinder, para. 100.

46 Rejoinder, para. 101 *citing Gulf of Fonseca*, cit., n. 43, pp. 597-98, para. 399 (**Annexes RUL-19**, **UAL-58**).

47 Counter-Memorial, para. 38. The Russian Federation considers the terms "historic waters" and "internal waters" to be interchangeable, "both having been used in a similar manner in practice and literature." Rejoinder, para. 104 *citing Fisheries case (UK v. Norway)*, Judgment, I.C.J. Reports 1951, p. 116 at p. 130 ("By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title") (**Annex UAL-124**). *See also* Yehuda Blum, *Historic Title In International Law* (Nijhoff 1965), p. 247 (**Annex RUL-137**). The Russian Federation similarly suggests that a historic bay "signifies a form of historic water." Rejoinder, para. 104; *see also* Hearing, 28 September 2024, 15:14-20, 41:3-8 (Crosato Neumann).

48 Hearing, 28 September 2024, 41:6-8 (Crosato Neumann), 5 October 2024, 17:1-19:9 (Crosato Neumann).

49 Hearing, 5 October 2024, 19:14-20:3 (Crosato Neumann).

50 Hearing, 5 October 2024, 20:4-8 (Crosato Neumann).

51 Hearing, 5 October 2024, 21:13-21:20 (Crosato Neumann).

52 Rejoinder, para. 107 *citing* Secretariat of the United Nations, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, 30 September 1957, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents), note 4, paras 98, 101 (**Annexes RU-5**, **UA-547-AM**); Baron Ferdinand De Cussy, *Phases et causes célèbres du droit maritime des Nations*, Vol. I, F.A. Brockhaus, 1856 (**Annex RUL-1**).

1954.[53] The Russian Federation further relies on Jessup and the 1930 Hague Codification Conference to assert that "[t]here was [...] no regime for juridical bays at the time."[54] During this period, the Russian Federation notes, the USSR declared the Sea of Azov to constitute part of its internal waters in domestic legislation in 1925, 1928, and 1935,[55] with the latter two instances published by the United Nations (hereinafter the "UN") in 1951.[56]

129. The Russian Federation adds that the UN Secretariat "confirmed" the Russian claim to historic title over the Sea of Azov in a 1957 "memorandum on historic bays [(hereinafter the "1957 UN Memorandum")] as part of the official record of the first UN Conference on the Law of the Sea."[57] Noting that customary international law prior to the 1958 Convention on the Territorial Sea and the Contiguous Zone (hereinafter the "1958 Geneva Convention") restricted the coastal State's jurisdiction to "the then narrow limits of the territorial sea," the Russian Federation contends that the Russian Empire and the USSR could not have considered the Sea of Azov and the Kerch Strait as internal waters if they had not long exercised undisturbed sovereignty over them.[58] The Russian Federation explains that the ICJ found the Norwegian practice of straight baselines to be "constant and sufficiently long" after only 65 years, and asserts that its own history adequately establishes historic title.[59]

130. The Russian Federation then turns to the final factor in the formation of historic title: the reaction of third States.[60] The Russian Federation claims that "[t]here have been no objections from third

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53 Rejoinder, para. 107 *citing* Philip Jessup, *The Law Of Territorial Waters And Maritime Jurisdiction* (G. A. Jennings Co. 1927), p. 383 (**Annex RUL-139**); Hearing, 5 October 2024, 21:21-22:3 (Crosato Neumann) *citing* Secretariat of the United Nations, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, 30 September 1957, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents) (**Annexes RU-5**, **UA-547-AM**).

54 Rejoinder, paras 107-09 *citing* Philip Jessup, *The Law Of Territorial Waters And Maritime Jurisdiction* (G. A. Jennings Co. 1927), pp. 382-83 (**Annex RUL-139**); Robin Churchill, Vaughan Lowe, *The Law Of The Sea* (3rd ed., Manchester University Press, 1999), p. 41 (**Annex UAL-62**); Mitchell P. Strohl, *The International Law Of Bays* (Nijhoff 1963), pp. 207-11 (**Annex RUL-138**).

55 Rejoinder, para. 106 *citing* Russian Federation's Preliminary Objections, paras 73-74; Order of the Revolutionary Military Council of the USSR No. 641, General Instructions for Interaction of the USSR Authorities with Foreign Military and Merchant Ships at Peacetime, 22 June 1925, Art. 2 (**Annex RU-2**).

56 Rejoinder, para. 106 *citing* Act No. 431 Concerning the Use of Radio Equipment for Foreign Vessels within the Territorial Waters of the Union, 24 July 1928, Arts 1 and 3, UN Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, United Nations, 1951, p. 121 (**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, Art. 2 and Schedule I, UN Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, United Nations, 1951, p. 124 (**Annex RU-4**).

57 Rejoinder, paras 105, 109 *citing* Secretariat of the United Nations, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, 30 September 1957, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents) (**Annexes RU-5**, **UA-547-AM**).

58 Counter-Memorial, para. 41.

59 Rejoinder, para. 109 [emphasis omitted] *citing Fisheries case (UK v. Norway)*, Judgment, I.C.J. Reports 1951, p. 116 at p. 138 (**Annex UAL-124**).

60 Rejoinder, 116.

States with regard to the status of the Sea of Azov and the Kerch Strait as historic internal waters."[61] It submits that the acquiescence of third States is demonstrated by the lack of objection to domestic legislation of 1925, 1928, and 1935 declaring the Sea of Azov as part of the internal waters of the USSR.[62] Further, the Russian Federation notes examples which included the Sea of Azov as historic waters of the USSR, including United States Department of Defense report and the 1957 UN Memorandum.[63] The Russian Federation observes that the 1957 UN Memorandum publicised the Russian historic title claim as States negotiated the 1958 Geneva Convention.[64] As of the date of the 1958 Geneva Convention, the Russian Federation asserts, a century had passed without third State protest against the Russian claim of peaceful possession of the Sea of Azov and the Kerch Strait.[65]

131. The Russian Federation disputes the relevance of Ukraine's assertions of recent objections by third States to the legal status of the Sea of Azov and the Kerch Strait as historic waters.[66] The Russian Federation contends that third States must protest against an assertion of sovereignty to prevent a claim to historic title from "arising."[67] In contrast, it suggests that acquiescence in a claim can be defined as the silence or "inaction of a state which is faced with a situation constituting a threat to or infringement of its rights."[68] The Russian Federation cites as an example that the ICJ's finding in the 1951 *Fisheries case (United Kingdom v. Norway)* (hereinafter the "*Fisheries case*") that Norway had established a historic right in circumstances where foreign States generally tolerated and failed to protest Norwegian practice.[69] The Russian Federation notes that Ukraine refers only to criticism occurring after 2018, whereas the Russian Federation has demonstrated historic title existing for over a century.[70] With no earlier evidence,

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61 Counter-Memorial para. 43; Hearing, 28 September 2024, 41:6-8 (Crosato Neumann).

62 Rejoinder, paras 106, 108 *referring to* Russian Federation's Preliminary Objections, paras 73-74; Order of the Revolutionary Military Council of the USSR No. 641, General Instructions for Interaction of the USSR Authorities with Foreign Military and Merchant Ships at Peacetime, 22 June 1925, Art. 2 (**Annex RU-2**).

63 The U.S. report includes the Sea of Azov in the section "A. Bays for which historic claims seem clearly to have been made." Counter-Memorial, paras 40, 43 *citing* Lewis M. Alexander, *Navigational Restrictions within the New LOS Context* (Brill | Nijhoff, 2017) (edited by J. Ashley Roach) (**Annex RU-307**); Secretariat of the United Nations, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, 30 September 1957, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents), para. 12 (**Annexes RU-5**, **UA-547-AM**).

64 Hearing, 28 September 2024, pp. 41:25-42:5 (Crosato Neumann).

65 Rejoinder, paras 109-10.

66 Rejoinder, para. 116 *citing* Reply, para. 22.

67 Rejoinder, para. 118.

68 Rejoinder, para. 118 *citing* I.C. MacGibbon, The Scope of Acquiescence in International Law, *British Yearbook of International Law*, 1954, Vol. 31, p. 143 (**Annex RUL-140**) [emphasis omitted]; Hearing, 5 October 2024, 20:17-21:1 (Crosato Neumann).

69 Rejoinder, para. 118 *citing Fisheries case (UK v. Norway)*, Judgment, I.C.J. Reports 1951, p. 116 at pp. 138-39 (**Annex UAL-124**).

70 Rejoinder, para. 117 *citing* Revised Memorial, paras 88-90.

the Russian Federation argues that the third State complaints referred to in Ukraine's submissions are too late to oppose the historic title claim.[71]

132. Furthermore, the Russian Federation argues that the protests referred to by Ukraine are irrelevant to the legal standard in question.[72] The Russian Federation explains that Ukraine refers to complaints of "alleged interference with third-State navigational rights," which is "not the applicable test for what is required of an assertion of sovereignty for an historic title to arise."[73] In addition, the Russian Federation asserts that the European Parliament resolution that Ukraine cites in fact supports the Russian Federation's position, as the resolution states that "the situation in the Sea of Azov was addressed by the bilateral agreement of 2003 between Ukraine and Russia, which defines these territories as internal waters of the two states."[74]

133. The Russian Federation also rejects Ukraine's position that the Sea of Azov and the Kerch Strait cannot constitute a historic bay because, Ukraine says, the Russian Empire and USSR had exercised sovereignty over them, not on the basis of historic title, but on the basis of a "'centuries old' principle that States may claim as internal waters bays with narrow mouths."[75] The Russian Federation submits that the 1957 UN Memorandum, the *Fisheries case*, and the 1962 UN Secretariat report on historic waters and bays all demonstrate "that the rules applicable to juridical bays were not well established at the time."[76] Even if the principle argued by Ukraine existed, the Russian Federation contends that the Russian Empire's claim would predate it,[77] as the Russian Empire became the sole coastal State by 1783, and as such Ukraine's arguments would not prove that the Russian Empire could not acquire title by prescription.[78]

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71 Rejoinder, para. 118. *See also* Hearing, 5 October 2024, 21:2-12 (Crosato Neumann).

72 Rejoinder, para. 119.

73 Rejoinder, para. 119 *citing* Reply, paras 88-90; Juridical Regime of Historic Waters Including Historic Bays - Study Prepared by the Secretariat, [1962] 2 Yearbook of the International Law Commission, UN Doc. A/CN.4/143, para. 89 (**Annex UA-591**). The Russian Federation further notes that the EU and Türkiye "only urge Russia to restore 'freedom of passage', a term not found in UNCLOS." Rejoinder, para. 120 n. 124 *citing* European Union, Statement by the Spokesperson on the escalating tensions in the Azov Sea, 25 November 2018 (**Annex UA-486**); *see also* 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**). The United States meanwhile "asks Russia to stop harassing international shipping – again a general term, not used in UNCLOS." Rejoinder, para. 120 n. 124 *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**).

74 Rejoinder, para. 120 *citing* European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)) (**Annex UA-544**).

75 Hearing, 28 September 2024, 45:2-9 (Crosato Neumann).

76 Hearing, 28 September 2024, 45:19-47:19 (Crosato Neumann).

77 Hearing, 5 October 2024, 23:18-25 (Crosato Neumann); Rejoinder para. 108 *citing* Reply, para. 18.

78 Hearing, 28 September 2024, 47:24-48:9 (Crosato Neumann). *See also* Counter-Memorial, para. 42.

134. Furthermore, the Russian Federation submits that the breadth of the entrance to the Sea of Azov does not fit the "'centuries-old' customary rule for juridical bays with narrow mouths" of 3, 6, or 10 miles argued by Ukraine.[79] According to the Russian Federation, if the historic principle alleged by Ukraine is presumed to include the rules on juridical bays found in the 1958 Geneva Convention and UNCLOS, then the relevant width would be "the distance between the low-water marks of the natural entrance points of the bay."[80] The Russian Federation notes that Ukraine appears to choose the narrowest possible points inside the Kerch Strait as the mouth, which Ukraine asserts are 2 miles apart.[81] However, the Russian Federation explains, the natural entrance points from which the baseline in the Black Sea has "always been measured" and which Ukraine submitted to the UN Secretariat in 1992, are Kyz-Aul and Cape Zhelezny Rog, which the Russian Federation calculates are 18 miles apart.[82] Consequently, the Russian Federation asserts, Ukraine's proposed historic principle concerning judicial bays with narrow mouths, which would only apply to bays with mouths of at most 10 miles across, would not have applied to the Sea of Azov and the Kerch Strait, and the Russian Empire could not have exercised sovereignty based on such a principle.[83]

135. In the Russian Federation's view, it is "entirely normal" for the Sea of Azov to fall under two international law regimes: the 1958 Geneva Convention's rules on juridical bays and customary international law relating to historic title.[84] According to the Russian Federation, the two systems have not been in conflict at any time since the Russian Federation acceded to the 1958 Geneva Convention in 1960. The Russian Federation submits that the ICJ Chamber, facing a similar situation in *Gulf of Fonseca,* determined that "the fact that the Gulf of Fonseca would today qualify geographically as a 'juridical' bay cannot now call in question or replace its historic status."[85] The Russian Federation argues that the correct interpretation of the ICJ Chamber's judgment confirms that the Gulf of Fonseca retained its historic title even after the establishment of both the 1958 Geneva Convention and UNCLOS.[86] The Russian Federation further notes that the provisions on juridical bays found in the 1958 Geneva Convention and UNCLOS do not apply to historic bays.[87]

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79 Hearing, 5 October 2024, 23:9-17 (Crosato Neumann).
80 Hearing, 5 October 2024, 24:1-23 (Crosato Neumann).
81 Hearing, 5 October 2024, 24:1-25:5 (Crosato Neumann).
82 Hearing, 5 October 2024, 25:6-26:4 (Crosato Neumann).
83 Hearing, 5 October 2024, 24:24-26:14 (Crosato Neumann).
84 Rejoinder, para. 112.
85 Rejoinder, para. 112 *citing Gulf of Fonseca*, cit., n. 43, p. 593, para. 393 (**Annexes RUL-19**, **UAL-58**); Counter-Memorial, para. 42.
86 Rejoinder, para. 113.
87 Rejoinder, para. 113 n. 111.

136. Applying both the historic title and the conventional regime to the present dispute, the Russian Federation recalls that the USSR enacted the Statute on the Protection of the State Border of the Union of Soviet Socialist Republics in 1960 (hereinafter the "1960 Statute"), three months before ratifying the 1958 Geneva Convention "to draw a closing line for the Kerch Strait and the Sea of Azov, enclosing them as internal waters, with reference to historical possession,"[88] and reiterated the closing line in a decree of the USSR Council of Ministers dated 15 January 1985, reflected in Declaration No. 4450.[89] The Russian Federation suggests that such action "shows the complementarity" between historic title and the conventional regime of juridical bays,"[90] and notes that Declaration No. 4450 relied on neither the 1958 Geneva Convention nor UNCLOS for a legal basis.[91]

137. Thus, the Russian Federation claims that the "decades-long exercise of sovereignty over these waters justifies the conclusion" that there was a historic title to the Sea of Azov and the Kerch Strait "before the codification of the international law of the seas by the Geneva Conventions of 1958,"[92] and that such a historic title does not "cease to exist, even when a historic bay meets the conventional requirements of a juridical bay."[93]

c. Whether the Parties Agreed on Historic Title over the Sea of Azov and the Kerch Strait

138. The Russian Federation submits that "[t]he historic character of the waters of the Sea of Azov [...] was explicitly recognised by both Ukraine and Russia in [Article 1, paragraph 1, of] the Azov/Kerch Cooperation Treaty," which states, in the Russian Federation's proffered translation, that "[t]he Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine."[94] The Russian Federation notes that the Joint Statement of 24 December 2003 of the President of the Russian Federation and the President of Ukraine

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88 Rejoinder, para. 111 *citing* Statute on the Protection of the State Border of the Union of SSR, approved by the Presidium of the Supreme Soviet of the USSR, 5 August 1960 (**Annex RU-6**).

89 Rejoinder, para. 111 *citing* Declaration of the USSR 4450 Containing List of Geographical Coordinates Defining the Position of the Baselines, 25 January 1985 (**Annex RU-12**). The Arbitral Tribunal understands that the decree contained in Declaration No. 4450 is legally binding.

90 Rejoinder, para. 111.

91 Rejoinder, para. 114.

92 Counter-Memorial, para. 39.

93 Rejoinder, para. 115.

94 Counter-Memorial, para. 44 *citing* Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, done in Kerch on 24 December 2003 (hereinafter the "Azov/Kerch Cooperation Treaty"), Art. 1(1) (**Annex RU-20-AM**).

(hereinafter the "Joint Statement of 24 December 2003") uses "[t]he same terminology."[95] The Russian Federation observes that the Parties do not dispute that the Azov/Kerch Cooperation Treaty "was, at all relevant times, a legally binding instrument between them," but only disagree on its interpretation.[96]

139. Recalling the statement of the UN International Law Commission (hereinafter the "ILC") that "the starting point of [treaty] interpretation is the meaning of the text,"[97] the Russian Federation notes that there are slight differences between the Russian Federation's translation and Ukraine's translation of the first sentence of Article 1 of the Azov/Kerch Cooperation Treaty.[98] While the Russian Federation translates Article 1, paragraph 1 to read "[t]he Sea of Azov and the Kerch Strait *are historically internal waters* of the Russian Federation and Ukraine," the translation referred to by Ukraine reads "[t]he Sea of Azov and the Kerch Strait *historically constitute internal waters* of the Russian Federation and Ukraine."[99]

140. With respect to the meaning of the text, the Russian Federation notes that Article 1, paragraph 1, of the Azov/Kerch Cooperation Treaty specifies that the Sea of Azov and the Kerch Strait are historically internal waters of "the Russian Federation and Ukraine," States which came into being as sovereign States only after the dissolution of the USSR.[100] The Russian Federation thus argues that the Azov/Kerch Cooperation Treaty "cannot refer to the past," because if the Parties had intended to refer to the period in which they were republics of the USSR, they would have specified that the internal waters belonged to the USSR.[101]

141. The Russian Federation further notes that both Parties' translations "are in the present tense and clearly refer to the present status of these water bodies, as well as to the historical origin of this status."[102] The Russian Federation submits that to interpret the word "historically" to refer to "a

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95 Counter-Memorial, para. 44 *citing* Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003, *Law of the Sea Bulletin*, 2004, Vo. 54, p. 131 (**Annexes RU-21**, **UA-530**).

96 Rejoinder, para. 121.

97 Rejoinder, para. 123 *citing* ILC Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, p. 220 (**Annex RUL-141**).

98 Rejoinder, paras 124-25. "The Sea of Azov and the Kerch Strait [*Russian Federation's translation:* are historically][*Ukraine's translation*: historically constitute] internal waters of the Russian Federation and Ukraine." Azov/Kerch Cooperation Treaty, Art. 1(1) (**Annexes RU-20-AM**, **UA-19**).

99 Rejoinder, paras 124-25 [emphasis added by the Russian Federation].

100 Counter-Memorial, para. 46.

101 Counter-Memorial, para. 46.

102 Rejoinder, para. 127.

historical fact as to the[] past status," as Ukraine attempts to, is contrary to the plain meaning of the clear use of the present tense.[103]

142. In addition, the Russian Federation argues that the context of the Azov/Kerch Cooperation Treaty supports its interpretation.[104] The Russian Federation recalls that the Joint Statement of 24 December 2003 was issued at the same time as the Azov/Kerch Cooperation Treaty and communicated to and published by the UN. Its text reads:

> [...] *historically* the Sea of Azov and the Strait of Kerch *are inland waters of Ukraine and Russia* [...].[105]

According to the Russian Federation, this sentence is likewise in the present tense and describes the historical origin of a present status, thus supporting its interpretation.[106]

143. The Russian Federation finds further support in Ukrainian President Leonid Kuchma's official statement made upon signing of the Azov/Kerch Cooperation Treaty on Ukraine's behalf:

> I am glad that today we practically did not have any diverging interpretations. And our opinion is united: that the Kerch Strait should serve equally both Ukraine and Russia. Especially, if the *Sea of Azov – this is not the first document supporting it, but it is also [supported] by the land border treaty – constitutes internal waters of the Russian Federation and Ukraine* – then, of course, the Kerch Strait should not be a bottleneck for the normal work of all parties.[107]

Observing that "President Kuchma did not use the word 'historical' but simply confirmed that the Sea of Azov was, in fact, considered by both the Russian Federation and Ukraine to be internal waters at that time," the Russian Federation notes that these statements provide further context supporting the Russian Federation's interpretation of the Azov/Kerch Cooperation Treaty.[108]

144. The Russian Federation also contends that Ukraine's current position that Ukraine was open to a future determination of an internal waters status, "but only if an agreement could be reached as to delimitation and a shared navigation regime," is in fact satisfied by the provisions of Articles 1 and 2 of the Azov/Kerch Cooperation Treaty.[109] The Russian Federation notes that these

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103 Rejoinder, para. 127 *citing* Revised Memorial, para. 110; Reply, para. 25 [brackets added by Russian Federation].

104 Hearing, 28 September 2024, 44:5-6 (Crosato Neumann).

105 Rejoinder, para. 126 *citing* Joint Statement of 24 December 2003, p. 131 (**Annexes RU-21**, **UA-530**) [emphasis added by Russian Federation].

106 Rejoinder, para. 127.

107 Rejoinder, para. 127 *citing* Ukrainska Pravda, How Kuchma gave up the Kerch Strait and the Sea of Azov. Transcript of the Press-Conference (24 December 2003) (**Annex RU-564**) [emphasis added by the Russian Federation].

108 Rejoinder, paras 128, 142.

109 Rejoinder, para. 144 *citing* Reply, para. 26.

provisions demonstrate a compromise between the Parties. It observes that the first two sentences of Article 1, with the Russian Federation recognising Ukraine's concern for delimitation in the Sea of Azov, "almost constitute an exchange of 'considerations' in contract law."[110] Given the negotiating history behind the Azov/Kerch Cooperation Treaty, with discussions beginning in 1995 and an agreement reached "in as early as 2000 as to the confirmation of the historic internal waters status of the Sea of Azov and the Kerch Strait," the Russian Federation considers it "unlikely [...] that Ukraine was unaware of the implications of the word 'historically.'"[111]

145. The Russian Federation suggests that interpreting Article 1, paragraph 1, of the Azov/Kerch Cooperation Treaty along with "the identical sentence in the Joint Statement of the same date as merely stating a historical fact" without legal implication for the subsequent relationships covered by the Treaty "would deny the provision any *effet utile*."[112]

146. The Russian Federation disputes Ukraine's assertion that the Azov/Kerch Cooperation Treaty was negotiated during a crisis, relating to a plan to construct a dam linking Tuzla Island to the Taman Peninsula in the Kerch Strait, that it was intended to diffuse.[113] Factually, the Russian Federation considers the assertion misleading, as negotiations began years before the dam episode.[114] Legally, the Russian Federation explains that the law of treaties restricts the grounds for termination or invalidity of a treaty, even though many treaties arise out of complicated political backgrounds. Here, according to the Russian Federation, both Parties implemented the Azov/Kerch Cooperation Treaty in good faith for over two decades.[115] The Russian Federation adds that the preamble of the Treaty makes clear that the purpose was to promote economic development and preserve the interests of the Parties, not to "diffuse a crisis."[116] Moreover, the Russian Federation notes that the Ukrainian Parliament ratified the Azov/Kerch Cooperation Treaty on the understanding that the Parties had agreed that "the Azov Sea and the Kerch Strait are internal waters of the Ukraine and the Russian Federation."[117]

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110 Rejoinder, para. 145.

111 Rejoinder, para. 145 *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 (19 October 1995) (**Annex RU-15**); Letter of the Russian President to the Ukrainian President dated 9 July 2001 (**Annex RU-68**). *See also* Hearing, 5 October 2024, 48:13-50:2 (Crosato Neumann).

112 Counter-Memorial, para. 47.

113 Hearing, 28 September 2024, 29:1-9 (Crosato Neumann).

114 Hearing, 28 September 2024, 29:9-14 (Crosato Neumann).

115 Hearing, 28 September 2024, 29:10-23 (Crosato Neumann).

116 Hearing, 28 September 2024, 29:24-30:3 (Crosato Neumann).

117 Hearing, 28 September 2024, 30:12-22 (Crosato Neumann) *citing* Law of Ukraine 'On Ratification of the Treaty for Cooperation in Utilizing the Azov Sea and the Kerch Strait between Ukraine and the Russian Federation', 5 May 2004 (**Annex RU-562**).

147. The Russian Federation further provides expert evidence from a linguist, [redacted], which is intended to emphasise (i) that the text of the Azov/Kerch Cooperation Treaty provision mentions both Parties; (ii) that the text shows that the Parties agreed in 2003 that the Sea of Azov and the Kerch Strait were historic internal waters; and (iii) that "[t]he treaty provided for a *condominium* for the time being, without leaving any part of the two areas of sea outside the scope of this status."[118]

148. The Russian Federation submits that the adverb "historically" includes among its meanings "in the course of historical development" and "in accordance with historical laws and principles," and is not limited to meaning "only in the past" as Ukraine claims.[119] The Russian Federation notes that [redacted] provides a number of examples "showing that the word 'historically' [...] when combined with a verb in the present tense [...] speaks of the current state of affairs" and does not describe a past scenario.[120]

149. The Russian Federation contends, in contrast to Ukraine, that [redacted] applies "classical methods" to interpret the Azov/Kerch Cooperation Treaty, as required by Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties (hereinafter the "VCLT").[121] The Russian Federation, relying on [redacted]'s criticisms, asserts that Ukraine's expert Dr. Danylenko's evidence "should be disregarded."[122] The Russian Federation further notes that [redacted] provides examples of semantically analogous sentences in Ukrainian which employ the term "historically" and which disprove Ukraine's interpretation.[123]

150. The Russian Federation argues that, had the Parties meant Article 1, paragraph 1, of the Azov/Kerch Cooperation Treaty to be purely historical and descriptive, the provisions on the

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118 Rejoinder, paras 132-33.

119 Counter-Memorial, para. 45 *citing* Opinion of [redacted], paras 27, 31-32, 38 (22 August 2022); Rejoinder, para. 133 *citing* Second Opinion of [redacted], para. 4(a) (8 December 2023).

120 Rejoinder, para. 134 *citing* Opinion of [redacted], para. 73 (8 December 2023).

121 Rejoinder, para. 135; Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332, 23 May 1969, Art. 31(1) (**Annex UAL-43**).

122 Rejoinder, paras 135-39 *citing* Opinion of [redacted], paras 20, 26, 31, 33 (8 December 2023).

123 Rejoinder, para. 141 *citing* Opinion of [redacted], paras 53-56 (22 August 2022); Opinion of [redacted], paras 72-79 (8 December 2023). One example is "Austria is historically a neutral country, it is not a member of NATO," where the present status as a "neutral country" is established by the present tense verb and the explanatory remark, and the adverb "historically" merely links this present status to the past. Rejoinder, para. 141(a) *citing Irina Vereshchuk: The Issue of EU Council's Sanctions Against Russia Can Be Considered Resolved*, NRCU (4 September 2018) (**Annex RU-813**). Another example is "Foreign Minister of the People's Republic of China Qin Gang said that Taiwan is historically an integral part of China." In this example, the Russian Federation notes that "the speaker clearly refers to Taiwan's *present* official status of being China's 'integral part'" by use of the present tense verb, while the adverb "historically" qualifies the status as the result of a "historical process." Rejoinder, para. 141(b) *citing China Says Taiwan Belongs to it 'Historically' - There Will be a Response to Attempts to Gain Independence*, Ukrinform (21 April 2023) (**Annex RU-814**).

navigation of foreign ships in the waters, set out in Article 2, paragraphs 2 and 3, would be incompatible with UNCLOS.[124] The Russian Federation's view is that Article 2 of the Azov/Kerch Cooperation Treaty provides for more restrictive navigational rights than UNCLOS for foreign-flagged merchant ships, foreign warships, and foreign government ships operated for non-commercial purposes.[125] The Azov/Kerch Cooperation Treaty's limitations on navigation by such ships could thus only be legal under UNCLOS if the Parties considered the Sea of Azov and the Kerch Strait to be internal waters, and if third States agreed, so that UNCLOS did not apply.[126]

d. The Effect of Ukraine's Article 298 Declaration

151. The Russian Federation rejects the argument that Ukraine has never recognised the Sea of Azov as a historic bay, countering that, since 1991, Ukraine has never denied the existence of historic title.[127] The Russian Federation adds that Ukraine "implicitly recognised" the historic bay character of the Sea of Azov when it excluded disputes involving "historic bays or titles" from compulsory jurisdiction in Ukraine's declaration under Article 298, paragraph 1(a)(i), of the Convention. The Russian Federation notes that "Ukraine did not have other bays, but the Sea of Azov, that can qualify as historic bays," and so argues that Ukraine's declaration "could only refer to the Sea of Azov."[128] The Russian Federation disputes Ukraine's argument that its declaration merely paraphrased the Convention, asserting that a declaration submitted to the Secretary-General of the UN and all member States "must be, and presumed to be, seriously prepared so that its contents have a real meaning."[129] The Russian Federation concludes that to interpret the declaration as paraphrase would "deprive it of its intended meaning and legal consequences."[130]

152. The Russian Federation finds "implausible" Ukraine's argument that it has never recognised the Sea of Azov as a historic bay despite its declaration.[131] The Russian Federation contests Ukraine's statement that its declaration is not an acknowledgement of "a special legal status" for the waters, responding that "the expression, 'special status', reflected the exact and shared understanding between the two countries in respect of the sea and the strait during their negotiations of the Azov/Kerch Cooperation Treaty."[132] The Russian Federation contends that Ukraine bears the

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124 Counter-Memorial, paras 48-50; Hearing, 28 September 2024, 44:13-16 (Crosato Neumann).
125 Rejoinder, paras 147-48.
126 Counter-Memorial, paras 48-50; Rejoinder, paras 147-48.
127 Rejoinder, para. 150.
128 Counter-Memorial, paras 37, 51.
129 Counter-Memorial, para. 51 *citing* Ukraine's Rejoinder on Jurisdiction, para. 97. *See also* Ukraine's Written Observations, para. 96.
130 Counter-Memorial, para. 51.
131 Rejoinder, para. 151.
132 Rejoinder, para. 151.

burden to offer evidence that it has another sea area subject to historic title so that its declaration could have meaning, and concludes that Ukraine "is unable to do so."[133]

2. Ukraine's Position

153. Ukraine summarises its response to the Russian Federation's contention that the Sea of Azov and the Kerch Strait should be considered a historic bay as follows:

> [...] the Sea of Azov and Kerch Strait are not a historic bay or waters subject to rights of historic title; the Parties never agreed to the existence of such a status; and Ukraine's practices concerning the Sea of Azov and Kerch Strait have not aligned with any such status.[134]

Consequently, Ukraine concludes that the Sea of Azov and the Kerch Strait are not covered by the Parties' declarations made under Article 298 of the Convention.

a. The Scope of Article 298, Paragraph 1(a)(i), of UNCLOS

154. Ukraine rejects the Russian Federation's assertion that, due to the Parties' Article 298 declarations, the Arbitral Tribunal is precluded from exercising jurisdiction if there is a disagreement over whether historic title or a historic bay exists.[135] This argument, in Ukraine's view, is "entirely self-judging," being in essence that "should Russia merely assert that the Sea of Azov is a historic bay, that position cannot be called into question" by the Arbitral Tribunal.[136] Ukraine explains that this objection is at odds with the Arbitral Tribunal's Award Concerning Preliminary Objections, where the Arbitral Tribunal noted that it "must ascertain whether historic title to the waters in question existed."[137] Ukraine adds that the ordinary meaning of Article 298 of the Convention requires the involvement of an actual historic bay or title, not merely a claim to one.[138] Ukraine explains that arbitral tribunals have routinely determined if other listed exceptions applied by establishing the existence of the claimed activities.[139]

155. In addition, Ukraine argues that the Russian Federation's reliance upon *South China Sea* is misplaced.[140] Ukraine explains that the *South China Sea* arbitral tribunal's analysis of China's

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133 Rejoinder, para. 151.
134 Reply, para. 13.
135 Hearing, 23 September 2024, 69:8-70:9 (Soons).
136 Hearing, 23 September 2024, 70:2-6 (Soons).
137 Hearing, 23 September 2024, 70:7-20 (Soons) *citing* Award Concerning Preliminary Objections, 21 February 2020, para. 292.
138 Hearing, 23 September 2024, 70:18-71:10 (Soons).
139 Hearing, 23 September 2024, 71:11-72:25 (Soons) *citing South China Sea*, cit., n. 37, paras 932-38 (**Annex UAL-11**).
140 Hearing, 23 September 2024, 73:17-23 (Soons).

claims proves that the Article 298 exception is not, in fact, self-judging.[141] Moreover, Ukraine continues, the *South China Sea* arbitral tribunal did not consider whether the Article 298 exception excludes disputes over the existence of historic title, as required in the present proceedings.[142]

156. In response to the Russian Federation's question of what would remain for the Article 298 exception under Ukraine's interpretation, Ukraine notes that the Russian Federation itself had proposed two categories of disputes in discussing the Article 298 exception—those concerning the existence of historic title and those "concerning activities within a recognised historic bay"—and that the latter category would remain under the exception.[143]

b. Whether the Sea of Azov and the Kerch Strait Were Internal Waters Subject to Historic Title

157. Ukraine submits that the Parties agree that the Soviet Union exercised sovereignty over the Sea of Azov until its dissolution but that they diverge on the basis of that exercise of sovereignty.[144] Ukraine asserts that the Sea of Azov and the Kerch Strait constituted a single-State juridical bay under the USSR, and that, post-dissolution, the waters lost that status.[145] Ukraine explains that, as there was no longer a single-State bay consistent with Article 10 of the Convention upon the USSR's dissolution, the Sea of Azov and the Kerch Strait became areas of internal waters, territorial seas, and exclusive economic zones.[146] Ukraine argues that "[n]ot only does UNCLOS bar any form of pluri-State internal water status for the Sea of Azov, but the Sea of Azov and Kerch Strait are also not subject to a claim of pluri-State historic title."[147] Ukraine also submits that the Russian Federation bears the burden of proof of establishing that the Article 298 exception excluding disputes involving historic bays applies in the present proceedings.[148]

158. Ukraine contends that "[h]istoric title is a form of 'acquisitive prescription' that is established only where a State exercises rights or sovereignty over an area of water to which it otherwise would not have title" and "there is acquiescence of third States with regard to that exercise of sovereignty."[149] In Ukraine's view, the "mere exercise by a State of *de jure* rights under

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141 Hearing, 23 September 2024, 73:24-74:15 (Soons).
142 Hearing, 23 September 2024, 74:16-21 (Soons).
143 Hearing, 3 October 2024, 40:5-17 (Soons).
144 Hearing, 23 September 2024, 76:13-17 (Soons).
145 Reply, para. 11. *See also* Hearing, 23 September 2024, 60:8-15 (Soons).
146 Hearing, 23 September 2024, 60:16-19 (Soons).
147 Revised Memorial, para. 120.
148 Hearing, 3 October 2024, 41:17-42:5 (Soons).
149 Reply, para. 14 *citing* Leo J. Bouchez, *The Regime of Bays in International Law* (1964), p. 281 (**Annex UAL-126-AM**); Coalter G. Lathrop, 'Baselines' in Donald R. Rothwell et al. (eds), *The Oxford Handbook*

international law does not establish historic title."[150] Ukraine argues that neither the Russian Empire nor the USSR "exercised such prescriptive rights over these waters, rather than simply exercising rights consistent with their long-standing status as a single-State, juridical bay."[151]

159. A juridical bay, according to Ukraine, is a bay with a narrow mouth surrounded entirely by a single coastal State.[152] Ukraine explains that "juridical" means "legal," and a juridical bay "is one that legally constitutes the internal waters of a single coastal State."[153] Ukraine asserts that "the concept of a single-State juridical bay goes back for centuries," and is visible in the "cannon shot standard, which held that a State could properly claim as its internal waters any bay which could be defended by cannon from the points of the bay's mouth."[154] Referring to the 1957 UN Memorandum, Ukraine observes that cannon shot standards included distances of 3, 6, and 10 miles.[155] Regarding the Russian Federation's reliance on Jessup, Ukraine explains that he did in fact recognise general rules on juridical bays in 1927, even articulating a 6-mile-wide opening standard.[156] Ukraine acknowledges that there was some debate during the late 19th and early 20th centuries "as to whether a single-State bay could be 6 or 10 miles wide,"[157] but submits that the jurisprudence and conventions from this time period, including sources relied upon by the Russian Federation, support the existence of juridical bays, albeit with disagreement over the maximum length of the closing line across the bay.[158]

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of the Law of the Sea (2015), p. 84 (**Annex UAL-123**); Hearing, 23 September 2024, 75:24-76:3 (Soons) [citations omitted]. *See also* Revised Memorial, para. 122.

150 Revised Memorial, para. 123.

151 Reply, para. 14; Revised Memorial, paras 120-26.

152 Hearing, 23 September 2024, 62:18-25 (Soons).

153 Hearing, 23 September 2024, 77:17-21 (Soons).

154 Hearing, 23 September 2024, 78:2-12 (Soons) *citing* Historic Bays: Memorandum by the Secretariat of the United Nations, UN Doc. A/CONF.13/1, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents) (24 February to 27 April 1958), para. 20 (*quoting Direct U. S. Cable Co. v. Anglo-American Cable Co.*, 2 App. Cas. 394 (P.C. 1877)) (**Annexes RUL-5**, **UA-547-AM**).

155 Hearing, 23 September 2024, 78:8-12 (Soons) *citing* Historic Bays: Memorandum by the Secretariat of the United Nations, UN Doc. A/CONF.13/1, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents) (24 February to 27 April 1958), p. 5 (*quoting Direct U.S. Cable Co. v. Anglo-American Cable Co.*, 2 App. Cas. 394 (P.C. 1877)) (**Annexes RUL-5**, **UA-547-AM**).

156 Hearing, 23 September 2024, 78:13-79:22 (Soons) *citing* Philip Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (G. A. Jennings Co. 1927), p. 382 (**Annex RUL-139**).

157 Hearing, 23 September 2024, 79:14-25 (Soons) *citing* Historic Bays: Memorandum by the Secretariat of the United Nations, UN Doc. A/CONF.13/1, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents) (24 February to 27 April 1958), p. 17 (*quoting* Rivier, *I Principes du Droit de Gens* (1896), pp. 154-55) (**Annexes RUL-5**, **UA-547-AM**).

158 Hearing, 23 September 2024, 80:1-81:8 (Soons) *citing* Mitchell P. Strohl, *The International Law of Bays* (Nijhoff 1963), pp. 207-08. (**Annex RUL-138**); Hearing, 3 October 2024, 42:6-44:4 (Soons) *citing* D.P. O'Connell, *The International Law of the Sea*, Vol. I (1984), pp. 353 (**Annex UAL-161**); Reply, para. 18.

160. Ukraine argues that, "[g]iven the narrowness of the Kerch Strait, the Sea of Azov qualified as a juridical bay even under" customary international law.[159] Thus, Ukraine continues, as "the Russian Empire and the Soviet Union exercised rights over the Sea of Azov that were consistent with the standard rules for bays as they stood long before the 1958 Convention—they did not accrue any form of prescriptive, historic title."[160] Ukraine therefore asserts that the ICJ Chamber's judgment in *Gulf of Fonseca* is inapposite, as it states that a new qualification as a juridical bay does not affect historic rights gained by prescription, whereas in the present dispute the Sea of Azov and the Kerch Strait qualified as a juridical bay for centuries and no rights were gained through prescription.[161]

161. Ukraine disputes that the Russian Federation's evidence demonstrates that the Russian Empire and the USSR had acquired historic title over the Sea of Azov and the Kerch Strait.[162] Ukraine notes that the Russian Federation has not provided any historical documents from either the Russian Empire or its contemporaries to support this claim.[163] Ukraine further asserts that the Russian Federation misrepresents de Cussy's 1856 book, as de Cussy noted that the Russian Empire's jurisdiction was executed by right, not by prescription.[164] In any event, Ukraine submits that references in academic literature to the Sea of Azov as a historic bay do not sufficiently demonstrate that the Russian Federation's predecessors acquired prescriptive rights.[165]

162. As regards the Soviet legislation cited by the Russian Federation, Ukraine notes that the treatment of the Sea of Azov as internal waters in the legislation is entirely consistent with contemporaneous principles establishing the Sea of Azov to be a juridical bay.[166] Similarly, Ukraine submits that the 1957 UN Memorandum upon which the Russian Federation also relies does not explain why the exercise of sovereignty over the Sea of Azov and the Kerch Strait by the USSR would be characterised as a historic bay rather than a single-State juridical bay.[167] Indeed, according to Ukraine, the 1957 UN Memorandum records that multiple scholars viewed the Sea of Azov as "ordinary internal waters of the Soviet Union under international law, not as a historic bay acquired by prescription."[168]

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159 Reply, para. 17.
160 Reply, para. 17. *See also* Hearing, 23 September 2024, 77:5-9 (Soons).
161 Reply, paras 15-18. *See also* Hearing, 23 September 2024, 85:13-86:15 (Soons).
162 Hearing, 23 September 2024, 81:9-18 (Soons).
163 Hearing, 3 October 2024, 20:20-25 (Soons).
164 Hearing, 23 September 2024, 81:19-82:17 (Soons) *citing* Baron Ferdinand De Cussy, *Phases et causes célèbres du droit maritime des Nations*, Vol. I, F.A. Brockhaus, 1856, p. 97 (**Annex RUL-1**).
165 Hearing, 3 October 2024, 49:13-16 (Soons).
166 Hearing, 23 September 2024, 82:24-83:17 (Soons) *referring to* Rejoinder, para. 106.
167 Hearing, 23 September 2024, 83:23-84:14 (Soons).
168 Hearing, 23 September 2024, 84:15-85:12 (Soons).

163. Ukraine further submits that the Russian Federation's contention that "[t]he USSR had never declared its refusal of the historic title [...] misses the point."[169] Ukraine contends instead that, because the USSR exercised rights through juridical title, it had no rights to historic title to refuse.[170] Ukraine adds that the Soviet sources offered by the Russian Federation are unpersuasive.[171] According to Ukraine, a 1958 article by the Soviet State University of Tartu contains a "long, dubious list of aggressive claims to Soviet internal waters," and recognises that the Sea of Azov qualifies as an "internal sea" due to its narrow mouth, "confirm[ing] that Russia could not have acquired title by prescription over the Sea of Azov, because it was a juridical bay."[172] Ukraine further contends that a 1966 Manual of International Maritime Law published by the Military Publishing House of the Ministry of Defence of the USSR similarly contains dubious claims and assertions, such as that third State recognition is not decisive in establishing historic bay status.[173]

164. In addition, Ukraine disputes the Russian Federation's assertion that it acquired title by prescription over the Sea of Azov before the establishment of the concept of juridical bays.[174] First, Ukraine submits that the concept of juridical bays predates that of historic title.[175] Second, Ukraine argues that the record in this Arbitration contains substantially more material regarding juridical bays than it does to support the claim that the Russian Empire had acquired historic title in 1783.[176] Finally, Ukraine contends that the record contradicts the Russian Federation's claim that the Sea of Azov was subject to a claim of historic title under the Russian Empire.[177]

165. As regards the Russian Federation's contention that third States have not objected to the status of the Sea of Azov and the Kerch Strait as historic internal waters, Ukraine states that the Soviet Union never exercised prescriptive title over the Sea of Azov and the Kerch Strait, meaning that there was nothing to which third States could acquiesce or object.[178] Regardless, Ukraine

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169 Reply, para. 19.
170 Reply, para. 19.
171 Reply, paras 19-21.
172 Reply, para. 20 *citing* A.T. Uustal, 'International Legal Regime of Territorial Waters', Transactions of the University of Tartu, Issue 66 (1958), p. 172 at pp. 178-79, nn.1-2 (**Annex RU-305**).
173 Reply, para. 21 *citing* P. D. Barabolya et al., *Manual of International Maritime Law*, Military Publishing House of the Ministry of Defense of the USSR, Moscow, 1966 (**Annex RU-304**).
174 Hearing, 3 October 2024, 44:5-45:48:4 (Soons).
175 Hearing, 3 October 2024, 44:17-22 (Soons).
176 Hearing, 3 October 2024, 45:2-46:9 (Soons).
177 Hearing, 3 October 2024, 46:10-48:4 (Soons) *citing* Leo J. Bouchez, *The Regime of Bays in International Law* (1964), pp. 215-37 (**Annex UAL-126-AM**); Secretariat of the United Nations, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, 30 September 1957, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents), paras 12, 92 (**Annexes RU-5**, **UA-547-AM**).
178 Hearing, 23 September 2024, 86:16-87:11 (Soons).

provides several examples of objections by third States and intergovernmental organisations to the Russian Federation interfering with third-State navigational rights.[179]

166. Ukraine explains that "[t]hese objections illustrate that third States have not acquiesced in any internal waters status for the Sea of Azov and Kerch Strait."[180] Instead, Ukraine asserts that the objections demonstrate that third States "continue to claim and exercise their navigational rights" in the Sea of Azov and the Kerch Strait.[181] Ukraine further explains that the reason for any previous lack of objections is that "States are not obligated to protest abstract harms to their rights before those harms have occurred."[182] However, Ukraine notes, "[o]nce Russia began interfering with third-State navigational rights, third States promptly protested."[183]

c. Whether the Parties' Agreed on Historic Title over the Sea of Azov and the Kerch Strait

167. Ukraine rejects the Russian Federation's contention that Article 1, paragraph 1, of the Azov/Kerch Cooperation Treaty[184] indicated that both Parties agreed that the Sea of Azov and the Kerch Strait are subject to historic title. Instead, Ukraine submits that "Article 1, paragraph 1 of the treaty records a historical fact about the past status of the waters, before Ukraine's independence."[185]

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179 Reply, para. 22; Revised Memorial paras 88-90 *citing e.g.,* European Union, Statement by the Spokesperson on the escalating tensions 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**); United Nations, General Assembly Adopts Resolution Urging Russian Federation to Withdraw Its Armed Forces from Crimea, Expressing Grave Concern about Rising Military Presence (17 December 2018) (**Annex UA-553**); European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP), para. G(4)-(5) (**Annex UA-544**); European Parliament, Resolution of 29 April 2021 on Russia, the Case of Alexei Navalny, the Military Build-up on Ukraine's Border and Russian Attacks in the Czech Republic (2021/2642(RSP), para. T(6) (**Annex UA-593**); NATO, EU Condemn Russia's Plans To Close Parts Of Black Sea For Six Months, *RFE/RL* (16 April 2021) (**Annex UA-597**); U.S. Department of State, Press Statement: Russia's Intention To Restrict Navigation in Parts of the Black Sea (19 April 2021) (**Annex UA-598**); UN General Assembly Resolution 73/194, UN Doc. No. A/73/PV.56, Problem of the Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, as well as Parts of the Black Sea and the Sea of Azov (17 December 2018), p. 2 (**Annex UA-594**); UN General Assembly Resolution 74/17, UN Doc. No. A/RES/74/17, Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (9 December 2019), p. 3 (**Annex UA-595**); UN General Assembly Resolution 74/29, UN Doc. No. A/RES/75/29, Problem of the Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, as well as Parts of the Black Sea and the Sea of Azov (7 December 2020), p. 4 (**Annex UA-596**).

180 Revised Memorial, para. 91.

181 Revised Memorial, para. 91.

182 Reply, para. 23.

183 Reply, para. 23.

184 Ukraine also refers to the Azov/Kerch Cooperation Treaty as the "2003 Sea of Azov Treaty" in its submissions.

185 Hearing, 23 September 2024, 88:21-24 (Soons).

Ukraine also notes that the Parties avoided the terms "historic bay" or "historic title" in the treaty.[186]

168. Ukraine explains that the Azov/Kerch Cooperation Treaty "was never intended to serve as a final, operative agreement" but instead was meant to preserve positions for future negotiations.[187] According to Ukraine, the Azov/Kerch Cooperation Treaty was "[e]xecuted amid a crisis," and contains only five brief articles, all of which contemplate future "agreements," "consultations," and "negotiations."[188]

169. Ukraine contests the "abstract, semantic" analysis proffered by [redacted], arguing that Article 31 of the VCLT instead requires interpreting a treaty's "ordinary meaning" and reading it in context "in the light of [the treaty's] object and purpose."[189] In response, Ukraine offers the report of its own expert, Dr. Danylenko, who explains that Article 1, paragraph 1, of the Azov/Kerch Cooperation Treaty "records a historical fact as to the *past status* of the Sea of Azov and the Kerch Strait," pointing out that the word "historically" does not mean "[i]n the course of historical development" but "indicates that Article 1, paragraph 1, of the Azov/Kerch Cooperation Treaty makes a claim about the *historical* status of the Sea of Azov and the Kerch Strait, rather than their present status."[190]

170. Ukraine next challenges the Russian Federation's argument that the reference in the Azov/Kerch Cooperation Treaty to "the Russian Federation and Ukraine" means that the Treaty does not refer to the past. Ukraine contends that the Russian Federation's argument is "pure speculation."[191] Ukraine explains that "[i]t is entirely natural for the Parties to have opted to use the present-day titles of their respective States."[192]

171. Ukraine also contests the Russian Federation's assertion that interpreting Article 1, paragraph 1, of the Azov/Kerch Cooperation Treaty to denote a historical fact would deny the text *effet utile*, because the doctrine of *effet utile* only applies to normative provisions.[193] However, Ukraine

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186 Hearing, 3 October 2024, 32:7-11 (Soons).
187 Reply, para. 26; Hearing, 3 October 2024, 32:25-33:12 (Soons).
188 Reply, para. 26 *citing* Azov/Kerch Cooperation Treaty, Arts. 3, 4 (**Annexes RU-20-AM**, **UA-19**). *See also* Hearing, 23 September 2024, 101:7-102:1 (Soons).
189 Reply, para. 27 *citing* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332, 23 May 1969, Art. 31(1) (**Annex UAL-43**).
190 Reply, para. 28 *citing* Opinion of Andriy Danylenko, paras 11, 22-27, 31, 36 (24 March 2023) [emphasis added by Ukraine].
191 Reply, para. 30.
192 Reply, para. 30.
193 Reply, para. 31.

continues, as Article 1, paragraph 1, of the Azov/Kerch Cooperation Treaty does not create rights or obligations for the Parties, the doctrine of *effet utile* does not apply.

172. In addition, Ukraine disputes the Russian Federation's argument that the Azov/Kerch Cooperation Treaty's provisions on third-State navigation would contravene UNCLOS if the Sea of Azov and the Kerch Strait were not to be considered as internal waters.[194] Ukraine reiterates that the purpose of the Azov/Kerch Cooperation Treaty was "to provide a framework for future discussions," not to assign rights and obligations.[195] For this reason, Ukraine explains, Article 2 of the Azov/Kerch Cooperation Treaty preserves essential navigational rights of third-State commercial vessels, and Article 3 of the Treaty leaves the precise shipping regime to be implemented through other then-existing and future agreements.[196]

173. Similarly, Ukraine argues that the provisions which allegedly restrict the navigational rights of foreign military ships and government vessels do not in fact limit those rights.[197] Ukraine explains that the provisions only require Ukraine and the Russian Federation not to invite foreign military vessels to their Sea of Azov ports without each other's approval, a security arrangement consistent with the Convention.[198] Ukraine further submits that the text of the Azov/Kerch Cooperation Treaty does not reflect "a clear declaration that third-State vessels could not enter the Sea of Azov absent consent of the littoral States," and that Ukraine negotiated the Azov/Kerch Cooperation Treaty while "focused on seeking to defuse a crisis that had placed its own territory and security under threat, not on defending the navigational rights of third-State vessels."[199] Ukraine contends that as the navigational rights of third States are guaranteed by the Convention, there was no need for Ukraine and the Russian Federation to explicitly protect them in the bilateral Treaty.[200]

174. Ukraine also questions the Russian Federation's reliance on President Kuchma's statement during the press conference held on 24 December 2003.[201] Ukraine argues that the Russian Federation selectively quotes from the statement, which it contends does not in fact call the Sea of Azov the Parties' internal waters, and which instead acknowledges that the Treaty was a starting point for further discussions.[202]

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194 Reply, para. 32.
195 Reply, para. 32.
196 Reply, paras 32, 34.
197 Reply, paras 32-33.
198 Reply, para. 33; Hearing, 23 September 2024, 104:14-22 (Soons).
199 Reply, para. 35.
200 Reply, para. 35.
201 Hearing, 23 September 2024, 105:3-19 (Soons) *citing* Ukrainska Pravda, How Kuchma gave up the Kerch Strait and the Sea of Azov. Transcript of the Press Conference (24 December 2003), p. 1 (**Annex RU-564**).
202 Hearing, 23 September 2024, 105:20-106:15 (Soons).

175. Finally, Ukraine submits that the Ukrainian Constitution as well as domestic law precluded the State from agreeing to joint internal waters with the Russian Federation.[203] Ukraine notes that its Declaration of Independence, as enacted by the Verkhovna Rada, the Ukrainian Parliament, states that "the Ukrainian SSR has the supremacy over all of its territory."[204]

d. The Effect of Ukraine's Article 298 Declaration

176. Ukraine rejects the Russian Federation's contention that Ukraine implicitly recognised the Sea of Azov as a historic bay when it made its Article 298 declaration under UNCLOS.[205] Ukraine repeats its position that its declaration "simply paraphrases" Article 298, paragraph 1(a)(i), of the Convention.[206] Ukraine notes that numerous other States have made a similar declaration excluding from compulsory jurisdiction disputes involving "historic bays or titles" despite never having claimed a historic bay.[207] Ukraine concludes that "Ukraine's decision [...] to make a general declaration paraphrasing the language of Article 298(1)(a)(i) cannot be taken as evidence that Ukraine in July 1999 intended to acknowledge a specific legal status as to the Sea of Azov and the Kerch Strait."[208]

C. THE RUSSIAN FEDERATION'S SECOND GENERAL OBJECTION

1. The Russian Federation's Position

177. The Russian Federation submits as an alternative argument that, if it does not hold historic title over the Sea of Azov and the Kerch Strait, both are nonetheless the Russian Federation's internal waters because they were the uncontested internal waters of the Russian Empire and the USSR and remained internal waters upon the latter's dissolution.[209] The Russian Federation contends that the Convention does not regulate matters such as those underlying Ukraine's claims when they are committed within internal waters.[210] The Russian Federation maintains that, consequently, the Arbitral Tribunal has no jurisdiction *ratione materiae* over this dispute.[211]

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203 Hearing, 3 October 2024, 32:12-24 (Soons).
204 Hearing, 3 October 2024, 32:12-24 (Soons).
205 Reply, para. 36 *citing* Ukraine's Written Observations, para. 96.
206 Reply, para. 36 *citing* Ukraine's Written Observations, para. 96.
207 Reply, para. 36. Ukraine's examples of States having made such a declaration without appearing to have claimed a historic bay include Algeria, Angola, Congo, Greece, Malaysia, Mexico, Montenegro, Singapore, Spain, and Trinidad and Tobago. Reply, n. 65.
208 Reply, para. 36.
209 Counter-Memorial, paras 34, 54-56; Rejoinder, paras 158-60.
210 Counter-Memorial, para. 59.
211 Counter-Memorial, para. 59.

178. The Russian Federation notes that the Parties agree that the Sea of Azov and the Kerch Strait held internal waters status prior to the dissolution of the USSR, but disagree as to the continuity of that status afterwards.[212] The Russian Federation argues that international law permits pluri-State bays, including in cases of the dissolution of States, and that the Sea of Azov holding such a status "is justified by the Convention, the law of State succession, the existing case law and the conduct of both Parties."[213]

179. As an alternative argument, the Russian Federation also relies on the *Island of Palmas case (Netherlands, USA)* and the *Case concerning Right of Passage over Indian Territory (Merits)* to support the proposition that a continuous and peaceful display of sovereignty can establish good title and may also give rise to "local custom."[214] The Russian Federation asserts that the coastal State or States of the Sea of Azov and the Kerch Strait have a long history of continuously displaying sovereignty over the waters without challenge or protest by third States, such that, even if the Russian Federation does not hold historic title, its conduct would still be sufficient to establish the internal waters status of those waters.[215]

a. Whether UNCLOS Bars the Russian Federation and Ukraine from Claiming Sovereignty over the Sea of Azov and the Kerch Strait

180. The Russian Federation disputes Ukraine's contention that "UNCLOS bars Russia and Ukraine from claiming sovereignty over areas of exclusive economic zone in the Sea of Azov."[216] The Russian Federation notes that Ukraine applies Article 89 of the Convention to exclusive economic zones through Article 58, paragraph 2, of the Convention.[217] The Russian Federation understands Ukraine to base its argument on the premise that its "independence in 1991 upon the dissolution of the USSR resulted in the application of general rules of international law of the sea, as reflected in UNCLOS" in the Sea of Azov.[218] However, according to the Russian Federation, Ukraine's contention is untenable for the following three reasons.

181. First, the Russian Federation argues that, while the dissolution of the USSR in 1991 led to the establishment of two new coastal States, this event would only have changed the legal regime

212 Rejoinder, para. 158 *citing* Award Concerning Preliminary Objections, para. 290.
213 Hearing, 28 September, 50:19-25 (Crosato Neumann).
214 Rejoinder, paras 159-60 *citing Island of Palmas case (Netherlands, USA)*, Reports of International Arbitral Awards, Vol. II, Award of 4 April 1928, pp. 829, 839 (**Annex RUL-82**); *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960, I.C.J. Reports 1960, p. 6 at pp. 39-40 (**Annex RUL-144**).
215 Rejoinder, para. 159.
216 Revised Memorial, paras 72, 161; Counter-Memorial, para. 61.
217 Counter-Memorial, para. 61.
218 Rejoinder, para. 161.

governing the Sea of Azov and the Kerch Strait had the new States, "by openly abandoning sovereignty succeeded from the USSR, [...] signalled to the world and each other their joint wish to follow general rules of the law of the sea, as reflected in UNCLOS."[219]

182. The Russian Federation explains that the "basic rule" of the law of State succession is that it entails "replacement of one State by another in the responsibility for the international relations of territory."[220] In its view, Article 2 of UNCLOS and general international law make clear that such territory includes the predecessor State's internal waters.[221] The Russian Federation further refers to the Badinter Commission's statements that, following the principle of *uti possidetis*, State succession should be equitable and should not change frontiers existing at the time of independence unless the States concerned agree otherwise.[222] In *Gulf of Fonseca*, the Russian Federation emphasises, the ICJ Chamber held that "*uti possidetis juris* should be applied to the waters of the gulf as well as to the land," eventually concluding that the three riparian States enjoyed co-ownership over the waters.[223] The Russian Federation notes that the application of the rules of State succession to maritime areas was reaffirmed by case law, including by the ICJ in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (hereinafter *Nicaragua v. Honduras)* and by the arbitral tribunal in *Croatia/Slovenia*.[224]

183. The Russian Federation explains that when the USSR dissolved and the Sea of Azov and the Kerch Strait became bordered by two States instead of one, they remained those States' internal waters.[225] The Russian Federation argues that to accept any change in legal status would mean that "the replacement of one State by two entails the consequence of each of the two losing part of the territory it has inherited" and that, in this case, "sovereignty [...] simply vanished."[226] Citing *Oppenheim's International Law*, the Russian Federation disputes that the coastal States should enjoy less control over pluri-Statal bays than single-State bays,[227] arguing instead that any change

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219 Rejoinder, para. 162.
220 Hearing, 28 September 2024, 51:1-5 (Crosato Neumann).
221 Hearing, 28 September 2024, 51:5-7 (Crosato Neumann).
222 Hearing, 28 September 2024, 51:8-52:9 (Crosato Neumann).
223 Hearing, 5 October 2024, 32:9-33:74 (Crosato Neumann).
224 Hearing, 5 October 2024, 33:23-37:6 (Crosato Neumann) *citing Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659 at p. 707, para. 156 (**Annex RUL-30**); PCA Case No. 2012-04: *In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia* (hereinafter "*Croatia/Slovenia*"), Final Award of 29 June 2017, paras 883, 885-86 (**Annex RUL-41**).
225 Counter-Memorial, para. 56.
226 Counter-Memorial, para. 57; Hearing, 28 September 2024, 53:8-10 (Crosato Neumann).
227 Counter-Memorial, para. 57 *citing* Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Vol. I, 9th edition, Oxford University Press 2008), pp. 632-33 (**Annex RUL-18**).

in the status quo would require the succeeding States to renounce their rights.[228] The Russian Federation asserts that the Parties did no such thing.[229]

184. Second, according to the Russian Federation, "UNCLOS cannot substitute an existing historic regime," and "Ukraine has not cited any authorities for the proposition of such application of the Convention to a new geographical situation as the one that arose in the Sea of Azov and the Kerch Strait in 1991."[230] The Russian Federation disputes Ukraine's argument that the Convention prevails over the law of State succession as *lex specialis*, as the Convention governs neither sovereignty nor State succession.[231]

185. The Russian Federation recalls that the Convention entered into force on 16 November 1994, and that the Russian Federation became a State Party in 1997 and Ukraine in 1999.[232] As such, the Russian Federation asserts that the Convention could not have automatically altered the status of areas of the Sea of Azov in 1991 without either State's consent.[233]

186. The Russian Federation submits that State succession to territorial sovereignty is automatic and applied upon the dissolution of the USSR.[234] The Russian Federation contends that "the sovereignty over the Sea of Azov and the Kerch Strait was different from the sovereignty over land territories [...] since the sovereignty, attached to the coast, can only be exercised by coastal States."[235] The Russian Federation argues that the "undivided sovereignty" over the Sea of Azov and the Kerch Strait in 1991 prompted Ukraine's insistence on delimiting the Sea of Azov by a state border between the Parties, which would not have been possible under UNCLOS.[236] According to the Russian Federation "[i]t is thus clear that the status of the Sea of Azov and the Kerch Strait as internal waters had not been altered during the period of 1991-2003."[237]

187. The Russian Federation further contends that the restrictions on sovereignty over the high seas provided in Article 89 of the Convention only apply when a State claims sovereignty over an area of the sea that, at the time the claim is made, is subject neither to a State's sovereignty nor to its

228 Hearing, 28 September 2024, 53:10-19 (Crosato Neumann).
229 Rejoinder, para. 162; Hearing, 28 September 2024, 53:19 (Crosato Neumann).
230 Rejoinder, para. 163.
231 Hearing, 28 September 2024, 53:20-54:3 (Crosato Neumann).
232 Rejoinder, para. 164.
233 Rejoinder, para. 164; Hearing, 5 October 2024, 30:16-19 (Crosato Neumann).
234 Rejoinder, para. 165.
235 Rejoinder, para. 166.
236 Rejoinder, para. 166.
237 Rejoinder, para. 166.

exclusive economic zone jurisdiction.[238] In contrast, the Russian Federation argues that a "State does not claim sovereignty" where it has maintained it for a long period.[239] Accordingly, the Russian Federation submits that Article 89 of the Convention does not apply in this instance, as it "is not proclaiming or claiming sovereignty, because Russia had and has such sovereignty over the Sea of Azov," and the Parties shared joint sovereignty over the Sea of Azov and the Kerch Strait until recently.[240]

188. The Russian Federation disputes that Ukraine's 1992 submission of base points to the UN entailed "any maritime entitlement that might have priority over the existing, undivided sovereignty" of the two States "the legality of which had long been recognised in international law."[241] The Russian Federation further recalls that the Convention was not in force at that time for Ukraine, and so the "maritime entitlements recognised in the Convention could not be treated as law."[242] Relying on the *Fisheries case,* the Russian Federation argues that Ukraine's unilateral acts of delimitation were not automatically valid under international law.[243] The Russian Federation argues that as the USSR's historic title had been established by 1991, Ukraine would have had to justify its base points in the face of said title. It contends that Ukraine has not done so.[244]

189. In addition, the Russian Federation disputes Ukraine's assertion that the Russian Federation had multiple opportunities to respond to the former's baselines, recalling that the Convention was not in force in 1992 when Ukraine submitted its base points to the UN Secretariat and the coordinates were not circulated to States Parties.[245] The Russian Federation explains that the coordinates were instead published in the Law of the Sea Bulletin in 1998 six years after they were submitted, by which point the Parties had made numerous references to the internal waters status of the Sea of Azov and the Kerch Strait in their maritime delimitation negotiations.[246] According to the Russian Federation, Ukraine communicated its baselines to the Russian Ministry of Foreign Affairs on 25 June 2002, upon which the Russian Ministry "responded swiftly, on 8 August 2002 [...] expressing its displeasure with Ukraine's unilateral action and insisting on preserving the

238 Counter-Memorial, paras 62, 64 *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment, ITLOS Reports 1999, p. 17 at p. 54, para. 127 (**Annex UAL-28**).
239 Counter-Memorial, para. 63.
240 Counter-Memorial, paras 62-63; Rejoinder, para. 167.
241 Rejoinder, para. 167.
242 Rejoinder, para. 167.
243 Rejoinder, para. 167 *citing Fisheries case*, cit., n. 69, p. 132 (**Annex UAL-124**).
244 Rejoinder, para. 168.
245 Rejoinder, paras 167-69; Hearing, 28 September 2024, 33:9-10 (Crosato Neumann).
246 Hearing, 28 September 2024, 33:11-16 (Crosato Neumann); 5 October 2024, 42:15-43:1 (Crosato Neumann).

status quo in the Sea of Azov and the Kerch Strait."[247] In the Russian Federation's view, Ukraine explained both at the time as well as more recently that it had transmitted the baselines for the purpose of delimiting the Sea of Azov with a median line.[248]

190. Furthermore, the Russian Federation observes that the base points in the Black Sea indicated by Ukraine in 1992 included the points Kyz-Aul and Cape Zhelezny Rog, which were located in Ukrainian and Russian territory, respectively. According to the Russian Federation, these base points "formed the closing line of the Kerch Strait as the entrance to the Sea of Azov."[249] Consequently, the Russian Federation continues, it shows that Ukraine considered everything landward of this closing line to be internal waters.[250]

191. The Russian Federation further recalls that historic titles are governed not by UNCLOS but by customary international law, and argues that Ukraine, through its conduct negotiating the Azov/Kerch Cooperation Treaty, "has long accepted" that customary international law is the applicable law for the legal status of the Sea of Azov and the Kerch Strait.[251] The Russian Federation submits that Ukraine "has never disowned the historic internal waters status of the Sea of Azov and the Kerch Strait, which survived the dissolution of the former USSR," and instead negotiated the legal regime of the waters with the Russian Federation before ratifying the Convention.[252] The Russian Federation states that the lack of disavowal "calls in question [Ukraine's] present reliance on Articles 89 and 58(2) of UNCLOS."[253] The Russian Federation continues that its "alleged failure [...] to engage with these provisions" is thus explained by the fact that the provisions do not apply to internal waters.[254]

192. Third, the Russian Federation agrees with Ukraine that "'no rules exist in the Convention' for pluri-State internal waters claims,"[255] but submits that the correct consequence to be drawn from the lack of such rules is that the Convention simply does not regulate such bays.[256] Instead, the

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247 Rejoinder, paras 169-70 *citing Note Verbale* from Ukraine to the Russian Federation, No. 72/22- 446-1375 (25 June 2002) (**Annex UA-513**).

248 Hearing, 28 September 2004, 33:17-34:8 (Crosato Neumann) *citing* President of Ukraine, Decree No. 320/2018 'On National Security and Defense Council of Ukraine Decision dated 12 October 2018 "On Urgent Measures to Protect National Interests in the South and East of Ukraine, in the Black Sea, the Sea of Azov and the Kerch Strait"', 12 October 2018 (**Annex RU-80**); *Note Verbale* from Ukraine to the Russian Federation, No. 72/22- 446-1375 (25 June 2002) (**Annex UA-513**).

249 Hearing, 5 October 2024, 43:2-13 (Crosato Neumann).

250 Hearing, 5 October 2024, 43:14-23 (Crosato Neumann).

251 Rejoinder, para. 171.

252 Rejoinder, para. 172.

253 Rejoinder, para. 172.

254 Rejoinder, para. 172.

255 Counter-Memorial, para. 65 *citing* Revised Memorial, para. 77.

256 Counter-Memorial, para. 66; Rejoinder, para. 173.

Russian Federation contends, pluri-State bays "remain under the sovereignty of the riparian State or States and are, thus, internal."[257] The Russian Federation submits that, were the entry into force of the Convention to change a pluri-State bay's status automatically, the State Party would lose sovereignty in a manner that it "cannot be presumed to accept as the result of its acceptance of being bound by the Convention."[258] The Russian Federation argues that only the mutual consent of the relevant riparian States can change the status of theretofore internal waters.[259] In support of this point, the Russian Federation notes that "UNCLOS is not universal and there are still matters unregulated by it, as is clearly envisaged in the preamble."[260]

193. Applying this standard to the instant case, the Russian Federation submits that "the consequence of Russia and Ukraine being the continuator and the successor" of the USSR is that the Parties maintained shared sovereignty over the Sea of Azov.[261] The Russian Federation states that the two States did not mutually consent to change the status of the Sea of Azov.[262] Therefore, the Russian Federation asserts that Ukraine is incorrect in asserting that recognition of the Sea of Azov as internal waters would change its status and affect third parties: there is no change of status, and, thus, no change to the rights of third parties.[263] The Russian Federation adds that, as the Sea of Azov and the Kerch Strait constitute, as a historic bay, "a feature lying outside of the scope of UNCLOS," the provisions cited by Ukraine do not apply to it.[264]

b. Ukraine's Criteria for Determining Internal Water Status of Pluri-State Bays

194. The Russian Federation rejects Ukraine's assertions that international law contains a general rule that "a sea surrounded by more than one State generally cannot be claimed as internal waters" unless it meets three criteria that the Sea of Azov lacks.[265] The criteria proposed by Ukraine are that (i) the bay must be too small to contain areas of high seas or exclusive economic zones, (ii) the exercise of sovereignty over the bay must not cause prejudice to third States, and (iii) all littoral States must have affirmatively agreed to an internal waters status.[266] The Russian

257 Counter-Memorial, para. 66.
258 Counter-Memorial, para. 66.
259 Counter-Memorial, para. 66.
260 Rejoinder, para. 173 *citing* UNCLOS, preamble ("Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law").
261 Counter-Memorial, para. 67.
262 Counter-Memorial, para. 66.
263 Counter-Memorial, para. 67.
264 Rejoinder, para. 174 *noting in particular* UNCLOS, Arts 7-11, 50.
265 Counter-Memorial, para. 68 *citing* Revised Memorial, para. 80.
266 Revised Memorial, para. 81. *See also* subsection III.C.2.b below.

Federation observes that Ukraine originally referred to a "strong [...] norm" of international law to this effect before resubmitting its argument as a "general rule" in the later phase.[267]

195. The Russian Federation contests the existence of Ukraine's alleged general rule, which it considers muddled and unclear.[268] The Russian Federation argues that Ukraine's approach is contradicted by previous international courts and tribunals, in particular the decisions in *Gulf of Fonseca* and *Croatia/Slovenia*.[269] As regards *Gulf of Fonseca*, the Russian Federation observes that the ICJ Chamber noted that "'[i]f all the bordering States act jointly to claim historic title to a bay,'" as the Russian Federation asserts occurred in the instant case, then "it would seem that in principle what has been said [...] regarding a claim to historic title by a single State would apply to this group of States.'"[270] In *Croatia/Slovenia*, the Russian Federation further observes, the arbitral tribunal stated that the dissolution of the Socialist Federal Republic of Yugoslavia (hereinafter the "SFRY") did not affect acquired rights, and that, while Article 10, paragraph 1, of the Convention only applies to single-State bays, its limited scope does not exclude the existence of pluri-State bays.[271] The Russian Federation also argues that State practice confirming the existence and legality of pluri-State bays can be found in the Rovuma Bay, Rio de la Plata, and the Bay of Oyapock.[272]

196. Replying to Ukraine's reliance on statements by Professor Yehuda Blum and Sir Gerald Fitzmaurice, the Russian Federation submits that these statements are insufficient to prove the existence of a rule of customary international law.[273] The Russian Federation notes that Blum "recognises that territorial changes on the coasts of a bay that result in 'splitting up' a 'single-national bay' do not bring about changes in the bay's legal status."[274] As regards Fitzmaurice, the Russian Federation considers the citation inapposite, and notes that he adopted the views of other

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267 Counter-Memorial, para. 69 *citing* Written Observations and Submissions of Ukraine on Jurisdiction, 27 November 2018, para. 69.

268 Hearing, 5 October 2024, 55:25-56:10 (Crosato Neumann).

269 Hearing, 28 September 2024, 54:7-11 (Crosato Neumann); Counter-Memorial, para. 69, n. 50. *See also* para. 182, above.

270 Hearing, 28 September 2024, 54:12-55:5 (Crosato Neumann) *citing Gulf of Fonseca*, cit. n. 43, p. 593 para. 394.

271 Hearing, 28 September 2024, 55:6-55:24 (Crosato Neumann).

272 Hearing, 28 September 2024, 56:25-57:6 (Crosato Neumann).

273 Counter-Memorial, paras 69-70; Rejoinder, para. 181 *citing* Yehuda Blum, *Historic Titles In International Law* (1965), p. 278 (**Annex UAL-56**).

274 Rejoinder, para. 181 *citing* Yehuda Blum, *Historic Titles In International Law* (1965), p. 278 (**Annex UAL-56**). *See also* Hearing, 28 September 2024, 58:18-59:14 (Crosato Neumann).

scholars who "endorsed the notion of pluri-state bays."[275] The Russian Federation adds that other scholars support its own position,[276] and rejects Ukraine's criticisms of these authorities.[277]

197. The Russian Federation further observes that Ukraine's general rule is irreconcilable with the law of State succession, under which one or more successor States automatically succeed to the territorial sovereignty, including internal waters within bays, of a predecessor State.[278] Finally, the Russian Federation submits that the alleged general rule ignores the statement in *Croatia/Slovenia* that Article 10 of the Convention does not apply to pluri-State bays, but the non-application does not imply that such bays do not exist.[279]

198. Nonetheless, assuming *in arguendo* the existence of the general rule, the Russian Federation disputes Ukraine's contention that its proposed criteria for exceptions constitute customary rules of international law.[280] The Russian Federation submits that making the criteria rules of law would endow descriptive characteristics shared by certain cases with prescriptive legal force, establishing a new mandatory rule upon other States for all similar cases.[281] The Russian Federation adds that, as Ukraine argues that the three criteria are cumulative, the inapplicability of any one necessarily entails the inapplicability of all.[282]

199. With respect to Ukraine's first criterion, that the bay must be too small to contain areas of high seas or exclusive economic zones, the Russian Federation argues that the judgments which Ukraine cites "do not rely on the dimension of these bays to accept the view that they continue to be constituted by internal waters after their only riparian State has been replaced by three or two States."[283] The Russian Federation submits that Ukraine's argument on the proscription of States subjecting any part of the high sea to their sovereignty, as found in Articles 58, 86, and 89 of the Convention, is inapposite, as Article 89 refers only to new claims of sovereignty and the Parties

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275 Rejoinder, para. 180 *citing* Sir Gerald Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topics', 8 International and Comparative Law Quarterly. 73 (1959), p. 82 (**Annex UAL-57**). The Russian Federation also refers to the concept as a "multi-State" bay. Counter-Memorial, para. 71.

276 Counter-Memorial, para. 57 *citing* Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Vol. I, Peace, Longman 1992), pp. 632-33 (**Annex RUL-18**); Rejoinder, para. 182 *citing* Lucius Caflisch, 'Les zones maritimes sous jurisdiction nationale, leurs limites et leur délimitation', in Daniel Bardonnet and Michel Virally (eds), *Le nouveau droit international de la mer* (Pedone 1983), pp. 37-40, p. 38 (**Annex RUL-54**); Mitchell P. Strohl, *The International Law Of Bays* (Nijhoff 1963), p. 375 (**Annex RUL-138**).

277 Rejoinder, para. 182 *citing* Reply, para. 43.

278 Hearing, 28 September 2024, 60:15-24 (Crosato Neumann).

279 Hearing, 28 September 2024, 60:25-61:10 (Crosato Neumann).

280 Counter-Memorial, para. 72; Rejoinder, para. 177.

281 Counter-Memorial, para. 72.

282 Rejoinder, para. 186 *citing* Revised Memorial, para. 81; Reply, para. 59.

283 Counter-Memorial, paras 76-77, 81.

in the present case had long held sovereignty over the relevant waters.[284] The Russian Federation further observes that Ukraine "never argued that the Sea of Azov is too big to qualify as being constituted by internal waters" in negotiations between the Parties, and that Ukraine has emphasised in these proceedings that it could have agreed to adopt delimited or pluri-State internal waters.[285] The Russian Federation considers it self-evident that "size has long been discarded as a factor in relation to historic bays" such that it cannot be a legal criterion for Ukraine's rule, and thus concludes that Ukraine's alleged first criterion does not apply to historic bays.[286]

200. The Russian Federation then turns to Ukraine's second criterion that "the exercise of sovereignty over [the bay] does not cause prejudice to third States."[287] The Russian Federation submits that Ukraine misreads *Gulf of Fonseca*, which in fact supports rights of passage, not for third parties, but for the littoral States.[288] In addition, the Russian Federation points out a contradiction between Ukraine's first and second criteria, as, if a pluri-State bay has to be small, then, based on Ukraine's examples, "there would be no right for third States that could be affected."[289] The Russian Federation also repeats that third States had no rights of navigation or other rights when the Sea of Azov was the internal waters of the USSR, and so could suffer no prejudice by a continuation of this status upon the USSR's dissolution.[290] In the Russian Federation's view, the third State protests to which Ukraine refers "are based on the wrong assumption that there is a claim by Russia to transform the status of these waters" when the status has in fact remained unchanged.[291] In any case, the Russian Federation observes that Ukraine indicates few protests, and that all of its examples are sufficiently recent to postdate the commencement of this Arbitration.[292] The Russian Federation further notes that Article 2, paragraph 2, of the Azov/Kerch Cooperation Treaty "reaffirmed" the pre-1991 legal status.[293]

201. The Russian Federation submits two arguments regarding Ukraine's third criterion that "all littoral States have affirmatively agreed to an internal waters status."[294]

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284 Counter-Memorial, para. 77. *See* paras 187-191 above.
285 Counter-Memorial, para. 76; Hearing, 28 September 2004, 63:2-64:1 (Crosato Neumann).
286 Rejoinder, para. 184 *citing* Philip Jessup, *The Law Of Territorial Waters And Maritime Jurisdiction* (G. A. Jennings Co. 1927), p. 382 (**Annex RUL-139**).
287 Revised Memorial, para. 81.
288 Hearing, 28 September 2024, 66:2-67:13 (Crosato Neumann).
289 Hearing, 28 September 2024, 67:14-22 (Crosato Neumann).
290 Counter-Memorial, paras 78-79; Rejoinder, para. 185.
291 Counter-Memorial, para. 79.
292 Hearing, 28 September 2024, 67:23-68:6 (Crosato Neumann).
293 Rejoinder, para. 185.
294 Revised Memorial, para. 81.

202. First, the Russian Federation argues that neither Ukraine's cited cases nor practice support this criterion.[295] Regarding the cases, the Russian Federation explains that the ICJ Chamber, in *Gulf of Fonseca*, referred to the bordering States "act[ing] jointly" to claim historic title to the bay.[296] The Russian Federation submits that "joint action is not the same thing as 'affirmative agreement,'" as the former does not require the same "meeting of the minds" as the latter.[297] Furthermore, it continues, the ICJ Chamber cited the UN Secretariat's 1962 Study on Historic Waters, which referred to "joint action" in the Gulf of Fonseca after 1821.[298] However, according to the Russian Federation, the succession of the three coastal States to the Spanish historic title had already taken place in 1821, and "[t]here is no mention of an affirmative agreement with regard to the status of the Gulf of Fonseca" in the judgments of the Central American Court of Justice in 1917 nor in those of the ICJ Chamber.[299] The Russian Federation thus affirms that the 1821 succession had already conferred "joint sovereignty on the three coastal States, and further agreement is only needed if they want to jointly regulate [...] or if they want to abandon the joint sovereignty."[300] As regards the Bay of Piran, the Russian Federation submits that Ukraine relies on the Arbitration Agreement between Croatia and Slovenia in *Croatia/Slovenia*, but that, in the award, the arbitral tribunal instead contemplated State succession in determining that the Bay was internal waters both before and after the dissolution of the SFRY.[301]

203. Turning to the practice cited by Ukraine, the Russian Federation explains that the instance of the Gulf of Riga is likewise not dispositive, as a number of political considerations could explain Estonia's decision to decline Latvia's proposal to declare the Gulf of Riga the two countries' common internal waters.[302] The Russian Federation also distinguishes the Gulf of Riga from the present case because, unlike the Sea of Azov, "there is no confirmation that Estonia and Latvia treated the Gulf of Riga as their shared internal waters prior to 1940," and both States had declared themselves to be continuators of their pre-1940 forms.[303] The Russian Federation adds that the fact that Latvia and Estonia entered into an agreement does not demonstrate that they considered themselves legally required to do so,[304] nor does the agreement speak to the status of the Gulf

295 Counter-Memorial, para. 80.
296 Counter-Memorial, para. 82 *citing Gulf of Fonseca*, cit., n. 43, p. 593, para. 394 (**Annexes RUL-19**, **UAL-58**).
297 Counter-Memorial, para. 82.
298 Rejoinder, para. 188 *citing Gulf of Fonseca*, cit., n. 43, pp. 593-94, para. 394 (**Annexes RUL-19**, **UAL-58**)
299 Rejoinder, para. 188.
300 Rejoinder, para. 188.
301 Counter-Memorial, para. 83; Rejoinder, paras 189-90 *citing Croatia/Slovenia*, cit., n. 224, para. 885 (**Annex RUL-41**). *See also* Hearing, 28 September 2024, 64:21-65:2 (Crosato Neumann).
302 Counter-Memorial, para. 84.
303 Counter-Memorial, para. 84.
304 Counter-Memorial, para. 85.

between its signing and the dissolution of the USSR.[305] Notably, the Russian Federation points out, Latvia's 1994 Maritime Code specified that the Gulf of Riga constituted "enclosed joint internal waters of Estonia and Latvia."[306]

204. The Russian Federation concludes that precedent supports its position that existing sovereignty over a bay, on either the basis of a historic title or of the law of juridical bays, "transfers to successor States by succession at the time when territorial sovereignty is devolved upon successor States"[307] such that affirmative agreement is required, not to continue the status quo, but to change it.[308]

205. Second, although affirmative agreement was not needed in the Sea of Azov, the Russian Federation contends that had there been such a need, such affirmative agreement existed, as "[b]oth Parties expressly confirmed [the internal waters] status in the Azov/Kerch Cooperation Treaty," as detailed in the following subsection.[309]

c. Whether the Parties' Practice in the Sea of Azov Evidences Agreement on Internal Waters Status

206. The Russian Federation asserts that there is substantial evidence in the Parties' negotiations, agreements, and practice after the dissolution of the USSR demonstrating the Parties' agreement that the Sea of Azov and the Kerch Strait were internal waters.[310]

i. Negotiations

207. During negotiations for the 2003 Azov/Kerch Cooperation Treaty, according to the Russian Federation, Ukraine agreed to the continued internal waters status of the Sea of Azov and the Kerch Strait numerous times.[311]

208. The Russian Federation submits that, before negotiations began, the Ukrainian Ministry of Foreign Affairs, while introducing before Parliament a draft Law on Exclusive (Maritime)

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305 Counter-Memorial, para. 85.

306 Counter-Memorial, para. 85 *citing The Estonian Straits. Exceptions to the Strait Regime of Innocent or Transit Passage* (Brill Nijhoff 2018), p. 129, n. 549. pp. 127-28 (**Annex RUL-78**).

307 Rejoinder, para. 191.

308 Rejoinder, para. 191. *See also* Hearing, 5 October 2024, 57:24-59:2 (Crosato Neumann).

309 Counter-Memorial, para. 80 *citing* Azov/Kerch Cooperation Treaty, Art. 1 ("The Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine") (**Annexes RU-20-AM**, **UA-19**); Rejoinder, paras 191-96.

310 Counter-Memorial, paras 86-87. *See also* Hearing, 28 September 2024, 16:11-15 (Crosato Neumann).

311 Counter-Memorial, paras 89-90. *See also* Hearing, 28 September 2024, 24:12-15 (Crosato Neumann).

Economic Zone, stated that "it is possible that we, the two states, will be able to agree on maintaining the status of the Sea of Azov, which exists today, as a closed sea, which waters are exclusively under the jurisdiction of coastal states," and that, if the Parties reached agreement, "the status of the Sea of Azov will not change, and it will be considered as an internal sea of two countries."[312] The Russian Federation then explains that both Parties conducted negotiations regarding the Sea of Azov and the Kerch Strait "from an understanding: that 'the Sea of Azov is treated as internal waters of Ukraine and the Russian Federation'"[313] and made statements accepting the Sea of Azov's status as internal waters on numerous occasions throughout the negotiations.[314]

209. In addition, the Russian Federation submits that the Parties' respective Presidents agreed during the negotiations that the Sea of Azov constituted internal waters.[315] In particular, the Russian Federation recalls that Ukrainian President Leonid Kuchma's 2001 letter to Russian President

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312 Hearing, 28 September 2024, 24:23-25:13 (Crosato Neumann) *citing* Transcript of the 42nd Plenary session of the Verkhovnaya Rada of Ukraine, 13 July 1994 (excerpt) (**Annex RU-61**).

313 Counter-Memorial, para. 89 *citing* Minutes of the Third 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 RU-309**); Hearing, 28 September 2024, 25:17-26:5 (Crosato Neumann) *citing* Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, No. 426/2dsng, 14 August 1996 (**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**). *See also* Hearing, 5 October 2024, 50:3-51:1 (Crosato Neumann) *citing* Minutes of the Third 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 Fourth 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) (**Annex UA-521**).

314 Counter-Memorial, paras 90-92 *citing* Minutes of the Sixth 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 Seventh 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 (excerpts) (**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 (excerpts) (**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 (excerpts) (**Annex RU-73**). *See also* Russian Federation's Preliminary Objections, para. 89; Russian Federation's Reply on Jurisdiction, paras 87-88; Hearing, 28 September 2024, 26:17-23 (Crosato Neumann) *citing* Minutes of the Fifth 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) (**Annex UA-522**).

315 Counter-Memorial, para. 92 *citing Note Verbale* from the Russian Federation to Ukraine No. 2378/2dsng (30 March 1998) (**Annex RU-62**); Letter of the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 (**Annex RU-68**); Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* from Ukraine to the Russian Federation No. 5211/13-011-268-2001 (13 August 2001) (**Annex RU-70**); *see also* Rejoinder, para. 193.

Vladimir Putin "mentioned 'the delimitation of the territories of the two States in the Sea of Azov and the Kerch Strait,'" which the Russian Federation views as a clear indication that "the two States both saw the Sea and the Strait as 'territories'" and internal waters.[316] The Russian Federation further emphasises that the Ukrainian President's letter stated that he "would like to reiterate that Ukraine agrees to the Russian Federation's proposals on *preserving* the status of internal waters for the water areas of the Sea of Azov and the Kerch Strait."[317] The Russian Federation adds that a new agreement would only have been necessary to change the status quo, which, as confirmed by the Parties' agreement, was that the Sea of Azov and the Kerch Strait were internal waters.[318]

210. The Russian Federation disputes Ukraine's description of the Parties' negotiations.[319] In the Russian Federation's view, Ukraine ignores numerous statements, instead selectively emphasising Ukraine's 2002 communication to the Russian Federation of its territorial sea baselines in the Sea of Azov. The Russian Federation explains that, upon receiving the base points communication, it "promptly reacted, reiterating its 'commitment to the well-known high-level agreements'" preserving the status of the Sea of Azov and the Kerch Strait as internal waters, and stressing that the Parties could only change the status of the waters by mutual agreement.[320] The Russian Federation also argues that Ukraine relies upon an incorrect translation in alleging that the Russian Federation acknowledged the application of UNCLOS to the Sea of Azov before initiating negotiations to "grant" it the status of internal waters.[321] The correct translation, according to the Russian Federation, did not suggest "granting" the status, but "affirmed" it.[322]

211. The Russian Federation submits several additional examples of representations by Ukraine affirming the internal waters status of the Sea of Azov and the Kerch Strait relating to the Parties' negotiation.[323]

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316 Rejoinder, para. 193 *citing* Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* from Ukraine to the Russian Federation No. 5211/13-011-268-2001, p. 2 (13 August 2001) (**Annex RU-70**); Philip Jessup, *The Law Of Territorial Waters And Maritime Jurisdiction* (G. A. Jennings Co. 1927), p. 382 (**Annex RUL-139**); Yehuda Blum, *Historic Titles In International Law* (Nijhoff 1965), p. 264 (**Annex RUL-137**).

317 Rejoinder, para. 194 *citing* Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* from Ukraine to the Russian Federation No. 5211/13-011-268-2001 p. 2 (13 August 2001) (**Annex RU-70**) [emphasis added by the Russian Federation].

318 Counter-Memorial, para. 91.

319 Counter-Memorial, paras 93-94.

320 Counter-Memorial, para. 93 *citing Note Verbale* from the Russian Federation to Ukraine, No. 6437/2dsng (8 August 2002) (**Annex RU-75**).

321 Counter-Memorial, para. 94 *citing* Revised Memorial, paras 104-06.

322 Counter-Memorial, para. 94.

323 Counter-Memorial, paras 95-99. *See also* n. 374 below.

ii. Agreements

212. The Russian Federation asserts that three Russian-Ukrainian agreements demonstrate that the Parties had agreed on the internal waters status of the Sea of Azov and the Kerch Strait.[324]

213. First, the Russian Federation notes that the 2003 Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border (hereinafter the "State Border Treaty") states in Article 5:

> Nothing in this Treaty shall prejudice the positions of the Russian Federation and Ukraine with respect to the status of the Sea of Azov and the Kerch Strait as internal waters of the two States.[325]

According to the Russian Federation, Article 5 reflects the Parties' shared starting point that the Sea of Azov constituted their internal waters. The Parties' negotiations were to determine whether the internal waters would be shared or delimited between them.[326] The Russian Federation further notes that Ukraine publicised the State Border Treaty as recently as 2016.[327]

214. Second, the Russian Federation contends that the shared understanding of the legal status of the waters is reflected in two paragraphs of Article 1 of the 2003 Azov/Kerch Cooperation Treaty:

> The Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine.
>
> [...]
>
> The Sea of Azov shall be delimited by the state border line in accordance with an agreement between the Parties.[328]

The Russian Federation adds that Article 1, paragraph 3, Article 2, and Article 3 of the Azov/Kerch Cooperation Treaty further confirm the Parties' agreement that the Sea of Azov and the Kerch Strait historically constitute the Parties' internal waters.[329] The Russian Federation notes that no State protested the publicised Treaty, nor its implementation.[330]

215. The Russian Federation disputes Ukraine's characterisation of the Azov/Kerch Cooperation Treaty as having an "interim nature."[331] The Russian Federation counters that the Parties did not

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324 Counter-Memorial, para. 95.
325 Counter-Memorial, para. 96 *citing* Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, 28 January 2003 (without Annexes), Art. 5 (**Annex RU-19**).
326 Counter-Memorial, para. 97. *See also* Hearing, 28 September 2024, 17:8-18:16 (Crosato Neumann).
327 Hearing, 28 September 2024, 18:11-18:16 (Crosato Neumann).
328 Counter-Memorial, para. 98 *citing* Azov/Kerch Cooperation Treaty, Art. 1 (**Annexes RU-20-AM**, **UA-19**).
329 Hearing, 28 September 2024, 19:25-22:8 (Crosato Neumann).
330 Hearing, 28 September 2024, 22:9-12 (Crosato Neumann). On the context of the signing of the Azov/Kerch Cooperation Treaty, *see* para. 146 above.
331 Counter-Memorial, para. 102 *citing* Revised Memorial, paras 112-13.

revisit the status of the Sea of Azov and the Kerch Strait in their subsequent negotiations. Instead, according to the Russian Federation, the status of the waters was a fixed premise upon which negotiations for delimitation and other cooperation occurred.[332] The Russian Federation contends that Ukraine proposed a "state border in the Sea of Azov, a line separating the State territories of Russia and Ukraine [... that] could have separated only the internal waters of the two States."[333] The Russian Federation emphasises that "status precedes delimitation" under the rules on maritime delimitation, as status determines the procedure for delimitation.[334] It asserts therefore that "there can be no delimitation of the state border" where the border would cross what, in other circumstances, would be the exclusive economic zone.[335]

216. Third, the Russian Federation submits that the Joint Statement of 24 December 2003, made alongside the Azov/Kerch Cooperation Treaty, further confirms the shared understanding.[336] The Russian Federation observes that the statement "did not provoke protest by third States."[337]

217. The Russian Federation adds that on the same day that the Joint Statement of 24 December 2003 was made, Ukrainian President Leonid Kuchma made an additional public statement confirming that the Sea of Azov and the Kerch Strait were joint internal waters.[338]

iii. Conduct

218. The Russian Federation asserts that Ukrainian practice demonstrates that Ukraine treated the Sea of Azov and the Kerch Strait as internal waters.[339]

219. The Russian Federation observes that Ukraine's treatment of airspace over the Sea of Azov has "suggested the absence of the [exclusive economic zone]."[340] The Russian Federation notes that Ukraine restricted flights in 2015 in airspace over the Sea of Azov beyond the 12-mile zone territorial sea off the coast.[341] According to the Russian Federation, as Article 9(b) of the Convention on International Civil Aviation (hereinafter the "Chicago Convention") grants States the right to restrict flight over its territory, this restriction that Ukraine introduced in the area of

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332 Counter-Memorial, para. 102; Hearing, 28 September 2024, 28:8-18 (Crosato Neumann).
333 Counter-Memorial, para. 103.
334 Hearing, 28 September 2024, 28:19-25 (Crosato Neumann).
335 Counter-Memorial, para. 103.
336 Counter-Memorial, para. 99 *citing* Joint Statement of 24 December 2003, 24 December 2003, *Law of the Sea Bulletin*, 2004, Vol. 54, p. 131 (**Annexes RU-21**, **UA-530**). *See also* para. 142 above.
337 Hearing, 28 September 2024, 22:13-23:16 (Crosato Neumann).
338 Hearing, 28 September 2024, 23:17-24:4 (Crosato Neumann). *See also* para. 143 above.
339 Counter-Memorial, para. 87.
340 Counter-Memorial, para. 104.
341 Counter-Memorial, para. 104 *citing* The European Union Aviation Safety Agency Official Website, "Airspace of Eastern Ukraine", Annex 1 (**Annex RU-312**).

the airspace over the Sea of Azov "tellingly corresponded to the characterization of these waters as sovereign ones," *i.e.*, internal waters.[342]

220. The Russian Federation also notes that Decree No. 320/2018 of the President of Ukraine of 12 October 2018 ordered the Ministry of Foreign Affairs to create and announce "the line of delimitation, *i.e.*, *the line of the state border between Ukrainian and Russian internal waters*" in the Black Sea, the Sea of Azov, and the Kerch Strait.[343] The Russian Federation further points to an interview of 8 December 2018 in which the President of Ukraine referred to the Parties' agreed regime for navigation and called the Sea of Azov and the Kerch Strait "Ukrainian and Russian waters."[344]

221. Turning to navigation practice, the Russian Federation contends that navigation by third-State merchant vessels is not incompatible with an internal waters regime if the coastal States authorised it, as the Parties did in the Azov/Kerch Cooperation Treaty.[345] However, the Russian Federation points out that the Parties' practice in respect of warships stands in contrast with UNCLOS.[346] The Russian Federation submits that the Parties agreed on several occasions, including in the Azov/Kerch Cooperation Treaty, that third-State warships could only enter the Kerch Strait and the Sea of Azov upon the invitation of one State and with the authorisation of the other.[347]

222. The Russian Federation views Ukraine's submissions on the Kerch Strait pilotage regime as irrelevant to whether the Kerch Strait and the Sea of Azov are internal waters.[348] Relying on its expert, [redacted], the Russian Federation observes that "compulsory pilotage

342 Counter-Memorial, para. 104 *citing* Convention on International Civil Aviation, done in Chicago on 7 December 1944 (**Annex RU-311, UAL-165**).

343 Counter-Memorial, para. 105 *citing* President of Ukraine, Decree No. 320/2018 "On National Security and Defense Council of Ukraine Decision dated 12 October 2018 *'On Urgent Measures to Protect National Interests in the South and East of Ukraine, in the Black Sea, the Sea of Azov and the Kerch Strait'*", 12 October 2018, para. 2(4) of the attached Decision (**Annex RU-80**) [emphasis added by the Russian Federation].

344 Hearing, 28 September 2024, 32:10-16 (Crosato Neumann) *citing* 'Russia is opposed to the whole world, blocking the freedom of navigation in the Ukrainian territorial waters - President in the interview to Fox News', 8 December (**Annex RU-85**).

345 Counter-Memorial, para. 108.

346 Counter-Memorial, para. 108.

347 Counter-Memorial, para. 108 *citing* Joint Statement of 24 December 2003, p. 131 (**Annexes RU-21**, **UA-530**); Minutes of the 12th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 19 April 2001 (excerpts) (**Annex RU-67**); Azov/Kerch Cooperation Treaty, Art. 2(3) (**Annexes RU-20-AM**, **UA-19**).

348 Counter-Memorial, para. 109.

is a reasonable control measure introduced to mitigate" risk where straits present challenges, and is not indicative of waters' status.[349]

223. The Russian Federation recalls that it has previously discussed examples of Ukraine's domestic legislation acknowledging the internal waters status of the Sea of Azov and the Kerch Strait.[350] The Russian Federation argues that Ukraine only referred to general provisions of the Parties' laws in response.[351] However, the Russian Federation submits that Ukraine's proffered general provisions do not refer specifically to the Sea of Azov and/or the Kerch Strait, and so do not deny the possibility of the waters having internal waters status.[352] The Russian Federation also notes that the status of the Sea of Azov as internal waters was established by an international treaty, rather than by the provisions of the national legislation referred to by Ukraine, and that both Parties' constitutions "stipulate that international treaties are an integral part of national legislation of a respective State."[353] The Russian Federation additionally refers to Ukrainian Law No. 2630/VII on 'Imposition of Martial Law in Ukraine,' which Ukraine passed on 26 November 2018, and which imposed martial law, *inter alia*, "in the internal waters of Ukraine in the Azov-Kerch water area."[354]

224. The Russian Federation submits that the Parties' fishery practice evidences an accepted regime of shared internal waters.[355] The Russian Federation disputes Ukraine's contentions involving the 1992 Agreement between the Government of Ukraine and the Government of the Russian Federation on Cooperation in the Fisheries Sector (hereinafter the "1992 Fisheries Agreement").[356] First, the Russian Federation states that, contrary to Ukraine's contention, the 1992 Fisheries Agreement does not evidence the mutual acknowledgement by the Parties of the relevance of UNCLOS to their fishing activities in the Sea of Azov.[357] Second, nor does the 1992 Fisheries Agreement support the absence of an internal waters status for the Sea of Azov.[358] The Russian Federation further notes that a year after the 1992 Fisheries Agreement, the Parties

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349 Counter-Memorial, para. 109 n. 125, n. 126.
350 Counter-Memorial, para. 110 *referring to* Russian Federation's Reply on Jurisdiction, para. 112.
351 Counter-Memorial, para. 110 *referring to* Revised Memorial, paras 101, 103.
352 Counter-Memorial, paras 110-11.
353 Counter-Memorial, para. 112 *referring to* Constitution of Ukraine of 28 June 1996, Art. 9(1) (**Annex RU-316**); Constitution of the Russian Federation of 12 December 1993, Art. 15(4) (**Annex RU-317**).
354 Hearing, 28 September 2024, 32:4-9 (Crosato Neumann) *citing* Law of Ukraine No. 2630-VII 'On Imposition of Martial Law in Ukraine", 26 November 2018 (**Annex RU-82**).
355 Counter-Memorial, para. 107.
356 Agreement between the Government of Ukraine and the Government of the Russian Federation in the Fisheries Sector (24 September 1992) (**Annex UA-70**).
357 Counter-Memorial, paras 115-18; Hearing, 28 September 2024, 36:2-25 (Crosato Neumann).
358 Counter-Memorial, paras 115, 118-19.

created a joint authority to govern fisheries in the Sea of Azov.[359] The underlying agreement between the Ukrainian and the Russian fisheries authorities "explicitly affirmed exclusive fishing rights in the Sea of Azov only to the vessels under the flags of Ukraine and the Russian Federation [...] on the premise that 'the living sources [...] shall be considered as common heritage of Azov littoral states.'"[360]

225. With respect to the 1991 Ukrainian Law on the State Border of Ukraine, the Russian Federation notes that the definition of Ukraine's territorial seas and internal waters contained in that law was formulated "in generic terms."[361] The Russian Federation further notes that in Article 6, paragraph 4, of that Law, Ukraine defines its internal waters to include "waters of gulfs, bays, estuaries and lagoons, seas and straits that historically belong to Ukraine."[362] The Russian Federation asserts that this provision must refer to the Sea of Azov and the Kerch Strait, as Ukraine had no other historical bays or straits to claim, and that to exclude the Sea of Azov and the Kerch Strait would be to render the provision meaningless.[363] Similarly, when the 1995 Ukrainian Law on the Exclusive (Maritime) Economic Zone is read together with the 1991 Law on the State Border of Ukraine, it "cannot be concluded that Ukraine intended to establish an exclusive economic zone in the Sea of Azov."[364] The Russian Federation likewise does not consider that the Declaration of State Sovereignty of Ukraine of 1990 supports Ukraine's position, as it merely refers to Ukraine's territory "within its existing boundaries."[365] If Ukraine had sought to reduce its sovereign territory in the Sea of Azov, as the Russian Federation believes that it is attempting to do in this proceeding, the co-ownership status of the waters would still have required the Russian Federation's agreement.[366]

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359 Counter-Memorial para. 107; Agreement between the State Committee of Ukraine for Fisheries and Commercial Fishing and the Fishery Committee of the Russian Federation on Aspects of Fishing in the Sea of Azov, 14 September 1993 (**Annex UA-71**).

360 Counter-Memorial, para. 107 *citing* Agreement between the State Committee of Ukraine for Fisheries and Commercial Fishing and the Fishery Committee of the Russian Federation on Aspects of Fishing in the Sea of Azov, 14 September 1993, Preamble, Art. 1(3) (**Annex UA-71**).

361 Hearing, 28 September 2024, 35:01-6 (Crosato Neumann) *citing* Law of Ukraine 'On the State Border of Ukraine', No. 177-XII, 4 November 1991, Art. 6 (**Annexes RU-58**, **UA-602**).

362 Hearing, 28 September 2024, 34:25-35:10 (Crosato Neumann) *citing* Law of Ukraine 'On the State Border of Ukraine', No. 177-XII, 4 November 1991, Art. 6 (**Annexes RU-58**, **UA-602**).

363 Hearing, 28 September 2024, 35:7-18 (Crosato Neumann).

364 Hearing, 28 September 2024, 35:19-36:1 (Crosato Neumann).

365 Hearing, 28 September 2024, 35:19-36:1 (Crosato Neumann).

366 Hearing, 5 October 2024, 37:12-39:4 (Crosato Neumann).

iv. Estoppel and Admission

226. The Russian Federation submits that Ukraine's consistent practice since 1991 "gives rise to an estoppel, or at least, an admission."[367]

227. The Russian Federation notes that the ICJ has defined estoppel as requiring "a statement or representation made by one party to another and reliance upon it by the other party to his detriment or to the advantage of the party making it."[368] A representation, according to the Russian Federation, "may be in the form of word, conduct, or silence."[369] The Russian Federation further cites the ITLOS statement that "[t]he 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."[370]

228. Turning to the possibility of characterising Ukraine's conduct as an admission, the Russian Federation asserts that an admission "may take the form of a statement of fact, or of an interpretation of a legal rule."[371] The Russian Federation views it as "well established in international law that a formal statement against interest has 'particular probative value'" as an admission.[372] The effect of an admission, in particular when it is "'a clear and unequivocal representation previously made' by a State to another" can be "to show a lack of consistency or weakness in a party's position."[373]

229. The Russian Federation submits a non-exhaustive list of "significant representations by Ukraine to the Russian Federation" in which, it asserts, "Ukraine agrees to the Russian position that the Sea of Azov and the Kerch Strait are internal waters."[374]

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367 Rejoinder, para. 198.

368 Rejoinder, para. 199 *citing Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (hereinafter "*Obligation to Negotiate Access to the Pacific Ocean*"), Judgment, I.C.J. Reports 2018, p. 507 at p. 558, para. 158 (**Annex RUL-147**).

369 Rejoinder, para. 200 *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 438 (**Annexes RUL-85, UAL-18**).

370 Rejoinder, para. 201 *citing Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4 at p. 42, para. 124 (**Annex UAL-63**).

371 Rejoinder, para. 202 *citing* D. Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence', *British Yearbook of International Law*, 1957, Vol. 33, p. 176 at p. 196 (**Annex RUL-148**).

372 Rejoinder, para. 202 *citing Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (hereinafter "*Military and Paramilitary Activities*"), Judgment, I.C.J. Reports 1986, p. 14 at p. 41, para. 64 (**Annex UAL-25**).

373 Rejoinder, para. 202 *citing* Arnold D. McNair, 'The Legality of the Occupation of the Ruhr', *British Yearbook of International Law*, 1924, Vol. 5, p. 35 (**Annex RUL-149**); *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (hereinafter *Temple of Preah Vihear*), Judgment, Dissenting Opinion of Judge Spender, I.C.J. Reports 1962, p. 101 at pp. 143-44 (**Annex RUL-150**).

374 Rejoinder, para. 203 *referring to* Agreement between the State Committee of Ukraine for Fisheries and Commercial Fishing and the Fishery Committee of the Russian Federation on Aspects of Fishing in the Sea

230. The Russian Federation contends that these representations establish an estoppel if Ukraine has "reaped benefits from such representations to the Russian Federation that it has accepted the Sea of Azov and the Kerch Strait as internal waters."[375] In the Russian Federation's view, the Azov/Kerch Cooperation Treaty includes such benefits by "provid[ing] for special treatment in the form of freedom of navigation, for the merchant vessels and warships of the Parties to the treaty, and in which the Russian Federation specifically recognized the wish of Ukraine to delimit the Sea of Azov and the Kerch Strait by a state border."[376]

231. Noting that an estoppel further requires a showing of detriment,[377] the Russian Federation argues that an estoppel is established because it suffered detriment "from recognising the two sea areas as internal waters of the two countries."[378] By acceding to Ukraine's requests during the Parties' negotiations over the internal waters status of the Sea of Azov and the Kerch Strait, the Russian Federation "suffered the prejudice of giving up its own stance that a delimitation of this type, albeit by a state border, should be avoided for fear that it would result in the loss of the exclusive rights so far enjoyed by the two countries."[379]

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of Azov, 14 September 1993, Art. 1(3) (**Annex UA-71**); 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**); *Note Verbale* from the Russian Federation to Ukraine, No. 2378/2dsng (30 March 1998) (**Annex RU-62**); Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* from Ukraine to the Russian Federation, No. 5211/13-011-268-2001 (13 August 2001) (**Annex RU-70**); Azov/Kerch Cooperation Treaty (**Annexes RU-20-AM**, **UA-19**); Joint Statement of 24 December 2003 (**Annexes RU-21**, **UA-530**); Ukrainska Pravda, How Kuchma gave up the Kerch Strait and the Sea of Azov. Transcript of the Press-Conference (24 December 2003) (**Annex RU-564**); Law of Ukraine 'On Ratification of the Treaty for Cooperation in Utilizing the Azov Sea and the Kerch Strait between Ukraine and the Russian Federation', 5 May 2004 (**Annex RU-562**); Draft Treaty between Ukraine and the Russian Federation on Ukraine-Russia State Border in the Sea of Azov, transmitted by *Note Verbale* from Ukraine to the Russian Federation, No. 72/22-410-831, p. 2 (16 February 2004) (**Annex RU-76**); *Note Verbale* from Ukraine to the Russian Federation, No. 610/22-110-1132 (29 July 2015) (**Annex UA-233**); President of Ukraine, Decree No. 320/2018, "On National Security and Defence Council of Ukraine Decision dated 12 October 2018 'On Urgent Measures to Protect National Interests in the South and East of Ukraine, in the Black Sea, the Sea of Azov and the Kerch Strait'", 12 October 2018 (**Annex RU-80**).

375 Rejoinder, para. 204.

376 Rejoinder, paras 204-05 *citing* 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**), Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* from Ukraine to the Russian Federation, No. 5211/13-011-268-2001 (13 August 2001) (**Annex RU-70**).

377 Rejoinder, para. 206, n. 280 *citing Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 303, para. 57 (**Annex RUL-62**).

378 Rejoinder, para. 206.

379 Rejoinder, para. 207 *citing* Letter of the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 (**Annex RU-68**).

232. The Russian Federation argues that, if the Arbitral Tribunal is disinclined to find an estoppel, "alternatively,[...] the list of significant representations made by Ukraine to the Russian Federation can also support the application of the doctrine of admission."[380] It contends that the admission is evident in the fact that Ukraine, "by repeated official representations to the Russian Federation" endorsed the view that the Sea of Azov and the Kerch Strait are historic internal waters of the two countries, and therefore "is likely precluded from denying the truthfulness of those representations."[381]

d. Applicability of UNCLOS to Internal Waters

233. The Russian Federation recalls the view it presented in its Preliminary Objections:

> [...] the Tribunal lacks jurisdiction *ratione materiae* as regards Ukraine's claims concerning the Sea of Azov and the Kerch Strait because these bodies of water are constituted of internal waters and, as UNCLOS does not establish a regime for internal waters, disputes concerning internal waters are not disputes concerning the interpretation or application of the Convention and consequently are not disputes for which this Tribunal is competent according to Article 288(1) of UNCLOS.[382]

234. The Russian Federation bases its view on the observation that "while there are some provisions in the Convention that refer to internal waters, they are not sufficient to establish a regime comparable to that of the territorial sea or the exclusive economic zone."[383] The Russian Federation submits that the Convention does not regulate matters in internal waters as it does in the territorial sea, lacking, for example, provisions concerning delimitation between States, fishing, mineral resources of the seabed, the laying of cables and pipelines, and the conduct of marine scientific research.[384] The principal point that the Russian Federation emphasises is that the Convention has no provision relating to internal waters comparable to Article 2 of the Convention relating to the territorial sea.[385] The Russian Federation maintains that the Convention "sets out the legal framework of a regime of the territorial sea, while it abstains from doing the same as regards internal waters."[386] In support, the Russian Federation reaffirms its reliance on the literature cited in its Preliminary Objections,[387] and recalls the joint separate

380 Rejoinder, para. 208.
381 Rejoinder, para. 208.
382 Counter-Memorial, para. 121 *referring to* Russian Federation's Preliminary Objections, paras 117-33.
383 Counter-Memorial, para. 122.
384 Counter-Memorial, para. 122.
385 Counter-Memorial, para. 131.
386 Counter-Memorial, paras 132-33.
387 Counter-Memorial, para. 123 *referring to* Russian Federation's Preliminary Objections, paras 123-26.

opinion of Judges Cot and Wolfrum in the Provisional Measures Order of ITLOS in *"ARA Libertad" (Argentina v. Ghana)*.[388]

235. The Russian Federation also responds to Ukraine's argument that some provisions of the Convention apply to all maritime areas, including internal waters, thus granting the Arbitral Tribunal jurisdiction over those matters.[389] According to the Russian Federation, Ukraine submits this argument for Article 192 (marine environment), Articles 204-206 (pollution), and Article 303, paragraph 1 (archaeological and historical objects).[390] The Russian Federation submits that Article 192 of the Convention "must be read in connection with the provisions set out in sections 5 and 6 specifying the legislative and enforcement competence" of States.[391] Neither section references internal waters.[392] Similarly, Article 303, paragraph 1, of the Convention must be read in context with Article 303, paragraph 2, of the Convention which "implements it specifying obligations concerning activities in a zone equivalent to the contiguous zone, and omitting references to internal waters."[393]

2. Ukraine's Position

a. The Status of the Sea of Azov and the Kerch Strait since the Dissolution of the USSR

236. According to Ukraine, "the Soviet Union claimed the Sea of Azov and Kerch Strait as a single juridical bay on the basis that they were entirely surrounded by a single State."[394] Ukraine explains that after the dissolution of the USSR, the Sea of Azov and the Kerch Strait became bordered by two States, and so "ceased to qualify as a single-State juridical bay."[395] Ukraine asserts that a consequence of the change was that the "areas seaward of the Ukrainian and Russian baselines became subject to the general regime of the law of the sea."[396] Ukraine notes that both Parties ultimately ratified, and became subject to the obligations of, the Convention.[397]

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388 Counter-Memorial, para. 123 *citing* Russian Federation's Preliminary Objections, paras 123-27; *"ARA Libertad" (Argentina v. Ghana),* Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012, para. 26 (**Annex RUL-34**).
389 Counter-Memorial, para. 128.
390 Counter-Memorial, para. 129 *referring to* Revised Memorial, para. 128.
391 Counter-Memorial, para. 130.
392 Counter-Memorial, para. 130.
393 Counter-Memorial, para. 130.
394 Revised Memorial, para. 61.
395 Revised Memorial, para. 61.
396 Revised Memorial, para. 61.
397 Revised Memorial, para. 62; Hearing, 23 September 2024, 94:17-95:3 (Soons).

237. Ukraine disagrees with the Russian Federation's arguments relating to the law of State succession.[398] In the view of Ukraine, the Russian Federation considers territorial land succession to be applicable to the present case without regard to the international law of the sea.[399] However, Ukraine asserts that UNCLOS is *lex specialis* in relation to the law of State succession with respect to maritime areas.[400] Ukraine thus explains that the manner in which the ICJ Chamber in *Gulf of Fonseca* dealt with maritime succession differs from that appropriate for succession to land territory.[401] As such, Ukraine submits that the principle of "*uti possidetis* cannot prevail over the law of the oceans."[402] Rather, Ukraine contends, it is the law of the sea which takes precedence.[403] According to Ukraine, the international law of the sea determined the status of the Sea of Azov and the Kerch Strait prior to 1991, and, likewise, did so after.[404] It continues that, even if the USSR possessed historic title, the principle of *uti possidetis* does not serve as a source of joint sovereignty but merely freezes title.[405] To establish a pluri-State bay under international law, the successor States would have needed to meet three criteria.[406] These criteria, which Ukraine contends were not met in the Sea of Azov and the Kerch Strait, are discussed at paragraphs 248 to 256 below.[407]

238. Ukraine further submits that, under the Convention, the political situation on land impacts the legal status of the surrounding waters such that a change in sovereignty over coastal territory may cause a resulting change to occur in the legal status of the adjacent waters.[408] By way of example, Ukraine notes that where an archipelagic State loses that status, or alters its baselines, surrounding waters will no longer constitute archipelagic waters.[409] Similarly, Ukraine observes that over the course of history, the waters of the Gulf of Finland, the Black Sea, and the Gulf of Riga have changed legal status due to political changes on the surrounding land.[410]

239. Ukraine asserts that "[a]pplying the rules of UNCLOS, the Sea of Azov contains territorial seas and exclusive economic zones, and the Kerch Strait is an international strait connecting the Sea

398 Hearing, 23 September 2024, 95:4-5 (Soons).
399 Hearing, 23 September 2024, 95:4-19 (Soons) *citing* James Crawford, *Brownlie's Principles of Public International Law* (9th ed., OUP 2019), p. 423 (**Annex RUL-145**).
400 Hearing, 23 September 2024, 95:20-96:7 (Soons).
401 Hearing, 23 September 2024, 95:20-96:7 (Soons) *citing Gulf of Fonseca*, cit., n. 43, para. 394 (**Annexes RUL-19**, **UAL-58**).
402 Hearing, 3 October 2024, 50:20-51:5 (Soons).
403 Hearing, 3 October 2024, 50:20-51:5 (Soons).
404 Hearing, 3 October 2024, 51:14-51:23 (Soons).
405 Hearing, 3 October 2024, 52:6-17 (Soons).
406 Hearing, 3 October 2024, 52:18-53:3 (Soons).
407 Hearing, 3 October 2024, 52:18-53:3 (Soons).
408 Hearing, 3 October 2024, 53:10-16 (Soons).
409 Hearing, 3 October 2024, 53:17-54:12 (Soons).
410 Hearing, 3 October 2024, 54:22-55:15 (Soons).

of Azov and the Black Sea."[411] Ukraine notes that Article 8 of the Convention provides that "waters on the landward side of the baseline of the territorial sea form part of the internal waters of *the* State," emphasising "a single State".[412] Ukraine notes further that, to define internal waters, baselines must be drawn in accordance with Articles 5 to 7 and 9 to 14 of the Convention.[413] While Article 10 gives specific instructions for drawing baselines at the entrance to bays, Ukraine quotes the Article as only applying "to bays the coasts of which belong to a single State."[414] As the Sea of Azov and the Kerch Strait have two littoral States, Ukraine submits that straight baselines may not be drawn to qualify the entirety of said areas as internal waters.[415]

240. Moving seaward, Ukraine further submits that Articles 3 and 4 of the Convention define a territorial sea of not more than 12 miles from the same baselines, while Articles 55 and 57 of the Convention provide for an exclusive economic zone extending up to 200 nautical miles from the baselines.[416] Contending that the Sea of Azov contains an exclusive economic zone, Ukraine maintains that the Kerch Strait thus "connects 'one part of [...] an exclusive economic zone' to another."[417] Applying Article 37 of the Convention, Ukraine concludes that the Kerch Strait is an international strait.[418]

241. Ukraine asserts that the Convention, through Articles 58, 86, and 89, "bars Russia and Ukraine from claiming sovereignty over areas of exclusive economic zone in the Sea of Azov."[419] In particular, Ukraine notes that Article 89 of the Convention applies not only to the high seas, but to all areas of the sea beyond the territorial sea established under UNCLOS, as explained by the *Virginia Commentary*.[420] Ukraine thus maintains that "neither State may proclaim sovereignty over the areas beyond their respective territorial seas in the Sea of Azov, as Russia seeks to do here."[421]

242. Ukraine adds that the Russian Federation cannot successfully argue that the Parties jointly claimed sovereignty over the Sea of Azov because the claim would violate Article 293, paragraph 1, and

411 Revised Memorial, para. 68.
412 Revised Memorial, para. 69 *citing* UNCLOS, Art. 8 [emphasis added by Ukraine].
413 Revised Memorial, para. 69. Ukraine submits that Article 47 draws baselines for archipelagic states and is not relevant here.
414 Revised Memorial, para. 69 *citing* UNCLOS, Art. 10.
415 Revised Memorial, para. 69.
416 Revised Memorial, para. 70.
417 Revised Memorial, para. 71 *citing* UNCLOS, Art. 37.
418 Revised Memorial, para. 71.
419 Revised Memorial, para. 72.
420 Revised Memorial, para. 73 *citing* Volume III: *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist et al., eds 1995), Art. 89, p. 93 (**Annex UAL-121**).
421 Revised Memorial, para. 74.

Article 311, paragraph 3, of the Convention.[422] According to Ukraine, the former "specifies that the Tribunal is bound to 'apply this Convention,' and may not consider agreements or rules that are "incompatible with [the] Convention."[423] Thus the Arbitral Tribunal may not consider an agreement which violates the rule established by Articles 58, 86, and 89 of the Convention.[424] Ukraine further argues that Article 311, paragraph 3, of the Convention prohibits agreements "modifying or suspending the operation of provisions of this Convention" where they would affect the application of basic treaty principles, the enjoyment of other States Parties of their rights and obligations, or go against the object and purpose of the Convention.[425] Ukraine submits that an agreement to assert sovereignty over the whole of the Sea of Azov would violate all three restrictions, and so is prohibited.[426]

243. Ukraine contends that these Articles operate as part of the central purpose of the Convention, which "is to systematize the zones over which coastal States can claim jurisdiction, and to balance those claims against the competing rights of third States and the interests of the international community."[427] Ukraine submits that pluri-State internal waters claims, which the Convention does not regulate, would contravene this purpose and cause conflict among States Parties.[428] Ukraine suggests that the risk of conflict is "particularly pronounced in waters otherwise large enough to contain exclusive economic zones," where sovereignty claims are prohibited by Articles 58, 86, and 89 of the Convention.[429] According to Ukraine, to permit such joint internal waters claims would deprive third States of rights provided by the Convention.[430]

244. Ukraine asserts that the Russian Federation, in responding to this argument, misinterprets the Convention:

> Russia's argument depends on the circular assumption that Articles 56, 58, 86, and 89 are irrelevant to the analysis of the legal status of the Sea of Azov because the dissolution of the USSR could have had no effect on such status. But this is precisely the question that the Tribunal is called upon to answer. Russia's preferred result cannot simply be assumed. The same assumption underlies Russia's argument that no third-State rights are prejudiced by treating the Sea of Azov and Kerch Strait as internal waters.[431]

422 Revised Memorial, para. 75; Reply, para. 38.
423 Revised Memorial, para. 75 *citing* UNCLOS, Art. 293(1).
424 Revised Memorial, para. 75; Reply, para. 39.
425 Revised Memorial, para. 75.
426 Revised Memorial, para. 75. *See also* Hearing, 3 October 2024, 58:12-22 (Soons).
427 Revised Memorial, para. 76 *referring to South China Sea*, cit., n. 37, para. 261 (**Annex UAL-11**).
428 Revised Memorial, para. 77.
429 Revised Memorial, para. 78.
430 Revised Memorial, para. 78.
431 Reply, para. 40.

245. Ukraine recalls that "[n]o provision of the Convention categorizes these waters as internal," noting that the Russian Federation does not cite the provisions that collectively define internal waters, and that the Russian Federation admits that pluri-State bays are not found in the Convention.[432] Ukraine contends that the Russian Federation cites no legal support for its assertion that the lack of provisions covering pluri-State bays means that such waters are internal waters unregulated by the Convention.[433] Ukraine further contends that the Russian Federation, in making the assertion, "ignores that six other categories of internal waters are specifically defined or discussed in UNCLOS."[434]

246. Ukraine questions the validity of a statement by Jennings and Watts in the 1992 Edition of *Oppenheim's International Law* cited by the Russian Federation to support its position that pluri-State bays constitute internal waters unregulated by the Convention, for three reasons.[435] First, Ukraine notes that the writers "did not appear to contemplate that a pluri-State bay would constitute internal waters, since they anticipated that access to such a bay would be governed by UNCLOS Article 45."[436] Second, Ukraine submits that, as the authors acknowledge, their statement is inconsistent with the position taken in previous editions of *Oppenheim's International Law*.[437] Third, Ukraine argues that the statement cites no other texts or examples of practice than the Gulf of Fonseca, which the authors acknowledge as unique.[438]

247. Likewise, Ukraine rejects the Russian Federation's argument that it has established a "local custom" or "good title" over the Sea of Azov and the Kerch Strait due to its predecessor State's "continuous and peaceful display of sovereignty."[439] Ukraine repeats that the USSR exercised sovereignty because the waters constituted, at the relevant time, a single-State juridical bay.[440] Furthermore, Ukraine contends that the Russian Federation's argument runs counter to Article 89 of the Convention's restriction on States subjecting any part of the high seas to their sovereignty, including as implemented by Article 58 in exclusive economic zones.[441]

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432 Reply, para. 41.
433 Reply, para. 42.
434 Reply, para. 42.
435 Reply, para. 43.
436 Reply, para. 43 *citing* Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Vol. I, Peace, Longman 1992), p. 633 (**Annex RUL-18**).
437 Reply, para. 43 *citing* Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Vol. I, Peace, Longman 1992), p. 632 (**Annex RUL-18**).
438 Reply, para. 43 *citing* Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Vol. I, Peace, Longman 1992), p. 632 (**Annex RUL-18**).
439 Hearing, 23 September 2024, 93:10-16 (Soons).
440 Hearing, 23 September 2024, 93:21-6 (Soons).
441 Hearing, 23 September 2024, 94:7-16 (Soons).

b. Ukraine's Criteria for Determining Internal Waters Status of Pluri-State Bays

248. Ukraine asserts that there has been a "general rule" since before the Convention that "a sea surrounded by more than one State generally cannot be claimed as internal waters."[442] Ukraine relies on statements by Blum and Fitzmaurice for support.[443]

249. Ukraine offers the Black Sea as an example of this general rule, as its status changed when the Russian Empire became a coastal State where previously the only littoral power was the Ottoman Empire.[444] In addition, Ukraine explains that UNCLOS fits with this long-standing rule, as Article 10 only applies to single-State bays.[445] Ukraine also disputes the relevance of the Russian Federation's references to Rovuma Bay, Rio de la Plata, and the Bay of Oyapock.[446] Ukraine notes in response that these are river mouths, and, as such, are governed by a separate law from bays.[447]

250. According to Ukraine, decisions of international courts and tribunals on pluri-State bays demonstrate that three necessary criteria are required for an exception to the rule:

> [...] first, they are too small to contain areas of high seas or exclusive economic zones, and so the exercise of sovereignty over them is not inconsistent with Articles 58, 86, and 89 (and with prior treaties and principles to similar effect, such as Article 2 of the 1958 Convention on the High Seas); second, the exercise of sovereignty over them does not cause prejudice to third States; and third, all littoral States have affirmatively agreed to an internal waters status.[448]

Ukraine responds to the Russian Federation's criticisms of this rule, claiming that the Russian Federation "identifies no State practice, and no other legal basis, for the recognition of pluri-State internal waters where the three conditions are not met."[449] Ukraine contends that none of the criteria are met in the present case.[450]

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442 Revised Memorial, paras 80-81.

443 Revised Memorial, paras 80-81 *citing* Yehuda Blum, *Historic Titles in International Law* (1965), p. 279 (**Annex UAL-56**) (*quoting* Charles B. Selak, Jr., 'A Consideration of the Legal Status of the Gulf of Aqaba', 52 AJIL 660 (1958), p. 693); Sir Gerald Fitzmaurice, 'Some Results of the Geneva Conference on the Law of the Sea: Part I – The Territorial Sea and Contiguous Zone and Related Topics', 8 International and Comparative Law Quarterly, 73 (January 1959), pp. 82- 83 (**Annex UAL-57**); Reply, paras 45-46. *See also* Hearing, 23 September 2024, 91:16-92:18 (Soons).

444 Hearing, 23 September 2024, 92:20-24 (Soons).

445 Hearing, 23 September 2024, 92:25-93:9 (Soons).

446 Hearing, 3 October 2024, 55:16-56:4 (Soons).

447 Hearing, 3 October 2024, 55:16-56:4 (Soons).

448 Revised Memorial, para. 81 [citations omitted].

449 Reply, para. 47.

450 Revised Memorial, para. 82.

251. Regarding the first criterion, size, Ukraine submits that "[c]onsistent with UNCLOS Articles 58, 86, and 89, pluri-State internal waters have been recognized only in bodies of water covering what would otherwise constitute territorial sea."[451] Ukraine observes that both the Gulf of Fonseca and the Bay of Piran meet this size requirement.[452] However, Ukraine emphasises, the Sea of Azov is substantially larger than other pluri-State bay examples.[453] Ukraine further notes that the Sea of Azov "contains large areas of exclusive economic zone."[454] It points out that the Russian Federation does not provide examples of pluri-State internal waters that include areas which would otherwise qualify as exclusive economic zones.[455]

252. The second criterion that Ukraine puts forward is that for "a pluri-State bay to be recognized as internal waters [...] such status cannot interfere with the rights of third States."[456] Recalling the first condition, the size requirement, Ukraine notes that the sole right to be protected in pluri-State internal waters that would otherwise constitute territorial seas is the right of innocent passage.[457] In this regard, Ukraine refers to *Gulf of Fonseca*, in which the ICJ Chamber emphasised that the gulf's waters were subject to the right to innocent passage for all nations.[458] By recognising the third-State navigational rights in the Gulf of Fonseca, according to Ukraine, the Chamber eliminated the risk of prejudice to the navigational interests of third States.[459] Ukraine contrasts the Gulf of Fonseca with the present situation in the Sea of Azov and the Kerch Strait, where Ukraine argues that the Russian Federation has prejudiced third-State rights by building a bridge over the Kerch Strait as well as by stopping and inspecting vessels traveling to and from Ukrainian ports.[460]

253. Ukraine notes that numerous third States have protested the Russian Federation's interference with their navigation rights, unilaterally and multilaterally.[461] Ukraine notes, for example, that Türkiye (a Black Sea littoral State), the United States, the European Union (including the Black Sea littoral States of Romania and Bulgaria), and the North Atlantic Treaty Organization (hereinafter "NATO") have all "protested Russia's discriminatory stoppages of ships as an

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451 Revised Memorial, para. 83.
452 Revised Memorial, para. 83 *citing* Britannica Online Encyclopedia, Gulf of Fonseca (11 April 2017) (**Annex UA-507**); *Croatia/Slovenia*, cit., n. 224, para. 872 (**Annexes RUL-41**, **UAL-61**).
453 Revised Memorial, paras 83-84, *see also* Revised Memorial, p. 41 Figure 1.
454 Revised Memorial, paras 83-84, *see also* Revised Memorial, p. 41 Figure 1.
455 Reply, para. 48.
456 Revised Memorial, para. 85.
457 Revised Memorial, para. 85.
458 Revised Memorial, para. 86 *citing Gulf of Fonseca*, cit., n. 43, p. 604, para. 412 (**Annexes RUL-19**, **UAL-58**).
459 Revised Memorial, para. 86.
460 Revised Memorial, para. 87.
461 Revised Memorial, paras 88-91.

unwarranted interference with third-State navigational rights."[462] Ukraine also notes that UN Member States have condemned the Russian Federation's interference with navigational rights and freedoms in the Sea of Azov and the Kerch Strait through multiple UN General Assembly resolutions.[463] Ukraine contends that the Russian Federation's argument that recognition of the Sea of Azov as a pluri-State Bay would not impact third States' rights is untrue and "incorrectly draws a parallel with the rights third States had under the juridical bay regime" before the USSR dissolved.[464]

254. With respect to the third requirement, Ukraine argues that the final necessity for pluri-State internal waters is the "affirmative agreement of the States concerned."[465] Ukraine relies again upon *Gulf of Fonseca*, where the ICJ Chamber found it necessary for bordering States to "*act jointly* to claim historic title to a bay" in order to grant it the status of internal waters.[466] Ukraine rejects the Russian Federation's assertion that there is a difference between "joint action" and "affirmative agreement."[467]

255. In response to the Russian Federation, Ukraine distinguishes the practice of Latvia and Estonia in the Gulf of Riga after the dissolution of the USSR from the scenario between the Parties in the Sea of Azov and the Kerch Strait. In the Gulf of Riga, Ukraine explains, Estonia declined Latvia's proposal to grant the Gulf joint internal waters status. Without such agreement, Ukraine continues,

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462 Revised Memorial, paras 88, 90 *citing* European Union, Statement by the Spokesperson on the Escalating Tensions 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**); Heather Nauert, Press Statement: Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov, United States Department of State (30 August 2018) (**Annex UA-543**); European Parliament Resolution No. P8_TAPROV(2018)0435, Situation in the Sea of Azov: European Parliament Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)) (25 October 2018) (**Annex UA-544**); United Nations, General Assembly Adopts Resolution Urging Russian Federation to Withdraw Its Armed Forces from Crimea, Expressing Grave Concern about Rising Military Presence (17 December 2018) (**Annex UA-553**); NATO, EU Condemn Russia's Plans To Close Parts Of Black Sea For Six Months (16 April 2021) (**Annex UA-597**); U.S. Department of State, Press Statement: Russia's Intention To Restrict Navigation in Parts of the Black Sea (19 April 2021) (**Annex UA-598**).

463 Revised Memorial, para. 89 *citing* UN General Assembly Resolution 73/194, UN Doc. No. A/RES/73/194, Problem of the Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, as well as Parts of the Black Sea and the Sea of Azov (17 December 2018), p. 2 (**Annex UA-549**); UN General Assembly Resolution 74/17, UN Doc. No. A/RES/74/17, Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (9 December 2019), p. 3 (**Annex UA-595**); UN General Assembly Resolution 75/29, UN Doc. No. A/RES/75/29, Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (7 December 2020), p. 4 (**Annex UA-596**).

464 Reply, para. 49.

465 Revised Memorial, para. 92.

466 Revised Memorial, para. 93 *citing Gulf of Fonseca*, cit., n. 43, p. 593, para. 394 (**Annexes RUL-19**, **UAL-58**) [citations omitted; emphasis added by Ukraine].

467 Reply, paras 50-51.

the Gulf of Riga was and is treated as international waters.[468] Further responding to the Russian Federation, Ukraine differentiates the Bay of Piran in *Croatia/Slovenia* from the present case.[469] In the Bay of Piran, according to Ukraine, the parties' arbitration agreement did not permit the arbitral tribunal to consider either party's unilateral actions following the dissolution of the SFRY.[470] Consequently, Ukraine maintains, the arbitration agreement functioned as an agreement "to continue their pre-dissolution regime."[471]

256. In contrast, Ukraine asserts that it has never come to an agreement with the Russian Federation to establish pluri-State internal waters status for the Sea of Azov and the Kerch Strait.[472] Moreover, Ukraine contends that the documents cited by the Russian Federation as evidence of such agreement, including the Azov/Kerch Cooperation Treaty and the State Border Treaty, do not support its argument.[473]

c. Whether the Parties' Practice in the Sea of Azov Evidences Agreement on Internal Waters Status

257. Ukraine submits that "[e]ven if the Parties could have jointly claimed the Sea of Azov and Kerch Strait as internal waters, they never agreed to do so."[474] To this point, Ukraine argues that soon after the dissolution of the USSR it expressed its viewpoint that the Sea of Azov contained both territorial sea and exclusive economic zone areas.[475] Ukraine contends that the Parties' subsequent negotiations over internal waters status failed to reach an agreement.[476]

258. Ukraine asserts that the Parties' conduct confirms this lack of agreement.[477] Ukraine submits that the record of the Parties' conduct regarding the Sea of Azov after the dissolution of the USSR is limited.[478] In its view, this thin record suggests that the Parties' practice "was relatively unremarkable," that the coastal States continued to use the waters as territorial seas and exclusive economic zones, and that third State merchant traffic continued to reach Ukrainian and Russian

468 Revised Memorial, para. 94.
469 Revised Memorial, para. 95 *referring to Croatia/Slovenia*, cit., n. 224 (**Annexes RUL-41**, **UAL-61**).
470 Revised Memorial, para. 95 *referring to Croatia/Slovenia*, cit., n. 224, Annex to the Award, Arbitration Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Art. 5 (**Annexes RUL-41**, **UAL-61**); Reply, para. 52.
471 Revised Memorial, para. 95 *referring to Croatia/Slovenia*, cit., n. 224, Annex to the Award, Arbitration Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Art. 5 (**Annexes RUL-41**, **UAL-61**); Reply, para. 52.
472 Revised Memorial, para. 95; Reply, paras 54-58.
473 Reply, paras 55-58.
474 Revised Memorial, para, 97.
475 Revised Memorial, paras 97-98.
476 Revised Memorial, paras 97-98.
477 Revised Memorial, paras 97-98.
478 Hearing, 23 September 2024, 61:10-62:15 (Soons); 3 October 2024, 24:13-23 (Soons).

ports.[479] Ukraine disputes the Russian Federation's assertion that the record contains a "wealth of practice," and replies that the Russian Federation points not to "activity or conduct of the Parties" but only to "statements, representations and provisional arrangements" made during the Parties' negotiations.[480]

i. Negotiations

259. Ukraine asserts that the Parties negotiated over a possible internal waters status for the Sea of Azov and the Kerch Strait.[481] According to Ukraine, the Parties began their negotiations in 1996 with both Ukraine and the Russian Federation "considering whether to 'grant' [the Sea of Azov and the Kerch Strait] an internal waters status."[482] Throughout the Parties' negotiations, Ukraine states, it expressed an openness to internal waters status conditional upon the waters being delimited between the States.[483] According to Ukraine, the Russian Federation opposed delimitation, and went so far as to say that delimitation according to the Convention "would make it impossible to grant these waters status as internal waters."[484] Ukraine states that both the Russian Federation and Ukraine subsequently reaffirmed their positions on "granting" internal waters status and on delimitation in 1997 and 1998, and negotiations of these points continued through 2002.[485]

260. By 2003, according to Ukraine, the Parties still had not reached an agreement on the status of the Sea of Azov and the Kerch Strait. Rather, Ukraine notes, the Parties confirmed in the State Border

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479 Hearing, 23 September 2024, 61:10-62:15 (Soons); 3 October 2024, 24:13-23 (Soons).

480 Hearing, 3 October 2024, 24:4-12 (Soons).

481 Revised Memorial, paras 104-05.

482 Revised Memorial, para. 105 *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 (17 October 1996), p. 2 (**Annex UA-517**); Protocol of the Second Meeting of the Delegations of Ukraine and the Russian Federation to Discuss Draft Agreements Between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and on Navigation in its Waters, on the Legal Status of the Kerch Strait, and on the Delimitation of the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea (21 July 1997), p. 1 (**Annex UA-605**). Hearing, 3 October 2024, 26:10-27:20 (Soons).

483 Revised Memorial, paras 106-07.

484 Revised Memorial, paras 106-07 *citing* 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), pp. 1-2 (**Annex UA-520**).

485 Hearing, 3 October 2024, 28:1-29:6 (Soons) *citing* Protocol of the Second Meeting of the Delegations of Ukraine and the Russian Federation to Discuss Draft Agreements Between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and on Navigation in its Waters, on the Legal Status of the Kerch Strait, and on the Delimitation of the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea (21 July 1997), p. 1 (**Annex UA-605**); Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of Delimitation (the Position of the Ukrainian Side) and Determination of Legal Status (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002), pp. 1-2 (**Annex UA-514**).

Treaty, which defined their shared land border, that the Treaty did not "prejudice the positions" of the Parties on "the status of the Sea of Azov and the Kerch Strait as internal waters of the two States."[486] Ukraine emphasises that the term "positions" is plural, reflecting that the Parties held conflicting positions on the status of the waters.[487] Ukraine maintains that these "positions" meant that the Parties were at a stalemate over the status of the waters.[488]

261. In October 2003, soon after the Parties concluded the State Border Treaty, Ukraine argues that the Russian Federation "precipitated a crisis in the Kerch Strait by building a dam between the Russian coast and Ukraine's Tuzla Island."[489] Ukraine states that the 2003 Azov/Kerch Cooperation Treaty resolved the crisis two months later. In Ukraine's view, the Azov/Kerch Cooperation Treaty was "[c]oncluded hurriedly in the face of this Russian aggression" and was "meant to preserve each Parties position" on internal waters status and delimitation for future negotiations.[490] Thus, Ukraine emphasises the Azov/Kerch Cooperation Treaty's "restrained language," which, according to Ukraine, maintains "constructive ambiguity" and affirms that "[t]he Sea of Azov and the Kerch Strait historically constitute internal waters" of the Parties.[491] Ukraine emphasises that this language does not describe "any present status for these waters – it instead records a historic fact as to their past status."[492]

262. Following the conclusion of the 2003 Azov/Kerch Cooperation Treaty, Ukraine observes that the Parties continued to negotiate over the legal status of the Sea of Azov and the Kerch Strait until 2010.[493] In Ukraine's view, the negotiations demonstrate that "both sides considered the legal status and delimitation of the Sea of Azov to be an outstanding issue."[494] However, Ukraine points out that they were unable to reach an agreement.[495] As such, Ukraine submits that "[a]ny statements, or even provisional agreements, offered during such inconclusive negotiations cannot be treated as binding, particularly given Ukraine's intention that a complete agreement would

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486 Revised Memorial, para. 108 *citing* Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border (28 January 2003), Preamble, Art. 5 (**Annex UA-529**).
487 Hearing, 3 October 2024, 29:14-30:7 (Soons).
488 Hearing, 3 October 2024, 30:10-17 (Soons).
489 Revised Memorial, para. 109; Hearing, 3 October 2024, 30:18-31:2 (Soons).
490 Revised Memorial, paras 109, 112.
491 Revised Memorial, para. 110 *citing* Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (24 December 2003), Art. 1 (**Annex UA-19**). Hearing, 3 October 2024, 31:14-19 (Soons).
492 Revised Memorial, para. 110.
493 Revised Memorial, para. 112.
494 Revised Memorial, para. 112.
495 Revised Memorial, para. 113.

need to be reached that encompassed" both the possible internal waters status of the Sea of Azov and the Kerch Strait as well as their delimitation between the Parties.[496]

ii. Conduct

263. Ukraine further submits that the Parties' conduct towards third States and each other "confirms the absence of an agreement to an internal waters status."[497]

264. Ukraine contends that "[s]hortly after its independence, Ukraine made clear that it considered the Sea of Azov as containing its territorial sea and exclusive economic zone."[498] According to Ukraine, "[o]n 11 November 1992, Ukraine deposited baselines with the UN Secretariat for measuring the breadth of its territorial sea, exclusive economic zone, and continental shelf, in both 'the Black Sea and the Sea of Azov.'"[499] Ukraine notes that the Russian Federation made no objection to the baselines, including when they were published in 1998 and "reiterated" to the Russian Federation during negotiations in 2002.[500] Ukraine adds that the Parties "acknowledged the relevance of UNCLOS to their fishing activities in the Sea of Azov" in the preamble to their 1992 Fisheries Agreement.[501]

265. Ukraine rejects the Russian Federation's allegation that Ukraine's 2002 *Note Verbale* to the Russian Federation in which Ukraine communicated its previously deposited baselines does not make clear that Ukraine viewed the Sea of Azov and the Kerch Strait as subject to the Convention.[502] In response, Ukraine notes that it had sent the baselines to the UN Secretariat for circulation to other States, not to the Russian Federation for the purpose of advancing the Parties' negotiations.[503] Ukraine explains that the 2002 *Note Verbale* confirms that Ukraine and the Russian Federation were still negotiating the legal status of the Sea of Azov at time it was sent, and so Ukraine communicated its baselines to facilitate that work, unrelated to their previous depositing.[504]

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496 Revised Memorial, para. 113.
497 Revised Memorial, para. 114.
498 Revised Memorial, para. 98.
499 Revised Memorial, para. 99 *citing Note Verbale* from the Permanent Mission of Ukraine to the United Nations to the Secretary-General of the United Nations, No. 633 (11 November 1992) (**Annex UA-3**).
500 Revised Memorial, para. 99.
501 Revised Memorial, para. 100 *citing* Agreement between the Government of Ukraine and the Government of the Russian Federation in the Fisheries Sector (24 September 1992), Preamble (**Annex UA-70**).
502 Hearing, 3 October 2024, 34:11-23 (Soons) *citing Note Verbale* from Ukraine to the Russian Federation, No. 72/22-446-1375 (25 June 2002), p. 1 (**Annex UA-513**).
503 Hearing, 3 October 2024, 34:24-35:16 (Soons).
504 Hearing, 3 October 2024, 35:17-36:1 (Soons).

266. Ukraine further asserts that its domestic legislation confirms that it understood that the Sea of Azov contained an exclusive economic zone. Ukraine's 1991 Law on the State Border established a 12-mile territorial sea and mirrored the Convention's definition of internal waters, which thus did not provide for the possibility of pluri-State internal waters in the Sea of Azov or elsewhere.[505] Less than four years later, Ukraine passed its 1995 Law on the Exclusive (Maritime) Economic Zone, which defined its exclusive economic zone by reference to "the same baselines as the territorial sea of Ukraine."[506] Ukraine recalls that the stated purpose of the deposited baselines was to measure, *inter alia*, the width of the exclusive economic zone in the Sea of Azov, and so asserts that its domestic legislation recognised an exclusive economic zone in the Sea of Azov.[507] Ukraine underlines that it never circulated revised baselines or adopted new domestic legislation suggesting an internal waters claim after the 2003 Azov/Kerch Cooperation Treaty.[508]

267. Ukraine disputes the Russian Federation's claim that Ukraine's domestic legislation is of "general application" so that it cannot be inferred that it applies specifically to the Sea of Azov and the Kerch Strait.[509] In response, Ukraine contends that, as there is "no specific exclusion for the Sea of Azov," the correct expectation is that "an UNCLOS-consistent set of maritime laws" would "apply to the Sea of Azov as it would to any other sea."[510] Ukraine further emphasises that when it ratified the Convention on 26 July 1999, it made no reservations as to the status of the Sea of Azov nor the Kerch Strait, and neither did the Russian Federation upon its own ratification of the Convention.[511] Ukraine observes that since the dissolution of the USSR the Russian Federation has passed similar domestic legislation to that of Ukraine, including 1998 legislation regulating the Russian Federation's maritime waters, which did not identify any special status or "carve-out" for the Sea of Azov.[512]

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505 Revised Memorial, para. 101 *referring to* Law of Ukraine On the State Border of 4 November 1991, Arts. 5-6 (**Annex UA-602**).

506 Revised Memorial, para. 101 *referring to* Law of Ukraine "On the Exclusive (Maritime) Economic Zone of Ukraine", No. 162/95-VR (16 May 1995), Art. 2 (**Annex UA-6**).

507 Revised Memorial, para. 101.

508 Hearing, 23 September 2024, 106:21-107:7 (Soons).

509 Reply, para. 64.

510 Reply, para. 64.

511 Revised Memorial, para. 102 *citing* UN Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 6: United Nations Convention on the Law of the Sea (10 December 1982), p. 3, 32, 40-41 (**Annex UA-8**).

512 Revised Memorial, para. 103; Hearing, 23 September 2024, 65:13-66:7 (Soons) *citing* Federal Law on Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation (17 July 1998) (**Annex UA-603**); Federal Law on the Exclusive Economic Zone of the Russian Federation (2 December 1998), Art. 1 (**Annex UA-590**).

268. In addition, Ukraine contends that its own conduct towards third States evidences that the Sea of Azov and the Kerch Strait do not have internal waters status.[513] Ukraine explains that it has neither established domestic legislation nor asserted changes to the baselines that it deposited with the UN Secretariat so as to alert other States to an internal waters claim.[514] Ukraine submits that it encourages international navigation in the Sea of Azov.[515] According to Ukraine, such third-Party navigation was safeguarded in the 2003 Azov/Kerch Cooperation Treaty, which contemplated navigation by foreign military and government vessels, and Ukraine maintained the USSR pilotage regime through the Kerch Strait to facilitate safe transit.[516]

269. Ukraine also argues that its conduct towards the Russian Federation demonstrated the lack of agreement between the Parties as to the status of the Sea of Azov and the Kerch Strait.[517] Ukraine submits that it periodically asserted its rights under the Convention to the Russian Federation. Ukraine refers, for example, to a diplomatic communication of 15 September 2002 in which Ukraine protested that the Russian Federation had unilaterally changed navigation conditions for vessels in the Kerch Strait in violation of the Convention.[518] Ukraine also notes that it has protested the Russian Federation's dredging activities on numerous occasions.[519] Ukraine also recalls the Parties' invocation in the 1992 Fisheries Agreement of the "'relevant articles of the UN Convention on the Law of the Sea' governing 'commercial fishing of stocks encountered in the zones of two or more states.'"[520]

270. Ukraine rejects the Russian Federation's argument that Ukraine's practice proves the Parties' agreement on the internal waters status of the Sea of Azov and the Kerch Strait.[521] Ukraine disputes the Russian Federation's claim that Ukraine's treatment of airspace, including a 2015 Notice to Air Missions issued by the Ukrainian State Aviation Service, suggested the lack of an exclusive economic zone in those waters.[522] In response, Ukraine notes that Article 12 of the Chicago Convention applies to airspace over exclusive economic zones and the high seas.[523]

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513 Revised Memorial, para. 115.
514 Revised Memorial, para. 115.
515 Revised Memorial, para. 116.
516 Revised Memorial, para. 116.
517 Revised Memorial, para. 117.
518 Revised Memorial, para. 117 *citing Note Verbale* from Ukraine to the Russian Federation, No. 72/22-446-2110 (15 September 2002), pp. 1-2 (**Annex UA-516**).
519 Revised Memorial, n. 232 *citing Note Verbale* from Ukraine to the Russian Federation, No. 72/22-446-933 (8 May 2002) (**Annex UA-538**); *Note Verbale* from Ukraine to the Russian Federation, No. 72/22-446-2304 (27 June 2003) (**Annex UA-539**); *Note Verbale* from Ukraine to the Russian Federation, No. 72/22-410-897 (23 February 2004) (**Annex UA-540**).
520 Revised Memorial, para. 117. *See also* Revised Memorial, subsection 4.I.A.
521 Reply, para. 68.
522 Reply, para. 69 *referring to* Chicago Convention, Art. 12 (**Annex RU-311, UAL-165**).
523 Reply, para. 69 *referring to* Chicago Convention, Art. 12 (**Annex RU-311, UAL-165**).

Accordingly, Ukraine's 2015 flight restriction on grounds of safety did not imply a claim of sovereignty over the waters under the airspace.[524]

271. Ukraine further challenges the relevance of the Russian Federation's reference to the October 2018 decree of the President of Ukraine. For its part, Ukraine asserts that the decree was made when Ukraine's interests were under severe threat after more than four years of Russian aggression. Ukraine recalls in this regard that Ukraine did not revise the baselines that it had deposited with the UN.[525]

272. Ukraine also disagrees with the Russian Federation's argument that the Parties' agreed in the 2003 Azov/Kerch Cooperation Treaty and in the 2003 Joint Declaration to limit the access of foreign warships to the Sea of Azov.[526] Ukraine repeats that the Azov/Kerch Cooperation Treaty was meant to preserve the Parties' positions and did not confirm any shared practices.[527] Ukraine further denies the Russian Federation's contention that, because Ukraine was a party to the Azov/Kerch Cooperation Treaty until recently, the Parties shared the same interpretation of the Treaty.[528]

273. In addition, Ukraine contends that the Russian Federation's conduct provides evidence that there was no agreement on the status of common internal waters.[529] According to Ukraine, until 2014, the Russian Federation had accepted, in deed as well as in the 2003 Azov/Kerch Cooperation Treaty, the extensive international navigation in the Sea of Azov and the Kerch Strait.[530] Ukraine submits that, since 2014, however, the Russian Federation has begun to interfere with the freedom of navigation in the Sea of Azov and the Kerch Strait.[531] Ukraine adds that, in contrast to the Russian Federation's claims that the Parties had agreed that the Kerch Strait was common internal waters, the Russian Federation has declared that the Kerch Strait is "under the full sovereignty of Russia."[532]

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524 Reply, para. 69.
525 Reply, para. 70.
526 Reply, para. 73 *referring to* Revised Memorial, para. 108.
527 Reply, para. 73 *referring to* Revised Memorial, para. 108.
528 Hearing, 23 September 2024, 107:8-18 (Soons).
529 Revised Memorial, para. 118.
530 Revised Memorial, para. 118.
531 Revised Memorial, para. 118 *citing* Foreign Ministry: Kyiv's Draft Law on the Maritime Territory Is Not Applicable to the Sea of Azov, *Russian Information Agency News* (15 November 2018) (**Annex UA-541**).
532 Revised Memorial, para. 118 *citing* Foreign Ministry: Kyiv's Draft Law on the Maritime Territory Is Not Applicable to the Sea of Azov, *Russian Information Agency News* (15 November 2018) (**Annex UA-541**).

iii. Estoppel

274. Ukraine rejects the Russian Federation's argument that Ukraine should be estopped from claiming that it at no time viewed the Sea of Azov and the Kerch Strait as having internal waters status.[533] On a procedural note, Ukraine submits that the argument, first introduced in the Rejoinder, is untimely.[534] As regards the substance of the Russian Federation's estoppel argument, Ukraine recalls that an estoppel requires a "clear and unequivocal representation" and asserts that the Russian Federation has not proven the existence of such representation.[535] Additionally, according to Ukraine, an estoppel requires the invoking party to demonstrate that it relied on such representations to its own detriment. However, Ukraine contends that the Russian Federation has not shown such reliance, nor can it.[536]

d. Applicability of UNCLOS to Internal Waters

275. Ukraine argues that even if the Sea of Azov were considered internal waters, "those internal waters would still be governed by UNCLOS in important respects."[537] Ukraine disputes the Russian Federation's assertion that the Convention does not regulate internal waters and contends that certain provisions of the Convention do apply to internal waters. In support of its assertion, Ukraine points out Article 8, paragraph 2, of the Convention (right of innocent passage in areas that were not considered internal waters before drawing straight baselines), and Articles 34 and 35 of the Convention (right of transit passage in international straits which were not considered internal waters before drawing straight baselines).[538] Ukraine also observes that several provisions of the Convention apply to all maritime areas, including internal waters, such as Article 192 (marine environment protection) and Articles 204-206 (pollution).[539]

533 Hearing, 23 September 2024, 109:9-15 (Soons).
534 Hearing, 23 September 2024, 109:16-25 (Soons).
535 Hearing, 23 September 2024, 110:3-23 (Soons) *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 435 (**Annexes RUL-85, UAL-18**).
536 Hearing, 23 September 2024, 110:24-112:17 (Soons) *citing Temple of Preah Vihear*, cit., no. 373, Separate Opinion of Sir Gerald Fitzmaurice, p. 63 (**Annex UAL-216**).
537 Revised Memorial, para. 127. *See also* Hearing, 3 October 2024, 41:2-5 (Soons).
538 Revised Memorial, para. 127.
539 Revised Memorial, para. 128.

D. THE RUSSIAN FEDERATION'S THIRD GENERAL OBJECTION

1. The Russian Federation's Position

276. The Russian Federation submits that the Arbitral Tribunal should take into account a change in circumstances that has occurred since the date of filing of the Revised Memorial and that it argues "substantially affect the issues under consideration."[540] Specifically, the Russian Federation states that on 30 September 2022, following referenda, the Donetsk People's Republic (hereinafter the "DPR"), the Lugansk People's Republic, the Zaporozhye Region and the Kherson Regions "became part of the sovereign territory of the Russian Federation pursuant to the Treaties on the accession of the same date."[541] According to the Russian Federation, several days later, on 4 October 2022, the Russian Federation enacted a new set of federal constitutional laws to regulate these regions' accessions into the Russian Federation.[542] The Russian Federation argues that, with the accession to the Russian Federation of the DPR, the Zaporozhye Region, and the Kherson Region, Ukraine has ceased to be a coastal State to the Sea of Azov.[543]

277. The Russian Federation submits that the Arbitral Tribunal's conclusion reached in its Award Concerning Preliminary Objections that it lacks jurisdiction over matters requiring it to decide on the sovereignty over Crimea should also be applied to the DPR, the Zaporozhye Region, and the Kherson Region.[544] Consequently, according to the Russian Federation, the Arbitral Tribunal has no jurisdiction over Ukraine's claims that require a determination on the sovereignty of either Party over the Sea of Azov and the Kerch Strait.[545]

278. The Russian Federation rejects Ukraine's criticism that the Russian Federation is seeking to give this objection retroactive effect.[546] Instead, the Russian Federation states that the objection only concerns Ukraine's claims as to alleged breaches of UNCLOS which would extend beyond September 2022: in effect, the Arbitral Tribunal should cease to assess possible breaches of the Convention as of September 2022 to avoid deciding on the Parties' sovereignty dispute.[547] According to the Russian Federation, this temporal limitation must also be taken into account when considering any of the remedies sought by Ukraine, such as dismantling the bridge.[548]

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540 Counter-Memorial, para. 25.
541 Counter-Memorial, para. 26.
542 Counter-Memorial, para. 26.
543 Counter-Memorial, para. 27.
544 Counter-Memorial, para. 28. *See also* Hearing, 28 September 69:15-71:15 (Crosato Neumann).
545 Counter-Memorial, para. 29.
546 Hearing, 28 September 2024, 71:16-19 (Crosato Neumann).
547 Hearing, 28 September 2024, 71:20-72:3 (Crosato Neumann).
548 Hearing, 28 September 2024, 72:8-11 (Crosato Neumann).

279. Regarding the two reasons given by Ukraine not to entertain its jurisdictional objection, the Russian Federation submits that while jurisdiction must "normally" be assessed on the date of the filing of the act instituting proceedings, this does not preclude that jurisdiction may be revisited at a later moment.[549] The Russian Federation further submits that the ICJ's Provisional Measures Order of March 2022, relied upon by Ukraine, is not a final decision and only addressed the Russian Federation's military operation.[550] The Russian Federation observes that the ICJ did not consider the regions' declarations of independence and subsequent referenda, nor did it order the Russian Federation not to recognise the referenda or accept their accession to the Russian Federation.[551] In addition, the Russian Federation points out that the Order has been vacated following the ICJ's Judgment on Preliminary Objections of 2 February 2024 and has no legal effect.[552]

280. The Russian Federation rejects Ukraine's characterisation of this objection as an argument on remedies, as the Russian Federation makes the argument in reference to Article 288 of the Convention and its limitation on the Arbitral Tribunal's jurisdiction.[553] Furthermore, the Russian Federation affirms that both States claim sovereignty over the same regions, thereby establishing a dispute as defined by the Arbitral Tribunal in its Award Concerning Preliminary Objections.[554] The Russian Federation denies that a dispute can be deemed not to exist because a situation is "in flux," or involves an armed conflict.[555]

2. Ukraine's Position

281. Ukraine submits that the Russian Federation's argument that there has been a change in circumstances "violate[s] two basic legal principles."[556] First, Ukraine argues that the Russian

549 Hearing, 28 September 2024, 72:15-73:24 (Crosato Neumann) *citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2008, p. 412 at p. 437, para. 79 (**Annex UAL-168**); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at p. 95, para. 127 (**Annexes RUL-180**, **UAL-170**).

550 Hearing, 28 September 2024, 73:24-74:10 (Crosato Neumann) *citing Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (hereinafter "*Ukraine v. Russia Provisional Measures Order*"), ICJ Provisional Measures Order of 16 March 2022, para. 86 (**Annex UAL-173**).

551 Hearing, 28 September 2024, 74:10-18 (Crosato Neumann).

552 Hearing, 28 September 2024, 74:19-75:24 (Crosato Neumann).

553 Hearing, 5 October 2024, 59:8-16 (Crosato Neumann).

554 Hearing, 5 October 2024, 61:21-66:3 (Crosato Neumann).

555 Hearing, 5 October 2024, 63:4-24 (Crosato Neumann).

556 Reply, para. 76.

Federation ignores the critical date for establishing jurisdiction.[557] Second, Ukraine contends that the Russian Federation's argument relies entirely on actions which violate a binding ICJ order.[558]

282. As regards the first legal principle, Ukraine asserts that the Russian Federation's argument ignores the "general rule"[559] that the critical date for the Arbitral Tribunal to consider when establishing jurisdiction is "the date on which the application is filed."[560] In this case, Ukraine submits that its Notification and Statement of Claim is dated 16 September 2016, and so subsequent events are irrelevant to the Arbitral Tribunal's jurisdiction.[561] Relying on the ICJ's analysis in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (hereinafter "*Croatia v. Serbia*") and other cases, Ukraine notes that the removal of an element necessary for jurisdiction does not have retroactive effect once jurisdiction has already been established.[562] Ukraine adds that the ICJ found this principle to hold even when a claimant seeks prospective relief.[563] Ukraine contends that both the Russian Federation and the Arbitral Tribunal have previously recognised the Donetsk, Luhansk, Zaporizhzhia, and Kherson Oblasts as Ukrainian territory, and Ukraine as a coastal State of the Sea of Azov.[564] Ukraine notes that the Russian Federation did not dispute that the Oblasts were part of Ukraine at the time that Ukraine filed its Notification and Statement of Claim.[565]

283. As for the second principle, Ukraine contends that the Russian Federation's argument depends on actions which themselves are inconsistent with a legally binding ICJ order.[566] According to Ukraine, as a result of these unlawful actions, "Russia's claims of sovereignty over Donetsk, Luhansk, Zaporizhzhia and Kherson [O]blasts can be treated as nothing more than a mere

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557 Reply, para. 78 *citing Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (hereinafter "*Nicaragua v. Colombia 2016*"), Judgment, I.C.J. Reports 2016, p. 3 at p. 18, para. 33 (**Annex UAL-169**).

558 Reply, para. 80.

559 Reply, para. 78 *citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2008, p. 412 at p. 437, para. 79 (**Annex UAL-168**).

560 Reply, para. 78 *citing Nicaragua v. Colombia (2016)*, cit., n. 557, p. 18, para. 33 (**Annex UAL-169**); *Croatia v. Serbia*, cit., n. 559, p. 437, para. 79 (**Annex UAL-168**).

561 Reply, para. 78.

562 Reply, para. 78 *citing Nicaragua v. Colombia (2016)*, cit., n. 557, p. 19, para. 33 (**Annex UAL-169**) *citing Croatia v. Serbia*, cit., n. 559, p. 438, para. 80 (**Annex UAL-168**); *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (hereinafter "*Nicaragua v. Colombia (2022)*"), Judgment, I.C.J. Reports 2022, at p. 89, para. 261 (**Annex UAL-172**); Hearing, 23 September 2024, 116:17-117:13 (Cheek).

563 Reply, para. 78 *citing Nicaragua v. Colombia (2022)*, cit., n. 562, para. 261 (**Annex UAL-172**).

564 Reply, para. 77 *citing* Russian Federation's Preliminary Objections, para. 84; Award Concerning Preliminary Objections, paras 199-297; Hearing, 23 September 2024, 116:9-16 (Cheek).

565 Reply, para. 77 *citing* Russian Federation's Preliminary Objections, para. 84; Award Concerning Preliminary Objections, paras 199-297; Hearing, 23 September 2024, 116:9-16 (Cheek).

566 Reply, para. 80.

assertion without legal consequence."[567] Ukraine submits that the ICJ order is one of three "authoritative determinations" which demonstrate that, legally, "there is no real dispute" over these territories: the other two determinations are the UN General Assembly Resolution of 12 October 2022 and the decision of the European Court of Human Rights of November 2022 in *Ukraine and The Netherlands v. the Russian Federation*.[568]

284. Ukraine recalls that the ICJ issued a Provisional Measures Order on 16 March 2022,[569] in which, according to Ukraine, the Court directed the Russian Federation to "immediately suspend the military operations commenced on 24 February 2022 in the territory of Ukraine."[570] Ukraine submits that it is indisputable that the Russian Federation has not followed the ICJ's Order.[571] To this point, Ukraine notes that a spokesperson for the Russian Federation, speaking of the ICJ Order, stated that the Russian Federation would "not be able to take this decision into account," and that Russian Federation military action in Ukraine continued after the issuance of the Provisional Measures Order.[572] Ukraine disputes the Russian Federation's claim that the Donetsk, Luhansk, Zaporizhzhia, and Kherson regions acceded to the Russian Federation's sovereignty of their own accord through referenda.[573] Ukraine states that these elections "were only possible because of Russia's continued military campaign in violation of the Order."[574] Ukraine adds that the referenda were illegitimate and that the Russian military was directly involved in collecting votes.[575]

285. Regarding the Russian Federation's aforementioned actions, Ukraine recalls that the Special Chamber of ITLOS determined in *Dispute Concerning Delimitation of the Maritime Boundary*

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567 Hearing, 23 September 2024, 115:11-14 (Cheek); Reply, para. 84.

568 Hearing, 3 October 2024, 166:17-176:7 (Cheek) *referring to* UN General Assembly Resolution ES-11/4 (12 October 2022) (**Annex UA-950**); *Ukraine and the Netherlands v. Russia*, 43800/14, 8019/16 and 28525/20, Decision (Grand Chamber), 20 November 2022, pp. 225-26 (**Annex UAL-237**).

569 Reply, para. 81 *citing Ukraine v. Russia Provisional Measures Order*, cit., n. 550, para. 86 (**Annex UAL-173**). *See also* Hearing, 23 September 2024, 118:3-13 (Cheek).

570 Reply, para. 81 *citing Ukraine v. Russia Provisional Measures Order*, cit., n. 550, para. 86 (**Annex UAL-173**). *See also* Hearing, 23 September 2024, 118:3-13 (Cheek).

571 Reply, para. 82 *citing* Sofia Stuart Leeson, *Russia Rejects International Court Ruling to Stop Invasion of Ukraine*, EURACTIV (17 March 2022) (**Annex UA-801**); Elena Becatoros et al., *Russia Claims to Have Taken Full Control of Mariupol*, Associated Press (20 May 2022) (**Annex UA-803**).

572 Reply, para. 82 *citing* Sofia Stuart Leeson, *Russia Rejects International Court Ruling to Stop Invasion of Ukraine*, EURACTIV (17 March 2022) (**Annex UA-801**); Elena Becatoros et al., *Russia Claims to Have Taken Full Control of Mariupol*, Associated Press (20 May 2022) (**Annex UA-803**).

573 Reply, para. 83.

574 Reply, para. 83, submitting that Mariupol was "not taken by the Russian Federation until May 2022, two months after the ICJ issued its Order" [citations omitted]. Elena Becatoros et al., *Russia Claims to Have Taken Full Control of Mariupol*, Associated Press (20 May 2022) (**Annex UA-803**).

575 Reply, para. 83 *citing* James Waterhouse, et al., *Ukraine 'Referendums': Soldiers Go Door-to-Door for Votes in Polls*, BBC (23 September 2022) (**Annex UA-804**); Yulia Gorbunova, *Fictitious Annexation Follows 'Voting' at Gunpoint*, Human Rights Watch (30 September 2022) (**Annex UA-805**).

Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) that a sovereignty claim that contradicts an ICJ ruling "cannot be considered anything more than a 'mere assertion,' 'does not prove the existence of a dispute,' and thus cannot interfere with the jurisdiction of an UNCLOS tribunal."[576] Ukraine contends that the Russian Federation's sovereignty claims similarly contradict an ICJ order.[577]

286. Ukraine denies that any "change in circumstances" would impact its requests for relief.[578] As regards its claims under Articles 38 and 44 of the Convention, Ukraine notes that the breaches occurred no later than August 2017.[579] Ukraine contends that, accordingly, it is appropriate for the Arbitral Tribunal to award a remedy as of this date, regardless of later events.[580] Ukraine adds that there is not a real dispute as to the sovereignty over Donetsk, Zaporizhzhia and Kherson Oblasts as the areas are an active war zone and "the situation [...] is in flux."[581] Ukraine explains that this status distinguishes these Oblasts from the situation that was occurring in Crimea at the time of the Arbitral Tribunal's Award Concerning Preliminary Objections.[582] Thus, in Ukraine's view, the Arbitral Tribunal is not required to make a legal finding regarding whether a dispute over sovereignty exists.[583] Instead, Ukraine submits, the Arbitral Tribunal can "find as a matter of fact that [...] Russia's purported annexation is a mere assertion."[584]

E. ANALYSIS OF THE ARBITRAL TRIBUNAL

1. Introduction

287. The Arbitral Tribunal considers that the central issue raised by the Russian Federation's general objections concerns the legal status of the Sea of Azov and the Kerch Strait. In this regard, the Arbitral Tribunal notes that the Russian Federation's first and second objections overlap to a significant extent. In particular, the Russian Federation maintains that the internal waters status of the Sea of Azov and the Kerch Strait continued after the dissolution of the Soviet Union, whether based on historic title or on other legal grounds.[585] Ukraine, however, disputes the

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576 Reply, para. 84 *citing Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Judgment, ITLOS Reports 2021, p. 17 at pp. 86-87, para. 243 (**Annex UAL-174**). *See also* Hearing, 23 September 2024, 119:9-24 (Cheek).

577 Reply, para. 84. *See also* Hearing, 23 September 2024, 119:25-120:11 (Cheek).

578 Hearing, 3 October 2024, 161:10-162:1 (Cheek).

579 Hearing, 3 October 2024, 161:10-162:1 (Cheek).

580 Hearing, 3 October 2024, 161:10-162:1 (Cheek).

581 Hearing, 3 October 2024, 162:16-163:13 (Cheek).

582 Hearing, 3 October 2024, 162:16-163:13 (Cheek).

583 Hearing, 3 October 2024, 163:14-20 (Cheek).

584 Hearing, 3 October 2024, 163:14-20 (Cheek).

585 *See* paras 117, 177 above.

continuation of the internal waters status on either basis.[586] Accordingly, the effect of the dissolution of the Soviet Union on the status of the Sea of Azov and the Kerch Strait is central to both arguments.

288. In the view of the Arbitral Tribunal, this question can be considered in the context of either the first or the second objection. If the Arbitral Tribunal finds that historic title existed over the Sea of Azov and the Kerch Strait, it would then need to assess whether such title continued after the dissolution of the Soviet Union. However, if the Arbitral Tribunal concludes that no such historic title existed, it would be more appropriate to address the effect of the dissolution of the Soviet Union on the status of the Sea of Azov and the Kerch Strait in the context of the second, alternative objection.

289. The Arbitral Tribunal will now address the Russian Federation's three general objections in turn.

2. The Russian Federation's First General Objection

290. The Russian Federation's first objection raises two key issues on which the Parties disagree. First, the Parties hold divergent views regarding the scope of Article 298, paragraph 1(a)(i), of the Convention, in particular the meaning of "disputes involving historic bays or titles." Second, the Parties disagree on whether the Sea of Azov and the Kerch Strait constitute a historic bay or are subject to historic title.

a. Scope of Article 298, paragraph 1(a)(i), of UNCLOS

291. With respect to the first issue, the Russian Federation argues that disputes "involving historic bays or titles", which are excluded from the compulsory procedures entailing binding decisions under section 2 of Part XV of the Convention, include disputes over whether such bays or titles exist in the first place.[587] In light of the Parties' disagreement as to whether the Sea of Azov and the Kerch Strait constitute a historic bay or are subject to historic title, the Russian Federation contends that the Arbitral Tribunal lacks jurisdiction over any claims relating to these waters, based on the declarations made by both Parties under Article 298, paragraph 1(a)(i), of the Convention.[588]

292. Ukraine, for its part, contends that Article 298, paragraph 1(a)(i), of the Convention does not extend to disputes concerning the existence of historic bays or titles.[589] Accordingly, Ukraine

586 *See* paras 157, 239 above.
587 *See* para. 119 above.
588 *See* paras 117-119 above.
589 See para. 154 above.

argues that the Arbitral Tribunal is not precluded from determining whether the Sea of Azov and the Kerch Strait constitute historic internal waters.[590]

293. Article 298, paragraph 1, of the Convention reads in part:

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or *those involving historic bays or titles*, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission [...].[591]

294. The word "involving" ordinarily means "including something as a necessary part" or "containing within as part of the whole."[592] Accordingly, disputes involving historic bays or titles refer to disputes that include historic bays or titles as a necessary element of the dispute. In the view of the Arbitral Tribunal, such disputes assume the existence of historic bays or titles.

295. Where the existence of historic bays or titles is itself disputed, the first task of a court or tribunal is to determine whether there is a dispute "involving historic bays or titles" for the purposes of Article 298, paragraph 1(a)(i), of the Convention. Only if the court or tribunal finds that there is such a dispute does the exception in Article 298, paragraph 1(a)(i) operate. The decision of the court or tribunal on this question is definitive as to the existence of a dispute "involving historic bays or titles" for the purposes of said provision; however, it is not definitive as to the question of the historic bays or titles themselves or to their content.

296. A dispute does not become a dispute involving historic bays or titles merely because one party asserts a claim to historic bays or titles. Whether a dispute qualifies as one involving historic bays or titles must be determined based on an objective assessment of the dispute and of characteristics of the bays or the nature of the titles to the waters in question.

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590 Hearing, 23 September 2024, 73:4-7 (Soons).

591 [Emphasis added].

592 *Cf.* Oxford Advanced Learner's Dictionary, Entry "Involve" (**Annex RU-595**) (defining "involve" as follows: "if a situation, an event or an activity involves something, that thing is an important or necessary part or result of it" [emphasis omitted]).

297. In this regard, the Arbitral Tribunal recalls that, in its Award Concerning Preliminary Objections, it stated:

> [...] 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.[593]

298. Thus, the Arbitral Tribunal indicated that, as an initial matter, it would be required to examine the basis for the claimed existence of historic bays or titles in this case in order to address the Russian Federation's alternative argument.

299. The Arbitral Tribunal notes that both Parties refer to *South China Sea* in support of their respective positions. However, what the arbitral tribunal in that case clarified was the meaning of "historic title," which it defined as referring specifically to historic sovereignty over land or maritime areas.[594] The arbitral tribunal further clarified that China did not claim historic title to the waters of the South China Sea, but rather a constellation of historic rights short of title.[595]

300. As a result, the arbitral tribunal in *South China Sea* did not find it necessary to address whether disputes involving historic bays or titles encompass disputes over the very existence of such bays or titles, as no claim to "historic title" within the meaning of Article 298, paragraph 1(a)(i), of the Convention was made in that case. In the view of the Arbitral Tribunal, *South China Sea* is therefore of limited relevance to the present case, in which a Party does assert claims to historic titles.

301. In the Arbitral Tribunal's view, the declarations made by the Parties under Article 298, paragraph 1(a)(i), of the Convention do not preclude the Arbitral Tribunal from determining whether the Sea of Azov and the Kerch Strait constitute a historic bay or are subject to historic title for the purposes of that Article.

b. Whether the Sea of Azov and the Kerch Strait Were Internal Waters Subject to Historic Title

302. The next issue the Arbitral Tribunal has to consider is whether a historic title to the Sea of Azov and the Kerch Strait existed, as asserted by the Russian Federation, for the purposes of Article 298

593 Award Concerning Preliminary Objections, para. 292.
594 *South China Sea*, cit., n. 37, para. 225 (**Annex UAL-11**).
595 *South China Sea*, cit., n. 37, para. 229 (**Annex UAL-11**).

of the Convention.[596] If such a title did exist in the past, the Arbitral Tribunal must also examine whether it continued following the dissolution of the Soviet Union in 1991.

303. It is common ground between the Parties that the Russian Empire, and subsequently the Soviet Union, exercised sovereignty over the Sea of Azov and the Kerch Strait.[597] The Parties also appear to agree on the requirements for the formation of a historic title under international law—namely, the continuous exercise of authority over the area in question for an extended period, combined with the acquiescence or absence of protest by third States.[598]

304. However, the Parties disagree on whether the Sea of Azov and the Kerch Strait constituted a historic bay or were subject to historic title. In particular, they hold divergent views regarding the relationship between the regime governing a historic bay and that applicable to what is commonly referred to as a juridical bay, as well as the implications of that relationship for the legal status of the Sea of Azov and the Kerch Strait.

305. The Russian Federation takes the view that the concept of a juridical bay was not well established in international law prior to 1958, when the 1958 Geneva Convention introduced the concept in Article 7.[599] It argues that neither the Russian Empire nor the Soviet Union, therefore, would have been entitled to treat the Sea of Azov and the Kerch Strait as internal waters, were it not for their continuous exercise of sovereignty over these waters for an extended period, without any protest from third States. [600]

306. Since November 1960, when the Soviet Union ratified the 1958 Geneva Convention, in the Russian Federation's view, the Sea of Azov and the Kerch Strait have fallen under the regimes of both juridical bays and historic title.[601] Referring to the ICJ Chamber's findings in *Gulf of Fonseca*, the Russian Federation maintains that even after 1960, the Soviet Union retained its historic title over the Sea of Azov and the Kerch Strait.[602] In support of this claim, it refers to Soviet legislation, including the 1960 Statute on the Protection of the State Border of the USSR and Declaration No. 4450.[603]

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596 *See* para. 137 above.
597 *See* paras 127, 157-158.
598 Hearing, 28 September 2024, 40:23-41:2 (Crosato Neumann); Hearing, 23 September 2024, 75:24-76:3 (Soons).
599 Hearing, 28 September 2024, 47:16-23 (Crosato Neumann).
600 Counter-Memorial, paras 41-43.
601 Rejoinder, paras 111-12.
602 Rejoinder, para. 113.
603 Rejoinder, paras 111, 114.

307. For its part, Ukraine asserts that the regime of a juridical bay—a bay with a narrow mouth entirely surrounded by a single State—existed for centuries, long before 1958.[604] According to Ukraine, due to the narrowness of the Kerch Strait, the Sea of Azov qualified as a juridical bay, and therefore, the Russian Empire and the Soviet Union exercised sovereignty over the Sea of Azov in accordance with the rules for bays as they were understood long before 1958.[605] Ukraine thus contends that the Russian Empire and the Soviet Union did not need to rely on the concept of historic title, as they could claim sovereignty over those waters based on other legal grounds.[606] Furthermore, Ukraine argues that the Russian Federation has failed to provide any documents from the Russian Empire or its contemporaries to support its claim to historic title.[607]

308. At the outset, the Arbitral Tribunal considers that, in order to address the question of whether historic title to the Sea of Azov and the Kerch Strait existed, it is not necessary to determine the precise moment when the regime of a juridical bay came into existence in international law, or whether the regime of a juridical bay preceded that of a historic bay, or vice versa.

309. In the Arbitral Tribunal's view, the idea that bays with narrow entrance, entirely surrounded by a single State, are "territorial" has been generally accepted for a long time. There appears to be substantial State practice supporting the notion that the regime of what later came to be referred to as juridical bays existed long before 1958. While it is difficult to pinpoint exactly when such a regime was established or whether it preceded the concept of historic waters, the Arbitral Tribunal is not persuaded by the Russian Federation's contention that the regime of a juridical bay was not established before 1958.

310. It is true that during this period, there was considerable uncertainty regarding the requirements for a juridical bay, particularly concerning the width of its mouth. However, this uncertainty did not prevent the regime of a juridical bay from becoming an established institution in international law. In this regard, it needs to be recalled that the regime of the territorial sea has long been recognised in international law, despite earlier disagreements over its breadth. The same can be said of the regime of the continental shelf, which remained uncertain in its geographical extent for a considerable period of time.

311. It was only with the conclusion of the 1958 Geneva Convention that the details of the regime of a juridical bay were settled. However, this does not imply that the regime of a juridical bay came

604 Hearing, 23 September 2024, 78:2-12 (Soons).
605 Reply, para. 17.
606 Reply, para. 19.
607 Hearing, 3 October 2024, 20:20-25 (Soons).

into existence only in 1958, or that it was impossible for a State to claim sovereignty over a bay on that basis in international law before that time.

312. The Arbitral Tribunal further observes that historic title is generally understood as an exception to the normal rule. The ICJ stated in the *Fisheries case*:

> By 'historic waters,' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.[608]

313. Thus, a historic title is established when a State would not have the legal basis to claim an area of water under the normal rules. If a State is able to exercise sovereignty over an area of water on legal grounds, such as those applicable to what are now called juridical bays, it is reasonable to assume that the State would prefer to do so on that basis, rather than by rejecting its legal entitlement under general international law and relying as an exception on historic title.

314. The evidence presented by the Parties does not clearly establish that the Russian Empire and the Soviet Union exercised sovereignty over the Sea of Azov and the Kerch Strait, either on a "legal" basis as a juridical bay or on the basis of historical title. However, in the view of the Arbitral Tribunal, since 1960, when the Soviet Union became a party to the 1958 Geneva Convention and could claim sovereignty over the Sea of Azov and the Kerch Strait under Article 7 of that Convention, it is reasonable inference from the evidence that the Soviet Union did so.

315. This tentative view that at least since 1960, the Soviet Union exercised sovereignty over the Sea of Azov and the Kerch Strait as a bay within the meaning of Article 7 of the 1958 Geneva Convention is further supported by the legislation of the Soviet Union. The Arbitral Tribunal notes that before its dissolution, the Soviet Union enacted several pieces of legislation concerning its internal waters.[609] While it is undisputed that such legislation treated the Sea of Azov as internal waters of the Soviet Union, it remains unclear whether this status was intended to be based on historic grounds or legal grounds.[610]

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608 *Fisheries case*, cit., n. 69, p. 130 (**Annex UAL-124**).

609 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, Arts 1, 3, UN Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, United Nations, 1951, p. 121 (**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, Art. 2, Schedule I, UN Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, United Nations, 1951, p. 124 (**Annex RU-4**).

610 *See* paras 128, 162 above.

316. In this regard, the Arbitral Tribunal considers that two pieces of legislations of the Soviet Union can shed light on this question: the 1960 Statute on the Protection of the State Border of the Union of Soviet Socialist Republics[611] and Declaration No. 4450.[612]

317. Article 4 of the 1960 Statute reads:

> Internal sea waters of the USSR shall include:
>
> (a) waters of ports of the USSR, delimited seaward by lines passing through the farthest extending points of hydrotechnical or other structures of ports seaward;
>
> (b) waters of bays, inlets, coves, and estuaries, whose entire shores belong to the USSR, up to a straight line drawn from shore to shore in a place where, seaward, one or several passages are first formed, if the breadth of each of these does not exceed 24 nautical miles;
>
> (c) waters of bays, inlets, coves, and estuaries, seas, and straits, historically belonging to the USSR.[613]

318. The Arbitral Tribunal notes that this statute was enacted just prior to the Soviet Union's ratification of the 1958 Geneva Convention. It appears that Article 4(b) refers to a juridical bay, while Article 4(c), which mentions "historically belonging to the USSR," suggests a historic bay or title.

319. The Arbitral Tribunal considers that the Sea of Azov meets the requirements of Article 4(b). However, this does not definitively establish that the Sea of Azov is a bay within the meaning of this provision, as it could also fall under the category outlined in Article 4(c). While the Russian Federation appears to assume in its pleading that the Sea of Azov and the Kerch Strait fall under Article 4(c), the 1960 Statute remains inconclusive in determining whether the Soviet Union regarded the Sea of Azov as a historic bay.

320. Another piece of legislation relevant in this regard is Declaration No. 4450. According to the information provided to the Arbitral Tribunal, by this Declaration the USSR Council of Ministers approved a list of the geographical coordinates defining "the position of the baselines used for measuring the breadth of the territorial sea, the exclusive economic zone, and the continental shelf of the USSR off the continental coast and islands of the Arctic Ocean and the Baltic and Black Seas."[614]

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611 Statute on the Protection of the State Border of the Union of SSR, approved by the Presidium of the Supreme Soviet of the USSR, 5 August 1960 (**Annex RU-6**).

612 Declaration of the USSR 4450 Containing List of Geographical Coordinates Defining the Position of the Baselines, 25 January 1985 (**Annex RU-12**).

613 Statute on the Protection of the State Border of the Union of SSR, approved by the Presidium of the Supreme Soviet of the USSR, 5 August 1960, Art. 4 (**Annex RU-6**).

614 Declaration of the USSR 4450 Containing List of Geographical Coordinates Defining the Position of the Baselines, 25 January 1985, p. 1 (**Annex RU-12**).

321. For the Black Sea, the Council approved a list of 40 geographical coordinates, including Point 35 (Cape Kyz-Aul: 45° 03' 32" – 36° 22' 33") and Point 36 (Cape Zhelezny Rog: 45° 06' 36" – 36° 44' 42"), which are located at the mouth of the Kerch Strait.[615] According to the uncontested assertion of the Russian Federation, the line joining Points 35 and 36 is around 16 nautical miles, or approximately 18 land miles, long and runs across the mouth of the Kerch Strait.[616]

322. In addition, the Declaration establishes:

> […] the waters of the White Sea south of the line connecting Cape Svyatoy Nos with Cape Kanin Nos, the waters of Cheshskaya/Bay south of the line connecting Cape Mikulkin with Cape Svyatoy/Nos (Timansky), and the waters of Baidaratskaya Bay south-east of the line connecting Cape Yuribeisalya with Cape Belushy Nos are, as waters historically belonging to the USSR, internal waters.[617]

323. It is clear that by Declaration No. 4450, the Sea of Azov and the Kerch Strait were designated as internal waters, enclosed by a straight line connecting Points 35 and 36. On the other hand, the Sea of Azov was not included in the list of waters "belonging historically to the USSR." In the view of the Arbitral Tribunal, this suggests that the Soviet Union treated the Sea of Azov and the Kerch Strait not as a historic bay or internal waters subject to historic title, but rather as internal waters that could be justified as an exercise of the rights set out in Articles 4 (Straight Baselines) or 7 (Bays) of the 1958 Geneva Convention.

324. The Arbitral Tribunal now turns to the Russian Federation's argument regarding the Azov/Kerch Cooperation Treaty, concluded between the Parties on 24 December 2003.[618] The Russian Federation submits that this Treaty confirms the historic character of the waters of the Sea of Azov.[619] It points out that the first sentence of Article 1 of the Treaty states that "[t]he Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine."[620] According to the Russian Federation, the adverb "historically," placed after the verb "are," indicates that the present status of the Sea of Azov as internal waters originates from historical circumstances.[621]

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615 Declaration of the USSR 4450 Containing List of Geographical Coordinates Defining the Position of the Baselines, 25 January 1985, p. 39 (**Annex RU-12**).

616 Russian Federation's Closing Submission at the Hearing, Jurisdictional Objection over Ukraine's Claim, 5 October 2025, Slide 19; *see also* Hearing, 5 October 2024, 25:24-26:4 (Crosato Neumann).

617 Declaration of the USSR 4450 Containing List of Geographical Coordinates Defining the Position of the Baselines, 25 January 1985, p. 1 (**Annex RU-12**).

618 Azov/Kerch Cooperation Treaty (**Annex RU-20-AM**).

619 Counter-Memorial, para. 44.

620 Counter-Memorial, para. 44 *citing* Azov/Kerch Cooperation Treaty, Art. 1(1) (**Annex RU-20-AM**).

621 Counter-Memorial, para. 45.

325. For its part, Ukraine rejects the Russian Federation's contention that the first sentence of Article 1 indicates that both Parties agreed on the historic title over the Sea of Azov and the Kerch Strait. Ukraine maintains that the term "historically" simply refers to the past status of the Sea of Azov and the Kerch Strait as internal waters.[622] It also points out that the Parties avoided the terms "historic bay" or "historic title" in the Azov/Kerch Cooperation Treaty.[623]

326. The Arbitral Tribunal is not persuaded by the Russian Federation's argument that the first sentence of Article 1 of the Azov/Kerch Cooperation Treaty confirms that the Sea of Azov is a historic bay or that sovereignty over it was based on historic title. In the view of the Arbitral Tribunal, this sentence states that the Sea of Azov and the Kerch Strait have historically been the internal waters of what are now the Russian Federation and Ukraine, but does not seek to specify the origin or basis of the internal waters status of the Sea of Azov and the Kerch Strait. The Arbitral Tribunal observes that all coastal States can be said to have enjoyed sovereignty over a belt of territorial sea adjacent to their coast, but that this does not imply that sovereignty over the waters within the range of a cannon shot or a marine league was based on historic title rather than upon a general rule of international law.

327. In the course of the present proceedings, both Parties referred to numerous materials and scholarly works, including the 1957 UN Memorandum, in support of their respective positions regarding the basis for the internal waters status of the Sea of Azov and the Kerch Strait. The Parties hold differing views as to the meaning and implications of these materials and works. However, the Arbitral Tribunal does not find any clear indication from these sources that would definitively support either position.

328. While it is true that the 1957 UN Memorandum listed the Sea of Azov as an example of a historic bay, it also presented a contrary view within the same section.[624] Moreover, the Arbitral Tribunal does not attach significant weight to these materials, which, at most, reflect personal opinions of individual authors, rather than constituting authoritative evidence in support of either side's position.

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622 Hearing, 23 September 2024, 88:21-24 (Soons).

623 Hearing, 3 October 2024, 32:7-11 (Soons).

624 Secretariat of the United Nations, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, 30 September 1957, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents), paras 12, 92 (**Annexes RU-5**, **UA-547-AM**) *citing* Gilbert Gidel, *Droit international public de la Mer*, 1930-1934, Vol. III, p. 663; A. N. Nikolaev, *Problema territorialnykh vod v mezhdunarodnom prave* (1954), pp. 207-08.

329. The Russian Federation submits that Ukraine has implicitly acknowledged the existence of historic title over the Sea of Azov by making a declaration under Article 298, paragraph 1(a)(i), of the Convention. According to the Russian Federation, such a declaration would serve no purpose unless Ukraine, which has no other historic bays, considered the Sea of Azov and the Kerch Strait to be subject to historic title.[625]

330. For its part, Ukraine rejects this interpretation, stating that its declaration merely paraphrased the wording of Article 298, paragraph 1(a)(i), of the Convention, without any intent to affirm the existence of historic title.[626]

331. The purpose of Article 298 of the Convention is to provide States with the option to exclude certain categories of disputes from the compulsory procedures entailing binding decisions. The Arbitral Tribunal does not consider that Ukraine's inclusion of disputes involving historic bays or titles in its declaration can be taken as evidence that Ukraine, by making such a declaration, recognised the Sea of Azov and the Kerch Strait as historic waters. Such an interpretation amounts to little more than conjecture. Moreover, Ukraine's declaration could equally serve to exclude the compulsory procedures in relation to disputes involving historic bays or titles between Ukraine, acting as a flag State, and a coastal State.

332. In light of the foregoing, the Arbitral Tribunal cannot accept the Russian Federation's argument that the Sea of Azov and the Kerch Strait constituted a historic bay or were subject to historic title. Accordingly, there is no need to examine whether any historic title over the Sea of Azov and the Kerch Strait continued after the dissolution of the Soviet Union. By the same token, the Arbitral Tribunal concludes that Article 298, paragraph 1(a)(i), of the Convention is inapplicable to the present case as there is no dispute involving historic bays or titles.

3. The Russian Federation's Second General Objection

333. The Arbitral Tribunal will now turn to the second, alternative objection raised by the Russian Federation—namely, that the internal waters status of the Sea of Azov and the Kerch Strait continued after the dissolution of the Soviet Union. According to the Russian Federation, because the Convention does not regulate internal waters, disputes concerning activities in the Sea of Azov and the Kerch Strait do not qualify as disputes concerning the interpretation or application of the

625 Counter-Memorial, para. 51.
626 Reply, para. 36.

Convention within the meaning of Article 288, paragraph 1, of the Convention. On this basis, the Russian Federation submits that the Arbitral Tribunal lacks jurisdiction over such disputes.[627]

334. For its part, Ukraine disagrees with the Russian Federation's position, maintaining that the Sea of Azov and the Kerch Strait lost their status as internal waters upon the dissolution of the Soviet Union and became subject to the general regime of the Convention. According to Ukraine, in 1991, by operation of law, what had previously been a single-State juridical bay consistent with Article 10 of the Convention was transformed into areas of internal waters, territorial sea, and exclusive economic zone, pursuant to Articles 2, 7, and 57 of the Convention.[628] Ukraine further asserts that the Kerch Strait qualifies as a strait used for international navigation within the meaning of Article 37 of the Convention.[629] Ukraine also contests the Russian Federation's view that the Convention does not regulate the regime of internal waters.[630] Accordingly, Ukraine submits that the Arbitral Tribunal has jurisdiction over the dispute relating to the Sea of Azov and the Kerch Strait.[631] Ukraine adds that under Article 89 of the Convention, exercising sovereignty over large areas of those waters is incompatible with the Convention.[632]

335. The Russian Federation's second general objection therefore raises two key issues: first, the effect of the dissolution of the Soviet Union on the status of the Sea of Azov and the Kerch Strait; and second, whether the regime governing internal waters falls outside the scope of the Convention.

336. In addressing the Russian Federation's second objection, the Arbitral Tribunal will first examine whether the internal waters status of the Sea of Azov and the Kerch Strait continued after the dissolution of the Soviet Union. If the answer to this question is affirmative, the Arbitral Tribunal will then consider the next issue regarding the scope of the Convention—whether the questions relating to the regime of internal waters at issue in this case fall outside the scope of the Convention. If the Arbitral Tribunal answers this question in the affirmative as well, it would have no jurisdiction over any dispute concerning the Sea of Azov and the Kerch Strait. Therefore, only if both questions are answered affirmatively would the Arbitral Tribunal lack jurisdiction to entertain Ukraine's claims concerning the Sea of Azov and the Kerch Strait.

627 *See* para. 177 above.
628 Hearing, 3 October 2024, 58:2-9 (Soons).
629 Hearing, 23 September 2024, 67:2-12 (Soons).
630 Hearing, 3 October 2024, 41:2-5 (Soons).
631 *See, e.g.*, Reply, paras 8, 59.
632 Hearing, 3 October 2024, 58:9-11 (Soons).

a. Effect of the Dissolution of the Soviet Union on the Status of the Sea of Azov and the Kerch Strait

337. While the Parties agree that, prior to the dissolution of the Soviet Union, the Sea of Azov and the Kerch Strait constituted the internal waters of the Soviet Union, they disagree on the effect of that dissolution on the legal status of the Sea of Azov and the Kerch Strait, which subsequently became surrounded by two States.[633]

338. The Russian Federation submits that nothing in international law precludes the existence of pluri-State bays composed of internal waters, in particular arising from the dissolution of States.[634] In its view, the possibility of the existence of such a bay is supported by the Convention, the law of State succession, relevant case law, and the conduct of the Parties.[635]

339. For its part, Ukraine contends that continuing to treat the Sea of Azov and the Kerch Strait as internal waters after 1991 is inconsistent with the law of the sea and the Convention.[636] According to Ukraine, it has long been recognised under the law of the sea that a bay bordered by more than one coastal State, a pluri-State bay, generally cannot be claimed as internal waters.[637]

340. The Arbitral Tribunal first examines the applicability of the law of State succession and the law of the sea to the present case.

341. The Russian Federation contends that the rules on State succession require that, upon independence, States succeed to the territory that they held within pre-existing border, consistent with the principle of *uti possidetis*.[638] According to the Russian Federation, these rules applied when the Soviet Union dissolved in 1991: the Russian Federation and Ukraine each succeeded to the territory located within the pre-existing Soviet borders, including the Sea of Azov and the Kerch Strait as internal waters.[639] The Russian Federation further argues that neither Party waived or renounced the "sovereign right" acquired through State succession.[640] It also asserts that the law of the sea does not prohibit the existence of pluri-State bays composed of internal waters.[641]

633 *See* paras 177-178, 236 above.
634 Hearing, 28 September 2024, 50:19-22 (Crosato Neumann).
635 Hearing, 28 September 2024, 50:22-25 (Crosato Neumann).
636 Hearing, 23 September 2024, 91:5-8 (Soons).
637 Hearing, 23 September 2024, 91:9-12 (Soons).
638 Hearing, 28 September 2024, 52:4-7 (Crosato Neumann).
639 Hearing, 28 September 2024, 52:10-16 (Crosato Neumann).
640 Hearing, 28 September 2024, 53:8-19 (Crosato Neumann).
641 Hearing, 5 October 2024, 55:13-24 (Crosato Neumann).

342. For its part, Ukraine contends that the rules governing land territory and those governing the seas are distinct areas of international law.[642] With respect to the seas, Ukraine emphasises that UNCLOS prevails over the general international law of State succession as *lex specialis*.[643] Under the international law of the sea, according to Ukraine, "pluri-State bays" generally cannot be claimed as internal waters.[644] Ukraine acknowledges possible exceptions to this general rule, but submits that the Sea of Azov does not meet the criteria required for the exceptional recognition of pluri-State bays.[645]

343. The Arbitral Tribunal notes at the outset that the question it must address concerns the legal status of the Sea of Azov and the Kerch Strait in the context of the dissolution of the Soviet Union. Given the nature of this question, namely the legal consequences arising from a change in sovereignty over territory, the Arbitral Tribunal considers that the law of State succession may be relevant to its analysis. At the same time, because the question also pertains to the legal status of maritime areas, the law of the sea is likewise relevant.

i. Law of State Succession

344. In the Arbitral Tribunal's view, since a State exercises sovereignty over internal waters in the same manner as it does over land territory, it can be argued that the internal waters status of a single-State bay passes to successor States, even if the bay becomes a pluri-State bay as a result of the dissolution of the predecessor State. While the law of State succession does not provide clear guidance on this specific issue, the Arbitral Tribunal recalls that similar questions have been addressed in previous cases.

345. In *Gulf of Fonseca*, the Chamber of the ICJ examined the legal status of the Gulf of Fonseca, which had been under Spanish sovereignty until three riparian States, El Salvador, Honduras, and Nicaragua, gained independence in 1821.[646] In this context, the Chamber stated that "[t]he rights in the Gulf of Fonseca of the present coastal States were thus acquired, like their land territories, by succession from Spain."[647] Thus, the Chamber appeared to recognise that the legal status of the Gulf of Fonseca passed to the successor States, despite the fact that the Gulf subsequently became bordered by three independent States.

642 Hearing, 23 September 2024, 95:20-23 (Soons).
643 Hearing, 23 September 2024, 95:23-25 (Soons).
644 Hearing, 23 September 2024, 91:9-12 (Soons).
645 Hearing, 23 September 2024, 96:8-96:17 (Soons).
646 *Gulf of Fonseca*, cit., n. 43, p. 589, para. 385 (**Annexes RUL-19**, **UAL-58**).
647 *Gulf of Fonseca*, cit., n. 43, p. 589, para. 385 (**Annexes RUL-19**, **UAL-58**).

346. In *Croatia/Slovenia*, the arbitral tribunal was confronted with a similar situation. The Bay of Piran had been internal waters of the SFRY before its dissolution in 1991. The arbitral tribunal found that "[t]he dissolution, and the ensuing legal transfer of the rights of [the SFRY] to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status."[648]

347. In the Arbitral Tribunal's view, the above cases suggest that the internal waters status of a bay bordering a predecessor State may, in certain circumstances, pass to successor States, even where the bay becomes bordered by more than one State.

348. The Arbitral Tribunal is aware of situations in which the legal status of a bay previously considered internal waters did not continue following the dissolution of a predecessor State. In this regard, the Arbitral Tribunal refers to the situation of the Gulf of Riga, which had been under the sovereignty of the Soviet Union. Following the dissolution of the Soviet Union, this maritime area came to be treated as comprising the territorial seas and exclusive economic zones of the two successor States, Latvia and Estonia.[649]

349. The Arbitral Tribunal further notes that Latvia proposed to Estonia that the Gulf of Riga be declared a historic bay with the status of joint internal waters. However, Estonia rejected Latvia's proposal. It appears that the two States ultimately agreed to treat the Gulf of Riga as consisting of their respective territorial seas and exclusive economic zones.[650] This example of the Gulf of Riga suggests that agreement between successor States can be an important factor in determining the status of a bay in the context of State succession.

ii. Law of the Sea

350. The Arbitral Tribunal now turns to the effect of the dissolution of the Soviet Union from the perspective of the law of the sea. The Convention addresses bays in Article 10, which reads:

> 1. This article relates only to bays the coasts of which belong to a single State.
>
> 2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
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> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more

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648 *Croatia/Slovenia*, cit., n. 224, para. 883 (**Annex RUL-41**).

649 Hearing, 23 September 2024, 100:20-24 (Soons).

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

> than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.
>
> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.
>
> 5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.
>
> 6. The foregoing provisions do not apply to so-called "historic" bays, or in any case where the system of straight baselines provided for in article 7 is applied.

351. Article 10 of UNCLOS is almost identical with Article 7 of the 1958 Geneva Convention. Article 10, paragraph 1, of UNCLOS provides that "[t]his article relates only to bays the coasts of which belong to a single State." Accordingly, it does not apply to bays with coasts belonging to more than one State—so-called pluri-State bays. However, in the view of the Arbitral Tribunal, this does not mean that international law prohibits the existence of pluri-State bays containing internal waters, nor that such bays are unrecognised under international law. As the arbitral tribunal in *Croatia/Slovenia* observed, "[t]he limitation of the scope of application of these provisions does not, however, imply that they exclude the existence of bays with the character of internal waters, the coasts of which belong to more than one State."[651] This view is even more pertinent in the context of State succession.

352. The Arbitral Tribunal notes in this regard that even Ukraine does not entirely rule out the possibility of pluri-State bays having the character of internal waters. Ukraine argues that pluri-State bays "generally" cannot be claimed as internal waters, but acknowledges the possibility of an exception, albeit with strict conditions.[652] Ukraine sets out three criteria for such an exception: first, the bay must not be large enough to contain areas of high seas or exclusive economic zones; second, the exercise of sovereignty over the bay must not prejudice the rights of third States; and third, all littoral States must have affirmatively agreed to the internal waters status.[653] Ukraine maintains that all three criteria must be satisfied for a pluri-State bay to be considered internal waters.[654]

353. Ukraine argues that the Sea of Azov and the Kerch Strait do not meet any of the criteria.[655] Specifically, Ukraine contends that the Sea of Azov, unlike the Gulf of Fonseca or the Bay of

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651 *Croatia/Slovenia*, cit., n. 224, para. 884 (**Annex RUL-41**).
652 Hearing, 23 September 2024, 96:12-15 (Soons).
653 Hearing, 23 September 2024, 96:18-24 (Soons).
654 Hearing, 23 September 2024, 96:12-15 (Soons).
655 Hearing, 23 September 2024, 96:12-15 (Soons).

Piran, extends beyond the territorial sea and includes areas that could qualify as part of the exclusive economic zone or high seas.[656] Moreover, Ukraine asserts that, if the Sea of Azov and the Kerch Strait were considered internal waters, third States would face substantial prejudice.[657] Additionally, Ukraine points out that there has been no affirmative agreement between Ukraine and the Russian Federation regarding the internal waters status of these areas.[658]

354. For its part, the Russian Federation disputes Ukraine's assertion of a "strong norm" or "general rule" that pluri-State bays cannot be claimed as internal waters.[659] The Russian Federation argues that such view is not supported by the law of State succession or relevant case law, particularly the *Gulf of Fonseca* and *Croatia/Slovenia* cases.[660] Additionally, the Russian Federation challenges the customary legal status of the criteria set out by Ukraine as conditions for the application of exceptions to the general rule.[661]

355. At the outset, the Arbitral Tribunal is not persuaded that there is a well-established "general rule" or "strong norm" against the existence of a pluri-State bay with internal waters, as Ukraine contends. The Arbitral Tribunal has already noted above that international jurisprudence appears to support the recognition of a pluri-State bay with internal waters, particularly in the context of State succession. Even assuming that such a general rule existed, the Arbitral Tribunal considers that some of the criteria Ukraine presents as applicable to possible exceptions to this rule are problematic.

356. The Arbitral Tribunal does not consider the size of a bay to be a relevant criterion for recognising a pluri-State bay as an exception. As Article 10, paragraphs 2, 4, and 5, of the Convention make clear, the key factors in qualifying a bay as a "juridical bay" include, in addition to being surrounded by a single State, the degree of indentation and the width of its mouth. The size of the waters enclosed by the bay is not a determining factor under Article 10. Therefore, it is doubtful that the size of the bay should be considered relevant when recognising a pluri-State bay with internal waters.

357. The Arbitral Tribunal finds no clear basis to support the proposition that a pluri-State bay can only be recognised if it contains a small area of waters. While Ukraine suggests that the Gulf of Fonseca and the Bay of Piran were recognised as pluri-State bays containing internal waters, in part due

656 Hearing, 23 September 2024, 97:20-98:4 (Soons).
657 Hearing, 23 September 2024, 98:18-20 (Soons).
658 Hearing, 23 September 2024, 99:3-20 (Soons).
659 Counter-Memorial, para. 69.
660 Hearing, 28 September 2024, 50:19-25, 54:7-11, 60:15-24 (Crosato Neumann).
661 Counter-Memorial, para. 72.

to their size, there is nothing in the ICJ Chamber's Judgment or the arbitral tribunal's award to support such an interpretation.[662]

358. The Arbitral Tribunal also considers it difficult to accept Ukraine's argument that Article 89 of the Convention precludes any pluri-State bay large enough to encompass areas of high seas or exclusive economic zones, and that the Sea of Azov and the Kerch Strait therefore lost their internal waters status upon becoming a pluri-State bay. While Article 89 prohibits claims of sovereignty over the high seas, the issue in this case concerns whether the existing internal waters status should continue—not the assertion of new sovereignty over the high seas. The Sea of Azov and the Kerch Strait were undisputedly internal waters prior to the dissolution of the Soviet Union, and the continuation of that status after dissolution does not amount to a claim of sovereignty over the high seas. Unless it is assumed that the internal waters status could not continue after the dissolution of the Soviet Union, the applicability of Article 89 is not warranted. In the view of the Arbitral Tribunal, however, such assumption is untenable. Accordingly, the Arbitral Tribunal finds no basis for the application of Article 89.

359. Nor does the Arbitral Tribunal find the second criterion presented by Ukraine to be plausible. Any bay with the character of internal waters, whether a single-State or pluri-State bay, would inevitably restrict the rights of third States in various ways. Moreover, prior to the dissolution of the Soviet Union, the Sea of Azov was considered the internal waters of the Soviet Union. As such, third States had no rights, including navigational rights, in the Sea of Azov, unless granted by the Soviet Union. Therefore, the continuation of the Sea of Azov's internal waters status after the dissolution of the Soviet Union would not alter this status quo with respect to the rights of third States.

360. Ukraine refers to alleged protests by third States against the Russian Federation's interference with their rights as evidence that the continuation of the internal waters status prejudiced third States' rights.[663] However, the Arbitral Tribunal notes that the protests cited by Ukraine occurred after the initiation of the present Arbitration and were directed at restrictive measures unilaterally imposed by the Russian Federation, which seemed to conflict with the navigational regime established under the Azov/Kerch Cooperation Treaty. In the Arbitral Tribunal's view, these protests do not appear to have a direct bearing on the continuation of the internal waters status of the Sea of Azov and the Kerch Strait.

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662 *See generally*, *Croatia/Slovenia*, cit., n. 224 (**Annex RUL-41**); *Gulf of Fonseca*, cit., n. 43 (**Annexes RUL-19**, **UAL-58**).

663 *See* para. 253 above.

361. On the other hand, the Arbitral Tribunal considers that the third criterion proposed by Ukraine could be relevant in recognising the existence of a pluri-State bay with the character of internal waters, particularly in the context of State succession. In the absence of clear rules on this issue, if the littoral States bordering a pluri-State bay agree not to maintain its internal waters status, it would be difficult to treat the bay as internal waters. Conversely, if the littoral States agree to continue the prior status of the bay and international law allows the possibility of pluri-State bays, there would appear to be little reason to deny the continuation of that status. In the Arbitral Tribunal's view, the positions of the littoral States regarding the status of a pluri-State bay are, therefore, significant.

362. In this regard, the Arbitral Tribunal recalls the observation it made in the Award Concerning Preliminary Objections:

> [...] 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.[664]

iii. Agreement

363. The Arbitral Tribunal will now examine whether there was any agreement between the Parties regarding the internal waters status of the Sea of Azov and the Kerch Strait following the dissolution of the Soviet Union. While the Russian Federation asserts that the Parties agreed to maintain the internal waters status of the Sea of Azov and the Kerch Strait, as reflected, *inter alia*, in the 2003 Azov/Kerch Cooperation Treaty and the Joint Statement of 24 December 2003,[665] Ukraine denies the existence of such an agreement.[666] The Arbitral Tribunal considers the Azov/Kerch Cooperation Treaty to be crucial in this regard.

364. Article 1 of the Azov/Kerch Cooperation Treaty reads (drawing on the translations of the Russian and Ukrainian texts, provided by the Parties):

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664 Award Concerning Preliminary Objections, para. 291.
665 *See* paras 212-217 above.
666 *See* paras 257-262, 272 above.

> The Sea of Azov and the Kerch Strait [*Russian Federation's translation:* are historically][*Ukraine's translation*: historically constitute] internal waters of the Russian Federation and Ukraine.
>
> The Sea of Azov shall be delimited by the state border line in accordance with an agreement between the Parties.
>
> *[Russian Federation's translation*: Matters concerning the Kerch Strait water area] [*Ukraine's translation*: Issues concerning the water area of the Kerch Strait] shall be resolved by agreement between the Parties.[667]

365. The Joint Statement of 24 December 2003 similarly reads, in translation:

> [...] historically the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia, and settlement of matters relating to the said area of water is realized by agreement between [...] Ukraine and Russia in accordance with international law.[668]

366. The Arbitral Tribunal notes that, in the course of the present proceedings, the Parties have engaged extensively in detailed discussions on the proper interpretation of Article 1 of the Azov/Kerch Cooperation Treaty. Both Parties even introduced linguistic experts to support their respective interpretations.[669]

367. The three sentences of Article 1 respectively address: first, the status of the Sea of Azov and the Kerch Strait; second, the obligation to delimit the Sea of Azov along the state border line; and, third, the obligation to resolve matters concerning the Kerch Strait by agreement between the Parties.

368. With respect to the status of the Sea of Azov and the Kerch Strait, the Russian Federation interprets the first sentence as indicating: first, that the current status of the Sea of Azov and the Kerch Strait is that of internal waters, as indicated by the use of the present tense; and second, that this status is based on historical grounds, as evidenced by the use of the word "historically."[670] The Arbitral Tribunal has already rejected the second aspect of the Russian Federation's interpretation.[671] For its part, Ukraine interprets the sentence as referring to a historical fact—namely, that the Sea of Azov and the Kerch Strait were internal waters in the past.[672]

369. In the view of the Arbitral Tribunal, and in accordance with Article 31 of the VCLT, this sentence should be interpreted to mean that the Sea of Azov and the Kerch Strait have been and remain the

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667 Azov/Kerch Cooperation Treaty, Art. 1(1) (**Annexes RU-20-AM**, **UA-19**).
668 Joint Statement of 24 December 2003, p. 131 (**Annexes RU-21**, **UA-530**).
669 *See generally* paras 139-150 above; Opinion of [redacted] (22 August 2022); Second Opinion of [redacted] (8 December 2023); paras 167-171; Opinion of Andriy Danylenko (24 March 2023).
670 *See* para. 141 above.
671 *See* para. 332 above.
672 *See* para. 167 above.

internal waters of the Russian Federation and Ukraine. In other words, the internal waters status of the Sea of Azov and the Kerch Strait has continued throughout history up to the present. It would be rather odd to interpret a sentence stating that the Sea of Azov and the Kerch Strait "are" or "constitute" internal waters as referring only to their past status. If the Parties had intended to declare only the past status of the Sea of Azov and the Kerch Strait, they would have used the past tense.

370. The bilateral negotiations leading up to the Azov/Kerch Cooperation Treaty, during which Ukraine repeatedly stated that the Sea of Azov and the Kerch Strait should have or "preserve" the status of internal waters, support the above interpretation of the first sentence of Article 1.[673]

371. Ukraine contends that the first sentence does not reflect a final agreement on the status of the Sea of Azov and the Kerch Strait, but rather, at most, a "temporary and provisional agreement."[674] However, there is nothing in the Azov/Kerch Cooperation Treaty, particularly in Article 1, to suggest that the first sentence constitutes merely a temporary or provisional arrangement subject to revocation or revision at a later stage.

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673 *See, e.g.*, Transcript of the 42nd Plenary session of the Verkhovnaya Rada of Ukraine, 13 July 1994 (**Annex RU-61**); 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**); Minutes of the Third 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 Fourth 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 (**Annex UA-521**); Minutes of the Fifth 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 (**Annex UA-522**); Minutes of the Sixth 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 Seventh 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**); Draft Declaration of the Presidents of Ukraine and Russia on Defining the Legal Status of the Sea of Azov and the Kerch Strait and Delimiting the Maritime Areas in the Black Sea, transmitted by *Note Verbale* from Ukraine to the Russian Federation, No. 21/20-410-1228, 6 August 2001 (**Annex RU-69**); Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* from Ukraine to the Russian Federation, No. 5211/13-011-268-2001, 13 August 2001 (**Annex RU-70**); Draft Declaration of the Presidents of Ukraine and Russia on Defining the Legal Status of the Sea of Azov and the Kerch Strait and Delimiting the Maritime Areas in the Black Sea, transmitted by *Note Verbale* from Ukraine to the Russian Federation, No. 21/20-410-1453, 31 August 2001 (**Annex RU-71**); 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**). *See also Note Verbale* from the Russian Federation to Ukraine, No. 2378/2dsng, 30 March 1998 (**Annex RU-62**); Letter of the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 (**Annex RU-68**).

674 Hearing, 23 September 2024, 104:23-25 (Soons).

372. The Arbitral Tribunal understands that the Azov/Kerch Cooperation Treaty was what might be called an umbrella or framework treaty between the two States, setting out basic principles governing cooperation in the use of the Sea of Azov and the Kerch Strait. As Article 3 of this Treaty reads:

> Russian-Ukrainian cooperation, including joint [*Russian Federation's translation*: activities in the area of navigation and hydrographic support, fisheries, protection of the marine environment, environmental safety as well as search and rescue in the Sea of Azov and the Kerch Strait, shall be provided both through][*Ukraine's translation*: activity in the area of shipping, including the regulation thereof and navigational-hydrographic support; fishing; marine environment protection; and environmental safety, as well as search and rescue in the Sea of Azov and the Kerch Strait, shall be ensured by both] the implementation of existing agreements and the [*Russian Federation's translation*: conclusion of new ones, where][*Ukraine's translation*: entering into of new ones as] appropriate.[675]

373. However, the framework nature of the Treaty does not mean that the Parties' agreement on the internal waters status of the Sea of Azov and the Kerch Strait was intended to be provisional or temporary. On the contrary, given that this agreement constituted the very premise of the cooperative regime envisaged by the Treaty, it is difficult to accept that the agreement reflected in the first sentence of Article 1 was intended to be merely provisional.

374. It is also true that the second sentence of Article 1 ("The Sea of Azov shall be delimited by the state border line in accordance with an agreement between the Parties") imposes an obligation on the Parties to delimit the Sea of Azov along the state border line. However, this obligation does not render the internal waters status of the Sea of Azov and the Kerch Strait, as reflected in the first sentence of Article 1, anything less than final. Nor does it make that status contingent upon future delimitation. There is no indication of any link between the first and second sentences suggesting that the status of the Sea of Azov and the Kerch Strait would remain provisional until the delimitation obligation under the second sentence is fulfilled. Had the Parties intended to create such a link, they could have expressly done so. However, nothing in Article 1 indicates the existence of such a connection.

375. The Arbitral Tribunal also notes that Ukraine refers to particular circumstances surrounding the conclusion of the Azov/Kerch Cooperation Treaty—namely, the alleged crisis over Tuzla Island.[676] The Arbitral Tribunal does not consider that Ukraine is invoking these circumstances as grounds for the invalidity of the Azov/Kerch Cooperation Treaty. Nor does the Arbitral Tribunal

675 Azov/Kerch Cooperation Treaty, Art. 3 (**Annexes RU-20-AM**, **UA-19**).
676 Hearing, 23 September 2024, 101:15-18 (Soons).

consider that the circumstances cited by Ukraine, even if factually correct, would support Ukraine's interpretation of the first sentence of Article 1 of the Azov/Kerch Cooperation Treaty.

376. The circumstances surrounding the conclusion of a treaty can play only a limited role in treaty interpretation, as provided for in Article 32 of the VCLT. The Arbitral Tribunal does not find it necessary to consider these circumstances, as the meaning of the first sentence, derived from the application of Article 31 of the VCLT, is neither ambiguous nor obscure.

377. The Parties' agreement on the internal waters status is further evidenced by Article 2 of the Azov/Kerch Cooperation Treaty, which reads:

> 1. [*Russian Federation's translation*: Merchant vessels and warships as well as other government vessels flying the flag of the Russian Federation or Ukraine][*Ukraine's translation*: Trade vessels and military ships, as well as other government vessels under the flag of the Russian Federation or Ukraine, that are] used for non-commercial purposes shall enjoy [*Russian Federation's translation*: freedom of navigation][*Ukraine's translation*: free passage] in the Sea of Azov and the Kerch Strait.
>
> 2. [*Russian Federation's translation*: Merchant vessels flying][*Ukraine's translation*: Trade vessels under] the flags of third States may enter the Sea of Azov and pass through the Kerch Strait if they are bound for or returning from a Russian or Ukrainian port.
>
> 3. [*Russian Federation's translation*: Warships and other government vessels of third States] [*Ukraine's translation*: Military ships and other government vessels that are] used for non-commercial purposes may enter the Sea of Azov and pass through the Kerch Strait if they are making a visit or business call to a port of [*Russian Federation's translation*: either Party upon its invitation or permission agreed upon with][*Ukraine's translation*: one of the Parties at its invitation or with its permission, approved by] the other Party.[677]

378. If the Sea of Azov were composed of the territorial seas and exclusive economic zones of the Parties, as Ukraine argues, the Kerch Strait would qualify as a strait used for international navigation within the meaning of Article 37 of the Convention. In that case, vessels flying the flags of third States would enjoy the right of transit passage through the Kerch Strait, as provided for in Article 38 of the Convention. They would also have the right of innocent passage through the territorial sea in the Sea of Azov under Article 17 and the freedom of navigation in its exclusive economic zone under Article 58.

379. However, Article 2, paragraph 2, of the Azov/Kerch Cooperation Treaty imposes restrictive conditions on such vessels that cannot be justified under the right of transit passage, the right of innocent passage, or the freedom of navigation. The restrictions envisaged in paragraph 3 are even more severe for warships and other government vessels of third States used for non-commercial purposes. The Arbitral Tribunal therefore considers that the navigational regime in the Sea of Azov and the Kerch Strait, as reflected in Article 2, is only compatible with the Sea of Azov and

677 Azov/Kerch Cooperation Treaty, Art. 3 (**Annexes RU-20-AM**, **UA-19**).

the Kerch Strait having the status of internal waters. In other words, the navigational regime established by Article 2 was premised on the internal waters status of the Sea of Azov and the Kerch Strait.

380. Ukraine asserts that Article 2 of the Azov/Kerch Cooperation Treaty safeguards the rights of commercial vessels to navigate to and from Ukrainian and Russian ports.[678] Ukraine further contends that, with respect to foreign military and government vessels, Article 2, paragraph 3, did not and could not restrict their navigation, since no third State was a party to the Azov/Kerch Cooperation Treaty.[679]

381. The Arbitral Tribunal agrees with Ukraine that Article 2 of the Azov/Kerch Cooperation Treaty grants third States certain limited navigational rights which they would not otherwise have enjoyed. However, the critical point is that the limited rights safeguarded by Article 2 would not have been necessary if the Sea of Azov and the Kerch Strait had been composed of territorial seas and exclusive economic zones. The very need to provide for such rights arises precisely because these waters were considered internal waters.

iv. Negotiations

382. The Arbitral Tribunal observes at this stage that a review of the bilateral negotiations leading up to the conclusion of the 2003 Azov/Kerch Cooperation Treaty indicates that Ukraine's primary concern during the negotiations was not so much the internal waters status of the Sea of Azov and the Kerch Strait itself, but rather the question whether they should be joint or common internal waters. It appears that Ukraine's preference was to delimit the Sea of Azov while simultaneously determining its internal waters status.[680] On the other hand, the Russian Federation appears to prefer to keep the Sea of Azov and the Kerch Strait as common internal waters. In particular, the Russian Federation expressed its concern that the delimitation of the Sea of Azov and the Kerch Strait according to the Convention "would make it impossible to affirm the internal waters status of these waters."[681] Eventually, the delimitation of the Sea of Azov was deferred to subsequent negotiations.[682]

678 Hearing, 23 September 2025, 104:6-13 (Soons).
679 Hearing, 23 September 2025, 104:14-17 (Soons).
680 *See* n. 673 above.
681 *See, e.g.*, Minutes of the Third 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 (**Annex UA-520; RU-309**).
682 *See* Azov/Kerch Cooperation Treaty, Art. 1 (**Annexes RU-20-AM**, **UA-19**).

383. In this regard, the Arbitral Tribunal finds the statement made by Ukrainian President Leonid Kuchma in his letter to the President of the Russian Federation on 13 August 2001 to be particularly telling:

> I would like to reiterate that Ukraine agrees to the Russian Federation's proposals on preserving the status of internal waters for the water areas of the Sea of Azov and the Kerch Strait.
>
> [...] the Ukrainian side does not regard the status of internal waters as rendering impossible the delimitation of the territories of the two States in the Sea of Azov and the Kerch Strait, nor will the demarcation of the international border across the water surface between Ukraine and Russia lead to acquiring of the status of international waters by the Sea of Azov.[683]

384. The Arbitral Tribunal also recalls the statement made by counsel for Ukraine in the hearing that "Ukraine was concerned that Russia would use a 'joint' internal waters status as a pretext to establish unilateral control over the Sea of Azov and Kerch Strait; and of course, this is now exactly what Russia seeks to achieve."[684]

385. The underlying disagreement between the Parties regarding the delimitation of the Sea of Azov is also reflected in Article 5 of the State Border Treaty, concluded on 28 January 2003, approximately 11 months prior to the conclusion of the Azov/Kerch Cooperation Treaty. Article 5 reads:

> Settlement of questions relating to the adjacent sea areas shall be effected by agreement between the Contracting Parties in accordance with international law. Nothing in this Treaty shall prejudice the positions of the Russian Federation and Ukraine with respect to the status of the Sea of Azov and the Kerch Strait as internal waters of the two States.[685]

386. This provision serves as a safeguard to preserve the Parties' respective positions on whether the internal waters should be jointly shared or delimited, rather than calling into question the internal waters status of the Sea of Azov and the Kerch Strait, as Ukraine contends.

387. The Arbitral Tribunal notes that, following the conclusion of the Azov/Kerch Cooperation Treaty, the Parties continued their negotiations.[686] Ukraine argues that these subsequent negotiations demonstrate that the status of the Sea of Azov and the Kerch Strait was not settled by the

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683 Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* from Ukraine to the Russian Federation, No. 5211/13-011-268-2001 (13 August 2001) (**Annex RU-70**).

684 Hearing, 3 October 2024, 25:25-26:4 (Soons).

685 State Border Treaty, Art. 5 (**Annex RU-19**).

686 *See, e.g.*, 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**).

Azov/Kerch Cooperation Treaty.[687] While the Arbitral Tribunal acknowledges that the minutes of these meetings contain ambiguous expressions such as "the issues of the legal status and delimitation of the Sea of Azov and the Kerch Strait"[688] or "determination of the legal status of the Azov Sea and the Kerch Strait,"[689] it appears that the term "legal status" was not intended to refer to the internal waters status of the Sea of Azov and the Kerch Strait. Rather, it seems that the term was used more broadly to encompass the legal regime governing cooperation in those waters.

388. The Arbitral Tribunal notes that the Azov/Kerch Cooperation Treaty remained in force until 2023, when it was denounced by Ukraine on 27 March 2023.[690] Neither Party indicated, at the time of denunciation, how this might affect the legal status of the Sea of Azov and the Kerch Strait. In the Arbitral Tribunal's view, the denunciation of the Azov/Kerch Cooperation Treaty, which occurred long after the initiation of the present proceedings, has no retroactive effect on the Parties' prior agreement regarding the status of the Sea of Azov and the Kerch Strait. Nor does the record establish that the legal status of the Sea of Azov or the Kerch Strait was changed prior to the denunciation of the Azov/Kerch Cooperation Treaty by any other development. The Arbitral Tribunal notes that this conclusion does not depend upon any assumptions or findings concerning sovereignty over the coasts of the Sea of Azov or have any implications for the question of such sovereignty.

v. Conduct

389. The Arbitral Tribunal recalls that, in its Award Concerning Preliminary Objections, it highlighted the relevance of how the Parties have acted vis-à-vis each other and vis-à-vis third States in the Sea of Azov and the Kerch Strait after the dissolution of the Soviet Union in determining the legal status of those waters.[691]

390. The Russian Federation argues that the conduct of the Parties following the dissolution of the Soviet Union demonstrates that they treated the Sea of Azov and the Kerch Strait as the internal waters of both States.[692] In this regard, the Russian Federation refers, in particular, to numerous

687 *See* Reply, para. 112.

688 *See, e.g.*, Minutes of the 17th Meeting of the Delegations of the Russian Federation and Ukraine to discuss the issues pertaining to the Sea of Azov and the Kerch Strait, 29-30 January 2004 (**Annex UA-531**).

689 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**).

690 *Note Verbale* from Ukraine to the Russian Federation, No. 61219/23-017-34357 (27 March 2023) (**Annex RU-601**).

691 Award Concerning Preliminary Objections, para. 291.

692 Counter-Memorial, para. 87.

statements made by Ukraine during bilateral negotiations and in diplomatic correspondence, which it considers to reflect Ukraine's understanding that the Sea of Azov and the Kerch Strait had the status of internal waters. It also refers to Ukrainian national legislation and statements made by government officials, including the President of Ukraine, to the same effect.[693]

391. In response, Ukraine refutes the Russian Federation's argument, offering its own interpretation of the precise meaning of such statements and the context and circumstance in which they were made.[694] Ukraine submits that the conduct of the Parties after the conclusion of the Azov/Kerch Cooperation Treaty, including the steps they deliberately did not take, confirms that neither side thought that a final agreement had been reached in December 2003.[695] In this regard, Ukraine refers to the continued negotiations over the "legal status" of the Sea of Azov.[696] It also draws the attention of the Arbitral Tribunal to the fact that it did not revise the geographical coordinates of points defining the baselines, which it had previously deposited with the UN in order to reflect the change in status from internal waters.[697] According to Ukraine, this demonstrates its understanding that the Sea of Azov and the Kerch Strait consist of territorial sea and exclusive economic zone rather than internal waters.[698] Ukraine points out that it did not revise its baseline throughout the bilateral negotiations and, in fact, sent a *Note Verbale* containing such coordinates to the Russian Federation as late as 2002.[699]

392. The Arbitral Tribunal does not consider that the information it has regarding the actual conduct of the Parties following the dissolution of the Soviet Union is sufficient to shed light conclusively on the legal status of the Sea of Azov and the Kerch Strait. The evidence presented by the Parties primarily consists of agreements concluded between them, official statements they have made, and their respective domestic legislation, rather than concrete examples of their practical conduct in relation to these waters.

393. However, the Arbitral Tribunal cannot overlook the fact that Ukraine's recognition of the internal waters status of the Sea of Azov and the Kerch Strait, as reflected in various documents, has been consistent throughout the period following the dissolution of the Soviet Union, including even after the initiation of the present Arbitration, although it has not been entirely free of controversy

693 *See generally*, Rejoinder, para. 203; Hearing, 28 September 2024, 30:23-32:16, 34:25-36:1 (Crosato Neumann).
694 *See* Hearing, 23 September 2024; 105:3-107:4, 108:21-25 (Soons).
695 Hearing, 23 September 2024, 108:1-4 (Soons).
696 Hearing, 23 September 2024, 106:16-20 (Soons).
697 Hearing, 23 September 2024, 106:21-107:2 (Soons).
698 Hearing, 23 September 2024, 107:3-7 (Soons).
699 Hearing, 23 September 2024, 106:21-107:2 (Soons); 3 October 2024, 35:17-36:1 (Soons).

or ambiguity. Accordingly, the Arbitral Tribunal is of the view that these statements support its provisional conclusion regarding the internal waters status of the Sea of Azov and the Kerch Strait.

394. The Arbitral Tribunal notes that Ukraine places considerable significance on the baselines it deposited with the Secretariat of the UN in 1992 shortly after gaining independence, viewing them as evidence that it did not treat the Sea of Azov and the Kerch Strait as internal waters, but rather as waters comprising the territorial sea and exclusive economic zone.[700] The *Note Verbale* transmitting the list of geographical coordinates defining the baselines explicitly states that they are "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."[701] According to Ukraine, the fact that it did not revise these baselines even after the conclusion of the Azov/Kerch Cooperation Treaty further demonstrates that it did not alter its position on the legal status of the Sea of Azov and the Kerch Strait.[702]

395. In the Arbitral Tribunal's view, there is a significant discrepancy between Ukraine's argument regarding its baselines, on the one hand, and the text of the Azov/Kerch Cooperation Treaty as well as various statements made by Ukraine during the bilateral negotiations leading up to its conclusion, on the other. Furthermore, the Arbitral Tribunal notes that in a *Note Verbale* sent by Ukraine to the Russian Federation in June 2002 during the course of bilateral negotiations, Ukraine stated that it had approved the coordinates to measure "the breadth of the territorial sea of Ukraine in the Sea of Azov" and that agreement on baselines "would facilitate the soonest possible delimitation and determination of the legal status of the Sea of Azov."[703] In light of these circumstances, the Arbitral Tribunal is of the view that Ukraine's argument relating to baselines is not sufficient to alter the Arbitral Tribunal's finding regarding the Parties' agreement on the legal status of the Sea of Azov and the Kerch Strait.

vi. Estoppel and Admission

396. The Russian Federation further contends that Ukraine's consistent practice since 1991 gives rise to an estoppel, precluding Ukraine from asserting that it did not recognise the Sea of Azov and the Kerch Strait as internal waters. The Russian Federation alternatively argues that Ukraine's conduct at least amounts to the "admission" of such status of the Sea of Azov and the Kerch

700 Hearing, 23 September 2024, 106:21-107:7 (Soons).
701 *Note Verbale* from Ukraine to the United Nations to the Secretary-General of the United Nations, No. 633 (11 November 1992) (**Annex UA-3**).
702 Hearing, 23 September 2024, 106:21-107:7 (Soons).
703 *Note Verbale* from Ukraine to the Russian Federation, No. 72/22-446-1375 (25 June 2002) (**Annex UA-513**).

Strait.[704] Ukraine rejects the Russian Federation's invocation of an estoppel, arguing that the Russian Federation has failed to demonstrate that the requirements for an estoppel have been met in this case.[705]

397. The Arbitral Tribunal recalls that, in *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS stated:

> 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 acting 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.[706]

398. The Arbitral Tribunal does not consider that a situation of estoppel exists in the present case. While the evidence presented by the Russian Federation to demonstrate Ukraine's recognition of the internal waters status may be persuasive, it is not sufficiently conclusive to meet the requirements of an estoppel. Moreover, the Arbitral Tribunal finds no evidence suggesting that Ukraine's conduct caused the Russian Federation to alter its position to its detriment or to suffer any prejudice as a result of reliance on such conduct. Accordingly, the Arbitral Tribunal rejects the Russian Federation's argument based on estoppel. The Arbitral Tribunal likewise does not accept the Russian Federation's argument relating to the doctrine of admission.

vii. Conclusion

399. Based on the above analysis, the Arbitral Tribunal concludes that the internal waters status of the Sea of Azov and the Kerch Strait continued after the dissolution of the Soviet Union.[707] This conclusion is supported by the law of State succession, as reflected in international jurisprudence, by the operation of law in accordance with the Convention and other rules of international law, as well as by the text of the Azov/Kerch Cooperation Treaty. The bilateral negotiations between the Parties, along with the conduct of the Parties since 1991, also appear consistent with this conclusion.

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704 *See* paras 226-232 above.

705 *See* para. 274 above.

706 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4 at p. 42, para. 124 (**Annex UAL-63**).

707 This conclusion leaves open whether the Sea of Azov and the Kerch Strait were common internal waters of the Russian Federation and Ukraine or whether the waters were to be delimited. This matter will be addressed in paragraphs 657-659 below.

b. Applicability of UNCLOS to Internal Waters

400. Having determined that the internal waters status of the Sea of Azov and the Kerch Strait continued following the dissolution of the Soviet Union, the Arbitral Tribunal will now proceed to consider the next issue—namely, whether the questions relating to the regime of internal waters at issue in this case fall outside the scope of the Convention, as argued by the Russian Federation.

401. The Parties hold differing views regarding the applicability of the Convention to internal waters. The Russian Federation asserts that the Convention does not regulate the regime of internal waters.[708] According to the Russian Federation, while there are some provisions in the Convention that refer to internal waters, they are not sufficient to establish a regime comparable to that of the territorial sea or the exclusive economic zone.[709] For its part, Ukraine contends that internal waters are governed by the Convention in important respects.[710] In this regard, Ukraine refers to several provisions of the Convention which apply to internal waters.[711]

402. The Arbitral Tribunal recalls that it stated in its Award Concerning Preliminary Objections:

> 294. [...] 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.
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> 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." 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 related 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." 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.
>
> 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

708 Counter-Memorial, para. 121.
709 Counter-Memorial, para. 122.
710 Revised Memorial, para. 127.
711 Revised Memorial, paras 127-28.

> whether the particular conduct complained of implicates, or raises questions of interpretation or application of the Convention.[712]

403. The Arbitral Tribunal notes that, as explained in its previous Award, the Convention contains numerous provisions that are explicitly or implicitly applicable to internal waters. While the Convention does not establish a comprehensive "regime" for internal waters comparable to that for the territorial sea, this may be because a coastal State exercises the same sovereignty over its internal waters as it does over its land territory, with fewer exceptions than in the case of the territorial sea, to which the sovereignty of the coastal State extends pursuant to Article 2 of the Convention.

404. However, in the Arbitral Tribunal's view, the critical question for determining its jurisdiction is not whether the Convention establishes a distinct regime for internal waters, but whether disputes relating to internal waters can constitute disputes concerning the interpretation or application of the Convention. The absence of a separate regime for internal waters within the Convention does not imply that every dispute involving internal waters necessarily falls outside the scope of the Convention. As long as a dispute concerning internal waters requires the interpretation or application of provisions of the Convention, such a dispute falls within the Convention's scope. Whether a particular dispute concerns the interpretation or application of the Convention is a question that must be assessed in light of the subject matter of the dispute and the specific claims advanced by the parties.

405. Accordingly, the Arbitral Tribunal cannot accept the proposition that every dispute relating to internal waters falls outside the scope of the Convention and therefore does not concern the interpretation or application of the Convention. Such a proposition would directly conflict with the fact that the Convention contains provisions applicable to internal waters. It would also be unconvincing, as it is difficult to imagine that the Convention, which recognises in its Preamble that "the problems of ocean space are closely interrelated and need to be considered as a whole," would completely leave out internal waters, a significant part of the ocean space, from its scope.[713]

406. The Arbitral Tribunal therefore rejects the Russian Federation's general objection that all disputes concerning Ukraine's claims relating to the Sea of Azov and the Kerch Strait fall outside the scope of the Convention and that the Arbitral Tribunal consequently lacks jurisdiction over them. Instead, the Arbitral Tribunal will assess whether Ukraine's specific claims relating to the Sea of Azov and the Kerch Strait, such as those concerning navigation, the protection of the marine

712 Award Concerning Preliminary Objections, paras 294-96 [citations omitted].
713 UNCLOS, Preamble.

environment, and the protection of UCH, fall within the scope of the Convention. This assessment will be undertaken in the relevant Chapters of the Award.

4. The Russian Federation's Third General Objection

407. The Arbitral Tribunal will now proceed to the third general objection raised by the Russian Federation.

408. The Russian Federation submits that due to new circumstances that have arisen since 30 September 2022, the Arbitral Tribunal no longer has jurisdiction over Ukraine's claims that necessarily require it to decide, expressly or implicitly, on the sovereignty of one Party or the other over the Sea of Azov and the Kerch Strait.[714] According to the Russian Federation, following the accession of the territories bordering the Sea of Azov—namely, the DPR, the Zaporozhye Region, and the Kherson Region—to the Russian Federation, Ukraine ceased to be a coastal State with respect to the Sea of Azov.[715] The Russian Federation asserts that, regardless of Ukraine's position on these events, they constitute objective reality, and that the conclusions reached by the Arbitral Tribunal in its Award Concerning Preliminary Objections apply fully to the current situation concerning the DPR, the Zaporozhye Region, and the Kherson Region.[716]

409. For its part, Ukraine submits that the Russian Federation's argument regarding a change in circumstances violates two basic legal principles and should, therefore, be rejected.[717] First, it argues that the Russian Federation disregards the "general rule" that the critical date when establishing jurisdiction is the date on which the application is filed.[718] Therefore, in Ukraine's view, the subsequent events cited by the Russian Federation are irrelevant to the Arbitral Tribunal's jurisdiction.[719] Second, Ukraine contends that the Russian Federation's argument depends on actions that are inconsistent with a legally binding ICJ order and, consequently, its claims of sovereignty over Donetsk, Luhansk, Zaporizhzhia, and Kherson Oblasts must be treated as having no legal consequence.[720]

410. It is a well-established principle of international procedural law that the jurisdiction of an international court or tribunal is determined based on the facts and legal situation as they existed

714 Counter-Memorial, para. 29.
715 Counter-Memorial, para. 27. In referring to these regions in its analysis, the Arbitral Tribunal applies the designation and spelling used by the Parties in their respective submissions.
716 Counter-Memorial, paras 27-28.
717 Reply, para. 76.
718 Reply, para. 78.
719 Reply, para. 78.
720 Reply, paras 80-83.

on the date the proceedings were instituted. The ICJ stated in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that "according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed."[721]

411. A corollary of this principle is that subsequent acts by either party to the dispute cannot defeat or undermine the jurisdiction of an international court or tribunal once that jurisdiction has been validly established. The ICJ confirmed this in *Croatia v. Serbia*, stating:

> If at the date of filing of an application all the conditions necessary for the Court to have jurisdiction were fulfilled, it would be unacceptable for that jurisdiction to cease to exist as the result of a subsequent event.[722]

412. The rationale behind this principle is well known. It serves to safeguard the certainty and predictability of judicial process and prevent States from frustrating proceedings by taking actions after a case has been duly submitted to the international court or tribunal. As the ICJ further explained in *Croatia v. Serbia*:

> What is at stake is legal certainty, respect for the principle of equality and the right of a State to see its claims decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time.[723]

413. While the general principle allows for some flexibility, any exception to this principle is usually confined to addressing temporary or technical defects in the establishment of jurisdiction. Such exceptions cannot be invoked to allow subsequent events to retroactively defeat jurisdiction that was validly established at the time the proceedings were instituted.

414. The Arbitral Tribunal notes that the "change in circumstances" referred to by the Russian Federation occurred on 30 September 2022, more than six years after the initiation of the present Arbitration on 16 September 2016.[724] According to the Russian Federation, these events resulted in the Sea of Azov becoming bordered by a single State rather than two States, as was the case when the proceedings were instituted. The Arbitral Tribunal considers that these events, occurring long after the initiation of the present proceedings, do not and cannot have retroactive effect on the Arbitral Tribunal's jurisdiction.

415. The Arbitral Tribunal notes that the Russian Federation refers to the Arbitral Tribunal's decision in the Award Concerning Preliminary Objections in support of its argument.[725] In that Award, the

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721 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at p. 12 para. 26.
722 *Croatia v. Serbia*, cit., n. 559, p. 438, para. 80 (**Annex UAL-168**).
723 *Croatia v. Serbia*, cit., n. 559, p. 438, para. 80 (**Annex UAL-168**).
724 *See* para. 24 above.
725 Counter-Memorial, para. 28 *citing* Award Concerning Preliminary Objections, paras 197-98.

Arbitral Tribunal upheld the Russian Federation's objection that it 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."[726] The Russian Federation now asks the Arbitral Tribunal to adopt the same approach with respect to the alleged change in circumstances.[727]

416. However, the two situations, namely, the situation the Arbitral Tribunal addressed in the proceedings on preliminary objections and the present situation, could not be more different. In the earlier proceedings, the Arbitral Tribunal was confronted with a situation where, in its assessment, a significant portion of Ukraine's claims rested on the premise that Ukraine was sovereign over Crimea, a premise directly challenged by the Russian Federation.[728] The Arbitral Tribunal found that a sovereignty dispute existed between the Parties and that resolving the question of sovereignty was a prerequisite to deciding a number of Ukraine's claims.[729] For that reason, the Arbitral Tribunal decided to uphold the Russian Federation's objection.[730]

417. In the present situation, however, at the time the proceedings were instituted, it was undisputed that both Ukraine and the Russian Federation were littoral States to the Sea of Azov. There was no sovereignty dispute whatsoever over the relevant coastal regions. Since the Arbitral Tribunal's jurisdiction must be determined based on the facts and legal situation as they existed on the date the proceedings were instituted, there is no basis for the Arbitral Tribunal to determine the sovereignty of one Party or the other over the Sea of Azov, as the Russian Federation asserts. The conclusions reached by the Arbitral Tribunal in the previous Award are therefore inapplicable to the present situation.

418. Accordingly, the Arbitral Tribunal cannot accept the Russian Federation's third general objection. Having rejected this objection on the grounds set out above, the Arbitral Tribunal finds it unnecessary to address the additional argument advanced by Ukraine that the Russian Federation's objection is inconsistent with the legally binding order of the ICJ and is therefore without legal effect.

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726 Award Concerning Preliminary Objections, para. 492(a).
727 Counter-Memorial, para. 28.
728 Award Concerning Preliminary Objections, paras 152-53.
729 Award Concerning Preliminary Objections, paras 165, 178, 195.
730 Award Concerning Preliminary Objections, paras 197, 491(a).

5. Conclusion

419. In light of the foregoing, the Arbitral Tribunal concludes as follows:

a) With respect to the Russian Federation's first general objection, the declarations made by both Parties pursuant to Article 298, paragraph 1(a)(i), of the Convention do not prevent the Arbitral Tribunal from determining whether the Sea of Azov and the Kerch Strait constituted a historic bay or were subject to historic title. The Arbitral Tribunal finds that the Sea of Azov and the Kerch Strait were not internal waters subject to historic title. Accordingly, the Russian Federation's first objection is rejected.

b) With respect to the Russian Federation's second general objection, the internal waters status of the Sea of Azov and the Kerch Strait has continued following the dissolution of the Soviet Union. Whether the Arbitral Tribunal has jurisdiction over Ukraine's claims relating to the Sea of Azov and the Kerch Strait depends on the content of claims advanced by Ukraine. Accordingly, the Russian Federation's second general objection is rejected. Instead, the Arbitral Tribunal will determine whether it has jurisdiction to address Ukraine's specific claims relating to the Sea of Azov and the Kerch Strait in the respective Chapters of the Award.

c) With respect to the Russian Federation's third general objection, the alleged change in circumstance cannot have retroactive effect on the Arbitral Tribunal's jurisdiction. Accordingly, the Russian Federation's third general objection is rejected.

IV. THE RUSSIAN FEDERATION'S ALLEGED INTERFERENCE WITH NAVIGATION IN THE BLACK SEA, THE SEA OF AZOV, AND THE KERCH STRAIT

A. INTRODUCTION

420. The Arbitral Tribunal will now turn to Ukraine's claims regarding the alleged interference with navigation in the Sea of Azov and the Kerch Strait by the Russian Federation.

421. In its Final Submissions, Ukraine raises several claims relating to alleged interferences by the Russian Federation with navigation in the Black Sea, the Sea of Azov, and the Kerch Strait. The Submissions read as follows:

a. The Russian Federation has violated Articles 38, 43, and 44 of the United Nations Convention on the Law of the Sea by: constructing a bridge across the Kerch Strait that permanently impedes the ability of vessels that previously transited the Strait or foreseeably may have transited the Strait from doing so; failing to share information as to threats to safe navigation caused by the bridge; delaying passage through the Strait for vessels that are navigating to and from Ukrainian ports and inspecting such vessels; and restricting the navigation of all foreign governmental vessels through the Strait for a period of over six months.

b. The Russian Federation has violated Articles 2, 58, and 87 of the Convention by stopping and inspecting Ukrainian and third-State vessels in the Sea of Azov traveling to and from Ukrainian ports.

c. The Russian Federation has violated Articles 58 and 92 of the Convention by stopping and inspecting Ukrainian-flagged vessels in the Sea of Azov travelling to and from Ukrainian ports.

d. The Russian Federation has violated Articles 2(3) and 91 of the Convention by unlawfully seizing and re-flagging two Ukrainian-flagged JDRs.[731]

422. These submissions relate to three geographically and factually distinct issues, which will be addressed below: first, the alleged unlawful impediment to transit passage in the Kerch Strait, resulting from the construction of the Kerch Strait bridge and other measures taken by the Russian Federation; second, the alleged interference with navigation in the Sea of Azov to and from Ukrainian ports caused by the Russian Federation stopping and inspecting vessels, and; third, the alleged violation of Article 91 of the Convention due to the alleged unlawful seizure and reflagging by the Russian Federation of two JDRs located in the Black Sea.

423. The Russian Federation rejects all of Ukraine's claims, as it considers them to be beyond the Arbitral Tribunal's jurisdiction or inadmissible. In any case, it argues that its conduct did not violate the Convention.

B. ALLEGED UNLAWFUL IMPEDIMENT OF TRANSIT PASSAGE IN THE KERCH STRAIT

424. The Parties disagree on whether the Russian Federation unlawfully impeded transit passage through the Kerch Strait and whether the Russian Federation failed to cooperate with Ukraine as to threats to safe navigation in the Kerch Strait.

425. Article 38, paragraph 1, of the Convention reads:

> In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; [...]

426. Article 43 of the Convention reads:

> User States and States bordering a strait should by agreement cooperate:

731 Ukraine's Final Submissions, para. 1(a)-(d). *See also* Revised Memorial, para. 314.

(a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
(b) for the prevention, reduction and control of pollution from ships.

427. Article 44 of the Convention reads:

> States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

1. Ukraine's Position

428. Ukraine claims that the Russian Federation violated Articles 38 and 44 of the Convention by constructing a bridge at half the height required for proper clearance, thereby preventing larger vessels from passing through the Kerch Strait and hampering transit passage.[732] In constructing the bridge, Ukraine states that the Russian Federation failed to share information with Ukraine about potentially significant threats to safe navigation posed by the bridge's alleged hasty construction, violating its obligations under Articles 43 and 44 of the Convention.[733] Additionally, Ukraine argues that beginning in June 2018, the Russian Federation has targeted and disproportionately inspected and/or delayed—by an average of 40 hours—those merchant vessels still able to pass under the Kerch Strait bridge that are traveling to or from Ukraine's Sea of Azov ports, further violating its obligations not to impede or hamper transit passage under Articles 38 and 44 of the Convention.[734] Finally, Ukraine contends that the Russian Federation's decision to unilaterally restrict the navigation of all foreign government vessels through the Kerch Strait for a period of more than six months in 2021 amounts to another violation of the transit passage regime in the Kerch Strait.[735]

a. The Applicable Standard under Articles 38 and 44 of UNCLOS

429. According to Ukraine, Articles 38 and 44 of the Convention place an obligation on States bordering an international strait not to impede, hamper, or suspend transit passage through that strait.[736] Relying on the wording of Articles 38 and 44 of the Convention, Ukraine argues that "*all* ships and aircraft enjoy the right of transit passage" in international straits, that such passage

732 Revised Memorial, paras 133-49.
733 Revised Memorial, paras 150-54.
734 Revised Memorial, paras 155-63.
735 Revised Memorial, paras 164-65.
736 Revised Memorial, para. 133.

"shall not be impeded,"[737] that "States bordering straits shall not hamper transit passage," and that "[t]here shall be no suspension of transit passage."[738]

430. Ukraine takes these provisions to mean that States bordering a strait are precluded from erecting physical structures that would impede or hamper transit passage.[739] In support of its position, it refers to *Passage through the Great Belt (Finland v. Denmark)* (hereinafter "*Passage through the Great Belt*") where, Ukraine notes, the parties agreed that international law required bridges over international straits to be built at a height that accommodated all ships using the strait and Denmark revised its plans for the bridge in reaction to a response from the USSR that the bridge should allow passage of vessels with an air draft of at least 65 metres, 3 metres more than initially planned.[740] Ukraine further maintains that State practice shows that bridges also must accommodate all ships that may reasonably be foreseen to use the strait in question in the future.[741]

431. According to Ukraine, the English, French, and Russian language versions of Articles 38 and 44 of the Convention are clear in prohibiting coastal States from impeding or hampering transit passage through straits used for international navigation, such as the Kerch Strait.[742]

432. Ukraine submits that this is confirmed by the context of these provisions: while Article 25, paragraph 3, of the Convention expressly establishes the right of the coastal State to suspend innocent passage in the territorial sea where such suspension is non-discriminatory and essential for the protection of its security, no similar exception exists for the regime of transit passage.[743]

433. Ukraine further submits that Article 42, paragraph 1, of the Convention sets out an exhaustive list of matters for which the coastal State is allowed to legislate in relation to transit passage, none of which are relevant in this case.[744] Ukraine highlights that Article 42, paragraph 2, further provides

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737 Revised Memorial, para. 133 *citing* UNCLOS Art. 38(1) [emphasis added by Ukraine].
738 Revised Memorial, para. 133 *citing* UNCLOS Art. 44.
739 Revised Memorial, para. 134.
740 Revised Memorial, para. 134 *referring to Passage through the Great Belt (Finland v. Denmark)* (hereinafter "*Passage through the Great Belt*"), Memorial of the Government of the Republic of Finland, December 1991, para. 421 (**Annex UAL-13**); *Passage through the Great Belt*, Counter-Memorial of the Government of the Kingdom of Denmark, May 1992, paras 66-70 (**Annex UAL-14**).
741 Revised Memorial, para. 134, n. 255 and Reply, paras 101-03 listing examples of State practice and *referring to* International Maritime Organization, Navigational Aspects of a Bridge Over the Straits of Messina, Note by the Government of Italy, IMO Doc. NAV/35/Inf.4 (1988), n. 207 (**Annex UA-608**); Hugo Caminos and Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge University Press 2014), p. 341, n. 208 (**Annex UAL-127**); William L. Schachte, Jr. and J. Peter A. Bernhardt, 'International Straits and Navigational Freedoms' (1993) 33 Virginia Journal of International Law, p. 527 at p. 529, n. 210 (**Annex UAL-128**); *see also* Hearing, 25 September 2024, 6:7-11:4 (Gore).
742 Reply, paras 106-08.
743 Reply, para. 109.
744 Reply, para. 109.

that laws and regulations relating to transit passage through straits cannot have "the practical effect of denying, hampering or impairing the right of transit passage," and Article 233 permits coastal States to directly enforce the laws and regulations referred to in Article 42, paragraph 1(a) and (b), only under limited circumstances, confirming that "transit passage cannot be made to yield to the interests of the coastal State [...]."[745]

434. Given the clarity of the wording of Articles 38 and 44 of the Convention, their context, and the object and purpose of the Convention, as well as the drafting history and corresponding State practice, Ukraine argues that there is no room for introducing a "self-judging balancing test" as proposed by the Russian Federation.[746] Ukraine also asserts that the Russian Federation relies on inapposite authorities and provisions of the Convention to support its balancing test.[747]

b. The Alleged Violations of Articles 38 and 44 of UNCLOS Caused by the Construction of the Kerch Strait Bridge

435. According to Ukraine, the construction of the Kerch Strait bridge interferes with the right to unimpeded transit passage through the Kerch Strait.[748]

i. The Bridge's Design Is Inappropriate for an International Waterway

436. According to Ukraine, in 2016, the Russian Federation began construction of the Kerch Strait bridge, which was completed in December 2019.[749] Ukraine notes that the bridge begins on the Taman Peninsula, crosses Tuzla Island and, passing over the principal Kerch-Yenikale navigation channel in the Strait, terminates on the Crimean Peninsula.[750] Ukraine adds that the rail and roadway arches put in place across the Kerch-Yenikale navigation channel between August and October 2017, mark the highest point of the bridge, sitting 35 metres above the water.[751] Accordingly, on 24 May 2017, Ukraine continues, the Russian Federation's Ministry of Transport issued a notice that from July or August 2017 on, vessels with an air draft over 33 metres would no longer be able to safely transit through the Kerch Strait,[752] and in March 2018 the Russian

745 Reply, para. 109.
746 Reply, paras 99-124.
747 Reply, paras 125-28.
748 Revised Memorial, para. 135.
749 Revised Memorial, para. 136.
750 Revised Memorial, para. 136; About the Project, Official Information Site for the Construction of the Crimean Bridge (**Annex UA-188**).
751 Revised Memorial, paras 136-37; About the Project-Bridge Height, Official Information Site for the Construction of the Crimean Bridge (**Annex UA-196**).
752 Ministry of Transport of the Russian Federation, Federal Agency for Sea and River Transport, Administration of the Sea Ports of the Black Sea in the City of Kerch, Captain of the Sea Port of Kerch, Order No. 842 SKP 0251 (24 May 2017) (**Annex UA-199**).

Federation reaffirmed this height restriction.[753] Ukraine asserts that as a result of the bridge's height restrictions, some larger, ocean-going vessels, which previously had been able to pass through the Kerch Strait to or from ports in the Sea of Azov, can no longer do so.[754]

437. Ukraine submits that the Russian Federation's choice to construct a bridge with a maximum clearance of 33 metres runs counter to international practice in straits and internal waterways used by international ocean-going vessels.[755] It rejects the Russian Federation's assertion that Ukraine's claims in respect of navigation in the Kerch Strait relate "not to the Strait itself, but to a narrow artificial canal dredged within it, the Kerch-Yenikale Canal,"[756] which in the view of the Russian Federation is an artificial waterway not governed by the Convention.[757] According to Ukraine, the dredging conducted to deepen the Kerch-Yenikale navigation channel is a common practice that does not affect the nature, let alone the legal status, of a natural waterway used for navigation.[758]

438. Ukraine contends that a comparison of bridges it submitted, including bridges that span international waterways and channels providing access to working ports for ocean-going vessels,[759] shows that the average clearance height of these bridges is 64.6 metres.[760] Ukraine's expert is of the view that particularly the newer bridges tend to be higher, possibly reflecting an expectation that those waterways will accommodate larger vessels at some point in the future.[761] Accordingly, Ukraine submits that the clearance under a bridge spanning a busy waterway like the Kerch Strait should be in the range of approximately 60-70 metres.[762]

439. Ukraine argues that the Russian Federation's alternative analysis of allegedly comparable bridges is misleading.[763] According to Ukraine, the analysis submitted by the Russian Federation does not include any bridges located in international straits connecting two areas of exclusive economic zones or territorial sea.[764] Ukraine adds that, in any event, with the exception of one bridge, all

753 Russian Federation Ministry of Transportation, Order No. 99 (March 2018) (**Annex UA-607**).
754 Revised Memorial, paras 143-46.
755 Revised Memorial, paras 138-43.
756 Rejoinder, para. 267.
757 Rejoinder, paras 268-69.
758 Hearing, 25 September 2024, 20:5-21:15 (Gore).
759 Opinion of Brian McJury, Waves Group, para. 4.6 (18 May 2021).
760 Opinion of Brian McJury, Waves Group, para. 4.7 (18 May 2021); *see also* Hearing, 24 September 2024, 69:14-18 (McJury).
761 Opinion of Brian McJury, Waves Group, para. 4.7 (18 May 2021).
762 Reply, para. 145.
763 Reply, paras 145-50; *see also* Hearing, 3 October 2024, 81:5-82:7 (Gore).
764 Reply, para. 146.

bridges examined in the Russian Federation's alternative analysis have a higher clearance height than the Kerch Strait bridge.[765]

ii. The Kerch Strait Bridge Impedes the Navigation of Larger Vessels

440. Against this background, Ukraine highlights the fact that only in the Kerch Strait, where it is Ukraine, not the Russian Federation, that has an interest in large-ship navigation, did the Russian Federation opt to construct a bridge with a maximum clearance of 33 metres.[766] According to Ukraine, this maximum clearance of 33 metres across the Kerch-Yenikale navigation channel prevents larger merchant vessels, which used to call at the ports of Mariupol and Berdyansk and are commonly used in international shipping, as well as certain specialised vessel types from passing through the Kerch Strait.[767]

441. [redacted][768][redacted][769][redacted].[770][redacted].[771][redacted].[772] Ukraine argues that an analysis of vessel design plans indicates that vessels of such a size generally require an air clearance above 33 metres.[773]

442. According to Ukraine, this conclusion is supported by a comparison of the number of ships of a certain size calling at the Berdyansk and Mariupol ports during two time periods, one before

765 Reply, para. 149; Second Opinion of Brian McJury, Waves Group, para. 7.16 (24 March 2023).
766 Revised Memorial, para. 143.
767 Revised Memorial, paras 143, 147.
768 [redacted]
769 Generally, bulk carriers with a DWT between 60,000-79,999t are classified as Panamax bulk carriers, *see* Opinion of Brian McJury, Waves Group, para. 4.23 (18 May 2021); World Bulk Carrier Fleet Profile, The Bulk Carrier Register 2016 (**Annex UA-209**).
770 Revised Memorial, para. 29; [redacted].
771 Revised Memorial, para. 29; [redacted].
772 Opinion of Brian McJury, Waves Group, paras 2.10, 5.1 (18 May 2021).
773 Revised Memorial, para. 143; Opinion of Brian McJury, Waves Group, paras 4.11-4.19 (18 May 2021).

construction of the bridge, and one after, indicating a drop of calls for larger vessels over 30,000tDWT and particularly over 40,000t DWT.[774]

443. Thus, Ukraine argues, the data supports its claim that the low clearance of the Kerch Strait bridge effectively closed the Kerch Strait to an entire class of larger merchant vessels. [redacted], and that the Vessel Traffic Systems (hereinafter "VTS") data relied on by [redacted], the Russian Federation's expert, which contains far more errors, shows a comparable level of vessels in excess of 40,000t DWT passing through the Kerch Strait prior to the construction of the bridge, and no further passages of such vessels after the construction of the bridge.[775] Ukraine highlights that the Russian Federation's claim that the share of vessels over 40,000t DWT [redacted][776] does not detract from the fact that the Kerch Strait bridge permanently closed the Kerch Strait to an entire class of vessels commonly used in international shipping.[777] Ukraine adds that because large ocean-going vessels carry much more sizeable loads than other vessels, even a small number of such vessels can account for a meaningful share of cargo shipping in a given area.[778]

444. Ukraine further submits that, apart from impeding merchant traffic, the Kerch Bridge also hinders the navigation of many specialised vessel types, affecting Ukraine's ability to develop its hydrocarbon resources in the Sea of Azov.[779] According to Ukraine, pipe layers, cable layers, crane barges, and heavy lift vessels, are among the vessels likely prevented from passing the Kerch Strait.[780] In particular, some of Ukraine's JDRs require a greater clearance than the Kerch Strait bridge allows, as their legs are elevated upwards when navigating.[781] Although removal and replacement of jack-up legs is a possibility, Ukraine points out, it may reduce the durability

774 Revised Memorial, paras 144-46; Opinion of Brian McJury, Waves Group, paras 4.36-4.50 (18 May 2021).
775 Hearing, 24 September 2024, 54:19-56:3 (Gore, McJury).
776 Counter-Memorial, para. 188.
777 Reply, para. 152; *see also* Hearing, 3 October 2024, 79:19-80:3 (Gore).
778 Reply, para. 152.
779 Revised Memorial, paras 147-48.
780 Revised Memorial, para. 147; Opinion of Brian McJury, Waves Group, paras 2.11, 4.52, 4.56 (18 May 2021).
781 Revised Memorial, para. 148; Witness Statement of [redacted], para. 8 (15 May 2021); Opinion of Brian McJury, Waves Group, para. 4.67 (18 May 2021).

of the leg structure.[782] Ukraine contends that requiring such action to enable JDRs' passage through the Kerch Strait cannot be reconciled with the notion of unimpeded passage.[783]

445. Ukraine asserts that the Russian Federation was aware of all of these consequences, since Ukraine notified the Russian Federation that its "plans to impose restrictions on maritime navigation through the Kerch Strait infringe Ukraine's rights in the Kerch Strait under UNCLOS," and that the "reported restrictions [...] will cause significant ongoing damage to Ukrainian seaports in the Sea of Azov, will hinder the future development of such seaports, and will interfere with Ukraine's use and enjoyment of its territorial waters and Exclusive Economic Zone in the Sea of Azov."[784] In particular with regard to the effect on the ability of JDRs to pass through the Kerch Strait, Ukraine asserts that the Russian Federation's feasibility study itself reveals that the Russian energy company Rosneft Oil Company OJSC (hereinafter "Rosneft") requested changes to the proposed dimensions and design of the bridge, which would permit JDRs to pass through the Kerch Strait into the Sea of Azov.[785] The Russian Federation must therefore be considered to have been aware of this effect of the bridge.[786]

iii. The Russian Federation Fails to Justify Construction of the Bridge under Its Own Fabricated Balancing Test

446. Finally, Ukraine contends that even under the balancing test proposed by the Russian Federation, the facts do not support the Russian Federation's position.[787]

447. According to Ukraine, the Russian Federation's allegation that constructing the bridge was an "economic and humanitarian necessity"[788] is irrelevant.[789] Even if such considerations were taken into account, Ukraine argues that the alleged necessity does not justify constructing a low-clearance bridge that prevents passage of vessels that historically transited the Kerch Strait.[790] Ukraine submits that any alleged economic or humanitarian necessity of connecting the Crimean

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782 Opinion of Brian McJury, Waves Group, para. 4.68 (18 May 2021).
783 Revised Memorial, para. 148; Reply, para. 153.
784 Revised Memorial, para. 149 *citing Note Verbale* from Ukraine to the Russian Federation, No. 72/22-663-1651, pp. 5-6 (12 July 2017) (**Annex UA-211**). This communication was mistakenly dated 12 July 2016 in Revised Memorial, *see* Reply, para. 155, n. 329.
785 Reply, para. 153.
786 Reply, para. 153.
787 Reply, para. 130.
788 Counter-Memorial, para. 151.
789 Reply, para. 131.
790 Reply, para. 132.

Peninsula to the Russian Federation could have been satisfied by constructing a bridge with a higher clearance.[791]

448. Ukraine also asserts that any argument under the Russian Federation's proposed balancing test that the construction of the Kerch Strait bridge was "justifiable and proportionate"[792] is not supported by the facts.[793]

449. Concerning the economic analysis by the Russian Federation's experts, [redacted] and [redacted], submitted along with the Rejoinder, Ukraine criticises their lack of expertise in shipping and their reliance on the same flawed VTS data as [redacted].[794] Ukraine argues that "the industry practice of partial loading and discharge is well established"[795] and that because "large ocean-going vessels are designed to carry more sizeable loads than smaller short sea vessels, even a small number of such larger vessels can account for a meaningful share of cargo uplift from a given port."[796]

450. While the Russian Federation seeks to assign significance to the fact that the Ukrainian ports of Mariupol and Berdyansk have a water depth of around 8 metres, Ukraine states that it is undisputed that large ocean-going vessels, including such in the Panamax class, were able to and did call at these ports before the construction of the bridge.[797]

c. The Alleged Violation of Articles 43 and 44 of UNCLOS Caused by the Russian Federation's Failure to Cooperate with Ukraine on Threats to Safe Navigation

451. Ukraine rejects the Russian Federation's contention that its claim is inadmissible because it was not included in the Notification and Statement of Claim and because the *Note Verbale* by which Ukraine requested the Russian Federation to share information regarding the construction of the bridge and related threats to navigation and the marine environment post-dates the filing of the Notification and Statement of Claim.[798] According to Ukraine, all of its claims arise directly out of the questions it made the subject matter of the dispute in its Notification and Statement of Claim.[799]

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791 Reply, para. 132.
792 Counter-Memorial, para. 151.
793 Reply, paras 135-44.
794 Hearing, 25 September 2024, 22:1-25 (Gore); 3 October 2024, 76:22-77:15 (Gore).
795 Reply, para. 141 *citing* Second Opinion of Brian McJury, Waves Group, para. 6.15 (24 March 2023).
796 Reply, para. 141 *citing* Second Opinion of Brian McJury, Waves Group, para. 3.5 (24 March 2023).
797 Reply, para. 143.
798 Hearing, 3 October 2024, 9:15-24 (Koh).
799 Hearing, 3 October 2024, 9:25-11:1 (Koh).

452. Ukraine contends that given the importance of international straits in facilitating international navigation, the Convention imposes specific obligations on States bordering straits to cooperate and to share information about threats to safe navigation.[800] According to Ukraine, it qualifies as a user State in the sense of Article 43 of the Convention, since Ukrainian-flagged vessels regularly use the Kerch Strait, and access to Ukraine's ports in the Sea of Azov requires transit through the Strait.[801] Ukraine argues that since the Russian Federation is a State bordering the Kerch Strait, Articles 43 and 44 of the Convention require the Russian Federation to cooperate with Ukraine on navigational safety in the Kerch Strait, including through the sharing of information relating to dangers to navigation.[802]

453. Ukraine contends that the Russian Federation's reading of Articles 43 and 44 of the Convention, which reduces the provisions to minimal obligations, is inconsistent with the ordinary meaning of the Articles, read in context and in light of the object and purpose of the Convention, as required by Article 31 of the VCLT.[803] Ukraine states that Article 44 requires States bordering a strait to give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. It further claims that this interpretation is confirmed by the context of the provisions, as the term "danger" in Article 98, paragraph 1, and Article 142 of the Convention is qualified, whereas Article 44 contains no qualification, expressly requiring publicity of *any* danger to navigation.[804] A broad understanding of the obligation to cooperate and give appropriate publicity to any danger to navigation, Ukraine continues, is also in line with the object and purpose of the Convention of facilitating international communication.[805]

454. According to Ukraine, the construction of the bridge was characterised by approval processes being rushed and corners being cut.[806] Ukraine argues that this hasty construction along with the geological and climatic challenges posed by the construction site created dangers to navigation, such as bridge deterioration or collapse,[807] possible changes in hydrodynamics and build-up of sea ice,[808] and increased sedimentation.[809] Accordingly, Ukraine demanded in a *Note Verbale* dated 12 July 2017 that the Russian Federation promptly provide it with all available information relating to the construction of the Kerch Strait bridge, and any associated threats to the marine

800 Revised Memorial, para. 150.
801 Revised Memorial, para. 150.
802 Revised Memorial, para. 150. *See also* Reply, para. 155.
803 Reply, para. 157; *see also* Hearing, 3 October 2024, 82:25-83:16 (Gore).
804 Reply, para. 160.
805 Reply, para. 161.
806 Revised Memorial, para. 152.
807 Opinion of John G. Aronson, EcologicDNA, LLC, paras 119-25 (17 May 2021).
808 Opinion of John G. Aronson, EcologicDNA, LLC, paras 110-16 (17 May 2021).
809 Opinion of Brian McJury, Waves Group, para. 4.3 (18 May 2021).

environment; information about the risk of ice jams and related navigational obstacles posed by the Kerch Strait bridge; and technical design specifications and assessments in order to assess the risk of collapse.[810]

455. Ukraine states that the Russian Federation did not fulfil this request and did not share any information regarding the construction of the Kerch Strait bridge with Ukraine that would have allowed Ukraine to understand and mitigate the risks to navigational safety associated with the hasty construction of the bridge.[811]

456. Ukraine also submits that none of the actions and arguments pointed to by the Russian Federation alleviate the concerns raised by Ukraine.[812] In particular, Ukraine notes that the Russian Federation relies on a communication from the International Maritime Organization (hereinafter the "IMO") stating that there is no requirement under the Convention for the Safety of Life at Sea to notify the IMO of the intention to construct a bridge across navigational channels used for international navigation.[813] Ukraine points out that in that same communication, the IMO indicates that the "international legal framework addressing straits used for international shipping is contained in [the Convention]" and encourages the Russian Federation to contact the UN Division for Ocean Affairs and the Law of the Sea.[814] According to Ukraine, there is no indication that the Russian Federation did so.[815]

457. Further, Ukraine states that the Russian Federation continues to fail to properly assess and monitor the potential impacts of the bridge construction and has no basis to rule out such impacts.[816]

458. Ukraine also argues that the Russian Federation cannot rely on security concerns for not sharing information regarding the construction of the bridge, as there is no security exception to Articles 43 and 44 of the Convention.[817] In any case, Ukraine contends that any current security concerns cannot excuse past failures to provide information.[818]

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810 *Note Verbale* from Ukraine to the Russian Federation, No. 72/22-663-1651 (12 July 2017) (**Annex UA-211**).

811 Revised Memorial, paras 151, 154.

812 Reply, paras 164-68.

813 Reply, para. 165; Letter from the Director of Maritime Safety Division to the International Maritime Organization to the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization (29 July 2015) (**Annex RU-359**).

814 Reply, para. 165; Letter from the Director of Maritime Safety Division to the International Maritime Organization to the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization (29 July 2015) (**Annex RU-359**).

815 Reply, para. 165.

816 Reply, para. 166.

817 Reply, para. 167; *see also* Hearing, 25 September 2024, 28:4-29:4 (Gore).

818 Reply, para. 167.

459. Finally, Ukraine submits that the Russian Federation cannot simply assume that any efforts to cooperate with Ukraine would have been futile.[819] According to Ukraine, the fact that Ukraine did not consent to the construction of the bridge does not establish that Ukraine would not have cooperated in ensuring safe navigation.[820]

d. The Alleged Violations of Articles 38 and 44 of UNCLOS Caused by the Russian Federation's Discriminatory Delays and Inspections of Vessels Traveling to and from Ukraine

460. Ukraine claims that the Russian Federation also violated Articles 38 and 44 of the Convention by delaying and otherwise hampering passage through the Kerch Strait for vessels traveling to or from Ukrainian ports.[821] Ukraine rejects the Russian Federation's contention that its claims in this regard were not properly introduced and thus are inadmissible. It states that the Notification and Statement of Claim referred to the Russian Federation's interference with navigation and transit passage in the Kerch Strait, thereby making related claims part of the original subject matter of the dispute, and that later submissions supplementing the legal and factual basis of Ukraine's claims did not change the subject matter of the dispute.[822] Equally, in Ukraine's view, the fact that these claims relate to events that took place after the filing of the Notification and Statement of Claim does not lead to their inadmissibility, since they do not transform the nature of the dispute.[823]

461. Regarding the substance of its claim, Ukraine underscores that contrary to the Russian Federation's allegations that Ukraine objects to the establishment of routine safety measures in the Kerch Strait,[824] Ukraine does not take issue with the measures *per se*, but with the way "[the Russian Federation] has used its control over the Kerch Strait to disproportionately delay and, in many instances, inspect vessels traveling to or from Ukraine's Sea of Azov ports."[825]

462. Ukraine recalls that the Russian Federation took over control of the entire Kerch Strait, including the Kerch-Yenikale navigation channel in 2014.[826] According to Ukraine, in order to transit the Strait, vessels must communicate in advance their port of destination, and generally must obtain

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819 Reply, para. 168.
820 Reply, para. 168.
821 Revised Memorial, paras 155-65.
822 Hearing, 23 September 2024, 129:3-131:6 (Cheek).
823 Hearing, 23 September 2024, 131:7-132:19 (Cheek) *referring to Nicaragua v. Colombia (2022)*, cit., n. 562, para. 44 (**Annex UAL-172**).
824 Counter-Memorial, paras 234-46.
825 Reply, para. 177.
826 Revised Memorial, para. 158; Witness statement of [redacted], para. 11 (14 May 2021).

permission before proceeding to the entrance of the Strait, waiting in designated anchorage areas adjacent to the Strait until receiving approval.[827]

463. Additionally, Ukraine submits that many vessels are required to take a pilot on board to transit the Strait, and the right to sail without a pilot can only be granted to captains of vessels flying the flag of the Russian Federation.[828] Ukraine argues that in practice this right has only been granted to Russian nationals.[829] According to Ukraine, the Russian Federation "does not even attempt to articulate a principled justification for excluding Ukrainian vessels from qualifying for the pilotage exemption."[830] Ukraine states that all examples of pilotage requirements relied upon by the Russian Federation can either be distinguished or do not permit exemptions only for domestic pilots and/or vessels, but treat equally applicants of any nationality that can meet the specified requirements.[831]

464. Further, Ukraine explains that merchant vessels are frequently subject to one-way traffic in the channel,[832] which necessitates greater use of caravanning in the Strait than was necessary in the past, contributing to delays.[833] According to Ukraine, one-way traffic was only made necessary by the low clearance of the Kerch Strait bridge, thus compounding the Russian Federation's hindrance of transit passage.[834] In Ukraine's view, the Russian Federation's claim that delays are not unusual, and its list of examples from other waterways, are misleading—as the examples refer to artificial canals, not straits.[835] Ukraine further claims that the Russian Federation discriminatorily enforced one-way traffic in order to target Ukrainian vessels for delay.[836]

465. Ukraine contends that the delays suffered by vessels bound for or returning from Ukraine's Sea of Azov ports are significantly greater than those affecting vessels traveling to or from the Russian Federation's Sea of Azov ports.[837] Based on its monitoring of AIS data tracking the location of

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827 Revised Memorial, para. 158; Witness statement of [redacted], para. 11 (14 May 2021).

828 Revised Memorial, para. 158; Ministry of Transport of the Russian Federation, Order No. 313, On Approval of the Bylaws of the Kerch Sea Port, 21 October 2015, updated March 2018, paras 31-32 (**Annex UA-612**).

829 Witness statement of [redacted], para. 11 (14 May 2021).

830 Reply, para. 178.

831 Reply, para. 178; Hearing, 3 October 2024, 94:24-97:7 (Gore); Port of London Authority, Pilotage Directions 2017 as amended, 1 August 2019 (**Annex RU-219**); Australian Maritime Safety Authority, Official Website, Coastal Pilotage Exemptions (**Annex RU-220**); Standard Club, Pilotage Bulletin, May 2016, p. 14 (**Annex RU-221**).

832 Revised Memorial, para. 158; Ministry of Transport of the Russian Federation, Order No. 313, On Approval of the Bylaws of the Kerch Sea Port, 21 October 2015, updated March 2018, paras 47, 64 (**Annex UA-612**).

833 Revised Memorial, para. 158; Witness statement of [redacted], para. 11 (14 May 2021).

834 Reply, para. 179.

835 Reply, para. 181.

836 Reply, para. 171.

837 Revised Memorial, para. 159.

vessels transiting the Strait between July 2018 and March 2021, according to Ukraine, there was an average wait time of 40 hours for ships bound for or returning from Ukrainian ports.[838] In contrast, according to the data available to Ukraine, the average waiting time for vessels traveling to or from ports of the Russian Federation is approximately three hours.[839] Ukraine asserts that the Russian Federation's submission that Article 42, paragraph 2, of the Convention does not prevent it from favouring its own vessels is unsupported and cannot be reconciled with the wording of Article 38 of the Convention, guaranteeing transit passage to all ships without differentiating between ships of different States, or the wording of Article 42, paragraph 2, which prohibits discrimination.[840]

466. Ukraine further explains that while being forced to wait to transit the Kerch Strait, a substantial number of vessels traveling to or from Ukraine are subjected to inspections by the Russian Federation's Border Guard.[841] Based on interviews of vessel captains by the Ukrainian Border Services units at Mariupol and Berdyansk, between April 2018 and April 2021, more than 1,600 cases of inspections by the Russian Federation's Border Guard of Ukrainian and foreign commercial vessels occurred,[842] with actual numbers likely being higher.[843] Ukraine claims that the Russian Federation's own data suggests that between April and December 2018, at least two-thirds of the vessels travelling to or from Ukraine were subjected to inspections, whereas only approximately 10 percent of vessels travelling to or from the Russian Federation were affected.[844] Ukraine submits that the Russian Federation's reliance on absolute numbers is misleading, since there are many more vessels travelling to Russian than to Ukrainian ports.[845]

467. In support of its claims, Ukraine points to the protests from other Black Sea littoral States (individually and as part of the EU),[846] the United States,[847] the European Parliament,[848] and the

838 Revised Memorial, para. 159; Witness statement of [redacted], para. 12 (14 May 2021).
839 Revised Memorial, para. 159; Witness statement of [redacted], para. 13 (14 May 2021).
840 Hearing, 25 September 2024, 50:2-16 (Gore).
841 Revised Memorial, para. 160; Witness statement of [redacted], para. 14 (14 May 2021).
842 Revised Memorial, para. 160; Witness statement of [redacted], para. 4 (14 May 2021).
843 Revised Memorial, para. 161; Witness statement of [redacted], para. 5 (14 May 2021).
844 Revised Memorial, para. 161; Witness statement of [redacted], para. 14 (14 May 2021).
845 Reply, para. 173; Witness statement of [redacted], para. 14 (14 May 2021).
846 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 Union, Statement by the Spokesperson on the Escalating Tensions in the Azov Sea, 25 November 2018 (**Annex UA-486**).
847 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**).
848 European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov, 2018/2870(RSP), 25 October 2018, para. 1 (**Annex UA-544**).

UN General Assembly[849] against the Russian Federation's actions in the Kerch Strait and Sea of Azov.[850]

468. In response to the Russian Federation's claim that the practices of inspections and delays in the Suez, Panama, and Kiel Canals evidence that inspections and delays are not unusual,[851] Ukraine submits that these are inapposite to the situation in the Kerch Strait, as these canals are artificial waterways which are often subject to more extensive regulation.[852]

469. Ukraine also submits that the documentary evidence and witness testimony provided in support of its claims relating to the Russian Federation's discriminatory delays and inspections of merchant vessels traveling to and from Ukraine's Sea of Azov ports meet the applicable standard of proof, *i.e.*, the preponderance of evidence or balance of probabilities.[853] Ukraine argues that the Russian Federation provides no basis, under the Convention or otherwise, to hold Ukraine to a heightened standard.[854] In support of its argument, Ukraine relies on ICJ jurisprudence, finding that "a State that is not in a position to provide direct proof of certain facts 'should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.'"[855] According to Ukraine, one circumstance where the ICJ has permitted this more liberal recourse to inferences is where relevant evidence is outside the applicant State's "exclusive territorial control,"[856] as is the case here.[857]

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

850 Revised Memorial, para. 162.

851 Counter-Memorial, para. 300.

852 Reply para. 181; Second Opinion of Brian McJury, Waves Group, para. 5.3 (24 March 2023).

853 Reply, paras 170-76.

854 Reply, para. 176.

855 Reply, para. 176 *citing Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment of 9 February 2022, I.C.J. Reports 2022, para. 120 (**Annex UAL-194**) *citing Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 18 (**Annexes RUL-88**, **UAL-15**).

856 *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 18 (**Annexes RUL-88**, **UAL-15**).

857 Reply, para. 176.

e. The Alleged Violation of Articles 38 and 44 of UNCLOS Caused by the Russian Federation's Suspension of Transit Passage

470. Finally, Ukraine submits that the Russian Federation's closure of the entirety of the southern entrance to the Kerch Strait to foreign military and other government vessels from April 2021 until the end of October 2021[858] represents another violation of the regime of transit passage guaranteed under Articles 38 and 44 of the Convention.[859]

471. Contrary to the Russian Federation's claims,[860] Ukraine argues that since the Russian Federation would have no right to suspend or impede transit passage even if it were considered the coastal State in Crimea, ruling on Ukraine's claim regarding transit passage for foreign warships and government ships does not require an impermissible determination as to whether the sea areas adjacent to Crimea can be regarded as the Russian Federation's territorial sea.[861] For the same reasons, Ukraine further rejects the Russian Federation's objection to the admissibility of its claims regarding the Russian Federation's failure to cooperate with Ukraine on threats to navigation.[862]

472. Ukraine points out that the Russian Federation's reliance on Article 25, paragraph 3, of the Convention as a justification for its measure to close off the Kerch Strait[863] fails to address Ukraine's claims as Article 25, paragraph 3, of the Convention pertains only to suspensions of innocent passage, not the unconditionally guaranteed right to transit passage.[864]

473. According to Ukraine, the Russian Federation's actions in any event fail to meet the requirements of Article 25, paragraph 3, of the Convention, as an uninterrupted closure of portions of the Black Sea for six months cannot be considered "temporary," as the Russian Federation's declaration applies only to warships and other State vessels and therefore discriminates in fact among types

858 Coastal Warning of the Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation No. 152/21, 7 April 2021 (**Annex UA-619**); Coastal Warning of the Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation No. 169/21, 16 April 2021 (**Annex UA-620**); Notice to the Mariners, Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation, Weekly Bulletin Issue 17/21, April 2021 (**Annex UA-621**); Statement by the Ministry of Foreign Affairs of Ukraine in Connection with the Russian Federation's Restriction of Freedom of Navigation in the Black Sea, 15 April 2021 (**Annex UA-622**).

859 Revised Memorial, para. 164.

860 Counter-Memorial, paras 252-54.

861 Reply, para. 184.

862 Hearing, 3 October 2024, 9:15-24 (Koh); *see* para. 451 above.

863 Counter-Memorial, paras 255-68.

864 Reply, paras 183-85.

of foreign ships, and as the Russian Federation did not publicly indicate why it was closing off portions of the Black Sea, let alone demonstrate that the closure was essential for its security.[865]

474. Equally, Ukraine argues that the Russian Federation's claims that Ukraine has a record of suspending innocent passage in its territorial sea areas of the Black Sea[866] are irrelevant for the issue at hand, since any Ukrainian practice regarding suspension of innocent passage in territorial sea areas of the Black Sea has no bearing on the Russian Federation's violation of the right of transit passage in the Kerch Strait.[867]

2. The Russian Federation's Position

475. For its part, the Russian Federation reiterates its position that the Sea of Azov and the Kerch Strait are internal waters and consequently not covered by the provisions of the Convention that Ukraine invokes in its submissions.[868] The Russian Federation further submits that since Ukraine's claims in question are based on certain events that post-date the critical date of 16 September 2016, the date of the Notification and Statement of Claim, they are inadmissible in these proceedings.[869] In any event, the Russian Federation argues "that the regime of transit passage would still not apply automatically to supersede the rights of the coastal State" and that the Russian Federation's actions regarding the safety of navigation in the Kerch Strait do not violate the Convention.[870]

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

476. In its Rejoinder, the Russian Federation submits that prioritising between a coastal State's right to construct a bridge over a strait and the right of transit passage through it—assuming that such a right exists, which the Russian Federation denies—is dependent on "which right was there in the first place."[871] It claims that if construction commenced before the regime of transit passage allegedly became relevant to the Kerch Strait, there would be no interference with this right, as it was not in place when the construction started.[872]

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865 Reply, para. 185; *see also* Hearing, 25 September 2024, 54:1-55:4 (Gore).
866 Counter-Memorial, para. 269.
867 Reply, para. 186.
868 Counter-Memorial, paras 141-42, 275; Rejoinder, para. 216.
869 Rejoinder, para. 503.
870 Counter-Memorial, para. 144.
871 Rejoinder, para. 218.
872 Rejoinder, para. 218.

477. The Russian Federation states that Ukraine itself recognised that a right of transit passage did not exist at the time of the bridge's construction.[873] According to the Russian Federation, the Azov/Kerch Cooperation Treaty, which set forth the legal regime governing the waters of the Kerch Strait and the Sea of Azov, including matters of navigation, did not provide for transit passage through the Strait.[874] The Russian Federation argues that construction of the Kerch Strait bridge commenced in 2015, at a time when the regime of passage in the Strait and the Sea of Azov was still governed by the Azov/Kerch Cooperation Treaty and Russian domestic legislation.[875] According to the Russian Federation, Ukraine recognised this in its Notification and Statement of Claim by confirming that "[a] 2003 bilateral agreement recognised both parties' rights and responsibilities in the Kerch Strait."[876] While Ukraine considered denouncing the Azov/Kerch Cooperation Treaty in 2015, the Russian Federation recalls that it only did so in March 2023, which in the view of the Russian Federation demonstrates that when Ukraine initiated this Arbitration, it was aware of the special regime governing navigation in the Strait.[877] Accordingly, the Russian Federation submits that since the bridge was also completed long before the Azov/Kerch Cooperation Treaty ceased to apply in 2023, Ukraine's claims of an alleged interference with the right of transit passage cannot affect the legality of the bridge's construction.[878]

b. Ukraine's Claims under Articles 38 and 44 of UNCLOS Are beyond the Arbitral Tribunal's Jurisdiction

478. Even assuming that the right of transit passage under Article 38 of the Convention were relevant for the Kerch Strait, the Russian Federation argues that "transit passage under Article 38(2) [of the Convention] allows only for 'entering, leaving or returning from a State bordering the strait.'"[879] Given that Ukraine's arguments in this context focus on the access to Mariupol and Berdyansk by ships passing through the Kerch Strait, the Russian Federation claims that "the prerequisite for those arguments to be considered must be that Ukraine was a State bordering the Kerch Strait at relevant times, which it was not [...]."[880] According to the Russian Federation, this question also affects issues over which the Arbitral Tribunal found it does not have jurisdiction because they would require deciding on the sovereignty of either Party over Crimea.[881] Thus, in

873 Rejoinder, para. 219.
874 Rejoinder, para. 220.
875 Rejoinder, para. 221.
876 Rejoinder, para. 221 *citing* Notification and Statement of Claim, para. 20.
877 Rejoinder, para. 222.
878 Rejoinder, para. 223.
879 Rejoinder, para. 225 *citing* UNCLOS, Art. 38(2).
880 Rejoinder, para. 225.
881 Rejoinder, para. 225 *referring to* Award Concerning Preliminary Objections, para. 197.

the view of the Russian Federation, either the passage of Ukrainian and third States' ships bound for Ukrainian ports does not qualify as transit passage, or the nature of those instances of passage cannot be addressed by the Arbitral Tribunal without exceeding its jurisdiction.[882] Either way, the Russian Federation submits, Ukraine's claims based on Articles 38 and 44 of the Convention must fail.[883]

c. The Applicable Standard under Articles 38 and 44 of UNCLOS

479. In any event, according to the Russian Federation, "[t]he Convention does not establish a hierarchy between the right to erect structures, in particular, bridges, and navigational rights."[884] The Russian Federation asserts that Ukraine's "self-contained analysis" of Articles 38 and 44 of the Convention is not suitable to determine what is considered to be impeding or hampering transit passage under the Convention.[885] Rather, the Russian Federation contends that "both Articles should [...] be interpreted in the context of Part III of the Convention, as well as the broader context of the Convention [...]."[886]

480. The Russian Federation submits that the starting point of any legal evaluation concerning a State's activities in its internal waters or territorial sea must be the sovereignty that States enjoy over their territory.[887] According to the Russian Federation, the right of transit passage is to be exercised within the territorial sea, where coastal sovereignty reigns supreme, as recognised by Article 34 of the Convention, meaning that there must be a balance between the right of transit passage and the rights of the coastal State.[888] In the view of the Russian Federation, Article 38, paragraph 3, of the Convention further highlights the importance given to sovereignty, as it claims that this provision leaves no doubt "that the coastal State exercises sovereign powers in making [the] judgment [whether an activity is an exercise of the right of transit passage or not]."[889]

481. The Russian Federation maintains that "the right of transit passage cannot possibly shield a transiting ship engaged in threat or use of force under Article 39(1)(b) [of the Convention] from being subjected to the rule of self-defence."[890] Moreover, as evidenced by Article 41, paragraph

882 Rejoinder, para. 226.
883 Rejoinder, para. 226.
884 Counter-Memorial, para. 147.
885 Rejoinder, paras 228-29.
886 Rejoinder, para. 230.
887 Counter-Memorial, para. 147; Rejoinder, paras 231-32; *see also* Hearing, 28 September 2024, 86:6-10 (Ortega Lemus).
888 Rejoinder, paras 231-32.
889 Rejoinder, para. 233.
890 Rejoinder, para. 234.

7, Article 42, paragraph 4, and Article 40 of the Convention, foreign ships in the exercise of the right of transit passage are subject to certain limitations as a result of the coastal State's sovereignty.[891] Article 233 of the Convention, the Russian Federation continues, allows the States bordering straits to take enforcement action in certain circumstances and "Article 234 [of the Convention] may also impact on the right of transit passage in ice-covered areas of sea."[892] The Russian Federation highlights that the preamble, relied upon by Ukraine for its argument that the Convention accords the right of transit passage special importance, expresses the need for "due regard for the sovereignty of all States," thereby recognising that the establishment of a legal order for the seas and oceans is conditioned by due regard for State sovereignty.[893] Given the importance attributed to sovereignty, in the view of the Russian Federation, limitations of this principle must be by virtue of express provisions.[894]

482. While the Russian Federation agrees that the right of navigation is expressly recognised in the Convention, it argues that limitations of that right are acceptable under the Convention.[895] The Russian Federation proposes that the principle of finding a necessary balance between the rights of the coastal State and those of other States, expressed among others in the prohibition of only "unjustifiable interference" in Article 78, paragraph 2, of the Convention or in the requirement of "due regard" in Article 87, is of general application.[896] The Russian Federation further refers to the finding in *Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom) (hereinafter "Chagos MPA")* that Article 194, paragraph 4, of the Convention "requires a balancing act between competing rights, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue."[897]

483. Building on these principles, the Russian Federation states that "[a] justifiable interference must be assumed when the measures taken are proportionate and necessary for meeting the objectives legitimately pursued by a State."[898] Applied to the present case, the Russian Federation submits that all interests at stake must be assessed, including the Russian Federation's "infrastructural and economic needs, as well as the existing and potential traffic through the Kerch Strait, notably, the

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891 Rejoinder, para. 234.
892 Rejoinder, para. 235.
893 Rejoinder, paras 237-38.
894 Counter-Memorial, para. 148; *The Case of the S.S. Lotus (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Series A, No. 10, p. 18 (**Annex RUL-83**).
895 Counter-Memorial, para. 149.
896 Counter-Memorial, para. 149; *see also* Hearing, 28 September 2024, 86:10-20; 88:25-89:5 (Ortega Lemus).
897 PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom)* (hereinafter "*Chagos MPA*"), Award of 18 March 2015, para. 540 (**Annexes RUL-85, UAL-18**).
898 Counter-Memorial, para. 150; *see also* Rejoinder, para. 246.

types of vessels expected to call at the ports of the Sea of Azov and the type of cargo they might be carrying."[899]

484. Contrary to Ukraine's assertion, the Russian Federation submits that neither the drafting history of the Convention, nor State practice provide conclusive support for Ukraine's interpretation.[900] According to the Russian Federation, "the drafting history of UNCLOS amply supports the Russian Federation's position that balancing the interests of the coastal and the user States permeates Part III of the Convention."[901]

485. Regarding Ukraine's arguments on alleged State practice in support of its position,[902] the Russian Federation submits that none of the instances referred to by Ukraine lend support to its interpretation, as Ukraine misrepresents relevant aspects with regard to *Passage through the Great Belt* and its other references to alleged State practice are inapposite.[903]

d. On the Alleged Violations of Articles 38 and 44 of UNCLOS Caused by the Construction of the Kerch Strait Bridge

486. The Russian Federation takes the position that the interference with navigation was both justifiable and proportionate in light of what it views as the economic and humanitarian necessity to connect the Crimean Peninsula to mainland Russia, especially after the imposition of a blockade by Ukraine in 2014, as well as in light of the potential adverse environmental effects of constructing a larger bridge, and the continuing ability of the vast majority of vessels to pass through the Kerch Strait even after the bridge's construction.[904]

487. As a preliminary matter, the Russian Federation draws attention to the fact that Ukraine's claims in respect of navigation in the Kerch Strait relate not to the Strait itself, but to a narrow artificial canal dredged within it, the Kerch-Yenikale Canal—without which the Kerch Strait would hardly

899 Counter-Memorial, para. 150.
900 Rejoinder, paras 239-61.
901 Rejoinder, para. 240; *see also* paras 241-43 *citing* Third United Nations Conference on the Law of the Sea, Summary Records of Meetings of the Second Committee Fifth meeting, UN Doc. A/CONF.62/C.2/SR.5, 16 July 1974, p. 110, para. 22 (**Annex RU-817**); Third United Nations Conference on the Law of the Sea, Summary Records of Meetings of the Second Committee 12th meeting, UN Doc. A/CONF.62/C.2/SR.12, 22 July 1974, p. 127, para. 8 (**Annex RU-818**); Third United Nations Conference on the Law of the Sea, Summary Records of Meetings of the Second Committee 15th meeting, UN Doc. A/CONF.62/C.2/SR.15, 25 July 1974, p. 142, para. 4 (**Annex RU-819**); *see also* Hearing, 28 September 2024, 89:6-91:20 (Ortega Lemus).
902 *See* para. 430 above.
903 Rejoinder, paras 247-61.
904 Counter-Memorial, para. 151; *see also* Rejoinder, paras 263-65; Hearing, 5 October 2024, 72:21-73:2 (Korolev).

be a navigable waterway.[905] In this respect, the Russian Federation recalls that artificial waterways are generally considered as not governed by the Convention.[906] It also reiterates its position that passage through the Kerch Strait was governed by the Azov/Kerch Cooperation Treaty at the time this Arbitration was initiated, and submits that "priority should not be given to a right that did not even exist in the Strait" at that time.[907]

i. The Construction of the Bridge Was an Economic and Humanitarian Necessity

488. Pointing to the past, the Russian Federation highlights Ukraine's previous support for constructing a bridge across the Kerch Strait as a "Russian-Ukrainian joint venture" given its "huge economic and humanitarian importance."[908] The Russian Federation goes on to argue that "after Crimea's reunification with Russia, Ukraine refused for political reasons to further engage with Russia on this matter [...]" and that "considering the circumstances, Russia had to proceed with the construction [...]."[909]

489. According to the Russian Federation, the need for constructing a bridge was all the more urgent because, in 2014, Ukraine imposed a full-scale indefinite blockade on the Crimean Peninsula.[910] Against this background, the Russian Federation claims that, in order to address the humanitarian needs of the Crimean population, it was necessary to take emergency measures to connect Crimea to the infrastructure networks in mainland Russia.[911] The Russian Federation notes that, at the time, the only available connection from mainland Russia to Crimea was the Kerch maritime ferry line, which was not sufficient to match the increased needs.[912]

490. The Russian Federation claims that the construction of the bridge greatly improved the situation on the Crimean Peninsula, increasing traffic flow,[913] trade and tourism,[914] and stabilising the fuel supply.[915]

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905 Rejoinder, paras 267-68.
906 Rejoinder, para. 269.
907 Rejoinder, para. 270.
908 Counter-Memorial, para. 153; *see also* Hearing, 28 September 2024, 100:14-22 (Korolev).
909 Counter-Memorial, para. 154.
910 Counter-Memorial, para. 155; *see also* Rejoinder, paras 273, 277-84.
911 Counter-Memorial, para. 156.
912 Counter-Memorial, para. 157.
913 Interfax, 5 Million Vehicles Have Crossed the Crimean Bridge in a Year of Operation, 15 May 2019 (**Annex RU-339**).
914 Letter from the Ministry of Economic Development of the Russian Federation to the Ambassador-at-Large No. D08i-4027, p. 3 (15 February 2022) (**Annex RU-341**).
915 Counter-Memorial, para. 158; *see also* Rejoinder, paras 285-88.

491. Responding to Ukraine's assertion that the humanitarian necessity of the bridge was irrelevant, the Russian Federation argues that the right of transit passage was not the only right at stake when the bridge was built: States do not only have sovereignty over their territory, but also a duty to protect their citizens and ensure their well-being and foster development.[916] The Russian Federation suggests that its activities were in pursuit of these goals and therefore of relevance.[917] Further, according to the Russian Federation, Ukraine's argument that in any case a higher bridge could have been built "misses the mark [as] Ukraine is quick to downplay the real threats to the population of the Crimea that the Kerch Bridge prevented; yet it is slow to demonstrate how its interests were actually harmed by the Bridge's construction."[918]

ii. The Bridge's Design Was the Only Viable Option

492. The Russian Federation claims that construction of the Kerch Strait bridge was the only viable option.[919] According to the Russian Federation, the impossibility of satisfying every concern to the fullest extent when implementing major infrastructure projects necessitates conducting a cost-benefit analysis.[920] It submits that it undertook such an analysis concerning the key characteristics of the bridge, including its location, design, and clearance.[921]

493. Regarding the bridge's location and design, the Russian Federation claims that numerous alternative options were considered for the location of a transport crossing as part of the feasibility study, including various combinations of bridges and underwater tunnels, but that the final location and design were considered the most advantageous.[922]

494. Regarding the clearance of the bridge, the Russian Federation claims that it was the result of careful consideration and that an analysis of historical traffic in the Kerch-Yenikale navigation channel confirms the reasonableness of the 33-metre clearance.[923] The Russian Federation further dismisses Ukraine's reliance on the fact that the feasibility study refers to the USSR's proposal

916 Rejoinder, para. 274.
917 Rejoinder, para. 274.
918 Rejoinder, para. 289.
919 Counter-Memorial, paras 161-86.
920 Counter-Memorial, para. 161; *see also* Hearing, 28 September 2024, 104:1-10 (Korolev).
921 Counter-Memorial, para. 161.
922 Counter-Memorial, paras 162-67; [redacted] *See also* Rejoinder, para. 293.
923 Counter-Memorial, paras 168-86.

from 1947 to build a bridge over the Kerch Strait with a clearance of 40 metres, as this is merely "a piece of historical background."[924]

495. The Russian Federation submits that the Design, Survey, and Research Institute of Sea Transport "Soyuzmorniiproekt" (hereinafter "Soyuzmorniiproekt"), an institute specialising in designing and reconstructing sea ports, ship yards, berthing, protection and hydraulic engineering structures,[925] developed the bridge dimensions based on the results of "comprehensive engineering surveys [...] and following all-encompassing research and development works [...]."[926] Soyuzmorniiproekt's work was then approved by State experts.[927] In response to Ukraine's claim that the Russian Federation did not produce the design documents in full, the Russian Federation submits that it produced all parts relevant to its position in this Arbitration.[928] It argues that there is no obligation to produce any irrelevant documents, especially given the threat to its security interests due to Ukraine's repeated threats and attempts to destroy the bridge.[929]

496. The Russian Federation submits that bridges should primarily be designed to reflect the parameters of the waters they cross.[930] Against this background, the Russian Federation points out that permissible vessel draft in the Kerch-Yenikale navigation channel has not exceeded eight metres ever since it was built in the 19th century.[931] Thus, according to the Russian Federation, it is not the bridge's clearance that prevents large-sized ships from calling at the Sea of Azov ports, "but rather the existing geographic, navigational and hydrographic conditions in the [Kerch-Yenikale navigation channel] [...] together with the size of the two main ports in the Sea of Azov – Berdyansk and Mariupol – which do not have reception facilities for the vessels with a draft of more than 8 m."[932]

497. The Russian Federation states that conducting a "thorough analysis of materials on shipping in the Azov-Black Sea basin over the past decades, with the involvement of related agencies and departments," Soyuzmorniiproekt identified only two types of large-sized vessels that had been

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924 Rejoinder, para. 299.
925 Counter-Memorial, para. 169, n. 215.
926 Counter-Memorial, para. 169.
927 Counter-Memorial, para. 169.
928 Rejoinder, para. 295.
929 Rejoinder, para. 295.
930 Counter-Memorial, para. 170; Opinion of [redacted], para. 69 (22 August 2022). *See also* Hearing, 28 September 2024, 105:9-19 (Korolev).
931 Counter-Memorial, para. 172 *citing* TASS, Ministry of Transport: the Clearance of the Arches of the Crimean Bridge will Ensure the Passage of All Ships, 29 August 2017 (**Annex RU-348**).
932 Counter-Memorial, para. 173.

navigating through the Kerch Strait to Ukrainian ports prior to 2015.[933] According to the Russian Federation, these were only loaded at 30-40 percent capacity due to draft restrictions, making the handling of such large-tonnage ocean-going vessels at the relevant ports and their passage through the Kerch-Yenikale navigation channel unreasonable.[934] Regarding Ukraine's claims that the study is inadequate and based on only two vessels, the Russian Federation claims that Ukraine misunderstands the study, which in fact considered various parameters, such as the types, sizes, deadweights, cargo types, and drafts.[935]

498. Further, the Russian Federation states that Ukraine's claim that the study recommends a vertical clearance of 39.5-42.5 metres is also incorrect.[936] Instead, according to the Russian Federation, the study concludes that "the clearance of the navigable span should be 35.0 metres for more than 95% of ships calling at the Ukrainian ports and for 100% of ships calling at the Russian ports, taking into account the prospects for 2030."[937] In the view of the Russian Federation, to accommodate for the largest ships to have historically passed through the Kerch Strait would make exceedingly expensive modifications to the bridge's design necessary, which would in turn negatively affect the necessary railway capacity.[938] The Russian Federation also asserts, contrary to Ukraine's claims, that a clearance of 39.5-42.5 metres would not accommodate vessels with a height of 50.5 metres, since the maximum safe passing height would be 40.5 metres, which—taking into account the draft limitation of 8 metres—leads to a maximum height of 48.5 metres.[939]

499. The Russian Federation further relies upon an "alternative independent analysis of traffic in the [Kerch-Yenikale navigation channel] confirming that the proportion of large-sized ocean-going ships transiting the [channel] was negligible, with their transit being cost-ineffective."[940] Responding to Ukraine's criticism that the Russian Federation's expert, [redacted], has no relevant expertise as an economist, and that his testimony on the alleged lack of economic rationale for erecting a high clearance bridge should accordingly be inadmissible, the Russian

933 Counter-Memorial, para. 174; *see also* Rejoinder, para. 297.
934 Counter-Memorial, para. 174; [redacted].
935 Rejoinder, para. 300.
936 Rejoinder, paras 301-02.
937 Counter-Memorial, para. 175 *citing* [redacted]. *See also* Rejoinder, paras 301-02.
938 Rejoinder, paras 302-03.
939 Rejoinder, para. 304.
940 Counter-Memorial, para. 176 *referring to* Opinion of [redacted] (22 August 2022).

Federation states that despite [redacted] competence being based on his experience in maritime shipping and shipbroking, it had procured a separate expert report on maritime shipping economics, which comes to the same conclusion as [redacted].[941]

500. [redacted][942] [redacted][943]

Despite Mr. McJury's claim that the industry practice of partial loading and discharge is well established, the Russian Federation argues that "nothing in his report indicates that such practice was actually 'well established' in the ports of the Azov Sea in respect of vessels over 40,000t DWT."[944] [redacted].[945]

501. Further, the Russian Federation calls into question Ukraine's suggestion, based on its comparison with other bridges, that the Kerch Strait bridge should have a 60-70 metres clearance .[946] The Russian Federation takes issue with Ukraine seemingly suggesting that the degree of business of a waterway should affect the required bridge height.[947] First, it argues that "busy" is a relative term, and the Kerch Strait is nowhere near as busy as the Bosphorus Strait or the Panama Canal.[948] Second, the traffic in the Kerch Strait is mostly comprised of smaller vessels heading to and from ports in shallower waters.[949] Third, the Russian Federation asserts that Ukraine has failed to provide a single example of a vessel with an air draft of around 60-70 metres having previously

941 [redacted]
942 [redacted]
943 [redacted] Opinion of [redacted] paras 57, 59-63 (22 August 2022).
944 Rejoinder, para. 309; *see also* Hearing, 28 September 2024, 117:19-25 (Korolev).
945 Counter-Memorial, paras 180-83; Opinion of [redacted] paras 50-56, 68 (22 August 2022). *See also* Rejoinder, paras 308, 310-24; Opinion of [redacted] and [redacted], paras 56, 82 (5 December 2023); Second Opinion of [redacted]., paras 141, 145 (6 December 2023).
946 Rejoinder, paras 328-49.
947 Rejoinder, paras 331-32.
948 Rejoinder, para. 333.
949 Rejoinder, para. 334.

passed through the Strait.[950] [redacted][951]

502. [redacted][952] Countering Ukraine's criticism of its list of comparable bridges, the Russian Federation submits that Ukraine seems to be suggesting that the height of a bridge should be dependent on the legal status of the surrounding bodies of water, which is incorrect, as it makes no sense to account for large vessels simply because of a body of water's status, if it is in fact too shallow to accommodate such large vessels.[953] Instead, the Russian Federation argues that the design of each bridge should be determined on a case-by-case basis, taking into account geographic and regional features, including depth of the waterway, vessel traffic, and weather conditions.[954] The Russian Federation further rejects additional criticism voiced by Ukraine regarding its list of comparable bridges, considering its comparators more fitting than those proposed by Ukraine.[955]

503. The Russian Federation also emphasises that a waterway's depth is a major factor influencing a bridge's clearance.[956] In its view, even if Ukraine were able to demonstrate a causal link between the construction of the bridge and the cessation of port calls from vessels over 40,000t DWT, the fact remains that the correlation between the depth of a waterway and a bridge's clearance is direct: a deeper waterway warrants a higher bridge.[957] The Russian Federation concludes that Ukraine's reference to the Øresund Bridge as an example is misleading in this regard, as a significant portion of traffic in that waterway historically involves ships with higher freeboards but shallower drafts, such as Ro-Ro vessels and ferries.[958]

950 Rejoinder, para. 335.
951 [redacted]; *see also* Rejoinder, para. 330.
952 [redacted]; Opinion of [redacted] paras 74-76, Table 5 (22 August 2022).
953 Rejoinder, para. 337; *see also* Hearing, 29 September 2024, 80:15-82:10 (Korolev, [redacted]).
954 Rejoinder, para. 339.
955 Rejoinder, paras 340-43.
956 Rejoinder, paras 345-48.
957 Rejoinder, paras 346-47.
958 Rejoinder, para. 348.

iii. The Bridge's Interference with Navigation Is Minimal

504. The Russian Federation also contends that, contrary to Ukraine's allegations, interference with navigation caused by the Kerch Strait bridge was minimal.[959] To begin with, the Russian Federation avers that the rate of vessel crossings through the Kerch Strait has generally remained constant, except in 2017 and 2020, which each saw a significant increase in crossings.[960] Equally, the Russian Federation submits that the number of vessels transiting to and from the ports of Mariupol and Berdyansk has also remained at pre-construction level.[961] [redacted][962] [redacted][963] [redacted][964] [redacted][965] [redacted][966] [redacted][967] It also asserts that the bridge's construction did not influence the overall cargo turnover of Mariupol and Berdyansk nor the amounts of particular cargo imported to and exported from these ports.[968] The

959 Counter-Memorial, paras 187-93; Rejoinder, paras 350-73.

960 Counter-Memorial, para. 177; Rosmoport, VTS Services, General Information, pp. 26-27 (**Annex RU-209**).

961 Counter-Memorial, para. 179; [redacted].

962 [redacted].

963 [redacted].

964 [redacted].

965 [redacted].

966 [redacted].

967 [redacted].

968 Rejoinder, paras 323, 359-61; *see also* Hearing, 5 October 2024, 77:11-78:1 (Korolev).

observed downward trends in certain types of cargo, the Russian Federation notes, referring to the study by [redacted] and [redacted], started before the bridge's construction.[969]

505. The Russian Federation rejects Ukraine's criticism of [redacted], [redacted], and [redacted] reliance on the VTS data.[970] [redacted][971] The Russian Federation goes on to claim that the number of Ukraine-bound vessels over 30,000t DWT has historically fluctuated around similar figures, in the timespan from 2015 to 2021, between 61 in 2017 and 31 in 2021.[972]

506. The Russian Federation further claims that, in 2017, Mariupol port officials "publicly confirmed that limitations on navigation originated in the Strait's natural characteristics, not the Bridge clearance, and assured that it would not be a problem considering the availability of a fleet capable of navigating underneath."[973] Consequently, the Russian Federation maintains that the "alleged decline of traffic cannot be linked to the construction of the Bridge solely."[974] It suggests that a more likely explanation is an overall downturn of trade in the region and the economic unviability of sending large-dimension ocean-going vessels into the Kerch Strait.[975]

507. Concerning specialised vessel types, including JDRs, the Russian Federation points out that a bridge clearance of 60-70 metres would still not accommodate any of the JDRs Ukraine refers to in its submissions.[976] Regarding Ukraine's assertion that requiring to cut into and detach parts of the JDRs at sea so as to enable their passage through the Kerch Strait is irreconcilable with the notion of unimpeded passage, the Russian Federation responds that removal and replacement of JDR's legs is possible, widely practiced and was used by Ukraine's state oil and gas company

969 Rejoinder, para. 361 *referring to* Opinion of [redacted] and [redacted], para. 77 (5 December 2023).
970 Hearing, 28 September 2024, 113:20-114:7; 5 October 2024, 79:6-80:19 (Korolev).
971 Counter-Memorial, para. 189.
972 Counter-Memorial, para. 189; [redacted]
973 Counter-Memorial, para. 190; Center for Transport Strategies, 8 Statements on Grain Logistics in the Azov Region, 19 June 2017 (**Annex RU-351**).
974 Counter-Memorial, para. 191; Opinion of [redacted], para. 115 (22 August 2022).
975 Counter-Memorial, para. 191; Opinion of [redacted], paras 112, 114-15 (22 August 2022). *See also* Rejoinder, para. 358.
976 Counter-Memorial, para. 192; *see* Opinion of Brian McJury, Waves Group, p. 28, Figure 12 (18 May 2021); Opinion of [redacted], para. 122 (22 August 2022).

Naftogaz to transport two mobile offshore drilling units over the Bosporus Strait.[977] It adds that other specialist vessels also routinely undergo alterations to pass under bridges, listing examples of quay cranes in the United States.[978] According to the Russian Federation, even the tallest bridges in the world are unable to freely accommodate mobile offshore drilling units.[979] It questions whether drilling rigs can be regarded as ships, raising the issue of whether the right of transit passage applies to them as it would to an ordinary ship.[980] Additionally, the Russian Federation rejects as incorrect Ukraine's allegation that, because Rosneft addressed the possibility of JDRs being transported to the Sea of Azov, the Russian Federation was "on notice that the proposed clearance of the Bridge would hinder the passage of JDRs."[981]

e. On Ukraine's Allegations of Non-Cooperation as to Threats to Safe Navigation

508. Apart from its jurisdictional arguments made in its Counter-Memorial,[982] and reiterated in its Rejoinder,[983] the Russian Federation asserts that Ukraine advanced its claims based on Articles 43 and 44 of UNCLOS for the first time in its Revised Memorial, which, according to the Russian Federation, makes it a new claim impermissibly introduced in violation of the Arbitral Tribunal's directions and should accordingly be dismissed.[984]

509. In the alternative, the Russian Federation submits that Articles 43 and 44 of the Convention do not stipulate "a general and all-encompassing obligation to cooperate, with the exception of an actual and imminent danger that needs to be brought to the attention of the public."[985] In any event, the Russian Federation argues, "Russia, for the sake of good order, has been giving and continues to give proper publicity to any real danger to navigation in the Kerch Strait. At the same time, all the navigational risks that Ukraine speculates on [...] are no more than hypothetical and are not based on facts."[986] Further, the Russian Federation claims that Ukraine made any cooperation impossible, and national security concerns justified the Russian Federation in not providing documents.[987]

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977 Counter-Memorial, para. 192; New Jack-up Rig *Nezalezhnist* Arrived at the Greek Seaport of Kavala and Leaved [*sic*] for the Bosporus Strait to Cross into the Black Sea, Naftogaz.com, 2 October 2012 (**Annex RU-233**). *See also* Rejoinder, paras 363-72.
978 Rejoinder, paras 365-66.
979 Rejoinder, para. 367.
980 Rejoinder, para. 369.
981 Rejoinder, para. 370 *citing* Reply, para. 153.
982 Counter-Memorial, paras 196-97.
983 Rejoinder, para. 375.
984 Rejoinder, para. 377; *see also* Hearing, 28 September 2024, 121:11-122:11 (Korolev).
985 Counter-Memorial, para. 195. *See also* Rejoinder, paras 374-75.
986 Counter-Memorial, para. 195. *See also* Rejoinder, paras 374-75.
987 Rejoinder, para. 376.

510. Concerning the extent of the obligations under Articles 43 and 44 of the Convention, the Russian Federation argues that it is more limited than suggested by Ukraine.[988] According to the Russian Federation, Article 43 of the Convention does not contain an obligation to make public any of the dangers alleged by Ukraine.[989] Rather, the Russian Federation contends that it merely "points out the way in which the issue of navigational aids is to be handled between user and coastal States, i.e. by agreement," but contains "no duty upon the coastal State to provide navigational aids."[990] It argues that the use of the word "should" as opposed to "shall" in Article 43 leaves little doubt that, while cooperation is desirable, there is no such obligation on States.[991] The Russian Federation asserts that the authority relied upon by Ukraine in support of its position fails to explain why the ordinary meaning of Article 43 should be departed from.[992] The Russian Federation further argues that this provision was conceived as a cost-sharing provision to address a perceived imbalance between the interests of coastal States bearing the expenses of providing navigational aids in their straits, on the one hand, and those of user States benefiting from those aids, on the other.[993] Consequently, the Russian Federation continues, the areas of cooperation envisaged by Article 43 do not cover all navigational matters, but are limited to necessary navigational and safety aids.[994] It refers to the drafting history of the Convention to illustrate this point, and maintains that bridge design documentation is not a navigational or safety aid, nor a device, system or service used to enhance safety of navigation, leaving it outside the scope of Article 43.[995]

511. Regarding Article 44 of the Convention, the Russian Federation submits that this provision requires States bordering straits to give appropriate publicity to real and imminent navigational dangers.[996] According to the Russian Federation, Article 44 is based on Article 16 of the ILC Articles concerning the Law of the Sea and therefore meant to "confirm[...] the principles which were upheld by the International Court of Justice in its judgment of 9 April 1949 in" the *Corfu*

988 Counter-Memorial, paras 198-206; Rejoinder, paras 381-401.
989 Counter-Memorial, para. 199.
990 Counter-Memorial, para. 199 *citing* Bing Bing Jia, 'Straits Used For International Navigation: Article 43' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 321, paras 1-2 (**Annex RUL-86**).
991 Rejoinder, para. 383; *see also* Hearing, 28 September 2024, 123:5-22 (Korolev).
992 Rejoinder, para. 384.
993 Rejoinder, para. 385.
994 Rejoinder, para. 386.
995 Rejoinder, paras 387-88.
996 Counter-Memorial, para. 200. *See also* Rejoinder, paras 391-92.

Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania) (hereinafter "*Corfu Channel*")."[997] The Russian Federation points to the ICJ's finding that:

> The obligations incumbent upon the Albanian authorities consisted in *notifying*, for the benefit of shipping in general, the *existence* of a minefield in Albanian territorial waters and in warning the approaching British warships of the *imminent danger* to which the minefield exposed them.[998]

512. In contrast with the ICJ's ruling, according to the Russian Federation, all of Ukraine's allegations are of a hypothetical nature.[999] The Russian Federation elaborates that the "appropriate publicity" under Article 44 of the Convention depends on all the relevant circumstances and does not cover all and any kind of information the user State feels entitled to demand, but rather is limited to information on real dangers to navigation.[1000] The Russian Federation submits that a bridge is not a navigational danger *per se,* meaning that a State planning to construct one does not need to cooperate with other States within the meaning of Article 44 of the Convention.[1001] It also avers that Ukraine's reference to scholarly writing allegedly supporting the idea that bridges could constitute a danger to navigation is taken out of context.[1002]

513. What is more, the Russian Federation claims that the term "appropriate publicity" in Article 44 of the Convention refers to the way that information can effectively reach its end users, and does not imply importing into Article 44 a duty to provide documents on request of a user State.[1003]

514. The Russian Federation maintains that its reading of Article 44 of the Convention is supported by State practice.[1004]

515. Additionally, the Russian Federation submits that, acting in good faith, it raised the issue whether a State planning to construct a bridge across a navigational channel had an obligation to notify the IMO of such intention.[1005] The IMO responded that there was no such duty under the International Convention for the Safety of Life at Sea, but rather a requirement to inform through

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997 Counter-Memorial, para. 200; Commentary to Article 16 in *Yearbook of the International Law Commission*, Vol. II, p. 273 (1956) (**Annex RUL-87**). *See also* Rejoinder, para. 393. *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22 (**Annexes RUL-88, UAL-15**).

998 Counter-Memorial, para. 200 *citing Corfu Channel*, cit., n. 997, p. 22 (**Annexes RUL-88**, **UAL-15**) [emphasis added by the Russian Federation].

999 Counter-Memorial, para. 201.

1000 Counter-Memorial, para. 202; *see also* Rejoinder, para. 394.

1001 Counter-Memorial, para. 213.

1002 Rejoinder, para. 395.

1003 Rejoinder, para. 396.

1004 Rejoinder, para. 397.

1005 Letter from the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization to the Director of Maritime Safety Division to the International Maritime Organization, No. 003/156, 24 July 2015 (**Annex RU-358**).

navigational warnings of any dangers,[1006] which the Russian Federation claims to have duly performed.[1007]

516. In consequence, the Russian Federation maintains that Articles 43 and 44 of the Convention provide no basis for Ukraine to demand "(1) 'all available information relating to the construction of the Kerch Strait bridge, [and any associated threats to the marine environment]'; (2) information about the risk of ice jams and related navigational obstacles posed by the Kerch Strait bridge; and (3) technical design specifications and assessments in order to assess the risk of collapse."[1008]

517. Even if Ukraine's interpretation of Articles 43 and 44 of the Convention were correct, the Russian Federation emphasises that none of the threats to navigation claimed by Ukraine proved to be actual, and consequently did not require the Russian Federation to give due publicity to any of them.[1009]

518. The Russian Federation claims that Ukraine fails to substantiate its allegations that the bridge is unsafe due to its alleged "hasty" construction.[1010] According to the Russian Federation, the construction of the bridge proceeded swiftly not because of an alleged lack of due diligence, but due to the urgency caused by the blockade of Crimea.[1011] The Russian Federation submits that the simultaneous conduct of preparatory works and the State Environmental Expert Review (hereinafter "SEER") of design documentation is common practice when it comes to large-scale construction projects of national importance.[1012]

519. Regarding the dangers associated with ice build-up and increased sedimentation alleged by Ukraine, the Russian Federation denies that the bridge had an impact on either of these natural phenomena and claims that any problems arising with ice build-up or sedimentation would be handled appropriately, by issuing warnings and using ice-breakers or implementing a dredging programme.[1013]

1006 Letter from the Director of Maritime Safety Division to the International Maritime Organization to the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization, 29 July 2015 (**Annex RU-359**).

1007 Counter-Memorial, para. 214.

1008 Counter-Memorial, para. 202 *citing* Revised Memorial, para. 154.

1009 Counter-Memorial, paras 216-24; Rejoinder, paras 402-09.

1010 Counter-Memorial, paras 218, 400.

1011 Counter-Memorial, para. 219.

1012 Counter-Memorial, para. 220.

1013 Counter-Memorial, paras 221-22; Opinion of [redacted], para. 97 (10 September 2022); Opinion of [redacted], paras 126-29 (22 August 2022).

520. The Russian Federation claims that any attempts to cooperate with Ukraine would have been futile.[1014] According to the Russian Federation, Ukraine's termination of the 2013 Cooperation Agreement[1015] in October 2014 made it clear that "it would be utterly hopeless to expect any cooperation from the Ukrainian side."[1016] Despite this, the Russian Federation states that as "a matter of goodwill, on 13 March 2015, Russia informed Ukraine of its decision to implement a project for a transport crossing across the Kerch Strait."[1017] According to the Russian Federation, Ukraine manifested its non-cooperative attitude in its response that it:

> [...] has not given, does not give, and does not intend to give its consent "to the implementation of a project involving the construction of a transport crossing across the Kerch Strait" in the internal waters of Ukraine around the Autonomous Republic of Crimea and the Azov-Kerch water zone.[1018]

Nonetheless, the Russian Federation adds, it always duly notified Ukraine and other user States on those occasions when construction works could affect navigation in the Kerch-Yenikale navigation channel.[1019]

521. The Russian Federation emphasises that, as Article 43 of the Convention makes clear, cooperation requires action by both sides, and Ukraine showed no interest in cooperation.[1020] It states that the *Note Verbale* of 12 July 2017, relied upon by Ukraine, does not even mention safety of navigation.[1021] In the view of the Russian Federation, the timing of the *Note Verbale* also indicates that Ukraine was not ever interested in true cooperation, but rather that the note was sent to support a "hastily constructed" claim.[1022]

522. In any event, the Russian Federation argues that there were and are legitimate security concerns for not disclosing any of the requested information, given the repeated military threats made against the bridge by "various persons, including Ukrainian top officials" and more recently the targeting of the Kerch Strait bridge "by the Ukrainian special forces."[1023] Regarding Ukraine's

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1014 Counter-Memorial, para. 207; Rejoinder, paras 410-17; *see also* Hearing, 28 September 2024, 128:16-21 (Korolev).

1015 Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Joint Steps to Organize the Construction of a Transport Crossing Across the Kerch Strait (17 December 2013) (**Annex UA-96-AM**).

1016 Counter-Memorial, para. 209.

1017 Counter-Memorial, para. 209 *referring to Note Verbale* from the Russian Federation to Ukraine, No. 2511/2dsng (13 March 2015) (**Annex RU-354**).

1018 Counter-Memorial, para. 209 *citing Note Verbale* from Ukraine to the Russian Federation, No. 610/22-110-1132 (29 July 2015) (**Annex UA-233**); *see also* Rejoinder, para. 412.

1019 Counter-Memorial, paras 210-12.

1020 Rejoinder, para. 412.

1021 Rejoinder, para. 413.

1022 Rejoinder, para. 414.

1023 Counter-Memorial, para. 206. *See also* Rejoinder, paras 425-26; Hearing, 28 September 2024, 129:9-130:13 (Korolev).

argument that neither Article 43 nor Article 44 of the Convention contain an exception for security interests, the Russian Federation reiterates that they do not contain a duty to share the documentation requested by Ukraine in the first place.[1024] Even assuming such an obligation, the Russian Federation refers to Article 302 of the Convention which reads:

> [...] nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security.[1025]

523. The Russian Federation also rejects Ukraine's argument that current security threats cannot excuse past failures to provide information, by arguing that security concerns go back as far as 2014 and Ukraine's declared plans to seek membership with NATO.[1026] It emphasises the importance of the Kerch Strait bridge for Crimea and draws parallels with NATO airstrikes on various bridges in the Federal Republic of Yugoslavia in 1999 to justify its concerns about sharing documents with Ukraine.[1027]

f. On the Alleged Violations of Articles 38 and 44 of UNCLOS Caused by the Discriminatory Delays and Inspections of Vessels Traveling to and from Ukraine

524. The Russian Federation submits that the navigation control measures put in place in the Kerch Strait do not violate Articles 38 and 44 of the Convention.[1028] First, the Russian Federation reiterates its position that the Kerch Strait and the Sea of Azov are internal waters of the Russian Federation and as such the Kerch Strait is not subject to Articles 38 and 44 and the right of transit passage.[1029] Further, it repeats its argument that at all relevant times navigation in the Kerch Strait was governed by the Azov/Kerch Cooperation Treaty as *lex specialis* to the Convention.[1030] Regarding inspections of Ukrainian vessels, the Russian Federation asserts that Ukraine's claims seek "to re-introduc[e] into these proceedings the issue of the Russian Federation's sovereignty over Crimea, in circumvention of the 2020 Award [on Preliminary Objections]."[1031] It also submits that these claims are inadmissible, as Ukraine's claims regarding vessel inspections were not contained in Ukraine's original submissions and subsequently were not properly introduced into the proceedings with the leave of the Arbitral Tribunal, and in any case are all based on events

1024 Rejoinder, para. 418.
1025 Rejoinder, para. 419.
1026 Rejoinder, paras 420-22.
1027 Rejoinder, paras 421-24.
1028 Counter-Memorial, paras 225-46; Rejoinder, paras 427-71.
1029 Counter-Memorial, paras 227-28, 276; Rejoinder, paras 430, 499.
1030 Rejoinder, paras 431, 500. *See also* Counter-Memorial, paras 282-84.
1031 Rejoinder, para. 501. *See also* Counter-Memorial, paras 279-80.

that post-date the critical date of 16 September 2016, the date of the Notification and Statement of Claim.[1032]

525. Apart from these objections, the Russian Federation also claims that transit passage is not an absolute right in international practice,[1033] and the regulations introduced by the Russian Federation are not in breach of the Convention.[1034]

i. Traffic Regulations in the Kerch Strait

526. Relying on scholars' works, the Russian Federation submits that "the transit passage regime has been the subject of a series of exceptions, reservations, declarations, qualifications and attenuations."[1035] It states that a general right of transit passage has not been accepted universally,[1036] and that it is foreseeable that transit passage will be qualified in the future to reflect the higher shipping traffic that is potentially hazardous to navigation and the marine environment.[1037]

527. Further, referring by way of example to Articles 34, 39, 42, and 43 of the Convention, the Russian Federation argues that the Convention itself provides for nuances and limitations of the right of transit passage.[1038]

528. Highlighting Ukraine's acknowledgment of the power of a coastal State to adopt laws and regulations relating to safety of navigation and regulation of maritime traffic, the Russian Federation recalls that "the Russian Federation's traffic regulations in the Kerch Strait are almost identical to those that had been applied by Ukraine itself prior to Crimea's reunification with the Russian Federation in 2014."[1039] Against this background, the Russian Federation goes on to

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1032 Rejoinder, paras 503-10.
1033 Counter-Memorial, para. 229; Rejoinder, para. 434.
1034 Rejoinder, para. 432.
1035 Counter-Memorial, para. 229 *citing* Tullio Scovazzi, 'Management Regimes and Responsibility for International Straits', Marine Policy Vol. 19 (1995), p. 137 at p. 146 (**Annex RUL-89**).
1036 Counter-Memorial, para. 229 *referring to* Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edition, Manchester University Press 1999), p. 113 (**Annex RUL-90**).
1037 Counter-Memorial, para. 229 *referring to* Tullio Scovazzi, 'Management Regimes and Responsibility for International Straits', Marine Policy Vol. 19 (1995), p. 137 at pp. 139-42 (**Annex RUL-89**); Sam Bateman, Donald R. Rothwell, and David VanderZwaag, 'Navigational Rights and Freedoms in the New Millennium: Dealing with 20th Century Controversies and 21st Century Challenges', in Donald R. Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff 2000), pp. 314-35 (**Annex RUL-92**).
1038 Counter-Memorial, paras 230-32 *citing* Sam Bateman and Michael White, 'Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment', Ocean Development & International Law Vol. 40 (2009), p. 184 at p. 194 (**Annex UAL-65**); *see also* Rejoinder, para. 434.
1039 Rejoinder, paras 435-36.

explain how the control measures it instituted in the Kerch Strait, including VTS, compulsory pilotage, and one-way traffic, are legitimate measures aimed at serving navigational safety and that they do not hamper or impair the passage of vessels in the strait.[1040]

529. The Russian Federation denies Ukraine's claim that the pilotage scheme introduced by the Russian Federation is discriminatory because it permits only qualifying Russian vessels to be exempt from it.[1041] It interprets Article 42, paragraph 2, of the Convention to preclude discrimination as between foreign States' vessels, but not prohibiting a coastal State from favouring its own vessels.[1042]

530. According to the Russian Federation, the system is designed to ensure safety in the region by admitting only those captains whose knowledge may be verified.[1043] In contrast, the Russian Federation recalls, Ukraine's own compulsory pilotage requirements in place before 2014 generally made pilotage compulsory for foreign vessels, while allowing automatic exemptions for ships flying the flag of a member State of the Commonwealth of Independent States not exceeding certain parameters.[1044] As the exemptions were granted automatically, and to vessels, not captains, without regard to the experience or merit of the crew, the Russian Federation asserts that its own pilotage system better fits Ukraine's expert's proposition that decisions to grant pilotage exemptions should be based on an objective assessment of the vessel's ability to safely navigate the area without a pilot, rather than on the nationality of the vessel.[1045] Finally, the Russian Federation lists a number of examples of what it considers to be similar pilotage systems from around the world, including Japan, Australia, Fiji, Chile, Canada, Ireland, and the Philippines, to contradict Ukraine's allegations of illegality.[1046]

531. Regarding one-way traffic in the Kerch Strait, the Russian Federation claims that Ukraine's allegations are misleading.[1047] The Russian Federation submits that one-way traffic is in place in only two instances in the Kerch-Yenikale navigation channel, namely in the area of the

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1040 Counter-Memorial, paras 234-46 *referring to* International Maritime Organization, Assembly Resolution A.857(20), Guidelines for vessel traffic services, 27 November 1997, para. 3.2.2 (**Annex RU-361**); Opinion of [redacted] paras 35-38 (22 August 2022); Opinion of Brian McJury, Waves Group, paras 3.5, 3.8 (18 May 2021).

1041 Rejoinder, paras 438-50.

1042 Rejoinder, para. 440; *see also* Hearing, 28 September 2024, 145:14-146:17 (Ortega Lemus).

1043 Rejoinder, paras 442-45.

1044 Rejoinder, para. 446.

1045 Rejoinder, para. 447 *citing* Second Opinion of Brian McJury, Waves Group, para. 2.12 (24 March 2023).

1046 Rejoinder, paras 448-49; *see also* Hearing, 29 September 2024, 62:20-63:17 (Korolev, [redacted]).

1047 Counter-Memorial, para. 245.

underbridge crossing for vessels with a length of over 20 metres,[1048] and for large ships carrying hazardous cargo or navigating in difficult navigation conditions.[1049] The Russian Federation states that it remains unclear how a one-way traffic scheme that applies to all vessels exceeding a certain size could discriminate against Ukrainian vessels.[1050] Further, the Russian Federation rejects Ukraine's claim that the reason for the implementation of one-way traffic was the clearance of the Kerch Strait bridge, instead asserting that the geographical and meteorological features of the Kerch Strait are the main reasons for the adoption of stricter measures aimed at ensuring the safety of navigation in the Strait.[1051] According to the Russian Federation, one-way traffic for ships of a certain size was already practised by Ukraine with even stricter requirements.[1052] The other condition for one-way traffic was introduced to safeguard navigation under the central arch of the newly constructed Kerch Strait bridge and is common for arch bridges around the world.[1053] The Russian Federations dismisses Ukraine's attempts to discount the relevance of examples of one-way traffic regulations because they relate to artificial waterways, not straits, since the Kerch-Yenikale Channel is equally artificially created.[1054]

532. The Russian Federation argues that regulations it introduced are reasonable and in compliance with the provisions of the Convention. It rejects any claim that these measures caused delays for vessels travelling to or from Ukrainian ports.[1055] In its view, the alleged analysis of AIS data to determine the hours of delay Ukrainian vessels allegedly experienced relies on vague sources, does not provide any baseline against which alleged delays are measured, or explain how the one-way traffic and the compulsory pilotage regimes affect the alleged delays.[1056] The Russian Federation submits that the time for sailing through the Kerch Strait is highly dependent on circumstances such as weather conditions or seasonal intensity of traffic.[1057] Other potential

1048 Counter-Memorial, para. 245 *referring to* Ministry of Transport of the Russian Federation, Order No. 313 on Approval of the Mandatory Regulations in the Kerch Seaport, 21 October 2015, para. 47 (**Annex RU-203**).

1049 Counter-Memorial, para. 245 *referring to* Ministry of Transport of the Russian Federation, Order No. 313 on Approval of the Mandatory Regulations in the Kerch Seaport, 21 October 2015, para. 64 (**Annex RU-203**).

1050 Rejoinder, para. 453.

1051 Rejoinder, paras 454-55; *see also* Hearing, 28 September 2024, 150:5-14 (Ortega Lemus).

1052 Counter-Memorial, para. 245; Opinion of [redacted], para. 33 (22 August 2022). *See also* Rejoinder, paras 456-58.

1053 Counter-Memorial, para. 245; Opinion of [redacted] para. 34 (22 August 2022). *See also* Rejoinder, paras 459-60.

1054 Rejoinder, paras 461-62.

1055 Rejoinder, paras 464-71.

1056 Rejoinder, paras 465-67.

1057 Rejoinder, para. 468.

causes of delays include failures to notify the traffic control services or technical failures of vessels.[1058]

ii. Inspection of Vessels in the Kerch Strait

533. Apart from the above-mentioned jurisdictional objections, the Russian Federation argues that the inspections by the Russian Border Guard Service were necessary for security reasons and a legitimate exercise of the Russian Federation's sovereign powers.[1059]

534. Before addressing the substance of Ukraine's claims, the Russian Federation submits that Ukraine misstates the Russian Federation's position on evidentiary issues.[1060] Contrary to Ukraine's allegation,[1061] the Russian Federation clarifies that it is not arguing for a "'heightened' standard of proof; rather, it has challenged Ukraine's reliance on irrelevant circumstantial evidence."[1062] The Russian Federation does not dispute that a party may rely on circumstantial evidence.[1063] However, it continues, as held by the ICJ in *Corfu Channel*, proof may only be drawn from inferences of fact "provided that they *leave no room for reasonable doubt.*"[1064] Further, the Russian Federation argues that the ICJ allowed liberal recourse to inferences of facts only where a State was not in a position to provide direct proof.[1065] The Russian Federation denies that Ukraine is in such a situation considering that its witnesses appear to have access to evidence concerning the inspection of vessels.[1066] Despite this, the Russian Federation avers that Ukraine continues to rely on overly-generalised evidence, such as "observation of AIS data and navigational patterns."[1067]

535. In the view of the Russian Federation, Ukraine builds its case on "unreliable witness statements and irrelevant documents of dubious evidentiary value."[1068] The Russian Federation claims that both [redacted] and [redacted] witness statements reflect their personal opinions and rely on hearsay, and thus do not satisfy the factors set out in *M/V "Norstar" (Panama v. Italy)*

1058 Rejoinder, paras 469-70.
1059 Counter-Memorial, para. 289; Rejoinder, para. 511.
1060 Rejoinder, paras 512-19.
1061 *See* para. 469 above.
1062 Rejoinder, para. 513.
1063 Rejoinder, para. 515.
1064 Rejoinder, para. 515 *citing Corfu Channel*, cit., n. 997, p. 18 (**Annexes RUL-88**, **UAL-15**) [emphasis added by the Russian Federation].
1065 Rejoinder, para. 517.
1066 Rejoinder, para. 518.
1067 Rejoinder, para. 518 *citing* Reply, para. 196.
1068 Rejoinder, para. 520.

(hereinafter "*M/V 'Norstar'*").[1069] It also questions the evidentiary value of the data relied upon by Ukraine's witnesses and states that Ukraine only provided two reports and three vessel logs out of more than 1,600 alleged documented inspections of vessels.[1070] Regarding the AIS data relied upon by Ukraine to prove the discriminatory delay of Ukrainian vessels, the Russian Federations argues that it is unsuitable for this purpose, since there exist numerous factors which may cause a delay, such as mechanical failures, adverse weather conditions, or waiting for cargo, and that the AIS data has no way of identifying the cause of any delay.[1071] The Russian Federation explains that inspections are intentionally conducted while vessels wait for pilots to arrive, so as to minimise delays.[1072] The Russian Federation adds that it remains unclear against which baseline the alleged average delays are being measured.[1073]

536. In any case, the Russian Federation maintains that it has demonstrated the legitimacy of its inspections of vessels.[1074] At the outset, the Russian Federation notes that inspections *per se* do not infringe upon vessels' ability to transit the Kerch Strait.[1075] The Russian Federation continues by claiming that there is an established practice that both Ukraine and the Russian Federation have the right to inspect vessels in any area of the Sea of Azov and the Kerch Strait within the framework of the 1993 Agreement between the State Committee of Ukraine for Fisheries and Commercial Fishing and the Fishery Committee of the Russian Federation on Aspects of Fishing in the Sea of Azov.[1076] Equally, according to the Russian Federation, within a framework of cooperation between the border authorities at the Council of Commanders of the Border Guard

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1069 Rejoinder, paras 521-23 *citing M/V "Norstar" (Panama v. Italy)* (hereinafter "*M/V 'Norstar'*"), Judgment, ITLOS Reports 2018-2019, p. 10 at p. 39, para. 99 (**Annex UAL-138**).

1070 Rejoinder, para. 524; *see also* Hearing, 28 September 2024, 158:17-159:13 (Ortega Lemus).

1071 Counter-Memorial, paras 295-96; Rejoinder, para. 526.

1072 Counter-Memorial, para. 297; Kommersant, *The Azov Topic Was Intentionally Thrown into the Information Space* (22 November 2018) (**Annex RU-395**).

1073 Rejoinder, para. 528.

1074 Counter-Memorial, paras 286-301; Rejoinder, paras 530-40.

1075 Counter-Memorial, para. 289.

1076 Counter-Memorial, para. 290; Procedure for Control of Catching Aquatic Biological Resources in the Sea of Azov and the Kerch Strait by Fishing and Other Vessels for 2017, Annex X to the Minutes of the 28th Session of the Ukrainian-Russian Commission on Fisheries in the Sea of Azov, 17-20 October 2016, para. 4 (**Annex RU-385**); Procedure for Control of Catching Aquatic Biological Resources in the Sea of Azov and the Kerch Strait by Fishing and Other Vessels for 2012, Annex VIII to the Minutes of the 23rd Session of the Russian-Ukrainian Commission on Fisheries in the Sea of Azov, 19-22 October 2011, paras 4-5 (**Annex RU-386**); Measures Aimed at Protecting the Fish Stock, Controlling and Providing Operational Regulation of Fishing by Fish Protection Bodies of the Russian Federation and Ukraine in the Sea of Azov and the Kerch Strait for 1997-1998, Annex V to the Minutes of the Eighth Session of the Russian-Ukrainian Commission on Fisheries in the Sea of Azov, 28-30 July 1997, para. 10 (**Annex RU-387**). *See also* Rejoinder, paras 538-39.

Troops, Russian and Ukrainian border authorities conducted joint crime-prevention operations in the Black-Azov Sea Basin, until 2018, when Ukraine withdrew from the Council.[1077]

537. The Russian Federation submits that its vessel inspections in the Kerch Strait serve the same security and crime-prevention purposes.[1078] Particularly since 2014, the Russian Federation argues, security inspections of vessels in the Kerch Strait have gained "critical importance for ensuring national security of the Russian Federation." According to the Russian Federation, "[r]epeated intentions of Ukrainian authorities to destroy the Kerch Bridge, as well as various acts of provocations by extremists, supported and endorsed by Ukrainian top officials, have prompted the need to react on the part of Russia."[1079]

538. The Russian Federation also states that the practice of security inspections of vessels transiting straits is common around the world, citing practices in the Suez and Panama Canals.[1080]

539. Responding to the allegations that Ukraine-bound vessels are targeted in a discriminatory fashion,[1081] the Russian Federation points to the fact that in Russian ports there is port control in place and all vessels calling at those ports undergo security inspections.[1082] Additionally, the Russian Federation submits that Russia-bound vessels also undergo random security inspections upon their transit through the Kerch Strait, and that the majority of all inspections during the period addressed by Ukraine affected vessels bound for Russian ports.[1083]

540. Concerning the allegedly longer inspections of vessels travelling to Ukraine, the Russian Federation points out that Ukraine's own witness claims that those vessels are more likely to be larger vessels,[1084] concluding that their inspection would naturally take longer.[1085] In the view of the Russian Federation, the witness statement relied upon by Ukraine recounting conversations with captains of vessels allegedly stopped and inspected by the Russian Federation constitute

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1077 Counter-Memorial, para. 291, n. 390.
1078 Counter-Memorial, para. 293.
1079 Counter-Memorial, para. 294; *see also* Rejoinder, para. 535 [citations omitted].
1080 Counter-Memorial, para. 300; Opinion of [redacted], para. 42 (22 August 2022); The London P&I Club, Suez Canal: Random Inspections, 24 July 2013 (**Annex RU-396**); Panama Canal Authority official website, OP Notice to Shipping No. N-1-2022, 1 January 2022 (**Annex RU-397**).
1081 Revised Memorial, para. 161.
1082 Counter-Memorial, para. 298.
1083 Counter-Memorial, para. 298; Rejoinder, para. 532.
1084 Witness statement of [redacted], para. 14 (14 May 2021).
1085 Counter-Memorial, para. 298.

"nothing more than a record of [...] hearsay evidence, which by itself is not a sufficiently reliable source of information and should not be given undue weight."[1086]

g. On the Alleged Violation of Articles 38 and 44 of UNCLOS Caused by the Russian Federation's Suspension of Transit Passage

541. The Russian Federation reiterates its position that the Arbitral Tribunal lacks jurisdiction to rule on the legality of the temporary suspension of passage of foreign warships and government ships as it would require deciding on the sovereignty over Crimea,[1087] and that the Kerch Strait and Sea of Azov constitute internal waters.[1088]

542. The Russian Federation further submits that Ukraine's claim concerning the closure is inadmissible as a new claim submitted in disregard of Article 13, paragraph 5, of the Rules of Procedure.[1089] According to the Russian Federation, Ukraine submitted this claim for the first time after the Arbitral Tribunal delivered its Award Concerning Preliminary Objections and should have sought leave from the Arbitral Tribunal before inserting the new claim in its Revised Memorial.[1090] Even if the claim were considered to accord with Article 13, paragraph 5, of the Rules of Procedure in that regard, the Russian Federation argues that it should still be dismissed for relying on a fact that falls outside the scope of the dispute submitted in the Notification and Statement of Claim.[1091] The facts underlying Ukraine's claim on the closure occurred five years after the Notification and Statement of Claim, thereby falling outside the temporal scope of the dispute.[1092]

543. In any case, the Russian Federation argues that "the suspension of the innocent passage of foreign warships and government ships was in full compliance with Article 25(3) of the Convention"[1093] and that Ukraine has itself suspended innocent passage in different territorial sea areas of the Black Sea on repeated occasions.[1094]

544. According to the Russian Federation, Article 25, paragraph 3, of the Convention "entitles a coastal State to suspend the innocent passage of foreign ships in its territorial sea under the following

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1086 Counter-Memorial, para. 299 *referring to Corfu Channel*, cit., n. 997, pp. 16-17 (**Annexes RUL-88**, **UAL-15**).
1087 Counter-Memorial, paras 249-54.
1088 Counter-Memorial, para. 248; Rejoinder, para. 480.
1089 Rejoinder, paras 474-79.
1090 Rejoinder, paras 475-76; *see also* Hearing, 28 September 2024, 171:11-25 (Ortega Lemus).
1091 Rejoinder, para. 477.
1092 Rejoinder, para. 479.
1093 Counter-Memorial, para. 248; *see also* Rejoinder, para. 483.
1094 Counter-Memorial, para. 248.

conditions: for the protection of its security, including weapons exercises, temporarily, and without discrimination among foreign ships. Such suspension shall take effect only after having been duly published."[1095]

545. The Russian Federation maintains that Ukraine mischaracterises the underlying factual background, as "the area where the navigation of foreign warships and government vessels was suspended in 2021 lay in the Russian Federation's *territorial* sea, rather than in the Kerch Strait."[1096]

546. Referring to various activities and statements by Ukraine, NATO, and certain other States from March to October 2021, the Russian Federation lays out why in its opinion there existed legitimate security concerns.[1097]

547. Against this background, the Russian Federation claims that it "exercised its lawful right to suspend innocent passage temporarily."[1098] According to the Russian Federation, "[a]s long as the Convention does not specify what is considered a temporary suspension, a suspension for the period of time 'coterminous with the related security threat' is considered to be temporary."[1099] The Russian Federation submits that the suspension began just before the announced deployment of two U.S. warships in the Black Sea and lasted for six months, covering the period of successive military exercises, thereby meeting the requirement of temporariness.[1100]

548. As far as the other criteria under Article 25, paragraph 3, of the Convention are concerned, the Russian Federation submits that passage was suspended for all foreign warships and government ships without discrimination as to their flag or other possible characteristics.[1101] In the view of the Russian Federation, as supported by the drafting history and literature,[1102] the requirement of there being no discrimination in form or in fact among foreign ships under Article 25, paragraph

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1095 Counter-Memorial, para. 256.

1096 Rejoinder, para. 482 [emphasis added by the Russian Federation]; *see also* Hearing, 28 September 2024, 172:5-14 (Ortega Lemus).

1097 Counter-Memorial, paras 257-65; UAWIRE, *Ukraine: Purpose of Upcoming Defender Europe 2021 Exercise is to Practice for War with Russia* (4 April 2021) (**Annex RU-365**); The Moscow Times, *U.S. Cancels Black Sea Deployment of 2 Warships – Turkey* (15 April 2021) (**Annex RU-374**); Reuters, *Russia Says it Chases British Destroyer out of Crimea Waters with Warning Shots, Bombs* (23 June 2021) (**Annex RU-375**); TASS, *Russia Scrambled Military Planes to Prevent Border Violation by Dutch Frigate* (30 June 2021) (**Annex RU-376**).

1098 Counter-Memorial, para. 266.

1099 Counter-Memorial, para. 266 *citing* Richard A. Barnes, 'Straits Used for International Navigation: Article 25', in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 226, para. 14 (**Annex RUL-94**).

1100 Counter-Memorial, para. 267; Rejoinder, paras 484-86.

1101 Counter-Memorial, para. 268; Rejoinder, paras 487-92.

1102 Rejoinder, paras 489-91.

3, of the Convention implies that a suspension of innocent passage must affect all foreign States equally.[1103] It submits that Ukraine's interpretation that the measure must not discriminate among types of foreign ships is "nonsensical in that it is at odds with the legitimate purpose for suspending innocent passage as envisage by Article 25(3), that 'such suspension is essential for the protection of the [coastal State's] security.'"[1104] According to Ukraine's logic, a coastal State would have to suspend innocent passage for all foreign vessels to comply with the non-discrimination requirement.[1105] It also argues that announcing the suspension through the publication of Notices to Mariners was a proper means for giving publicity to navigational hazards.[1106] The Russian Federation asserts that Ukraine does not provide any authority supporting the need for a State to indicate why it was suspending transit passage.[1107]

549. Finally, the Russian Federation draws attention to Ukraine's previous practice of suspending innocent passage in different territorial sea areas of the Black Sea. According to the Russian Federation, Ukraine prohibited passage in a specific area of the Black Sea from December 2018 until September 2020, successively renewing the prohibition every three months, with the same area being closed from June 2021 to March 2022 as well.[1108] The Russian Federation claims that Ukraine closed another area of the Black Sea from December 2018 to September 2020 and from September 2021 to March 2022, as well as a third area from March 2019 to June 2019 and from June 2021 to August 2021.[1109]

C. ALLEGED IMPEDIMENT OF NAVIGATION IN THE SEA OF AZOV TO AND FROM UKRAINIAN PORTS

550. The Parties' dispute regarding navigation extends beyond the Kerch Strait to the Sea of Azov and the inspection of vessels traveling to or from Ukrainian ports by Russian authorities in those waters.

551. Article 2 of the Convention reads:

1103 Rejoinder, para. 488.
1104 Rejoinder, para. 492 *citing* Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (Pinter Publishers 1990), p. 165 (**Annex RUL-171**).
1105 Rejoinder, para. 492.
1106 Counter-Memorial, para. 268 *referring to* Richard A. Barnes, 'Straits Used for International Navigation: Article 25', in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), pp. 225-26, paras 11-15 (**Annex RUL-94**). *See also* Rejoinder, paras 493-97.
1107 Rejoinder, para. 495.
1108 Counter-Memorial, para. 269.
1109 Counter-Memorial, paras 269-70.

> 1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
>
> 2. This sovereignty extends to the air space of the territorial sea as well as to its bed and subsoil.
>
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

552. Article 58 of the Convention reads:

> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight [...], and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships [...] and compatible with the other provisions of this Convention.
>
> 2. Article 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
>
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this part.

553. Article 87 of the Convention reads:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation
>
> [...]
>
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

554. Article 92 of the Convention reads:

> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
>
> 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

1. Ukraine's Position

555. According to Ukraine, the Russian Federation violated Articles 2, 58, 87, and 92 of the Convention by stopping and inspecting Ukrainian-flagged vessels as well as vessels flying the flags of third States in the exclusive economic zone of Ukraine, and within 12 nautical miles of

mainland Ukraine over the course of a six-month period from April 2018 through November 2018.[1110]

a. The Russian Federation's Obligations under Articles 2, 58, 87, and 92 of UNCLOS

556. Ukraine submits that Articles 58 and 87 of the Convention enshrine one of the pillars of the law of the sea, freedom of navigation, in the regime of the high seas and exclusive economic zone, reflecting the principle that no State can subject a vessel of a foreign State to its jurisdiction on the high seas.[1111]

557. According to Ukraine, Articles 58 and 87 of the Convention establish a collective obligation between and among all States Parties to the Convention.[1112] Ukraine argues that freedom of navigation under customary international law has also consistently been understood as an obligation owed to and enforceable by the international community as a whole.[1113] Ukraine also states that as a specially affected State, Ukraine has a particular interest in ensuring free navigation in the Black Sea, the Sea of Azov, and the Kerch Strait.[1114]

558. Ukraine adds that under Article 92, paragraph 1, of the Convention, ships sail under the flag of one State only and generally on the high seas are subject to the exclusive jurisdiction of that State.[1115] Ukraine notes that Article 58, paragraph 2, of the Convention makes that rule applicable also to the exclusive economic zone.[1116]

559. Ukraine asserts that Article 2 of the Convention also prevents the Russian Federation from interfering with navigation in Ukraine's territorial sea.[1117] According to Ukraine, as it enjoys the exclusive right to take enforcement measures against foreign-flagged vessels within its territorial sea, including in the twelve miles extending from Ukraine's mainland baselines into the Sea of Azov, no other State may impede the passage of ships through these waters absent Ukraine's consent.[1118]

1110 Revised Memorial, para. 166; *see also* Hearing, 25 September 2024, 32:20-33:10 (Gore).
1111 Revised Memorial, para. 167 *referring to M/V "Norstar"*, cit., n. 1069, para. 216 (**Annex UAL-138**).
1112 Revised Memorial, para. 169.
1113 Revised Memorial, para. 169 *referring to S.S. Wimbledon (UK et al. v. Germany)*, Judgment, PCIJ Series A, No. 1, p. 15 at p. 20 (**Annex UAL-139**).
1114 Revised Memorial, para. 169.
1115 Revised Memorial, para. 170.
1116 Revised Memorial, para. 170.
1117 Revised Memorial, para. 171.
1118 Revised Memorial, para. 171 *referring to* Sarah Wolf, 'Territorial Sea', in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (August 2013), paras 20, 40, 43 (**Annex UAL-142**).

560. Ukraine rejects the Russian Federation's claims that these provisions are irrelevant because "there was no territorial sea and exclusive economic zone in the water area with the status of shared internal waters, which the Sea of Azov enjoyed"[1119] and because "issues of navigation in these waters were regulated by [...] the Azov/Kerch Cooperation Treaty."[1120] Ukraine maintains:

> First, under UNCLOS, the Sea of Azov is comprised of territorial seas and exclusive economic zones. Second, the (two-page) 2003 Sea of Azov Treaty does not govern the regime of navigation in the Sea of Azov and the Kerch Strait, nor do its provisions supersede the obligations and protections guaranteed by UNCLOS. Further, none of Ukraine's claims in this proceeding invoke the 2003 Sea of Azov Treaty or allege violations of it. The 2003 Sea of Azov Treaty is thus inapplicable to the resolution of Ukraine's claims of breaches of its navigation rights under UNCLOS, which is the instrument this Tribunal is tasked with applying.[1121]

b. The Russian Federation's Alleged Breach of its Obligations by Stopping and Inspecting Vessels Traveling to and from Ukraine's Sea of Azov Ports

561. Based on AIS data, navigational patterns, as well as reports by vessel masters who had experienced stops and inspections, Ukraine submits that during the period from April 2018 through November 2018, there were over 100 instances where Russian Border Guard vessels stopped and inspected cargo vessels traveling to or from Mariupol or Berdyansk, while there is no evidence of a similar pattern of stoppages against vessels heading to and from Russian ports.[1122]

562. According to Ukraine, these inspections lasted, on average, approximately two to four hours, and occurred in several areas of the Sea of Azov, both within Ukraine's territorial sea and farther out at sea in Ukraine's exclusive economic zone.[1123]

563. Thus, Ukraine claims that concerning the stoppages and inspections that occurred in the exclusive economic zone, the Russian Federation violated Articles 58 and 87 of the Convention.[1124] Where these incidents involved Ukrainian-flagged vessels, Ukraine submits that the Russian Federation also violated Ukraine's exclusive jurisdiction under Articles 58 and 92 of the Convention.[1125] Finally, concerning the stoppages and inspections within 12 nautical miles of mainland Ukraine's

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1119 Counter-Memorial, para. 281.
1120 Counter-Memorial, para. 282.
1121 Reply, para. 190 [citations omitted].
1122 Revised Memorial, para. 173; Reply, para. 196 both *referring to* Witness statement of [redacted], paras 7-8 (14 May 2021).
1123 Revised Memorial, para. 174; Witness statement of [redacted], para. 9 (14 May 2021).
1124 Revised Memorial, para. 175.
1125 Revised Memorial, para. 175.

Sea of Azov baselines, Ukraine accuses the Russian Federation of violating Ukraine's sovereignty over its territorial sea under Article 2 of the Convention.[1126]

564. Further, Ukraine rejects the Russian Federation's characterisation of Ukraine's evidence for the stoppages and inspections of vessels in the Sea of Azov as "nothing more than a record of [...] hearsay evidence."[1127]

565. Ukraine argues that the Russian Federation incorrectly relies on *Corfu Channel* in support of its argument.[1128] According to Ukraine, the circumstances referred to by the ICJ in *Corfu Channel* are distinguishable from those in the present case.[1129] In *Corfu Channel*, Ukraine notes, the United Kingdom relied on testimony from a single witness who allegedly saw mines loaded onto two Yugoslav vessels that departed from Sibenik and returned there after the relevant explosions.[1130] The ICJ found that this information relayed by the witness without "personal or direct confirmation" was not enough to establish the "charge of such exceptional gravity" that Yugoslavia had colluded with Albania.[1131]

566. In the case at hand, according to Ukraine, "the testimony of Ukraine's witnesses as regards Russia's discriminatory stoppages and inspections [...] is corroborated by [...] AIS data observed in the regular course of their official duties, as well as by reports received from vessel masters who had experienced these stops and inspections."[1132]

567. Ukraine also points to the ICJ's finding in *Corfu Channel* that in situations where relevant evidence is outside the applicant State's "exclusive territorial control," the State that is not in a position to provide direct proof of certain facts "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."[1133] Against this background, Ukraine contends, it is notable that while Ukraine's evidence shows that the Russian Federation stopped and inspected vessels, the Russian Federation, which certainly knows what inspections its authorities have undertaken, fails to provide any official record or other evidence to rebut Ukraine's credible witness testimony and accompanying documentary evidence.[1134]

1126 Revised Memorial, para. 175.
1127 Counter-Memorial, para. 299.
1128 Reply, para. 195.
1129 Reply, para. 195.
1130 Reply, para. 195 *referring to Corfu Channel*, cit., n. 997, p. 16 (**Annexes RUL-88**, **UAL-15**).
1131 Reply, para. 195 *citing Corfu Channel*, cit., n. 997, p. 17 (**Annexes RUL-88**, **UAL-15**).
1132 Reply, para. 196.
1133 Reply, para. 195 *citing Corfu Channel*, cit., n. 997, p. 18 (**Annexes RUL-88**, **UAL-15**).
1134 Reply, paras 196-98.

568. Ukraine further contends that the Russian Federation's reliance on the Parties' practice prior to 2014 is misplaced.[1135] According to Ukraine, unlike the Russian Federation's unilateral actions between April and November 2018, "any prior joint inspection practice reflected coordinated efforts between both States, was non-discriminatory, and thus attracted 'no record of protests from third States,' as Russia notes."[1136]

569. Finally, Ukraine argues that the Russian Federation's attempt to equate prior joint practice and its unilateral actions in 2018, by claiming the post-2014 inspections served the same security and crime-prevention purposes,[1137] must fail.[1138] According to Ukraine, the alleged threats to security in the Sea of Azov which intensified after 2014 do not constitute a legal justification for stopping and inspecting vessels in violation of the freedom of navigation in the exclusive economic zone and of Ukraine's sovereignty in its territorial sea.[1139] In any case, Ukraine submits that any such threat arose well after the Russian Federation commenced its pattern of stoppages.[1140]

2. The Russian Federation's Position

a. The Claims Concerning Inspections in the Sea of Azov Are beyond the Arbitral Tribunal's Jurisdiction and Inadmissible

570. The Russian Federation reiterates its position that "there could be and there was no territorial sea and exclusive economic zone in the water area with the status of shared internal waters, which the Sea of Azov enjoyed."[1141] According to the Russian Federation, issues of navigation in the Sea of Azov were regulated by a bilateral agreement between the Russian Federation and Ukraine, the 2003 Azov/Kerch Cooperation Treaty.[1142] The Russian Federation submits that this Treaty only guaranteed freedom of navigation for ships under the flags of the Russian Federation and Ukraine, whereas "merchant vessels flying the flags of third States may enter the Sea of Azov and pass through the Kerch Strait if they are bound for or returning from a Russian or Ukrainian port."[1143]

1135 Reply, para. 191; *see also* Hearing, 25 September 2024, 35:1-36:7 (Gore).
1136 Reply, para. 192 *citing* Counter-Memorial, para. 292.
1137 Counter-Memorial, para. 293.
1138 Reply, paras 193, 199.
1139 Reply, para. 199.
1140 Reply, para. 199.
1141 Counter-Memorial, para. 281; Rejoinder, paras 499, 502.
1142 Counter-Memorial, para. 282; Rejoinder, para. 500.
1143 Counter-Memorial, paras 282-83 *citing* Azov/Kerch Cooperation Treaty, Art. 2(2) (**Annexes RU-20-AM**, **UA-19**).

571. The Russian Federation further states that the provisions of the Azov/Kerch Cooperation Treaty are beyond the jurisdiction of the Arbitral Tribunal. While recognising the Arbitral Tribunal's statement in the Award Concerning Preliminary Objections that the Azov/Kerch Cooperation Treaty "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,"[1144] the Russian Federation argues that "this requires an express mutual consent of both Parties, which is apparently absent in the instant case."[1145]

572. Finally, the Russian Federation argues that just as Ukraine's claims concerning the inspections of vessels transiting through the Kerch Strait "clearly fall outside the jurisdiction of the Tribunal, as they concern the question of sovereignty over Crimea – an issue outside the remit of this Tribunal, as the Tribunal has previously ruled [...,] [t]he same applies to Ukraine's claims with regard to Russia's inspections of vessels in the Sea of Azov, as they equally concern the question of Russia [*sic*] sovereignty with regard to its new subjects – the DPR, the Zaporozhye Region and the Kherson Region [...]."[1146]

573. Applying the same reasoning as for the claims regarding inspections in the Kerch Strait, the Russian Federation also submits that Ukraine's claims concerning inspections conducted in the Sea of Azov are inadmissible.[1147]

b. Vessel Inspections Constitute a Legitimate Exercise of Sovereign Powers

574. In any case, the Russian Federation contends that the inspection of vessels in the Sea of Azov constituted legitimate exercises of the Russian Federation's sovereignty, as the Sea of Azov is part of the Russian Federation's internal waters.[1148] Further, the Russian Federation argues that the inspections of vessels in the Sea of Azov did not *per se* infringe upon vessels' ability to transit the Sea of Azov on their way to and from ports, and that they were necessary for security reasons.[1149] The arguments advanced by the Russian Federation in support of this claim are the same as with regard to inspections in the Kerch Strait.[1150]

1144 Award Concerning Preliminary Objections, para. 490.
1145 Counter-Memorial, para. 284.
1146 Counter-Memorial, para. 285; *see also* Rejoinder, para. 501.
1147 Rejoinder, paras 503-10; *see* para. 524 above.
1148 Counter-Memorial, paras 286-88.
1149 Counter-Memorial, paras 289-301.
1150 *See* paras 533-540 above.

D. ALLEGED SEIZURE AND REFLAGGING OF THE JDRS

575. Apart from the Parties' dispute regarding navigation to and from Ukrainian ports, there is also a dispute concerning two JDRs located in the Black Sea, which prior to 2014 were registered with the IMO as Ukrainian vessels and were allegedly seized as they were undergoing servicing in the territorial sea off Crimea and re-flagged by the Russian Federation.

576. Article 2, paragraph 3, of the Convention reads:

> The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

577. Article 91 of the Convention reads:

> 1. Every State Shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

1. Ukraine's Position

578. Ukraine submits that in seizing and re-flagging two Ukrainian JDRs, the *Tavrida* and *Sivash*, the Russian Federation violated Article 2, paragraph 3, and Article 91 of the Convention.[1151]

a. The Russian Federation's Objections to Jurisdiction and Admissibility Are Misplaced

579. Ukraine rejects the Russian Federation's arguments that the Arbitral Tribunal lacks jurisdiction for the JDR-related claims or, in the alternative, that these claims are inadmissible. Ukraine highlights that contrary to the Russian Federation's claims, Ukraine is not asking the Arbitral Tribunal to assess the legality of the transfer of the JDR's ownership title, but rather to determine whether the Russian Federation unlawfully re-flagged the Ukrainian JDRs, a task that according to Ukraine falls squarely within the Arbitral Tribunal's competence under Article 91 of the Convention.[1152]

580. Ukraine also states that "[t]here is no overlap between Ukraine's request for relief in this proceeding (*i.e.*, the release of the JDRs, as well as the withdrawal of Russia's claim to have re-

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1151 Revised Memorial, paras 176-81; *see also* Hearing, 25 September 2024, 37:20-24 (Gore).
1152 Reply, para. 202.

flagged the JDRs under the Russian flag), and the compensation sought by the Ukrainian oil and gas company for the unlawful seizure of the JDRs" in a parallel investment arbitration.[1153]

581. Ukraine further argues that "a finding that Russia re-flagged the JDRs in violation of the Convention does not depend on a determination of the sovereign status of Crimea," since Ukraine is only asking the Arbitral Tribunal "to decide the limited question of the nationality of the JDRs, which depends on an assessment of whether Ukraine's procedures for de-registration and re-flagging of Ukrainian vessels were followed."[1154]

582. Finally, Ukraine rejects the Russian Federation's contention that the JDR-related claims are new claims raised in disregard of the Rules of Procedure and the Award Concerning Preliminary Objections and therefore inadmissible, arguing that, without transforming the subject matter of the dispute, it merely revised its original claims to focus on the Russian Federation's obligations under Article 2, paragraph 3, and Article 91 of UNCLOS in order to comply with the Award Concerning Preliminary Objections.[1155]

b. The Russian Federation's Obligations under Article 2, paragraph 3, and Article 91 of UNCLOS

583. Ukraine argues that UNCLOS obliges the Russian Federation to respect Ukraine's exclusive rights in connection with the de-registration and re-flagging of Ukrainian vessels. According to Ukraine, "the removal of a vessel's flag, and any other change in the status of a vessel's flag, must be conducted in accordance with procedures stipulated by the flag State's municipal law."[1156]

584. Ukraine submits that "the exclusivity of flag state authority over de-registration follows from Article 91, and is in keeping with the customary principle that 'it is for the internal law of each state to determine who is, and who is not, a national of the state.'"[1157] Ukraine continues that a vessel remains subject to its flag State's registration laws regardless of whether another State

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1153 Reply, para. 203.

1154 Reply, para. 204.

1155 Hearing, 23 September 2024, 122:19-125:19 (Cheek).

1156 Revised Memorial, para. 177. *See also* Reply, paras 205-06 *referring to M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment, ITLOS Reports 1999, p. 17 at p. 37, para. 65 (**Annex UAL-28**); *The "Grand Prince" Case (Belize v. France)*, Prompt Release Judgment, ITLOS Reports 2001, p. 17 at pp. 42-44, paras 84-92 (**Annex UAL-145**); *Lauritzen v. Larsen*, 345 U.S. 571, 548 (1953) (**Annex UAL-144**).

1157 Revised Memorial, para. 178 *citing* Sir Robert Jennings and Sir Arthur Watts, 'Individuals, Acquisitions and Loss of Nationality', in Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Vol. I, 9th edition, Oxford University Press 2008), p. 868 at p. 869 (**Annex UAL-146**).

exercises effective control over the vessel at the relevant time.[1158] Additionally, Ukraine argues that a State may not grant a vessel the right to sail its flag if the vessel already has a flag.[1159]

585. Ukraine goes on to note that under Article 2, paragraph 3, of the Convention, these strictures apply fully in the territorial sea, since the coastal State's exercise of sovereignty must be in accordance with the Convention and other rules of international law.[1160]

c. Seizure and Reflagging of the JDRs in Violation of Article 2, paragraph 3, and Article 91 of UNCLOS

586. Ukraine submits that, in 2014, the Russian Federation seized control of two Ukrainian-flagged JDRs, the *Tavrida* and *Sivash*, which were used to develop the hydrocarbon resources in the Black Sea and the Sea of Azov.[1161] Both vessels were registered with the IMO and flew the Ukrainian flag at the time of seizure.[1162] According to Ukraine, the *Tavrida* and *Sivash* were undergoing servicing in Crimea's territorial sea, over which the Russian Federation claims sovereignty, when Russian troops seized them.[1163] Ukraine further states that since their seizure, the two JDRs have been renamed and re-registered to fly the Russian flag.[1164]

587. Ukraine submits that the Russian Federation's acts of registering the *Tavrida* and *Sivash* as Russian vessels, entitled to fly the Russian flag, violate Article 2, paragraph 3, and Article 91 of the Convention since, as vessels with Ukrainian nationality, the JDRs were subject to the law of Ukraine regarding the procedures that must be followed for a change in their flag status.[1165] In

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1158 Revised Memorial, para. 178 *referring to* Rüdiger Wolfrum, 'Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective', Virginia Journal of International Law, Vol. 29 (1989), p. 387 at pp. 392-93 (**Annex UAL-147**); Richard Barnes, 'Flag States' in Donald R. Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015), p. 304 at p. 309 (**Annex UAL-148**).

1159 Revised Memorial, para. 178 *referring to* Richard Barnes, 'Flag States' in Donald R. Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015), p. 304 at p. 307 (**Annex UAL-148**); Robert Rienow, *The Test of Nationality of a Merchant Vessel* (Columbia University Press 1937), p. 16 (**Annex UAL-149**).

1160 Revised Memorial, para. 178.

1161 Revised Memorial, para. 179; Witness Statement of [redacted], paras 12-15 (15 May 2021); IMO Circular Letter No.3625, Communication from the Government of Ukraine, 10 February 2016 (**Annex UA-140**).

1162 Revised Memorial, para. 179; CNG Vessel Patents (Jack-Up Drilling Rigs) (**Annex UA-53**); CNG Vessel Patents (Service Vessels) (**Annex UA-54**).

1163 Revised Memorial, para. 179; Witness Statement of [redacted], paras 13-14 (15 May 2021).

1164 Revised Memorial, para. 179; [redacted]

1165 Revised Memorial, para. 180 *referring to* Cabinet of Ministers of Ukraine Resolution No. 1069, On the Approval of the Procedure for Maintaining the State Register of Vessels of Ukraine and the Vessel Register of Ukraine, 26 September 1997, Arts 49, 52 (**Annex UA-570**); Code of Merchant Shipping of Ukraine, Vidomosti Verkhovnoyi Rady Ukrayiny (VVR), 1995, Art. 29 (**Annex UA-571**).

the view of Ukraine, the Convention required the Russian Federation to respect Ukraine's exclusive rights in connection with the de-registration and re-flagging of Ukrainian vessels.[1166] Ukraine relies on the finding in *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea) (hereinafter "M/V 'SAIGA'")* that "determination of the criteria and establishment of the procedures for granting *and withdrawing* nationality to ships are matters within the exclusive jurisdiction of the flag State."[1167] Ukraine submits that a State may not grant a vessel the right to sail its flag if the vessel already has a flag, due to the requirement under Article 92, paragraph 1, which obliges ships to sail under the flag of one State only.[1168] As the Ukrainian vessel de-registration procedures were not followed, Ukraine argues that the Russian Federation's registration of the vessels "is inconsistent with the rules on nationality of vessels in the Convention and in general international law [...]."[1169]

588. Ukraine refutes the Russian Federation's claim that the re-registration of the JDRs is excused because Ukraine did not respond to the "so-called Republic of Crimea State Unitary Enterprise Chornomornaftogas' [(hereinafter "Crimean CNG")] request to de-register the JDRs in June 2014."[1170] Ukraine states that "[t]he Russian Federation [...] fails to provide any evidence that the State Service of Ukraine for the Safety of Maritime and River Transport received the letter drafted by [Crimean] CNG."[1171] Further, according to Ukraine, the de-registration application submitted by the Russian Federation as evidence to the Arbitral Tribunal[1172] is facially incomplete, as it is missing required registration documents, registration certificates, and other ownership documents.[1173]

589. In any case, Ukraine states that "[i]f [Crimean] CNG believed that Ukraine's ship registry was not responding appropriately to a de-registration request, then, consistent with UNCLOS Article 91, its recourse lay in the Ukrainian courts. It was not for Russia to issue a second flag to the JDRs before they were de-registered by Ukraine, and Russia's decision to do so violated Articles 2(3) and 91 of the Convention."[1174]

1166 Revised Memorial, para. 177.
1167 Revised Memorial, para. 177 *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment, ITLOS Reports 1999, p. 17 at p. 37, para. 65 (**Annex UAL-28**) [emphasis added by Ukraine].
1168 Reply, para. 206.
1169 Revised Memorial, para. 180.
1170 Reply, para. 207 *referring to* Counter-Memorial, paras 314-17.
1171 Reply, para. 207 *referring to* Counter-Memorial, paras 315-16.
1172 Chernomorneftegaz Crimean Republican Enterprise, Letter No. 12/02-530 to the State Service of Ukraine for the Safety of Maritime and River Transport, 6 June 2014 (**Annex RU-402**).
1173 Reply, para. 207, n. 465.
1174 Reply, para. 208.

2. The Russian Federation's Position

590. The Russian Federation objects to Ukraine's JDR-related claims on jurisdictional grounds.[1175] Further, it argues that Ukraine's claims regarding the JDRs, first raised in the Revised Memorial, are inadmissible as an impermissible introduction of new claims in the merits phase of the proceedings.[1176] In any event, the Russian Federation submits that Ukraine's arguments based on Articles 91 and 92 of the Convention are misconceived and that there is a right for the Russian Federation to register the JDRs independently of any de-listing by Ukraine.[1177]

a. Jurisdictional Objections Regarding the JDR-Related Claims and Inadmissibility of the Claims

591. First, according to the Russian Federation, Ukraine's claims concern the legality of the transfer of ownership title over the JDRs, a matter entirely extraneous to the Convention which the Russian Federation submits is beyond the Arbitral Tribunal's jurisdiction.[1178] The Russian Federation states that "[f]ollowing the secession of Crimea from Ukraine and its accession to the Russian Federation in March 2014, the JDRs became owned by the Republic of Crimea and were transferred to Crimean CNG as the new rightful titleholder."[1179] This process, the Russian Federation notes, is what Ukraine terms the "seizure" of the JDRs.[1180] The Russian Federation is of the opinion that what Ukraine truly seeks is to contest Crimean CNG's ownership rights to the JDRs.[1181] While Ukraine states that the Arbitral Tribunal is only "being asked to decide which sovereign State exercises jurisdiction over the vessels, not which oil and gas company owns the vessels,"[1182] the Russian Federation argues that an award upholding Ukraine's request for release of the JDRs will inevitably predetermine the issue of their ownership, which it finds to be beyond the Arbitral Tribunal's jurisdiction.[1183]

592. The Russian Federation further submits that both aspects of Ukraine's requests to release the JDRs and cancel their Russian registrations "depend on the assessment of lawfulness of legal acts that the Republic of Crimea adopted and the actions that Crimean authorities took after Crimea's

1175 Counter-Memorial, paras 307-13; Rejoinder, paras 543-60.
1176 Counter-Memorial, paras 305-06; Rejoinder, paras 561-73.
1177 Counter-Memorial, paras 314-19; Rejoinder, paras 574-95.
1178 Counter-Memorial, para. 309; Rejoinder, paras 543-54; *see also* Hearing, 28 September 2024, 133:4-16 (Ortega Lemus).
1179 Rejoinder, para. 546.
1180 Rejoinder, para. 546.
1181 Rejoinder, paras 547-48.
1182 Reply, para. 202.
1183 Rejoinder, paras 551-53.

secession from Ukraine."[1184] Doing so, therefore, would inevitably require the Arbitral Tribunal to consider the issue of sovereignty over Crimea in violation of the Award Concerning Preliminary Objections.[1185]

593. Should the Arbitral Tribunal find that it has jurisdiction, the Russian Federation contends that the JDR-related claims would still fall outside the ambit of the Arbitral Tribunal's purview due to their inadmissibility.[1186] According to the Russian Federation, Ukraine added the re-flagging claims for the first time at the merits stage of the proceedings.[1187] In the view of the Russian Federation, for a new claim to be admitted, it must arise directly out of the application instituting proceedings or be implicit in it.[1188] In its original Memorial, Ukraine described the taking control of the JDRs by the Russian Federation as violations of Articles 2, 56, 58, 60, 77, and 92 of the Convention, but did not contend that the re-flagging of the JDRs amounts to a breach of the Convention, nor base its claim on Article 91 of the Convention.[1189]

594. The Russian Federation also recalls that the title over the JDRs is the subject of a separate investment arbitration proceeding under the Russia-Ukraine bilateral investment treaty brought, *inter alia,* by Ukraine's State-owned company "Naftogaz."[1190] The Russian Federation argues that Ukraine's JDR-related claims, therefore, raise concerns about the risk of double recovery for the same alleged damage or conflicting decisions of different international fora and should accordingly be dismissed.[1191] Contrary to Ukraine's claims, the Russian Federation asserts that both cases concern the same JDRs and the risk of double recovery is real, as the arbitral tribunal in the investment arbitration has awarded a monetary compensation to Naftogaz for the alleged expropriation of the disputed JDRs by the Russian Federation.[1192]

595. Finally, the Russian Federation also states that Ukraine's own laws would render an award upholding re-flagging of the JDRs back to the Ukrainian flag unenforceable and that the claim accordingly should be denied.[1193] According to the Russian Federation, Ukrainian law considers

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1184 Counter-Memorial, para. 313.
1185 Counter-Memorial, paras 311, 313; Rejoinder, 555-59.
1186 Rejoinder, para. 561.
1187 Rejoinder, para. 562.
1188 Rejoinder, para. 563.
1189 Rejoinder, para. 564.
1190 Counter-Memorial, para. 310; Rejoinder, para. 565 *referring to* PCA Case No. 2017-16: *NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation*, Final Award of 12 April 2023 (**Annex RUL-185**).
1191 Counter-Memorial, para. 310 *referring to Case Concerning the Factory at Chorzów* (hereinafter "*Factory at Chorzów (Merits)*"), Claim for Indemnity (Merits), PCIJ Series A, No. 17, p. 3 at pp. 48-49 (**Annexes RUL-96**, **UAL-27**). *See also* Rejoinder, paras 565-67.
1192 Rejoinder, para. 567; *see also* Hearing, 28 September 2024, 133:17-134:16 (Ortega Lemus).
1193 Rejoinder, paras 568-72.

Crimea an occupied territory and any Crimean bodies and their activities are considered illegal and void if these bodies were established under laws other than those of Ukraine.[1194] Crimean CNG, the current owner of the JDRs, in the view of the Russian Federation, "is a State Unitary Enterprise owned by the Republic of Crimea (constituent entity of the Russian Federation). Crimean CNG is a legal successor to the Crimean Republican Enterprise 'Chernomorneftegaz', which was established by the Republic of Crimea as an independent State after its secession from Ukraine."[1195] The Russian Federation argues that it follows from Ukraine's legislation that Crimean CNG and its predecessor were established and operated under enactments that Ukraine by its own laws considers to be void.[1196] Further, the Russian Federation notes that Ukraine's current laws specifically forbid vessels owned by entities of the Russian Federation to fly the Ukrainian flag, and that Ukrainian authorities have "declared that they would 'prevent the vessels from being re-registered to the fake Chornomornaftogas, registered in Russian jurisdiction.'"[1197] Consequently, the Russian Federation concludes, insofar as the JDRs are owned by Crimean CNG, under Ukraine's own laws they cannot fly Ukraine's flag and be registered in Ukraine and it is evident that Ukraine intends to use an award upholding the request to re-flag as grounds for transfer of ownership of the JDRs to Ukraine.[1198]

b. The Right to Register the JDRs is Independent from De-Registration by Ukraine

596. The Russian Federation claims that Ukraine misinterprets Article 91 of the Convention by reading into it a non-existent element of exclusivity of flag State authority over de-registration.[1199]

597. In the view of the Russian Federation, "UNCLOS in general, and Article 91 in particular, do[] not require that a ship fly the flag of a particular State."[1200] The Russian Federation argues that it is the shipowner's will that constitutes a primary prerequisite for the registration and re-registration of a vessel.[1201] The text of Article 91, paragraph 1, only recognises an obligation for every State to fix the conditions for the grant of nationality, registration, and the right to fly a national flag, without creating any kind of hierarchy.[1202] The Russian Federation states that "[s]cholars qualify

1194 Rejoinder, para. 569.
1195 Rejoinder, para. 569.
1196 Rejoinder, para. 569.
1197 Rejoinder, paras 570-71 *citing* Centre for Investigative Journalism, The Chornomornaftogaz Fleet: How Russia is Confusing the Traces of Its Crimes in Crimea (12 June 2020) (**Annex RU-604**).
1198 Rejoinder, para. 572.
1199 Rejoinder, para. 576.
1200 Rejoinder, para. 577.
1201 Rejoinder, para. 577.
1202 Counter-Memorial, para. 316 *citing* Volume III: *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist et al. eds. 1995), p. 103 at p. 106 (**Annex RUL-15-AM**); Rejoinder, para. 579.

a State's right to register a vessel to fly its flag, where that vessel already flies another State's flag by reference to the vessel owner's intention to waive the earlier registration (which is precisely the case at hand)."[1203] This is in line with the use of the term "entitled" in Article 91, paragraph 1, which suggests that the vessel owner has a right, but not an obligation, to fly the flag of a particular State.[1204] Accordingly, the Russian Federation argues, where a State does not respond to a de-registration request within a reasonable time, the vessel owner should be able to register the vessel in another jurisdiction and to have its nationality changed for the purposes of Article 91, as the State would otherwise be able to frustrate any attempts to change a vessel's nationality simply by not reacting.[1205]

598. The Russian Federation notes that Russian law provides for the possibility to register a vessel in the Russian Vessels Registry upon expiry of 30 days following the application to de-register that vessel from another State's vessels registry.[1206] The Russian Federation argues that Ukraine ignored a request by Crimean CNG to de-register the JDRs from the Ukrainian Vessels Registry.[1207] It continues that in the absence of a response from Ukraine, Crimean CNG proceeded to register the JDRs in accordance with Russian Law.[1208] Hence, the de-registration did not take place because of Ukraine's own inaction.[1209] The Russian Federation dismisses Ukraine's claims that there is no evidence that the Ukrainian authorities received the application from Crimean CNG.[1210] According to the Russian Federation, relevant Ukrainian legislation recognises dispatch of an application for withdrawal from the Ukrainian Vessels Registry by post as a valid means of submission. Such submission in this case is corroborated by a copy of Crimean CNG's application together with the duly stamped and signed postal receipt, as well as by the testimony of [redacted][1211]

599. The Russian Federation also asserts that the registration of the JDRs in the Russian Registry of Vessels ensured consistency with the requirement of Article 91, paragraph 1, of the Convention that there must exist a genuine link between the State and the ship, whereas maintaining

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1203 Rejoinder, para. 582.
1204 Rejoinder, para. 582.
1205 Rejoinder, para. 583; *see also* Counter-Memorial, para. 317.
1206 Rejoinder, para. 579.
1207 Counter-Memorial, paras 314-16; Rejoinder, para. 586.
1208 Counter-Memorial, para. 316.
1209 Rejoinder, para. 586.
1210 Rejoinder, para. 587.
1211 Rejoinder, para. 587 *referring to* Letter from Chernomorneftegaz Crimean Republican Enterprise to the State Service of Ukraine for the Safety of Maritime and River Transport, No. 12/02-530 (6 June 2014) (**Annex RU-402**); Witness statement of [redacted], 6 December 2023, paras 35-38.

registration of the JDRs with the Ukrainian registry of vessels would vitiate compliance with this requirement.[1212]

600. Finally, the Russian Federation argues that Ukraine's reference to Article 92, paragraph 1, of the Convention in support of its argument that a State may not grant a vessel the right to sail its flag if the vessel already has a flag, is inapposite.[1213] In the view of the Russian Federation, the rationale behind this provision is to prevent the abusive practice of vessels flying flags of two or more States on the high seas.[1214] Moreover, the Russian Federation emphasises, Article 92 addresses shipowners, spelling out for them the consequences of flying more than one national flag at any given time, presuming that they may elect to apply for the protection of a national flag at their will, and that national jurisdiction applies according to their choice of flag.[1215] Given the set of facts at hand, the Russian Federation argues that Article 92 of the Convention is not applicable; and in any case, Article 92, paragraph 1, provides for an exceptional right to change flags during a voyage or while in a port of call in the case of a real transfer of ownership.[1216] Given the real change of ownership of the JDRs, Article 92, paragraph 1, if applicable, would therefore also support the Russian Federation's position.[1217]

E. ANALYSIS OF THE ARBITRAL TRIBUNAL

1. Introduction

601. The Arbitral Tribunal will now address Ukraine's claims regarding interference with navigation through the Kerch Strait and in the Sea of Azov. As summarised above, Ukraine's claims fall into three categories: (i) the alleged interference with transit passage through the Kerch Strait due to the construction of the Kerch Bridge and other measures by the Russian Federation, and the alleged failure to cooperate as to threats to safe navigation, in violation of Articles 38, 43, and 44 of the Convention; (ii) the alleged interference with navigation in the Sea of Azov by the Russian Federation, in violation of Articles 2, 58, 87, and 92 of the Convention; and (iii) the alleged seizure and reflagging of two JDRs by the Russian Federation, in violation of Articles 2 and 91 of the Convention.

1212 Counter-Memorial, para. 318.
1213 Rejoinder, paras 588-94.
1214 Rejoinder, para. 589.
1215 Rejoinder, para. 590.
1216 Rejoinder, para. 592.
1217 Rejoinder, para. 594.

602. The Russian Federation, in turn, raises multiple objections to the Arbitral Tribunal's jurisdiction and the admissibility of Ukraine's claims. Additionally, it contends that Ukraine's claims are without merit and must therefore be rejected.

603. In addressing the Parties' disputes over the alleged interference with navigation in the Sea of Azov and the Kerch Strait, the Arbitral Tribunal will proceed as follows.

604. At the outset, the Arbitral Tribunal will consider the Russian Federation's objection that the Arbitral Tribunal lacks jurisdiction over all of Ukraine's claims related to navigation in the Sea of Azov and the Kerch Strait. The Arbitral Tribunal has already concluded in the previous Chapter that the internal waters status of the Sea of Azov and the Kerch Strait remained unchanged following the dissolution of the Soviet Union.[1218] Consequently, at the time the present Arbitration was initiated, the Sea of Azov and the Kerch Strait had this status.

605. The Arbitral Tribunal considers that this determination has significant implications for the issues of both jurisdiction and the merits to be examined in this Section.

606. Regarding jurisdiction, as previously stated, the Arbitral Tribunal's jurisdiction over Ukraine's claims concerning the Russian Federation's alleged interference with navigation in the Sea of Azov and the Kerch Strait depends on whether navigation in internal waters falls within the scope of the Convention. If the Arbitral Tribunal answers this question in the affirmative, it must then consider any additional jurisdictional or admissibility objections raised by the Russian Federation, before addressing the merits of Ukraine's claims. The Arbitral Tribunal can deal with the merits of Ukraine's claims only if it rejects the Russian Federation's additional objections. Conversely, if the Arbitral Tribunal concludes that navigation in internal waters falls outside the Convention's scope or upholds the Russian Federation's additional objections, it would lack jurisdiction over most of Ukraine's claims related to interference with navigation in these waters.

607. As for the merits, the finding that the Sea of Azov and the Kerch Strait have the status of internal waters could have far-reaching consequences. The Arbitral Tribunal must clarify the applicable navigation regime for these waters. In this context, most of Ukraine's claims would be difficult to sustain, as they are based on the premise that the Sea of Azov consists of territorial seas and exclusive economic zones of the Parties, and that the Kerch Strait is a strait used for international navigation subject to the regime of transit passage within the meaning of Article 37 of the Convention.

[1218] *See* para. 399 above.

608. Accordingly, the Arbitral Tribunal will first address the objection raised by the Russian Federation on the ground that the Convention does not regulate the regime of internal waters.

2. Objection to Jurisdiction over Ukraine's Claims Relating to Navigation in the Sea of Azov and the Kerch Strait

609. The Arbitral Tribunal has already examined the Parties' arguments on the applicability of the Convention to internal waters while addressing the Russian Federation's second general objection in the previous Chapter.[1219] The key question before the Arbitral Tribunal is whether navigation in internal waters falls within the scope of the Convention and, consequently, whether any related dispute qualifies as one concerning the interpretation or application of the Convention within the meaning of Article 288, paragraph 1, of the Convention.

610. In the Arbitral Tribunal's view, several provisions of the Convention are relevant to the legal status of internal waters, including their navigational regime. In particular, the Arbitral Tribunal considers Article 2 of the Convention to be especially pertinent to this question.

611. Article 2 of the Convention reads:

> 1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic States, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
>
> 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
>
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

612. Although Article 2, paragraph 1, of the Convention primarily concerns the territorial sea, it also clarifies the legal status of internal waters. The provision states that the sovereignty of a coastal State extends beyond "its land territory and internal waters [...]" to the territorial sea. By placing land territory and internal waters on the same plane, this provision makes clear that, in principle, a coastal State enjoys the same sovereignty over its internal waters as it does over its land territory. Likewise, in contrast with the right of innocent passage in the territorial sea, foreign ships, in principle, have no right of navigation in the internal waters of a coastal State.

613. The Arbitral Tribunal recalls in this regard the pronouncement of ITLOS in *M/V "Norstar"* that:

> [...] a State exercises sovereignty in its internal waters. Foreign ships have no right of navigation therein unless conferred by the Convention or other rules of international law.[1220]

1219 *See* subsection III.E.3.b above.

1220 *M/V "Norstar"*, cit., n. 1069, para. 221 (**Annex UAL-138**).

614. Several provisions of the Convention specifically address navigation in internal waters. Article 8, paragraph 2, reads:

> Where the establishment of a straight baseline in accordance with the method set forth in Article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

Accordingly, while a coastal State exercises sovereignty over its internal waters, this sovereignty is subject to a right of innocent passage for foreign ships in the limited areas designated under the above provision.

615. For internal waters within straits used for international navigation, Article 35(a) of the Convention reads:

> Nothing in this Part affects:
>
> (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;

616. This provision makes clear that, with the exception of the "Article 7 baseline" situation, the passage regime applicable to straits used for international navigation, as set out in Part III of the Convention, does not extend to any areas of internal waters within a strait. Consequently, foreign ships do not enjoy the right of transit passage through internal waters within a strait that connects one part of the high seas or an exclusive economic zone to another.[1221] Similarly, foreign ships do not have the right of non-suspendable innocent passage under Article 45 of UNCLOS through internal waters within straits used for international navigation when the strait connects the high seas or an exclusive economic zone to the territorial sea of a foreign State, or when the strait is formed by an island of a State bordering the strait and its mainland.[1222]

617. However, where the establishment of a straight baseline in accordance with the method set forth in Article 7 has the effect of enclosing as internal waters areas within straits which had not previously been considered as such, the passage regime set out in Part III applies. Thus, in such waters, foreign ships enjoy the right of transit passage or the right of non-suspendable innocent passage, depending on the characteristics of straits used for international navigation.

618. Another provision of the Convention relevant to navigation in internal waters is Article 25, paragraph 2, of the Convention, which reads:

1221 UNCLOS, Art. 38(1).

1222 *See* UNCLOS, Art. 45(1)(a)-(b).

> In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which the admission of those ships to internal waters or such a call is subject.

619. While this provision primarily concerns the coastal State's right to take protective measures in its territorial sea, it has significant implications for the navigational regime governing internal waters. It presupposes that a coastal State has the authority to establish conditions for the admission of foreign ships into its internal waters. Such authority is derived from the coastal State's sovereignty over these waters.

620. A coastal State has broad discretion in determining the conditions for admitting foreign ships into its internal waters. These conditions may be established by a coastal State unilaterally or through its agreements with flag States. Thus, the navigational regime applicable to a coastal State's internal waters depends largely on the conditions established by the coastal State.

621. In the view of the Arbitral Tribunal, the above provisions of the Convention establish a general framework for navigation in internal waters. The Convention leaves the specific regulation of navigation in these waters to each coastal State. However, this does not mean that navigation in internal waters falls outside the scope of the Convention. On the contrary, through Article 2, paragraph 1, and Article 25, paragraph 2, the Convention clearly recognises the authority of a coastal State to regulate navigation within its internal waters. Article 8, paragraph 2, and Article 35(a) of the Convention place some limitations on such authority in the areas to which those provisions apply.

622. The Arbitral Tribunal finds that the above provisions of the Convention provide a sufficient basis for its jurisdiction *ratione materiae* over a dispute concerning navigation in internal waters. At this juncture, it is opportune to note that a distinction should be made between the question of jurisdiction and that of applicable law. While the Arbitral Tribunal relies on the above provisions of the Convention to establish its jurisdiction over the navigational dispute in the Sea of Azov and the Kerch Strait, in addressing this dispute it is not precluded from applying other relevant provisions of the Convention or other rules of international law not incompatible with the Convention, in accordance with Article 293 of the Convention.

623. The absence of any separate section on internal waters in the Convention, or the fact that there are only a few provisions addressing them, is not material to the assessment of whether and to what extent the Convention regulates activities in internal waters.

624. For the above reasons, the Arbitral Tribunal concludes that navigation in internal waters falls within the scope of the Convention. Accordingly, it rejects the Russian Federation's objection that the Arbitral Tribunal lacks jurisdiction over all of Ukraine's claims relating to navigation in the Sea of Azov and the Kerch Strait because the Convention does not regulate navigation in internal waters, and finds that it has jurisdiction in this regard.

625. The Arbitral Tribunal will now examine the three categories of Ukraine's claims in turn. It will begin with the first category of claims, namely those concerning the unlawful impediment of transit passage in the Kerch Strait.

3. Alleged Unlawful Impediment of Transit Passage in the Kerch Strait

626. Ukraine submits that the Russian Federation has violated Articles 38, 43, and 44 of the Convention by engaging in the following actions: first, constructing a bridge across the Kerch Strait that permanently impedes the ability of vessels that previously transited the Strait or foreseeably may transit the Strait from doing so; second, failing to share information as to threats to safe navigation caused by the bridge; third, delaying passage through the Kerch Strait for vessels that are navigating to and from Ukrainian ports and inspecting such vessels; and, fourth, restricting the navigation of all foreign warships and other government vessels through the Kerch Strait by closing the entire southern entrance to the Kerch Strait for a period of over six months.[1223] With respect to its last claim, Ukraine asserts that the Russian Federation's action is also inconsistent with Article 25, paragraph 3, of the Convention.[1224]

627. The Russian Federation, for its part, argues that the Arbitral Tribunal lacks jurisdiction over certain claims made by Ukraine.[1225] Additionally, it asserts that some of Ukraine's claims are inadmissible. In the alternative, the Russian Federation contends that Ukraine's claims lack merit and that it has not violated the Convention.

628. The Arbitral Tribunal has already rejected the general objection of the Russian Federation based on the internal waters status of the Sea of Azov and the Kerch Strait. The Arbitral Tribunal will now address the Russian Federation's additional objections to jurisdiction and admissibility.

1223 Revised Memorial, para. 314; Ukraine's Final Submissions.
1224 *See* para. 473 above.
1225 *See* para. 478 above.

a. Jurisdiction and Admissibility

i. Jurisdiction

629. The Russian Federation contends that consideration of Ukraine's claims under Articles 38 and 44 of the Convention would require the Arbitral Tribunal to address the question of sovereignty over Crimea.[1226] According to the Russian Federation, the prerequisite for Ukraine's arguments relating to transit passage through the Kerch Strait to be considered must be that Ukraine was "a State bordering the Kerch Strait at relevant times, which it was not as a matter of fact."[1227] The Russian Federation argues that the question of a State bordering the Strait will therefore implicate the decision of the Arbitral Tribunal in the Award Concerning Preliminary Objections, to the extent that no finding can be made in response to that question.[1228] Accordingly, the Russian Federation asserts that Ukraine's claims cannot be addressed by the Arbitral Tribunal without exceeding its jurisdiction.[1229]

630. The Russian Federation further contends that since it now exercises exclusive sovereignty over the land on both sides of the Kerch Strait, Ukraine's claims challenging the Russian Federation's exercise of its sovereignty in its own internal waters by conducting inspections of vessels are "in effect yet another attempt to bring up the issue of sovereignty over Crimea."[1230]

631. In response, Ukraine rejects the Russian Federation's contention that Ukraine continues to assert claims premised on its sovereignty over Crimea.[1231] Ukraine argues that its claims related to vessel inspections in the Kerch Strait and restrictions on passage for non-Russian governmental ships through the Strait depend not on sovereignty over Crimea but on the Kerch Strait's status as an international strait.[1232] Ukraine adds that the Russian Federation would have these obligations even if it were the only coastal State in the Kerch Strait.[1233]

632. The Arbitral Tribunal does not consider that ruling on Ukraine's claims requires it to decide upon whether Ukraine is a State bordering the Kerch Strait. Ukraine's claims are explicitly based on the premise that the Kerch Strait is a strait used for international navigation within the meaning of Article 37 of the Convention and that in such straits all ships enjoy the right of transit passage

1226 Rejoinder, para. 226.
1227 Rejoinder, para. 225.
1228 Rejoinder, para. 225.
1229 Rejoinder, para. 226.
1230 Counter-Memorial, para. 279.
1231 Reply, para. 85.
1232 Reply, para. 86; Hearing, 23 September 2024, 121:8-18 (Cheek).
1233 Reply, para. 86.

in accordance with Article 38 of the Convention. Thus, whether Ukraine is a State bordering the Kerch Strait is irrelevant in assessing Ukraine's claims. Accordingly, the Arbitral Tribunal rejects this objection by the Russian Federation, and finds that it has jurisdiction over Ukraine's claims in this regard.

ii. Admissibility

633. The Russian Federation submits that Ukraine's third and fourth claims (regarding delays and inspections of vessels and the closure of the southern entrance to the Kerch Strait) are inadmissible, as they were not contained in Ukraine's original submissions and subsequently introduced into the proceedings without the leave of the Arbitral Tribunal in disregard of Article 13, paragraph 5, of the Rules of Procedure.[1234] The Russian Federation adds that, in any case, these claims are all based on events that occurred after the critical date of 16 September 2016, the date of the Notification and Statement of Claim.[1235] In particular, according to the Russian Federation, the facts underlying Ukraine's claim on the closure of the southern entrance to the Kerch Strait occurred five years after the institution of this Arbitration, thereby falling outside the temporal scope of the dispute.[1236]

634. For its part, Ukraine points out that its Notification and Statement of Claim refers to the Russian Federation's interference with navigation and transit passage in the Kerch Strait. Thus, according to Ukraine, the later submissions supplementing the legal and factual basis of Ukraine's claims do not change the subject matter of the dispute.[1237] Ukraine adds that the fact that its claims relate to events that took place after the filing of the Notification and Statement of Claim does not lead to their inadmissibility, since they do not transform the nature of dispute.[1238]

635. At the outset, the Arbitral Tribunal notes that Ukraine's third and fourth claims relate to events that occurred after the initiation of the present Arbitration. However, this does not, *per se*, render such claims inadmissible. Generally, parties to a dispute have a certain degree of liberty to amend or supplement their submissions, even up to the conclusion of oral proceedings.[1239] However, such liberty has its limits.

1234 Rejoinder, paras 474-79, 503-10.
1235 Rejoinder, paras 479, 503-10.
1236 Rejoinder, para. 479.
1237 Hearing, 23 September 2024, 129:3-131:6 (Cheek).
1238 Hearing, 23 September 2024: 131:7-132:19 (Cheek).
1239 *Société Commerciale de Belgique*, Judgment, 1939, PCIJ Series A/B, No. 78, p. 159 at p. 173.

636. When disputes are submitted to international courts or tribunals, the document instituting proceedings, whether an application or a notification and statement of claim, must indicate the "subject of the dispute."[1240] As ITLOS stated in *M/V "Louisa"(Saint Vincent and the Grenadines v. Kingdom of Spain) (hereinafter "M/V 'Louisa'")*, "while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application."[1241] In this regard, the Arbitral Tribunal notes that Article 13, paragraph 5, of the Rules of Procedure provides that:

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

637. In a similar vein, the ICJ stated in *Oil Platforms (Islamic Republic of Iran v. United States of America)* that:

> It is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings "transform the dispute brought before the Court into a dispute that would be of a different nature."[1242]

638. Referring to the ICJ pronouncement in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ITLOS further points out that it is a legal requirement that "any new claim to be admitted must arise directly out of the application or be implicit in it."[1243]

639. Thus, the admissibility of Ukraine's claims relating to the inspection of vessels passing through the Kerch Strait or interference with passage due to the closure of its southern entrance depends on whether these claims fall within the scope of the dispute originally submitted by Ukraine or whether they transform the nature of the dispute brought before the Arbitral Tribunal.

640. The Arbitral Tribunal considers that the Notification and Statement of Claim explicitly refers to interference with the right of transit passage through the Kerch Strait as one of the disputes submitted.[1244] Therefore, the Arbitral Tribunal does not find that these claims, though related to

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1240 *M/V "Louisa"(Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 44, para. 143 (**Annex RUL-36**).

1241 *M/V "Louisa"(Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 44, para. 143 (**Annex RUL-36**).

1242 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161 at p. 213, para. 117 *citing Certain Phosphate Lands in Nauru (Nauru* v. *Australia*), Preliminary Objections, Judgment, I.C.J. Reports 1992*,* p. 240 at p. 265, para. 63.

1243 *M/V "Louisa"*, cit., n. 1241, p. 44, para. 142 (**Annex RUL-36**) *referring to Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 at p. 266, para. 67).

1244 *See* Notification and Statement of Claim, paras 20-25.

events occurring after the initiation of the present Arbitration, fall outside the scope of the dispute outlined in the Notification and Statement of Claim. Nor does it consider that they transform the dispute's nature.

641. Accordingly, the Arbitral Tribunal rejects the Russian Federation's objection to the admissibility of Ukraine's claims.

b. Legality of the Russian Federation's Actions in the Kerch Strait

642. Having rejected the Russian Federation's additional objections to its jurisdiction and the admissibility of Ukraine's claims, the Arbitral Tribunal will now address the substance of the Parties' dispute regarding the alleged interference with navigation in the Kerch Strait.

643. Ukraine contends that the Russian Federation has violated Articles 38, 43, and 44 of the Convention by taking various actions, as outlined above, that have impeded the transit passage of vessels through the Kerch Strait. In particular, Ukraine argues that the Russian Federation has constructed a bridge at half the height required for "proper" clearance, thereby preventing larger vessels from passing through the Kerch Strait and violating its obligations under Articles 38 and 44 of the Convention.[1245] Ukraine further argues that the Russian Federation has failed, in violation of Articles 43 and 44, to share information with Ukraine about threats to safe navigation posed by its hasty construction of the Kerch Strait bridge.[1246] In this regard, Ukraine presents extensive arguments on how these provisions should be interpreted and applied to the facts of the present case.[1247]

644. The premise of Ukraine's claims is that the Sea of Azov includes territorial seas and exclusive economic zones of both Ukraine and the Russian Federation. According to Ukraine, consequently, the Kerch Strait, connecting one part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone, qualifies as a strait used for international navigation and is therefore subject to the regime of transit passage under the Convention.

645. For its part, the Russian Federation submits that Articles 38, 43, and 44 of the Convention are not applicable to the present case because the Kerch Strait is not a strait used for international navigation within the meaning of Article 37 of the Convention but part of its internal waters. According to the Russian Federation, it is the Azov/Kerch Cooperation Treaty that governed

1245 Revised Memorial, para. 132.
1246 Revised Memorial, para. 132.
1247 *See* subsection IV.B.1 above.

navigation in the Kerch Strait at all relevant times, including before and on 16 September 2016.[1248] The Russian Federation points out that the Azov/Kerch Cooperation Treaty provided for a special restrictive regime of passage through the Kerch Strait and constituted *lex specialis* in relation to UNCLOS.[1249] It further adds that the navigational provisions of the Azov/Kerch Cooperation Treaty, however, are beyond the jurisdiction of the Arbitral Tribunal, since disputes between the Parties related to the interpretation and application of the Azov/Kerch Cooperation Treaty shall not be resolved by the Arbitral Tribunal without the express mutual consent of both Parties, which is apparently absent in the instant case.[1250]

646. Alternatively, the Russian Federation maintains that even if the regime of transit passage does apply to the Kerch Strait, it did not violate the provisions invoked by Ukraine because such regime would still not apply automatically to supersede the rights of the coastal State.[1251] In the present case, the Russian Federation argues, the interference with navigation by the construction of the Kerch Bridge was both justifiable and proportionate in light of the economic and humanitarian necessity to connect the Crimean Peninsula to mainland Russian territory, especially after the imposition of a blockade by Ukraine in 2014.[1252]

647. Thus, there is a divergence of views between the Parties as to various legal and factual issues concerning the alleged interference with navigation in the Kerch Strait. In their pleadings, they have argued extensively in support of their respective positions while also contesting the opposing views.[1253]

648. In addressing the Parties' dispute over navigation in the Kerch Strait, the Arbitral Tribunal considers that the first—and perhaps most fundamental—question it must clarify is what should be the applicable law for the present dispute, in particular the navigational regime applicable to the Kerch Strait. In the Arbitral Tribunal's view, this question lies at the heart of the present dispute.

649. The Parties hold diametrically opposed views on this issue. Ukraine asserts that the regime of transit passage, as set out in Articles 38, 43, and 44 of the Convention, should apply, whereas the Russian Federation argues that these provisions are inapplicable to the present dispute. This

1248 Rejoinder, para. 431.
1249 Rejoinder, para. 431.
1250 Counter-Memorial, para. 284.
1251 Counter-Memorial, para. 144.
1252 Counter-Memorial, para. 151.
1253 *See* Section IV.B above.

fundamental disagreement stems in turn from their differing interpretations of the legal status of the Sea of Azov and the Kerch Strait.

650. The Arbitral Tribunal has found above that upon and following the dissolution of the Soviet Union, the Sea of Azov and the Kerch Strait has had the status of internal waters.[1254] In reaching this conclusion, the Arbitral Tribunal has examined the law of State succession, relevant judicial and arbitral decisions, the law and practice concerning pluri-State bays, and the agreement between the Parties as reflected in the Azov/Kerch Cooperation Treaty, along with its negotiation history and subsequent practice.

651. In the view of the Arbitral Tribunal, this finding has decisive consequences for the navigational regime governing the Sea of Azov and the Kerch Strait.

652. In the first place, it is evident that the Kerch Strait does not qualify as a strait used for international navigation within the meaning of Article 37 of the Convention, because it does not connect one part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone. Consequently, Articles 38, 43, and 44 of the Convention are inapplicable to the present dispute. As a result, Ukraine's claims based on the regime of transit passage under these provisions are untenable. The Arbitral Tribunal also notes that Ukraine appears to accept that Article 45 of the Convention (innocent passage) is not applicable because that provision "applies to passage in straits connecting the high seas and a territorial sea (not an area of internal waters)."[1255]

653. This would dismiss Ukraine's claims regarding interference with navigation in the Kerch Strait, provided no other grounds justify them. Accordingly, the question the Arbitral Tribunal has to address is whether such other grounds that could justify Ukraine's claims exist. The Arbitral Tribunal thus finds it necessary to conduct a more detailed examination of the navigational regime applicable to the Kerch Strait and determine whether any legal basis other than transit passage could support Ukraine's claims, at least in part. This inquiry requires further clarification of the Arbitral Tribunal's finding that the Sea of Azov and the Kerch Strait had the status of internal waters and of its implication for navigation.

1254 *See* para. 399 above.
1255 Reply, para. 43.

654. In conducting this inquiry, the Arbitral Tribunal is mindful that it is bound to ascertain and apply the relevant law in the circumstances of the present case and that this inquiry must be conducted within the bounds of the principle of *ne ultra petita*.

i. Nature of Sovereignty over the Sea of Azov and the Kerch Strait and Its Implications

655. The finding that the Sea of Azov and the Kerch Strait constituted the internal waters of the Parties can certainly be interpreted to mean that they have exercised sovereignty over these waters. However, the precise nature of that sovereignty remains unclear. In order to address this question, it is necessary to examine how the Parties have treated these waters following the dissolution of the Soviet Union.

656. In this regard, the Arbitral Tribunal notes that neither Party has presented evidence suggesting the existence of an internal administrative boundary that divided the Sea of Azov or the Kerch Strait into separate maritime zones during the Soviet era. Nor does the Arbitral Tribunal find any evidence indicating that, following the dissolution of the Soviet Union, the Parties attempted to succeed to an existing internal maritime boundary by invoking the principle of *uti possidetis* or otherwise. Furthermore, while the Arbitral Tribunal lacks sufficient information regarding the Parties' actual practice in treating the Sea of Azov and the Kerch Strait after the dissolution of the Soviet Union, there is no evidence to suggest that the Parties had *de facto* divided the Sea of Azov into their respective maritime zones in regulating various maritime activities during the relevant period.

657. However, this does not necessarily entail the conclusion that the Parties have exercised joint sovereignty over the Sea of Azov and the Kerch Strait. As the Chamber of the ICJ stated in *Gulf of Fonseca*, "the mere absence of the delimitation of division of a maritime territory, cannot be said of itself 'always' to entail a joint sovereignty over that area of maritime territory."[1256]

658. As reviewed above, during the negotiations leading up to the conclusion of the Azov/Kerch Cooperation Treaty, the Parties disagreed not so much on the internal waters status of the Sea of Azov and the Kerch Strait as on whether these water areas should be kept as their joint or common internal waters or whether, on the other hand, each State should have a part of those water areas as its own internal waters. While Ukraine insisted on the delimitation of the Sea of Azov, the Russian Federation was reluctant to delimit a boundary, preferring instead to maintain the Sea of Azov and the Kerch Strait as the "common internal waters" of both States. Ultimately, the Parties

1256 *Gulf of Fonseca*, cit., n. 43, p. 600, para. 401 (**Annexes RUL-19**, **UAL-58**).

agreed to the delimitation of the Sea of Azov but postponed its implementation to an unspecified future date.[1257]

659. In light of the Parties' disagreement on the nature of their sovereignty over the Sea of Azov and the Kerch Strait, it would be difficult to conclude that the sovereignty exercised by the Parties over these waters was "joint sovereignty" in the sense that each Party's sovereignty extended to the entirety of the Sea of Azov and the Kerch Strait. This tentative finding is further strengthened by the Parties' agreement to delimit the Sea of Azov. At this juncture, the Arbitral Tribunal wishes to revisit the text of Article 1 of the Azov/Kerch Cooperation Treaty:

> The Sea of Azov and the Kerch Strait [*Russian Federation's translation:* are historically][*Ukraine's translation*: historically constitute] internal waters of the Russian Federation and Ukraine.
>
> The Sea of Azov shall be delimited by the state border line in accordance with an agreement between the Parties.
>
> *[Russian Federation's translation*: Matters concerning the Kerch Strait water area] [*Ukraine's translation*: Issues concerning the water area of the Kerch Strait] shall be resolved by agreement between the Parties.

660. The text above reveals a distinction between the treatment of the Sea of Azov and of the Kerch Strait in terms of delimitation. While both were designated as internal waters, the obligation of delimitation applied only to the Sea of Azov. In contrast, there was no such obligation for the Kerch Strait: instead, matters concerning its waters had to be resolved through mutual agreement between the Parties.

661. The obligation to resolve matters concerning the Kerch Strait through mutual agreement required the Parties to jointly regulate navigation in the Strait. It also prohibited either Party from unilaterally introducing or implementing measures that could impact passage through the Kerch Strait without the agreement of the other Party. Accordingly, navigational measures such as VTS, pilotage, and one-way traffic requirements should have been established through mutual agreement between the Parties. Unilateral imposition of such measures by one Party would have been contrary to the text of Article 1 of the Azov/Kerch Cooperation Treaty.

662. This is further reflected in Article 3 of the Azov/Kerch Cooperation Treaty, which reads:

> Russian-Ukrainian cooperation, including joint [*Russian Federation's translation*: activities in the area of navigation and hydrographic support, fisheries, protection of the marine environment, environmental safety as well as search and rescue in the Sea of Azov and the Kerch Strait, shall be provided both through][*Ukraine's translation*: activity in the area of shipping, including the regulation thereof and navigational-hydrographic support; fishing; marine environment protection; and environmental safety, as well as search and rescue in the

1257 *See* para. 382 above.

> Sea of Azov and the Kerch Strait, shall be ensured by both] the implementation of existing agreements and the [*Russian Federation's translation*: conclusion of new ones, where][*Ukraine's translation*: entering into of new ones as] appropriate.

ii. Navigational Regime Applicable to the Kerch Strait and Its Implications

663. Next, the Arbitral Tribunal turns to the navigational regime governing the Sea of Azov and the Kerch Strait. The Parties' agreement on how their sovereignty should be exercised with respect to navigation is reflected in Article 2 of the Azov/Kerch Cooperation Treaty, which reads:

> 1. [*Russian Federation's translation*: Merchant vessels and warships as well as other government vessels flying the flag of the Russian Federation or Ukraine][*Ukraine's translation*: Trade vessels and military ships, as well as other government vessels under the flag of the Russian Federation or Ukraine, that are] used for non-commercial purposes shall enjoy [*Russian Federation's translation*: freedom of navigation][*Ukraine's translation*: free passage] in the Sea of Azov and the Kerch Strait.
>
> 2. [*Russian Federation's translation*: Merchant vessels flying][*Ukraine's translation*: Trade vessels under] the flags of third States may enter the Sea of Azov and pass through the Kerch Strait if they are bound for or returning from a Russian or Ukrainian port.
>
> 3. [*Russian Federation's translation*: Warships and other government vessels of third States] [*Ukraine's translation*: Military ships and other government vessels that are] used for non-commercial purposes may enter the Sea of Azov and pass through the Kerch Strait if they are making a visit or business call to a port of [*Russian Federation's translation*: either Party upon its invitation or permission agreed upon with][*Ukraine's translation*: one of the Parties at its invitation or with its permission, approved by] the other Party.

664. Thus, the navigational regime applicable to the Sea of Azov and the Kerch Strait under the Azov/Kerch Cooperation Treaty varied depending on the flag of the vessels as well as their classification and use as either commercial or governmental.

665. Vessels flying the flag of the Russian Federation or Ukraine enjoyed "freedom of navigation" or "free passage" in the Sea of Azov and the Kerch Strait. The term "freedom of navigation" appears to have been used in the same sense generally recognised in the law of the sea,[1258] namely the unrestricted movement that ships enjoy on the high seas. The equivalent term in the translation presented by Ukraine is "free passage" and this appears to have similar connotations. Accordingly, any act of interference with, or impediment to, the navigation of vessels flying the flag of either Party or any exercise of jurisdiction over such vessels would, in principle, have constituted a breach of this freedom. Plainly, however, that is subject to whatever rights the coastal State(s) may possess as a matter of international law by virtue of their sovereignty and jurisdiction over the waters in question.

[1258] *See, e.g.*, UNCLOS Article 87(1)(a), and *cf.*, Articles 58(1), 78(2). The Russian and Ukrainian original texts of the Azov/Kerch Cooperation Treaty use the same words as are used in the Russian text of UNCLOS Article 87(1)(a) for what the English text of that Article refers to as "freedom of navigation."

666. In contrast, vessels flying the flag of third States were granted a significantly more restricted right of navigation in these waters. In particular, the passage of warships and other government vessels of third States through the Kerch Strait was subject to the mutual consent of both Parties.

667. This navigational regime would constitute part of the applicable law under which Ukraine's claim against the actions of the Russian Federation in the Sea of Azov and the Kerch Strait should be assessed in accordance with Article 293 of UNCLOS. However, there are two issues the Arbitral Tribunal has to consider before proceeding to do so.

668. The first issue concerns the Russian Federation's objection that the Azov/Kerch Cooperation Treaty is beyond the Arbitral Tribunal's jurisdiction and any pronouncements as to its legal effect or nature would be *ultra vires* since Article 4 of the Treaty precludes the Arbitral Tribunal from dealing with disputes concerning the interpretation or application of the Treaty.[1259] However, the Arbitral Tribunal has already rejected such objection in its Award Concerning Preliminary Objections. In that Award, the Arbitral Tribunal stated that its jurisdiction is not precluded by the dispute resolution provision in Article 4 of the Azov/Kerch Cooperation Treaty.[1260]

669. The second issue concerns whether Ukraine's claims, as stated in its pleadings and submissions, preclude the Arbitral Tribunal from ruling on these claims in the context of the navigational regime under the Azov/Kerch Cooperation Treaty. In this regard, the Arbitral Tribunal notes that Ukraine's claims relating to navigation in the Kerch Strait are formulated exclusively under Articles 38, 43, and 44 of the Convention. Ukraine does not allege a breach of the Azov/Kerch Cooperation Treaty by the Russian Federation. On the contrary, Ukraine explicitly states that it is not invoking a breach of that Treaty.

670. In its Reply, Ukraine states that:

> [...] the [...] 2003 Sea of Azov Treaty does not govern the regime of navigation in the Sea of Azov and the Kerch Strait, nor do its provisions supersede the obligations and protections guaranteed by UNCLOS. Further, none of Ukraine's claims in this proceeding invoke the 2003 Sea of Azov Treaty or allege violations of it. The 2003 Sea of Azov Treaty is thus inapplicable to the resolution of Ukraine's claims of breaches of its navigation rights under UNCLOS, which is the instrument this Tribunal is tasked with applying.[1261]

671. It is well established in international proceedings that a court or tribunal cannot decide on questions that go beyond the specific claims presented by the parties. It must operate within the

1259 Counter-Memorial, para. 284.
1260 Award Concerning Preliminary Objections, para. 490.
1261 Reply, para. 190.

limits set by the parties' submissions. As the ICJ stated in *Request for interpretation of the Judgment of 20 November 1950, in the asylum case (Colombia v. Peru)*,

> it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.[1262]

672. In light of Ukraine's clear position on the inapplicability of the Azov/Kerch Cooperation Treaty in the present case, as quoted above, the Arbitral Tribunal would breach the principle of *ne ultra petita* if it proceeded to examine Ukraine's claims regarding navigation in the Kerch Strait under that Treaty. Moreover, in these circumstances, addressing Ukraine's claim under the Azov/Kerch Cooperation Treaty without allowing the Parties to present their arguments would be contrary to the fair administration of justice. Consequently, the Arbitral Tribunal must halt its inquiry into the significance of rights of navigation in the Sea of Azov and the Kerch Strait under the Azov/Kerch Cooperation Treaty for Ukraine's claims in this case.

673. Ukraine's submissions, revised in light of the Award Concerning Preliminary Objections, are explicitly limited—in so far as questions of navigational rights are concerned—to claims of violations of Articles 38, 43, and 44 of the Convention with respect to the Kerch Strait, and of Articles 2, 58, and 87 of the Convention with respect to the Sea of Azov, as will be examined below. The Arbitral Tribunal's finding that the Sea of Azov consisted of internal waters upon the dissolution of the Soviet Union, and that this status was not subsequently changed,[1263] necessarily means that the Sea of Azov contained no territorial sea or exclusive economic zone and that the Kerch Strait does not fulfil the criteria set by the Convention for its classification as a strait used for international navigation. In consequence, Articles 38, 43, and 44, and Articles 2, 58, and 87 of the Convention cannot constitute the legal basis of navigational rights in the Kerch Strait or the Sea of Azov, and Ukraine's case as pleaded must fail. It is, however, clear from the explicit terms of Article 2 of the Azov/Kerch Cooperation Treaty that the Parties were agreed that ships flying the flag of the littoral States of the Sea of Azov could navigate freely throughout the Kerch Strait and Sea of Azov and that ships of other States had more limited rights to call at ports in the Sea of Azov. The Arbitral Tribunal's decision, therefore, does not in any way affect or prejudice the position of any littoral State or any other third State in respect of any such navigational rights, which existed independently of the Convention until the termination of the Azov/Kerch Cooperation Treaty in 2023.

1262 *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case*, Judgment of November 27th, 1950: I.C.J. Reports 1950, p. 395 at p. 402.

1263 *See* paras 393-395 above.

4. Alleged Violation of Innocent Passage in the Black Sea

674. There remains the issue relating to the Russian Federation's closure of the southern entrance to the Kerch Strait located in the Black Sea for approximately six months, from April 2021 to the end of October 2021.

675. Ukraine argues in its Revised Memorial that the Russian Federation's closure of the southern entrance to navigation by foreign military and other governmental vessels constitutes yet another violation of the regime of transit passage guaranteed under Articles 38 and 44 of the Convention.[1264] In response to the Russian Federation's argument in the Counter-Memorial, Ukraine expands its argument in its Reply, pointing out that the closure of the southern entrance in the Black Sea by the Russian Federation also fails to meet the requirements under Article 25, paragraph 3, of the Convention concerning innocent passage through the territorial sea and the rights of protection of the coastal State.[1265]

676. Thus, although Ukraine did not include an explicit claim in its final submissions regarding the Russian Federation's measure to suspend innocent passage of foreign warships and government vessels in the portions of the Black Sea near the Kerch Strait for six months, the Arbitral Tribunal finds it necessary to consider whether this measure is in conformity with the Convention. The Arbitral Tribunal notes in this regard that it has already rejected the Russian Federation's objections to its jurisdiction and the admissibility of Ukraine's claim on this issue.[1266]

677. The Parties disagree on whether the closure of portions of the Black Sea met the requirements under Article 25, paragraph 3, of the Convention. Specifically, they dispute whether the six-month closure can be considered "temporary"; whether the closure only to warships and other governmental vessels constitutes "discrimination in form or in fact among foreign ships"; and whether the Russian Federation publicly indicated why it was closing off portions of the Black Sea and demonstrated that the closure was "essential for its security."[1267]

678. Article 25, paragraph 3, of the Convention reads:

> The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified area of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

1264 Revised Memorial, para. 164.
1265 Reply, para. 185.
1266 *See* paras 629-632, 633-641 above.
1267 Reply, paras 185-86; Hearing, 25 September, 54:1-55:4 (Gore). *See also* Counter-Memorial, paras 257-72; Rejoinder, paras 482-97.

679. Under Article 25, paragraph 3, of the Convention, the coastal State may suspend the innocent passage of foreign ships in specified areas of its territorial sea, subject to four conditions: (i) suspension must be necessary to protect its security; (ii) suspension must not discriminate among foreign ships in form or in fact; (iii) suspension must be temporary; and (iv) suspension must be duly published to be effective.

680. In its pleadings, the Russian Federation refers to security concerns arising from a series of military exercises and the presence of foreign warships and government ships in the Azov-Black Sea basin at the time in question, which prompted it to exercise the right to suspend innocent passage.[1268] The Russian Federation submitted relevant information in support of its claim.[1269] The Arbitral Tribunal finds no evidence to dispute the Russian Federation's assessment of the situation that existed prior to and during the period when innocent passage was suspended.

681. Article 25 of UNCLOS is one of several provisions in the Convention that forbids discrimination with respect to foreign vessels. Some such provisions forbid discrimination in form or in fact "against the ships of any State,"[1270] but Article 25, paragraph 3, forbids discrimination in form or in fact "among foreign ships."[1271] Giving the words of Article 25, paragraph 3, their ordinary meaning in their context and in the light of the object and purpose of the Convention, the Arbitral Tribunal does not consider that the measure closing portions of the Black Sea to foreign warships and other governmental vessels amounts to discrimination in form or fact "among foreign ships," as it applied equally to warships and governmental vessels of different nationalities. The fact that the measure applied only to foreign warships and governmental vessels does not render it discriminatory under Article 25, paragraph 3, provided it applies to all such warships and vessels on equal terms.

682. Article 25, paragraph 3, of the Convention does not define "temporary." However, the term "temporary" should be assessed in relation to the need to protect the security of the coastal State. Based on the unrebutted information submitted to the Arbitral Tribunal, it is reasonable to assume that the Russian Federation's perceived security concerns were not insignificant, related to risks involving the presence of foreign warships or governmental vessels, and persisted throughout the period when innocent passage was suspended.

1268 Counter-Memorial, paras 257-65.
1269 Counter-Memorial, paras 257-65.
1270 UNCLOS, Art. 24(1)(b). S*ee also* UNCLOS Arts 119(3), 227.
1271 *See also* UNCLOS, Arts 42(2), 52(2).

683. The Arbitral Tribunal considers that the Russian Federation, by issuing the Notices to Mariners,[1272] fulfilled the requirement to duly publish the suspension of innocent passage. On the other hand, the Russian Federation's claim that Ukraine also has a record of suspending innocent passage for a period of several months is irrelevant to assessing the Russian Federation's measure in question.

684. For the reasons set out above, the Arbitral Tribunal concludes that the Russian Federation's suspension of innocent passage in the portions of the Black Sea near the Kerch Strait does not constitute a violation of Article 25, paragraph 3, of the Convention.

5. Alleged Impediment to Navigation in the Sea of Azov to and from Ukrainian Ports

685. The Arbitral Tribunal will now consider the Parties' dispute regarding the alleged impediment to navigation in the Sea of Azov to and from Ukrainian ports.

686. Ukraine argues that the Russian Federation violated Articles 2, 58, 87, and 92 of the Convention by stopping and inspecting Ukrainian-flagged vessels, as well as vessels flying the flags of third States, in the exclusive economic zone and within 12 nautical miles of mainland Ukraine over a six-month period from April to November 2018.[1273] According to Ukraine, Russian Border Guard vessels stopped and inspected cargo ships travelling to and from Mariupol or Berdyansk on more than 100 occasions.[1274]

687. Regarding the stoppages and inspections that took place in the exclusive economic zone, Ukraine contends that the Russian Federation violated the freedom of navigation guaranteed under Articles 58 and 87 of the Convention.[1275] Ukraine further contends that where such stoppages and inspections involved Ukrainian-flagged vessels, the Russian Federation also violated Ukraine's exclusive jurisdiction over its vessels under Article 92 of the Convention.[1276] For such stoppages and inspections that occurred within 12 nautical miles of Ukraine's mainland, Ukraine claims that the Russian Federation violated its sovereignty over its territorial sea under Article 2 of the Convention.[1277] Ukraine has provided evidence in support of its claim, including AIS data and two witness statements.

1272 *E.g.*, Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation, Notice to the Mariners Navigation Warnings, Weekly Bulletin Issue 17/21 (**Annex UA-621**).
1273 Revised Memorial, para. 166.
1274 Revised Memorial, para. 173.
1275 Reply, para. 188.
1276 Reply, para. 188.
1277 Reply, para. 188.

688. For its part, the Russian Federation raises objections to the Arbitral Tribunal's jurisdiction and the admissibility of Ukraine's claims. The Russian Federation argues that Ukraine's claims regarding the inspection of vessels in the Sea of Azov fall outside the jurisdiction of the Arbitral Tribunal, as they "concern the question of Russia [*sic*] sovereignty with regard to its new subjects – the DPR, the Zaporozhye Region and the Kherson Region."[1278] Additionally, the Russian Federation asserts that Ukraine's claims are inadmissible because they are based on events that occurred after the "critical date," *i.e.*, the date on which the present Arbitration was initiated.[1279]

689. Concerning the merits of Ukraine's claims, the Russian Federation contends that the UNCLOS provisions invoked by Ukraine are irrelevant, as there is no territorial sea and exclusive economic zone in the Sea of Azov.[1280] It further contends that the issues of navigation in these waters were governed by the Azov/Kerch Cooperation Treaty.[1281] The Russian Federation adds that, in any event, the inspection of vessels in the Sea of Azov constitutes a legitimate exercise of its sovereignty, as the Sea of Azov is part of its internal waters.[1282] The Russian Federation also challenges the reliability of Ukraine's documentary and witness evidence.[1283]

a. Jurisdiction and Admissibility

690. The Arbitral Tribunal will first address the Russian Federation's objections to its jurisdiction and the admissibility of Ukraine's claims.

691. The Arbitral Tribunal has already rejected the Russian Federation's objections to its jurisdiction that were based on the grounds that internal waters fall outside the scope of the Convention (second general objection) and that a change in circumstances deprives the Arbitral Tribunal of its jurisdiction (third general objection).[1284]

692. With respect to the Russian Federation's objection to admissibility, the Arbitral Tribunal notes that Ukraine's claims concern events that occurred after the initiation of the present Arbitration. However, as previously stated, this does not automatically render Ukraine's claims inadmissible. In the Arbitral Tribunal's view, interference with navigation was one of the central issues in the dispute submitted by Ukraine. Therefore, the Arbitral Tribunal does not consider Ukraine's claims

1278 Counter-Memorial, para. 285.
1279 Rejoinder, paras 503-10.
1280 Counter-Memorial, para. 281.
1281 Counter-Memorial, para. 282.
1282 Counter-Memorial, paras 286-88.
1283 Rejoinder, paras 521-23.
1284 *See* subsections III.E.3, III.E.4 above.

in this regard to fall outside the scope of the dispute. Accordingly, the Russian Federation's objection to admissibility must be rejected.

b. Legality of the Russian Federation's Actions in the Sea of Azov

693. The Arbitral Tribunal notes that the fundamental premise of Ukraine's claims regarding the Russian Federation's impediment to navigation in the Sea of Azov is that the Sea of Azov consists of the territorial seas and exclusive economic zones of the two littoral States, Ukraine and the Russian Federation. However, this premise is untenable given the Arbitral Tribunal's finding that the Sea of Azov constituted the internal waters of both States at the time of the initiation of this Arbitration.[1285] Accordingly, Articles 2 (Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil), 58 (Rights and duties of other States in the exclusive economic zone), 87 (Freedom of the high seas), and 92 (Status of ships) of the Convention are inapplicable to the present dispute.

694. Before its termination in 2023, the navigational regime applicable to the Sea of Azov was governed by the Azov/Kerch Cooperation Treaty. As noted above, vessels flying the flag of Ukraine enjoyed freedom of navigation or free passage under that Treaty. Vessels flying the flag of third States had more limited rights of navigation.

695. However, for the same reasons as are set out above,[1286] the Arbitral Tribunal must refrain from examining whether the Russian Federation's stoppages and inspections in the Sea of Azov of Ukrainian flagged vessels as well as vessels flying the flags of third States to and from Ukrainian ports violated the navigational regime under the Azov/Kerch Cooperation Treaty. Those questions do not form part of Ukraine's claims in this case.

696. Accordingly, Ukraine's claim regarding impediments to navigation in the Sea of Azov must be rejected.

6. Alleged Seizure and Reflagging of the JDRs

697. The Arbitral Tribunal will now consider the Parties' dispute regarding the alleged seizure and reflagging of the JDRs.

1285 *See* para. 399 above.
1286 *See* paras 669-673 above.

698. Ukraine argues that, by seizing and reflagging two Ukrainian JDRs, *Tavrida* and *Sivash*, the Russian Federation violated Article 2, paragraph 3, and Article 91 of the Convention.[1287]

699. For its part, the Russian Federation raises objections to both the jurisdiction of the Arbitral Tribunal and the admissibility of Ukraine's claim.[1288] In any event, it contends that Ukraine's arguments based on Articles 91 and 92 of the Convention are misconceived and that it has a right to register the JDRs independently of any de-listing by Ukraine.[1289]

a. Jurisdiction and Admissibility

i. Jurisdiction

700. The Arbitral Tribunal will first address the Russian Federation's objection to its jurisdiction.

701. The Russian Federation argues that Ukraine's claims regarding both (i) the seizure of the JDRs and (ii) their reflagging concern matters not regulated by the Convention and therefore fall outside the Arbitral Tribunal's jurisdiction.[1290] According to the Russian Federation, Ukraine's "seizure" claims concern the sovereignty over Crimea and the ownership rights to the JDRs of their current rightful owner, Crimean CNG, and are plainly outside the Arbitral Tribunal's jurisdiction.[1291] The Russian Federation further contends that Ukraine's reflagging claim is necessarily based on the premise that Crimea is part of its territory and thus involves a matter which the Arbitral Tribunal has already determined to be outside its jurisdiction in its Award Concerning Preliminary Objections.[1292]

702. In response, Ukraine argues that it is not asking the Arbitral Tribunal to assess the legality of the transfer of ownership of the JDRs but rather to determine the legality of their reflagging, which, according to Ukraine, falls within the Arbitral Tribunal's competence under Article 91 of the Convention.[1293] Ukraine further contends that a ruling on the reflagging of the JDRs does not require a determination of Crimea's sovereign status, since Ukraine is simply requesting the

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1287 Revised Memorial, paras 176-81.
1288 Rejoinder, paras 543-73.
1289 Counter-Memorial, paras 314-19; Rejoinder, paras 574-95.
1290 Counter-Memorial, para. 309; Rejoinder, paras 543-60; Hearing, 28 September 2024, 133:4-16, 137:4-6 (Ortega Lemus).
1291 Rejoinder, paras 543-44.
1292 Rejoinder, para. 556.
1293 Reply, para. 202.

Arbitral Tribunal to decide whether Ukraine's procedures for de-registration and reflagging of its vessels were properly followed.[1294]

703. At the outset, the Arbitral Tribunal notes that Ukraine's claims concern both the seizure and reflagging of the JDRs. In its final submissions, Ukraine requests the Arbitral Tribunal to adjudge and declare that the Russian Federation has violated Article 2, paragraph 3, and Article 91 of the Convention by unlawfully "seizing" and reflagging two Ukrainian-flagged JDRs.[1295] In addition, Ukraine requests that the Arbitral Tribunal order the Russian Federation to "release" to Ukraine the two Ukrainian-flagged JDRs it unlawfully seized and reflagged so as to re-establish Ukraine's exclusive jurisdiction over the vessels.[1296] Thus, it is clear that Ukraine's claims encompass not only the reflagging of the JDRs but also their seizure.

704. In the Arbitral Tribunal's view, assessing the transfer of ownership of the JDRs falls outside the scope of the Convention. No provision of the Convention gives any indication that it might be addressing this question. Accordingly, the Arbitral Tribunal lacks jurisdiction to consider Ukraine's claim regarding the seizure of the JDRs.

705. On the other hand, Ukraine's claim regarding the reflagging of the JDRs is distinct from the issue of ownership and does not require the Arbitral Tribunal to address the question of sovereignty over Crimea, which it has already ruled out in its previous Award Concerning Preliminary Objections. Ukraine's reflagging claim stands irrespective of which Party exercises sovereignty over Crimea. The Arbitral Tribunal considers this claim to fall within the scope of the Convention. Accordingly, the Arbitral Tribunal rejects the Russian Federation's objection and finds that it has jurisdiction over this claim.

ii. Admissibility

706. The Arbitral Tribunal will now turn to the Russian Federation's objection to the admissibility of Ukraine's claims.

707. The Russian Federation maintains that Ukraine's reflagging claims are inadmissible, as they were inappropriately added for the first time at the merits stage of the proceedings.[1297] According to the Russian Federation, while Ukraine's original Memorial alleged that taking control of the JDRs violated Articles 2, 56, 58, 60, 77, and 92 of the Convention, it is only in the Revised Memorial

1294 Reply, para. 204.
1295 Ukraine's Final Submissions, para. 1(d).
1296 Ukraine's Final Submissions, para. 3(b).
1297 Rejoinder, para. 562.

that Ukraine raised the claim that the reflagging of the JDRs was incompatible with Article 91 of the Convention.[1298] The Russian Federation asserts that introducing the reflagging claim in this manner thus transforms the dispute brought before the Arbitral Tribunal into a dispute of different nature.[1299]

708. In addition, the Russian Federation argues that the issue of title over the JDRs raises the risk of double recovery, as this matter is the subject of a separate investment arbitration proceeding.[1300] The Russian Federation also contends that Ukraine's own laws would render an award upholding the reflagging of the JDRs back to the Ukrainian flag unenforceable and without practical effect, as the JDRs, owned by Crimean CNG, cannot fly Ukraine's flag or be registered in Ukraine.[1301]

709. For its part, Ukraine maintains that it merely revised its original claim regarding the JDRs to focus on the Russian Federation's obligations under Article 2, paragraph 3, and Article 91 of the Convention, in compliance with the Award Concerning Preliminary Objections.[1302] Ukraine adds that there is no overlap between its request for relief in the present proceedings and the compensation sought by the Ukrainian company for the unlawful seizure of the JDRs in a separate investment arbitration.[1303]

710. With respect to the Russian Federation's objection that Ukraine's reflagging claim is inadmissible because it was introduced at a later stage of the proceedings, the Arbitral Tribunal notes that the submission of a new claim is not in itself inadmissible. The key question is whether the claim transforms the dispute brought before the Arbitral Tribunal into a dispute that would be of a different nature.

711. The Arbitral Tribunal does not consider that Ukraine's claim regarding the reflagging of the JDRs fundamentally transforms the nature of the dispute brought before it. While Ukraine modified the legal basis of its claim from Articles 2, 56, 58, 77, and 92 of the Convention in its original Memorial to Article 2, paragraph 3, and Article 91 in its Revised Memorial, this change was made in compliance with the Arbitral Tribunal's instruction in its Award Concerning Preliminary Objections. The Arbitral Tribunal recalls that Ukraine was specifically requested to "revise its

1298 Rejoinder, paras 562, 564.
1299 Rejoinder, para. 563.
1300 Counter-Memorial, para. 310; Rejoinder, paras 565-67.
1301 Rejoinder, paras 568-72.
1302 Hearing, 23 September 2024, 122:19-125:2 (Cheek).
1303 Reply, para. 203.

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."[1304]

712. In the Arbitral Tribunal's view, the Russian Federation's argument relating to the risk of double recovery is inapplicable to the present case, as Ukraine does not seek the recovery of the JDR's title. In any event, double recovery is a matter that can and should be considered in the context of remedies, rather than jurisdiction and admissibility. Nor is the Russian Federation's objection based on Ukraine's domestic legislation well founded: Ukraine's claim concerns only the legality of the Russian Federation's reflagging of the JDRs under Article 91 of the Convention, the claims relating to the seizure of and title to the JDRs having already been ruled to be beyond the Arbitral Tribunal's jurisdiction.

713. For these reasons, the Arbitral Tribunal rejects the Russian Federation's objection to the admissibility of Ukraine's claims.

b. Legality of Reflagging of the JDRs

714. It is undisputed between the Parties that in 2014, the Russian Federation took control of two Ukrainian-flagged JDRs, *Tavrida* and *Sivash*, in Crimea's territorial sea. It is also undisputed that the Russian Federation de-registered and reflagged the JDRs as Russian vessels.

715. However, the Parties disagree on whether Crimean CNG submitted an application for the de-registration of the JDRs to the Ukrainian Vessels Registry in accordance with Ukrainian law and procedure. The Russian Federation claims that although Crimean CNG duly submitted its application for the withdrawal of the JDRs from the Ukrainian Vessels Registry, because of Ukraine's inaction the de-registration did not take place.[1305] Conversely, Ukraine raises doubts about whether such application was submitted at all and claims that Crimean CNG's de-registration application is "facially" incomplete.[1306]

716. The Russian Federation has presented evidence before the Arbitral Tribunal to support its assertion that it duly submitted an application for the de-registration of the JDRs to the Ukrainian

1304 Award Concerning Preliminary Objections, para. 198.
1305 Rejoinder, para. 586.
1306 Reply, para. 207. Ukraine points out that the required registration documents, registration certificates, and other ownership documents are absent from the Russian Federation's application as submitted to the Arbitral Tribunal. *See* Reply, n. 465.

Vessels Registry in June 2014, in accordance with Ukrainian law.[1307] Based on this evidence, the Arbitral Tribunal considers that Crimean CNG made an effort to pursue the procedures to de-register the JDRs. While Ukraine argues that if Crimean CNG believed that Ukraine's ship registry was not responding to its de-registration request appropriately and in accordance with Article 91 of the Convention, its recourse should have been through the Ukrainian courts,[1308] the Arbitral Tribunal questions whether such recourse was a realistic option.

717. The Parties further disagree on the interpretation of Article 91 of the Convention, particularly whether this provision implies the exclusive authority of the flag State over the de-registration of vessels.

718. Ukraine argues that the registering of the JDRs in the Russian Vessels Registry before their de-registration from the Ukrainian Vessels Registry constitutes a violation of Article 2, paragraph 3, and Article 91 of the Convention.[1309]

719. For its part, the Russian Federation asserts that its authority to register the JDRs is independent of Ukraine's abusive disregard of Crimean CNG's de-registration application.[1310] According to the Russian Federation, Article 91, paragraph 1, of the Convention only establishes the obligation for every State to fix the conditions for the grant of its nationality to ships, and nothing in its plain text suggests otherwise.[1311]

720. Article 91 of the Convention reads:

> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

721. According to ITLOS, Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships.[1312] ITLOS further states that:

1307 Letter from Chernomorneftegaz Crimean Republican Enterprise to the State Service of Ukraine for the Safety of Maritime and River Transport, No. 12/02-530 (6 June 2014) (**Annex RU-402**); Witness Statement of [redacted], 6 December 2023, paras 35-38.

1308 Reply, para. 208.

1309 Reply, para. 208.

1310 Counter-Memorial, para. 317; Rejoinder, para. 579.

1311 Rejoinder, para. 579.

1312 *M/V "Saiga"*, cit. n. 1167, p. 36, para. 63 (**Annex UAL-28**).

> Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.[1313]

722. Thus, ITLOS recognises that, under Article 91 of the Convention, each State has exclusive jurisdiction not only over granting nationality to ships but also over withdrawing it. These matters are regulated by a State's domestic law. Therefore, the de-registration of ships must follow the procedures established in the domestic law of the flag State.

723. However, this does not necessarily mean that the registration of a ship in one State's registry prevents its re-registration in the registry of another State. Nothing in the text of Article 91 of the Convention suggests such a restriction.

724. Thus, in the Arbitral Tribunal's view, the fact that the de-registration procedure was not completed under Ukrainian domestic law does not prevent Crimean CNG from registering the JDRs with the Russian Vessels Registry. It appears that the Russian Federation registered the JDRs based on the application of Crimean CNG, in accordance with the Russian Federation's domestic procedure, which allows for the registration of a vessel in the Russian Vessels Registry upon expiry of 30 days following the application to de-register that vessel from another State's vessels registry.[1314] Article 91, paragraph 1, of the Convention, which provides for the exclusive jurisdiction of each State over the granting of its nationality to ships, cannot be invoked to prohibit the registration of the JDRs with the Russian Vessels Registry under the circumstances of the present case.

725. Accordingly, the Arbitral Tribunal dismisses Ukraine's claim that, by reflagging the JDRs, the Russian Federation violated Article 91 of the Convention. No claim is made concerning Article 2, paragraph 3, independently of the alleged violation of Article 91; and it may be that the reference to Article 2, paragraph 3, is related to Ukraine's claim concerning the seizure of the JDRs. The Arbitral Tribunal has already decided that it has no jurisdiction to address Ukraine's claim regarding the seizure of the JDRs.

7. Conclusion

726. In light of the foregoing, the Arbitral Tribunal concludes as follows:

1313 *M/V "Saiga"*, cit. n. 1167, p. 37, para. 65 (**Annex UAL-28**).
1314 Rejoinder, para. 579.

a) With respect to Ukraine's claims regarding interference with navigation and failure to cooperate in the Kerch Strait, Articles 38, 43, and 44 of the Convention are inapplicable to the present case. Accordingly, Ukraine's claims regarding the alleged violations of those Articles by the Russian Federation are dismissed;

b) With respect to Ukraine's claim regarding the closure of the southern entrance to the Kerch Strait in the Black Sea, the Arbitral Tribunal finds that the Russian Federation did not violate Article 25, paragraph 3, of the Convention;

c) With respect to Ukraine's claims concerning impediments to navigation in the Sea of Azov, Articles 2, 58, 87, and 92 of the Convention are inapplicable to the present case. Accordingly, Ukraine's claims regarding the alleged violations of those Articles by the Russian Federation are dismissed;

d) With respect to Ukraine's claims regarding the seizure and reflagging of the JDRs, the Arbitral Tribunal finds that it lacks jurisdiction to decide on the release of the JDRs. The Arbitral Tribunal further finds that the Russian Federation did not violate Article 91 of the Convention.

V. THE RUSSIAN FEDERATION'S ALLEGED FAILURE TO PROTECT THE MARINE ENVIRONMENT

A. INTRODUCTION

727. Ukraine contends that the Russian Federation risked grave and enduring damage to the marine environment in the Black Sea, the Sea of Azov, and the Kerch Strait by engaging in invasive construction projects in the Kerch Strait without regard for their impact on the delicate marine ecosystem as well as by its handling of an alleged oil spill near Sevastopol.[1315] Specifically, Ukraine submits that:

> e. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention by failing to assess, monitor, and protect against potential adverse effects on the marine environment caused by its construction activities in the Kerch Strait.
>
> f. The Russian Federation has violated Articles 123, 192, 194, 204, 205, and 206 of the Convention by failing to cooperate and share information with Ukraine and other

[1315] Revised Memorial, paras 182, 249-50.

potentially-affected States concerning the environmental impact of its construction activities in the Kerch Strait.

g. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention by failing to communicate or cooperate with Ukraine concerning the May 2016 oil spill off the coast of Sevastopol.[1316]

728. Ukraine's claims regarding the Russian Federation's alleged failure to protect the marine environment arise out of two separate instances and raise a number of legal issues. With regard to the construction projects in the Kerch Strait, these claims are: the Russian Federation's alleged failure to conduct adequate EIAs[1317] and to communicate their results as prescribed by Article 206 of the Convention; the alleged failure by the Russian Federation to adequately monitor the risks and effects of the construction projects and to communicate the monitoring results as prescribed by Articles 204 and 205 of the Convention; and the alleged breaches by the Russian Federation of its general obligations to protect the marine environment and cooperate with neighbouring States for the same purpose in accordance with Articles 123, 192, and 194 of the Convention. Concerning the alleged oil spill near Sevastopol, Ukraine's complaint is that the Russian Federation failed to notify Ukraine of imminent or actual damage to the marine environment as prescribed by Article 198 of the Convention, did not cooperate with Ukraine to mitigate the effects of the alleged oil spill as prescribed by Articles 123, 192, 194, and 199 of the Convention, and failed to monitor the effects and report to other States on the results of its monitoring effects, as prescribed by Articles 204 and 205 of the Convention. Ukraine argues that Part XII of the Convention applies to all maritime areas, including internal waters.[1318]

729. For its part, the Russian Federation denies the applicability of the Convention to what it considers internal waters, and, in any case, rejects Ukraine's claims that the conduct of the Russian Federation violated the relevant provisions of the Convention.[1319]

B. ALLEGED FAILURE TO ADEQUATELY ASSESS THE ENVIRONMENTAL IMPACTS OF THE CONSTRUCTION PROJECTS AND TO COMMUNICATE REPORTS OF ANY EIA

730. The Parties disagree as to whether the Russian Federation complied with the obligations to assess potential effects of its construction projects in the Kerch Strait and to communicate reports of the results of such assessments in accordance with Articles 206 and 205 of the Convention.

1316 Ukraine's Final Submissions, para. 1(e)-(g); *see also* Revised Memorial, para. 314(e)-(g).

1317 The Arbitral Tribunal, like the Parties, refers to the assessments of potential effects of activities provided for in Article 206 of the Convention as EIAs.

1318 Hearing, 25 September 2024, 101:8-102:9 (Thouvenin).

1319 Counter-Memorial, para. 321; *see also* Hearing, 28 September 2024, 176:9-14 (Udovichenko).

731. Article 206 of the Convention reads:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

732. Article 205 of the Convention reads:

> States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

1. Ukraine's Position

733. Ukraine asserts that the Russian Federation violated Article 206 of the Convention by not conducting adequate EIAs before undertaking the construction projects in the Kerch Strait and communicating reports of the results of such assessments.[1320]

734. Ukraine submits that the Russian Federation undertook significant construction projects in the Kerch Strait, including "an almost 20-kilometer, multi-lane road and long-distance railway bridge," "a 16-kilometer undersea liquid-natural-gas pipeline," and "no fewer than five undersea electric-power and fiber-optic-communication cables."[1321]

a. The Applicable Standard under Article 206 of UNCLOS

735. According to Ukraine, Article 206 of the Convention required the Russian Federation to "(i) determine whether there were 'reasonable grounds for believing' that the planned construction projects might 'cause substantial pollution of or significant and harmful changes to the marine environment' and, if so, (ii) adequately 'assess the potential effects' of its construction projects in the Kerch Strait, and (iii) 'communicate reports of the results of such assessments' in the manner provided in Article 205, namely by publication or provision 'to competent international organizations, which should make them available to all States.'"[1322] Failure to satisfy any one of these elements, Ukraine submits, violates Article 206 of the Convention.[1323]

1320 Revised Memorial, para. 193.
1321 Revised Memorial, para. 183.
1322 Revised Memorial, para. 193; Reply, para. 214.
1323 Revised Memorial, para. 193.

736. Ukraine submits that Article 206 of the Convention establishes an objective test for determining whether an EIA must be undertaken for any particular project.[1324] Pointing to what it describes as a large body of consistent practice, codified in international standards developed by public and private international organisations involved in construction projects around the world, Ukraine argues that the application of Article 206 of the Convention to any given project is informed by this practice and these standards.[1325] The importance of international standards for assessing environmental risks, Ukraine states, was recognised by the ICJ in *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (hereinafter "*Gabčíkovo-Nagymaros Project*").[1326] Further, in contrast to the Russian Federation's claims that in interpreting a treaty pursuant to Article 31 of the VCLT, no reference can be made to other international standards,[1327] Ukraine submits that the ordinary meaning of such phrases as "reasonable grounds to believe" and "as far as practicable" is "necessarily informed by the ability of current science and technology to diagnose the potential for environmental harm and to mitigate its occurrence."[1328]

737. Ukraine rejects the Russian Federation's suggestion that Article 206 of the Convention grants States "wide discretion"[1329] in determining which activities require an assessment.[1330] Instead, Ukraine emphasises the need to read Article 206 of the Convention in line with Articles 192 and 194 of the Convention, which require States Parties to take all measures necessary to avoid pollution,[1331] as well as with the "precautionary principle in international environmental law,"[1332]

1324 Revised Memorial, para. 197 *referring to* the ICJ's elaborations on the standard of review for determining whether something is reasonable in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (hereinafter "*Whaling*"), Judgment, I.C.J. Reports 2014, p. 226 at p. 254, para. 67, p. 260, para. 97 (**Annex UAL-155**); Reply, para. 220; *see also* Hearing, 25 September 2024, 118:7-14 (Thouvenin) *referring to* ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (hereinafter "*Climate Change and International Law*"), Advisory Opinion of 21 May 2024, para. 361 (**Annexes RUL-241**, **UAL-225**).

1325 Revised Memorial, para. 197 *referring to* Opinion of John G. Aronson, EcologicDNA, LLC, paras 37-38 (17 May 2021). *See also* Reply, para. 236.

1326 Reply, para. 235 *citing Gabčíkovo-Nagymaros Project (Hungary v. Slovakia*), Judgment, I.C.J. Reports 1997, p. 7 at pp. 77-78, para. 140 (**Annex UAL-201**).

1327 Counter-Memorial, paras 335-36.

1328 Reply, para. 236.

1329 Counter-Memorial, para. 443.

1330 Reply, para. 219; *see also* Hearing, 25 September 2024, 120:7-122:10 (Thouvenin).

1331 Reply, para. 220, n. 485 *citing* Eike Blitza, 'Assessment of Potential Effects of Activities: Article 206' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 1374, para. 9 (**Annex UAL-197**) and *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, p. 10 at p. 46, para. 131 (**Annexes RUL-101**, **UAL-156**). *See also* Hearing, 25 September 2024, 119:10-20 (Thouvenin) *citing Climate Change and International Law*, cit., n. 1324, para. 206 (**Annexes RUL-241**, **UAL-225**).

1332 Reply, para. 220, n. 485 *citing* Eike Blitza, 'Assessment of Potential Effects of Activities: Article 206' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 1374, para. 9 (**Annex UAL-197**) and *referring to Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, p. 10 at p. 46, para. 131 (**Annexes RUL-101**, **UAL-156**).

thereby limiting any room for discretion. As Article 206 of the Convention requires only "'reasonable grounds for believing' that planned activities [...] *may* cause substantial pollution of or significant harmful changes to the marine environment,'"[1333] Ukraine submits that the provision sets a "low threshold of foreseeable risk."[1334]

738. Concerning the contents of any EIA, Ukraine maintains that while Article 206 of the Convention "may leave the *procedures* or *formats* for conducting the EIA to national discretion, it has been consistently interpreted to impose an objective international standard for determining the *adequacy* of environmental assessments—one defined in light of the specific circumstances of each case and consistent with an aim of minimizing the risk of significant environmental harm."[1335] In support of its position, Ukraine refers to both jurisprudence and commentary.[1336] Based on its expert's determination, Ukraine asserts that, to adequately assess the environmental impacts of the construction projects, an EIA should have included at minimum "(i) a thorough scoping exercise to define the specific project elements and associated environmental impacts to be assessed; (ii) contemporaneous baseline data covering a full-year cycle, based on the survey of the existing environment at the time of project contemplation; (iii) systematic, transparent, and comprehensive public and stakeholder consultations; and (iv) concrete monitoring, data collection, mitigation, and management plans."[1337]

b. Each Construction Project in the Kerch Strait Allegedly Required EIAs

739. Ukraine submits that there were reasonable grounds to believe that the planned construction projects risked causing significant adverse impacts on the marine environment of the Kerch Strait,

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1333 Reply, para. 220 [emphasis added by Ukraine].

1334 Reply, para. 220 *citing* Alan Boyle and Catherine Redgwell (eds), *Birnie, Boyle & Redgwell's International Law and the Environment* (4th edition, Oxford University Press 2021), p. 191 (**Annex RUL-105**).

1335 Reply, para. 230 [emphases added by Ukraine]; *see also* Hearing, 25 September 2024, 118:18-119:1 (Thouvenin).

1336 Reply, paras 231-32; *South China Sea*, cit., n. 37, paras 989-90 (**Annex UAL-11**); Inter-American Court of Human Rights, *The Environment and Human Rights* (hereinafter "*Environment and Human Rights*"), Advisory Opinion of 15 November 2017, Requested by the Republic of Colombia, para. 142 (**Annex UAL-154**); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 at p. 83, para. 205 (**Annex UAL-152**); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665 at pp. 723, 725, paras 161, 173 (**Annex UAL-153**); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Separate Opinion of Judge Dugard, I.C.J. Reports 2015, p. 842 at p. 849, para. 18 (**Annex UAL-200**); Eike Blitza, 'Assessment of Potential Effects of Activities: Article 206' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 1376, para. 14 (**Annex UAL-197**); Alan Boyle and Catherine Redgwell (eds), *Birnie, Boyle & Redgwell's International Law and the Environment* (4th edition, Oxford University Press 2021), p. 195 (**Annex RUL-105**).

1337 Reply, para. 234.

with potential repercussions across the Sea of Azov and the Black Sea, triggering the obligation to conduct EIAs under Article 206 of the Convention.[1338]

740. Relying on its expert's assessment of the Kerch Strait construction projects, Ukraine argues that each one of the projects required an EIA under international standards.[1339] Ukraine highlights that the installation of the more than 7,000 support pilings for the Kerch Strait bridge alone involved numerous active construction sites, at which heavy equipment drove large steel tubing up to 91 metres (300 feet) deep into the seabed,[1340] large cement and asphalt plants were built on both sides of the Kerch Strait bridge,[1341] and more than 6,000 workers from 20 different companies stayed in on-site temporary camps in the immediate vicinity of the construction site.[1342] According to Ukraine, "the Espoo Convention, the UNDP Social and Environmental Screening Procedure, the IFC Performance Standards, and other similar guidelines, all provide that new road construction, railway construction, pipeline construction, and comparable projects are considered to have a high risk of impact on the environment such that they require an EIA prior to approval and commencement of" such projects.[1343] Additionally, Ukraine states that the Russian Federation's domestic standards, which, according to Ukraine, originally drew on international instruments like the Espoo Convention,[1344] also require an EIA for marine installations and the laying of submarine cables.[1345]

1338 Revised Memorial, para. 195; Reply, para. 217; *see also* Hearing, 26 September 2024, 90:20-91:3 (Gimblett).

1339 Revised Memorial, para. 198; Opinion of John G. Aronson, EcologicDNA, LLC, para. 135 (17 May 2021).

1340 Reply, para. 216; Opinion of John G. Aronson, EcologicDNA, LLC, para. 25 (17 May 2021).

1341 Reply, para. 216; Construction.RU, Superplants for the Construction of the Kerch Bridge, 18 August 2015 (**Annex UA-829**).

1342 Reply, para. 216; Opinion of John G. Aronson, EcologicDNA, LLC, para. 79 (17 May 2021); Natalya Aleksandrovna Sytnik et al., 'Assessment of the Impact of the Construction of the Crimean Bridge on the Eco-System of the Kerch Strait', Eurasian Union of Scientists: Biological Sciences, Volume 10 No. 43 (2017), p. 12 (**Annex UA-654**); Supplemental Translation of Annex RU-103, Public Roundtable Minutes, in STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation, 2015, para. 19 (**Annex UA-830**).

1343 Revised Memorial, para. 198; Opinion of John G. Aronson, EcologicDNA, LLC, paras 39-45 (17 May 2021); Convention on Environmental Impact Assessment in a Transboundary Context, done in Espoo on 25 February 1991, Annex I (**Annex UA-635**); UNDP, Guidance Note: UNDP Social and Environmental Standards (SES), Social and Environmental Screening Procedure Updated, 2019, Annex 2, p. 33 (**Annex UA-636**); Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment (85/337/EEC), p. 7 (**Annex UA-637**); European Bank for Reconstruction and Development, Environmental and Social Policy, April 2019, Appendix 2, p. 13 (**Annex UA-638**).

1344 Revised Memorial, para. 198; Opinion of John G. Aronson, EcologicDNA, LLC, para. 49 (17 May 2021); Daria N. Ratsiborinskaya, 'Russian Environmental Law – An Overview for Businesses', in Wybe Th. Douma and Fiona M. Mucklow (eds), *Environmental Finance and Socially Responsible Business in Russia – Legal and Practical Trends* (T.M.C. Asser Press 2010), p. 14 (**Annex UA-639**).

1345 Revised Memorial, para. 198; Russian Federation Federal Law No. 155-FZ, On the Internal Waters, the Territorial Sea, and the Contiguous Zone of the Russian Federation, 31 July 1998, Art. 34(3) (**Annex UA-640**).

741. Ukraine submits that the Russian Federation's objection to the admissibility of its claims regarding the laying of the submarine fibre-optic cable should be rejected. Ukraine argues that it merely updated the legal basis for these claims in its Revised Memorial to comply with the Award Concerning Preliminary Objections, and that the claims are based on the same underlying conduct by the Russian Federation and fall within the subject-matter of the dispute.[1346]

742. Ukraine contests the notion that Article 206 of the Convention contains any sort of "security exception" as suggested by the Russian Federation's argument that the fibre-optic cable was a security issue for the Russian Federation and residents of Crimea.[1347]

743. Ukraine further contests the Russian Federation's claim that EIAs are typically not required for the laying of fibre-optic submarine cables, as such projects have a minor impact on the marine environment.[1348] According to Ukraine, the laying of such cable can "reasonably be anticipated to cause significant sedimentological impacts with unknown nearfield effects on benthos and other marine organisms, as well as erosion and other hydrodynamic effects."[1349] These environmental risks, Ukraine claims, are documented in "real-world assessments performed for submarine fiber optic cables in numerous jurisdictions."[1350] Consequently, Ukraine states, "it is standard international practice, reflected in well-established international standards, that an EIA is required for a submarine fiber optic cable."[1351]

744. Further, Ukraine asserts that the Russian Federation's position is contradicted by its own evidence.[1352] The OSPAR Commission's Guidelines referred to by the Russian Federation explicitly state that "the installation and operation of submarine cables should follow a formal approval procedure that includes the elaboration of an environmental impact assessment."[1353] In contrast, Ukraine characterises the position of the International Cable Protection Committee, which the Russian Federation also relies on, as "self-serving views of [...] industry stakeholders [that] do not reflect an alleged consensus in the scientific literature [...]."[1354] In any case, Ukraine

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1346 Reply, paras 92, 226.
1347 Reply, para. 225 *referring to* Counter-Memorial, para. 446. *See also* Hearing, 26 September 2024, 95:3-8 (Gimblett).
1348 Reply, para. 221.
1349 Reply, para. 221 *citing* Opinion of John G. Aronson, EcologicDNA, LLC, para. 153 (17 May 2021).
1350 Reply, para. 221 *referring to* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 12 (21 March 2023).
1351 Reply, para. 221.
1352 Reply, para. 222.
1353 Reply, para. 222 *citing* OSPAR Commission, Guidelines on Best Environmental Practice (BEP) in Cable Laying and Operation, 2012, p. 15, para. 6 (**Annex RUL-109**). The OSPAR Commission is the mechanism by which 15 governments and the European Union cooperate to protect the marine environment of the North-East Atlantic under the 1992 OSPAR Convention.
1354 Reply, para. 223.

argues that generalised statements on the impact of fibre-optic cables on the marine environment are beside the point as the relevant question is whether an EIA was required in this specific case, given the particular circumstances of the marine environment in the Black Sea basin.[1355]

745. Apart from the Kerch Strait construction projects all being of a kind that generally requires EIAs, Ukraine submits that the environmental specificities of the Kerch Strait, the Sea of Azov, and the Black Sea also provide reasonable grounds to anticipate substantial pollution or significant and harmful changes to the marine environment as a result of the construction.[1356] Separated from the wider oceanic system, Ukraine explains, the Black Sea basin receives salt water via an undercurrent through the Bosporus, while at the same time collecting fresh water from 23 European countries through the Danube, Dnieper, and Dniester rivers, which drain into the Black Sea, as well as the Don and Kuban rivers, which themselves drain into the Sea of Azov.[1357] For this reason, according to Ukraine, the Black Sea basin receives a comparatively higher proportion of its volume from fresh water than neighbouring seas.[1358] The higher density of the higher-salinity water coming from the Mediterranean Sea compared to the fresh water draining into the Black Sea basin, Ukraine continues, creates a vertically stratified water column due to the unusually swift change in water density with depth—a phenomenon termed a pycnocline.[1359] Ukraine states that this prevents vertical mixing of the waters, keeping oxygen from the surface from reaching deeper waters and creating a phenomenon called anoxia, *i.e.*, the complete absence of oxygen in waters below 70 to 200 metres depth.[1360] Ukraine further contends that the separation of the water layers means they have distinct currents—the less-saline water moving in a swift "rim current," which transports it around the perimeter of the Black Sea into the territorial seas of the respective coastal States.[1361] Consequently, according to Ukraine, anything on the sea surface or in the upper water layer can be transported from one place to another in the Black Sea basin in a matter of days or weeks, making the region especially vulnerable to the spread of

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1355 Reply, para. 224.

1356 Revised Memorial, para. 199 *referring to Environment and Human Rights*, cit., n. 1336, para. 142 (**Annex UAL-154**), which found that fragile ecosystems require greater efforts to avoid risks to than other parts of the environment.

1357 Revised Memorial, para. 45; Opinion of Ahmet Kideys, Middle East Technical University, paras 13-14 (16 May 2021).

1358 Revised Memorial, para. 45; Opinion of Ahmet Kideys, Middle East Technical University, para. 17 (16 May 2021).

1359 Revised Memorial, para. 46; Opinion of Ahmet Kideys, Middle East Technical University, para. 21 (16 May 2021).

1360 Revised Memorial, para. 46.

1361 Revised Memorial, para. 47; Opinion of Ahmet Kideys, Middle East Technical University, paras 16-18, 22-23 (16 May 2021); Temel Oguz et al., 'Physical and Biogeochemical Characteristics of the Black Sea', in Allan R. Robinson and Kenneth H. Brink (eds), *The Sea* (Volume 14, Harvard University Press 2004), p. 1336 (**Annex UA-405**).

pollution.[1362] Ukraine notes that due to the anoxic character of deeper waters, the Black Sea basin's marine life also concentrates in the upper-water layer, adding to the vulnerability of the ecosystem.[1363]

746. Ukraine asserts that due to the features of the Black Sea basin, even a highly localised event could have far-reaching consequences.[1364] Given the special importance of the Kerch Strait for the entire marine environment of the Black Sea basin, Ukraine recalls that when Ukraine and the Russian Federation jointly considered transport projects in the Kerch Strait in the past, they expressly contemplated the conduct of an EIA prior to commencing any construction.[1365]

747. Based on the conclusions its expert drew from studying publicly available information concerning the Russian Federation's construction projects in the Kerch Strait, Ukraine argues that it would have been evident at the planning stage of the construction projects that they posed significant risks to the marine environment, due to both immediate, short-term environmental impacts caused by the construction itself and continuing environmental impacts associated with the operation of the projects.[1366]

i. Short-Term Environmental Impacts Caused by the Construction Projects

748. According to Ukraine, the anticipated short-term environmental impacts include (i) significantly increased rates of surface and particulate disturbance with significant effects on breeding, reproduction, and the marine food chain for key species of fish and shellfish;[1367] (ii) increased light, noise, and vibrations and their impacts in particular on resident species for distances of up

1362 Revised Memorial, paras 47-48; Opinion of Ahmet Kideys, Middle East Technical University, paras 23, 27 (16 May 2021).

1363 Revised Memorial, paras 49-51; Opinion of Ahmet Kideys, Middle East Technical University, paras 24, 29 (16 May 2021).

1364 Revised Memorial, para. 199; Opinion of Ahmet Kideys, Middle East Technical University, paras 27-35 (16 May 2021).

1365 Revised Memorial, para. 199; Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Joint Steps to Organize the Construction of a Transport Crossing Across the Kerch Strait, 17 December 2013, Arts 5 and 8 (**Annex UA-96-AM**); The Scope of Work for Engineering Surveys and the Development of a Feasibility Study for the Construction of a Transport Crossing Across the Kerch Strait, 31 January 2014, para. 8.16 (**Annex UA-100**).

1366 Revised Memorial, para. 200.

1367 Revised Memorial, para. 202 *referring to* Opinion of John G. Aronson, EcologicDNA, LLC, paras 66-68 (17 May 2021); Reply, paras 271-72 *citing* Witness Statement of [redacted], para. 88 (1 September 2022); Opinion of [redacted], para. 78 (10 September 2022); STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), pp. 61, 91 (**Annex RU-93**).

to 50 kilometres;[1368] and (iii) the introduction of hazardous, toxic, or otherwise harmful pollutants into the marine environment.[1369] Ukraine argues that a proper EIA would have accounted for these short-term impacts and considered monitoring systems and appropriate mitigation measures.[1370]

ii. Continuing Environmental Impact Caused by the Operation of the Projects

749. In addition to these short-term effects, Ukraine also submits that the nature of the construction projects should have caused the Russian Federation to anticipate the following continuing impacts on the marine environment: (i) changes to the hydrodynamics of the Kerch Strait affecting the ecological equilibrium in the Black Sea basin and potentially triggering substantial downstream effects;[1371] (ii) increased eutrophication and algal bloom;[1372] (iii) the creation of "attractive nuisances" causing conditions favouring predation and attracting piscivorous predators such as dolphins, thereby impacting fish populations and leaving concentrated predators more vulnerable to localised impacts;[1373] (iv) significantly larger or longer-lasting ice formations causing risk of collapse of the bridge as well as larger environmental concerns;[1374] (v) chronic and/or episodic pollution due to increased traffic and risk of release of hazardous materials;[1375] and (vi) the ongoing risk of failure of the construction projects themselves.[1376] Ukraine submits that proper

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1368 Revised Memorial, para. 203; Opinion of John G. Aronson, EcologicDNA, LLC, paras 75, 77 (17 May 2021); *see also* Reply, para. 275 *citing* Opinion of [redacted], para. 86 (10 September 2022); STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 182 (**Annex RU-93**).

1369 Revised Memorial, para. 204; Opinion of John G. Aronson, EcologicDNA, LLC, paras 78-89 (17 May 2021); *see also* Reply, para. 277.

1370 Revised Memorial, paras 202-04.

1371 Revised Memorial, paras 206-07 *referring to* Opinion of Ahmet Kideys, Middle East Technical University, paras 37-38 (16 May 2021); Opinion of John G. Aronson, EcologicDNA, LLC, paras 55, 59-60, 94-97, 112 (17 May 2021); *see also* Reply, paras 280-81, 291 *citing* [redacted]

1372 Revised Memorial, paras 209-10; Opinion of John G. Aronson, EcologicDNA, LLC, paras 99, 103-04 (17 May 2021); Reply, paras 288-90.

1373 Revised Memorial, para. 211; Opinion of John G. Aronson, EcologicDNA, LLC, paras 105-06, 108 (17 May 2021); Eleonora Goldman, *Crimean Bridge Construction Boosts Dolphin Population in Kerch Strait*, Russia Beyond (28 February 2017) (**Annex UA-718**); Reply, para. 298.

1374 Revised Memorial, paras 213-14 *referring to* Opinion of John G. Aronson, EcologicDNA, LLC, paras 112-13 (17 May 2021); Reply, para. 294 *referring to* Institute of Water Problems and Land Reclamation NAAS, 'About Some Environmental Consequences of Kerch Strait Bridge Construction', Hydrology Vol. 6 No. 1 (2018), p. 1 at pp. 6-8 (**Annex UA-220**).

1375 Revised Memorial, para. 216; Reply, para. 301.

1376 Revised Memorial, para. 218; Reply, para. 306; Opinion of John G. Aronson, EcologicDNA, LLC, paras 119-25 (17 May 2021); Halya Coynash, *Putin's Bridge to Crimea is Doomed to Collapse*, Newsweek (13 January 2017) (**Annex UA-643**).

testing and analysis as well as consideration of adequate monitoring and mitigation systems should have occurred before construction.[1377]

c. The Russian Federation Failed to Conduct Adequate EIAs and Implement Mitigation Measures

750. Ukraine submits that the burden of proof in showing that an EIA or similar preliminary assessment has been conducted is on the State undertaking the activity prompting the need for an EIA.[1378] In the view of Ukraine, the Russian Federation has failed to demonstrate that it conducted adequate EIAs.[1379]

i. The EIAs Followed a Rushed Timeline and Suffered from Other Procedural Deficiencies

751. Ukraine asserts that where the circumstances demand an EIA, relevant international standards and best practices require open, transparent, and deliberate public participation in the EIA process, including notification to and solicitation of input from stakeholders such as nearby States who may be affected by the activities.[1380]

752. According to Ukraine, even if such notifications and consultations were performed, "given the accelerated timetable for the construction of the bridge authorized by special new Russian legislation, any environmental impact assessment would have been rushed, inadequate, and therefore unreliable from an environmental science perspective."[1381] The Russian Federation, Ukraine claims, amended its legislation through Federal Law No. 221-FZ,[1382] removing various environmental protections in the interest of accelerating construction.[1383] Specifically, Ukraine

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1377 Revised Memorial, paras 208, 210, 212, 215, 217-18.

1378 Reply, para. 239 *referring to Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665 at p. 720, para. 154 (**Annex UAL-153**); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Separate Opinion of Judge Dugard, I.C.J. Reports 2015, p. 842 at pp. 849-50, para. 19 (**Annex UAL-200**).

1379 Revised Memorial, paras 221-28; Reply, paras 237-53.

1380 Revised Memorial, paras 222-24 *citing* Hussein Abaza et al., Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, UNEP 2004, p. 28 (**Annex UA-644**).

1381 Revised Memorial, para. 225; *see also* Reply, paras 245-50.

1382 Russian Federation Federal Law No. 221-FZ, On Aspects of the Regulation of Certain Legal Relations Arising in Connection with the Construction and Upgrading of Transport Infrastructure Facilities of Federal and Regional Significance Designed to Provide Transport Links between the Taman and Kerch Peninsulas and Utility Infrastructure Facilities of Federal and Regional Significance on the Taman and Kerch Peninsulas, and on Amendments to Certain Legislative Acts of the Russian Federation, 1 July 2015 (hereinafter "Federal Law No. 221-FZ") (**Annex UA-187-AM**).

1383 Revised Memorial, para. 225.

asserts that Federal Law No. 221-FZ "even goes so far as to suspend enforcement of provisions concerning the 'prevention of adverse environmental impact' contained in certain water sanitization laws."[1384] Regarding the timeline and process under Federal Law No. 221-FZ, Ukraine claims that the law cuts short the process otherwise followed for EIAs.[1385]

753. While the Russian Federation takes issue with Ukraine's technical description of the accelerated timetable authorised by Federal Law No. 221-FZ,[1386] according to Ukraine, the Russian Federation does not dispute that special measures were taken to fast-track the construction projects, that the timeline for construction was not set based on engineering or environmental concerns but by President Putin, and that the timeline was so aggressive that no contractor would agree to construct the Kerch Strait bridge until "a close ally of President Putin" agreed to do so.[1387] Ukraine maintains that the Russian Federation's clarifications on Federal Law No. 221-FZ "do not alter the fact that [it]: (i) restricts the SEER to 45 days; (ii) allows review of the design documents to be conducted in parallel with the SEER or the EIA; and (iii) allows simultaneous design review and certain preparatory work for construction."[1388] Ukraine argues that these modifications to the Russian legal framework "'demonstrably and adversely impacted the quality' of any EIA and, 'more generally, the efforts to prevent marine pollution.'"[1389] Relying on its expert, Mr. John G. Aronson, Ukraine submits that a properly conducted EIA for the Kerch Strait construction projects should have benefited from at least a full year's worth of observational data to account for how the seasons may factor into the potential impacts of the projects.[1390]

754. Regarding the Kerch Strait bridge, Ukraine refers to the Russian Federation's documents revealing that the EIA process, from the alleged collection of baseline data to the submission of the design documentation to the Russian authority for administrative review, took less than a year, from 29 September 2014 to 7 September 2015.[1391] Ukraine further refers to the claim of the Russian Federation that the EIA process was followed by the SEER process which involved the

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1384 Revised Memorial, para. 228 *citing* Russian Federation Federal Law No. 416-FZ, "On Water Supply and Wastewater Disposal," 29 November 2011, Arts 26, 27 (**Annex UA-649**) and *referring to* Federal Law No. 221-FZ, Art. 14 (**Annex UA-187-AM**).

1385 Revised Memorial, paras 225-27 *referring to* Arts 6(4), (5), and (12) of Federal Law No. 221-FZ (**Annex UA-187-AM**).

1386 *See* paras 782-783 below.

1387 Reply, para. 251; *see also* Hearing, 26 September 2024, 95:19:96:9 (Gimblett).

1388 Reply, para. 252.

1389 Reply, para. 252 *citing* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 36 (21 March 2023). *See also* Hearing, 3 October 2024, 138:3-139:15 (Gimblett).

1390 Revised Memorial, para. 227; Opinion of John G. Aronson, EcologicDNA, LLC, paras 142-43, 148-51 (17 May 2021).

1391 Reply, para. 245, n. 537.

review of thousands of pages of documents and lasted less than three months, from 7 September 2015 to 19 November 2015.[1392]

755. Ukraine questions the reliability of this timeline as the Russian Federation's description of it relies on the witness statement of [redacted] "supposedly in charge of the environment-related issues during the construction of the Kerch Strait bridge," who, as Ukraine emphasises, only started working for [redacted] approximately ten months after the September 2014 start date.[1393] Ukraine points out that [redacted] admits that "her description of pre-22 June 2015 events relies entirely on 'design documentation' archived at the Taman Highways Administration, which she has supposedly selected as relevant."[1394] In contrast, Ukraine states that the official design documentation "consistently describes the EIA as having begun at a substantially later date, 'on 15 June 2015.'"[1395] Even accepting the Russian Federation's timeframe of slightly more than 11 months at face value, Ukraine argues that it is "grossly inadequate for an EIA for a project as significant and invasive as the construction of the Kerch Strait Bridge" and submits, based on its expert's assessment, that an adequate EIA would likely have taken at least two years.[1396]

756. For the gas pipeline, Ukraine argues, the timeframe was even shorter.[1397] Ukraine recalls the Russian Federation's own account of the entire approval process—from hiring a contractor for the EIA to the final approval by the reviewing agency, the Russian Federal Service for Supervision of Natural Resource Use (hereinafter "Rosprirodnadzor")—as having taken approximately six months (from 10 August 2015 to 19 February 2016), with the actual EIA process taking only just over three months.[1398] During this time, Ukraine states, the Russian Federation claims to have collected extensive baseline data, drafted hundreds of pages of design documentation materials focused on the EIA, and held multiple public hearings.[1399] Concerning the timeline for the alleged EIA in connection with the submarine power cables, Ukraine states that it remains unclear, but would have been less than a year, with the SEER by Rosprirodnadzor lasting only approximately

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1392 Reply, para. 245 *referring to* Counter-Memorial, para. 369.
1393 Reply, para. 246.
1394 Reply, para. 246 *referring to* Witness Statement of [redacted], paras 2, 5 (1 September 2022).
1395 Reply, para. 246 *citing* STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 1) (2015), p. 10 (**Annex RU-100**); STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 2) (2015), pp. 8-9 (**Annex RU-103**).
1396 Reply, para. 247 *referring to* Opinion of John G. Aronson, EcologicDNA, LLC, para. 151 (17 May 2021).
1397 Reply, para. 248.
1398 Reply, para. 248.
1399 Reply, para. 248.

one month.[1400] In Ukraine's view, both of these timeframes are inadequate and unrealistic for an EIA under any recognised standards.[1401]

757. The public consultations, Ukraine adds, are further evidence of undue haste. Based on the available evidence, Ukraine highlights that the design documents were made accessible to the public for the first time only weeks before the conclusion of the alleged EIA process, and hearings and public roundtables on the design documents were held only in the final month of the process.[1402]

758. Additionally, Ukraine argues that the documents the Russian Federation submitted as evidence of it having conducted EIAs for the construction projects other than the laying of the fibre-optic cable themselves confirm the inadequacy of any environmental assessment conducted.[1403] Ukraine claims that the Russian Federation only submitted environmental impact information included in its "Design Documentation" but failed to submit an actual EIA as required under the Russian Federation's SEER process.[1404] According to Ukraine, forgoing the SEER process alone reflects a notable departure from the usual Russian processes for assessing environmental impacts, and demonstrates the rushed nature of the assessment of the construction projects.[1405] Relying solely on the design documents to assess environmental impacts, Ukraine avers, "is not only unorthodox, but is also incompatible with the goal of adequately assessing the interconnected environmental risks in a holistic manner."[1406] Ukraine further observes that the documents submitted by the Russian Federation in these proceedings are "heavily redacted or thinly excerpted."[1407] Particularly with regard to the submarine gas pipeline and power cables, Ukraine opines that the "extent of the redactions, coupled with the lack of witness or expert testimony, should be sufficient for the Tribunal to give no weight to the design documentation [...] and to conclude that Russia has failed to prove the adequacy of its alleged EIAs in connection to those projects."[1408]

1400 Reply, para. 248.
1401 Reply, para. 248.
1402 Reply, para. 249.
1403 Reply, para. 237.
1404 Reply, para. 238.
1405 Reply, para. 238.
1406 Reply, para. 238 *referring to* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 25 (21 March 2023).
1407 Reply, para. 239.
1408 Reply, para. 239.

ii. The EIAs Did Not Adequately Assess the Environmental Risks of the Construction Projects

759. Examining in more detail the information provided by the Russian Federation regarding the EIAs it conducted, Ukraine asserts that these were also substantively flawed with regard to baseline studies as well as the impact analysis and mitigation measures.[1409]

(a) Baseline Data

760. Concerning the baseline studies conducted in connection with the Kerch Strait bridge construction project, Ukraine claims that these studies relied on dated and generalized data not specific to the location or timing of the anticipated impacts.[1410] Given its expert's assessment that a "reliable, contemporaneous baseline reflecting a full-year cycle of data is foundational to any assessment of an impact to the marine environment [...],"[1411] Ukraine submits that the Russian Federation could not "effectively and accurately compare project construction and operational monitoring data to an established site-specific baseline."[1412]

761. Against the background of the lack of robust, site-specific baseline data, Ukraine continues, the Russian Federation's supposed impact analysis and recommended course of action on mitigation was inevitably overly generalised and conclusory and not grounded in recognisable analytical methodologies.[1413]

(b) Insufficient Risk Assessment and Mitigation

762. Regarding the above-mentioned anticipated short-term and long-term impacts of the construction projects,[1414] Ukraine also lays out how, in its view, the Russian Federation's risk assessments and proposed mitigation measures were insufficient.[1415]

763. In particular, Ukraine criticises the Russian Federation's purported risk assessment and mitigation measures with regard to (i) increased surface and particulate disturbance;[1416] (ii) increased levels

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1409 Reply, paras 240-44.
1410 Reply, para. 240.
1411 Reply, para. 240 *referring to* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 19 (21 March 2023); *see also* Hearing, 3 October 2024, 137:17-139:15 (Gimblett).
1412 Reply, para. 240 *citing* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 23 (21 March 2023).
1413 Reply, paras 241-44.
1414 *See* paras 748-749 above.
1415 Reply, paras 271-311.
1416 Reply, paras 273-74; Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 75-76, 79 (21 March 2023).

of light, noise, and vibration;[1417] (iii) pollution;[1418] (iv) impact on hydrodynamics;[1419] (v) changes in eutrophication and salinity;[1420] (vi) attractive nuisances;[1421] (vii) ice build-up;[1422] (viii) various species' migration patterns;[1423] (ix) chronic pollution;[1424] and (x) risk of structural failure of the bridge.[1425] According to Ukraine, the Russian Federation's approach to risk assessment and mitigation measures with regard to these risks was overly simplistic, limited in scope, and resting on baseless assumptions.[1426]

d. The Russian Federation Failed to Communicate Reports of Any EIA

764. Ukraine further submits that there is no evidence that the Russian Federation published or communicated any EIA or similar assessment to "competent international organizations" as required by Articles 206 and 205 of the Convention.[1427] Rejecting the Russian Federation's position that its "primary EIA materials" could have been found based on "the simplest research,"[1428] Ukraine asserts that there is no evidence that the alleged EIA materials can be found anywhere in the public domain, as evidenced by the fact that a substantial part of the materials submitted by the Russian Federation as exhibits were redacted.[1429]

765. While the Russian Federation states that the "results of the EIA were made available to the wider public, and in that context any third parties could consult them to make their comments and suggestions on the content of the EIA,"[1430] Ukraine argues that the Russian Federation's alleged

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1417 Reply, para. 276; Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 82-83 (21 March 2023).
1418 Reply, para. 279; Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 89 (21 March 2023).
1419 Revised Memorial, paras 206-08; Reply, paras 281-87; Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 104-08 (21 March 2023); Second Opinion of Ahmet Kideys, Middle East Technical University, paras 24-28 (22 March 2023).
1420 Reply, paras 288-92; Second Opinion of Ahmet Kideys, Middle East Technical University, para. 20 (22 March 2023); Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 110-16 (21 March 2023).
1421 Reply, paras 299-300.
1422 Reply, paras 293-95.
1423 Reply, paras 296-97.
1424 Reply, paras 301-05 *citing* STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 8, Book 1) (2015), p. 9 (**Annex RU-131**); Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 133-39 (21 March 2023).
1425 Reply, paras 307-10; Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 140-46 (21 March 2023).
1426 Reply, paras 273-74, 276, 279, 282-83, 285, 289, 292, 297, 302, 307.
1427 Revised Memorial, paras 221, 229; Reply, para. 254.
1428 Counter-Memorial, paras 359, 433.
1429 Reply, para. 255.
1430 Counter-Memorial, para. 368.

publication efforts fall short of the requirement to "communicate" the reports under Article 206 of the Convention.[1431]

766. Ukraine finds it problematic that in most cases the Russian Federation only made hard copies of the EIAs available in a small number of local administrative offices and for a limited period of time, typically barely one month before the conclusion of the alleged EIA processes.[1432] Equally, Ukraine questions the Russian Federation's claim that it held public roundtables open to anyone, given that there is no evidence that such roundtables were ever announced or advertised in advance.[1433] To the contrary, Ukraine argues that the redacted minutes produced by the Russian Federation provide no meaningful information and contradict the alleged public nature of the consultations.[1434] Ukraine further contests the Russian Federation's claim that it posted "preliminary EIAs" and "Terms of Reference" for EIAs for public review and arranged public discussions on them.[1435]

767. According to Ukraine, the Russian Federation's comments on the transparency of the alleged EIA process, made in the context of an expert group for environmental support of the Kerch Strait bridge project created by its Ministry of Natural Resources and Environment on 19 February 2015, and its reference to communications between the Parties in the framework of the Ukrainian-Russian Commission on Fisheries in the Sea of Azov (hereinafter the "URC")[1436] are beside the point and misleading.[1437] The expert group of the Ministry of Natural Resources and Environment, Ukraine explains, did nothing to publish or communicate EIA results;[1438] nor does the URC have anything to do with public consultations on an EIA, and no EIA results or reports were shared with Ukraine in this context.[1439]

768. In conclusion, Ukraine argues that "[t]emporary access to EIA documents through passive posting of the whereabouts of the materials—or last-minute public consultations—do not satisfy the obligation to 'publish' under Article 205 of the Convention."[1440] Ukraine submits that the Russian Federation "is conflating two different obligations: first, the need to consult the public stakeholders for the purpose of adequately assessing the environmental and social impact of its

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1431 Reply, para. 257; Hearing, 26 September 2024, 104:8-21 (Gimblett).
1432 Reply, para. 258.
1433 Reply, para. 259.
1434 Reply, para. 259.
1435 Reply, para. 260 *referring to* Counter-Memorial, paras 368, 435.
1436 The Russian Federation refers to the same commission as the "Russian-Ukrainian Commission on Fisheries in the Sea of Azov" (hereinafter the "RUC").
1437 Reply, paras 265-66 *referring to* Counter-Memorial, para. 367.
1438 Reply, para. 265.
1439 Reply, para. 266.
1440 Reply, para. 261.

planned construction projects; and second, the need to communicate the results of its EIA to other States."[1441] In the view of Ukraine, publication of EIA results within the meaning of Article 205 of the Convention "must involve a proactive effort using a medium of communication calculated to bring the results to the attention of other interested States."[1442] In support of its interpretation, Ukraine refers to jurisprudence and commentary.[1443]

2. The Russian Federation's Position

769. The Russian Federation rejects Ukraine's allegation that it did not conduct appropriate EIAs for the construction projects in the Kerch Strait and failed to communicate reports of EIA results, and thereby violated Article 206 of the Convention.[1444]

a. The Applicable Standard under Article 206 of UNCLOS

770. Contrary to Ukraine's claims, the Russian Federation submits that neither general international law nor Article 206 of the Convention determines the specific content or procedures to follow while performing an EIA.[1445] It asserts that Ukraine cannot substitute its expert's opinion and alleged international standards compiled by that expert for the requirements of international law.[1446] In support of its position, the Russian Federation cites the ICJ's finding in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (hereinafter "*Pulp Mills*") that:

> [...] general international law [does not] specify the scope and content of an [EIA]. […] [I]t is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the [EIA] required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.[1447]

771. The Russian Federation further relies on the separate opinion of Judge Donoghue in *Certain Activities and Construction of a Road* that there is "scope for variation in the way that States of origin conduct the assessment, so long as the State meets its obligation to exercise due diligence

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1441 Hearing, 26 September 2024, 108:1-6 (Gimblett).
1442 Reply, para. 264.
1443 Reply, paras 262-63 *citing South China Sea*, cit., n. 37, paras 947, 991 (**Annex UAL-11**); Eike Blitza, 'Assessment of Potential Effects of Activities: Article 206' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 1369, para. 13 (**Annex UAL-197**).
1444 Counter-Memorial, para. 324.
1445 Counter-Memorial, para. 326; *see also* Hearing, 28 September 2024, 179:15-25 (Udovichenko).
1446 Counter-Memorial, para. 326.
1447 Counter-Memorial, para. 327 *citing Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 at p. 83, para. 205 (**Annex UAL-152**). *See also* Rejoinder, para. 599.

in preventing transboundary environmental harm."[1448] It also refers to the separate opinion of Judge Bhandari in the same case that international law may contain a *renvoi* to domestic law and that no autonomous binding standards under international law exist in respect of the conduct of an EIA.[1449] The ILC's commentaries to its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, the Russian Federation adds, also state that "[t]he specifics of what ought to be the content of assessment is left to the domestic laws of the State [...]."[1450]

772. Referring to the Advisory Opinion in *Responsibilities and Obligations of States with Respect to Activities in the Area*, the Russian Federation asserts that Article 206 of the Convention "gives only few indications of [the] scope and content" of EIAs.[1451] According to the Russian Federation, Article 206 does not mandate any kind of formal EIA but merely imposes an obligation to conduct a *sui generis* assessment of the potential effects of certain planned activities within a State's jurisdiction, with the format and modalities of carrying out the assessment being left to the States to determine.[1452] The discretion afforded to States in the conduct of any assessment, the Russian Federation argues, is further evidenced by the wording of Article 206 of the Convention, which requires assessment "as far as practicable."[1453] The Russian Federation claims that this discretion is particularly relevant against the background of "the necessity to ensure basic needs of the Crimean population during Ukraine's blockade."[1454]

773. According to the Russian Federation, it is not for the Arbitral Tribunal to act as a "court of appeal" in relation to the adequacy of the EIAs conducted by the Russian Federation for the construction projects, assessing particular methodologies or the compliance with domestic law.[1455] It rejects Ukraine's attempts to equate compliance with Article 206 of the Convention with compliance

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1448 Counter-Memorial, para. 328 *citing Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Separate Opinion of Judge Donoghue, I.C.J. Reports 2015, p. 782 at p. 786, para. 15 (**Annex RUL-98**).

1449 Counter-Memorial, para. 329 *citing Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Separate Opinion of Judge Bhandari, I.C.J. Reports 2015, p. 790 at pp. 799-800, para. 29 (**Annex RUL-99**).

1450 Counter-Memorial, para. 330 *citing* Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, *Yearbook of the International Law Commission,* Vol. II, Part Two, Commentary to Article 7, pp. 158-59, para. 7 (2001) (**Annex RUL-100**). *See also* Rejoinder, para. 619.

1451 Counter-Memorial, para. 331; Rejoinder, para. 621 *citing Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, p. 10 at, p. 51, para. 149 (**Annexes RUL-101**, **UAL-156**). *See also* Hearing, 28 September 2024, 180:3-24 (Udovichenko) *referring to Climate Change and International Law*, cit., n. 1324, para. 363 (**Annexes RUL-241**, **UAL-225**).

1452 Counter-Memorial, para. 332.

1453 Counter-Memorial, para. 333; Rejoinder, para. 606.

1454 Counter-Memorial, para. 333.

1455 Counter-Memorial, para. 334.

with certain alleged international standards identified by Ukraine's expert.[1456] The Russian Federation submits that there is no legal basis for Ukraine's contention, as what constitutes an assessment under Article 206 of the Convention is a question of law and not one for experts to determine.[1457] Unlike Articles 207 to 211 of the Convention, the Russian Federation avers, Article 206 of the Convention does not refer to internationally agreed rules and standards.[1458] Equally, the Russian Federation emphasises, the ICJ expressly noted the lack of binding force of such standards in *Pulp Mills*.[1459] In the view of the Russian Federation, there is no basis for the broad reading of Article 206 of the Convention proposed by Ukraine, and the sources relied upon by Ukraine are either inapposite or do not support its position but instead underpin the Russian Federation's reading of that provision.[1460] The Russian Federation asserts that the obligation to conduct an EIA is case- and fact-specific and the process is a "subjective" one.[1461] Regarding Ukraine's reliance on the ICJ's findings in *Gabčíkovo-Nagymaros Project*, the Russian Federation argues that Ukraine fails to explain why that decision, resting on the wording of a bilateral treaty applicable only between the parties to that dispute, is applicable to Article 206 of the Convention.[1462]

774. In conclusion, for the Russian Federation, "Article 206 [of the Convention] is a tool 'to provide decision-makers with information about possible environmental effects when deciding whether to authorise a potentially harmful activity.'"[1463] According to the Russian Federation, "[h]ow this information is obtained cannot be subjected to an objective standard, as it differs from State to State, and depends on the specificities of a given project."[1464] Further, the Russian Federation claims that State practice confirms the lack of an objective international standard followed by

1456 Counter-Memorial, paras 335-36.
1457 Counter-Memorial, para. 336.
1458 Counter-Memorial, para. 336; Rejoinder, para. 607.
1459 Counter-Memorial, para. 336 *referring to Pulp Mills*, cit., n. 1447, p. 83, para. 205 (**Annex UAL-152**).
1460 Rejoinder, paras 608-20 *referring to Whaling*, cit., n. 1324, p. 260, para. 97 (**Annex UAL-155**); *South China Sea*, cit., n. 37, paras 948, 989-90 (**Annex UAL-11**); *Environment and Human Rights*, cit., n. 1336, para. 170 (**Annex UAL-154**); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665 at pp. 722-23, para. 161 (**Annex UAL-153**); *Certain Activities and Construction of a Road*, Separate Opinion of Judge Dugard, I.C.J. Reports 2015, p. 842 at p. 849, para. 18 (**Annex UAL-200**); Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, *Yearbook of the International Law Commission,* Vol. II, Part Two, Commentary to Article 7, pp. 158-59, paras 5-7 (2001) (**Annex RUL-100**).
1461 Rejoinder, para. 600.
1462 Rejoinder, para. 604.
1463 Rejoinder, para. 624 *citing* Alan Boyle and Catherine Redgwell (eds), *Birnie Boyle & Redgwell's International Law and the Environment* (4th edition, Oxford University Press 2021), p. 184 (**Annex RUL-105**).
1464 Rejoinder, para. 624.

States when conducting EIAs.[1465] In support of this claim, the Russian Federation, by way of example, refers to the differing practices and statements regarding EIAs in Mexico, the Republic of Korea, and the United Kingdom.[1466]

b. The Laying of the Fibre-Optic Cable Did Not Require an EIA

775. The Russian Federation argues that Ukraine's claims regarding the fibre-optic cable are belated and inadmissible.[1467] In any case, the Russian Federation is of the view that the laying of the fibre-optic cable did not require an EIA under the Convention.[1468]

776. In this regard, the Russian Federation recalls the wide discretion that it claims Article 206 of the Convention grants to States in their evaluation of whether reasonable grounds exist for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment.[1469] Unlike for power cables or pipelines, the Russian Federation points out, its law does not require an EIA or SEER for the laying of communication cables, including fibre-optic cables.[1470] According to the Russian Federation, this is in line with international standards.[1471] It is common practice, the Russian Federation argues, to distinguish between power cables and telecommunication cables for the purposes of an EIA, given their different functions, technical characteristics, and environmental impacts.[1472] Specifically for submarine fibre-optic cables, the Russian Federation points to "a widely accepted and substantiated volume of scientific opinion that the laying and operation of such cables does not generally carry any substantial harm to the environment."[1473] It lists examples of State practice from around the world, according to which fibre-optic cables are routinely laid without an EIA due to their minimal expected environmental impact.[1474] The Russian Federation further relies on its expert, [redacted] who explains that the laying

1465 Rejoinder, para. 625.
1466 Rejoinder, para. 625.
1467 Counter-Memorial, para. 441; Rejoinder, paras 684-89. *See also* Hearing, 28 September 2024, 202:19-203:12 (Udovichenko).
1468 Counter-Memorial, paras 442-46; Rejoinder, paras 690-715.
1469 Counter-Memorial, para. 443; Rejoinder, para. 691.
1470 Counter-Memorial, para. 444; Rejoinder, para. 690.
1471 Counter-Memorial, para. 445.
1472 Counter-Memorial, para. 445 *referring to* OSPAR Commission, Guidelines on Best Environmental Practice (BEP) in Cable Laying and Operation, 2012, p. 2 (**Annex RUL-109**).
1473 Rejoinder, para. 694; *see also* Counter-Memorial, para. 445.
1474 Rejoinder, paras 709-11; Hearing, 28 September 2024, 203:24-204:10 (Udovichenko).

of communication cables is non-intrusive because of their small diameter and the character of the cable-laying process.[1475]

777. In response to Ukraine's reference to the nearfield effects on benthos and other marine organisms,[1476] the Russian Federation asserts that the term "nearfield" refers to distances that are comparable to the linear dimensions of the obstacle, meaning that any impacts of a submarine fibre-optic cable would be "restricted to the distance of centimetres to first tens of centimetres from the underwater cable," and therefore likely to have "little or no significance at the ecosystem level."[1477] Similarly, the Russian Federation argues, "'the laying of the [fibre-optic cable] could only have caused insignificant and brief turbidity in its immediate vicinity' that would not be noticeable against the naturally high turbidity in the Kerch Strait and could not have affected its well-adjusted resident species."[1478] Finally, the Russian Federation submits that the operation of such cables is virtually risk free.[1479]

778. According to the Russian Federation, Ukraine fails to explain why substantial pollution should have been expected against this background.[1480] On the "real-world assessments" which, Ukraine claims, demonstrate the environmental risks of the laying of submarine fibre-optic cables,[1481] the Russian Federation notes that Ukraine in fact only provides one such example from the Caribbean region, which is of no relevance to the matter at hand since the environmental conditions of the Caribbean Sea and the Kerch Strait are very different.[1482] Equally, the Russian Federation contests the existence of "well-established international standards" requiring EIAs for fibre-optic cables as claimed by Ukraine.[1483] The only standards Ukraine's expert refers to are the 2007 International Financial Corporation's guidelines, which apply only to projects conducted with the

1475 Rejoinder, para. 696 *citing* Second Opinion of [redacted], para. 78 (7 December 2023).
1476 Reply, para. 221; *see* para. 743 above.
1477 Rejoinder, para. 697 *citing* Second Opinion of [redacted], para. 82 (7 December 2023).
1478 Rejoinder, para. 698 *citing* Second Opinion of [redacted], para. 93 (7 December 2023) [emphasis omitted].
1479 Rejoinder, para. 699 *referring to* Second Opinion of [redacted], paras 78-79 (7 December 2023).
1480 Rejoinder, paras 700-02.
1481 Reply, para. 221 *referring to* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 12 (21 March 2023).
1482 Rejoinder, paras 703-04 *referring to* Second Opinion of [redacted], paras 88-90, 278 (7 December 2023).
1483 Rejoinder, para. 705 *citing* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 10 (21 March 2023).

involvement of the World Bank Group and can hardly be said to contain widely-accepted requirements.[1484]

779. The Russian Federation claims that Ukraine's arguments concerning the OSPAR Commission's Guidelines are misleading as the Guidelines merely constitute industry recommendations, which were designed for a particular water area.[1485] Even if the Guidelines, which the Russian Federation argues are aimed primarily at power cables, were to cover fibre-optic communications cables, the Russian Federation contends that they would have no bearing on the obligations enshrined in Article 206 of the Convention.[1486]

780. The Russian Federation also challenges Ukraine's submission that "[t]he relevant question is whether an EIA was required in this case, considering the circumstances of the particular environment at issue"[1487] as attempting to have it both ways, given Ukraine's position on the need for an "objective assessment" of the necessity of an EIA.[1488] In any case, the Russian Federation emphasises that no impact on the Azov or Black Sea environment ever materialised from any of the construction projects and draws attention to the "glaring inconsistency of Ukraine's current position with its own environmental practice."[1489]

781. Finally, the Russian Federation also asserts that the laying of the fibre-optic cable has to be seen in the context of "Crimea's reunification with Russia."[1490] It is the Russian Federation's view that the securing of access to internet connection and establishing direct channels of communication with Crimea was a security issue for the Russian Federation and residents of Crimea.[1491]

c. An Appropriate EIA for the Construction of the Kerch Strait Bridge Was Conducted and Made Publicly Available

i. Ukraine Misrepresents the Russian Federation's Regulatory Framework

782. As a preliminary point, the Russian Federation asserts that Ukraine misrepresents the applicable Russian regulatory framework, in particular Federal Law No. 221-FZ, when it describes the

1484 Rejoinder, paras 705-06.
1485 Rejoinder, para. 707 *referring to* Reply, para. 222.
1486 Rejoinder, paras 707-08.
1487 Reply, para. 224; *see* para. 744 above.
1488 Rejoinder, para. 712.
1489 Rejoinder, paras 713-14.
1490 Counter-Memorial, para. 446.
1491 Counter-Memorial, para. 446.

planning and approval process of the construction project as rushed and departing from ordinary EIA rules.[1492]

783. The Russian Federation goes on to correct what it considers to be misrepresentations by Ukraine of the Russian regulatory framework under Federal Law No. 221-FZ, in particular regarding the timing of various steps of the approval process.[1493] In this context, the Russian Federation distinguishes the approval of design documentation by a State authority named Glavgosekspertiza from the conduct of a SEER or the issuance of opinions on EIAs, something that is within the competence of a different State authority, Rosprirodnadzor,[1494] and explains that these processes were in fact conducted separately[1495] and in accordance with ordinary timeframes for similar large scale projects.[1496] The Russian Federation further draws attention to the fact that Ukraine's own environmental review system fails to satisfy the requirements that Ukraine seeks to apply to the Russian Federation.[1497]

784. The Russian Federation also rejects Ukraine's assertion that the EIA materials in respect of the Kerch Strait bridge submitted to the Arbitral Tribunal are not actual EIA documents that would normally be generated for Rosprirodnadzor's environmental review, the SEER.[1498] Contrary to Ukraine's expert's opinion that there is a separate EIA developed and reviewed by authorities in the Russian Federation,[1499] the Russian Federation asserts that there "is no such independent *document* as an 'EIA' (or 'OVOS') that is to be subject to SEER, and Russian law explicitly provides that what undergoes SEER is '*design documentation*', which embraces the totality of technical documents on the construction project, including its EIA."[1500] Under Russian Law, the Russian Federation elaborates, the composition of design documentation is clearly defined so as to "contain a section called '*Environmental Protection'*, which includes (i) the EIA, and (ii) the list of measures for the prevention and/or mitigation of potential negative environmental

1492 Counter-Memorial, paras 339-40; Rejoinder, para. 629; Hearing, 28 September 2024, 191:20-192:23 (Udovichenko).
1493 Counter-Memorial paras 341-58; Rejoinder, paras 676-80.
1494 Counter-Memorial, para. 343.
1495 Counter-Memorial, para. 344; Witness Statement of [redacted], paras 60, 68-71 (1 September 2022); *see also* Rejoinder, para. 677; Hearing, 24 September 2024, 192:8-14 (Udovichenko).
1496 Counter-Memorial, para. 354; Rejoinder, paras 679-80; *see also* Hearing, 28 September 2024, 191:25-192:4 (Udovichenko).
1497 Rejoinder, para. 681.
1498 Rejoinder, para. 631.
1499 Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 24-25 (21 March 2023).
1500 Rejoinder, para. 632 [emphasis added by Russian Federation]. *See also* Hearing, 28 September 2024, 187:21-188:21 (Udovichenko).

impact."[1501] According to the Russian Federation, that is what it has provided to the Arbitral Tribunal, thereby demonstrating that its EIAs fully complied with Russian law.[1502]

785. Further, the Russian Federation criticises the assessment of Ukraine's expert that its design documentation falls short of what is objectively required because a construction project's core elements must be defined through design documentation prior to conducting an EIA.[1503] Rather, the Russian Federation points out, "the requirement of submitting [an] EIA for SEER as part of the design documentation reflects the Russian Federation's integrated approach aimed exactly at ensuring that EIAs are conducted and reviewed with reference to other technical elements of the project, and thus fully correspond to them."[1504] More generally, referring to an Explanatory Report of the Council of Europe from 1992, the Russian Federation dismisses Ukraine's characterisation of the practice of relying solely on the design documentation to assess environmental impacts as "unorthodox," asserting that "EIAs conducted as part of the development planning process and reflected in the project development plans are [...], in fact, the *modus operandi* suggested by international sources."[1505]

ii. The EIA Followed an Appropriate Timetable and Procedure

786. Apart from what the Russian Federation considers to be Ukraine's misrepresentation of the applicable Russian legislation, it also rejects Ukraine's criticism directed at the timetable and procedure followed for the EIA process.[1506]

787. Regarding the process of the EIA, according to the Russian Federation, Ukraine's allegation of a "rushed" or "accelerated timetable"[1507] is incorrect and the timeframe "was adequate to complete the Kerch Bridge EIA and public consultations, without compromising its quality."[1508] The Russian Federation states that the Russian authorities commenced the EIA, in particular the collection of baseline data, well before any actual construction-related activities.[1509]

1501 Rejoinder, para. 633 [emphasis added by the Russian Federation].
1502 Rejoinder, paras 633-38.
1503 Rejoinder, para. 639 *citing* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 25 (21 March 2023).
1504 Rejoinder, para. 639 *referring to* Second Opinion of [redacted], para. 32 (7 December 2023).
1505 Rejoinder, para. 640 *referring to* Council of Europe, Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised), ETS No. 143, 16 January 1992 (hereinafter the "Explanatory Report to the Valletta Convention"), p. 6 (**Annex RUL-123**).
1506 Counter-Memorial, paras 361, 365-71; Rejoinder, paras 660-75.
1507 Revised Memorial, para. 225; Reply, paras 238, 245-50; *see also* paras 752, 757 above.
1508 Counter-Memorial, para. 361; *see also* Hearing, 28 September 2024, 185:22-187:15 (Udovichenko).
1509 Counter-Memorial, para. 365; Hearing, 28 September 2024, 185:22-186:4 (Udovichenko).

788. According to the Russian Federation, the process of baseline data collection involved local residents, academics, civic organisations, and the media, and the baseline data materials were publicly available.[1510] Rosprirodnadzor and Glavgosekspertiza issued their expert opinions approving the quality of the collected baseline data in August 2015.[1511]

789. The Russian Federation submits that STG-Eco LLC, a sub-contractor of the company in charge of the design documentation for the Kerch Strait bridge, prepared the EIA documentation in parallel.[1512] After the Ministry of Natural Resources and Environment of the Russian Federation had created an expert group for environmental support for the Kerch Strait bridge construction project on 19 February 2015 involving leading research institutes, the expert group consulted the Taman Highways Administration, STG-Eco LLC, and other involved organisations, ensuring the implementation of the best environmental solutions.[1513] Through the expert group, the Russian Federation claims, all interested third parties could contribute to the EIA preparation.[1514] The Russian Federation notes that Ukraine did not engage with the expert group.[1515]

790. The results of the EIA, the Russian Federation states, were made available to the wider public, allowing any third parties to consult them and make comments or suggestions.[1516] In particular, in June and July 2015, the Taman Highways Administration published "information about the terms of reference for the EIA and a preliminary EIA document specifying the means to obtain access to the underlying materials, as well as about the EIA materials" and made known the address where the complete sets of the EIA materials were available.[1517] In mid-July 2015, the Russian Federation adds, local administrators published the texts of their resolutions informing the public about the upcoming public hearings and the addresses where the complete sets of EIA materials were available on their websites.[1518] Further, according to the Russian Federation, the Taman Highways Administration "submitted the Terms of Reference for the EIA, preliminary EIA as well as full versions of the EIA materials to the local administrations of Taman, Kerch and Temryuksky District" in June and July 2015, where any person could access these documents.[1519] Finally, the Russian Federation submits that, in July and August 2015, roundtables and public

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1510 Counter-Memorial, para. 366.
1511 Counter-Memorial, para. 366.
1512 Counter-Memorial, para. 367.
1513 Counter-Memorial, para. 367 *referring to* Ministry of Natural Resources and Environment of the Russian Federation, On the Setting-Up of an Environmental Support Expert Group for the Project 'Transport Crossing across the Kerch Strait', Order No. 62, 19 February 2015 (**Annex RU-416**).
1514 Counter-Memorial, para. 367.
1515 Counter-Memorial, para. 367.
1516 Counter-Memorial, para. 368.
1517 Counter-Memorial, para. 368.
1518 Counter-Memorial, para. 368.
1519 Counter-Memorial, para. 368.

hearings were organised in Kerch and Taman, involving representatives of civil society, academia, industry, and journalists.[1520]

791. After the completion of the public hearings, the Russian Federation claims, State agencies proceeded to review the design documentation. According to the Russian Federation's account, the Taman Highways Administration submitted the completed EIA materials to Rosprirodnadzor for the SEER on 7 September 2015, and Rosprirodnadzor issued its expert opinion endorsing the Kerch Strait bridge EIA on 19 November 2015.[1521] On 30 October 2015, the Russian Federation adds, the Federal Agency for Fishery, exercising its "powers to ensure the conservation of aquatic biological resources during construction projects in internal waters of Russia," approved the project on the "condition that the fish would be reproduced in accordance with the developed programme."[1522] In February 2016, the Russian Federation states, Glavgosekspertiza approved the design documentation and Rosavtodor, the Federal Road Agency, issued a construction permit, following which the main construction works commenced.[1523]

792. Against this background, the Russian Federation submits that there is no basis for Ukraine's assertion that the EIA was confined to an unduly short period, as "the EIA preparation had commenced well before construction works started, spanned over a period of more than a year (from September 2014 to September 2015) and was followed by a lengthy review of the documentation by the competent authorities."[1524] Addressing Ukraine's criticism of the timeline for the EIA process and, in particular, the characterisation by Ukraine's expert, Mr. Aronson, of the process as "grossly inadequate [...] under any recognized standards,"[1525] the Russian Federation argues that it remains unclear what "standards" Mr. Aronson refers to that could amount to "any relevant and mandatory standard in the Russian Federation or internationally."[1526] Concerning Ukraine's questioning of the reliability of the timeline of the Kerch Strait bridge EIA based on the fact that [redacted], the Russian Federation's fact witness, [redacted],[1527] the Russian Federation states that the start date of

1520 Counter-Memorial, para. 368.
1521 Counter-Memorial, para. 369; [redacted] *See also* Rejoinder, para. 672.
1522 Counter-Memorial, para. 369.
1523 Counter-Memorial, para. 369.
1524 Counter-Memorial, para. 370; *see also* Rejoinder, paras 668, 678.
1525 Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 32 (21 March 2023).
1526 Rejoinder, para. 662 *referring to* Second Opinion of [redacted], para. 42 (7 December 2023).
1527 Reply, para. 246; *see also* para. 755 above.

September 2014 was taken by [redacted] directly from the baseline materials for the Kerch Strait bridge.[1528]

793. The Russian Federation asserts that the transparency and publicity of the process went well beyond the requirements of Articles 205 and 206 of the Convention, as public hearings were held, ways to access the EIA materials were publicly advertised in the media, including periodicals, and the materials themselves were freely available.[1529] Specifically regarding the length of the public consultations, the Russian Federation argues that these were held "exactly how they were supposed to under the relevant provisions of the Russian law," as confirmed by Ukraine's own submissions.[1530]

794. In any case, the Russian Federation emphasises that the duration of an EIA process is not what dictates its quality, and relies on [redacted]'s expert opinion that the EIAs conducted for the construction projects "were not only adequate but represent high-quality environmental assessments."[1531] Similarly, the Russian Federation argues that, while Ukraine criticises the alleged brevity of the public consultations, it fails to identify any substantive flaw with them.[1532]

iii. The EIA Properly Assessed the Environmental Risks of the Construction of the Kerch Strait Bridge

795. The Russian Federation claims that Ukraine's criticism directed at the content of the EIA is baseless and that the environmental risks of the construction of the Kerch Strait bridge were properly assessed and mitigated.[1533]

796. Generally, according to the Russian Federation, Ukraine's criticism relies on "dubious 'well studied risks', 'well-established fact[s]', 'and well-documented notions'" without substantive corroboration.[1534] At the same time, the Russian Federation accuses Ukraine of simply ignoring the years of studies and monitoring conducted by leading Russian scientific institutions, while Ukraine's own experts fail to "rely on any specialised and systemic research, or any scientific

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1528 Rejoinder, para. 668 *referring to* STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Part 4, Book 1) (2015) (**Annex RU-89**).

1529 Counter-Memorial, para. 371.

1530 Rejoinder, paras 673-74 *referring to* Reply, n. 573.

1531 Rejoinder, paras 666-67 *citing* Second Opinion of [redacted], para. 43 (7 December 2023).

1532 Rejoinder, para. 675.

1533 Counter-Memorial, paras 372-432; Rejoinder, paras 653-59, 716-98.

1534 Rejoinder, para. 717 *citing* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 141 (21 March 2023); Second Opinion of Ahmet Kideys, Middle East Technical University, paras 3, 12, 31 (22 March 2023) [citations omitted].

literature to back their far-reaching claims."[1535] Instead, the Russian Federation notes, Ukraine relies for evidence of many of the alleged environmental risks on one single source, an article by Ukraine's Institute of Water Problems and Land Reclamation, which the Russian Federation claims was likely prepared specifically for the purposes of this Arbitration.[1536]

797. Highlighting that several years have passed since the construction of the Kerch Strait bridge and the initiation of this Arbitration, the Russian Federation states that Ukraine remains unable to identify a single environmental risk that has materialised.[1537] As the studies undertaken by [redacted] reveal, the Russian Federation adds, there has been no increase of pollution or signs of any other harm to the environment asserted by Ukraine.[1538]

798. The Russian Federation also addresses the specific alleged insufficiencies raised by Ukraine with regard to the content of the EIA, including baseline data as well as the Russian Federation's risk assessment and proposed mitigation measures.

(a) Baseline Data

799. Beginning with Ukraine's criticism of the alleged lack of baseline data for the construction of the Kerch Strait bridge,[1539] the Russian Federation avers that the Kerch Strait has long been subject to extensive scientific research and monitoring.[1540] Accordingly, the Russian Federation claims, much of the necessary baseline data, including some insights into the response of the Kerch Strait system to anthropogenic stresses, was already available to serve as background for the Russian Federation's compilation of the set of baseline data.[1541] However, the Russian Federation rejects Ukraine's assertion that this historical data was used as a substitute for contemporaneous measurements.[1542] It states that STG-Eco LLC sub-contracted a number of scientific organisations for such measurements: specifically, in autumn 2014, Analitik LLC sampled water and bottom sediments, conducting additional sampling in the areas that were supposed to be most significantly impacted in summer 2015.[1543] The Southern Research Institute of Fisheries and Oceanography analysed historical data on the hydrobiology and ichthyology of the Kerch Strait

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1535 Rejoinder, para. 718 *referring to* Second Opinion of [redacted] para. 14 (7 December 2023).
1536 Rejoinder, para. 719.
1537 Rejoinder, para. 721; *see also* Hearing, 28 September 2024, 193:23-194:4 (Udovichenko).
1538 Rejoinder, paras 722-24 *referring to* Second Opinion of [redacted], paras 23-25, 169 (7 December 2023).
1539 *See* Reply, para. 204; *see also* para. 760 above.
1540 Counter-Memorial, para. 372; Rejoinder, para. 654.
1541 Counter-Memorial, para. 372.
1542 Rejoinder, para. 654.
1543 Counter-Memorial, para. 373.

prior to 2014.[1544] The All-Russian Research Institute of Fisheries and Oceanography analysed historical data and conducted field research in November 2014, studying plankton, benthos, and fish in the area and comparing the results with 2010 to 2011.[1545] In addition to the studies organised by STG-Eco LLC, the Zubov Institute reviewed historical data from 1891 to 2013 on temperature, salinity, ice, current, disturbance, water levels, and sediment dynamics of the Kerch Strait and conducted field research of the Kerch Strait from summer 2014 to March 2015.[1546] Relying on [redacted] opinion, the Russian Federation argues that the EIA allowed for sufficient spatial and temporal coverage, in particular, with regard to the hydrometeorological surveys.[1547]

(b) Risk Assessment and Mitigation Measures

800. Turning to environmental impacts that Ukraine contends were not adequately considered by the Russian Federation's EIA, the Russian Federation observes that EIAs need not test every possible hypothesis and argues that most impacts and mitigation measures addressed by Ukraine are irrelevant.[1548]

801. The Russian Federation explains in detail how the EIA accounted for the relevant impacts and why the other hypothetical impacts raised by Ukraine should be disregarded with regard to (i) impact on water quality;[1549] (ii) alleged increased surface and particulate disturbance;[1550] (iii) impact on aquatic bioresources;[1551] (iv) impact on hydrodynamics;[1552]

1544 Counter-Memorial, para. 373.

1545 Counter-Memorial, para. 373.

1546 Counter-Memorial, para. 374.

1547 Rejoinder, paras 656-58 *referring to* Second Opinion of [redacted], paras 107-09 (7 December 2023).

1548 Counter-Memorial, para. 376.

1549 Counter-Memorial, paras 378-82 *citing* Opinion of John G. Aronson, EcologicDNA, LLC, paras 179-80 (17 May 2021); *see also* Rejoinder paras 743-49 *referring to* Federal Agency for Fishery (Rosrybolovstvo), Letter No. 8813-VS/U04, 28 September 2021 (**Annex RU-798**); Federal Agency for Fishery (Rosrybolovstvo), Letter No. 3633-VS/U04, 20 April 2022 (**Annex RU-799**); Hearing, 28 September 2024, 196:24-197:9 (Udovichenko).

1550 Rejoinder, paras 725-32; Hearing, 28 September 2024, 195:10-23 (Udovichenko).

1551 Counter-Memorial, paras 383-86; Rejoinder, paras 733-42; *see also* Hearing, 28 September 2024, 195:24-196:23 (Udovichenko).

1552 Counter-Memorial, paras 387-92; Rejoinder, paras 751-59 *citing* Federal Service for Hydrometeorology and Environmental Monitoring, Letter No. 31-07883/22i, forwarding a note of the Zubov State Oceanographic Institute, 25 August 2022, p. 6 (**Annex RU-274**). *See also* Hearing, 28 September 2024, 197:10-198:16 (Udovichenko).

(v) eutrophication;[1553] (vi) salinity;[1554] (vii) ice formation and build-ups;[1555] (viii) migration patterns of various species;[1556] (ix) creation of attractive nuisances;[1557] (x) emergency response plans;[1558] and (xi) safety and structural integrity of the Kerch Strait bridge.[1559]

d. An Appropriate EIA Was Conducted for the Undersea Gas Pipeline and Power Cables and Made Publicly Available

802. The Russian Federation asserts that appropriate EIAs were conducted for the gas pipeline and power cables.[1560] While Ukraine extends its criticism regarding the alleged rushed nature of the EIA process for the gas pipeline and power cables, the Russian Federation refutes these claims just as it does with regards to the Kerch Strait bridge EIA.[1561]

803. According to the Russian Federation, the general contractor for the gas pipeline, SGM LLC, contracted another company to design it, and this company in turn sub-contracted two separate companies to gather baseline data and perform the EIA.[1562] In addition to its own research, the company hired for the baseline data collection used available baseline data, including that collected by STG-Eco LLC for the Kerch Strait bridge engineering surveys.[1563] After its completion, the results of the gas pipeline EIA were made available for public scrutiny: from 8 to 13 September 2015, information on the start of the EIA, including a link to the Terms of Reference for the EIA, was published in a series of official federal, regional, and local newspapers;[1564] local administrations of the "Leninsky District of the Republic of Crimea and the Temryuksky District of the Krasnodar Region" arranged dates and places for public hearings on the EIA, which they communicated on their websites;[1565] from 4 to 8 October 2015 information on the upcoming

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1553 Counter-Memorial, para. 395; Rejoinder, paras 760-64; *see also* Hearing, 28 September 2024, 198:17-199:4 (Udovichenko).

1554 Counter-Memorial, para. 394; Rejoinder, paras 765-70; *see also* Hearing, 28 September 2024, 199:5-21 (Udovichenko).

1555 Counter-Memorial, paras 396-98; Rejoinder, paras 771-80; Hearing, 28 September 2024, 199:22-200:10 (Udovichenko).

1556 Counter-Memorial, para. 398; Rejoinder, paras 781-88; Hearing, 28 September 2024, 200:11-21 (Udovichenko).

1557 Rejoinder, paras 789-91.

1558 Rejoinder, paras 792-94.

1559 Counter-Memorial, paras 399-432 *citing* N. N. Dyakov et al., 'On Possible Risks in Construction and Operation of Bridge Transition over the Kerch Strait', Proceedings of the State Oceanographic Institute, Issue 218 (2017), p. 233 (**Annex RU-273**); Rejoinder, paras 795-98; *see also* Hearing, 28 September 2024, 200:22-201:6 (Udovichenko).

1560 Counter-Memorial, paras 433-40; Rejoinder, paras 642-52.

1561 Rejoinder, paras 660-61, 663; *see also* Hearing, 28 September 2024, 201:11-202:14 (Udovichenko).

1562 Counter-Memorial, para. 434.

1563 Counter-Memorial, para. 434.

1564 Counter-Memorial, para. 435(a).

1565 Counter-Memorial, para. 435(b).

public hearings, including dates and location of the hearings and addresses where the EIA materials were available, was published in a series of official federal, regional, and local newspapers;[1566] and public hearings took place on 5 and 9 November 2015 in the Leninsky District and Temryuksky District, enabling the public to give their comments and suggestions.[1567] After completion of the EIA, Rosprirodnadzor conducted a SEER and issued its positive expert opinion on the EIA for the gas pipeline on 19 February 2016.[1568]

804. For the power cables, according to the Russian Federation, the Federal State Budgetary Institution "Russian Energy Agency" was the contracting authority.[1569] It hired a contractor for the project, which in turn sub-contracted separate companies to act as the general design organisation and to prepare EIA materials.[1570] Just as for the gas pipeline, the results of the EIA for the submarine power cables were made available for public scrutiny: between 19 and 27 October 2014, information on the upcoming public hearings, including the dates and places where the hearings took place and the addresses where the EIA materials were available, was published in a series of official federal, regional, and local newspapers;[1571] and public hearings took place on 24 and 28 November 2014 in the Leninsky District and Temryuksky District, where the public had the opportunity to give their comments and suggestions.[1572] Following the EIA's completion, Rosprirodnadzor conducted a SEER and issued its positive expert opinion on the EIA for the power cables on 23 July 2015.[1573] Despite the fact that Rosprirodnadzor's website provides an open registry of all SEERs completed since 2011 and the extensive coverage both EIA processes received, the Russian Federation notes that Ukraine did not appear to consult these sources.[1574]

805. The Russian Federation submits that apart from the claim that there was no appropriate EIA for these projects, "Ukraine and its environmental experts have not tendered any arguments for the Russian Federation to respond to [...]."[1575] Nonetheless, the Russian Federation states, it submitted an expert evaluation of the magnitude of impacts that could have been expected from the gas pipeline and power cables with its Rejoinder.[1576] Relying on [redacted]'s evaluation, the Russian Federation asserts that the environmental impacts of underwater pipeline

1566 Counter-Memorial, para. 435(c).
1567 Counter-Memorial, para. 435(d).
1568 Counter-Memorial, para. 436.
1569 Counter-Memorial, para. 437.
1570 Counter-Memorial, para. 437.
1571 Counter-Memorial, para. 438(a).
1572 Counter-Memorial, para. 438(b).
1573 Counter-Memorial, para. 439.
1574 Counter-Memorial, para. 440; Rejoinder, paras 642-43.
1575 Rejoinder, para. 644.
1576 Rejoinder, para. 646.

projects are relatively low, as these are highly confined and located in areas with soft sediments where benthic communities will recover much faster than in less favourable areas.[1577] Concerning the power cables, the Russian Federation claims, the impact is even smaller.[1578] Nonetheless, the Russian Federation emphasises that each of these projects involved "a thorough and proper EIA" that passed a stringent State review.[1579] The EIAs were also accompanied by impact prevention and mitigation measures, such as detailed restrictions for vessels and aircrafts engaged in the pipeline laying, designed to minimise acoustic impact on biota, regulation of wastewater treatment and disposal, and scheduling of works for the power cables in accordance with fish species' life cycles.[1580] Further, according to the Russian Federation, there were compensatory measures for the projects, including the hatching and release of juvenile fish.[1581]

C. Alleged Failure to Adequately Monitor the Risks and Effects of the Construction Projects and to Communicate the Monitoring Results

806. The Parties disagree on whether the Russian Federation complied with the obligation to monitor risks and effects of pollution with regard to the construction projects and the obligation to publish reports of the results of the monitoring in accordance with Articles 204 and 205 of the Convention.

807. Article 204 of the Convention reads:

> 1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate, and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.
>
> 2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

808. Article 205 of the Convention reads:

> States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

1577 Rejoinder, para. 647 *referring to* Second Opinion of [redacted], para. 64 (7 December 2023).

1578 Rejoinder, para. 648.

1579 Rejoinder, para. 649.

1580 Rejoinder, para. 650.

1581 Rejoinder, para. 651.

1. Ukraine's Position

809. Ukraine submits that the Russian Federation has violated, and continues to violate, Articles 204 and 205 of the Convention by not adequately monitoring the risks and effects of its construction projects on the marine environment in the Kerch Strait and failing to communicate reports of monitoring results.[1582]

a. The Applicable Standards under Articles 204 and 205 of UNCLOS

810. Ukraine refers to the wording of the provisions to underline that "States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment."[1583] It notes that the Convention obliges States to do so by "observ[ing], measur[ing], evaluat[ing] and analys[ing], by recognised scientific methods, the risks or effects of pollution of the marine environment."[1584] Ukraine rejects the Russian Federation's claims that Article 204 of the Convention allows significant discretion to States when performing their monitoring obligations.[1585] According to Ukraine, the Russian Federation's interpretation of the obligation under Article 204 is incorrect and would empty the provision of any meaningful content.[1586] It argues that the Russian Federation's claim that obligations for States under Article 204, paragraph 1, are limited to endeavouring "as far as practicable" to monitor the risks or effects of pollution[1587] entirely disregards the obligations under Article 204, paragraph 2, which contain no similar qualifications.[1588] What is more, Ukraine recalls that the qualifications in Article 204, paragraph 1, which were proposed by Kenya at the Third UN Conference on the Law of the Sea to avoid excessive burdens for developing States, are specifically linked to the capability of a State to discharge its duty.[1589] According to Ukraine, the Russian Federation, however, does not claim or offer any evidence that it lacks the capacity to properly monitor the risks or effects of marine pollution, but rather highlights its "prowess in the environmental sciences and its technical capability to monitor environmental impacts in the Kerch Strait."[1590] Consequently, in Ukraine's

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1582 Revised Memorial, paras 231-41; Reply, paras 312-31.
1583 Revised Memorial, para. 189 *citing* UNCLOS, Art. 204(2).
1584 Revised Memorial, para. 189 *citing* UNCLOS, Art. 204(1).
1585 Hearing, 25 September 2024, 108:22-110:23 (Thouvenin).
1586 Reply, para. 313.
1587 *See* paras 821-822 below.
1588 Reply, para. 313.
1589 Reply, para. 314 *referring to* Eike Blitza, 'Monitoring of the Risks or Effects of Pollution: Article 204' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 1362, para. 17 (**Annex RUL-115**).
1590 Reply, para. 314.

view, the Russian Federation's failure to properly monitor the effects of its construction activities violates both paragraphs of Article 204.[1591]

811. Article 205 of the Convention, Ukraine adds, requires States to "publish reports of the results obtained pursuant to Article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States."[1592] Ukraine submits that the purpose of these alternative forms of publication is to ensure that information for the effective protection of the marine environment is shared among all States.[1593] To meet the requirements of Article 205 of the Convention, Ukraine maintains that the reports communicated must be comprehensive, adequate to ensure that environmental risks are properly mitigated,[1594] and "adequately aimed at ensuring transparency and dissemination of scientific analysis of the risks to the marine environment caused by [the Russian Federation's] construction projects, as well as its evaluation and analysis of the data collected."[1595] In the view of Ukraine, publishing only "high-level" environmental monitoring summaries does not fulfil the requirements of that provision.[1596]

b. The Russian Federation Has Failed to Adequately Monitor the Risks or Effects

812. Based on its expert's review of the information provided by the Russian Federation, Ukraine claims that the Russian Federation has failed to sufficiently monitor the ongoing marine environmental impacts resulting from the Kerch Strait bridge or other construction projects in a scientifically acceptable manner.[1597] According to Ukraine, recognised scientific methods require a reliable, contemporaneous baseline of data from the period immediately before the activities commenced in order for subsequent monitoring to determine whether harm is being caused to the marine environment.[1598]

813. Referring first to the summaries provided by the Taman Highways Administration, and later also to the quarterly reports for 2017 made available by the Russian Federation with its Counter-Memorial, Ukraine submits that there is no indication of, or reference to, any such baseline or

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1591 Reply, para. 313.
1592 Revised Memorial, para. 189 *citing* UNCLOS, Art. 205.
1593 Hearing, 25 September 2024, 111:23-112:9 (Thouvenin).
1594 Revised Memorial, para. 190.
1595 Hearing, 25 September 2024, 116:5-9 (Thouvenin); *see also* Hearing, 25 September 2024, 115:8-116:2 (Thouvenin) *referring to* ITLOS, *Climate Change and International Law*, cit., n. 1324, para. 351 (**Annexes RUL-241**, **UAL-225**).
1596 Reply, para. 329.
1597 Revised Memorial, paras 234-35 *referring to* Opinion of John G. Aronson, EcologicDNA, LLC, paras 211, 215 (17 May 2021).
1598 Revised Memorial, para. 236.

standardised data against which conditions can be measured.[1599] Instead, the monitoring data is generally compared to maximum tolerable or acceptable limits (Maximum Allowable Concentrations, hereinafter "MAC").[1600] While this may be useful in determining whether the Black Sea basin has become intolerably polluted, it does not answer the relevant question of whether, how, and to what extent the construction projects impacted the marine environment.[1601]

814. Ukraine claims that the available Russian reports do not provide the raw data or an explanation of methodologies used to generate that data, which—according to Mr. Aronson—makes the conclusions or opinions drawn in these reports "scientifically useless."[1602] Ukraine describes the methodologies adopted in the reports to analyse the environmental impact as "rudimentary and overly generalized."[1603] It adds that multiple instances of data exceeding the MACs are "simply explained away" without any further investigation into possible impacts from the construction activities.[1604] In the view of Ukraine, the conclusions drawn in the reports are also unsubstantiated and in several cases at odds with the few actual findings reported.[1605] Ukraine also asserts that the Taman Highways Administration did not monitor relevant environmental conditions for significant parts of the year.[1606] According to Ukraine, proper scientific protocols would require more frequent monitoring of those environmental conditions.[1607]

815. In response to the Russian Federation's claim that its alleged collaboration with renowned research institutions must serve as *prima facie* evidence of compliance with the requirement for using "recognized scientific methods" under Article 204, paragraph 1, of the Convention, Ukraine submits that there is no support for this claim and that the Russian monitoring efforts suffer from several additional weaknesses.[1608] Contrary to the Russian Federation's claim that its monitoring

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1599 Revised Memorial, paras 233, 236; Reply, para. 318.
1600 Revised Memorial, para. 237; Reply, para. 318.
1601 Reply, para. 318.
1602 Revised Memorial, para. 237 *citing* Opinion of John G. Aronson, EcologicDNA, LLC, para. 210 (17 May 2021).
1603 Reply, para. 319 *citing* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 157 (21 March 2023); *see also* Hearing, 26 September 2024, 111:14-20 (Gimblett).
1604 Reply, para. 319 *citing* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 157 (21 March 2023).
1605 Revised Memorial, paras 238-39 *referring to* Opinion of John G. Aronson, EcologicDNA, LLC, paras 221-23 (17 May 2021); Taman Highways Administration, Results of Environmental Monitoring Over the First Quarter of 2017 at the Site of the Construction of the Bridge to Crimea, 2017 (**Annexes UA-655**, **Annex UA-747**); *see also* Reply, paras 320-21.
1606 Revised Memorial, para. 240 *citing* Taman Highways Administration, Results of Environmental Monitoring Over the First Quarter of 2017 at the Site of the Construction of the Bridge to Crimea, 2017, pp. 1-2 (**Annexes UA-655**, **Annex UA-747**).
1607 Revised Memorial, para. 240 *referring to* Opinion of John G. Aronson, EcologicDNA, LLC, para. 225 (17 May 2021).
1608 Reply, paras 322-26.

programme "fully corresponds to Mr. Aronson's criteria,"[1609] there is no evidence of "compliance monitoring" or "mitigation monitoring," which Mr. Aronson considers critical to after-the-fact monitoring, especially where—as in the case of the Kerch Strait bridge—the impact assessments are largely premised on the planned implementation of certain mitigation activities.[1610] Equally, Ukraine maintains that there is no evidence that the Russian Federation is monitoring the operational conditions of the bridge, despite the well-documented impact of noise, light, and vibrations on a variety of organisms.[1611] It emphasises that the Russian Federation's focus on the parameters of the monitoring programme is misplaced as a monitoring report "may cover all the required parameters (which Russia's reports do not) and still lead to irrelevant or unreliable results if not carefully designed and implemented."[1612]

816. Finally, Ukraine contends that the Russian Federation's reliance on its allegedly existing effective system of State-sponsored environmental monitoring is misplaced, as it was not specifically designed to capture the impacts of the construction projects. For example, Ukraine points out, the data collected by the Russian Federation's State Directorates for Hydrometeorology and Monitoring of Environment referred to by the Russian Federation[1613] was collected more than 13 kilometres to the northeast of the bridge construction site.[1614] Similarly, regarding the monitoring of the Kerch Strait bridge's effects on hydrodynamics, Ukraine criticises the fact that all of the inshore monitoring sites identified by the Russian Federation's Crimean Directorate for Hydrometeorology and Environmental Monitoring are located at a cross section of the Kerch Strait miles away from the site of the Kerch Strait bridge and, thus, cannot reliably monitor changes near the installations.[1615] Additionally, Ukraine claims that there appears to be no pertinent data on the actual changes in sediment erosion, transport, or deposition in the documentation, and [redacted]'s opinion on those issues "was based in part on counsel's instruction."[1616]

1609 Counter-Memorial, para. 459.
1610 Reply, para. 323 *referring to* Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 152 (21 March 2023).
1611 Reply, para. 323.
1612 Reply, para. 324.
1613 *See* Counter-Memorial, paras 476-78.
1614 Reply, para. 325.
1615 Reply, para. 286.
1616 Reply, para. 286.

c. The Russian Federation Has Failed to Communicate Results of any Monitoring Efforts

817. Ukraine notes that beginning in the third quarter of 2015, the Taman Highways Administration published approximately 25 quarterly environmental monitoring reports purporting to contain the "results of environmental monitoring [...] at the site of the construction and operation of the bridge to Crimea," as well as various other *ad hoc* reports.[1617] Yet, according to Ukraine, "none of these reports publish actual results from the alleged monitoring efforts. Instead, they are high-level summaries of unsubstantiated conclusions drawn from alleged but unspecified and unpublished, environmental monitoring results."[1618] Ukraine criticises the fact that the monitoring reports regarding the Kerch Strait bridge submitted into the record by the Russian Federation are "heavily redacted" and "leanly excerpted."[1619] Even when specifically requested by Ukraine, as occurred during sessions of the URC, the Russian Federation has failed to share any pertinent monitoring results.[1620] Ukraine states that the Russian Federation confirms that only high-level summaries of underlying reports on the results of the environmental monitoring were made public.[1621] According to Ukraine, the Russian Federation describes these as only "'brief results of environmental monitoring' that 'were not intended, and under the applicable [Russian] laws are not required, to provide a comprehensive account of the environmental monitoring exercise, nor should they be deemed as the actual *reports* on environmental monitoring.'"[1622] Ukraine argues that the Russian Federation's description of the documents "is practically an admission that it withheld the requisite information from other [S]tates in violation of Article 205 [of the Convention]."[1623]

818. Concerning the submarine power cables and gas pipeline, Ukraine asserts that the Russian Federation does not claim that any summaries, let alone monitoring reports or results, were made public or communicated to any international organisations.[1624] The two monitoring reports submitted by the Russian Federation in this Arbitration, which allegedly summarise the extent of the monitoring efforts in respect of these projects, are 11- and five-page excerpts from what appear

1617 Revised Memorial, para. 233.
1618 Revised Memorial, para. 234.
1619 Hearing, 26 September 2024, 113:4-22 (Gimblett).
1620 Reply, para. 328 *referring to* URC XXX Session, October 2018 (**Annex UA-837**).
1621 Reply, para. 329 *referring to* Counter-Memorial, paras 462-63.
1622 Reply, para. 329 *citing* Counter-Memorial, para. 463 [emphasis added by Ukraine].
1623 Reply, para. 329.
1624 Reply, para. 330; Hearing, 26 September 2024, 112:14-19 (Gimblett).

to be 428- and 128-page documents respectively and, accordingly, do not provide a basis for any meaningful assessment of the Russian Federation's alleged monitoring efforts.[1625]

819. Ukraine adds that the Russian Federation's system of State-sponsored, site-specific environmental monitoring also does not satisfy Article 205 of the Convention as generic data taken miles away from the construction sites are not the type of monitoring data required under the Convention.[1626]

2. The Russian Federation's Position

820. For its part, the Russian Federation argues that Ukraine applies an incorrect standard under Articles 204 and 205 of the Convention, that the Russian Federation ensured robust environmental monitoring of all construction projects, and that it complied with the obligation to publish monitoring results.[1627]

a. The Applicable Standards under Articles 204 and 205 of UNCLOS

821. The Russian Federation submits that Article 204 of the Convention does not contain an obligation of result but "one which has to be assessed on a 'best effort' basis."[1628] It agrees that the two paragraphs of Article 204 of the Convention envisage two separate obligations:

> Whereas Art. 204 (1) aims at generating knowledge on the effects and risks of pollution to the marine environment as a whole, Art. 204 (2) narrows down the focus by requiring States to particularly keep activities under their control under surveillance.[1629]

822. According to the Russian Federation, the plain text of Article 204, paragraph 1, of the Convention requires only certain conduct, not the achievement of a specific result.[1630] It argues that the expression "as far as practicable" was inserted upon a proposal by Kenya to allow more flexibility in implementing the Convention and that Ukraine's claims that the insertion focuses on developing States are to no avail.[1631] Consequently, the Russian Federation submits that even if Ukraine presented evidence that the monitoring was incomplete or inaccurate, which according to the Russian Federation is not the case, it would still not amount to a breach of Article 204 of

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1625 Reply, para. 316.
1626 Reply, para. 331.
1627 Counter-Memorial, paras 447-91; Rejoinder, paras 799-850.
1628 Counter-Memorial, para. 449; *see also* Hearing, 28 September 2024, 206:6-11 (Udovichenko).
1629 Rejoinder, para. 802 *citing* Eike Blitza, 'Monitoring of the Risks or Effects of Pollution: Article 204' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 1357, para. 2 (**Annex RUL-200**).
1630 Rejoinder, para. 803.
1631 Counter-Memorial, para. 449; Rejoinder, para. 804 *citing* Eike Blitza, 'Monitoring of the Risks or Effects of Pollution: Article 204' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 1362, para. 17 (**Annex RUL-200**).

the Convention, absent a discrete showing that the Russian Federation had also failed to comply with its best effort obligations.[1632] In the Russian Federation's view, this means that the relevant question is not whether a particular scientific method was applied or not, but whether an endeavour had been made to, as far as practicable, carry out environmental monitoring.[1633]

823. While Article 204, paragraph 2, of the Convention does not contain similar qualifications, the Russian Federation maintains that its wording:

> […] clearly indicates that a State is only required to keep under surveillance any activities to determine the *likeliness* of marine environment pollution. No doubt, seeing "whether [the State's activities] are likely to pollute the marine environment' is far from analysing 'whether, how and to what extent [State's activities] have impacted the marine environment."[1634]

824. The Russian Federation submits that "Article 204 of UNCLOS, being general in nature, allows significant discretion to the State when performing its monitoring obligations."[1635]

825. With respect to Article 205 of the Convention, the Russian Federation takes the position that the text limits the publication obligation to "reports of the results."[1636] Contrary to Ukraine's claims, the provision does not require the publication of thousands of pages of environmental documentation, and its purpose is not to provide a platform for scientific analysis or discussion of environmental monitoring results.[1637] According to the Russian Federation, while Article 205 is clear on the strict nature of the publication obligation itself, it does not specify any requirements as to the content of the reports to be published.[1638] Recalling the separate obligations contained in Article 204, paragraphs 1 and 2, the Russian Federation argues that the obligation of publication under Article 205 relates solely to the general obligation in Article 204, paragraph 1.[1639] Such an interpretation of Article 205 is also supported by the *travaux préparatoires*, since first drafts of this provision only covered reporting in relation to risks and effects of pollution, and the reference to Article 204 was inserted into the draft text as a minor and insubstantial amendment.[1640] Therefore, the Russian Federation submits that, properly interpreted, Article 205 does not require

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1632 Counter-Memorial, para. 450.
1633 Counter-Memorial, para. 451.
1634 Rejoinder, para. 805 *citing* Article 204(2) of the Convention [emphasis added by the Russian Federation].
1635 Rejoinder, para. 806.
1636 Counter-Memorial, para. 490.
1637 Counter-Memorial, para. 490; Rejoinder, paras 840-41.
1638 Rejoinder, para. 833; *see also* Hearing, 28 September 2024, 209:22-210:4 (Udovichenko).
1639 Rejoinder, paras 834-37 *citing* Eike Blitza, 'Publication of Reports: Article 205' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 1367, para. 7 (**Annex RUL-200**).
1640 Rejoinder, paras 835-36.

publication of reports in order to prove States' implementation of Article 204, but rather to exchange information on the marine environment.[1641]

b. The Russian Federation Conducted Robust Environmental Monitoring

826. The Russian Federation asserts that it ensured proper environmental monitoring for the construction projects.[1642] In its Counter-Memorial, the Russian Federation accuses Ukraine of making unfounded claims regarding the adequacy of environmental monitoring concerning the Kerch Strait bridge, given that Ukraine had not reviewed the monitoring documentation.[1643] Submitting by way of example documentary records of the particular monitoring exercises related to the Kerch Strait bridge for all four quarters of 2017, the Russian Federation argues that the environmental monitoring "was robust and adhered to the generally applicable—and scientifically *not* contested—approach to environmental monitoring under the applicable law."[1644] It goes on to address specific arguments raised by Ukraine on the supposed inadequacy of the Kerch Strait bridge environmental monitoring.

827. First, the Russian Federation recalls that the Kerch Strait bridge EIA envisaged a programme of environmental monitoring, which was successfully implemented by the Institute of Land-Use Ecology LLC (hereinafter the "Institute of Ecology").[1645] According to the Russian Federation, this programme was developed with the involvement of the most prominent and reputable Russian researchers and practitioners, received approval from Rosprirodnadzor in the course of the SEER, and was carried out by "the most reputable, renowned and respected Russian research institutions."[1646] The Russian Federation states that this involvement of renowned scientific institutions should serve as *prima facie* evidence of the observance of "'accepted scientific methodologies' in the development and implementation of the Monitoring Programme."[1647]

828. Second, the Russian Federation notes that the monitoring programme prescribed the preparation of quarterly environmental monitoring reports (hereinafter "EM Reports") during the construction and operation of the bridge.[1648] According to the Russian Federation, the Institute of Ecology carried out monitoring in three areas of the Kerch Strait: in the vicinity of the construction site, in

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1641 Rejoinder, para. 837.
1642 Counter-Memorial, paras 453-89; Rejoinder, paras 811-31.
1643 Counter-Memorial, para. 453.
1644 Counter-Memorial, para. 454 [emphasis added by the Russian Federation].
1645 Counter-Memorial, para. 455.
1646 Counter-Memorial, para. 456 *citing* Witness Statement of [redacted], para. 15 (21 August 2022).
1647 Counter-Memorial, para. 457; *see also* Rejoinder, para. 815.
1648 Counter-Memorial, para. 458.

the area of water outlets discharging treated water from the local treatment facilities, and in the protected area of the Zaporozhsko-Tamansky Nature Reserve.[1649] The monitoring programme provided for, in particular, the sampling and analysis of water and bottom sediments and monitoring of aquatic bioresources, and additional meteorological stations were set up at the construction site to ensure continuous hydrometeorological monitoring.[1650] Reviewing the monitoring programme and comparing it with what Mr. Aronson considers an "adequate monitoring system," [redacted] concludes that the programme fully corresponds to Mr. Aronson's criteria.[1651] At the same time, the Russian Federation criticises Ukraine's reliance on "Mr. Aronson's personal opinions regarding the proper structure and content of monitoring reports" and his "false" assessment that the monitoring efforts were incomplete because they did not include "compliance monitoring" and "mitigation monitoring."[1652] The Russian Federation also contests Mr. Aronson's statement that the impact assessments were largely premised on the planned implementation of certain mitigation activities, since the mitigation measures responded to the assessed impacts, not the other way around.[1653]

829. Regarding two further specific criticisms of Ukraine, the frequency of aquatic bioresource monitoring and bottom sediments monitoring,[1654] the Russian Federation responds that winter monitoring of aquatic bioresources was unnecessary as none of the key fish species migrate through the Strait in the winter.[1655] Equally, the Russian Federation disagrees with the need for continuous bottom sediments monitoring, since a sharp change in the concentration of pollutants is not typical of bottom sediments, making tri-annual sampling sufficient.[1656] Concerning Ukraine's criticism of the alleged focus of the Russian Federation and its expert on the parameters of the monitoring process, the Russian Federation argues that [redacted] statements were responses to Mr. Aronson's own criticisms and that Mr. Aronson "does not elaborate his vague suggestion with any concrete criticisms of the quarterly reports."[1657] Regarding Ukraine's concerns about the alleged serious pollution levels, the Russian Federation states that these are based on "only two occasions where high concentrations were found in bottom sediments 'at or near' the construction sites—which in both instances turns out to be the same Dzhardzhava River

1649 Counter-Memorial, para. 458.
1650 Counter-Memorial, para. 459.
1651 Counter-Memorial, para. 459 *referring to* Opinion of [redacted], paras 148-50, Addendum A (10 September 2022).
1652 Rejoinder, paras 816-17.
1653 Rejoinder, para. 818.
1654 *See* para. 814 above.
1655 Counter-Memorial, para. 460.
1656 Counter-Memorial, para. 461.
1657 Rejoinder, para. 819.

that runs on the Kerch shore."[1658] It dismisses the concerns, arguing that no attempt has been made by Ukraine "to establish any actual, not just assumed, connection of the pollutions referred to with the Kerch Bridge construction."[1659] The Russian Federation also contests Ukraine's claims that no proper monitoring of alterations of the hydrodynamics occurred, as [redacted] personally acted as chief scientist in at least eight field surveys of the Kerch Strait in 2020 to 2023 and also supervised the deployment of two long-term continuously working mooring stations equipped with acoustic current meters.[1660] Finally, the Russian Federation dismisses Ukraine's criticism of the placement of the monitoring sites, explaining that "the monitoring sites and settings were placed to allow for monitoring the hydrodynamic features in the entire Strait, including smaller scale processes."[1661]

830. Third, concerning the implementation of the monitoring programme, the Russian Federation explains that upon the conclusion of each quarterly monitoring, the Institute of Ecology compiled extensive EM Reports on the results of environmental monitoring, of which the Taman Highways Administration published brief summaries on its website (hereinafter the "EM Summaries"). The EM Summaries do not and "were not intended, and under the applicable laws are not required, to provide a comprehensive account of the environmental monitoring exercise [...]."[1662] Responding to Ukraine's criticisms of the supposedly deficient content of and methodologies underpinning the EM Reports, the Russian Federation explains that the Institute of Ecology had access to extensive baseline data collected before the construction commenced and did in fact compare the measurements with those data.[1663] It adds that the environmental indicators used in the monitoring process, such as MACs and the hydrochemical index of water pollution (hereinafter "WPI"), "represent fundamental scientific standards and methods generally recognised in many countries worldwide" and "[a]s such, they are entirely appropriate and apposite for the purposes of Article 204" of the Convention.[1664] Further, it rejects the assertion that the reports contain only generalised and basic conclusions without providing any relevant data: according to [redacted] assessment of the EM Reports, they "provide a detailed account of the monitoring results and actual concentrations measured and set out the underlying methodologies and standards used to collect the raw data."[1665]

1658 Rejoinder, para. 821.
1659 Rejoinder, para. 821.
1660 Rejoinder, para. 757; *see also* Hearing, 28 September 2024, 198:13-16 (Udovichenko).
1661 Rejoinder, para. 758.
1662 Counter-Memorial, paras 462-63.
1663 Counter-Memorial, para. 465; Rejoinder, para. 813.
1664 Rejoinder, para. 814.
1665 Counter-Memorial, para. 466.

831. The Russian Federation also rejects Ukraine's claim that the environmental monitoring summaries published by the Taman Highways Administration contain unsubstantiated conclusions.[1666] In the Russian Federation's view, Ukraine wrongly relies on the EM Summaries, while the EM Reports contain a detailed substantiation of the conclusions reached.[1667] With respect to Ukraine's claim that the WPI classification is meaningless without a scale against which to judge it, the Russian Federation states that the environmental monitoring programme for the Kerch Strait bridge defines the WPI classification used by the Institute of Ecology and that the WPI is a fundamental indicator of water quality generally recognised in post-Soviet countries.[1668] Finally, regarding the alleged lack of clarity on the sampling or analysis methodologies, the Russian Federation avers that the monitoring programme and EM Reports extensively describe these methodologies and that they were in compliance with accepted standards.[1669]

832. Turning to the monitoring of the undersea gas pipeline and power cables, the Russian Federation rejects the allegation that it is not in compliance with Article 204 of the Convention in this respect.[1670] It states that the gas pipeline monitoring was carried out by EcoSky LLC in accordance with a monitoring programme prepared by Expert Centre LLC and contained in the EIA.[1671] The environmental monitoring of the submarine power cables was carried out by the Clean Seas International Environmental Fund in compliance with the monitoring requirements in the EIA.[1672]

833. In addition to the specific monitoring efforts described above, the Russian Federation further relies on its system of State environmental monitoring of the Kerch Strait area, which it states was carried out prior to and during the construction and continues to date, with results regularly being published by Russian scientific institutes and shared with Ukraine.[1673] The State Directorates for Hydrometeorology and Monitoring of Environment conduct continuous environmental monitoring, collecting raw data and transferring it to scientific institutes for processing and preparation of monitoring reports.[1674] The Zubov Institute prepares annual reports on water quality, including of the water in the Kerch Strait, which are publicly available online.[1675] Additionally, the Russian Federation argues that the Zubov Institute monitored the Kerch Strait

1666 Counter-Memorial, para. 467.
1667 Counter-Memorial, para. 467.
1668 Counter-Memorial, para. 469.
1669 Counter-Memorial, para. 470.
1670 Counter-Memorial, paras 473-75; Rejoinder, paras 822-24.
1671 Counter-Memorial, para. 474.
1672 Counter-Memorial, para. 474.
1673 Counter-Memorial, paras 476-84. *See also* Rejoinder, paras 825-31.
1674 Counter-Memorial, para. 477; Rejoinder, para. 826.
1675 Counter-Memorial, para. 477.

environment in the context of a project implemented under the aegis of the European Union and the UN Development Programme, in which Ukraine also participated (the EMBLAS-II-Project) and for which it also has access to the data.[1676]

834. Apart from the water quality monitoring, the Russian Federation notes that there also exists State environmental monitoring of aquatic bioresources carried out by the Azov Research Institute of Fisheries.[1677] According to the Russian Federation, the results of this kind of monitoring were provided to Ukraine within the framework of the RUC.[1678] Further, the Russian Federation monitors the state of aquatic bioresources through a system of automated fisheries monitoring which requires all fishing vessels in the Sea of Azov and the Kerch Strait to regularly transmit information on the amount of harvested fish to the Azov-Black Sea Territorial Directorate of the Federal Agency for Fishery.[1679] The Russian Federation points out that this information was also shared with Ukraine on a weekly basis pursuant to the RUC protocols.[1680]

835. Finally, the Russian Federation states that, in addition to the monitoring described above, three supervisory agencies of the Russian Federation—Rostekhnadzor, Rosprirodnadzor, and the Federal Agency for Water Resources (hereinafter the "Water Agency")—controlled compliance with environmental regulations during the construction and operation of the Kerch Bridge.[1681] According to the Russian Federation, Rostekhnadzor was present at the Kerch Strait bridge construction site every day, conducting scheduled and unscheduled inspections.[1682] Rosprirodnadzor, which was entitled to conduct unscheduled inspections of construction works in internal waters, inspected the construction site for three weeks in November 2016, sampling and analysing water and bottom sediments without detecting any non-compliance with environmental regulations.[1683] Rosprirodnadzor also conducted several site-specific "scheduled raid examinations" with the purpose of ensuring that environmental conditions in a particular area do not indicate environmental breaches requiring further entity-specific investigation, and none of these showed exceedances of the MACs.[1684] The Water Agency, in turn, controlled compliance with the "water use decision," which any entity performing construction works in a water body must obtain, and which established a set of environmental obligations.[1685] As part of this, SGM

1676 Counter-Memorial, paras 479-80.
1677 Counter-Memorial, para. 481.
1678 Counter-Memorial, para. 482.
1679 Counter-Memorial, para. 483.
1680 Counter-Memorial, para. 483.
1681 Counter-Memorial, para. 485.
1682 Counter-Memorial, para. 486.
1683 Counter-Memorial, para. 487.
1684 Counter-Memorial, para. 488.
1685 Counter-Memorial, para. 489.

LLC provided the Water Agency with sampling and laboratory test protocols on a quarterly basis.[1686]

836. The Russian Federation rejects Ukraine's argument that these additional measures were meaningless, as they were taken too far away to monitor the construction projects' specific impacts.[1687] According to the Russian Federation, any significant pollution would have propagated beyond the Kerch Strait and would thus have been noticed by the competent State agencies and institutions.[1688]

c. The Russian Federation Published the Results of Environmental Monitoring

837. The Russian Federation argues that the results of its environmental monitoring were published in the format of the EM Summaries in the annual reports of the Zubov Institute and the EMBLAS-II reports, which all remain available online.[1689] In addition, the Russian Federation claims that it shared the results of the State monitoring of aquatic bioresources with Ukraine in the framework of the RUC.[1690]

838. The Russian Federation rejects Ukraine's submissions calling these publications into question. Specifically, regarding the communication within the RUC, the Russian Federation clarifies that the RUC protocol referred to by Ukraine[1691] points back to a 2016 protocol which provides that the Russian delegation shared with Ukraine detailed results of the State aquatic bioresources monitoring conducted in the Black Sea basin.[1692] The Russian Federation also argues that Ukraine simply ignored the publications of the Zubov Institute and the data available from the EMBLAS-II project.[1693] Moreover, the Russian Federation claims that Ukraine actively sought to prevent the Russian Federation from sharing its environmental monitoring information under the framework of the Black Sea Commission and also "blocked all good faith attempts by the Russian Federation to establish environmental cooperation and exchange information on the activities in the Black Sea and Sea of Azov."[1694]

1686 Counter-Memorial, para. 489.
1687 Rejoinder, para. 829.
1688 Rejoinder, para. 829.
1689 Counter-Memorial, para. 491; Rejoinder, para. 838.
1690 Counter-Memorial, para. 491; Rejoinder, para. 838.
1691 *See* para. 817 above.
1692 Rejoinder, para. 839.
1693 Rejoinder, para. 843.
1694 Rejoinder, paras 844-49.

839. While the Russian Federation submits that it has met its obligations to publish results of environmental monitoring, it adds that its "conservative approach towards disclosure of documents relating to the Infrastructure Projects has been informed by Ukraine's own continued t[h]reats and repeated military attacks against the Infrastructure Projects, and particularly the Kerch Bridge [...]."[1695]

D. ALLEGED VIOLATIONS OF THE GENERAL OBLIGATIONS TO PROTECT THE MARINE ENVIRONMENT AND COOPERATE WITH NEIGHBOURS FOR THE SAME PURPOSE

840. There is also a dispute between the Parties regarding alleged breaches of the general obligation to protect the marine environment and to cooperate with neighbours for that same purpose under Articles 123, 192, and 194 of the Convention.

841. Article 123 of the Convention reads:

> States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
>
> (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
>
> (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
>
> (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
>
> (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

842. Article 192 of the Convention reads:

> States have the obligation to protect and preserve the marine environment.

843. Article 194 of the Convention reads:

> 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.
>
> 2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

[1695] Rejoinder, para. 810.

> 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:
>
> (a) the release of toxic, harmful or noxious substances, especially for those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
>
> (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;
>
> (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;
>
> (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.
>
> 4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.
>
> 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

1. Ukraine's Position

844. Ukraine claims that the Russian Federation has, by its conduct in the Kerch Strait, violated not only Articles 204, 205, and 206 of the Convention, but also independently its obligations under Articles 123, 192, and 194 of the Convention to protect the marine environment and cooperate with its neighbours for that same purpose.[1696]

a. The Obligations under Articles 123, 192, and 194 of UNCLOS

845. Ukraine argues that the principles of cooperation, communication, and transparency reflected in other provisions of the Convention apply with particular force to States bordering enclosed seas, such as the Black Sea and the Sea of Azov. According to Ukraine, Article 123 of the Convention obliges such States "'to cooperate with each other in the exercise of their rights and the performance of their duties' under the Convention, including specifically 'to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.'"[1697] Ukraine submits that the duty to cooperate has been found to be "a

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1696 Revised Memorial, paras 242-48; Reply, paras 332-44.
1697 Revised Memorial, para. 191 *citing* UNCLOS, Art. 123.

fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law [...]"[1698] and "an integral part of the general obligations under Articles 194 and 192 [of the Convention]."[1699] Against this background, Ukraine rejects the Russian Federation's characterisation of Article 123 as non-obligatory.[1700]

846. According to Ukraine, Article 192 of the Convention establishes States' obligation to protect and preserve the marine environment.[1701] As was observed by the *South China Sea* arbitral tribunal, Ukraine asserts, "[t]he content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII," including Articles 194, 204, 205, and 206.[1702] Ukraine emphasises that ITLOS confirmed that Article 192 of the Convention, "as general as it is, 'imposes upon States a legal obligation' and that it 'has a broad scope, encompassing any type of harm or threat to the marine environment.'"[1703] Together, according to Ukraine, Articles 192 and 194 of the Convention oblige States to take all measures to prevent, reduce, and control pollution and harm to the marine environment.[1704]

847. Ukraine notes that arbitral tribunals have interpreted Article 194 of the Convention to be "'not limited to measures aimed strictly at controlling pollution and extend[ing] to measures focused primarily on conservation and preservation of ecosystems.'"[1705] In the view of Ukraine, arbitral tribunals have also interpreted the obligations under Articles 192 and 194 to require specific measures for protecting the environment, including requiring States to share information about potential threats to the marine environment with potentially affected States.[1706] Relying on the findings of ITLOS, Ukraine submits that Article 194 of the Convention is to be understood broadly—that it is not up to each State to decide on a purely discretionary basis what measures to take and that a precautionary approach applies.[1707]

1698 Revised Memorial, n. 389 *citing MOX Plant (Ireland v. United Kingdom)* (hereinafter "*MOX Plant*"), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95 at p. 110, para. 82 (**Annex UAL-17**).

1699 Hearing, 25 September 2024, 125:10-11 (Thouvenin) *citing Climate Change and International Law*, cit., n. 1324, para. 299 (**Annexes RUL-241**, **UAL-225**).

1700 Hearing, 25 September 2024, 124:23-125:12 (Thouvenin).

1701 Revised Memorial, para. 185.

1702 Revised Memorial, para. 186 *citing South China Sea*, cit., n. 37, para. 942 (**Annex UAL-11**).

1703 Hearing, 25 September 2024, 103:3-7 (Thouvenin) *citing Climate Change and International Law*, paras 184, 385 (**Annexes RUL-241**, **UAL-225**).

1704 Revised Memorial, para. 243.

1705 Revised Memorial, n. 517 *citing Chagos MPA*, cit., n. 897, para. 538 (**Annexes RUL-85, UAL-18**).

1706 Revised Memorial, para. 243 *referring to South China Sea*, cit., n. 37, paras 941-42, 944 (**Annex UAL-11**); *MOX Plant*, cit., n. 1698, p. 110, para. 84 (**Annex UAL-17**).

1707 Hearing, 25 September 2024, 103:25-105:1 (Thouvenin) *referring to Climate Change and International Law*, cit., n. 1324, paras 203, 213, 242-43 (**Annexes RUL-241**, **UAL-225**).

848. Ukraine submits that the measures necessary to protect the marine environment envisioned under Articles 192 and 194 of the Convention also "demand a 'certain level of vigilance' and 'the exercise of administrative control' over waters vulnerable to pollution and damage; they entail an 'obligation to investigate' possible harm to the marine environment; and they oblige States to 'take any action necessary to remedy' a potential threat to the undersea ecosystem."[1708]

849. In response to the Russian Federation's claims that Ukraine is misrepresenting the contents and meaning of Articles 192 and 194 of the Convention by disregarding the "due diligence nature" of the provisions, which is "not intended to guarantee that significant harm be totally prevented,"[1709] Ukraine submits that this misses the point: its case does not depend on the extent of harm to the marine environment that the Russian Federation failed to prevent. Rather, Ukraine points out, compliance with the obligations to assess, monitor, and communicate the potential and actual effects on the marine environment is what due diligence under Articles 192 and 194 requires.[1710] Similarly, Ukraine rejects the Russian Federation's contention that Article 194, paragraph 2, requires a demonstration of damage by pollution and that Ukraine failed to meet its burden of proof.[1711] Ukraine notes that Article 194, paragraph 2, requires States to "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment."[1712] As explained by the *South China Sea* arbitral tribunal, Ukraine argues, the obligation to "ensure" is "an obligation of conduct," *i.e.*, an obligation to take the measures appropriate to achieving the desired result, rather than actually to achieve such result.[1713] In response to the Russian Federation's reliance on an ITLOS Seabed Disputes Chamber's interpretation of Article 139, paragraph 2, of the Convention, Ukraine asserts that neither Article 139, paragraph 2, nor the advisory opinion of the Seabed Disputes Chamber imposes "such an overarching burden to show actual damage to establish a breach of any other UNCLOS provision."[1714] According to Ukraine, this obligation is also an obligation of due diligence which, as ITLOS found, "can be even more stringent than that under Article 194, paragraph 1, because of the nature of transboundary pollution."[1715]

1708 Revised Memorial, para. 244 *citing South China Sea*, cit., n. 37, para. 944 (**Annex UAL-11**).
1709 Counter-Memorial, para. 502.
1710 Reply, para. 335.
1711 Reply, para. 336.
1712 Reply, para. 336 *citing* UNCLOS, Art. 194(2).
1713 Reply, para. 336 *citing South China Sea*, cit., n. 37, para. 944 (**Annex UAL-11**).
1714 Reply, para. 336.
1715 Hearing, 25 September 2024, 106:5-12 (Thouvenin) *citing Climate Change and International Law*, cit., n. 1324, para. 258 (**Annexes RUL-241**, **UAL-225**).

b. The Russian Federation's Violation of Its Obligations

850. Ukraine submits that the Russian Federation's failure to conduct adequate EIAs and communicate reports of their results violates not only Article 206 of the Convention, but also its obligation to protect and preserve the marine environment under Article 192; its obligation to take all measures necessary to prevent pollution of the marine environment under Article 194; and its obligation to cooperate with Ukraine as a fellow coastal State in the enclosed Black Sea and Sea of Azov under Article 123.[1716] Additionally, Ukraine claims that the Russian Federation has failed to inform Ukraine of any potential environmental harms, to exercise due diligence, and to take effective actions to remedy the harms it has likely caused.[1717]

851. Ukraine rejects the Russian Federation's claims that it was Ukraine "who made any cooperation impossible, unnecessarily turning the issue of environmental protection into a political dispute around sovereignty of Crimea" and that Ukraine requested information on the environmental risks posed by the Kerch Strait bridge construction only in July 2017.[1718] Ukraine asserts that the Convention imposes an absolute obligation to disseminate reports of the results of the EIAs and monitoring programmes on the Russian Federation, independent of another State's request.[1719] In any event, Ukraine argues that the Russian Federation misrepresents the record of the Parties' communications, in that it was the Russian Federation that failed to address Ukraine's concerns about the environmental risks, including those raised months before July 2017.[1720] For example, in a diplomatic note dated 9 October 2015, Ukraine raised concerns relating to the environment in the Black Sea and Azov Sea which were responded to by the Russian Federation only in vague terms.[1721] Similarly, diplomatic notes from 23 February 2016 expressing Ukraine's concerns about the impact of the Russian Federation's actions on the environment and from 12 May 2016 about the Russian authorities' statement that "an unidentified vessel has discharged oil products in the Black Sea near the city of Sevastopol" went unanswered.[1722] Ukraine highlights the fact that the Russian Federation never communicated the results of any EIAs or monitoring reports, even when specifically asked to do so by Ukraine, as in its *Note Verbale* dated 12 July 2017.[1723]

1716 Reply, para. 333; *see also* Revised Memorial, para. 245.
1717 Revised Memorial, paras 246-48; Reply, para. 334.
1718 Reply, paras 337-38 *citing* Counter-Memorial, paras 492-96.
1719 Reply, para. 338.
1720 Reply, para. 339.
1721 Reply, para. 339 *referring to Note Verbale* from Ukraine to the Russian Federation, No. 72/22-620-2476, p. 2 (9 October 2015) (**Annex UA-839**).
1722 Reply, paras 340-41 *referring to Note Verbale* from Ukraine to the Russian Federation, No. 72/22-194/510-485 (23 February 2016) (**Annex UA-841**); *Note Verbale* from Ukraine to the Russian Federation, No. 72/22-663-1146 (12 May 2016) (**Annex UA-226**).
1723 Reply, paras 342-43 *referring to Note Verbale* from Ukraine to the Russian Federation, No. 72/22-663-1651 (12 July 2017) (**Annex RU-352**).

Concerning the Russian Federation's criticism of Ukraine objecting to the Russian Federation sharing data concerning Crimea and the city of Sevastopol in international fora, Ukraine submits that its "refusal to act in any way that might be interpreted as acknowledging Russian sovereignty over territory unlawfully occupied by Russia is entirely understandable and cannot be held against it in the context of the present dispute."[1724]

2. The Russian Federation's Position

a. The Obligations under Articles 123, 192, and 194 of UNCLOS

852. In the view of the Russian Federation, Ukraine misrepresents the scope and content of Articles 192 and 194 of the Convention, ignoring their due diligence nature.[1725] The Russian Federation recalls that "'due diligence [...] is not intended to guarantee that significant harm be totally prevented [...]' and a State is required only 'to exert its best possible efforts to minimize the risk.'"[1726] Further, it submits that Article 194, paragraph 2, of the Convention "explicitly requires demonstration of 'damage by pollution.'"[1727] According to the Russian Federation, Article 139, paragraph 2, of the Convention contains an analogous due diligence obligation, and the Seabed Disputes Chamber of ITLOS has found that, for this provision, "it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities."[1728] The Russian Federation contends that "Article 194(2) [of the Convention] warrants a similar approach [...] and cannot be interpreted as imposing more onerous obligations on States than Article 139(2)."[1729] It claims that ITLOS confirmed in its Advisory Opinion in *Climate Change and International Law* that Article 194 of the Convention is an obligation of conduct, requiring States to exercise due diligence.[1730]

853. Concerning Article 123 of the Convention, the Russian Federation denies that it imposes any legal obligation as indicated by the purposeful replacement of the word "shall" with the word "should"

1724 Reply, para. 344.
1725 Counter-Memorial para. 502; Rejoinder, para. 867.
1726 Counter-Memorial, para. 502 *citing* United Nations General Assembly, Report of the International Law Commission on the Work of its Fifty-Third Session (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10, 2001, p. 154, para. 7 (**Annex RUL-116**).
1727 Counter-Memorial, para. 503.
1728 Counter-Memorial, para. 503 *citing Responsibilities and Obligations of States with Respect to Activities in the Area*, cit., n. 1451, pp. 59-60, para. 182 (**Annexes RUL-101**, **UAL-156**).
1729 Counter-Memorial, para. 503.
1730 Hearing, 28 September 2024, 213:15-23 (Udovichenko).

in the drafting process.[1731] Further, even if there were a duty to cooperate, the Russian Federation objects to the "manifest leap in logic between arguing an obligation to cooperate and extending it to a non-existent duty to produce design documents for the Infrastructure Projects."[1732] The Russian Federation reiterates that the EIA materials were publicly available and Ukraine was free to consult these materials.[1733]

b. The Russian Federation Did Not Violate Articles 192 and 194 of UNCLOS

854. The Russian Federation asserts that Ukraine does not present a separate factual basis for its claims under Articles 192 and 194 of the Convention, repeating instead the factual allegations forming the basis of its claims under Articles 204, 205, and 206 of the Convention.[1734] The Russian Federation reiterates its position that those factual allegations are without merit, as they are based on insufficient information and misinterpretations of the Russian legislative framework.[1735] It claims to have exercised the necessary due diligence required by those provisions.[1736]

c. Ukraine Made Cooperation Impossible

855. Setting aside its position that Article 123 of the Convention does not create a legal obligation to cooperate, the Russian Federation submits that it, in any event, made good faith efforts to cooperate with Ukraine in connection with the construction projects.[1737] According to the Russian Federation, it was Ukraine that "chose to put its political claims to the fore and made any cooperation with it impossible."[1738] The Russian Federation states that it informed Ukraine of its decision to build the Kerch Bridge by a *Note Verbale* dated 13 March 2015.[1739] However, according to the Russian Federation, instead of attempting to cooperate with the Russian authorities with a view to ensuring the protection of the marine environment, "all Ukraine had to say was that the Kerch Strait is Ukraine's (alleged) sovereign internal waters" and "Ukraine raised

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1731 Rejoinder, paras 869-70 *citing* Satya N. Nadan, Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (Vol. III, Nijhoff 2002), p. 362, para. 21 (**Annex RUL-204**); Ingo Winkelmann, 'Cooperation of States Bordering Enclosed or Semi-Enclosed Seas: Article 123' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos 2017), p. 888, para. 3 (**Annex RUL-203**).

1732 Rejoinder, para. 872.

1733 Rejoinder, para. 872.

1734 Counter-Memorial, para. 500; Rejoinder, para. 868.

1735 Counter-Memorial, para. 501.

1736 Rejoinder, para. 868; Hearing, 28 September 2024, 214:4-16 (Udovichenko).

1737 Rejoinder, para. 871.

1738 Rejoinder, para. 871. *See also* Counter-Memorial, para. 492.

1739 Counter-Memorial, para. 493 *referring to Note Verbale* from the Russian Federation to Ukraine, No. 2511/2dsng (13 March 2015) (**Annex RU-354**).

no environmental concern."[1740] The Russian Federation claims that it made good faith efforts at the same time, in February 2016, to establish cooperation with Ukraine and confirmed its readiness to exchange information on the activities in the Black Sea and Sea of Azov, for example proposing a meeting in Minsk, and participating in a meeting on 11 August 2016 "where Ukraine voiced its concerns."[1741] These efforts were once again disregarded by Ukraine.[1742] According to the Russian Federation, it was not until July 2017, immediately after the Arbitral Tribunal set a deadline for the submission of Ukraine's Memorial, that Ukraine requested the Russian Federation to provide "information concerning the construction of the Kerch Strait Bridge, [and] any related threats to the marine environment [...]."[1743] The Russian Federation also highlights Ukraine's conduct in relevant international organisations, such as the Black Sea Commission, where it "consistently maintained the absurd position that the Russian Federation should be prohibited from sharing information on the Crimean marine environment."[1744]

E. ALLEGED FAILURE TO NOTIFY DAMAGE TO THE MARINE ENVIRONMENT, COOPERATE TO MITIGATE AND MONITOR THE EFFECTS, AND REPORT WITH REGARD TO THE SEVASTOPOL OIL SPILL

856. The Parties further disagree on whether the Russian Federation's handling of an alleged oil spill near Sevastopol violated Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention.[1745]

857. Article 198 of the Convention reads:

> When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations.

858. Article 199 of the Convention reads:

> In the cases referred to in article 198, States in the area affected, in accordance with their capabilities, and the competent international organizations shall cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage. To

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1740 Counter-Memorial, para. 493 *referring to Note Verbale* from Ukraine to the Russian Federation, No 610/22-110-1132 (29 July 2015) (**Annex UA-233**). *See also Note Verbale* from of Ukraine to the Russian Federation, No. 72/22-194/510-485 (23 February 2016) (**Annex RU-505**).

1741 Counter-Memorial, paras 494, 498 *referring to Note Verbale* from the Russian Federation to Ukraine, No. 1599/2dsng (16 February 2016) (**Annex RU-506**); *Note Verbale* from the Russian Federation to Ukraine, No. 10949/2dsng (5 September 2016) (**Annex RU-43**).

1742 Counter-Memorial, para. 495 *citing Note Verbale* from Ukraine to the Russian Federation, No. 72/22-194/510-1409, p. 1 (15 June 2016) (**Annex RU-507**).

1743 Counter-Memorial, para. 496 *citing Note Verbale* from Ukraine to the Russian Federation, No. 72/22-663-1651, p. 4 (12 July 2017) (**Annex RU-352**).

1744 Counter-Memorial, para. 497.

1745 The wording of Articles 123, 192, 194 of the Convention is reflected at paras 841-843 above, the wording of Articles 204 and 205 of the Convention at paras 807-808 above.

this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.

1. Ukraine's Position

859. Ukraine argues that the Convention requires States to take specific steps in response to cases of pollution discharge. In the situations described by Article 198 of the Convention, the obligations to protect the marine environment and cooperate under Articles 123, 192, and 194 come into play, while Article 199 provides for specific obligations of cooperation for eliminating the effects of pollution and preventing or minimising damage.[1746]

860. According to Ukraine, the Russian Federation violated these obligations in relation to an oil spill in the Black Sea that reportedly occurred on 8 May 2016.[1747] Ukraine notes that on 11 May 2016, Rosprirodnadzor recorded the presence of petroleum on a beach in Sevastopol, apparently resulting from a spill at sea, and that Rosprirodnadzor announced that it would take investigative steps.[1748] Ukraine claims that the Russian Federation did not provide any official notification to Ukraine of the incident or its proposed response to it, despite Ukraine's interest as a neighbouring littoral State in the discharge of pollutants into a delicate marine ecosystem.[1749] Rather, Ukraine states that it learned about the matter in the press and promptly requested the Russian Federation to provide details of the incident in a *Note Verbale* of 12 May 2016.[1750] However, according to Ukraine, the Russian Federation disregarded this inquiry.[1751] While the Russian Federation claims in its Counter-Memorial that the pollution was likely caused by a natural process called "downwelling" rather than an oil spill, was small in volume and short-term in duration, and was unlikely to have caused any considerable harm to the marine environment,[1752] Ukraine argues that, regardless of the validity of this assessment, the Russian Federation failed to provide any evidence that the pollution was studied when it occurred in May 2016, relying entirely on an after-the-fact analysis.[1753] Consequently, Ukraine accuses the Russian Federation of violating its obligations under Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention.[1754]

1746 Revised Memorial, para. 249.
1747 Revised Memorial, para. 250.
1748 Revised Memorial, para. 250.
1749 Revised Memorial, para. 250.
1750 Revised Memorial, para. 251 *referring to Note Verbale* from Ukraine to the Russian Federation, No. 72/22-663-11146 (12 May 2016) (**Annex UA-226**).
1751 Revised Memorial, para. 251.
1752 Counter-Memorial, paras 508-12.
1753 Reply, para. 305.
1754 Revised Memorial, para. 252.

2. The Russian Federation's Position

861. The Russian Federation rejects Ukraine's claims with regard to the alleged oil spill.[1755] It argues that the duty of notification under Article 198 of the Convention is contingent on two conditions: first, the marine environment must be in imminent danger of being damaged or have been damaged by pollution; and second, other States must be deemed likely to be affected by such damage.[1756] According to the Russian Federation, neither of these conditions were met, thus, triggering no obligation to notify Ukraine.[1757]

862. According to the Russian Federation, while Rosprirodnadzor initially considered that the Sevastopol beach was polluted by oil products discharged from an unidentified vessel, the expert study by [redacted] shows that a natural process called "downwelling" was the most likely cause of the pollution.[1758] [redacted] explains that downwelling describes the process by which "warm surface waters reach the seabed, melt oil products that have been preserved there in solid form for years, causing them to surface."[1759] Hydrometeorological historical data demonstrate that the temperature, wind, and current patterns necessary for this process were present on 6 to 7 May 2016.[1760] Based on the photographs taken on the Sevastopol beach and satellite images from 2 May 2016 and 8 May 2016 demonstrating minor slicks characteristic of downwelling not far from the beach, [redacted] concluded that the oil products on the beach were likely caused by downwelling rather than a spill.[1761] Based on [redacted] calculations, the Russian Federation also asserts that the approximate volume of hydrocarbons in the water near the coast "was insignificant and could not exceed several dozen litres."[1762] Accordingly, the Russian Federation claims, the pollution was not likely to have caused any considerable harm to the marine environment and did not trigger the duty of notification under Article 198 of the Convention.[1763] Given the lack of damage to the marine environment, the Russian Federation adds, "there was no requirement to monitor the effects of the slicks under Articles 204 and 205,

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1755 Counter-Memorial, paras 504-17; Rejoinder, paras 851-64.
1756 Counter-Memorial, para. 505.
1757 Counter-Memorial, para. 506.
1758 Counter-Memorial, paras 507-08; Rejoinder, para. 852 *referring to* Opinion of [redacted] (22 August 2022).
1759 Counter-Memorial, para. 508 *referring to* Opinion of [redacted], paras 19-21 (22 August 2022).
1760 Counter-Memorial, para. 509 *referring to* Opinion of [redacted], paras 25-26 (22 August 2022).
1761 Counter-Memorial, paras 510-11 *referring to* Opinion of [redacted], paras 34-35 (22 August 2022).
1762 Counter-Memorial, para. 512 *referring to* Opinion of [redacted], paras 39-43 (22 August 2022). *See also* Rejoinder, para. 854.
1763 Counter-Memorial, para. 513.

and their presence could not have even conceivably given rise to violations of Articles 192, 194 and 199."[1764]

863. In any case, the Russian Federation argues that the alleged oil spill was not large enough to have affected Ukraine.[1765] The Russian Federation submits that the wording of Article 198 of the Convention provides the notifying State with discretion in determining whether the damage is likely to affect another State.[1766] Given the insignificant volume of hydrocarbons released, there was no basis to assume that it would affect the water areas of the Black Sea close to the coast of Ukraine in any way.[1767]

864. Finally, the Russian Federation denies Ukraine's allegations that there were no investigations of the incident prior to [redacted] report prepared in 2022.[1768] According to the Russian Federation, the competent Russian authorities investigated the pollution promptly.[1769] The Russian Federation states that Rosprirodnadzor's territorial department carried out field inspections of the Black Sea coast near the beaches where the oil was identified, its environmental specialists took photographs, gathered and examined samples of the soil and seawater, and an administrative investigation was opened on the same day.[1770] According to the Russian Federation, the investigation was unable to confirm the initial suspicion that the oil had been spilled from a vessel, as no delinquent vessel could be identified.[1771] Concurrently, all contaminated material was removed in a matter of days, and a further field inspection conducted in November 2016 confirmed that no traces of pollution remained.[1772] Further, the Russian Federation draws attention to the fact that [redacted] expert report draws from results of his previous personal study of the incident dating back to 2019, which was the first to demonstrate the causal relationship between downwelling and the occurrence of oil slicks in that particular area of the Black Sea.[1773] Thus, the Russian Federation submits, it was reasonable for Rosprirodnadzor to initially assume that the oil originated from a vessel, and the Russian authorities took all reasonable and sufficient measures to investigate the pollution.[1774]

1764 Counter-Memorial, para. 513.
1765 Counter-Memorial, paras 514-17.
1766 Counter-Memorial, para. 514.
1767 Counter-Memorial, para. 516.
1768 Rejoinder, paras 855-63.
1769 Rejoinder, para. 857.
1770 Rejoinder, para. 857.
1771 Rejoinder, para. 857.
1772 Rejoinder, para. 858.
1773 Rejoinder, paras 859-62.
1774 Rejoinder, paras 862-63.

F. ANALYSIS OF THE ARBITRAL TRIBUNAL

865. The Arbitral Tribunal will now address the Parties' dispute concerning the protection of the marine environment. Ukraine argues that the Russian Federation has violated its obligations under Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention to protect the marine environment. Specifically, Ukraine argues that the Russian Federation has (i) violated Article 206 by failing to conduct adequate EIAs before the construction projects commenced and communicate reports of their results, (ii) violated Articles 204 and 205 by failing to monitor the risks and effects of the construction projects and communicate the results of the monitoring, (iii) violated Articles 123, 192, and 194 by failing to fulfil its general obligations and cooperate with its neighbouring States to protect the marine environment, and (iv) violated Articles 192, 194, 198, 204, and 205 by failing to notify Ukraine of, and to mitigate, monitor, and report on, an oil spill near Sevastopol.

866. In response, the Russian Federation raises objections to the Arbitral Tribunal's jurisdiction over Ukraine's claims, as well as to the admissibility of certain claims. It further rejects Ukraine's claims on the merits.

867. The Arbitral Tribunal will first consider the Russian Federation's objections to its jurisdiction over Ukraine's claims, as well as to the admissibility of certain claims, before turning to each of Ukraine's claims.

1. Jurisdiction and Admissibility

868. The Russian Federation repeats its objection that the Convention does not apply to internal waters.[1775] The Arbitral Tribunal has already rejected the proposition that every dispute relating to internal waters falls outside the scope of the Convention.[1776] Instead, the Arbitral Tribunal stated that it would assess whether Ukraine's specific claims relating to the Sea of Azov and the Kerch Strait fall within the scope of the Convention.[1777]

869. The Arbitral Tribunal notes that the provisions of UNCLOS invoked by Ukraine concern the protection of the marine environment, without specifying any particular maritime zone. In this regard, the Arbitral Tribunal recalls the statement of ITLOS in its Advisory Opinion in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*

1775 Counter-Memorial, para. 321.
1776 *See* para. 406 above.
1777 *See* para. 406 above.

(hereinafter "*Sub-Regional Fisheries Commission*") that the obligation to protect and preserve the marine environment under Article 192 of the Convention applies to "all maritime areas."[1778] It is clear that such areas include internal waters.[1779] ITLOS further noted in its recent Advisory Opinion in *Climate Change and International Law* that "most of the provisions of Part XII and, in particular, articles 192 and 194, use the term 'marine environment' generally, without specifying to which maritime zone it relates."[1780] It went on to state:

> Article 1, paragraph 1, subparagraph 4, of the Convention refers to "the marine environment, including estuaries." Articles 145, paragraph (a), and 211, paragraph 1, refer to "the marine environment, including the coastline." This indicates that the marine environment under the Convention encompasses certain spaces beyond maritime zones established thereunder.[1781]

870. Given the broad scope of the term "marine environment," the Arbitral Tribunal considers that the provisions invoked by Ukraine apply to all maritime areas, including internal waters, and that Ukraine's claims relating to the protection and preservation of the marine environment in the Sea of Azov and the Kerch Strait fall within the scope of the Convention. Accordingly, the Arbitral Tribunal rejects the Russian Federation's objection in this regard and finds that it has jurisdiction over those claims.

871. The Russian Federation further argues that Ukraine's claims relating to the fibre-optic cables are inadmissible new claims.[1782] The Arbitral Tribunal has already laid out the test for determining whether a new claim is admissible in the previous Chapter.[1783] Thus, the admissibility of Ukraine's claims relating to the fibre-optic cables depends on whether these claims transform the nature of the dispute brought before the Arbitral Tribunal or whether they arise directly out of the Notification and Statement of Claim or are implicit in it.[1784]

872. The Arbitral Tribunal takes note in this regard that Ukraine, in its Notification and Statement of Claim and the Memorial, requested relief related to the Russian Federation's construction activities in the Kerch Strait, including the laying of cables and pipelines,[1785] and related to the protection and preservation of the marine environment.[1786] Ukraine's claims regarding the laying of fibre-optic cables therefore "arise directly out of the question which is the subject-matter" of

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1778 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, paras 120 (**Annex UAL-198**).
1779 *See* Award Concerning Preliminary Objections, para. 295.
1780 ITLOS, *Climate Change and International Law*, cit., n. 1324, para. 167 (**Annexes RUL-241**, **UAL-225**).
1781 ITLOS, *Climate Change and International Law*, cit., n. 1324, para. 168 (**Annexes RUL-241**, **UAL-225**).
1782 Counter-Memorial, para. 441.
1783 *See* paras 636-639 above.
1784 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624 at p. 665, para. 109 (**Annex UAL-175**); *See* para. 639 above.
1785 Notification and Statement of Claim, paras 21, 26, 50(h); Memorial, paras 192-93, 265(j)-(k).
1786 Notification and Statement of Claim, paras 29-31, 50(i); Memorial, paras 182, 186-87, 205-11, 265(o)-(p).

the dispute.[1787] For this reason, the Russian Federation's objection to the admissibility of Ukraine's claims relating to the fibre-optic cables is dismissed.

2. Alleged Violation of Article 206 of UNCLOS

873. Ukraine asserts that the Russian Federation failed to conduct a required EIA for the laying of the fibre-optic cables, conducted inadequate EIAs for the Kerch Strait bridge, power cables, and gas pipeline projects, and failed to communicate reports of the results of the EIAs.[1788] For its part, the Russian Federation submits that Ukraine incorrectly interprets Article 206 of the Convention, and that Ukraine's claims are factually unfounded.[1789] The Arbitral Tribunal first considers how Article 206 should be interpreted, before turning to the facts of the present dispute.

a. The Obligations Imposed by Article 206 of UNCLOS

i. The Scope of the Obligation to Conduct an EIA under Article 206 of UNCLOS

874. Article 206 of the Convention reads:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

875. This Article requires States to assess the potentially harmful effects of a planned activity under their jurisdiction or control on the marine environment prior to its execution and to communicate reports of the obtained results thereafter. The obligation to conduct an EIA is triggered by "reasonable grounds for believing" that such activity "may cause substantial pollution of or significant and harmful changes to the marine environment." The Arbitral Tribunal observes that ITLOS recently confirmed as much, considering "reasonable grounds for believing" to be a requirement "trigger[ing] the obligation to conduct an [EIA]."[1790]

876. The term "reasonable grounds for believing" appears to imply a margin of discretion for States concerned. However, such discretion is not unlimited.

1787 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639 at p. 657, para. 41 (**Annex RUL-136**).

1788 Reply, paras 211-12, 214.

1789 Rejoinder, para. 598.

1790 *Climate Change and International Law*, cit., n. 1324, para. 359 (**Annexes RUL-241**, **UAL-225**).

877. This view is confirmed by ITLOS, which stated that, although a State has an "element of discretion" in determining whether the obligation to conduct an EIA is triggered:

> [...] the discretion of such a State is limited by the fact that it is required to determine whether an activity under its jurisdiction or control "may cause substantial pollution of or significant and harmful changes to the marine environment." It is a matter of objective determination based on facts and scientific knowledge. Such pollution and changes need not be actual but can also be potential. Therefore, the Tribunal considers that the precautionary approach may restrict the margin of discretion on the part of the State concerned.[1791]

878. The Arbitral Tribunal considers that the standard of "reasonable grounds for believing" must be determined objectively. A State's subjective belief on the matter cannot in itself suffice to meet the standard.[1792]

879. In addition, the "precautionary approach" should influence the standard of "reasonable grounds for believing" which triggers a State's obligation to conduct an EIA. Therefore, a lack of scientific certainty about the potential adverse effects of a planned activity on the marine environment does not justify forgoing an EIA. The Arbitral Tribunal recognises that the application of the precautionary approach in assessing risk to the marine environment finds substantial support in jurisprudence.[1793]

880. The Arbitral Tribunal is of the view that the obligation to conduct an EIA under Article 206 of the Convention requires States first to determine objectively whether there exist "reasonable grounds for believing" that there is a risk of harmful effects on the marine environment. Consequently, States are required to conduct a preliminary assessment of whether planned activities under their jurisdiction or control may cause substantial pollution of, or significant and harmful changes to, the marine environment. If the preliminary assessment shows that there are no reasonable grounds to believe that such a risk exists or is negligible, then the State has no further obligations under Article 206 to conduct an EIA and communicate its results. However, the State must reasonably examine the planned activities in order to come to its conclusion.[1794] In the Arbitral Tribunal's view, the preliminary assessment should in practice follow a process examining the planned activities' potential impact and concluding with a reasoned decision, such that the State can

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1791 *Climate Change and International Law*, cit., n. 1324, para. 361 (**Annexes RUL-241**, **UAL-225**).

1792 *See, e.g.*, *Whaling*, cit., n. 1324, p. 254, para. 67, p. 260, para. 97 (**Annex UAL-155**).

1793 *Climate Change and International Law*, cit., n. 1324, para. 213 (**Annexes RUL-241**, **UAL-225**); *Responsibilities and Obligations of States with Respect to Activities in the Area*, cit., n. 1451, pp. 46, 47, paras 131, 135 (**Annexes RUL-101**, **UAL-156**).

1794 *Cf.*, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665 at p. 720, para. 154 (**Annex UAL-153**) ("a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant [...] harm.").

demonstrate that it has fulfilled its obligation. In providing this view, the Arbitral Tribunal recalls previous jurisprudence that mere declarations that assessments have been undertaken are insufficient to prove that the undertaking in fact occurred.[1795]

881. Lastly, Article 206 of the Convention provides for two alternative thresholds for subjecting a planned activity to an EIA: "substantial pollution" and "significant and harmful change to the marine environment."[1796] While these thresholds are not defined, they clearly exclude very minor instances of pollution or changes. On the other hand, such pollution or changes "need not be actual but can also be potential."[1797]

ii. The Scope and Content of an EIA under Article 206 of UNCLOS

882. The Arbitral Tribunal next considers the scope and content of an EIA that Article 206 of the Convention requires.

883. The Parties agree that Article 206 of the Convention does not specify procedures or formats required for an EIA.[1798] However, they disagree on whether Article 206 establishes an objective standard which EIAs must meet. Ukraine asserts that Article 206 "impose[s] an objective international standard for determining the adequacy of [EIAs]."[1799] For its part, the Russian Federation argues that "there is no 'objective standard,'"[1800] and that "Article 206 does not reference any international standard."[1801] Instead, the Russian Federation maintains that a State has "considerable discretion"[1802] and that "the EIA is set solely by national legislation."[1803]

884. The Arbitral Tribunal notes that Article 206 of the Convention does not specify the scope and content of an EIA. Thus, as the ICJ stated in *Pulp Mills*, "it is for each State to determine in its

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1795 In *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Costa Rica stated that a preliminary assessment was undertaken, but did not submit evidence. The ICJ subsequently found that Costa Rica had breached its duty to conduct an *ex ante* evaluation. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665 at p. 720, para. 154, p. 723, para. 162 (**Annex UAL-153**). In *South China Sea*, despite assertions by Chinese officials, the arbitral tribunal was unable to make a "definitive finding" that China had prepared an EIA as necessary. *See also South China Sea*, cit., n. 37, para. 989 (**Annex UAL-11**).

1796 *See Climate Change and International Law*, cit., n. 1324, para. 362 (**Annexes RUL-241**, **UAL-225**).

1797 *Climate Change and International Law*, cit., n. 1324, para. 361 (**Annexes RUL-241**, **UAL-225**).

1798 Reply, para. 230; Rejoinder, para. 602.

1799 Reply, para. 230 [emphasis omitted].

1800 Rejoinder, para. 598.

1801 Hearing, 28 September 2024, 181:24-25 (Udovichenko).

1802 Rejoinder, para. 598.

1803 Hearing, 28 September 2024, 180:17 (Udovichenko).

domestic legislation or in the authorization process for the project, the specific content of the [EIA] required in each case."[1804] However, the Arbitral Tribunal does not consider a State's discretion in determining the scope and content of an EIA to be unlimited.

885. In this regard, the Arbitral Tribunal recalls that previous jurisprudence has suggested limits to a State's discretion in conducting an EIA. In *Pulp Mills*, the ICJ stated that States must determine the necessary content of an EIA:

> [...] having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.[1805]

In the Arbitral Tribunal's view, the need to exercise due diligence suggests that the conduct in question must rise to a certain standard.[1806] In the same vein, the ICJ expressed in *Certain Activities and Construction of a Road* that States are required to assess environmental risk "on the basis of an objective evaluation of all the relevant circumstances."[1807] The Arbitral Tribunal likewise considers that States must take an objective approach in evaluating risk, both for preliminary assessments and also when conducting EIAs.

886. The need to exercise due diligence in conducting an EIA requires that States take a precautionary approach in assessing potential risks to the marine environment. The adequacy of an EIA may depend on several factors, including the different capabilities of States, as the expression "as far as practicable" in Article 206 of the Convention suggests.

887. As for the methodology for assessing risks to the marine environment, the Arbitral Tribunal recalls the statement of the ICJ in *Gabčíkovo-Nagymaros Project* that "current standards must be taken into consideration," and that "new norms and standards have been developed, set forth in a great number of instruments [...]. Such new norms have to be taken into consideration and such new standards given proper weight."[1808] In this vein, the Arbitral Tribunal observes that, while

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1804 *Pulp Mills*, cit., n. 1447, p. 83, para. 205 (**Annex UAL-152**); *see also Certain Activities and Construction of a Road*, cit., n. 1336, p. 706, para. 104 (**Annex UAL-153**); *Climate Change and International Law*, cit., n. 1324, para. 357 (**Annexes RUL-241**, **UAL-225**).

1805 *Pulp Mills*, cit., n. 1447, p. 83, para. 205 (**Annex UAL-152**).

1806 *Responsibilities and Obligations of States with Respect to Activities in the Area*, cit., n. 1451, p. 41, para. 110 (**Annexes RUL-101**, **UAL-156**). *See also Climate Change and International Law*, cit., n. 1324, para. 363 (**Annexes RUL-241**, **UAL-225**) *citing Pulp Mills*, cit., n. 1447, p. 83, para. 205 (**Annex UAL-152**). *See also Responsibilities and Obligations of States with Respect to Activities in the Area*, cit., n. 1451, p. 48, paras 141-42 (**Annexes RUL-101**, **UAL-156**).

1807 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (hereinafter "*Certain Activities and Construction of a Road*"), Judgment, I.C.J. Reports 2015, p. 665 at p. 720, para. 153 (**Annex UAL-153**).

1808 *Gabčíkovo-Nagymaros Project*, cit., n. 1326, p. 77, para. 140 (**Annex UAL-201**).

conformity with specific external instruments is not required to satisfy Article 206 of the Convention, States may find guidance on EIA procedures and standards in international instruments.[1809]

iii. The Obligation to Communicate the Results of an EIA under Article 206 of UNCLOS

888. Article 206 of the Convention provides that States, having conducted EIAs, "shall communicate reports of the results of such assessments in the manner provided in article 205." Article 205, in turn, sets out that "States shall publish reports of the results [...] or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States."

889. As both provisions use the mandatory "shall," the obligation to communicate the reports is a strict or "absolute" requirement.[1810] The Arbitral Tribunal takes note that States may satisfy the communication requirement of Article 206 of the Convention by following one of two tracks prescribed by Article 205: they may either publish the reports themselves, or they may provide the reports to the competent international organisations which should make them available to all States. In the view of the Arbitral Tribunal, the two tracks should be seen as equal in their purpose. Through both, Article 205 aims to ensure that the reports are "available to all States."

b. Whether the Russian Federation's Conduct Violated Article 206 of UNCLOS

890. Having reviewed the obligations under Article 206 of the Convention, the Arbitral Tribunal now turns to Ukraine's claims arising under this provision. First, the Arbitral Tribunal will consider whether the Russian Federation carried out a preliminary assessment with respect to the necessity of an EIA for the laying of fibre-optic cables. Second, the Arbitral Tribunal will examine whether the EIAs conducted by the Russian Federation for the construction projects were adequate under Article 206. Third, the Arbitral Tribunal will consider whether the Russian Federation communicated reports of the results of the EIAs conducted as required by Article 206.

891. Before examining the alleged violation of the obligations under Article 206 of the Convention, the Arbitral Tribunal first addresses the issue of the burden of proof. Ukraine submits that the

1809 *See, e.g.*, Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, done in New York on 19 June 2023; Convention on Environmental Impact Assessment in a Transboundary Context, done in Espoo on 25 February 1991 (**Annex RUL-112**). *See also Climate Change and International Law*, cit., n. 1324, para. 366 (**Annexes RUL-241**, **UAL-225**).

1810 *See South China Sea*, cit., n. 37, para. 948 (**Annex UAL-11**).

Russian Federation bears the burden of establishing that it has not violated Article 206 by conducting an appropriate preliminary assessment or EIA.[1811] The Russian Federation, in contrast, submits that it is for an applicant to establish its case.[1812] As the ICJ noted in *Pulp Mills*, the principle of *onus probandi incumbit actori* establishes that "it is the duty of the party which asserts certain facts to establish the existence of such facts."[1813] This rule applies to assertions of fact made by any party.[1814] The ICJ further noted that "it is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims."[1815] However, this rule is not an absolute one, to be applied in all circumstances, and the determination of the burden of proof depends on the circumstances of each dispute, including its subject matter and nature as well as the type of facts.

892. Accordingly, the Arbitral Tribunal considers that Ukraine as the Claimant, in principle, bears the initial burden of establishing the alleged facts in support of its claims relating to the protection of the marine environment. However, it will also consider whether there is any reason to depart from this general rule in assessing Ukraine's claims.

i. Whether the Russian Federation Violated Article 206 of UNCLOS by Not Conducting an EIA for the Fibre-Optic Cable

893. Having determined that Article 206 of the Convention requires States to conduct a preliminary assessment to determine whether an EIA is necessary, the Arbitral Tribunal now turns to the issue of the fibre-optic cable in dispute between the Parties.

894. The Parties agree that the Russian Federation did not conduct an EIA for the laying of the fibre-optic cables,[1816] but it is less clear whether the Russian Federation conducted a formal preliminary assessment to decide whether an EIA was necessary. The Russian Federation does not explain how its decision was reached at the time.[1817] Instead, the Russian Federation submits that

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1811 Reply, para. 239.

1812 Rejoinder, para. 514 *citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at p. 128, para. 204 (**Annex RUL-180**).

1813 *Pulp Mills*, cit., n. 1447, p. 61, para. 162 (**Annex UAL-152**) *referring to, inter alia Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61 at p. 86, para. 68 (**Annex UAL-2**); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at p. 128, para. 204 (**Annex RUL-180**); *Military and Paramilitary Activities*, cit., no. 372 p. 437, para. 101 (**Annex UAL-25**).

1814 *Pulp Mills*, cit., n. 1447, p. 61, para. 162 (**Annex UAL-152**).

1815 *Pulp Mills*, cit., n. 1447, p. 61, para. 163 (**Annex UAL-152**).

1816 Counter-Memorial, para. 441; Reply, para. 211.

1817 Counter-Memorial, para. 444.

"Russian legislation does not require conducting an EIA for laying of fibre-optic communication cables"[1818] and that Article 206 only requires an EIA where a State "'[has] reasonable grounds for believing' that planned activities may cause substantial pollution of or significant and harmful changes to the marine environment."[1819] In support of its submissions, the Russian Federation has offered evidence, including from its expert, [redacted] that it is "widely accepted [...] that the laying and operation of such cables does not generally carry any substantial risk to the environment." [1820] The Russian Federation submits that "a plethora of State practice" demonstrates that an "EIA is not principally, or even typically required for the laying of fibre optic cables."[1821]

895. The Arbitral Tribunal observes that the Russian Federation refers to many examples of State practice which do not include submarine fibre-optic cables within a list of activities requiring either an EIA or a preliminary assessment. The Arbitral Tribunal does not, however, have access to the full regulatory apparatus of each State and cannot confirm that EIAs related to fibre-optic cables are not elsewhere regulated, and the Arbitral Tribunal is not convinced that the omission of fibre-optic cables from the lists proves that under the regulations of the jurisdictions in question the laying of such cables can never, in any circumstances, require an EIA or a preliminary assessment.

896. The Arbitral Tribunal notes that the Russian government regulation, which the Russian Federation has provided to demonstrate that EIAs for the laying of fibre-optic cables were not obligatory, requires that in order to obtain a permit to lay communication cables in the territorial sea and internal waters, an application must contain "a list of measures aimed at the prevention or mitigation of potential damage to the environment including the marine environment [...]."[1822] This in effect requires that the question of potential pollution or harmful changes to the marine environment be addressed when fibre-optic cable laying is planned. While the Russian Federation

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1818 Counter-Memorial, para. 444.

1819 Counter-Memorial, para. 443; *see also* Rejoinder, paras 691-92.

1820 Rejoinder, para. 694 *citing* Second Opinion by [redacted], Chapter III(E)(iii)(a) (7 December 2023). *See also* Rejoinder, paras 695-715.

1821 Rejoinder, para. 709.

1822 Resolution of the Government of the Russian Federation No. 610 "Approving Regulations on the Construction and Operation of Communication Lines when Crossing the State Border of the Russian Federation, in the Border Area, Internal Sea Waters and Territorial Sea of the Russian Federation", 9 November 2004, para. 8(c) (**Annex RU-476**); Order of the Ministry of Natural Resources and Environment of the Russian Federation No. 202 "Administrative Rules of the Federal Service for Supervision of Natural Resources Regarding the Provision of a State Service on the Issuance of Permits for Construction, Reconstruction, Surveys for the Purpose of Design Engineering or Removal of Submarine Communication Lines in the Internal Sea Waters or Territorial Sea of the Russian Federation", 29 June 2012, para. 28(e) (**Annex RU-478**).

has not provided the application relating to the fibre-optic cable in question, nothing on the record suggests that this requirement was not complied with. On the basis of the evidence before it, the Arbitral Tribunal does not consider that the Russian Federation failed to conduct the preliminary assessment and thereby violated Article 206 of the Convention.

897. Further, having considered the record, the Arbitral Tribunal concludes that it was reasonable for the Russian Federation to believe that there was no risk of substantial pollution of or significant and harmful changes to the marine environment which would have required an EIA to be conducted in relation to the fibre-optic cable. The lack of contemporaneous evidence of a formal preliminary assessment is regrettable. Nonetheless, the Arbitral Tribunal does not consider that a violation of Article 206 of the Convention has been established in this case.

898. The Arbitral Tribunal accordingly concludes that the evidence before it does not establish that the decision of the Russian Federation not to conduct an EIA for the laying of the submarine fibre-optic cable violated Article 206 of the Convention

ii. Whether the Russian Federation Conducted Adequate EIAs for the Kerch Strait Bridge, Power Cables, and Gas Pipeline

899. The Arbitral Tribunal now considers whether the Russian Federation conducted adequate EIAs for the Kerch Strait bridge, the power cables, and the gas pipeline. The Arbitral Tribunal notes at the outset that the Parties agree that the Russian Federation did conduct such EIAs, but disagree as to whether the EIAs conducted by the Russian Federation were adequate to satisfy Article 206 of the Convention.[1823]

900. Ukraine relies on its expert, Mr. Aronson, to evaluate the adequacy of the Russian Federation's proffered EIAs.[1824] In Mr. Aronson's opinion, the EIAs suffer from major procedural and substantive flaws which render them "superficial and generalized."[1825] He contends that "the entire process was extremely rushed and inadequate," and that it "did not entail any meaningful stakeholder engagement efforts."[1826] Mr. Aronson comments that the documentation submitted "is not based on appropriately-collected baseline data," contains improper methodologies, and

1823 Hearing, 26 September 2024, 95:19-96:2 (Gimblett); 28 September 2024, 184:25-185:11 (Udovichenko).
1824 *See, e.g.*, Reply, para. 237.
1825 Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 23 (21 March 2023).
1826 Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 23 (21 March 2023).

lacks programmes grounded on collected data.[1827] Mr. Aronson further opines that changes to Russian legislation suggest that the EIA was limited by political factors.[1828]

901. The Russian Federation's expert, [redacted], disagrees with Mr. Aronson's opinion and contends that "Mr[.] Aronson misrepresents the EIA processes and the respective materials submitted by the Russian Federation."[1829] He likewise disputes that the EIAs were conducted through a rushed and inadequate process,[1830] or missing stakeholder engagement.[1831] [redacted] submits that there was ample baseline data,[1832] and that the EIAs for each project "were implemented properly, thoroughly and effectively."[1833] He did not comment on Mr. Aronson's allegations relating to changes to Russian EIA legislation, noting that neither of the two experts is a lawyer.[1834]

902. The Arbitral Tribunal notes that the experts are in broad agreement on what is necessary for an adequate EIA but disagree on whether the Russian Federation's assessments meet the standard of such EIA. In this regard, the Arbitral Tribunal considers that the Parties' disagreements on the adequacy of the timeframes for the EIAs and the baseline data necessary for the EIAs are of particular relevance to its assessment.

903. Both experts agree that sufficient time is necessary to conduct an EIA, but they disagree as to how much time was required for this specific project. Mr. Aronson does not question statutory limitations on EIA timeframes *per se*, but criticises the reduction in the time allowed for a SEER from 4 months to 45 days in this case.[1835] [redacted], for his part, reasons that "a long duration of the EIA process does not equal to its high quality, and *vice versa*," contending that the adequacy of EIA timeframes "should clearly be judged on a case-by[-]case basis, taking into account the project's specificities and the resources diverted to its environmental aspects."[1836] As regards the EIAs concerned in these proceedings, the experts further dispute their actual durations.

1827 Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 23 (21 March 2023).
1828 Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 34-35 (21 March 2023).
1829 Second Opinion by [redacted], para. 7 (7 December 2023).
1830 Second Opinion by [redacted] para. 41 (7 December 2023).
1831 Second Opinion by [redacted], para. 40 (7 December 2023).
1832 Second Opinion by [redacted], para. 102 (7 December 2023).
1833 Hearing, 30 September 2024, 123:18-20 ([redacted]).
1834 Second Opinion by [redacted], para. 53 (7 December 2023).
1835 Hearing, 26 September 2024, 14:8-15 (Aronson).
1836 Second Opinion by [redacted], paras 38, 43 (7 December 2023).

Mr. Aronson submits that the EIAs for the bridge and power cables took less than a year, while the EIA for the gas pipeline lasted under six months.[1837] In response, [redacted] comments that Ukraine underestimates the timeframe of the EIA for the bridge, which, according to him, in fact took almost 20 months.[1838]

904. In the view of the Arbitral Tribunal, a timeframe sufficient for an EIA under Article 206 of the Convention cannot be stipulated in abstract terms but must take account of the "nature and magnitude" of a project and "its likely adverse impact on the environment,"[1839] as well as the size of the team conducting an EIA.[1840] Given the magnitude of the projects in question and their potential impact on the marine environment, and in light of international practice, the Arbitral Tribunal is not convinced that the timeframe for the EIAs conducted by the Russian Federation was sufficient to meet the requirements under Article 206, even if its timeline is accepted as correct.

905. As for the baseline data necessary for an EIA, both Mr. Aronson and [redacted] agreed that "collecting reliable baseline data before the implementation of a project is essential to an effective EIA" and that "ideally it is preferable to have a data for all four seasons."[1841] Mr. Aronson states that "[f]or these specific projects, it is my opinion that *at least* one year would be needed" to gather adequate baseline data.[1842] [redacted] stated repeatedly that year-round observations had taken place.[1843] The Arbitral Tribunal understands him to support the view that year-round data is necessary.

906. The importance and necessity of collecting sufficient baseline data for an EIA is clear. A State cannot adequately assess risks to the environment, plan risk mitigation, and monitor the results without a comprehensive understanding of the environment *ex ante*. In particular, in circumstances where there are significant seasonal climatic changes affecting parameters such as temperature and water flows, which may in turn affect the environmental indices that are being

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1837 Second Opinion of John G. Aronson, EcologicDNA, LLC, paras 30-31 (21 March 2023).

1838 Second Opinion by [redacted], para. 49 (7 December 2023).

1839 *Pulp Mills*, cit., n. 1447, p. 83, para. 205 (**Annex UAL-152**).

1840 *Cf.*, Hearing, 30 September 2024, 119:25-120:4 ([redacted]) (reasoning that the "very large number of people, experts and participants" involved in the EIA allowed it to be conducted "in optimal timeframe"). The Arbitral Tribunal notes that [redacted], while differentiating a SEER from an EIA, likewise considers the time necessary for such review to depend on factors including the number of personnel involved. Witness Statement of [redacted], para. 64 (1 September 2022).

1841 Hearing, 1 October 2024, pp. 7:10-13, 10:6-14 (Gimblett, [redacted]).

1842 Opinion of John G. Aronson, EcologicDNA, LLC, para. 143 (17 May 2021) [emphasis added by Aronson].

1843 Hearing, 1 October 2024, pp. 10:6-11:3, 19:11-19 ([redacted]).

considered in an EIA, year-round baseline data is indispensable in order to conduct an adequate EIA under Article 206 of the Convention.

907. As for the present dispute, the case record does not contain the full EIA data and materials. [redacted] contends that substantial baseline data was gathered, but only "the most important and most informative sections" of the EIA materials were submitted to the Arbitral Tribunal.[1844] He explains that:

> [...] the full EIA documentation consists of several tens of volumes, each of which has 300 or 400 pages [...]. But they also contain a lot of superfluous technical information, and therefore it would be superfluous for the proceedings. And therefore we believed it to be correct to make a relatively compact, informative and transparent selections from these documents.[1845]

[redacted] likewise states that detailed EIA materials were collected and submitted to the authorities,[1846] with extensive baseline data, including historical data.[1847]

908. Given the limited evidence in the case record, however, the Arbitral Tribunal considers that the Russian Federation has not rebutted Ukraine's claim that the Russian Federation failed to collect sufficient baseline data for adequate EIAs before the start of the projects in question. On the basis of the evidence before it, the Arbitral Tribunal is of the view that the Russian Federation has failed to demonstrate that it met the standard which Article 206 of the Convention requires.

909. For these reasons, the Arbitral Tribunal concludes that the EIAs conducted by the Russian Federation for the Kerch Strait bridge, the power cables, and the gas pipeline are not consistent with the requirements under Article 206 of the Convention.

iii. Whether the Russian Federation Communicated its EIA Reports in Compliance with Article 206 of UNCLOS

910. In its Rejoinder, the Russian Federation recognises the arbitral tribunal's finding in *South China Sea* that "the obligation to communicate EIA results [...] is absolute."[1848] However, at no point in these proceedings has the Russian Federation claimed, let alone established, that it had communicated "reports of the results" of the assessments conducted for the Kerch Strait bridge, the gas pipeline, or the power cables "in the manner provided in article 205."

1844 Hearing, 1 October 2024, p. 15:9-10 ([redacted]).
1845 Hearing, 1 October 2024, p. 15:14-25 ([redacted]).
1846 Witness Statement of [redacted], para. 49 (1 September 2022).
1847 Witness Statement of [redacted], paras 25, 27, 30 (1 September 2022).
1848 Rejoinder, para. 613 *citing South China Sea*, cit., n. 37, para. 948 (**Annex UAL-11**).

911. The Arbitral Tribunal notes that the Russian Federation refers to information allegedly having been made available to the public in its pleading.[1849] However, in the Arbitral Tribunal's view, such information does not relate to, or satisfy, the obligation to communicate the results of EIAs under Articles 205 and 206 of the Convention, but rather to the requirement of public consultations that were part of the EIA process; and even in this regard, doubts remain.

912. The Russian Federation claims that Ukraine should have been able to find the EIA reports on its own.[1850] Ukraine and its expert, Mr Aronson, submit that they were unable to find them.[1851] The fact that they were able to find documentation relating to results of monitoring,[1852] but not reports of the results of the EIAs, suggests to the Arbitral Tribunal that these EIA reports were not communicated in the manner provided in Article 205 of the Convention. In this regard, the Arbitral Tribunal observes that, although the Russian Federation claims that Ukraine should have been able to find the EIA reports through its own research, the Russian Federation did not indicate where Ukraine and its expert should have searched.[1853] [redacted] notes repeatedly that Mr. Aronson was not in possession of all the information relating to the EIA.[1854] He further cites a certain amount of confidential information, which, by its nature, was not made available.[1855] Similarly, while [redacted] explains that the public was able to comment on EIA materials during the process of the assessment,[1856] the Arbitral Tribunal notes that the Russian Federation has only provided limited, redacted materials in these proceedings. The Arbitral Tribunal finds it difficult to accept that the Russian Federation would submit redacted excerpts of materials that had already been published and made available to all States. To this point, the Arbitral Tribunal finds persuasive Mr. Aronson's comments that the redacted nature of the submitted materials suggests that they are not publicly available.[1857]

913. For these reasons, the Arbitral Tribunal concludes that the Russian Federation did not meet the requirements under Article 206 of the Convention to communicate reports of the results of the EIAs in the manner provided in Article 205.

1849 Counter-Memorial, para. 368.
1850 Counter-Memorial, paras 433.
1851 *See* Revised Memorial, paras 229-30; Opinion of John G. Aronson, EcologicDNA, LLC, Chapter V.D (17 May 2021); Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 26 (21 March 2023).
1852 *See* para. 939 below.
1853 Counter-Memorial, paras 359, 433.
1854 Hearing, 30 September 2024, 106:23-25 ([redacted]); 1 October 2024, 14:22-15:25 (Gimblett, [redacted]).
1855 *See, e.g.*, Second Opinion by [redacted], paras 49-50, nn. 63, 65 (7 December 2023).
1856 *See, e.g.*, Witness Statement of [redacted], paras 39-60 (1 September 2022).
1857 Reply, para. 255; Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 26 (21 March 2023).

3. Alleged Violation of Articles 204 and 205 of UNCLOS

914. The Arbitral Tribunal now turns to Ukraine's claims that the Russian Federation violated its monitoring and communication obligations under Articles 204 and 205 of the Convention. In advancing these claims, Ukraine submits that the Russian Federation has failed to adequately monitor the risks and effects of its construction projects, and to communicate the results of the monitoring to other States.[1858] For its part, the Russian Federation argues that Ukraine misconstrues the relevant provisions, and further fails to establish its claims.[1859] The Arbitral Tribunal begins with the analysis of the obligations under Articles 204 and 205, and then addresses Ukraine's claims.

a. The Obligations under Articles 204 and 205 of UNCLOS

915. The Arbitral Tribunal notes that the Parties disagree as to the scope and nature of the obligations under Article 204 of the Convention. They also disagree as to how much discretion the Convention affords States in carrying out their monitoring obligations.[1860] While Ukraine underlines that Article 204 requires States to observe, measure, evaluate and analyse, by recognised scientific methods, the risks or effects of pollution of the marine environment, the Russian Federation argues that the obligation under this Article is not an obligation of result, but "one which has to be assessed on a 'best effort' basis."[1861] According to the Russian Federation, therefore, the relevant question is not whether a particular scientific method was employed or not, but whether an endeavour had been made, as far as practicable, to carry out environmental monitoring.[1862]

916. Under Article 204 of the Convention, States shall endeavour to monitor the risks or effects of pollution of the marine environment (paragraph 1) and shall keep under surveillance the effects of any activities which they permit or in which they engage (paragraph 2).

917. Article 204, paragraph 1, of the Convention elaborates the notion of "monitoring' by specifying four types of activities: "to observe, measure, evaluate and analyse." It also refers to the use of "recognized scientific methods," a standard which, according to ITLOS in its Advisory Opinion in *Climate Change and International Law*, is "exacting."[1863] States, thus, must observe, measure,

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1858 Hearing, 25 September 2024, 98:13-20 (Thouvenin).
1859 Rejoinder, para. 799.
1860 *See* Hearing, 25 September 2024, 108:22-109:3 (Thouvenin); 28 September 2024, 206:14-18 (Udovichenko).
1861 Counter-Memorial, para. 449.
1862 Counter-Memorial, para. 449.
1863 *Climate Change and International Law*, cit., n. 1324, para. 347 (**Annexes RUL-241**, **UAL-225**).

evaluate and analyse, by such methods, the risks and effects of pollution of the marine environment. To the extent that a State carries out its monitoring activities in a manner set out in this provision, it may decide on the details of precisely how to engage in those activities.

918. The obligation under Article 204, paragraph 1, of the Convention is subject to a qualification. As ITLOS stated in its Advisory Opinion in *Climate Change and International Law*:

> The extent of the monitoring obligation is conditioned by the fact that States, consistent with the rights of other States, are obliged to make every effort, as far as practicable, taking into account their capabilities.[1864]

919. The Parties disagree on the degree of discretion which the terms "endeavour" and "as far as practicable" in Article 204 of the Convention grant to States. However, they agree that the Russian Federation possesses first-rate environmental science capabilities.[1865] As the Russian Federation is undisputedly highly capable, the Arbitral Tribunal is not called upon to determine the impact of this qualification on the obligation of the Russian Federation under Article 204.

920. Article 204, paragraph 2, of the Convention imposes upon States a "stricter" obligation to keep under surveillance the effects of any activities that States have permitted, or in which they are engaged.[1866] In this regard, the Arbitral Tribunal notes that paragraph 2 employs the mandatory "shall" without any qualifier, as opposed to "shall, as far as practicable, endeavour" in paragraph 1. The Arbitral Tribunal further notes that the requirements under paragraph 1 relating to the types of activities and the use of scientific methods continue to apply to the activities described in paragraph 2.

921. The Arbitral Tribunal now turns to Article 205 of the Convention, which requires States to publish reports of the results obtained pursuant to Article 204 or to provide such reports at appropriate intervals to the competent international organisations. The Arbitral Tribunal has already noted that this is an "absolute" or mandatory obligation.[1867]

922. The Parties disagree as to what the contents of such reports should be in order to satisfy the obligation under Article 205 of the Convention. Ukraine asserts that the reports "should contain sufficient data and detail to allow others in the scientific community to independently analyse, detect and evaluate risks to the marine environment."[1868] Ukraine adds that the "deliberate

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1864 *Climate Change and International Law*, cit., n. 1324, para. 346 (**Annexes RUL-241**, **UAL-225**).
1865 Hearing, 25 September 2024, 109:16-17 (Thouvenin); 28 September 2024, 206:24-207:2 (Udovichenko); Counter-Memorial, para. 456.
1866 *Climate Change and International Law*, cit., n. 1324, para. 349 (**Annexes RUL-241**, **UAL-225**).
1867 *See* para. 889 above.
1868 Hearing, 25 September 2024, 115:15-18 (Thouvenin).

withholding of monitoring results may [...] amount to a material breach of the Convention."[1869] The Russian Federation submits that Article 205 "is silent on the content" of reports, which are "concise version[s] of information prepared for ease of presentation" which "can be brief," and that Article 205 merely requires States to "exchange information."[1870]

923. The phrase "report of the results" in Article 205 says little as to the required content. However, the Arbitral Tribunal does not consider that all of the data gathered through monitoring needs to be included in such reports. Rather, States may exercise a certain degree of discretion as to the content of the reports, which is moderated by the very purpose of the obligation to communicate the results of monitoring under Article 205. In this regard, the Arbitral Tribunal recalls the statement of ITLOS in its Advisory Opinion in *Climate Change and International Law*:

> [...] the obligation to publish such reports or to provide them to the competent international organizations complements the duty of monitoring set out in article 204 of the Convention. The obligation to circulate reports is based on the assumption that one of the most effective means for the protection and preservation of the marine environment consists in sharing information and scientific results on the risks to the marine environment.[1871]

924. The Arbitral Tribunal, thus, is of the view that the reports should contain sufficient information to enable other States to independently assess risks to the marine environment; were it otherwise, the purpose of sharing the information would be undermined.

925. The Arbitral Tribunal has already discussed, in the context of Article 206, the manner in which Article 205 of the Convention requires reports to be communicated, noting that both tracks should be seen as equal in their purpose to make such reports "available to all States."[1872]

b. Whether the Russian Federation's Conduct Violated Articles 204 and 205 of UNCLOS

926. The Arbitral Tribunal now turns to the question whether the Russian Federation's conduct meets the requirements of Articles 204 and 205 of the Convention.

927. At the outset, the Arbitral Tribunal recalls that under Article 204, paragraph 1, of the Convention, the Russian Federation shall endeavour, as far as practicable, to observe, measure, evaluate and analyse, by recognised scientific methods, the risks and effects of pollution of the marine

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1869 Hearing, 25 September 2024, 115:25-116:1 (Thouvenin) *citing* Eike Blitza, 'Monitoring of the Risks or Effects of Pollution: Article 205' in Alexander Proelss (ed), *Protection And Preservation Of The Marine Environment In United Nations Convention On The Law Of The Sea: A Commentary* (Nomos, 2017), p. 1367, para. 6 (**Annexes RUL-200**, **UAL-197**).

1870 Hearing, 28 September 2024, 209:22-210:23 (Udovichenko).

1871 *Climate Change and International Law*, cit., n. 1324, para. 351 (**Annexes RUL-241**, **UAL-225**).

1872 *See* para. 889 above.

environment relating to the construction projects in the Kerch Strait area. In particular, under Article 204, paragraph 2, the Russian Federation shall keep under surveillance the effects of its activities relating to the construction projects. As ITLOS stated in its Advisory Opinion in *Climate Change and International Law*, these obligations are "continuing in nature, in that monitoring and surveillance must be ongoing."[1873] The Parties disagree as to whether the Russian Federation complied with these obligations.

928. Ukraine contends that the Russian Federation's monitoring efforts were inadequate.[1874] Ukraine adds that the Russian Federation was, in effect, incapable of conducting adequate monitoring as it did not have sufficient baseline data from the period immediately prior to the commencement of construction activities to enable it to assess the impact of the activities.[1875] These criticisms are limited, Ukraine acknowledges, because of its lack of access to data, which is in turn due to the Russian Federation's failure to publish adequate monitoring reports for the bridge, and any reports at all for the power cables or gas pipeline.[1876]

929. In response, the Russian Federation explains that it has conducted "an extensive monitoring programme" under Article 204 of the Convention,[1877] and fulfilled its obligation under Article 205 through sufficient quarterly and annual reporting.[1878]

930. The Arbitral Tribunal first considers Ukraine's allegation that the Russian Federation violated Article 204 of the Convention.

931. Ukraine relies on its expert, Mr. Aronson, in asserting that the Russian Federation failed to adequately monitor the risks or effects of pollution from the construction projects as required by Article 204. In his reports, Mr. Aronson explains that the documentation available to him demonstrates an inadequate monitoring programme.[1879] Mr. Aronson notes that none of the "original monitoring materials relating to the projects are publicly available," despite the fact that "it is standard practice for such environmental monitoring reports to be published, so that the scientific community and interested stakeholders can independently evaluate the environmental impact of the project."[1880] According to Mr. Aronson, therefore, his assessment "is limited to the

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1873 *Climate Change and International Law*, cit., n. 1324, para. 346 (**Annexes RUL-241**, **UAL-225**).
1874 Hearing, 26 September 2024, 111:9-13 (Gimblett).
1875 Hearing, 3 October 2024, 140:1-7, 141:22-24 (Gimblett).
1876 Reply, paras 329-30; Hearing, 26 September 2024, 111:24-112:4 (Gimblett).
1877 Hearing, 28 September 2024, 208:9 (Udovichenko).
1878 Hearing, 28 September 2024, 208:12-18, 211:10-24 (Udovichenko).
1879 Hearing, 26 September 2024, 111:9-13 (Gimblett).
1880 Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 148 (21 March 2023); Opinion of John G. Aronson, EcologicDNA, LLC, para. 210 (17 May 2021). *See also* Hearing, 26 September 2024, 11:11-12:3 (Aronson).

excerpts that Russia has submitted in the context of these proceedings: highly redacted and incomplete."[1881] He adds that the excerpted documents provided by the Russian Federation particularly regarding the power cables and gas pipeline are insufficient for him "to conclude that Russia has undertaken adequate monitoring efforts."[1882]

932. The Arbitral Tribunal takes note of Mr. Aronson's contention that he is unable to reach conclusions about the adequacy of the Russian Federation's monitoring programmes based on the data available to him. The Arbitral Tribunal recalls in this regard that [redacted] considered the "main deficiency" in Mr. Aronson's first report to be that he lacked full monitoring data to review.[1883] Ukraine, thus, appears to take a position that the burden of proof should be placed on the Russian Federation to establish that its environmental monitoring met the requirements under Article 204 of the Convention. In the view of the Arbitral Tribunal, however, even if Ukraine's assertions concerning the data were correct, this would not necessarily transfer the burden of proof to the Russian Federation.

933. The Russian Federation has, for its part, submitted sample evidence of environmental monitoring programmes for the risks and effects of the construction of the Kerch Strait bridge,[1884] the power cables,[1885] and the gas pipeline,[1886] as well as the Kerch Strait in general.[1887] Two witnesses for the Russian Federation, [redacted] and [redacted], explain their monitoring efforts. The Russian Federation explains that it has further provided "full versions of the environmental

1881 Hearing, 26 September 2024, 12:4-6 (Aronson).

1882 Second Opinion of John G. Aronson, EcologicDNA, LLC, para. 149 (21 March 2023).

1883 Opinion of [redacted], para. 145 (10 September 2022).

1884 First quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (excerpts) (**Annex RU-142**); Second quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (excerpts) (**Annex RU-139**); Third quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (excerpts) (**Annex RU-143**); Fourth quarter 2017 Report on Environmental Monitoring of the Kerch Bridge construction (excerpts) (**Annex RU-290**).

1885 [redacted]); Clean Seas, Final Report on Environmental Monitoring of the Electric Power Supply Bridge "Russian Federation – Crimean Peninsula" Construction, 28 December 2016 (**Annex RU-484**).

1886 [redacted].

1887 *See, e.g.*, Zubov State Oceanographic Institute, 2016 Annual Report on Marine Water Pollution, 2017 (**Annex RU-250**); Zubov State Oceanographic Institute, 2019 Annual Report on Marine Water Pollution, 2020 (**Annex RU-251**).

monitoring programme, as well as quarterly monitoring reports" to [redacted], who analyses the monitoring strictly as it pertains to the marine environment.[1888]

934. In determining the adequacy of the Russian Federation's environmental monitoring under Article 204 of the Convention, the Arbitral Tribunal needs to balance the evidence provided by the Russian Federation against the evidence of an expert who states that he does not have the necessary data to reach a conclusion. The Arbitral Tribunal notes Mr. Aronson's explanation of what the information before him permits in the application of his expertise. In this regard, the Arbitral Tribunal notes that the Russian Federation's documentary, witness, and expert evidence remains uncontested and, in particular, not contradicted by Mr. Aronson's qualified criticisms.

935. With respect to the Russian Federation's claim that it already had in place a "system of state environmental monitoring of the Kerch Strait area"[1889] which continued to operate, Ukraine contends that the Russian Federation cannot satisfy its monitoring requirement without employing an environmental monitoring system "specifically designed to capture the impacts of the [c]onstruction [p]rojects."[1890] The Arbitral Tribunal recalls its finding in paragraph 917 above that Article 204 of the Convention leaves the detail of how to monitor activities to States, so long as they engage in monitoring by employing recognised scientific methods. More specifically, the Arbitral Tribunal does not consider that the Convention requires an independent monitoring program or regime to be established for each project: monitoring or surveillance under Article 204, paragraph 2, may be integrated into existing or broader monitoring programs. What is important is that a State ensures that the monitoring, however it is organised, is capable of determining the actual impact of the specific activities that trigger the State's obligation under Article 204.

936. Accordingly, the Arbitral Tribunal finds no clear evidence that the Russian Federation failed to comply with its obligation under Article 204 of the Convention to monitor the marine environment for the risks or effects of pollution relating to the construction projects.

937. The Arbitral Tribunal will next consider whether the Russian Federation published "reports of the results obtained" in compliance with Article 205 of the Convention.

1888 Opinion of [redacted], para. 146 (10 September 2022) ("I will not review the monitoring efforts related to the protection of atmospheric air, soil cover, animal kingdom (zoology), avifauna (birds), use of compensation plots and analysis of geological conditions").

1889 Counter-Memorial, para. 476.

1890 Reply, para. 325.

938. For the obligation to publish reports under Article 205 of the Convention, it is undisputed between the Parties that the Russian Federation published reports containing an overview of its monitoring efforts related to the Kerch Strait bridge on a regular basis.[1891] However, Ukraine claims that these reports did not contain sufficient information for the Russian Federation to satisfy its obligations under Article 205.[1892] Ukraine further asserts that the Russian Federation has published no reports on any monitoring efforts related to the power cables or gas pipeline.[1893]

939. As discussed above at paragraph 923, the Arbitral Tribunal considers that States have a certain amount of discretion as to what they publish as their "reports of the results." As regards the reports of the Kerch Strait bridge monitoring, Ukraine submitted in its Revised Memorial that the Russian Federal Highways Administration had published approximately twenty-five "high-level summaries" of the environmental monitoring programme, as well as "various other *ad hoc* reports."[1894] The Russian Federation explains that these documents are summaries of quarterly environmental monitoring reports compiled by the Institute of Ecology.[1895] As for the marine water quality, including the water quality of the Kerch Strait, the Russian Federation notes that the Zubov Institute's annual reports[1896] as well as data obtained through monitoring under the EMBLAS-II Project are both published online.[1897]

940. In asserting that the Russian Federation has published no reports of its monitoring of the power cables or gas pipeline, Ukraine discounts the publications of the Zubov Institute and EMBLAS-II. The Arbitral Tribunal has already determined that States have discretion in how they conduct their monitoring so long as they follow recognized scientific methods.[1898] In the view of the Arbitral Tribunal, Institute of Ecology, the Zubov Institute, and the EMBLAS-II Project play a

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1891 Revised Memorial, para. 233; Counter-Memorial, paras 462-63.

1892 Reply, para. 329.

1893 Reply, para. 330; Hearing, 26 September 2024, 112:14-19 (Gimblett).

1894 Revised Memorial, para. 233 *citing* Russian Federal Highways Administration, Environmental Monitoring Homepage (last accessed 30 March 2020) (**Annex UA-651**); Russian Federal Highways Administration, Comparative Analysis of the Results of Environmental Monitoring for the Fourth Quarter of 2016 with Previous Periods for the Construction of the Bridge to Crimea, 21 February 2017 (**Annex UA-652**); Russian Federal Highways Administration, Results of Environmental Monitoring at the Site of the Construction of the Crimean Bridge Over a 3-Year Period, 2018 (**Annex UA-653**).

1895 Counter-Memorial, para. 462.

1896 Counter-Memorial, para. 477 *citing as examples* Zubov State Oceanographic Institute, 2016 Annual Report on Marine Water Pollution, 2017, p. 67 (**Annex RU-250**); Zubov State Oceanographic Institute, 2019 Annual Report on Marine Water Pollution, 2020, p. 71 (**Annex RU-251**); *and noting that* Originals of the Zubov Institute's Monitoring Reports can be downloaded at http://oceanography.institute/index.php/2020-11-08-17-54-32/2020-11-08-18-07-11.

1897 Counter-Memorial, para. 479 *citing* EMBLAS Project, Scientific Report - 12-Months Monitoring Studies in Georgia, Russian Federation and Ukraine, 2016-2017, pp. 110-20. The Russian Federation notes that the EMBLAS-II Project data remains available at http://blackseadb.org/.

1898 *See* para. 935 above.

role in the required monitoring under Article 204 of the Convention, and their publication online relates to the Russian Federation's publication obligations under Article 205. Accordingly, when considered alongside the environmental monitoring programme reports, the Arbitral Tribunal is of the view that the record in these proceedings contains evidence of the publication of "reports of the results" of environmental monitoring of the Kerch Strait, including the three construction projects.

941. The Arbitral Tribunal therefore finds no clear evidence that the Russian Federation has failed to comply with Article 205 of the Convention with respect to the obligation to publish reports of the results of environmental monitoring.[1899]

4. Alleged Violation of the General Obligations to Protect the Marine Environment and Cooperate under Articles 123, 192, and 194 of UNCLOS

942. Ukraine claims that the same conduct by the Russian Federation which it submits violates Articles 204, 205, and 206 of the Convention also independently violates the Russian Federation's general obligations under Articles 123, 192, and 194.[1900] The Russian Federation, for its part, rejects Ukraine's claims as meritless.[1901]

943. The Arbitral Tribunal notes at the outset that Ukraine has not advanced a distinct factual basis for its present claims. Instead, it contends that the same facts underlying its claims under Articles 204, 205 and 206 of the Convention equally constitute the violations of Articles 123, 192, and 194. Accordingly, the Arbitral Tribunal will first examine the obligations set out in these latter provisions, before assessing their application to the conduct of the Russian Federation as established in the preceding subsections.

a. The Obligations under Articles 123, 192, and 194 of UNCLOS

944. Article 123 of the Convention addresses the cooperation of States bordering enclosed or semi-enclosed seas. The Parties agree that the Black Sea and the Sea of Azov fall within this category but disagree as to the nature of the obligation Article 123 imposes. Ukraine submits that this provision establishes a binding duty, requiring that "States are obliged 'to cooperate with each

1899 Having found no clear evidence that the Russian Federation has not complied with its Article 205 obligations through publicly available reports, the Arbitral Tribunal is not required to consider the Parties' contentions regarding their bilateral communications of monitoring reports, or lack thereof, including through the Commission on Fisheries in the Sea of Azov.

1900 Revised Memorial, para. 242.

1901 Rejoinder, para. 865.

other in the exercise of their rights and the performance of their duties' under the Convention."[1902] By contrast, the Russian Federation contends that Article 123 is of "a non-obligatory nature."[1903]

945. The first sentence of Article 123 of the Convention provides that States bordering an enclosed or semi-enclosed sea "should" cooperate with each other in the exercise of their rights and in the performance of their duties under the Convention. Thus, it does not appear to impose upon such States a mandatory obligation of cooperation.

946. However, the second sentence of Article 123 of the Convention requires States bordering an enclosed or semi-enclosed sea to "endeavour" to carry out certain actions. In particular, it requires the States to endeavour to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment. The word "endeavour" indicates that States must make every effort to coordinate the implementation of their rights and duties in this regard but are not required to achieve such coordination.[1904] Article 123 therefore establishes an obligation of conduct for States to make every effort, directly or through an appropriate regional organisation, to coordinate with the other States bordering an enclosed or semi-enclosed sea in the manner provided in the Article.

947. Article 192 of the Convention establishes a general obligation to protect and preserve the marine environment.[1905] As such, Article 192 does not specify how the marine environment must be protected and preserved. As the *South China Sea* arbitral tribunal observed, the content of the general obligation under Article 192 "is informed by the other provisions of Part XII and other applicable rules of international law," including by Article 194.[1906]

948. What is required of States under Article 192 of the Convention is not to guarantee the protection and preservation of the marine environment but to make their best efforts to achieve such result. Thus, this is an obligation of conduct, and not an obligation of result. As such, it requires States to act with due diligence in taking measures necessary to protect and preserve the marine environment. The Parties agree that compliance with Article 192 is to be assessed by the application of a due diligence standard.[1907]

1902 Revised Memorial, para. 191; Hearing, 25 September 2024, 124:11:19 (Thouvenin).
1903 Rejoinder, para. 870; Hearing, 28 September 2024, 214:17-21 (Udovichenko).
1904 *See Climate Change and International Law*, cit., n. 1324, para. 230 (**Annexes RUL-241**, **UAL-225**).
1905 Hearing, 25 September 2024, 102:24-103:2 (Thouvenin); 28 September 2024, 213:7-8 (Udovichenko).
1906 *South China Sea*, cit., n. 37, paras 941-42 (**Annex UAL-11**). *See also Climate Change and International Law*, cit., n. 1324, para. 388 (**Annexes RUL-241**, **UAL-225**).
1907 Reply, paras 334-35; Hearing, 28 September 2024, 213:7-8 (Udovichenko).

949. Article 194 of the Convention establishes an obligation to take measures necessary to prevent, reduce and control the pollution of the marine environment. For the purposes of the present analysis, the most relevant provision is paragraph 2, which sets out the obligations of States in a situation of transboundary pollution. Under this provision, States have the obligation, in particular, to take all measures necessary to ensure that activities under their jurisdiction or control do not cause damage by pollution to other States and their environment. This obligation is also an obligation of conduct, which requires States to act with due diligence.

950. The Parties generally agree as to the nature of the obligation under Article 194, paragraph 2, of the Convention. However, they disagree as to whether damage must be demonstrated in order to prove a breach of this provision.[1908] Ukraine contends that an obligation of conduct can be breached should the requisite conduct be lacking, regardless of whether harmful consequences in fact occurred.[1909] For its part, the Russian Federation states that Article 194, paragraph 2, "explicitly requires demonstration of 'damage by pollution'" to prove a breach,[1910] although it also argues that the obligations found in Articles 192 and 194 are "obligations of conduct, meaning they do not require a specific result for a State to comply with them."[1911]

951. In the view of the Arbitral Tribunal, the showing of damage is not required for establishing the breach of an obligation under Article 194, paragraph 2, of the Convention. The obligation imposed by express terms of that provision is an obligation to "*take all measures necessary to ensure* that activities [...] are so conducted as not to cause damage by pollution": the plain aim is to prevent or minimize the risk of damage, and not simply to impose responsibility and liability if and when such damage eventuates.[1912] Damage may occur despite a State having complied with its duty of due diligence, and, conversely, it is possible for a State's conduct to fall short of the due diligence standard without causing any resultant damage. While damage to the environment may at times provide evidence in support of a claim that a State has failed to fulfil its due diligence obligation, damage is not required in order to prove breach of an obligation under Article 194, paragraph 2.

952. The Parties also dispute the extent to which Articles 192 and 194 of the Convention establish a duty of cooperation. Ukraine asserts that Articles 192 and 194 establish an obligation to

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1908 Hearing, 25 September 2024, 107:16-20 (Thouvenin); Counter-Memorial, para. 503.
1909 Hearing, 25 September 2024, 107:20-24 (Thouvenin).
1910 Counter-Memorial, para. 503.
1911 Rejoinder, para. 867 *citing Pulp Mills*, cit., n. 1447, p. 77, para. 187 (**Annex UAL-152**); *Responsibilities and Obligations of States with Respect to Activities in the Area*, cit., n. 1451, pp. 41-42, paras 111, 113 (**Annexes RUL-101**, **UAL-156**). *See also* Rejoinder, para. 868.
1912 UNCLOS, Art. 194(2) [emphasis added].

cooperate.[1913] The Russian Federation contends that "cooperation with Ukraine is not an indispensable requirement for compliance with the general duty of prevention."[1914] The Arbitral Tribunal notes that Article 194, paragraph 1, requires States, "individually or jointly as appropriate," to take all measures necessary to prevent, reduce and control pollution of the marine environment, and to "endeavour to harmonize" their policies in this connection. The references to acting "jointly" or to "harmonize" underscore the importance of cooperation in addressing pollution of the marine environment. As ITLOS observed in *Climate Change and International Law*, "the duty to cooperate is an integral part of the general obligations under articles 194 and 192 of the Convention."[1915]

953. More broadly, the Arbitral Tribunal considers that protection and preservation of the marine environment will necessarily require international cooperation in circumstances where the causes and effects of a pollution are not confined to waters located in and used by a single State. In this regard, the Arbitral Tribunal recalls ITLOS's findings that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law"[1916] and that "the duty to cooperate is reflected in and permeates the entirety of Part XII of the Convention."[1917] The Arbitral Tribunal therefore considers that the duty to cooperate operates at three levels: as a specific obligation under Articles 192 and 194; as a concept permeating the entirety of Part XII; and as a fundamental principle of general international law.

954. In this regard, the Arbitral Tribunal considers that Article 123 of the Convention provides further guidance to States in relation to enclosed or semi-enclosed seas. States bordering such seas are to cooperate with each other in exercising their rights and performing their duties under the Convention, and must make their best efforts to discharge the specific duties set out in sub-paragraphs (a) through (d) of that Article. In the Arbitral Tribunal's view, Article 123 does not establish a free-standing obligation of cooperation but rather elaborates the obligations contained in other provisions of the Convention, such as Articles 192 and 194, in the context of enclosed or semi-enclosed seas.

1913 Hearing, 25 September 2024, 123:24-124:2 (Thouvenin) *citing Climate Change and International Law*, cit., n. 1324, para. 299 (**Annexes RUL-241**, **UAL-225**).

1914 Counter-Memorial, para. 501, n. 817.

1915 *Climate Change and International Law*, cit., n. 1324, para. 299 (209 (**Annexes RUL-241**, **UAL-225**).

1916 *MOX Plant*, cit., n. 1698, p. 110, para. 82 (**Annex UAL-17**).

1917 *Climate Change and International Law*, cit., n. 1324, para. 297 (**Annexes RUL-241**, **UAL-225**).

b. Whether the Russian Federation's Conduct Violated Articles 123, 192, and 194 of UNCLOS

955. Ukraine claims that the same conduct of the Russian Federation that it submits violated Articles 204, 205, and 206 of the Convention, *i.e.*, the alleged failure to conduct the EIAs and communicate reports of their results and to carry out environmental monitoring and publish or provide monitoring reports, equally violated Articles 123, 192, and 194.[1918] Ukraine further claims that the Russian Federation violated Articles 123, 192, and 194 by generally failing to inform Ukraine of any potential environmental harms, by not exercising due diligence, and by not taking effective measures to remedy harms that the Russian Federation "likely caused."[1919] Ukraine adds that the Russian Federation failed to cooperate with it, in further violation of Articles 123, 192, and 194.[1920] The Russian Federation rejects Ukraine's allegations.[1921]

956. The Arbitral Tribunal has already examined the facts alleged by Ukraine in support of its claims under Articles 204, 205, and 206 of the Convention in the preceding subsections.[1922] In this regard, the Arbitral Tribunal has found that Ukraine has not established that the Russian Federation breached Article 206 by failing to conduct an EIA for the fibre-optic cables.[1923] Accordingly, the Arbitral Tribunal does not find that such omission constituted a violation of the Russian Federation's due diligence obligations under Articles 192 and 194.

957. The Arbitral Tribunal has also already found that there is no clear indication that the Russian Federation has not complied with its obligations to monitor the marine environment and communicate the results of such monitoring under Articles 204 and 205 of the Convention.[1924] Accordingly, the Arbitral Tribunal is of the view that, in this regard, the Russian Federation fulfilled its due diligence obligations under Articles 192 and 194. To this point, the Arbitral Tribunal notes that, on the record presented, it does not see clear evidence to indicate that any damage to the marine environment has in fact been caused by the construction projects in breach of Articles 192 and 194 of the Convention. As the Arbitral Tribunal has explained, actual harm is in principle neither necessary nor sufficient to demonstrate a violation of Articles 192 or 194.[1925] It is, however, relevant insofar as Ukraine accuses the Russian Federation of taking "no effective

1918 Reply, paras 332-33.
1919 Revised Memorial, para. 246.
1920 Revised Memorial, para. 246.
1921 Rejoinder, para. 865.
1922 *See* subsections V.F.2.b and V.F.3.b above.
1923 *See* paras 893-898, above.
1924 *See* para. 941, above.
1925 *See* paras 948, 951, above.

action to remedy the harms it has likely caused."[1926] Without clear evidence of actual environmental harms, the Arbitral Tribunal cannot find that the Russian Federation violated its duty to take effective measures to remedy actual damage.

958. On the other hand, the Arbitral Tribunal concluded that the evidence on the record was that the EIAs conducted by the Russian Federation for the construction of the Kerch Strait bridge, the power cables, and the gas pipelines did not meet the requirements of Article 206 of the Convention.[1927] It further found that the Russian Federation did not fulfil its obligation under Article 206 to communicate reports of the results of such assessments.[1928] As ITLOS observed in *Climate Change and International Law,* the compliance with the obligations to conduct an EIA and to communicate its results is "a relevant factor in meeting the general obligations under articles 194 and 192 of the Convention."[1929] The obligations under Articles 205 and 206 are specific components of the broader duty to protect and preserve the marine environment and to take all measures necessary to prevent, reduce and control pollution of the marine environment. Accordingly, the Arbitral Tribunal finds that, by conducting the EIAs inconsistent with the requirements under Article 206 and failing to communicate reports of their results in the manner provided in Article 205, the Russian Federation did not fulfil its due diligence obligations under Article 192 and 194.

959. Regarding the duty to cooperate, the Parties disagree both on the existence of such a duty under Articles 123, 192, and 194 of the Convention, and on the factual record of cooperation between them. Ukraine contends that the Russian Federation failed to provide information relating to environmental risks when directly requested to do so.[1930] The Parties further dispute the record of their bilateral communications: Ukraine asserts that the Russian Federation ignored its requests for information,[1931] while the Russian Federation maintains that the record shows that Ukraine rejected its attempts at cooperation.[1932]

960. The Arbitral Tribunal has already concluded that the duty to cooperate is reflected in general international law, throughout Part XII of the Convention, and in particular in Articles 192 and 194.[1933] All States have the duty to cooperate to protect and preserve the marine environment. No

1926 Reply, para. 334.
1927 *See* para. 909 above.
1928 *See* para. 913 above.
1929 *Climate Change and International Law*, cit., n. 1324, para. 345 (**Annexes RUL-241**, **UAL-225**).
1930 Reply, paras 343-44.
1931 Reply, paras 343-44.
1932 Rejoinder, para. 871.
1933 *See* para. 953 above.

State is entitled to use the seas, even in those areas that fall under its own sovereignty, in a manner that risks or causes significant degradation of the seas and disregards the rights and interests that all States share in them. The Arbitral Tribunal considers that this duty continues even in times of tension. In the present case, given that the Sea of Azov and the Kerch Strait had the status of internal waters,[1934] cooperation was all the more important for the protection of the marine environment.

961. The Arbitral Tribunal is concerned by the level of cooperation demonstrated by the Parties. The record before it shows that both Parties fell short of fulfilling their respective duties to cooperate. Given the fundamental importance of cooperation, the Arbitral Tribunal considers that the Parties could, and should, have engaged more fully in order to protect the marine environment in the Sea of Azov, the Kerch Strait, and the Black Sea. The Arbitral Tribunal has already concluded that, by failing to communicate the results of the EIAs in the manner required by Article 205 of the Convention, the Russian Federation did not fulfil its due diligence obligations under Articles 192 and 194 to that extent.[1935] As Ukraine's claims concerning the failure to cooperate were directed primarily at the sharing of information on environmental risks arising from the construction projects, the Arbitral Tribunal likewise finds that the Russian Federation did not fulfil its duty to cooperate under Articles 123, 192, and 194.

5. Alleged Violation of Articles 123, 192, 194, 198, 199, 204, and 205 of UNCLOS with Regard to the Oil Spill

962. With regard to the oil spill that reportedly occurred on 8 May 2016 in the Black Sea off the coast of Crimea near Sevastopol, Ukraine claims that the Russian Federation failed to notify Ukraine of imminent or actual damage to the marine environment, to cooperate with Ukraine to mitigate the effects of the oil spill, and to monitor its effects and communicate the reports of the results of monitoring, thereby violating Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention.[1936] The Russian Federation, for its part, rejects these claims.[1937]

1934 *See* para. 399 above.
1935 *See* para. 958 above.
1936 Revised Memorial, para. 252; Hearing, 26 September 2024, 122:15-20 (Gimblett).
1937 Rejoinder, para. 864; Hearing, 28 September 2024, 216:8-12 (Udovichenko).

a. The Content of the Obligations Imposed by Articles 123, 192, 194, 198, 199, 204, and 205 of UNCLOS

963. The Arbitral Tribunal has already set out the scope and contents of the obligations under Articles 123, 192, 194, 204, and 205 of the Convention.[1938] It therefore turns to consideration of Articles 198 and 199 of the Convention.

964. There seems to be little disagreement between the Parties on the content of these provisions. Ukraine notes that Article 198 of the Convention mandates specific steps that States must take in response to the imminent danger of, or actual, damage by pollution.[1939] In such cases, Ukraine claims that the obligations under Articles 123, 192, and 194 come into play and that Article 199 additionally requires States in the affected area to cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimising the damage.[1940] The Russian Federation emphasises that the duty to notify other States under Article 198 is contingent on two conditions, namely that the marine environment is in imminent danger of being damaged or has been damaged by pollution and that the other State be deemed likely to be affected by such damage.[1941]

965. Article 198 of the Convention applies in case of imminent danger of damage or actual damage to the marine environment caused by pollution. Accordingly, minor incidents incapable of posing such risk of damage do not fall within the scope of Article 198. In addition, this provision applies to damage caused by "pollution" only. The Arbitral Tribunal notes that Article 1, paragraph 1, subparagraph 4, of the Convention defines pollution as:

> [...] the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Consequently, the obligation of notification is triggered only when the actual or potential damage is caused by human activities.

966. Article 198 of the Convention requires that the notification be made "immediately." Yet, in order to determine the cause of the phenomenon in question, as well as the risk of damage being caused to the marine environment, States may at least have to undertake an initial assessment. Article 198 also introduces an element of discretion with regard to the obligation to notify other States,

1938 *See* paras 915-925, 944-954 above.
1939 Revised Memorial, para. 249.
1940 Revised Memorial, para. 249; Hearing, 25 September 2024, 125:25-126:6 (Thouvenin).
1941 Revised Memorial, para. 505.

limiting it to such States that the notifying State "deems likely to be affected by such damage." In making all of these assessments, regard must be had to the precautionary approach, taking into account the circumstances of the individual case.

b. Whether the Russian Federation Violated Articles 123, 192, 194, 198, 199, 204, and 205 of UNCLOS by Not Notifying Ukraine with Regard to the Alleged Oil Spill

967. The Arbitral Tribunal next addresses the question of whether the Russian Federation was obliged to notify Ukraine of the alleged oil spill and whether its failure to do so and its overall response to the incident violated any or all of Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention.

968. Ukraine submits that, in response to the reported oil spill, the Russian Federation failed to notify Ukraine and further refused to reply to a Ukrainian *Note Verbale* of 12 May 2016 specifically requesting information on the incident and on the Russian Federation's response to it.[1942] Ukraine also criticises the Russian Federation's overall response, suggesting that the Russian Federation only investigated the incident almost six years after its occurrence in the course of this Arbitration.[1943]

969. The Russian Federation counters that, while Rosprirodnadzor initially considered the source of the oil to have been an unidentified vessel, the expert study conducted later by [redacted] demonstrates that the oil slicks were most likely the result of a natural process called "downwelling," and that Article 198 of the Convention, accordingly, was not triggered.[1944] Further, the Russian Federation states that the volume of oil was so small that there "were, from the scientific perspective, no reasonable grounds to believe that Ukraine could be affected by this minor, localised and short term occurrence."[1945] Rebutting Ukraine's claims that there was no further investigation of the incident until [redacted] report, the Russian Federation refers to

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1942 Revised Memorial, paras 250-51 *referring to Note Verbale* from Ukraine to the Russian Federation, No. 72/22-663-1146 (12 May 2016) (**Annex UA-226**).

1943 Reply, para. 305 *referring to* Opinion of [redacted] (22 August 2022).

1944 Counter-Memorial, paras 507-08; Rejoinder, para. 852 *referring to* Opinion of [redacted] (22 August 2022), paras 15-37; Second Opinion of [redacted] (6 December 2023), paras 12-20.

1945 Rejoinder, para. 852.

an investigation by Rosprirodnadzor, its removal of the oil, and subsequent field inspections that verified the lack of any traces of pollution.[1946]

970. The Arbitral Tribunal finds itself in no position to determine whether the oil in question was the result of pollution in the sense of Article 1, paragraph 1, subparagraph 4, of the Convention or, as [redacted] suggests, the result of the natural process of "downwelling." The Arbitral Tribunal notes in this regard that [redacted] himself finds downwelling only to be the "most probable reason behind the pollution" and that similarly, Rosprirodnadzor's administrative offence investigation was terminated on account of the "absence of corpus delicti of an administrative offence," rather than due to a finding that the oil did not result from a spill.[1947]

971. However, even assuming that the introduction of the oil into the sea was by a vessel, the Arbitral Tribunal sees no evidence that the incident was of such a scale as to trigger the relevant obligations under Article 198 of the Convention.

972. According to [redacted] calculations, the volume of the oil could not have exceeded several dozen litres, an amount which, according to him, "could not have impacted the marine environment near the coast of Ukraine."[1948] [redacted] points out that the very small scale of the incident is further evidenced by satellite imagery from one day after the reported incident, where hydrocarbon slicks were no longer visible within an area of 40 kilometres around the polluted area.[1949] Additionally, the Russian authorities were able to remove all traces of hydrocarbons within a matter of days. Against this background, the Russian Federation cannot be said to have been obliged to notify Ukraine under Article 198 of the Convention. The oil, whether or not introduced into the sea "by man", was in a quantity that did not overcome the *de minimis* limitation to which all treaty provisions, read in good faith in accordance with their ordinary meaning in their context and in the light of the object and purpose of the treaty, are subject.

973. As Article 199 of the Convention is tied to the conditions of Article 198 being met, the Arbitral Tribunal comes to the same conclusion with regard to Ukraine's claim made under Article 199.

1946 Rejoinder, paras 857-58 *referring to* Second Opinion of [redacted] (6 December 2023), para. 35; Rosprirodnadzor, Resolution No. 03/50 on Termination of the Administrative Offence Proceedings, 7 July 2016, p. 2 (**Annex RU-645**); Rosprirodnadzor, Letter No. RN-03-02-29/28917 (29 December 2017), pp. 1-2 (**Annex RU-644**).

1947 *See* Opinion of [redacted] (22 August 2022), para. 7; Rosprirodnadzor, Resolution No. 03/50 on Termination of the Administrative Offence Proceedings, 7 July 2016, p. 3 (**Annex RU-645**).

1948 Second Opinion of [redacted] (6 December 2023), para. 21.

1949 *See* Opinion of [redacted] (22 August 2022), Figure 17.

Since Article 123 does not contain an independent obligation of cooperation,[1950] and the Russian Federation has not breached the obligations under Articles 198 and 199, Article 123 does not add anything to the analysis. The Arbitral Tribunal further takes note of the account of the removal and monitoring efforts undertaken by the Russian authorities to address the pollution incident. Given the very small scale of the incident, the Arbitral Tribunal does not find that in acting as it did, the Russian Federation violated Articles 192 and 194 of the Convention. Nor does it consider that the May 2016 incident prompted any particular monitoring and reporting obligations under Articles 204 and 205 of the Convention going beyond the efforts undertaken by the Russian Federation.

974. Accordingly, the Arbitral Tribunal concludes that the Russian Federation's response to the oil spill incident does not violate Articles 123, 192, 194, 198, 199, 204, or 205 of the Convention.

6. Conclusion

975. In light of the foregoing, the Arbitral Tribunal concludes as follows:

a) The decision of the Russian Federation not to conduct an EIA for the laying of the fibre-optic cable did not violate Article 206 of the Convention;

b) The EIAs conducted by the Russian Federation for the Kerch Strait bridge, the power cables, and the gas pipelines are inconsistent with the requirements under Article 206 of the Convention;

c) With respect to the obligation to communicate reports of the results of EIAs, the Russian Federation did not fulfil the requirements under Article 205 of the Convention;

d) With respect to the obligation to monitor and to communicate reports of the results of monitoring, the evidence does not establish that the Russian Federation did not fulfil the requirements under Articles 204 and 205 of the Convention;

e) By conducting the EIAs inconsistently with requirements under Article 206, failing to communicate reports of their results in the manner provided in Article 205, and failing to cooperate for the protection and preservation of the marine environment in and around the Kerch Strait, the Russian Federation did not fulfil its obligations under Articles 123, 192, and 194 of the Convention;

1950 *See* para. 954 above.

f) The Russian Federation's response to the oil spill incident near Sevastopol did not violate Articles 123, 192, 194, 198, 199, 204, or 205 of the Convention.

VI. THE RUSSIAN FEDERATION'S ALLEGED FAILURE TO PROTECT UNDERWATER CULTURAL HERITAGE

A. INTRODUCTION

976. Ukraine asserts that the Russian Federation has violated its duty under Article 303, paragraph 1, of the Convention by failing to protect UCH in the Black Sea, the Sea of Azov, and the Kerch Strait since 2014, pointing to four specific excavations.[1951]

977. For its part, the Russian Federation submits that the Arbitral Tribunal does not have jurisdiction over Ukraine's claims. The Russian Federation further submits that, in any case, it has met its due diligence obligations because the four excavations took place in full accordance with international law and standards.[1952]

978. Article 303 of the Convention reads:

> 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
>
> 2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
>
> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
>
> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

B. UKRAINE'S POSITION

1. The Nature and Scope of the Duty under Article 303, Paragraph 1, of UNCLOS

a. The Applicable UCH Protection Standards under UNCLOS

979. Ukraine submits that Article 303, paragraph 1, of the Convention imposes on all States a "duty to protect objects of an archaeological and historical nature found at sea" and requires that all States

1951 Revised Memorial, para. 256; Reply, paras 345, 370.
1952 Counter-Memorial, paras 518-22.

"cooperate for this purpose."[1953] As such, Ukraine argues, this provision imposes an affirmative duty to protect UCH on States Parties, which encompasses accepted international standards of conduct.[1954]

980. Ukraine submits that, pursuant to the VCLT, "[t]he ordinary meaning of 'protect' is to 'defend or guard from danger or injury; [...] to preserve from attack, persecution, harassment; [...] to keep safe, take care of; [...] to shield from attack or damage.'"[1955] Ukraine further submits that the context of the provision confirms that the concept of "protection" includes "tak[ing] the necessary steps to prevent" a specific, undesired result.[1956]

981. Ukraine notes that this understanding of Article 303, paragraph 1, of the Convention is consistent with the meaning ascribed to "protect" in Part XII of the Convention. Ukraine also notes in this regard that tribunals have interpreted the obligation to protect the marine environment to:

> [R]equire[] "due diligence" in the sense of [...] not only adopting appropriate rules and measures, but also "a certain level of vigilance in their enforcement and the exercise of administrative control." Upon receipt from another State of reports of non-compliance, [a ...] State "is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action."[1957]

982. According to Ukraine, interpreted in light of this context, Article 303, paragraph 1, of the Convention "requires that States adopt appropriate rules and measures to prevent, reduce, and control harm to UCH, and exercise administrative diligence by not only investigating, but also remedying, potential threats once known."[1958]

983. Ukraine recalls that ITLOS has noted that "the content of 'due diligence' obligations," and thus the adequacy of measures undertaken, "may change over time," depending on, for example, advances in science or technology.[1959] Ukraine continues that Article 303, paragraph 1, of the Convention thus imposes an "affirmative duty to protect UCH consistent with current scientific and technological knowledge."[1960] Ukraine argues that this interpretation of Article 303,

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1953 Revised Memorial, para. 255.
1954 Reply, para. 352.
1955 Revised Memorial, para. 259 *citing* Oxford English Dictionary*, protect, v.* (online ed.) (**Annex UAL-158**).
1956 Revised Memorial, para. 259 *citing* UNCLOS, Art. 25.
1957 Revised Memorial, para. 260 *citing South China Sea*, cit., n. 37, para. 944 (**Annex UAL-11**) [brackets added by Ukraine].
1958 Revised Memorial, para. 260.
1959 Revised Memorial, para. 260 *citing Responsibilities and Obligations of States with Respect to Activities in the Area*, cit., n. 1451, para. 117 (**Annexes RUL-101**, **UAL-156**); Hearing, 25 September 2024, 69:10-19 (Koh) *citing Climate Change and International Law*, cit., n. 1324, para. 239 (**Annexes RUL-241**, **UAL-225**).
1960 Revised Memorial, para. 261: *see also* Hearing, 25 September 2024, 68:10-70:7 (Koh) *citing Gabčíkovo-Nagymaros Project*, cit., n. 1326, paras 107, 140 (**Annex UAL-201**); *Climate Change and International Law*, cit., n. 1324, para. 239 (**Annexes RUL-241**, **UAL-225**).

paragraph 1, "aligns the Convention with other rules of international law, including international and regional agreements in place when UNCLOS was drafted."[1961]

984. Ukraine submits that UNCLOS provides a general constitutional framework for the protection of UCH, stating a general, broad obligation, which was intended to be supplemented by subsequent international agreements.[1962] For this reason, in order to determine the content, at the time of the excavations, of the duty to protect as found in Article 303, paragraph 1, of the Convention, Ukraine submits that account must be taken of both international practice at the time of the Convention's adoption in 1982 as well as subsequent developments, as technological and scientific standards have progressed.[1963] Ukraine submits that the drafters of Article 303, paragraph 1, of the Convention envisioned protecting cultural heritage by acting in accordance with accepted standards.[1964] These accepted standards have developed, especially in regard to UCH, as technological advances have made the seabed increasingly accessible.[1965] Article 303, paragraph 4, of the Convention further provides that the obligations established in Article 303 are "without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historic nature."[1966] Ukraine notes that the commentary edited by Proelss clarifies that this provision was specifically intended to include later gap-filling instruments.[1967]

985. According to Ukraine, the "[f]oremost among these common standards are the 'Rules concerning activities directed at underwater cultural heritage'" (hereinafter the "UCH Rules"), which are found in the Annex to the 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage (hereinafter the "UCH Convention").[1968]

986. Ukraine notes that, while "some significant seafaring States, including Russia," have not ratified the UCH Convention, the UCH Rules are widely recognised as best practices for the preservation

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1961 Revised Memorial, para. 261 *referring to* Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151, 16 November 1972 (**Annex UA-124**).

1962 Hearing, 25 September 2024, 59:21-60:11 (Koh).

1963 Revised Memorial, para. 262.

1964 Revised Memorial, para. 266.

1965 Revised Memorial, para. 267.

1966 Hearing, 25 September 2024, 61:22-62:5 (Koh).

1967 Hearing, 25 September 2024, 62:6-17 (Koh) *citing* Tullio Scovazzi, 'Archeological and historical objects found at sea: Art. 303', in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea - A Commentary* (Nomos 2017), p. 1960, para. 42 (**Annex UAL-197**).

1968 Revised Memorial, para. 267 *citing* Convention on the Protection of the Underwater Cultural Heritage, 2562 U.N.T.S. 158, 2 November 2001, Annex: Rules Concerning Activities Directed at Underwater Cultural Heritage (**Annex UA-120**). S*ee also* Hearing, 25 September 2024, 60:12-64:14 (Koh) (on the history of the UCH Convention); Hearing, 25 September 2024, 71:3-6 (Koh).

of UCH, including by non-ratifying States.[1969] Indeed, Ukraine continues, the Rules "were adopted by consensus" including States which did not ratify the UCH Convention,[1970] and have been recognised as setting the prevailing technical standards of UCH protection by non-ratifying States with significant maritime interests.[1971] Today, UNESCO considers the Rules to have become the "reference document" for UCH preservation.[1972] Ukraine submits that the Russian Federation likewise views the UCH Rules as authoritative.[1973]

987. Ukraine states that it is standard treaty practice to look to relevant external standards in order to interpret the content of a legal obligation, especially when the obligation is enduring or continuing, and where performance of the obligation involves the use of scientific or technological means.[1974] Ukraine argues that interpreting the Convention in light of a consensus as to current best practices "does not equate to asking the Tribunal to rule on breaches of other treaties or to import legal obligations from those treaties into UNCLOS."[1975] Ukraine contends that the Russian Federation's argument that the UCH Rules are not customary international law is similarly irrelevant, as Ukraine only argues that the Rules represent current scientific and technological standards.[1976]

988. Ukraine contends that the Russian Federation attempts "to minimize the content" of the duty to protect UCH, as found in Article 303, paragraph 1, of the Convention, so that it will be satisfied "so long as a State Party introduces policies, legislation, and administrative controls *capable* of preventing or minimizing the risk to UCH, regardless of the vigor with which such measures are actually enforced on a day-to-day basis."[1977] Ukraine argues that the Russian Federation's

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1969 Revised Memorial, para. 268 *citing* Hayley Roberts, 'The British Ratification of the Underwater Heritage Convention; Problems and Prospects', International & Comparative Law Quarterly, Vol. 67, No. 4 (October 2018), p. 838 (**Annex UA-659**); Jeanne-Marie Panayotopoulos, 'The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Main Controversies' in Ana Filipa Vrdoljak and Francesco Francioni (eds), *The Illicit Traffic of Cultural Objects in the Mediterranean* (2009), p. 55 (**Annex UA-660**). S*ee also* Hearing, 25 September 2024, 71:7-23 (Koh).

1970 Revised Memorial, para. 268 *citing* Ole Varmer, 'Closing Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf', Stanford Environmental Law Journal, Vol. 33, No. 2 (2014), p. 261 n. 40 (**Annex UA-661**). S*ee also* Hearing, 25 September 2024, 71:18-23 (Koh) *citing* Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge 2013), p. 59 (**Annex UAL-204-AM**).

1971 Revised Memorial, para. 268 *citing* United Nations General Assembly, Fifty-Sixth Session, 65th Plenary Meeting, UN Doc. A/56/PV.65 (27 November 2001), pp. 19, 23 (**Annex UA-662**); Statement of United Kingdom Minister for the Arts, Heritage, and Tourism on Underwater Cultural Heritage, UK Parliament, Statement UIN HCWS208 (31 October 2017) (**Annex UA-663**).

1972 Revised Memorial, para. 268 *citing* UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions*, p. 7 (**Annex UA-664**).

1973 Reply, paras 352-53. S*ee also* Hearing, 25 September 2024, 71:24-72:15 (Koh).

1974 Reply, para. 354.

1975 Reply, para. 355.

1976 Reply, para. 356.

1977 Reply, para. 358 *citing* Counter-Memorial, para. 519 [emphasis added by Ukraine].

attempts "to minimize the content" are inconsistent with the ordinary meaning of the provision and incompatible with the object and purpose of the Convention.[1978] Furthermore, Ukraine submits that previous UNCLOS tribunals have interpreted due diligence as requiring both the adoption of laws and also a "certain level of vigilance in their enforcement."[1979] In addition, scholarly literature describes due diligence as a context-specific minimum standard test that compares a State's conduct to that of a "reasonable" government in the same situation.[1980]

989. Ukraine thus asserts that the Russian Federation's focus on legislation, as opposed to implementation, does not fulfil the due diligence standard of Article 303, paragraph 1, of the Convention to protect UCH.[1981]

990. While Ukraine considers the Parties to agree that Article 303, paragraph 1, of the Convention creates a due diligence standard, it disputes the Russian Federation's assertion that the Arbitral Tribunal must find harm to UCH in order to determine that the Russian Federation did not meet the standard.[1982] In contrast, Ukraine notes that the Russian Federation itself has repeatedly stated that the due diligence obligation is one of "conduct," not of "result," and that the Russian Federation's reference for an alternative argument is unsupportive.[1983] In addition, Ukraine contests the Russian Federation's assertion that the level of due diligence necessary in the context of UCH may be lower than that in respect of other activities.[1984] Ukraine contends that the Russian Federation misreads the Advisory Opinion of ITLOS in *Climate Change and International Law*, as distinguishing the standard necessitated by different provisions of the Convention, while it in fact distinguished between the due diligence necessary for different activities within a given context.[1985]

991. Ukraine further rejects the Russian Federation's argument that it would be unreasonable to hold a State responsible for harm caused by non-State actors if the State has acted with due diligence.[1986] On the contrary, Ukraine states that the State is responsible for regulating activities

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1978 Reply, paras 358-59.
1979 Reply, para. 360 *citing South China Sea*, cit., n. 37, para. 944 (**Annex UAL-11**).
1980 Reply, para. 361 *citing* Timo Koivurova, Krittika Singh, 'Due Diligence' in *Max Planck Encyclopedia of International Law* (August 2022), para. 5 (**Annex UAL-206**).
1981 Reply, para. 362.
1982 Hearing, 3 October 2024, 102:4-21 (Gimblett).
1983 Hearing, 3 October 2024, 102:18-104:10 (Gimblett) *citing* Hearing, 29 September 2024, 4:5-6 (Crosato Neumann); Counter-Memorial, para. 520.
1984 Hearing, 3 October 2024, 102:7-11 (Gimblett).
1985 Hearing, 3 October 2024, 104:11-106:9 (Gimblett).
1986 Hearing, 3 October 2024, 113:19-25 (Gimblett).

directed at UCH, and that, in any case, in the examples on the record in this Arbitration, Russian State instrumentalities were directly involved.[1987]

992. As for what must be protected under the duty, Ukraine further applies the VCLT and submits that the unqualified reference to "objects of an archaeological and historical nature," and use of the conjunction "and" suggests that the phrase should be read in its broadest sense.[1988] Ukraine argues that the term "archaeological" has no temporal limit and that "historical," as it means "related to history and the study of the past," clearly encompasses events including World War II and the dissolution of the USSR.[1989] Ukraine rejects the Russian Federation's attempt to limit "historical," in line with the UCH Convention's definition, to items under water for over 100 years.[1990] In response, Ukraine submits that the Russian Federation's argument is unprincipled, as the Russian Federation has sought not to be bound by the UCH Convention, to which it is not a signatory.[1991] Ukraine further submits that the Russian Federation's argument is illogical, as the UCH Convention should not retroactively limit the broader phrasing in Article 303 of UNCLOS.[1992] Ukraine emphasises that it refers to the UCH Rules "not as a legally binding instrument but as a statement of internationally accepted best practice," the measuring standard applicable to Article 303, paragraph 1, of UNCLOS.[1993]

993. Finally, Ukraine rejects the Russian Federation's "clean hands" argument.[1994] Ukraine asserts that the ICJ recently, in a case between the Parties, clarified that "[i]t has never upheld the doctrine or recognized it either as a principle of customary international law or as a general principle of law" and rejected the argument that it could constitute a bar to admissibility.[1995]

b. The Applicable UCH Protection Standards under the UCH Convention

994. Regarding the UCH Rules, Ukraine recalls that Rule 6 provides that "[a]ctivities directed at [UCH] [...] shall be strictly regulated to ensure proper recording of cultural, historical and archaeological information."[1996] Ukraine states that "[c]ommonly accepted standards of UCH

1987 Hearing, 3 October 2024, 114:1-115:5 (Gimblett).
1988 Hearing, 25 September 2024, 63:4-63:13 (Koh).
1989 Hearing, 25 September 2024, 63:4-65:1 (Koh).
1990 Reply, para. 383 *citing* Counter-Memorial, para. 549; Hearing, 25 September 2024, 65:8-14 (Koh).
1991 Hearing, 25 September 2024, 65:15-20 (Koh).
1992 Hearing, 25 September 2024, 65:21-66:20 (Koh).
1993 Hearing, 3 October 2024, 107:25-108:13 (Gimblett).
1994 Hearing, 23 September 2024, 53:12-21 (Koh); Hearing, 25 September 2024, 58:24-59:11 (Koh).
1995 Hearing, 23 September 2024, 53:22-54:17 (Koh) *citing Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation)* (hereinafter "*Ukraine v. Russia (2024)*"), ICJ Judgment of 31 January 2024, para. 37 (**Annex UAL-217**).
1996 Hearing, 25 September 2024, 75:11-14 (Gimblett).

protection today require that access to and control over artifacts be limited to 'qualified underwater archaeologist[s] with scientific competence appropriate to the project.'"[1997] The UCH Rules also require that *in situ* preservation be considered as the first option for the preservation of UCH.[1998]

995. Ukraine submits that the first sentence of UCH Rule 1, demonstrates that *in situ* preservation is the default preservation option.[1999] Ukraine explains that UCH should be left *in situ* because it is often better protected underwater.[2000] According to Ukraine, while the Russian Federation's counsel and experts distinguish between monuments and artefacts, such distinction is a false dichotomy unsupported by their cited source and contradicted by UCH Rule 4.[2001] UNESCO's Manual for Activities Directed at Underwater Cultural Heritage, Ukraine notes, likewise prioritises *in situ* preservation.[2002]

996. Ukraine argues that the Russian Federation mischaracterises Ukraine's position as being that *in situ* preservation is the only option.[2003] However, Ukraine notes that the commentary upon which the Russian Federation relies, in arguing that *in situ* preservation is neither "the only right way forward" nor "an overriding objective" of UCH protection, points out that "excavation is destructive, therefore clear research objectives are essential," that there must be strong arguments for *ex situ* preservation, and that many aspects must be considered in assessing whether there are "good grounds for rejecting" *in situ* preservation.[2004] Ukraine contends that the Russian Federation has not explained what is the threshold for when *ex situ* preservation is appropriate.[2005] In response to the Russian Federation's argument that UCH may be removed during an infrastructure project, Ukraine submits that the Russian Federation's examples only confirm its

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1997 Revised Memorial, para. 270 *citing* Convention on the Protection of the Underwater Cultural Heritage, 2642 U.N.T.S. 158, done in Paris on 2 November 2001, Annex, Rule 22 (**Annex UA-120**).

1998 Revised Memorial, paras 267, 270 *citing* UCH Convention, Annex: Rules Concerning Activities Directed at Underwater Cultural Heritage (**Annex UA-120**).

1999 Hearing, 25 September 2024, 75:8-77:1 (Gimblett).

2000 Hearing, 25 September 2024, 77:2-78:11 (Gimblett).

2001 Hearing, 25 September 2024, 78:12-79:14 (Gimblett); Hearing, 3 October 2024, 108:21-109:19 (Gimblett).

2002 Hearing, 25 September 2024, 79:15-80:14 (Gimblett) *citing* Thijs J. Maarleveld, Ulrike Guerin and Barbara Egger (eds), *Manual for Activities directed at Underwater Cultural Heritage, Guidelines to the Annex of the UNESCO 2001 Convention* (UNESCO 2013), p. 24 (**Annex RUL-124**).

2003 Reply, para. 366.

2004 Reply, para. 367 *citing* Martijn Manders, 'In Situ Preservation: "The Preferred Option"', Museum International 60 (2008), pp. 32-33 (**Annex RUL-126**); Patrick J. O'Keefe, 'Underwater Cultural Heritage' in Francesco Francioni, Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford 2020), p. 302 (**Annex RUL-127**).

2005 Reply, para. 367 *citing* Martijn Manders, 'In Situ Preservation: "The Preferred Option"', Museum International, 60 (2008), pp. 32-33 (**Annex RUL-126**); Patrick J. O'Keefe, 'Underwater Cultural Heritage' in Francesco Francioni, Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford 2020), p. 302 (**Annex RUL-127**); Hearing, 3 October 2024, 109:20-110:19 (Gimblett).

own disregard for its obligations.[2006] For instance, the number of UCH objects removed in order to build the Nord Stream pipeline, an example upon which the Russian Federation relies, was "very low compared to those preserved *in situ*."[2007]

997. Ukraine submits that UCH Rule 6 requires activities directed at UCH to be strictly regulated, including, pursuant to UCH Rules 9 and 10, that marine archaeologists go through rigorous approval processes before engaging in such activities.[2008] Ukraine also notes UCH Rules 22 and 23, which require that such activities "be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist," and that "[a]ll persons on the project team shall be qualified and have demonstrated competence appropriate to their roles."[2009]

998. Ukraine maintains that other Black Sea littoral States similarly uphold international standards: for example, Bulgaria participates with international partners in the Black Sea Marine Archaeology Project, which has preserved sites *in situ* in "strict adherence" to the UCH Convention.[2010]

999. Ukraine argues that the Russian Federation distorts the substance of the international standards in seeking to demonstrate that its own conduct satisfies the requirements.[2011] According to Ukraine, the Russian Federation "exaggerates the difference between the Parties concerning the relevant UCH best practices by again mischaracterizing Ukraine's position."[2012] Ukraine further argues that the Russian Federation's reading of relevant international standards makes them "toothless," while simultaneously admitting that they establish requirements that underwater archaeological activities are supervised by a qualified archaeologist and that *in situ* preservation is to be preferred.[2013]

2006 Reply, para. 368 *citing* Nord Stream, Fact Sheet – Underwater Cultural Heritage in the Baltic Sea, November 2013, p. 2 (**Annex RU-519**).

2007 Reply, para. 368 *citing* Nord Stream, Fact Sheet – Underwater Cultural Heritage in the Baltic Sea, November 2013, p. 2 (**Annex RU-519**).

2008 Hearing, 25 September 2024, 80:23-82:14 (Gimblett) *citing* UCH Convention, Rules 9, 10 (**Annex UA-120**).

2009 Hearing, 25 September 2024, 82:15-83:1 (Gimblett) *citing* UCH Convention, Rules 22, 23 (**Annex UA-120**).

2010 Revised Memorial, para. 279 *citing* Black Sea Map, The Black Sea Maritime Archaeology Project (**Annex UA-672**); University of Southampton, *Maritime Archaeology Expedition in Black Sea*, Phys.org (14 October 2016) (**Annex UA-673**).

2011 Reply, para. 363.

2012 Reply, para. 363.

2013 Reply, para. 363.

2. Four Instances of the Russian Federation's Treatment of UCH

1000. Ukraine contends that, contrary to accepted international standards, including the UCH Convention and the European Convention on the Protection of Archaeological Heritage (hereinafter the "Valletta Convention"), "Russia has allowed unqualified persons to explore and, at times, excavate various UCH sites," removing numerous items of archaeological and historic interest in the process, and "thereby endangering the integrity of those sites and the artefacts they contain."[2014] Ukraine refers to four examples, while stating that the Russian Federation's "serial disregard of the duty to protect UCH" extends well beyond them, forming "part of a broader pattern of cultural theft."[2015] Ukraine submits that these four examples each violate Article 303, paragraph 1, of UNCLOS.[2016]

1001. Ukraine also submits that its "detailed allegations in its written pleadings shift the burden to Russia to demonstrate that its conduct with regard to the examples provided by Ukraine complied with international standards," a burden the Russian Federation has not discharged.[2017]

1002. Ukraine argues that the Arbitral Tribunal should give no weight to the Russian Federation's proffered evidence defending its conduct, including "a witness statement by the purported leader of the expedition to the sunken Byzantine vessel and three letters from various institutions that claim to have been involved in the other three incidents."[2018] Ukraine recalls that the ICJ has stated that affidavits sworn later "for the purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred."[2019] Ukraine also refers to the statement of ITLOS in *M/V "Norstar"* that:

> [...] the Tribunal will assess relevance and probative value of [witness and expert] testimonies by taking into account, inter alia: whether those testimonies concern the existence of facts or represent only personal opinions; whether they are based on first-hand knowledge; whether they are duly tested through cross-examination; whether they are corroborated by other evidence; and whether a witness or expert may have an interest in the outcome of the proceedings.[2020]

2014 Revised Memorial, para. 270 *citing* UCH Convention, Annex, Rule 22 (**Annex UA-120**); *see* European Convention on the Protection of Archaeological Heritage (Revised), done in Valletta on 16 January 1992 (hereinafter the "Valletta Convention"), Art. 3(ii) (requiring States to "ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially authorised persons") (**Annex UA-121**).

2015 Reply, para. 346.

2016 Hearing, 25 September 2024, 85:7-24 (Gimblett).

2017 Hearing, 3 October 2024, 110:25-111:5 (Gimblett).

2018 Reply, paras 370-72 [citations omitted].

2019 Reply, para. 371 *citing Nicaragua v. Honduras*, cit., n. 224, p. 76, para. 244 (**Annex RUL-30**).

2020 Reply, para. 371 *citing M/V "Norstar"*, cit., n. 1069, p. 29 para. 99 (**Annex UAL-138**) [brackets added].

1003. Ukraine notes that the Russian Federation's witness statement and letters are all after-the-fact statements made for the purposes of litigation and are not corroborated by contemporaneous documents, but instead are sometimes contradicted by the public record of the time.[2021]

1004. In response to the Russian Federation's criticism of its dependence on public sources for its evidence, Ukraine asserts that it must do so as it no longer has free access to the waters surrounding Crimea.[2022]

a. Treatment of a Byzantine-Era Ship

1005. According to Ukraine, in May 2015, the Rostov Dive club, a private Russian diving club, reportedly discovered a large sunken Byzantine-era ship.[2023] Ukraine notes that, following subsequent dives, the club posted reports and pictures of its excavation of the site and removal of amphorae from the seabed on its blog.[2024] Ukraine also notes that the photographs show excavated amphorae placed on top of each other, "exposed in rough fish netting," and handled by club members, which Ukraine contends violates international standards requiring that UCH should not be "uncovered or left exposed during or after excavation without provision being made for their proper preservation, conservation and management."[2025] Ukraine emphasises that contemporaneous evidence strongly suggests that the dive club initiated and led the expedition.[2026]

1006. Ukraine submits that UCH Rules 1, 4, 9, and 10 together require careful justification of any excavation of UCH artefacts from their context, and that any excavation be done in a manner which is non-destructive and contributes to the artefacts' preservation.[2027] Ukraine argues that the amphorae were not treated in a manner compatible with this standard.[2028]

1007. Ukraine contends that "[t]here is no indication that the Rostov Dive club is technically competent to observe the proper archaeological, technical, and other necessary scientific protocols to have

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2021 Reply, para. 372.
2022 Hearing, 25 September 2024, 85:8-13 (Gimblett).
2023 Revised Memorial, para. 272 *citing Find of the Millennium: Huge Antique Ship Discovered at the Bottom of the Sea in Crimea*, Zvezda (26 May 2015) (**Annex UA-228**).
2024 Revised Memorial, para. 272 *citing* Rostov Dive, Raising the First Artifacts, 22 August 2015 (**Annex UA-667**); *Russian Divers Report Ancient Ship Find Near Crimea*, Daily News (28 May 2015) (**Annex UA-229**); Hearing, 25 September 2024, 87:24-88:9 (Gimblett).
2025 Revised Memorial, para. 272 *citing* Rostov Dive, Raising the First Artifacts, 22 August 2015 (**Annex UA-667**); Valletta Convention, Art. 3(i)(b) (**Annex UA-121**); *see* UCH Convention, Annex, Rule 24 (**Annex UA-120**).
2026 Hearing, 25 September 2024, 89:9-20 (Gimblett).
2027 Hearing, 25 September 2024, 89:21-90:4 (Gimblett).
2028 Hearing, 25 September 2024, 90:5-8 (Gimblett).

access to, let alone disturb, such sites."[2029] Ukraine points out that the club states on its website that it teaches and promotes "technical diving," and submits that the club's publication of photographs in which its members are handling ancient amphorae demonstrates the club's "unfamiliarity with international best practice concerning the treatment of UCH."[2030] Ukraine argues that, despite such unfamiliarity, the Russian Government, including the Ministry of Defence, aided the club in further excavations, including a visit in a submersible by President Putin.[2031] According to Ukraine, the club has since discovered 150 additional UCH sites that, in Ukraine's view, are "now vulnerable to the same kinds of careless excavation procedures."[2032] Ukraine contends that the Rostov Dive club's actions exemplify a pattern of interference with and removal of UCH by Russian government officials directly or through permission granted to private parties, in contravention of international standards that UCH be preserved *in situ* as much as possible.[2033]

1008. Ukraine states that the Russian Federation mischaracterises its position as implying that divers may not participate in underwater archaeological expeditions, when Ukraine in fact complains of "amateur dive club members" being given "unfettered access" to sites and artefacts.[2034] According to Ukraine, this complaint is consistent with the Russian Federation's proffered passage from the Explanatory Report to the Valletta Convention which notes that "members of the general public [...] must be under the control of a qualified person who is responsible for the excavation."[2035] Ukraine submits that the Russian Federation misrepresents the extent to which divers may participate, as their role, as noted in the Explanatory Report, is limited to one of "assistance."[2036]

2029 Revised Memorial, para. 274.

2030 Revised Memorial, para. 274.

2031 Revised Memorial, para. 275 *citing Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor*, Zvezda (7 June 2015) (**Annex UA-231**); *Putin Made a Dive in a Bathyscaphe Near Sevastopol*, Interfax, 18 August 2015 (**Annex UA-230**).

2032 Revised Memorial, para. 275 *citing Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor*, Zvezda (7 June 2015) (**Annex UA-231**).

2033 Revised Memorial, para. 276 *citing Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge*, Official Information Site for the Construction of the Crimean Bridge (22 March 2017) (**Annex UA-235**); Mysterious Graffiti on Amphoras, Rostov Dive, 6 September 2015, (**Annex UA-668**); *Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor*, Zvezda (7 June 2015) (**Annex UA-231**); Charter on the Protection and Management of Underwater Cultural Heritage, done in Sofia on 9 October 1996, ICOMOS General Assembly, Art. 10 (**Annex UA-665**); Valletta Convention, Art. 3 (**Annex UA-121**); UCH Convention, Preamble, Annex, Rule 4 (**Annex UA-120**).

2034 Reply, para. 364.

2035 Reply, para. 364 *citing* Explanatory Report to the Valletta Convention, p. 5 (describing requirements in relation to Article 3, paragraph ii, of the Valletta Convention) (**Annex RUL-123**).

2036 Reply, para. 364 *citing* Explanatory Report to the Valletta Convention, p. 5 (**Annex RUL-123**); *see* Valletta Convention, Art. 3, paragraph ii ("To preserve the archaeological heritage and guarantee the scientific

1009. Ukraine disputes the Russian Federation's claim that the excavation was in fact led by [redacted], in accordance with international standards.[2037] Ukraine argues that [redacted] Statement (hereinafter the "[redacted] Statement") contains evidentiary weaknesses which give rise to questions as to its veracity.[2038] First, the [redacted] Statement was not made contemporaneously with the events, but instead was made during this Arbitration and "written in full knowledge of the criticisms that have been levelled at the expedition by Ukraine in these proceedings."[2039] In addition, the [redacted] Statement is not supported by reference to contemporaneous evidence, including documentation that Ukraine submits would have been generated had the expedition been conducted according to Russian law, such as his application for a licence, project design, or approval to remove amphorae.[2040] Ukraine argues that Russian law requires permits for the expedition and an "after-action scientific report," none of which the Russian Federation has submitted.[2041] Ukraine further argues that the [redacted] Statement contradicts contemporaneous evidence that [redacted] the head of Rostov Dive club, led the expedition.[2042] According to Ukraine, contemporaneous documents instead describe [redacted] as offering scientific support or as "an expedition participant."[2043] Ukraine asserts that [redacted] testimony was inconsistent and its credibility should be doubted.[2044]

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significance of archaeological research work, each Party undertakes [...] to ensure that *excavations* and other potentially destructive techniques *are carried out only by qualified, specially authorised persons*") (**Annex UA-121**) [emphases added].

2037 Reply, paras 374-76.

2038 Reply, para. 375.

2039 Reply, para. 375.

2040 Reply, para. 375; Hearing, 25 September 2024, 90:25-91:5 (Gimblett).

2041 Reply, para. 375. Ukraine further submits that the Russian Federation has offered no evidence of: "(i) [redacted] appointment, (ii) the scope of his expedition, (iii) the permit he was allegedly given by the State for his expedition, (iv) the request by the competent authorities that the permit holder shall transfer the artifact to the State division of the Museum Fund, or (v) any monitoring conducted by the competent authorities of the archeological works and [redacted] compliance with his legal obligations." Reply, para. 375, n. 836.

2042 Reply, para. 376.

2043 Reply, para. 376 *citing* Rostov Dive, We Are Opening A New Project "Russian Underwater Research Expedition," 27 May 2015 (**Annex UA-848**); Evgeniya Artemova, *In the Depths of Centuries*, Interfax.ru (27 May 2015) (**Annex UA-846**). *See also* Hearing, 25 September 2024, 88:10-15 (Gimblett).

2044 Hearing, 3 October 2024, 111:20-113:18 (Gimblett).

b. Treatment of a Terracotta Sculpture Fragment

1010. Ukraine states that, "during construction of the Kerch Strait Bridge, divers discovered, excavated, and removed a terracotta sculpture of ancient Greek origin that is believed to be 'unique for the North Black Sea area.'"[2045]

1011. Ukraine argues that the Arbitral Tribunal should give no weight to the Russian Federation's evidence denying that it extracted the terracotta sculpture head in violation of international UCH standards.[2046] According to Ukraine, the Russian Federation offers no witnesses, but only a letter, written after-the-fact, from the Institute of Archaeology of the Russian Academy of Sciences (hereinafter the "IA RAS") with the author's name redacted.[2047] Ukraine states that it is thus limited in its ability to test the reliability of the evidence, and no cross-examination is possible.[2048]

1012. Furthermore, Ukraine contends that the letter suggests many more potential violations of the UCH standards. According to the letter, Ukraine notes, the terracotta sculpture head was one of a large number of UCH artefacts, which were excavated from the seabed near Kerch during the construction of the bridge.[2049] Ukraine further notes that, while the letter states that such excavation was necessary in order to construct the bridge, whose path could not be altered, it offers no explanation for the lack of alternatives.[2050] Yet, according to Ukraine, the Russian Federation's UCH experts state that UCH can be protected in such a scenario either by moving the construction area or by conducting rescue archaeological studies.[2051] In the view of Ukraine, as *in situ* preservation is preferred and removal requires a "high level of justification," the decisions to remove the terracotta sculpture head and thousands of other items should have been documented.[2052] Ukraine emphasises that while [redacted] the Russian Federation's expert, testified that Russian law requires *in situ* preservation to be impossible before removal will be

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2045 Revised Memorial, para. 277 *citing Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge*, Official Information Site for the Construction of the Crimean Bridge (22 March 2017) (**Annex UA-235**).

2046 Reply, para. 377.

2047 Reply, para. 378.

2048 Reply, para. 378.

2049 Reply, para. 379 *citing* Letter from the Institute of Archaeology of the Russian Academy of Sciences to the Ministry of Foreign Affairs of the Russian Federation, No. 14102/2115 OP-1762 (28 June 2022), p. 3 (**Annex RU-531**); N.V. Zavoykina, S.V. Olkhovsky, 'A Commercial Record from Underwater Excavations by the Cape Ak-Burun in the Eastern Crimea', Hypanis, Works of the Department of Classical Archeology of the IA of RAS, 1 (2019), p. 105 (**Annex UA-850**).

2050 Reply, para. 379.

2051 Hearing, 25 September 2024, 92:10-19 (Gimblett) *citing* Opinion of [redacted] and [redacted], para. 39.

2052 Reply, para. 379.

approved,[2053] the Russian Federation "has failed to produce any analysis" of preservation options or an explanation of why the bridge construction could not have been adapted to leave the UCH *in situ*.[2054]

c. Treatment of the Kitty Hawk Fight Jet and Airacobra Aircraft

1013. Ukraine states, citing press reports, that, in May 2017, "a Russian 'historical reconstruction group' lifted a World War II P40 'Kitty Hawk' fighter jet from the seabed of the Kerch Strait," during which the "wings were torn off by gravity as the crane pulled it out of the water and its tail was damaged." [2055] Ukraine contends that "[t]here is no indication" that the group followed appropriate archaeological standards, and that the operation violates the international standard that "the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains."[2056]

1014. Ukraine notes that three years later, on 28 September 2020, the Russian Ministry of Defence helped the Russian Geographical Society to remove from the sea floor a Bell P-39 Airacobra aircraft, another World War II era plane.[2057] Ukraine contends that, despite the damage to the Kitty Hawk, photographs and video of the Airacobra removal show the use of a similar crane hoist system.[2058]

1015. In response to the Russian Federation's two letters offered as evidence concerning the two incidents, Ukraine contends that the letters lack evidentiary value and raise further questions.[2059] Ukraine argues that both letters were written after the fact, and neither is corroborated with

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2053 Hearing, 3 October 2024, 111:9-13 (Gimblett) *citing* Hearing, 1 October 2024, 150:16-151:2 (Gimblett, [redacted]).

2054 Ukraine notes that construction was altered to leave UCH in place in the Nord Stream project, which the Russian Federation now suggests is a model. Reply, para. 379.

2055 Revised Memorial, para. 271 *citing Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2*, Russia Today (6 May 2017) (**Annex UA-237**); *The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait*, Komsomolskaya Pravda (6 May 2017) (**Annex UA-236**).

2056 Revised Memorial, para. 271 *citing* UCH Convention, Annex, Rule 4 (**Annex UA-120**); Valletta Convention, Art. 3(i)(b) (**Annex UA-121**).

2057 Revised Memorial, para. 278 *citing WWII Fighter Lifted From the Bottom of the Black Sea*, Russian Geographical Society (1 October 2020) (**Annex UA-670**); *US Fighter Raised from Black Sea*, Divernet (28 September 2020) (**Annex UA-694**); Reply, para. 380.

2058 Revised Memorial, para. 278 *citing WWII Fighter Lifted From the Bottom of the Black Sea*, Russian Geographical Society (1 October 2020) (**Annex UA-670**); *US Fighter Raised from Black Sea*, Divernet (28 September 2020) (**Annex UA-694**); *Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2*, Russia Today (6 May 2017) (**Annex UA-237**); *The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait*, Komsomolskaya Pravda (6 May 2017) (**Annex UA-236**).

2059 Reply, para. 381.

reference to contemporaneous documents.[2060] Nor has either author been made available for cross-examination; and the signature on the letter from the Ministry of Defence is redacted.[2061]

1016. According to Ukraine, the two letters explain that the aircraft are not considered archaeological objects under Russian law as they have been underwater for less than 100 years, with the Ministry of Defence stating that it considers the Airacobra to be the exclusive property of the Russian Federation, which may dispose of it at its discretion.[2062] In response, Ukraine notes that the Airacobra "served in the armed forces of the Soviet Union, of which Ukraine was a part."[2063] Ukraine submits that the Russian Federation Ministry of Defence has no "documentation establishing a procedure for removing this aircraft from the water" and that, disturbingly, "[o]ver the past period, more than 20,000 objects of military-technical history have been transferred to the museums of the Russian Ministry of Defence and the museums of the Republic of Crimea."[2064] Ukraine adds that, regardless of Russian law, the aircraft are archaeological and historical objects within the meaning of Article 303, paragraph 1, of the Convention, and that the Russian Federation may not justify its breach of this provision by reference to its internal law.[2065]

1017. Ukraine asserts that the Russian Federation's own arguments and evidence demonstrate that it is conducting "large-scale" excavations of the seabed around Crimea "without regard to generally accepted international standards for underwater archaeology reflected in the UCH Rules" as part of a campaign to "russify" Crimean history.[2066] Ukraine points out that while the Russian Federation argues that it is not bound by the UCH Convention as a non-signatory, its Ministry of Defence relies upon the UCH Convention to support its determination of what objects enjoy archaeological protections.[2067] However, according to Ukraine, the duty to protect UCH imposed by Article 303, paragraph 1, of UNCLOS does not exclude items which are less than 100 years old.[2068]

2060 Reply, para. 382.
2061 Reply, para. 382.
2062 Reply, para. 383 *citing* Letter from Battery 29 BIS to the Ministry of Foreign Affairs of the Russian Federation, No. 0149 (15 June 2022) p. 2 (**Annex RU-546**); Letter from the Ministry of Defence of the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation, No. 174/1790 (24 November 2021), p. 2, para. 2 (**Annex RU-552**).
2063 Reply, para. 383.
2064 Reply, para. 383 *citing* Letter from the Ministry of Defence of the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation, No. 174/1790 (24 November 2021), p. 3, para. 2 (**Annex RU-552**); Hearing, 25 September 2024, 94:20-95:5 (Gimblett).
2065 Hearing, 25 September 2024, 95:12-96:2 (Gimblett).
2066 Reply, para. 384.
2067 Reply, para. 384.
2068 Reply, para. 384.

C. THE RUSSIAN FEDERATION'S POSITION

1. The Nature and Scope of the Duty under Article 303, Paragraph 1, of UNCLOS

1018. The Russian Federation submits that "[t]here is in principle no disagreement between the Parties that Article 303(1) of UNCLOS creates an affirmative duty on coastal States to take necessary actions to protect [UCH], including to adopt appropriate rules and implement measures to prevent, reduce and control harm to UCH."[2069] The Russian Federation notes that, other than Article 149, which deals with the Area, Article 303 is the only provision in the Convention which addresses UCH, and that it is located in Part XVI ("General Provisions") of the Convention.[2070] The Convention does not provide much detail regarding UCH, which the Russian Federation explains is "primarily regulated by a special body of law" at the international, regional, and municipal levels.[2071] The Russian Federation agrees with Ukraine that UCH may be considered part of the cultural heritage of humanity, but suggests that regard must also be paid to other considerations found in Articles 149 and 303, paragraph 3, of the Convention.[2072]

1019. In the view of the Russian Federation, the Parties agree that the duty under Article 303, paragraph 1, of the Convention is a "due diligence" obligation, which the Russian Federation submits is not an "obligation of result" but rather one "of conduct."[2073] The Russian Federation recalls that ITLOS recently provided guidance on assessing a due diligence standard, which it summarises in its oral pleading.[2074]

2069 Counter-Memorial, para. 519.

2070 Hearing, 29 September 2024, 2:22-25 (Crosato Neumann).

2071 Hearing, 29 September 2024, 2:25-3:5 (Crosato Neumann).

2072 Hearing, 29 September 2024, 3:6-4:1 (Crosato Neumann).

2073 Counter-Memorial, para. 519 *citing* Alan Boyle, Catherine Redgwell (eds), *Birnie, Boyle & Redgwell's International Law and the Environment* (4th ed., Oxford University Press 2021), p. 164 (**Annex RUL-105**); *referring to* United Nations General Assembly, Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10, 2001, p. 154, para. 7 (**Annex RUL-116**); Hearing, 29 September 2024, 4:2-6 (Crosato Neumann).

2074 The Russian Federation summarises as follows: (i) "Obligations of due diligence require States to put in place a national system, including legislation, administrative procedures and enforcement mechanism necessary to regulate the activities in question"; (ii) States must "exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective"; (iii) The obligations are "particularly relevant in a situation in which the activities in question are mostly carried out by private persons", which the Russian Federation explains makes it unreasonable to hold a State responsible for harms caused by a private person or entity where the State acted with due diligence; (iv) The standard "varies depending on the particular circumstances" including scientific and technological information, relevant international rules and standards, risk of harm, and urgency; and (v) The standard is "more severe for the riskier activities," where risk must be considered "in terms of both the probability and the foreseeability of the occurrence of the harm and its severity or magnitude"; Hearing, 29 September 2024, 4:5-5:12 (Crosato Neumann) *citing Climate Change and International Law*, cit., n. 1324, paras 235-36 (**Annexes RUL-241**, **UAL-225**). *See also* Counter-Memorial, para. 519 *citing* Alan Boyle, Catherine

1020. The Russian Federation asserts that the Arbitral Tribunal's consideration of due diligence as it applies to UCH will be "somewhat unique," as most applications of the standard have come in the contexts of genocide or environmental protection.[2075] For example, pollution may cause devastating harm, and a higher degree of diligence is necessary to prevent heinous crimes such as genocide. In comparison, the Russian Federation argues, UCH, although serious, poses different risks.[2076]

1021. Consequently, the Russian Federation submits that "to establish a violation of Article 303(1) of UNCLOS, Ukraine should prove a lack of diligent efforts in protecting UCH on the part of Russia, rather than assert that a damage was inflicted in selected instances" during expeditions carried out by individuals.[2077] However, according to the Russian Federation, Ukraine has offered no evidence that the Russian Federation failed to effectively legislate and implement policy to protect and preserve UCH.[2078]

1022. Nor, the Russian Federation adds, does Ukraine demonstrate any actual harm to UCH, in which case "Russia's international responsibility would also not be engaged" even if it had failed to act with due diligence.[2079] The Russian Federation states that, following the ICJ judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, actual harm is a threshold that must be met to prove a breach of the due diligence obligation.[2080]

a. The Arbitral Tribunal's Jurisdiction over Ukraine's UCH Claims

1023. The Russian Federation raises an objection to the jurisdiction of the Arbitral Tribunal over Ukraine's UCH claim on the ground that Article 303, paragraph 1, of the Convention does not apply to the Sea of Azov and the Kerch Strait which constitute internal waters.[2081] The Russian

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Redgwell (eds), *Birnie, Boyle & Redgwell's International Law and the Environment* (4th ed., Oxford University Press 2021) p. 164 (**Annex RUL-105**) [citations omitted].

2075 Hearing, 29 September 2024, 5:18-6:3 (Crosato Neumann).

2076 Hearing, 29 September 2024, 6:4-15 (Crosato Neumann).

2077 Counter-Memorial, para. 520 *referring* to Timo Koivurova, 'Due diligence', in *Max Planck Encyclopedia of Public International Law* (Oxford online edition last updated February 2010), para. 30 (**Annex RUL-118**); Hearing, 29 September 2024, 7:15-8:1 (Crosato Neumann).

2078 Hearing, 29 September 2024, 7:1-14 (Crosato Neumann).

2079 Hearing, 29 September 2024, 8:2-9 (Crosato Neumann) *citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at pp. 182-83, paras 430-31 (**Annex RUL-180**).

2080 Hearing, 5 October 2024, 149:14-150:12 (Crosato Neumann) *citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at, p. 182-83, paras 430-31 (**Annex RUL-180**).

2081 Counter-Memorial, para. 121.

Federation further contends that Article 303, paragraph 1, of the Convention must be read in conjunction with paragraph 2 which "implements it specifying obligations concerning activities in a zone equivalent to the contiguous zone, and omitting references to internal waters."[2082]

1024. In addition, the Russian Federation makes three arguments in asserting that the Arbitral Tribunal's jurisdiction does not extend to Ukraine's UCH claims which, in its view, are based on extraneous instruments.[2083] The Russian Federation contends that "Ukraine is unable to identify a single violation by the Russian Federation of Article 303(1) as it is drafted, and attempts to 'import' into UNCLOS matters from other treaties."[2084]

1025. First, the Russian Federation argues that the Arbitral Tribunal does not have jurisdiction over Ukraine's UCH claims, as Ukraine requires the Arbitral Tribunal to evaluate alleged breaches of other international treaties, whereas Article 288, paragraph 1, of the Convention restricts the Arbitral Tribunal's jurisdiction to disputes "concerning the interpretation or application of this Convention."[2085] The Russian Federation submits that a tribunal's jurisdiction to establish the legal responsibility of a party to a treaty is restricted to the provisions granting the tribunal dispute resolution powers, so that alleged nonconformity with practices extraneous to the treaty "cannot form a basis for establishing international responsibility under the given treaty."[2086]

1026. The Russian Federation notes that, under Article 293, paragraph 1, of the Convention, a tribunal shall apply "other rules of international law not incompatible" with the Convention.[2087] However, the Russian Federation points out that "this article 'should not be interpreted as an expansion of the jurisdiction of UNCLOS tribunals beyond UNCLOS.'"[2088] As observed by the arbitral tribunal in *The Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)* (hereinafter "*Arctic Sunrise*"), Article 293 is not "a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention."[2089] According to the Russian Federation, to permit a tribunal to interpret a different treaty through

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2082 Counter-Memorial, para. 130.
2083 Rejoinder, para. 878.
2084 Rejoinder, para. 878.
2085 Counter-Memorial, paras 523-27.
2086 Rejoinder, para. 880.
2087 Counter-Memorial, para. 524.
2088 Counter-Memorial, para. 524 *citing* Peter Tzeng, 'Jurisdiction and Applicable Law under UNCLOS', Yale Law Journal (2016), p. 242 at p. 248 (**Annex RUL-119**).
2089 Counter-Memorial, para. 525 *citing* PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)*, Merits Award of 14 August 2015, para. 192 (**Annex UAL-4**); *see also* PCA Case No. 2014-07: *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)* (hereinafter "*Duzgit Integrity*"), Award of 5 September 2016, para. 207 (**Annex RUL-121**).

Article 293 would be to subject a State to the tribunal's jurisdiction over a treaty other than that specified in the clause granting jurisdiction in the first place.[2090]

1027. Second, the Russian Federation argues that, contrary to Ukraine's claim, "the language employed in Article 303(1) of the Convention does not envisage incorporation of external 'standards.'"[2091] Relying on scholarship, in particular from Professor Aznar, the Russian Federation asserts that "it is hardly possible to deduce from the wording of Article 303(1) of UNCLOS, read in context with the text of the article as a whole, any specific measures that a State is obliged to take."[2092] The Russian Federation accepts that because Article 303, paragraph 1, of the Convention "imposes a due diligence obligation, it may still require, according to the jurisprudence, some reference to extrinsic rules and standards to determine compliance."[2093] However, it continues, even if extrinsic rules "may be relevant for purposes of interpretation," that does not mean that "an Annex VII tribunal is empowered to determine a violation of such rules or standards," as incorporating such external standards "would unduly expand the Tribunal's jurisdiction ratione materiae."[2094]

1028. The Russian Federation states that "Ukraine resorts to referencing jurisprudence on interpretation of rules concerning protection of maritime environment," which do not apply to UCH protection, as evidenced by the lack of mention of UCH in Part XII of the Convention.[2095]

1029. The Russian Federation claims that jurisprudence does not support Ukraine's position. Notably, according to the Russian Federation, the arbitral tribunal in the *Iron Rhine Railway Arbitration (Belgium v. Netherlands)* confirmed that a treaty's content may not be replaced through its interpretation with reference to other sources of international law.[2096] In addition, the Russian Federation refers to the ICJ judgment in *Gabčíkovo-Nagymaros Project* for the proposition that, under current standards, the Parties have a "general obligation to take preventative measures for the environment," but not for UCH.[2097] The Russian Federation adds that "transboundary environmental harm is an entirely different subject-matter" from UCH, and notes that the ICJ did

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2090 Counter-Memorial, para. 525 *citing Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Buergenthal, I.C.J. Reports 1996, p. 279, para. 22 (**Annex RUL-122**); *see also* Rejoinder, para. 880.

2091 Rejoinder, para. 881 *citing* Reply, paras 354-56.

2092 Rejoinder, para. 881 *citing* Mariano Aznar, 'In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle', Journal of Maritime Archaeology (2018), p. 67 at p. 75 (**Annex RUL-128**).

2093 Hearing, 29 September 2024, 9:7-12 (Crosato Neumann).

2094 Hearing, 29 September 2024, 9:13-21 (Crosato Neumann).

2095 Rejoinder, para. 882.

2096 Rejoinder, para. 883 *citing Iron Rhine Railway Arbitration (Belgium v. Netherlands)*, Award of 24 May 2005, 27 UNRIAA 35, paras 57-60 (**Annex RUL-190**).

2097 Rejoinder, para. 886 *citing Gabčíkovo-Nagymaros Project*, cit., n. 1326, p. 74, para. 140 (**Annex UAL-201**).

not require the parties to take specific measures in that case.[2098] Furthermore, in *Pulp Mills*, the ICJ declined to import rules from extraneous instruments, even where it considered that the parties should take them into account.[2099] The Russian Federation asserts that ICJ case law thus demonstrates that the Parties cannot replace provisions of the Convention with extraneous rules.[2100]

1030. The Russian Federation further asserts that Ukraine's arguments run "contrary to the rules of treaty interpretation."[2101] In its view, "[w]hat Ukraine calls an analysis of the 'ordinary meaning' of Article 303(1) of the Convention is in fact an attempt to interpret the UNCLOS through extraneous legal instruments as provided by Article 31(3)(c) of the VCLT."[2102] However, "this technique is [...] only available where relevant rules of international law are 'applicable in the relations between the parties.'"[2103]

1031. The Russian Federation submits that the UCH Rules are not applicable between Ukraine and the Russian Federation, as the Russian Federation is not a State Party to the UCH Convention and the UCH Rules are not customary international law. In support of this point, the Russian Federation refers to the statements of UNESCO which affirmed that the UCH Convention is "independent of any other treaty"[2104] and "only applies to States that become party to it."[2105] The Russian Federation emphasises that it has not consented to the UCH Convention or the UCH Rules and has instead explicitly stated that it views the UCH Convention as incompatible with UNCLOS and non-binding.[2106] According to the Russian Federation, even had the Russian Federation expressed an intention to voluntarily apply the UCH Rules, such intent would not create a binding obligation giving rise to international responsibility, either by itself or through a treaty.[2107]

2098 Rejoinder, para. 886 *citing Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, Yearbook of the International Law Commission (2001), Vol. II, Part 2 (**Annex RUL-186**).

2099 Rejoinder, para. 887 *citing Pulp Mills*, cit., n. 1447, p. 82, para. 203 (**Annex UAL-152**).

2100 Rejoinder, para. 888.

2101 Rejoinder, para. 889.

2102 Rejoinder, para. 889.

2103 Rejoinder, para. 889.

2104 Rejoinder, para. 889(a) *citing* UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions*, p. 16 (**Annex UA-664**).

2105 Rejoinder, para. 889(b) *citing* UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions*, p. 17 (**Annex UA-664**).

2106 Rejoinder, para. 889(c) *citing* United Nations Educational, Scientific and Cultural Organization, 31st Session, Twentieth Plenary Meeting Report of Commission IV: Resolutions and Recommendations, p. 559, para. 15.40 (**Annex RU-816**).

2107 Rejoinder, para. 889(d).

1032. According to the Russian Federation, even had the Russian Federation expressed an intention to voluntarily apply the UCH Rules, such intent would not create a binding obligation giving rise to international responsibility, either by itself or through a treaty.[2108]

1033. Third, the Russian Federation submits that Article 303, paragraph 1, of the Convention contains no reference to external standards, whereas other provisions such as Articles 207 and 208 of the Convention provide such express references. According to the Russian Federation, this context demonstrates that the drafters of the Convention would have included such a reference had they intended to do so.[2109]

1034. Therefore, the Russian Federation contends that the Arbitral Tribunal has no jurisdiction to establish alleged violations of the UCH Convention or other UCH-related treaties, but instead "should only assess whether Russia made diligent efforts in protecting UCH, as UNCLOS requires it."[2110] The Russian Federation points out in this regard that Article 303, paragraph 4, of UNCLOS provides that this article "is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."[2111]

b. The Applicable UCH Protection Standards under the UCH Convention

1035. The Russian Federation submits that Ukraine misinterprets the relevant UCH protection standards. The Russian Federation contends that "[t]o establish a violation of Article 303(1), Ukraine must prove that Russia failed to take diligent efforts in protecting UCH, namely, [failed] to introduce [a] framework capable of preventing or minimizing the risk of damage to UCH."[2112]

1036. The Russian Federation disagrees with Ukraine on the role that international standards prescribe for divers in underwater archaeological expeditions. According to the Russian Federation, the preamble of the UCH Convention states that cooperation between States, scientific institutions, archaeologists, and divers is "essential" for the protection of UCH.[2113] The Russian Federation further notes that UNESCO's Manual for Activities Directed at UCH provides that:

> Archaeologists and competent authorities must encourage responsible participation and involvement by the wider diving community in investigating and managing underwater

2108 Rejoinder, para. 889(d).
2109 Rejoinder, para. 891.
2110 Counter-Memorial, para. 527.
2111 Rejoinder, para. 892.
2112 Rejoinder, para. 894.
2113 Counter-Memorial, para. 536 *citing* UCH Convention, Preamble, para. 11 (**Annex UA-120**).

> heritage. An informed and enthusiastic diving community is a wonderful ally and asset in the work of managing and investigating underwater cultural heritage.[2114]

1037. Responding to Ukraine's references to the UCH Rules and citations of the Valletta Convention, the Russian Federation explains that neither set of rules restricts participation in expedition groups to exclusively professional archaeologists.[2115] The Russian Federation notes that the Explanatory Report to the Valletta Convention, for example, includes the statement that "[t]his [rule] does not mean to say that members of the general public cannot be engaged on excavations. It means that they must be under the control of a qualified person who is responsible for the excavation."[2116] In addition, the Explanatory Report observes that "[n]on-professionals have in fact contributed greatly to the development of knowledge through assistance in excavation of the archaeological heritage."[2117] In addition, the Russian Federation points out that UCH Rule 23 states that expedition personnel merely require "competence appropriate to their roles," which thus permits non-archaeologists to participate so long as they are well-suited for their respective roles.[2118]

1038. The Russian Federation rejects Ukraine's assertion that international UCH standards do not permit divers to remove objects from the seabed.[2119] Article 2, paragraph 10, of the UCH Convention, it contends, does not limit divers to "observation" of archaeological sites, as Ukraine argues.[2120] This provision in fact only sets "objectives and general principles" for archaeological expeditions and addresses the general public's access to UCH.[2121]

1039. The Russian Federation adds that the States Parties to the UCH Convention have established a Code of Ethics for Diving on Submerged Archaeological Sites (hereinafter the "UCH Code of Ethics"), and UNESCO signed a letter of understanding with the World Underwater Federation (*Conféderation mondiale des activités subaquatiques*, hereinafter the "CMAS") whereby CMAS made the UCH Code of Ethics its official document and undertook to establish a course on

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2114 Counter-Memorial, para. 536 *citing* Thijs J. Maarleveld, et al. (eds), *Manual for Activities directed at Underwater Cultural Heritage. Guidelines to the Annex of the UNESCO 2001 Convention* (UNESCO 2013), p. 174 (**Annex RUL-124**).

2115 Counter-Memorial, paras 533-34.

2116 Counter-Memorial, para. 534 *citing* Explanatory Report to the Valletta Convention, p. 5 (**Annex RUL-123**).

2117 Counter-Memorial, para. 535 *citing* Explanatory Report to the Valletta Convention, p. 5 (**Annex RUL-123**).

2118 Rejoinder, paras 898-99.

2119 Rejoinder, para. 897.

2120 Rejoinder, para. 897 *citing* Reply, para. 365 n. 811.

2121 Rejoinder, para. 897 *citing* Sarah Dromgoole, 'UNESCO Convention on the Protection of the Underwater Cultural Heritage', International Journal of Marine and Coastal Law, Vol. 18 no. 1 (2003), pp. 67-68 (**Annex RUL-191**).

underwater archaeology and scientific diving.[2122] Rule 5 of the UCH Code of Ethics "states that the relocation or removal of an object ought not to be done without the 'supervision of a professional archaeologist authorized by the competent authorities.'"[2123] The Russian Federation argues that this Rule implies that divers are permitted to remove UCH objects when adequately supervised by a professional archaeologist.[2124]

1040. The Russian Federation submits that, in practice, divers often assist professional underwater archaeologists. The Russian Federation's expert witnesses, [redacted] and [redacted] note in their expert report (hereinafter the "[redacted] and [redacted] Report") that only a small part of an archaeological expedition team normally consists of professional archaeologists, who mainly supervise and coordinate the worksite and expedition team.[2125] The remainder of the expedition team comprises other professionals, including those with specific diver qualifications and special skills, who receive mandatory basic archaeological training from the team leader before the expedition.[2126] According to the report, the characteristics of a diving site, often found at considerable depths underwater, necessitate the involvement of skilled divers, who are guided and controlled by the professional archaeologist leading the expedition.[2127] The Russian Federation asserts that to follow Ukraine's approach and disallow removal by supervised divers would make large complex underwater excavations impossible, "as any archaeologist in the team would have to possess the qualities of a professional diver."[2128]

1041. The Russian Federation further submits that international practice commonly involves divers working under the supervision of archaeologists.[2129] According to the Russian Federation, research institutions around the world "often call for divers to assist archaeologists in underwater

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2122 Counter-Memorial, para. 537 *citing* UNESCO Code of Ethics for Diving on Submerged Archaeological Sites (**Annex RUL-125**); Letter of Understanding between United Nations Educational, Scientific and Cultural Organization (UNESCO) and World Underwater Federation (CMAS), 2012 (**Annex RU-513**).

2123 Rejoinder, para. 900 *citing* UNESCO Code of Ethics for Diving on Submerged Archaeological Sites (**Annex RUL-125**).

2124 Rejoinder, para. 900.

2125 Rejoinder, para. 901 *citing* Opinion of [redacted] and [redacted], para. 65 (8 December 2023).

2126 Rejoinder, para. 901 *citing* Opinion of [redacted] and [redacted], paras 64, 66, 70 (8 December 2023).

2127 Rejoinder, paras 901, 905 *citing* Opinion of [redacted] and [redacted], paras 68, 70 (8 December 2023).

2128 Rejoinder, para. 905.

2129 Rejoinder, para. 903.

expeditions."[2130] The Russian Federation cites a number of examples in this regard, including the Advisory Council on Underwater Archaeology's use of volunteers in its projects.[2131]

1042. As to Ukraine's arguments that *in situ* preservation is preferred, the Russian Federation notes that the UCH Convention promotes such preservation as a "first option" and not as "the only right way forward" nor "an overriding objective" nor a "mandatory rule that brooks no exception."[2132] Instead, depending on the situation, there "may be good grounds for rejecting" *in situ* preservation, and *ex situ* may better guarantee preservation.[2133]

1043. The Russian Federation notes that several provisions of the UCH Convention envisage and regulate *ex situ* preservation.[2134] The Russian Federation adds that the UCH Rules, Ukraine's source of best practice for preserving UCH, permit excavation where there are reasonable grounds to do so, including the conduct of scientific study or the protection of UCH.[2135] The Russian Federation recalls the same principles in the Valletta Convention and its Explanatory Report.[2136]

2130 Counter-Memorial, para. 538 *citing* ACUA, Projects Worldwide. Around the World (**Annex RU-516**).

2131 Counter-Memorial, para. 538 *citing* ACUA, Projects Worldwide. Around the World (**Annex RU-516**); *Marine Archaeologists in Greece Explore 1500-year-old Shipwreck*, *Planet Today* (5 March 2022) (**Annex RU-517**); Rejoinder, para. 904 *citing* Anna Lazarus Caplan, *Divers Plan to Recover 3,000-Year-Old, Hand-Sewn Ship in the Mediterranean Sea Next Month*, People (22 June 2023) (**Annex RU-649**); *New Finds at the Regal Ship Kronan's Wreck Site*, Kalmar County Museum (26 August 2022) (**Annex RU-650**); *Time for New Dives at the Kronan Wreck Site*, Kalmar County Museum (25 May 2023)(**Annex RU-651**); *New Findings from the Underwater Archaeological Research at the Antikythera Shipwreck*, Return to Antikythera (18 October 2019) (**Annex RU-652**); *Press release: 'Return to Antikythera 2022',* Return to Antikythera (20 June 2022) (**Annex RU-653**). *See also Teaming Up with Legendary Explorer Mario Arena in Italy*, Ghost Diving (3 August 2021) (**Annex RU-654**); *A Blast from the Past: Marine Archaeology Day in Sweden Starts with a Cannon Salute,* Nord Stream Facts (August 2010) (**Annex RU-655**); Opinion of [redacted] and [redacted], paras 71-75 (8 December 2023); Witness Statement of [redacted], para. 18 (21 August 2022).

2132 Counter-Memorial, paras 540-41 *citing* UCH Convention, Art. 2(5) (**Annex UA-120**); Martijn Manders, 'In Situ Preservation: 'The Preferred Option,"' Museum International, 60(4) (2008) p. 31 (**Annex RUL-126**); Patrick J. O'Keefe, 'Underwater Cultural Heritage', in Francesco Francioni, Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020) p. 302 (**Annex RUL-127**); Mariano J. Aznar, 'In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle', Journal of Maritime Archaeology (2018), p. 67 at pp. 67–68 (**Annex RUL-128**); Rejoinder, para. 908 *citing* UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions*, p. 8 (**Annex UA-664**).

2133 Counter-Memorial, para. 542 *citing* Patrizia Vigni, 'The Enforcement of Underwater Cultural Heritage by Courts', in Francesco Francioni, James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013), p. 148 (**Annex RUL-129**); Patrick J. O'Keefe, 'Underwater Cultural Heritage', in Francesco Francioni, Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020), p. 302 (**Annex RUL-127**).

2134 Hearing, 29 September 2024, 14:1-21 (Crosato Neumann).

2135 Hearing, 29 September 2024, 15:1-10 (Crosato Neumann); Counter-Memorial, para. 543 *citing* UCH Convention, Annex, Rule 1 (**Annex UA-120**).

2136 Counter-Memorial, para. 543 *citing* Explanatory Report to the Valletta Convention, p. 3 (**Annex RUL-123**).

1044. The Russian Federation further recalls that both the UCH Rules and the 1990 Charter for the Protection and Management of Archaeological Heritage of the International Council on Monuments and Sites (hereinafter the "ICOMOS") provide for the *ex situ* preservation of UCH due to development projects which require access to the site.[2137] The Russian Federation notes that experts agree that, where infrastructure projects affect UCH, *in situ* preservation can only occur where project modification to avoid the site is possible.[2138] If such modification is not possible for feasibility reasons or due to reasonable time and cost constraints, excavation is justified where the physical preservation of the site *in situ* is threatened.[2139]

1045. The Russian Federation contends that removal from the seabed can also lead to better preservation.[2140] The Russian Federation further contends that educational benefits may also require excavation of UCH, especially where shipwrecks are concerned.[2141] Thus, the Russian Federation explains, conditions of the site or the need for study may "make it preferable" to remove UCH.[2142] In addition, the Russian Federation submits that removal of artefacts for scientific study is a "commonplace practice."[2143]

1046. In addition, the Russian Federation asserts that Ukraine misleadingly applies standards applicable to preserving UCH "sites" to individual UCH "artefacts."[2144] As explained in the [redacted] and [redacted] Report, a "site" or "monument" refers to "a whole object found undersea," as opposed to individual items, and the two categories have different preservation considerations.[2145]

2137 Counter-Memorial, para. 544; Rejoinder, para. 908; Hearing, 29 September 2024, 15:21-16:3 (Crosato Neumann) *citing* ICOMOS, Charter for the Protection and Management of the Archaeological Heritage, 1990, Art. 5 (Appendix K, Opinion of [redacted] and [redacted]).

2138 Rejoinder, para. 914 *citing* Opinion of [redacted] and [redacted] para. 36 (8 December 2023); Chartered Institute for Archaeologists, Standard and guidance for archaeological excavation (2014), p. 4 (**Annex RU-665**); Nils Johansson, Lars G. Johansson, 'Rescue Archaeology' in *UNESCO - Encyclopedia Life Support Systems* (**Annex RU-666**).

2139 Rejoinder, para. 914.

2140 Rejoinder, paras 908-11.

2141 Counter-Memorial, para. 545 *citing* David Gregory, Martijn Manders (eds), *Guideline Manual 2: Best Practices for Locating, Surveying, Assessing, Monitoring and Preserving Underwater Archaeological Sites, SASMAP* (2015), p. 85 (**Annex RU-520**); Olivier Berger, 'Keeping Artefacts *in Situ* and Preserving Them Once Out of the Water: Daily Questions for a Conservator-Restorer in Marine Excavations', Asia-Pacific Regional Conference on Underwater Cultural Heritage, Manila, Philippines, 2011, p. 5 (**Annex RU-521**).

2142 Counter-Memorial, para. 543 *citing* Mariano J. Aznar, 'In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle', Journal of Maritime Archaeology (2018), p. 67 at p. 77 (**Annex RUL-128**).

2143 Hearing, 29 September 2024, 16:12-17 (Crosato Neumann).

2144 Rejoinder, para. 912.

2145 Rejoinder, para. 912 *citing* Opinion of [redacted] and [redacted], paras 15-17 (8 December 2023).

2. The Russian Federation's Position on its Treatment of Underwater Cultural Heritage

1047. The Russian Federation asserts that "it has taken the necessary steps and efforts to satisfy the 'due diligence' obligations to protect UCH within its jurisdiction by adopting proper legislation and enforcement practice."[2146]

1048. According to the Russian Federation, its main legislative act on protecting Russian cultural heritage is Federal Law No. 73-FZ "On Cultural Heritage Objects (Historical and Cultural Monuments) of the Peoples of the Russian Federation" dated 25 June 2002 (hereinafter "Federal Law No. 73-FZ").[2147] Instead of using the term "underwater cultural heritage," the law covers UCH under the broad definition of "archaeological heritage objects" as "traces of human existence from the past epochs that are 'partially or completely hidden in the ground or under water'" and can mostly be explored through archaeological expeditions.[2148] The Russian Federation notes that movable archaeological heritage objects are called "archaeological artefacts."[2149] It further notes that its domestic legislative framework takes the UCH Convention and UCH Rules into account; accordingly, the Arbitral Tribunal "may indeed rely on the consensual aspects" of these documents.[2150]

1049. The Russian Federation adds that Federal Law No. 73-FZ only accords State protection to archaeological heritage objects and artefacts that are over 100 years old.[2151] According to the Russian Federation, this approach meets the international standard as established by the UCH Convention, which defines UCH as objects that have been "partially or totally under water, periodically or continuously, for at least 100 years."[2152] The Russian Federation explains that the definition of UCH under Article 1 of the UCH Convention "traces the provisions of Article 303, paragraph 1 of [the Convention]" and "the definition of the [UCH] Convention as a consensual standard informs the provisions of [the Convention]."[2153] Thus, the Russian Federation submits

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2146 Rejoinder, para. 916; *see also* Counter-Memorial, paras 521, 561; *see also* paras 1018-1019 above.

2147 Counter-Memorial, para. 548 *citing* Federal Law No. 73-FZ "On Cultural Heritage Objects (Historical and Cultural Monuments) of the Peoples of the Russian Federation", 25 June 2002 (**Annex RU-171**).

2148 Counter-Memorial, para. 548 *citing* Federal Law No. 73-FZ "On Cultural Heritage Objects (Historical and Cultural Monuments) of the Peoples of the Russian Federation", 25 June 2002, Art. 3, para. 2 (**Annex RU-171**).

2149 Counter-Memorial, para. 548 *citing* Federal Law No. 73-FZ "On Cultural Heritage Objects (Historical and Cultural Monuments) of the Peoples of the Russian Federation", 25 June 2002, Art. 3, para. 3 (**Annex RU-171**).

2150 Hearing, 29 September 2024, 10:8-19 (Crosato Neumann).

2151 Counter-Memorial, para. 549 *citing* Federal Law No. 73-FZ "On Cultural Heritage Objects (Historical and Cultural Monuments) of the Peoples of the Russian Federation", 25 June 2002, Art. 18(12) (**Annex RU-171**).

2152 Counter-Memorial, para. 549, n. 892 *citing* UCH Convention, Art. 1(a) (**Annex UA-120**).

2153 Hearing, 29 September 2024, 11:16-21 (Crosato Neumann).

that this "naturally must include the 100-year time requirement."[2154] The Russian Federation finds contradictory Ukraine's protestations that UNCLOS must be interpreted in line with the UCH Convention but that it would be arbitrary to apply the time-limit.[2155] For its part, the Russian Federation submits that if the UCH Convention is the relevant standard to interpret Article 303 of UNCLOS, then its definition of UCH must likewise be applied, as it would be nonsensical to apply the UCH Convention's substantive provisions but to ignore the definition of the object to which they apply.[2156] Consequently, it maintains, underwater objects dating to World War II are not archaeological heritage objects or artefacts under Article 303 of UNCLOS, and should not be considered as part of Ukraine's claims.[2157] However, the Russian Federation notes, World War II objects are protected in the Russian Federation through a distinct legal regime.[2158]

1050. Following a detailed overview of the contents of Russian legislation regarding archaeological heritage objects, including World War II military objects,[2159] the Russian Federation concludes that, while underwater World War II objects are not archaeological heritage under Russian law, the Russian Federation "takes all necessary actions to protect and commemorate the underwater heritage of [...] [World War II]."[2160]

1051. In addition to the measures aimed at nation-wide protection and preservation of UCH and World War II objects, the Russian Federation notes that it "has developed a number of active and diligent mechanisms" focused on Crimean cultural heritage, and has confirmed its commitment to do so to UNESCO.[2161]

1052. With respect to Ukraine's claims regarding the four episodes, the Russian Federation submits that Ukraine has not established, or even alleged for three of the four episodes, any actual harm to the objects in question or to thousands of other UCH objects it has speculated about.[2162] The Russian Federation submits that no evidence is provided because no damage has occurred.[2163]

2154 Hearing, 29 September 2024, 11:21-22 (Crosato Neumann).
2155 Hearing, 29 September 2024, 11:23-13:4 (Crosato Neumann).
2156 Hearing, 29 September 2024, 13:3-11 (Crosato Neumann), *see also* Hearing, 5 October 2024, 151:6-22 (Crosato Neumann).
2157 Hearing, 29 September 2024, 13:12-16 (Crosato Neumann).
2158 Counter-Memorial, para. 549.
2159 Counter-Memorial, paras 551-67.
2160 Counter-Memorial, para. 568.
2161 Rejoinder, paras 922-23 *citing* Permanent Delegation of the Russian Federation to UNESCO, Information on the Situation in the Republic of Crimea (Russian Federation) in the Fields of UNESCO Competence, 17 October 2014 (**Annex RU-679**).
2162 Hearing, 29 September 2024, 21:20-22:5 (Crosato Neumann); Hearing, 5 October 2024 154:9-12 (Crosato Neumann).
2163 Hearing, 29 September 2024, 22:6-10 (Crosato Neumann).

1053. The Russian Federation also contests Ukraine's argument that its "detailed allegations" shift the burden of proof to the Russian Federation. The Russian Federation submits that no such rule shifting the burden exists, and that Ukraine's argument suggests that Ukraine is unable to prove that the Russian Federation has breached the Convention.[2164]

a. Treatment of the Byzantine-Era Ship

1054. The Russian Federation argues that Ukraine "grossly misinterprets the facts" in recounting the excavation of the Byzantine-era ship.[2165] According to the Russian Federation, the shipwreck was not explored and excavated by amateurs with no experience, as Ukraine argues, but "within the framework of scientific archaeological fieldworks," authorised by the Ministry of Culture, and "organised and supervised by a professional archaeologist with significant experience, [redacted] [*sic*] [redacted]"[2166] The Russian Federation also argues that Ukraine wrongly applies the standard for *in situ* preservation of an archaeological site (or "monument") to individual artefacts. As its experts note, the standards for the former do not apply to individual artefacts such as the amphorae.[2167]

1055. The Russian Federation submits that [redacted] had ensured that the divers were professionals capable of diving to depths of over 100 meters and certified by CMAS in underwater archaeology.[2168] Pursuant to international standards, the Russian Federation points out, "the divers acted under the supervision of [redacted] at all times."[2169] According to the Russian Federation, [redacted] "'gave detailed instructions to the team of divers' before each stage of the expedition," controlled their dives via unmanned and manned submersibles, and made "the decision to remove a number of artefacts for further examination."[2170] The Russian Federation notes that technical divers were necessary as the shipwreck lies 86 metres under the sea.[2171]

1056. Referring to [redacted] statement, the Russian Federation explains that the expedition had two stages. First, the divers non-intrusively examined the shipwreck, taking photographs and measurements. After completing this stage, "[redacted] decided to lift several amphorae to

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2164 Hearing, 5 October 2024, 153:23-154:7 (Crosato Neumann).
2165 Counter-Memorial, para. 570.
2166 Counter-Memorial, para. 571 *citing* Witness Statement of [redacted], paras 2-5, 7, 12-13 (21 August 2022); [redacted].
2167 Rejoinder, para. 943 *citing* Opinion of [redacted] and [redacted], para. 17 (8 December 2023).
2168 Counter-Memorial, para. 572 *citing* Witness Statement of [redacted], para. 17 (21 August 2022).
2169 Counter-Memorial, para. 573.
2170 Counter-Memorial, para. 573 *citing* Witness Statement of [redacted], paras 14, 18, 33 (21 August 2022).
2171 Hearing, 29 September 2024, 23:7-10 (Crosato Neumann).

clarify 'the shipwreck's age, chemical composition of the ceramic material and nature of the cargo the Byzantine vessel could be carrying.'"[2172] The Russian Federation, citing [redacted] and its UCH experts, submits that such an excavation is in line with international standards permitting excavation "to enable better study of the site," and that the post-excavation examination "provoke[ed] an extensive academic discussion."[2173] According to the Russian Federation, five amphorae were removed from among many more such items.[2174] The Russian Federation notes that Ukraine has recently engaged in similar conduct.[2175]

1057. With respect to a photograph of five amphorae on the ship, which Ukraine submitted as evidence that the divers left the artefacts "exposed in rough fish netting" and "without provision [...] for their proper preservation," [redacted] explains that the photograph was taken while the amphorae were being recorded and tagged, as required by Russian law.[2176] According to the Russian Federation, the fish netting was used to protect the amphorae from the deck.[2177] After recording and tagging, the amphorae were placed in sea water and transported to the Tauric Chersonese Museum for conservation, where they remain in the museum's collection, ensuring their safety.[2178] With respect to other photographs Ukraine submitted as evidence that the divers handled and passed around the amphorae, [redacted] further explains that the photographs were taken at the Tauric Chersonese Museum after the completion of necessary conservation procedures. According to [redacted] the pictures in fact depict two artists who sketched the amphorae, as well as the head of the Rostov Dive club, and show [redacted] himself supervising the process.[2179] The Russian Federation also notes that President Putin's visit did not physically interact with the shipwreck.[2180] Finally, it notes that there is nothing in the record showing that the recovered amphorae were damaged.[2181]

2172 Counter-Memorial, para. 574 *citing* Witness Statement of [redacted], paras 24-29, 31 (21 August 2022).

2173 Counter-Memorial, para. 574 *citing* Witness Statement of [redacted], paras 47-48 (21 August 2022); Hearing, 29 September 2024, 23:22-24:3 (Crosato Neumann) *citing* Opinion of [redacted] and [redacted], para. 115 (8 December 2023).

2174 Hearing, 5 October 2024, 155:20-24 (Crosato Neumann).

2175 Hearing, 29 September 2024, 24:4-5 (Crosato Neumann).

2176 Counter-Memorial, para. 575 *citing* Witness Statement of [redacted], paras 36-37 (21 August 2022); Revised Memorial, para. 272, Figure 6.

2177 Counter-Memorial, para. 575 *citing* Witness Statement of [redacted], para. 36 (21 August 2022).

2178 Counter-Memorial, para. 575 *citing* Witness Statement of [redacted], paras 37-38, 40, 44 (21 August 2022).

2179 Counter-Memorial, para. 576 *citing* Witness Statement of [redacted], para. 42 (21 August 2022).

2180 Hearing, 29 September 2024, 25:4-6 (Crosato Neumann).

2181 Hearing, 29 September 2024, 25:10-12 (Crosato Neumann).

1058. The Russian Federation considers Ukraine's criticisms of [redacted] statement to be meritless.[2182] According to the Russian Federation, it is undisputed that [redacted] is a private person with no State body affiliation or private interest in the outcome of the present Arbitration.[2183] The Russian Federation notes that he is a well-renowned archaeologist with over 20 years of experience with UCH and numerous publications, and led the expedition to the Byzantine-era Ship and prepared a report on the results, giving him both expertise and direct knowledge of the events.[2184] The Russian Federation considers his statement to have more evidentiary weight than the testimony of Ukraine's own witnesses, [redacted] and [redacted].[2185]

1059. The Russian Federation contends that Ukraine neglects to establish and support its own case with relevant evidence and instead "attempts to refute the Russian Federation's arguments."[2186]According to the Russian Federation, Ukraine mischaracterises the involvement of the divers, ignoring the fact that [redacted] led and supervised the expedition and incorrectly portraying [redacted] as the expedition supervisor instead.[2187] The Russian Federation points out that [redacted] describes his own involvement as applicant, permit holder, and expedition supervisor in his statement, which is corroborated by numerous media reports listing him as "a scientific supervisor of the expedition."[2188] Furthermore, in response to Ukraine's criticisms of the lack of contemporaneous documents, the Russian Federation provides [redacted] expedition permit designating him as an expedition leader.[2189]

1060. The Russian Federation adds that the divers were not "amateurs," as Ukraine continues to wrongly label them, but were "certified technical divers with the right to dive to a depth of 100+ meters on gas mixtures and also had the CMAS international certificates in underwater archaeology" who were supervised via an unmanned submersible.[2190]

2182 Rejoinder, paras 944-51.
2183 Rejoinder, para. 949.
2184 Rejoinder, para. 949 *citing* Witness Statement of [redacted], paras 4-5, 14 (21 August 2022).
2185 Rejoinder, para. 950 *referring to* Rejoinder, subsection IV(C)(ii).
2186 Rejoinder, para. 952 *referring to* Reply, paras 373-76.
2187 Rejoinder, para. 953 *citing* Reply, para. 376; Witness Statement of [redacted], paras 12-13 (21 August 2022); Counter-Memorial, para. 572.
2188 Rejoinder, para. 954 *citing* Witness Statement of [redacted], paras 23-38 (21 August 2022); *The Byzantine Ship Near Balaklava Will Not Be Lifted Entirely from the Bottom*, Meridian (26 of August 2015) (**Annex RU-696**).
2189 Rejoinder, para. 955 *citing* Ministry of Culture of the Russian Federation, Open List for [redacted], 26 May 2015 (**Annex RU-700**).
2190 Rejoinder, para. 957 *citing* Witness Statement of [redacted], paras 17-18 (21 August 2022).

1061. The Russian Federation further notes that Ukraine bases its allegations on media sources and blogs, which have lower evidentiary value than scientific reports which are checked before publication.[2191] Furthermore, the Russian Federation asserts, a number of Ukraine's own sources "directly contradict its arguments."[2192]

1062. Finally, the Russian Federation contends that, while Ukraine argues that the amphorae were wrongly removed, it "simply ignores the fact that no damage was inflicted to them."[2193] The amphorae were "excavated, preserved and examined by competent specialists" and are now on display in the Tauric Chersonese Museum-Reserve.[2194]

b. Treatment of the Terracotta Sculpture Fragment

1063. In response to Ukraine's allegations that the Russian Federation violated modern technical and archaeological standards by excavating a terracotta sculpture fragment, the Russian Federation submits that Ukraine does not explain the allegations. According to the Russian Federation, that is because the Russian Federation complied with the relevant standards.[2195]

1064. The Russian Federation notes that the expedition was led by an experienced professional archaeologist, [redacted] who was authorised by the Ministry of Culture, as required by Russian law and in accordance with international archaeological standards.[2196] The Russian Federation further notes that, while Ukraine "ignores this fact," its own reference suggests that an underwater group of the IA RAS, headed by [redacted] carried out the expedition.[2197]

1065. The Russian Federation argues that the excavation and *ex situ* preservation was justified, in accordance with international standards, by the development of a major infrastructure project in the area—the Kerch Bridge.[2198] According to the Russian Federation, before construction began, IA RAS archaeologists conducted surveys in the Kerch Strait to determine archaeological heritage sites might be affected by the project and to plan their preservation. The surveys found

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2191 Rejoinder, para. 961.

2192 The Russian Federation notes, for example, *Find of the Millennium: Huge Antique Ship Discovered at the Bottom of the Sea in Crimea*, Zvezda (26 May 2015) (**Annex UA-228**); Evgeniya Artemova, *In the Depths of Centuries*, Interfax.ru (27 May 2015) (**Annex UA-846**); *see* Rejoinder, paras 956, 962.

2193 Rejoinder, para. 963.

2194 Rejoinder, para. 963 *citing* Witness Statement of [redacted], paras 39-41 (21 August 2022).

2195 Counter-Memorial, paras 578-79.

2196 Counter-Memorial, para. 580 *citing* Letter from the Institute of Archaeology of the Russian Academy of Sciences No. 14102/2115 OP-1762 (28 June 2022), p. 3 (**Annex RU-531**).

2197 Counter-Memorial, para. 580 *citing Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge*, Official Information Site for the Construction of the Crimean Bridge (22 March 2017) (**Annex UA-235**).

2198 Counter-Memorial, paras 581-82.

archaeological artefacts on the seabed of the Kerch Strait near Cape Ak-Burun. The Russian Federation states that, after assessing preservation options, the IA RAS was tasked to excavate all discovered artefacts, including the terracotta sculpture fragment, in order to ensure *ex situ* preservation. The Russian Federation claims that the excavation work was conducted in compliance with the relevant archaeological methodology.[2199] It asserts that all excavated artefacts "underwent necessary conservation procedures and [were] transferred to a state museum for safekeeping."[2200] The Russian Federation notes that the Terracotta Sculpture Fragment is now part of the Eastern-Crimean Historical and Cultural Museum-Preserve's collection, where it is carefully preserved and no deterioration has been recorded.[2201]

1066. The Russian Federation rejects Ukraine's criticism that the letter from the IA RAS was neither contemporaneous nor contemporaneously corroborated.[2202] The Russian Federation responds that the IA RAS "is the most reputable archaeological institution in the Russian Federation with extensive experience in the field" and its "capability to provide the factual and scientific account of events in question cannot thus be contested."[2203]

1067. Furthermore, according to the Russian Federation, the Terracotta Sculpture Fragment "cannot even be treated as an UCH artefact found *in situ*."[2204] As explained by experts [redacted] and [redacted] in their report, a UCH object ceases to be considered *in situ* when it is removed from its locale and relocated elsewhere, as occurred to the Terracotta Sculpture Fragment, which Ukraine's authority explains was relocated in the 1970's as part of dredging work in the Kerch Bay.[2205] In the view of the Russian Federation, the Terracotta Sculpture Fragment should instead be considered as an excavated *ex situ* artefact.[2206]

1068. In any case, the Russian Federation emphasises that the removal of the Terracotta Sculpture Fragment was justified and in line with international practice. *Ex situ* preservation is expressly

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2199 Rejoinder, para. 979 *citing* IA RAS, Letter No. 14102/2115 OP-1762 (28 June 2022), pp. 4-5 (**Annex RU-531**); Opinion of [redacted] and [redacted], para. 135 (8 December 2023).

2200 Counter-Memorial, para. 582 *citing* Letter from the Institute of Archaeology of the Russian Academy of Sciences No. 14102/2115 OP-1762 (28 June 2022), pp. 2–5 (**Annex RU-531**).

2201 Rejoinder, para. 980 *citing* Ministry of Culture of the Republic of Crimea, Letter No. 28280/10-11/2 (17 August 2023) (**Annex RU-706**); *see also* Rejoinder, para. 980, Figure 5.

2202 Rejoinder, para. 982 *citing* Reply, paras 372, 378.

2203 Rejoinder, para. 983 *citing* Opinion of [redacted] and [redacted], paras 93-101 (8 December 2023).

2204 Rejoinder, para. 967.

2205 Rejoinder, para. 967 *citing Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge*, Official Information Site for the Construction of the Crimean Bridge (22 March 2017) (**Annex UA-235**).

2206 Rejoinder, para. 967 *citing* Opinion of [redacted] and [redacted] para. 134 (8 December 2023); *see also* Hearing, 5 October 2024, 160:3-12 (Crosato Neumann).

permitted even by the standards upon which Ukraine relies, such as the UCH Convention, for "scientific or protective purposes."[2207] In this vein, the Russian Federation maintains, the excavation of the Terracotta Sculpture Fragment guaranteed its preservation and permitted scientific research.[2208]

1069. The Russian Federation disputes Ukraine's allegation that the Russian Federation has not produced "analysis weighing the preservation options" for the Terracotta Sculpture Fragments and other UCH objects.[2209] The Russian Federation submits that a survey of over 400 hectares of the Kerch Strait was undertaken before bridge construction began in order to identify potential archaeological heritage sites that the project may disrupt.[2210] According to the Russian Federation, following discovery of archaeological artefacts near Cape Ak-Burun, several preservation options were considered, with *in situ* preservation decided against, because "the accumulation of archaeological artefacts was located where the construction of the Kerch Bridge was to be implemented" and "the preservation of artefacts *in situ* in the instant case threatened their safety."[2211] The Russian Federation maintains that *in situ* preservation "cannot ensure the security of fragile underwater artefacts for the long term,"[2212] because the Ak-Burun Cape area is an active shipping area, and *in situ* conservation would have put the artefacts at risk due to human activity and the surrounding marine environment.[2213]

1070. Finally, as regards Ukraine's argument that the Russian Federation should have provided documentation of the formal decision to remove UCH in the area in question, the Russian Federation considers this argument to have been put forward very late by Ukraine, and submits further that the evidence confirms that the appropriate methodology was in fact followed, resulting in [redacted] obtaining an "open list" permit to conduct rescue archaeological works.[2214]

2207 Rejoinder, para. 968 *citing* UCH Convention, Preamble (**Annex UA-120**); *see also* Opinion of [redacted] and [redacted], paras 33-35 (8 December 2023).
2208 Rejoinder, para. 970.
2209 Rejoinder, para. 971.
2210 Rejoinder, para. 971 *citing* Counter-Memorial, para. 583.
2211 Rejoinder, paras 973, 977.
2212 Rejoinder, paras 908-10, 977.
2213 Rejoinder, para. 977.
2214 Hearing, 5 October 2024, 160:13-162:10 (Crosato Neumann).

c. Treatment of the Kitty Hawk Fight Jet and Airacobra Aircraft

1071. The Russian Federation submits that Ukraine's allegations of the Russian Federation's inappropriate treatment of the Kitty Hawk jet and Airacobra aircraft are groundless.[2215]

1072. Regarding the Kitty Hawk, the Russian Federation asserts that, consistent with Russian law, the removal was conducted by "competent specialists duly authorised by the Ministry of Defence."[2216] According to the Russian Federation, the removal was part of the "Great Landing Force Expedition – 2017," which explored sunken aircraft "in accordance with the annual plan approved by the Ministry of Defence."[2217] The non-governmental organisation Battery 29 BIS conducted the expedition with support from the Black Sea Centre for Underwater Research and the Exploratory Movement of Russia.[2218] Contrary to Ukraine's assertions, the Russian Federation points out, Battery 29 BIS is "a public organisation regularly engaged in military search expeditions and restoration of" World War II objects.[2219]

1073. In addition, the Russian Federation asserts that *in situ* preservation of the Kitty Hawk was not a viable option. It notes that the Kitty Hawk "was found on the edge of an anchorage area of the Ports of Kerch and Kavkaz in the Kerch Strait, which put the jet at significant risk of being destroyed by ship anchors," and indeed anchors were found nearby.[2220] The aircraft lay at an accessible depth, creating a risk of looting as its location became known, and, being made of metal, destruction by corrosion "was just a matter of time"[2221]

2215 Counter-Memorial, para. 585.

2216 Counter-Memorial, para. 586.

2217 Counter-Memorial, para. 586 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), p. 2 (**Annex RU-546**).

2218 Counter-Memorial, para. 586. The Russian Federation explains that "the Black Sea Centre for Underwater Research is a state institution of the Republic of Crimea specialising in studying and protection of UCH" and "[t]he Exploratory Movement of Russia is the largest organisation engaged in field and archival search operations." Counter-Memorial, para. 586, nn. 976-77.

2219 Counter-Memorial, para. 586 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), pp. 1-2 (**Annex RU-546**). The Russian Federation adds that, *inter alia*, "[t]he head of Battery 29 BIS, Mr Aleksandr Elkin, is a well-known and experienced researcher of sunken aircraft in the Black Sea and the Sea of Azov, an author of a number of publications dedicated to the Black Sea and Sea of Azov shipwrecks of the Great Patriotic War and a certified SSI Master Diver. He frequently participates as a scientific supervisor in underwater expeditions organised by the Ministry of Defence of the Russian Federation." Counter-Memorial, para. 586, n. 978 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), pp. 1-2 (**Annex RU-546**).

2220 Counter-Memorial, paras 587, n. 980 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), pp. 3-4 (**Annex RU-546**); Report of Search Operations at the Site of the Destruction of the Aviation Equipment No. 1 (12 May 2017), p. 1 (**Annex RU-547**).

2221 Counter-Memorial, para. 587 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), p. 4 (**Annex RU-546**).

1074. The Russian Federation contends that the Kitty Hawk's extraction was done with due care. It explains that as the aircraft was heavily silted and partially buried, necessary preparatory works were conducted before lifting. Due to the known damage, the aircraft was not lifted by its tail, but instead with a crane using "special towel-type slings under the aircraft body," which the Russian Federation asserts is an internationally-accepted practice.[2222] The tail was not lost even though "prior serious damage to the keel made it impossible to keep the tail completely intact."[2223] The Russian Federation notes that the aircraft is currently undergoing restoration before exhibition in "one of the largest antique vehicle museums in Europe located in the Moscow Region."[2224]

1075. The Russian Federation also responds to Ukraine's allegations about the excavation of the Bell P-39 Airacobra with "a similar crane hoist system" to the one used to lift the Kitty Hawk. The Russian Federation repeats that the system accords with international practice and states that all other aspects of the expedition complied with Russian and international legal requirements and accepted standards.[2225]

1076. According to the Russian Federation, in 2019, the Ministry of Defence of the Russian Federation, with the Crimean Institute of Archaeology of the Russian Academy of Sciences and the head of Battery 29 BIS, examined and identified the aircraft.[2226] A year later, in 2020, a joint expedition of the Expeditionary Centre of the Ministry of Defence and the Russian Geographical Society, assisted by the underwater technical works enterprise "Petr," removed the Airacobra in accordance with Ministry of Defence's annual plan.[2227]

2222 Counter-Memorial, para. 589 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), p. 4 (**Annex RU-546**); *On the Ground, in the Air and under Water*, Skalko.Livejournal (13 April 2010) (**Annex RU-548**); *Echo of the Great War... \ part 3 *, Drive2.RU (6 June 2017) (**Annex RU-549**); *RAF Museum Successfully Raises Dornier Do17*, *Gov.UK* (11 June 2013) (**Annex RU-550**); *World War II Era Fighter Plane Recovered From Lake Michigan*, Getty Images (7 December 2012) (**Annex RU-551**).

2223 *On the Ground, in the Air and under Water*, Livejournal (13 April 2010) (**Annex RU-548**); *Echo of the Great War... \ part 3 *, Drive2.RU (6 June 2017) (**Annex RU-549**); *RAF Museum Successfully Raises Dornier Do17*, GOV.UK (11 June 2013) (**Annex RU-550**); *World War II Era Fighter Plane Recovered From Lake Michigan*, Getty Images (7 December 2012) (**Annex RU-551**).

2224 Counter-Memorial, para. 589 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), p. 4 (**Annex RU-546**).

2225 Counter-Memorial, para. 591 *citing* Counter-Memorial, para. 589 n. 986.

2226 Counter-Memorial, para. 592 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), pp. 4-5 (**Annex RU-546**).

2227 Counter-Memorial, para. 592 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), p. 5 (**Annex RU-546**); Letter from the Ministry of Defence of the Russian Federation No. 174/1790 (24 November 2021), p. 2 (**Annex RU-552**); *WWII Fighter Lifted From the Bottom of the Black Sea*, Russian Geographical Society (1 October 2020) **(Annex UA-670)**. The Russian Federation explains that "[t]he [e]nterprise "Petr" is one of the leading Russian enterprises in the field of underwater technical works on small water bodies. Since the late 1990s, it has lifted objects of the Great Patriotic War, participating in search expeditions of the Russian Ministry of Defence, as well as in archaeological expeditions." Counter-Memorial, para. 592, n. 991.

1077. The Russian Federation asserts that *ex situ* preservation of the Airacobra was necessary to protect it from looting and corrosion.[2228] Already, the aircraft was heavily damaged.[2229] The Russian Federation claims that to avoid further damage, slings were used to pull the aircraft to shore where it was lifted by a truck crane.[2230] It states that the Airacobra is currently in a freshwater reservoir in Crimea, to prevent further corrosion and damage, and will be transferred to a museum for restoration and exhibition.[2231]

1078. In response to Ukraine's claims that the Russian Federation's evidence on this topic—letters from the IA RAS, Battery 29 BIS, and the Ministry of Defence of the Russian Federation—is deficient and should be disregarded, the Russian Federation argues that the totality of the evidence supports the facts as described in the letters.[2232] The Russian Federation rejects Ukraine's criticism of the Battery 29 BIS letter, corroborated by the Battery 29 BIS report on the removal of the Kitty Hawk.[2233]

3. The "Clean Hands" Doctrine

1079. The Russian Federation asserts that the "clean hands" doctrine precludes Ukraine from making UCH-related claims against the Russian Federation due to its own approach to UCH protection.[2234]

1080. According to the Russian Federation, the "clean hands" doctrine suggests that a court or tribunal:

> [...] should not encourage a party that has engaged in bad faith behaviour with respect to the very subject of the relief sought. In these circumstances, equity and good faith require to deny remedies requested by such party, as "he who comes to equity for relief must come with clean hands."[2235]

2228 Counter-Memorial, para. 593 *citing* Letter from Battery 29 BIS No. 0149 (15 June 2022), p. 5 (**Annex RU-546**).

2229 Counter-Memorial, para. 593 *citing* Letter from the Ministry of Defence of the Russian Federation No. 174/1790 (24 November 2021), p. 3 (**Annex RU-552**); *see also WWII Fighter Lifted From the Bottom of the Black Sea*, Russian Geographical Society (1 October 2020), p. 3 **(Annex UA-670**).

2230 Counter-Memorial, para. 594 *citing* Letter from the Ministry of Defence of the Russian Federation No. 174/1790 (24 November 2021), p. 3 (**Annex RU-552**).

2231 Counter-Memorial, para. 594 *citing* Letter from the Ministry of Defence of the Russian Federation No. 174/1790 (24 November 2021), p. 3 (**Annex RU-552**).

2232 Rejoinder, paras 927-28 *citing* Reply, para. 382. The Russian Federation recalls "the position taken by the ICJ in the *Corfu Channel* case allowing to draw inferences of fact from circumstantial evidence, provided that it leaves 'no room for reasonable doubt.'" Rejoinder, para. 928, n. 1557 *citing* Rejoinder, para. 515.

2233 Rejoinder, para. 928.

2234 Rejoinder, para. 985.

2235 Rejoinder, para. 986 *citing* Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' in *Collected Courses Of The Hague Academy Of International Law* (Vol. 92, Brill 1958), p. 119 (**Annex RUL-224**).

The Russian Federation submits that although the ICJ has not yet expressly endorsed the argument based on this doctrine, its conclusion in *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* suggests that the Court does not question its existence.[2236]

1081. The Russian Federation notes that a 2017 analysis of Ukraine's cultural heritage preservation programmes found severe problems in Ukraine's system of UCH protection.[2237] According to the Russian Federation, there was poor control over the implementation of Ukraine's UCH legislation by State authorities, with violations "systemic" and violators bearing limited responsibility.[2238] In addition, the Russian Federation states, there was a lack of consistency and coordination in the activities of different responsible State authorities and a lack of scientific documentation in relation to most historical and cultural objects.[2239]

1082. According to the Russian Federation, black-market trade in archaeological artefacts developed gradually in Ukraine after the dissolution of the Soviet Union until vandalism of valuable underwater monuments has "become an uncontrolled process and grown to menacing proportions," leading to several well-known wrecks being "literally pulled apart."[2240]

1083. The Russian Federation contends that while Ukraine asserts that its domestic legislation provides for the protection of UCH, the laws are not applied. Notably, the Russian Federation points out, the representative of the Scientific and Educational Centre of Underwater Archaeology of the Kiev National University stated that the "laws are well-drafted, but in fact they do not work."[2241]

1084. The Russian Federation claims that black-market archaeological heritage traders "are even reported to work under the shelter of Ukraine's high-ranking officials, including the Security Service and police," without prosecution.[2242] In this regard, the Russian Federation refers to

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2236 Rejoinder, para. 990 *citing Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, I.C.J. Reports 2019, p. 7 at p. 44, para. 122 (**Annex RUL-228**)

2237 Rejoinder, para. 992, n. 1669 *citing* Oleg Rybchinsky, *Analysis Of Cultural Heritage Preservation Programs In Ukraine* (2017), p. 12 (**Annex RU-711**).

2238 Rejoinder, para. 992(a) *citing* Oleg Rybchinsky, *Analysis Of Cultural Heritage Preservation Programs In Ukraine* (2017), p. 12 (**Annex RU-711**).

2239 Rejoinder, para. 992 *citing* Oleg Rybchinsky, *Analysis Of Cultural Heritage Preservation Programs In Ukraine* (2017), p. 12 (**Annex RU-711**).

2240 Rejoinder, para. 993 *citing*, Valeria Chepurko, *'Black Archaeologists' Stole all the Treasures of Ukraine*, KP.UA (18 June 2011) (**Annex RU-712**); *Diving in Ukraine: Time to Get out of the Shadows*, Hitlife (2006) (**Annex RU-713**).

2241 Rejoinder, para. 994 *citing* Scientists in Scuba: 20 Questions to Underwater Archaeologists, WAS (**Annex RU-714**).

2242 Rejoinder, para. 995 *citing* Oksana Poritskaya, *Business on Bones: How Crimea is Robbed by Black Archaeologists*, Octagon (6 April 2020) (**Annex RU-715**); Ministry of Culture of Ukraine Information Centre for Culture and Art, 'Some Problems of Protection of Archaeological Heritage in Ukraine (review

media reports, which state that "[o]ver the past 25 years, not a single criminal case against 'black archaeologists', diggers, grave robbers in Ukraine has ended with a real imprisonment for the guilty."[2243]

1085. The Russian Federation notes that the activities of the Ukrainian Department of Underwater Heritage, which, according to Ukraine, was created "to develop underwater archaeology in Ukraine," have been widely criticised and its head, Sergey Voronov, reportedly has "no professional archaeological education."[2244]

1086. In light of Ukraine's own notoriously careless treatment of UCH, the Russian Federation submits, Ukraine should be precluded from making its UCH-related claims against the Russian Federation based on the "clean hands" doctrine.[2245]

D. ANALYSIS OF THE ARBITRAL TRIBUNAL

1087. The Arbitral Tribunal will now address the Parties' dispute concerning the protection of the UCH. Ukraine submits that the Russian Federation has violated its obligation to protect UCH under Article 303, paragraph 1, of the Convention, as reflected in four specific episodes. For its part, the Russian Federation (i) objects to the Arbitral Tribunal's jurisdiction over Ukraine's claims; (ii) asserts that Ukraine misrepresents the applicable law and standards; and (iii) affirms that, on the facts, the Russian Federation has fulfilled its duties even under Ukraine's purported standards. The Russian Federation also argues that the "clean hands" doctrine precludes Ukraine from making claims relating to UCH. The Arbitral Tribunal will address the questions of jurisdiction, law, and facts *seriatim* below.

1. Jurisdiction

1088. The Arbitral Tribunal first addresses the Russian Federation's objection that Ukraine's claims relating to UCH are outside the Arbitral Tribunal's jurisdiction. In support of its jurisdictional objection, the Russian Federation advances two arguments.

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based on press materials (2011-2012)', National Parliamentary Library of Ukraine (2013), DZK Issue 1/5 (**Annex RU-716**).

2243 Rejoinder, para. 995 *citing* Oksana Poritskaya, *Business on Bones: How Crimea is Robbed by Black Archaeologists*, Octagon (6 April 2020) (**Annex RU-715**).

2244 Rejoinder, para. 997 *citing* Revised Memorial, para. 59; Public Organization Ukrainian Union of Submariners, Open Letter No. 01-12/10 to the Head of Administration of the President of Ukraine Mr. S. V. Lyovochkin (15 December 2010), para. 9 (**Annex RU-719**).

2245 Rejoinder, para. 1000.

1089. First, the Russian Federation argues that Article 303, paragraph 1, of the Convention does not apply to the Sea of Azov and the Kerch Strait as these bodies of water constitute internal waters.[2246] It also contends that this provision "must be read in conjunction with paragraph 2 of the same article which implements it specifying obligations concerning activities in a zone equivalent to the continuous zone, and omitting reference to internal waters."[2247]

1090. For its part, Ukraine rejects the Russian Federation's objection, asserting that the Sea of Azov and the Kerch Strait are not internal waters.[2248] Ukraine argues that even if the Sea of Azov and the Kerch Strait were internal waters, Article 303, paragraph 1, of the Convention applies, given the breadth of its reference to objects "found at sea."[2249] It further argues that even if the Russian Federation's objection were upheld, Article 303 would apply to at least UCH in the Black Sea.[2250]

1091. Article 303, paragraph 1, of the Convention provides that "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose."[2251] Pursuant to Article 31 of the VCLT, the Arbitral Tribunal considers that the phrase "objects of an archaeological and historical nature found at sea" indicates a broad scope for the provision, not limiting its application to a specific maritime zone or zones but applying it to all maritime areas, including internal waters.

1092. The Arbitral Tribunal notes that Article 303, paragraph 2, of the Convention refers to "the zone referred to in [Article 33]", *i.e.*, the contiguous zone. However, the Arbitral Tribunal does not consider that paragraph 2 acts to "implement" Article 303, paragraph 1 and to "specify[] obligations", as the Russian Federation argues[2252] Paragraph 2 allows a coastal State to "presume" that the removal of UCH from the seabed in the contiguous zone "without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in [Article 33]." The paragraph grants this permission "[i]n order to control traffic in such objects." In the Arbitral Tribunal's view, the granting of a right in the contiguous zone in support of fulfilling a duty to protect UCH found "at sea" should not be read to restrict the application of the duty to UCH found in that maritime zone.

2246 Rejoinder, para. 874.
2247 Counter-Memorial, para. 130.
2248 Reply, para. 347.
2249 Reply, para. 347.
2250 Reply, para. 347.
2251 UNCLOS, Art. 303(1) [emphasis added].
2252 Counter-Memorial, para. 130.

1093. Accordingly, the Arbitral Tribunal rejects the Russian Federation's first objection to its jurisdiction.

1094. Next, the Russian Federation asserts that Ukraine's UCH claims rely upon "extraneous instruments" which, it argues, "cannot vest the Arbitral Tribunal with jurisdiction over Ukraine's claims based on them."[2253] In the Russian Federation's view, Ukraine seeks inappropriately to expand the Arbitral Tribunal's jurisdiction beyond what is permitted by Article 288, paragraph 1, of the Convention.[2254]

1095. Ukraine, for its part, rejects the Russian Federation's argument as "wilful mischaracterization" of its position.[2255] Ukraine asserts that it is not asking the Arbitral Tribunal either to establish alleged violations of other UCH-related treaties or to import obligations from those treaties into UNCLOS.[2256] Ukraine submits that it is simply asking the Arbitral Tribunal to read Article 303, paragraph 1, of the Convention in light of the "consensus" recognising the UCH Rules as current best practice in the protection of UCH.[2257]

1096. Article 288, paragraph 1, of the Convention provides that "[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part." Thus, this provision grants the Arbitral Tribunal "jurisdiction over any dispute concerning the interpretation or application of this Convention."[2258] In the view of the Arbitral Tribunal, there is no disagreement between the Parties that the Arbitral Tribunal is not called upon to determine whether an extrinsic instrument may or may not have been breached. The Arbitral Tribunal notes in this regard that the Russian Federation acknowledges that "[i]nternational standards also need to be taken into account when interpreting Article 303," including instruments of international law.[2259] In response, Ukraine specifies that it does not ask the Arbitral Tribunal "'to pass judgment on alleged breaches of' rules of international law external to UNCLOS" but only to make "a ruling on Russia's breaches of an UNCLOS provision – 303(1)."[2260]

2253 Rejoinder, para. 878; *see also* Hearing, 29 September 2024, 9:13-21 (Crosato Neumann).
2254 Rejoinder, para. 893. *See generally* Rejoinder, paras 878-93.
2255 Reply, para. 351.
2256 Reply, para. 351.
2257 Reply, para. 355.
2258 *See* Award Concerning Preliminary Objections, subsection IV.E.2.
2259 Hearing, 5 October 2024, 148:11-16 (Crosato Neumann). *See also* Hearing, 29 September 2024, 8:24-9:12 (Crosato Neumann).
2260 Hearing, 3 October 2024, 108:7-13 (Gimblett). *See also* Reply, paras 351-52.

1097. The Arbitral Tribunal does not consider that Ukraine relies on extraneous instruments in a manner which improperly expands the Arbitral Tribunal's jurisdiction. Article 288 of the Convention grants the Arbitral Tribunal jurisdiction over any dispute concerning "interpretation or application of this Convention." The relevance, or lack thereof, of external instruments to Article 303, paragraph 1, of the Convention is an aspect of such "interpretation or application." Accordingly, the Arbitral Tribunal considers the disagreement between the Parties over external instruments, not as a question of its jurisdiction, but of the interpretation and application of the Convention. As such, the Arbitral Tribunal rejects the second objection of the Russian Federation to its jurisdiction over Ukraine's UCH claims.

1098. Lastly, the Russian Federation asserts in its Rejoinder that "Ukraine should be precluded from invoking its UCH-related claims [...] based on the 'clean hands' doctrine in view of its own approach to UCH protection."[2261]

1099. The Arbitral Tribunal takes note that the Russian Federation did not advance this argument in either its Counter-Memorial or at the Hearing. Nor has the Russian Federation specified whether it raises the "clean hands" doctrine as an objection to admissibility of Ukraine's claims or as a defence on the merits. In the Arbitral Tribunal's view, the term "precluded" appears to invoke admissibility, whereas the Russian Federation's assertion that the doctrine requires denying remedies, and the placement of the argument in the Russian Federation's pleading on the merits, seem to suggest that the doctrine is intended as a defence on the merits.[2262] In any case, the Arbitral Tribunal deals with the argument as an issue preliminary to its analysis of Ukraine's UCH-related claims.

1100. The Arbitral Tribunal observes that, although the "clean hands" doctrine has often been invoked in international proceedings, international courts and tribunals have rarely accepted arguments based on that doctrine, whether as an objection to admissibility or as a defence on the merits.[2263]

1101. As noted by Ukraine,[2264] the ICJ recently ruled on the "clean hands" doctrine in a similar instance where the Russian Federation raised the doctrine at the merits stage of a bifurcated proceeding between the Parties.[2265] The ICJ, determining that the doctrine was invoked as a defence on the merits, recalled that it has previously rejected the doctrine as an objection to admissibility and

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2261 Rejoinder, para. 985.
2262 Rejoinder, para. 986.
2263 *See Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2023, p. 51 at p. 87, para. 81.
2264 *See* Hearing, 23 September 2024, 53:9-54:17 (Koh).
2265 *Ukraine v. Russia (2024)*, cit., n. 1995, para. 38 (**Annex UAL-217**).

further "consider[ed] that the 'clean hands' doctrine cannot be applied in an inter-State dispute where the Court's jurisdiction is established and the application is admissible."[2266]

1102. The Arbitral Tribunal therefore rejects the objection raised by the Russian Federation to the admissibility of Ukraine's claims relating to UCH. In addition, as the Arbitral Tribunal's jurisdiction is established and the present application is otherwise admissible, the Arbitral Tribunal likewise rejects the Russian Federation's argument based on the "clean hands" doctrine as a defence to Ukraine's UCH-related claims.

1103. For the aforementioned reasons, the Arbitral Tribunal rejects the Russian Federation's objections to its jurisdiction over Ukraine's UCH-related claims and finds that it has jurisdiction over those claims. The Arbitral Tribunal will now proceed to the merits of Ukraine's claims.

2. The Nature and Scope of the Duty under Article 303, Paragraph 1, of UNCLOS

1104. The Arbitral Tribunal considers next the nature and scope of duty that Article 303, paragraph 1, of the Convention imposes on States.

1105. At the outset, the Arbitral Tribunal observes that the Parties agree in large part on the nature of duty imposed by Article 303, paragraph 1, of the Convention. The Arbitral Tribunal further observes that both Parties direct the Arbitral Tribunal's attention to the same sources for their position. Both Parties refer to the jurisprudence developed in several judicial and arbitral decisions.[2267]

1106. The Parties agree that Article 303, paragraph 1, of the Convention establishes an "affirmative duty" on States to protect UCH.[2268] Both consider that this duty is "general"[2269] and "broad,"[2270] and that it is a duty of "due diligence."[2271] The Arbitral Tribunal considers that the duty to protect under Article 303, paragraph 1, is a duty of due diligence and that it is an obligation of conduct. Thus, as ITLOS has stated, "it is [...] the conduct of a State, not the result which would be entailed by the conduct, that will determine whether the State has complied with its obligation."[2272] In

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2266 *Ukraine v. Russia (2024)*, cit., n. 1995, para. 38 (**Annex UAL-217**).

2267 Hearing, 25 September 2024, 67:13-69:25 (Koh) *citing South China Sea*, cit., n. 37, para. 944 (**Annex UAL-11**); *Pulp Mills*, cit., n. 1447, p. 79, para. 197 (**Annex UAL-152**); *Gabčíkovo-Nagymaros Project*, cit., n. 1326, p. 77, para. 140 (**Annex UAL-201**); *also citing Climate Change and International Law*, cit., n. 1324, para. 239 (**Annexes RUL-241**, **UAL-225**). *See also* Revised Memorial, para. 260.

2268 Counter-Memorial, para. 519; Hearing, 25 September 2024, 56:14-16 (Koh).

2269 Hearing, 25 September 2024, 59:13 (Koh); Hearing, 29 September 2024, 2:18-21 (Crosato Neumann).

2270 Hearing, 25 September 2024, 59:13 (Koh); Hearing, 5 October 2024, 147:17-19 (Crosato Neumann).

2271 Hearing, 25 September 2024, 68:10-14 (Koh); Hearing, 29 September 2024, 4:2-4 (Crosato Neumann).

2272 *Climate Change and International Law*, cit., n. 1324, para. 233 (**Annexes RUL-241**, **UAL-225**).

assessing Ukraine's claim relating to UCH, what matters is the conduct of the Russian Federation, rather than the result of that conduct.

1107. However, the Arbitral Tribunal notes that the Parties disagree on whether the actual harm to UCH, or its absence, is a decisive factor in determining the responsibility of the Russian Federation. According to the Russian Federation, while due diligence is an "obligation of conduct," "if no actual harm to UCH can be demonstrated in the present case, Russia's international responsibility would also not be engaged, even if it could be shown that Russia did not act with the required diligence."[2273] Ukraine disputes this position.[2274] As has been noted above,[2275] in the view of the Arbitral Tribunal, such harm, or its absence, may be relevant in assessing the international responsibility for non-compliance with the duty of due diligence but cannot be decisive.

1108. Regarding the scope and content of the duty of due diligence, both Parties refer to the Advisory Opinion of ITLOS *in Climate Change and International Law*, which stated, in relevant part:

> The obligation of due diligence requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently [...].[2276]

The Arbitral Tribunal notes that the Parties are in agreement that Article 303, paragraph 1, of the Convention requires States to establish a legislative framework as well as to exercise adequate vigilance in enforcing said laws.[2277]

1109. As to the standard of due diligence, the Arbitral Tribunal recalls the pronouncement of ITLOS:

> [...] due diligence is a "variable concept." It is difficult to describe due diligence in general terms, as the standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies. There are several factors to be considered in this regard. They include scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved. The standard of due diligence may change over time, given that those factors constantly evolve.[2278]

2273 Hearing, 29 September 2024, 8:2-9 (Crosato Neumann) *citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at p. 221, paras 430-31 (**Annex RUL-180**).

2274 Hearing, 3 October 2024, 102:12-1-104:10 (Gimblett).

2275 *See* paras 948, 951 above.

2276 *Climate Change and International Law*, cit., n. 1324, para. 235 (**Annexes RUL-241**, **UAL-225**).

2277 *See Revised Memorial*, para. 260 *citing South China Sea*, cit., n. 37, paras 941 (**Annex UAL-11**); Rejoinder, para. 916.

2278 *Climate Change and International Law*, cit., n. 1324, para. 239 (**Annexes RUL-241**, **UAL-225**) [citations omitted] *citing Responsibilities and Obligations of States with Respect to Activities in the Area*, cit., n. 1451, para. 117 (**Annexes RUL-101**, **UAL-156**).

1110. The Parties agree that the Arbitral Tribunal must consider the aforementioned "several factors," in assessing the applicable standard of due diligence in the present case. Both Parties submit that due diligence requires an evolving standard based on scientific and technological advancement.[2279] In addition, they refer to relevant international rules and standards as providing information for determining the present state of this standard.[2280] In particular, both Ukraine and the Russian Federation direct the Arbitral Tribunal to the UCH Rules found in the Annex of the 2001 UCH Convention.[2281] However, the Parties dispute how the Arbitral Tribunal should treat these Rules.

1111. Ukraine asserts that the UCH Rules are "the most reliable guide to current best scientific practices in the field."[2282] Ukraine emphasises that it refers to the UCH Rules to "inform the evolving duty of due diligence inherent in" Article 303, paragraph 1, of the Convention.[2283] However, Ukraine specifies that the Arbitral Tribunal should not apply the UCH Rules "as a legally binding instrument."[2284]

1112. The Russian Federation, for its part, emphasises that it is not a party to the UCH Convention, and thus the Arbitral Tribunal may not pronounce that the Russian Federation has violated it.[2285] That said, the Russian Federation accepts that the Arbitral Tribunal may "rely on the consensual aspects of the [UCH] Convention and Rules for purposes of interpreting Article 303" of UNCLOS.[2286]

1113. In the view of the Arbitral Tribunal, the UCH Convention, including the UCH Rules, is a distinct legal instrument, which imposes specific obligations on its contracting parties. The Arbitral Tribunal considers that Article 303, paragraph 1, of the Convention, which imposes a duty of due diligence upon States Parties, cannot be read to import the UCH Rules as applicable law. Rather, the UCH Rules may constitute a relevant factor in interpreting and applying this provision and inform the scope and content of the duty of due diligence under Article 303, paragraph 1. Consequently, complying with the UCH Rules can be relevant in assessing whether a State has fulfilled its duty under the Article 303, paragraph 1. However, non-compliance with the Rules does not necessarily entail a breach of the Convention.

2279 Hearing, 25 September 2024, 70:1-22 (Koh); Hearing, 29 September 2024, 5:8-10 (Crosato Neumann).
2280 Revised Memorial, para. 262; Hearing, 29 September 2024, 9:7-12 (Crosato Neumann).
2281 Hearing, 25 September 2024, 71:3-6 (Koh); Hearing, 29 September 2024, 10:8-19 (Crosato Neumann).
2282 Hearing, 25 September 2024, 71:4-5 (Koh).
2283 Hearing, 25 September 2024, 73:12-13 (Koh).
2284 Hearing, 3 October 2024, 108:1-2 (Gimblett).
2285 Hearing, 29 September 2024, 10:3-7 (Crosato Neumann).
2286 Hearing, 29 September 2024, 9:13-17, 10:8-19 (Crosato Neumann).

3. Four Instances of the Russian Federation's Alleged Violation of Article 303, Paragraph 1, of UNCLOS

a. Introduction

1114. The Arbitral Tribunal turns next to Ukraine's claims concerning the Russian Federation's alleged interference with UCH. Before considering the four episodes to which Ukraine refers, the Arbitral Tribunal wishes to make the following observations.

1115. Due diligence requires States to enact an appropriate legislative framework, which they then must enforce with adequate vigilance.[2287] Notably, Ukraine does not allege that the Russian Federation's legislative framework is insufficient under Article 303, paragraph 1, of the Convention. Instead, Ukraine criticises the Russian Federation's "heavy focus on the paper requirements," asserting that the episodes concerned show that "the existence of such written sources of law are no guarantee of genuine compliance" or of "actual implementation."[2288] The Arbitral Tribunal thus observes that Ukraine's claim focuses on the Russian Federation's actions in implementing or enforcing its legislation.

1116. To determine the adequacy of implementation, the Russian Federation submits that it is the conduct of the State, as opposed to that of private individuals, which must be assessed.[2289] Ukraine responds that, legally, the State is responsible for regulating individuals and, on the facts, the Russian State instrumentalities were involved in each of Ukraine's allegations.[2290]

1117. The Arbitral Tribunal considers that the duty of due diligence is particularly relevant in a situation in which activities in question are carried out by private individuals.[2291] In that situation, a breach of due diligence may occur if a State fails to take all necessary measures to ensure that private individuals do not engage in activities inconsistent with international rules.

1118. Finally, the Arbitral Tribunal needs to address the issue of the burden of proof required for Ukraine's UCH-related claims. The Parties disagree as to who should bear such burden. Ukraine asserts, and the Russian Federation disputes,[2292] that "Ukraine's detailed allegations in its written

2287 *See* para. 1108 above.
2288 Reply, para. 362. *See also* Hearing, 25 September 2024, 68:4-9 (Koh) (asserting that the Russian Federation has failed to "monitor compliance or to enforce the law").
2289 Hearing, 29 September 2024, 5:2-5, 7:15-8:1 (Crosato Neumann).
2290 Hearing, 3 October 2025, 114:1-115:5 (Gimblett).
2291 *Climate Change and International Law*, cit., n. 1324, para. 236 (**Annexes RUL-241**, **UAL-225**).
2292 Hearing, 5 October 2024, 153:21-154:3 (Crosato Neumann).

pleadings shift the burden to Russia to demonstrate that its conduct [...] complied with international standards."[2293]

1119. The Arbitral Tribunal has already addressed in the previous Chapter the manner in which the principle of *onus probandi incumbit actori* as a general rule for the burden of proof should apply.[2294] Accordingly, the Arbitral Tribunal considers that Ukraine as the Claimant, in principle, bears the initial burden of establishing the factual allegations supporting its UCH claims. However, it will also consider whether there is any reason to necessitate deviation from this general rule.

1120. Having made these preliminary observations, the Arbitral Tribunal now proceeds to the four incidents to which Ukraine refers: (i) the Byzantine shipwreck, (ii) the terracotta sculpture fragment, (iii) the Kittyhawk aircraft, and (iv) the Airacobra aircraft.

b. Byzantine Shipwreck

1121. The Arbitral Tribunal notes that the Parties disagree as to who led an expedition to the Byzantine shipwreck. Ukraine claims that the Russian Federation has "breached its duty to protect UCH by allowing divers from the Rostov Dive club with no qualifications in underwater archaeology to lead an expedition to a newly discovered Byzantine shipwreck."[2295] In support of its claim, Ukraine relies on "contemporaneous public reporting," which, it claims, gives the "strong impression" that the expedition was led by the dive club.[2296] In response, the Russian Federation submits that the expedition was led by an underwater archaeologist, [redacted] who has submitted a witness statement and testified in these proceedings.[2297]

1122. The Arbitral Tribunal further notes that the Parties disagree as to whether the excavation of the five amphorae was justified in terms of international standards and whether the excavated amphorae were treated properly. According to Ukraine, the dive club's members failed to consider *in situ* preservation and improperly disturbed, excavated, and mistreated UCH.[2298] The Russian Federation rejects Ukraine's claim and submits that the excavation and subsequent treatment of amphorae was in accordance with international standards.[2299]

2293 Hearing, 3 October 2024, 110:23-111:4 (Gimblett).
2294 *See* para. 891, above.
2295 Reply, para. 373.
2296 Hearing, 25 September 2024, 89:9-18 (Gimblett).
2297 Hearing, 29 September 2024, 22:13-23:18 (Crosato Neumann).
2298 Revised Memorial, para. 274.
2299 Counter-Memorial, paras 570-77.

1123. With respect to the question of who led the expedition to the Byzantine shipwreck, the Arbitral Tribunal is not convinced by Ukraine's argument that the expedition was led by an unqualified diver. In this regard, the Arbitral Tribunal does not consider that a "strong impression" is sufficient to meet Ukraine's burden of proof.

1124. On the other hand, the Arbitral Tribunal is of the view that [redacted] account of the facts is persuasive. According to [redacted], in May 2015, he applied to the Ministry of Culture of the Russian Federation for a permit to conduct archaeological works in the Black Sea, and received an archaeological excavation permit as expedition leader;[2300] the permit allowed him to conduct archaeological exploration works and to conduct local earthworks to identify archaeological objects;[2301] as head of the expedition, he was present at all stages of work, took all relevant decisions (including those related to excavation), kept a field diary, directed the transfer of artefacts to the Museum Fund of the Russian Federation, and prepared a report after the expedition.[2302] [redacted] further explains that the archaeological expedition sought technical assistance from divers, whom he directed.[2303] According to [redacted] he managed the full expedition, whereas [redacted], as a diver, was responsible for organising aspects of the underwater work, including that done by the technical divers.[2304]

1125. Ukraine asks the Arbitral Tribunal to reject [redacted] evidence, arguing that his witness statement is uncorroborated by contemporaneous documents and contradicted by public reporting and that his testimony was inconsistent.[2305] In making this contention, Ukraine suggests that the Arbitral Tribunal adopt the methodology employed by the ICJ and ITLOS to assign weight to evidence.[2306]

1126. Even applying such methodology, the Arbitral Tribunal finds no reason to doubt the testimony of [redacted] In particular, the Arbitral Tribunal considers it not "inappropriate [...] to receive affidavits produced for the purposes of a litigation if they attest to personal knowledge of facts by

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2300 Witness Statement of [redacted], paras 12-13 (21 August 2022); Hearing, 1 October 2024, 48:18-22 ([redacted]).

2301 Witness Statement of [redacted], para. 13 (21 August 2022).

2302 Witness Statement of [redacted], para. 14 (21 August 2022); Hearing, 1 October 2024, 50:3-13 [redacted]).

2303 Witness Statement of [redacted], paras 17-18 (21 August 2022).

2304 Hearing, 1 October 2024, 50:20-51:10 ([redacted]).

2305 Reply, paras 371-72, 375-76; Hearing, 3 October 2024, 111:20-23 (Gimblett).

2306 Reply, para. 371. The methodology refers to factors including: (a) whether the testimony concerns facts or personal opinions; (b) whether the testimony is based on first-hand knowledge; (c) whether the testimony is tested through cross-examination; (d) whether the testimony is corroborated by other evidence; and (e) whether the testimony comes from a private individual or a State official as related to whether the testifier holds an interest in the outcome of the proceedings. *See Nicaragua v. Honduras*, cit. n. 224, p. 731, para. 244 (**Annex RUL-30**); *M/V "Norstar"*, cit., n. 1069, p. 39, para. 99 (**Annex UAL-138**).

a particular individual."[2307] [redacted] statement and testimony provides first-hand knowledge, tested through cross-examination, of the facts of the discovery and expedition to the Byzantine shipwreck. The Arbitral Tribunal does not rely upon his testimony where it constitutes his personal opinion as to whether or not violations occurred. The Arbitral Tribunal takes note that [redacted] acknowledged in cross-examination that a portion of his salary comes from the Russian State budget.[2308] Whether or not Ukraine is suggesting that [redacted] is a State official with an interest in the outcome of the proceedings, in the view of the Arbitral Tribunal, his employment at a public institution of higher learning and research renders his factual testimony no less credible.

1127. Ukraine focuses its criticisms of [redacted] testimony on an alleged lack of supporting documentation and corroborating reporting.[2309] As regards documentation, the Arbitral Tribunal notes that [redacted] "open list" permit, which he explains is "the main document giving the right to conduct archaeological works,"[2310] has been entered into the record.[2311] The Arbitral Tribunal further notes that [redacted] explains that his 2015 application for the permit "was preserved in the archive or in the documentation of the Ministry of Culture,"[2312] and that the Scientific Council for Field Research of the Russian Academy of Sciences approved his publicly available scientific report of the endeavour, including his methodology.[2313]

1128. Ukraine submits that a diver, [redacted], in fact supervised the expedition with [redacted] providing only "scientific support."[2314] Ukraine adds that one Russian press report about President Putin's visit to the shipwreck does not mention [redacted][2315] The Arbitral Tribunal notes, however, that a number of Ukraine's factual exhibits relating to the Byzantine shipwreck, submitted both before and after [redacted] statement, refer to him as an archaeologist on the expedition,[2316] with two other reports referring to unnamed archaeologists

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2307 *Nicaragua v. Honduras*, cit. n. 224 p. 731, para. 244 (**Annex RUL-30**).

2308 Hearing, 1 October 2024, 62:19-63:2 (Gimblett, [redacted]).

2309 *See, e.g.*, Reply, para. 375.

2310 Hearing, 1 October 2025, 68:20-22 ([redacted])

2311 Ministry of Culture of the Russian Federation, Open List for [redacted], 26 May 2015 (**Annex RU-700**).

2312 Hearing, 1 October 2024, 65:15-20, 66:2-7 ([redacted]).

2313 Hearing, 1 October 2024, 95:7-96:2 ([redacted], Korolev); Witness Statement of [redacted], para. 46 (22 August 2022).

2314 Reply, para. 376; Hearing, 25 September 2024, 88:10-15 (Gimblett).

2315 Hearing, 25 September 2024, 88:10-25 (Gimblett) *citing Putin Made a Dive in a Bathyscaphe Near Sevastopol*, Interfax, 18 August 2015 (**Annex UA-230**).

2316 *Russian Divers Report Ancient Ship Find Near Crimea*, Daily News (28 May 2015) (**Annex UA-229**); *Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor*, Zvezda (7 June 2015) (**Annex UA-231**); Evgeniya Artemova, *In the Depths of Centuries*, Interfax.ru (27 May 2015) (**Annex UA-846**); *Rostov Divers Found A Sunken Byzantine Ship in the Black Sea*, Donday.ru (29 May

and the IA RAS.[2317] When questioned about a 27 May 2015 press release from the Rostov Dive club, [redacted] responded that "mass media are not always precise in reflecting the reality," and that the press release contains factual errors.[2318] [redacted] explained that [redacted] was involved with both the military and archaeological expeditions, where he directed aspects relating to the technical diving.[2319] The Arbitral Tribunal finds that this explanation is credible and that the written exhibits submitted by Ukraine do not contradict it. As the public reporting is not written for a scientific audience, it is unsurprising to the Arbitral Tribunal that blog posts written and published by the Rostov Dive club itself would focus on the club's own involvement.

1129. The Arbitral Tribunal further observes that parts of the record suggest that [redacted] was not leading the expedition. In one article from May 2015, [redacted] says he "will ask our government" to help achieve his goal to raise the Byzantine ship and to put it in a museum, adding that "the ship that we will raise now will be seen by the whole world."[2320] However, the shipwreck remains underwater, with [redacted] explaining that he chose not to raise it as such an endeavour might cause damage.[2321] Ukraine has not explained why [redacted] reported intentions were left unfulfilled if he was indeed the supervisor of the expedition.

1130. Therefore, the Arbitral Tribunal finds that Ukraine has failed to substantiate its claim that the expedition was not led by an archaeologist as would be required by the UCH Rules.

1131. With respect to the excavation and treatment of five amphorae, the Arbitral Tribunal is likewise unconvinced by Ukraine's claim. Ukraine's evidence that divers improperly disturbed the amphorae at the site consists of a single photograph which depicts a diver shining a light on the seabed.[2322] [redacted] explains that the photograph shows a diver visually examining the object.[2323] The Arbitral Tribunal observes that Ukraine has not pleaded that such contactless evaluation violates international standards.

1132. Ukraine then argues, referring to UCH Rules 1, 4, 9, and 10, that five amphorae were excavated from the site of the shipwreck without proper justification and subsequently treated

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2015) (**Annex UA-847**); We Are Opening A New Project "Russian Underwater Research Expedition," Rostov Dive (27 May 2015) (**Annex UA-848**).

2317 *Find of the Millennium: Huge Antique Ship Discovered at the Bottom of the Sea in Crimea*, Zvezda (26 May 2015) (**Annex UA-228**); Raising the First Artifacts, Rostov Dive (22 August 2015) (**Annex UA-667**).

2318 Hearing, 1 October 2024, 76:5-13 ([redacted]).

2319 Hearing, 1 October 2024, 50:15-24, 82:23-83:12 ([redacted]).

2320 Evgeniya Artemova, *In the Depths of Centuries*, Interfax.ru (27 May 2015) (**Annex UA-846**).

2321 Hearing, 1 October 2025, 57:2-10 (Korolev, [redacted]).

2322 *See* Revised Memorial, para. 272, Figure 5.

2323 Witness Statement of [redacted], para. 27 (21 August 2022).

improperly.[2324] In this regard, the Arbitral Tribunal notes that there is no dispute between the Parties that international standards require consideration of *in situ* preservation as a first option.[2325] In addition, the Parties agree that UCH may be removed for *ex situ* preservation where necessary for scientific study.[2326]

1133. Considering the UCH Rules relating to *in situ* and *ex situ* preservation, the Arbitral Tribunal does not find that the excavation of the five amphorae was inappropriate. [redacted], [redacted], and [redacted] explain that it is permissible under Russian methodological guidelines to excavate a "minimum number of finds" for scientific purposes.[2327] The expert witnesses explain that Russian practice permits expedition leaders to determine "the importance and scientific usefulness of the material to be extracted," which they must explain in their expedition report for verification by competent authorities.[2328] [redacted] explains that he made the decision to lift the amphorae for certain scientific reasons, which he recorded in his scientific report that the Scientific Council for Field Research of the Russian Academy of Sciences subsequently approved.[2329] Both the fact and expert witnesses testify to the scientific importance of the find, including the knowledge gleaned from the raised amphorae.[2330] As regards the importance of *in situ* preservation as the first option, the Arbitral Tribunal takes note that the shipwreck itself was left in place, as were the vast majority of amphorae—about 400-450 in total[2331]—at the wreck site. The Arbitral Tribunal further observes that Ukraine has not substantiated that the excavation of the amphorae was not in compliance with international standards and practice.

2324 Hearing, 25 September 2024, 89:21-90:8 (Gimblett).

2325 Hearing, 25 September 2024, 76:8-15 (Gimblett); 29 September 2024, 15:1-3 (Crosato Neumann); *see* UCH Convention, Annex, Rule 1 (**Annex UA-120**).

2326 Hearing, 25 September 2024, 77:24-78:11 (Gimblett); 29 September 2024, 15:3-10 (Crosato Neumann).

2327 Witness Statement of [redacted], para. 30 (21 August 2022) *citing* Russian Academy of Sciences Guidelines of 2013, para. 3.1 (**Annex RU-170**); Opinion of [redacted] and [redacted], paras 115, 119 (8 December 2023).

2328 Opinion of [redacted] and [redacted], para. 116 (8 December 2023).

2329 Witness Statement of [redacted], paras 31-32, 45-46 (21 August 2022).

2330 Witness Statement of [redacted], paras 47-48 (21 August 2022) *citing* List of Scientific Works and Speeches Devoted to the Byzantine Shipwreck Research (**Annex RU-173**); Opinion of [redacted] and [redacted], para. 118 (8 December 2023) *citing* [redacted].

2331 Hearing, 1 October 2025, 53:3-9 ([redacted]).

1134. Ukraine also contends that the amphorae were not treated according to internationally required standards of care, as photographs show them, first, "exposed to the elements on rough ship netting" and, second, "being handed around among the expedition members."[2332] Regarding the first complaint, the Arbitral Tribunal notes that [redacted] agrees with Ukraine that international standards require that UCH objects not be "uncovered or left exposed during or after excavation without provision being made for their proper preservation, conservation and management."[2333] [redacted] explains that the amphorae were laid on the netting, to protect them from the ship's deck, for about 15 minutes in order to undertake mandatory tagging.[2334] He adds that the amphorae were then placed in sea water for the protection before being transported on the same day to a museum for conservation.[2335] As regards the photographs of individuals holding the amphorae, [redacted] identifies the persons as himself, [redacted], and two painters, who are sketching the amphorae under his supervision following necessary conservation procedures.[2336] The Arbitral Tribunal finds these explanations convincing and observes that Ukraine has not submitted any evidence to refute [redacted] statements on these matters or to establish that any harm occurred to the amphorae. Accordingly, the Arbitral Tribunal does not consider that the amphorae were treated inappropriately after their excavation.

1135. For the aforementioned reasons, the Arbitral Tribunal concludes that the Russian Federation's conduct concerning the Byzantine shipwreck did not violate Article 303 of the Convention.

c. Terracotta Sculpture Fragment

1136. The Parties disagree as to whether the excavation from the Kerch Bay near Ak-Burun Peninsula of a terracotta sculpture fragment was consistent with the international standard that *in situ* preservation should be the first consideration. Ukraine argues that the decision to remove this object of UCH from its resting place was not properly authorised in accordance with the default option of *in situ* preservation.[2337] Ukraine asserts that the Russian Federation's evidence, including a letter from the IA RAS (with author redacted), does not prove that the Russian Federation excavated the fragment in line with the international standard.[2338] For its part, the Russian Federation submits that the excavation and *ex situ* preservation was justified, in

2332 Hearing, 25 September 2024, 90:5-8 (Gimblett).
2333 Revised Memorial, para. 272 *citing* Valletta Convention, Art. 3(i)(b) (**Annex UA-121**); Witness Statement of [redacted], paras 36-37 (22 August 2022).
2334 Witness Statement of [redacted], para. 36 (21 August 2022).
2335 Witness Statement of [redacted], para. 37 (21 August 2022).
2336 Witness Statement of [redacted], para. 42 (21 August 2022).
2337 Hearing, 25 September 2024, 91:6-15 (Gimblett).
2338 Hearing, 25 September 2024, 91:16-93:11 (Gimblett).

accordance with international standards, by the development of a major infrastructure project in the area—the Kerch Bridge.[2339]

1137. In support of its allegation, Ukraine cites a single news article, dated 22 March 2017, which explains the process of excavation in the area in question.[2340] The article further cites [redacted], the head of the underwater group of the IA RAS, on the scientific importance of the fragment.[2341] However, it contains no information about whether the option of *in situ* preservation was considered.

1138. The Arbitral Tribunal notes that while the press article does not indicate whether consideration of *in situ* preservation occurred prior to lifting, it suggests that the other aspects of international standards which Ukraine references in these proceedings have been met, including as relates to the need for proper authorisation.[2342] The press article recounts that the work was guided by archaeologists and care was taken in the treatment and preservation of the excavated materials.[2343] Ukraine does not claim that these standards of treatment were violated. In the view of the Arbitral Tribunal, the absence of reference to consideration of *in situ* preservation in a mass media article cannot in itself sufficiently evidence a breach of the international best practice, or of the due diligence standard under Article 303, paragraph 1, of the Convention. Where Ukraine questions whether the Russian Federation considered constructing the bridge in a manner to avoid the archaeological site,[2344] the Arbitral Tribunal considers Ukraine to bear the burden of proving that the Russian Federation omitted to do so and failed to comply with the Convention.

1139. The Arbitral Tribunal also takes note of the Russian Federation's claim that the terracotta fragment cannot even be treated as an artefact found *in situ* because it had already been removed from its original location. Thus, even when interpreting Article 303, paragraph 1, in light of the UCH

2339 Hearing, 29 September 2024, 25:24-26:22 (Crosato Neumann).

2340 The article explains that "systematic archaeological study" of the area began during the designing of the Kerch Strait bridge, leading to the excavation of over 60,000 finds, that the excavation was conducted "under the guidance of archaeologists" with work on bottom deposits by hand "to reduce the risk of damaging fragile archaeological finds," that the sections of the site are not handed over construction crews until the archaeologists have completed their work, and that each find would "undergo laboratory inspection and study" before delivery to a local museum. 'Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge', Official Information Site for the Construction of the Crimean Bridge (22 March 2017) (**Annex UA-235**).

2341 'Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge', Official Information Site for the Construction of the Crimean Bridge (22 March 2017) (**Annex UA-235**).

2342 'Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge', Official Information Site for the Construction of the Crimean Bridge (22 March 2017) (**Annex UA-235**).

2343 'Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge', Official Information Site for the Construction of the Crimean Bridge (22 March 2017) (**Annex UA-235**).

2344 Reply, para. 379.

Rules, UCH Rule 1 on *in situ* preservation may not apply to the terracotta sculpture fragment. Ukraine submits an academic article co-written by [redacted] on the excavations near Cape Ak-Burun which, while not directly referencing the fragment, indicates that "almost 70 thousand archaeological items," including ceramics, were lifted in "rescue underwater excavations" necessitated by the planned building of bridge supports in the area.[2345] The article, as well as two more cited by [redacted] and [redacted], notes that research has established that "the discovered archaeological objects [...] were moved [near Cape Ak-Burun] in the 1970's as a result of deepening the bottom in the port of Kerch."[2346] The Russian Federation's UCH experts explain that archaeological finds which have already been moved are not considered *in situ*, as "any displacement of an archaeological object already brings it into an *ex situ* condition."[2347]

1140. [redacted] and [redacted] consider the excavation justified, as the terracotta fragment was already *ex situ* and the excavation was "rescue" archaeological work necessitated by the nearby bridge construction.[2348] The witnesses also note that the excavation was reported to and approved by the Scientific Council.[2349] The Arbitral Tribunal accepts their evidence.

1141. The Arbitral Tribunal therefore concludes that the Russian Federation's conduct related to the terracotta sculpture fragment was not in breach of Article 303 of the Convention.

d. Kitty Hawk

1142. The Arbitral Tribunal now turns to the third episode advanced by Ukraine. Ukraine asserts that a "Russian 'historical reconstruction group'" breached accepted international standards when it raised a World War II-era US Curtiss P-40 "Kitty Hawk" fighter plane from near the Kerch Strait in May 2017.[2350] Ukraine argues that "[t]here is no indication that appropriate archaeological

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2345 N.V. Zavoykina, S.V. Olkhovsky, 'Commercial Record from the Underwater Excavations At Cape Ak-Burun in Eastern Crimea', Proceedings of the Department of Classical Archeology of the IA RAS, Vol. 1 (December 2019), p. 105 (**Annex UA-850**).

2346 N.V. Zavoykina, S.V. Olkhovsky, 'Commercial Record from the Underwater Excavations At Cape Ak-Burun in Eastern Crimea', Proceedings of the Department of Classical Archeology of the IA RAS, Vol. 1 (December 2019), p. 105 (**Annex UA-850**). *See also* Opinion of [redacted] and [redacted], para. 131 *citing* [redacted]

2347 Opinion of [redacted] and [redacted], para. 133 (8 December 2023).

2348 Opinion of [redacted] and [redacted], paras 133-36 (8 December 2023); Hearing, 1 October 2024, 126:20-127:7 ([redacted]).

2349 Opinion of [redacted] and [redacted], para. 137 (8 December 2023); Hearing, 1 October 2024, 127:8-20 ([redacted]).

2350 Revised Memorial, para. 271.

standards were met" and that "press reports indicate that the aircraft suffered significant damage as it was extracted from the water."[2351] Ukraine also rejects the applicability of a temporal criterion limiting the application of Article 303, paragraph 1, of UNCLOS, to objects over 100 years old.[2352]

1143. The Russian Federation, for its part, submits that the military planes are not UCH under either Russian law or under UNCLOS, as the UCH Convention, which it notes Ukraine refers to as evidence of best standards, covers only objects partially or wholly submerged for over 100 years.[2353] In any event, the Russian Federation argues, the removal was conducted by competent specialist authorised by the Ministry of Defence, consistent with its law.[2354]

1144. The Arbitral Tribunal notes that the Partis disagree as to the temporal scope of Article 303, paragraph 1, of the Convention. They further disagree as to whether the removal met appropriate UCH standards. In the view of the Arbitral Tribunal, the burden of proof in respect of Ukraine's allegations does not require the Russian Federation to prove that appropriate archaeological standards were met, nor is the burden satisfied by Ukraine submitting that there is "no indication" of compliance. Rather, Ukraine must initially establish the Russian Federation's failure to comply with its due diligence obligation under Article 303, paragraph 1, of the Convention, which the Russian Federation denies. The two news reports relied upon by Ukraine are not sufficient to meet this burden.[2355]

1145. In fact, Ukraine's two submitted press articles suggest that a large team took part in an operation which may have taken almost a year of planning.[2356] While the Russian Federation asserts that the plane is not an archaeological object, the Arbitral Tribunal recognises that the excavation team included [redacted], who has testified in these proceedings as an expert on UCH

2351 Revised Memorial, para. 271.
2352 Reply, para. 384.
2353 Hearing, 29 September 2024, 12:10-13:16 (Crosato Neumann).
2354 Counter-Memorial, para. 586.
2355 *See* Reply, para. 380 *citing Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2*, Russia Today (6 May 2017) (**Annex UA-237**); *The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait*, KP (Komsomolskaya Pravda) (6 May 2017) (**Annex UA-236**).
2356 *The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait*, KP (Komsomolskaya Pravda) (6 May 2017) (**Annex UA-236**).

archaeology.[2357] Ukraine has not provided the Arbitral Tribunal with any evidence of improper supervision of the excavation.[2358]

1146. The Arbitral Tribunal further notes that although Ukraine argues that the "reckless" extraction damaged the aircraft, the articles it submitted report that the Kitty Hawk's condition had already "significantly deteriorated after spending seven decades underwater," where it came to rest after being "apparently damaged during a combat mission," and that it was at risk to further harm.[2359] Ukraine does not offer evidence that the damage to the Kitty Hawk was caused by any improper conduct.

1147. For these reasons, the Arbitral Tribunal does not find that the Russian Federation violated Article 303 of the Convention.

e. Airacobra

1148. Lastly, Ukraine contends that the September 2020 extraction of a Bell P-39 Airacobra dating to World War II by the Russian Geographical Society with assistance from the Russian Ministry of Defence violated international standards.[2360] Ukraine again submits two news articles in support of its claims.[2361]

1149. For the same reasons as explained in the previous subsection in the context of the Kitty Hawk aircraft, the Arbitral Tribunal does not consider these two press reports sufficient to meet Ukraine's burden of proof and to demonstrate that the extraction of the Airacobra did not meet international standards. Ukraine submits no evidence that the extraction was "reckless," that *in*

2357 *The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait*, KP (Komsomolskaya Pravda) (6 May 2017) (**Annex UA-236**). [redacted] did not testify as a fact or expert witness on this episode.

2358 Ukraine's sources describe Alexandr Elkin (Yolkin) as the expedition leader. *The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait*, KP (Komsomolskaya Pravda) (6 May 2017) (**Annex UA-236**); *Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2*, Russia Today (6 May 2017) (**Annex UA-237**). The Russian Federation offers evidence that Mr. Elkin supervised the expedition, has ample experience leading underwater search expeditions, and has authored a number of relevant publications. Counter-Memorial, n. 978 *citing* Letter from Battery 29 BIS No. 0149 15 June 2022 (**Annex RU-546**). Ukraine challenges that this letter "lack[s] evidentiary weight." Reply, para. 381. As the burden of proof is on Ukraine to demonstrate that the excavation was improperly supervised, and Ukraine has not done so, the Arbitral Tribunal has no need to consider the letter and its weight.

2359 *Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2*, Russia Today (6 May 2017) (**Annex UA-237**). *See also The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait*, KP (Komsomolskaya Pravda) (6 May 2017) (**Annex UA-236**).

2360 Revised Memorial, paras 276, 278.

2361 Reply, para. 380 *citing WWII Fighter Lifted From the Bottom of the Black Sea*, Russian Geographical Society (1 October 2020) (**Annex UA-670**); *US Fighter Raised from the Black Sea*, Divernet (28 September 2020) (**Annex UA-694**).

situ preservation was not first considered, or that the operation was inadequately supervised. Ukraine's evidence reports that the operation was carried out jointly by the Russian Geographical Society and the Expeditionary Center of the Russian Ministry of Defence.[2362] The Arbitral Tribunal has not seen evidence that the operation did not have adequate supervision from these two organisations. The evidence instead indicates that "specialists carried out search and reconnaissance activities" and cleaned the aircraft before lifting, and contains no reference to any damage caused by the extraction.[2363] Finally, the article notes that "apparently, someone else tried to lift it and damaged it" even before this excavation.[2364] This prior event suggests that there may indeed have been reason for *ex situ* excavation. The Arbitral Tribunal therefore finds no reason to question that the treatment of the Airacobra met international standards.

1150. As the Arbitral Tribunal finds Ukraine's evidence insufficient to prove improper conduct, there is no need to consider the Russian Federation's counter-evidence or Ukraine's request that it be given limited weight.

1151. Accordingly, the Arbitral Tribunal does not find that the Russian Federation violated Article 303 of the Convention.

4. Conclusion

1152. In light of the foregoing, the Arbitral Tribunal concludes as follows:

a) With respect to Ukraine's claim concerning the Byzantine ship, the Arbitral Tribunal finds that the Russian Federation did not violate its obligations under Article 303 of the Convention;

b) With respect to Ukraine's claim concerning the Terracotta sculpture head fragment, the Arbitral Tribunal finds that the Russian Federation did not violate its obligations under Article 303 of the Convention;

2362 *WWII Fighter Lifted From the Bottom of the Black Sea*, Russian Geographical Society (1 October 2020) (**Annex UA-670**).

2363 *WWII Fighter Lifted From the Bottom of the Black Sea*, Russian Geographical Society (1 October 2020) (**Annex UA-670**).

2364 *WWII Fighter Lifted From the Bottom of the Black Sea*, Russian Geographical Society (1 October 2020) (**Annex UA-670**).

c) With respect to Ukraine's claim concerning the Kitty Hawk and Airacobra aircraft, the Arbitral Tribunal finds that the Russian Federation did not violate its obligations under Article 303 of the Convention.

VII. THE RUSSIAN FEDERATION'S ALLEGED AGGRAVATION OF THE DISPUTE BETWEEN THE PARTIES

A. INTRODUCTION

1153. The Arbitral Tribunal will now address Ukraine's claim concerning the aggravation of the dispute. Ukraine contends that, since it initiated this Arbitration in September 2016, the Russian Federation "has substantially compounded its violations of the Convention" and "substantially aggravated the dispute" before this Arbitral Tribunal, in violation of Articles 279 and 300 of the Convention.[2365] The Russian Federation, for its part, argues that the Convention contains no jurisdictional basis upon which Ukraine may advance a claim that the Russian Federation has aggravated the dispute. It further argues that the claim is baseless even if there was jurisdiction, and that the "clean hands" doctrine precludes Ukraine from making such a claim.[2366]

1154. Article 279 of the Convention reads:

> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

1155. Article 300 of the Convention reads:

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

B. UKRAINE'S POSITION

1. Jurisdiction

1156. Ukraine asserts that the Arbitral Tribunal has jurisdiction over its claim concerning the aggravation of the dispute. Ukraine submits that Article 288 of the Convention grants the Arbitral Tribunal "jurisdiction over any dispute concerning the interpretation or application of this

2365 Revised Memorial, para. 283; Reply, para. 386.
2366 Rejoinder, para. 1002.

Convention," subject to the restrictions in Article 297 and to declarations made under Article 298.[2367]

1157. In the instant case, Ukraine submits that the Parties have a dispute over the scope and content of Articles 279 and 300 of the Convention, as well as over how to apply these Articles to the facts of the present case.[2368] Ukraine contends that "these provisions impose a duty not to aggravate a dispute while it is subject to compulsory dispute settlement" and that Russian Federation's actions have violated this duty.[2369] According to Ukraine, the Russian Federation disagrees on both the legal standard and its application to the facts. Ukraine asserts that this "conflict of legal views" on the interpretation and application of Articles 279 and 300 is thus "plainly within the Tribunal's Article 288 jurisdiction."[2370] Ukraine notes that a comparable situation arose between the Parties in *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation")* (hereinafter "*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*"), in which the arbitral tribunal determined that there existed a dispute over the interpretation and application of Article 279 of the Convention.[2371]

1158. Ukraine disputes the Russian Federation's contention that the aggravation claim is merely a "reshuffle" of Ukraine's main claims. Ukraine responds that non-aggravation is an independent obligation to not render the dispute harder to resolve.[2372]

2. Applicable Standards under Articles 279, 293, and 300 of UNCLOS

1159. Ukraine notes that Article 279 of the Convention requires States Parties to "settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations."[2373] Article 2, paragraph 3, of the UN Charter provides that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice,

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2367 Reply, para. 389.
2368 Reply, para. 390.
2369 Reply, para. 390 *citing South China Sea*, cit., n. 37, para. 1171 (**Annex UAL-11**).
2370 Reply, para. 390 *citing Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 30 August 1924, P.C.I.J. Series A, No. 2, p. 11 (**Annex UAL-83**).
2371 Hearing, 26 September 2024, 129:17-130:9 (Thouvenin) *citing* PCA Case No. 2019-28: *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation")* (hereinafter "*Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*"), Award on the Preliminary Objections of the Russian Federation, 27 June 2022, para. 184 (**Annex UAL-233**).
2372 Hearing, 3 October 2024, 151:2-24, 153:24-155:20 (Cheek).
2373 Revised Memorial, para. 284 *citing* UNCLOS, Art. 279.

are not endangered."[2374] Ukraine submits that a "widely recognized corollary of the duty to settle disputes peacefully is the duty not to aggravate or extend them."[2375] Ukraine refers to the Manila Declaration on the Peaceful Settlement of Disputes (hereinafter the "Manila Declaration"), which confirms that corollary.[2376] Ukraine is of the view that the express reference to the peaceful settlement of disputes "in accordance with" Article 2, paragraph 3, of the UN Charter "thus imposes a duty not to aggravate a dispute while it is subject to compulsory dispute settlement."[2377]

1160. Ukraine disputes the Russian Federation's claim that Article 279 of the Convention does not impose obligations beyond the obligation of the parties to a dispute to refrain from the use of force.[2378] Ukraine further contests the Russian Federation's claim that the *travaux préparatoires* to the Convention do not reference an obligation of non-aggravation, stating that the working paper which proposed the initial version of Article 279 of the Convention referenced under "relevant provisions of international instruments" the Friendly Relations Declaration provision that "States parties to an international dispute [...] shall refrain from any action which may aggravate the situation."[2379] Ukraine denies the Russian Federation's assertion that the Convention would require an express provision to establish a duty of non-aggravation, repeating that Article 279 includes such an obligation.[2380]

1161. As for Article 300 of the Convention, Ukraine states that it requires States Parties to "fulfil in good faith the obligations assumed under this Convention and [...] exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."[2381] Ukraine disputes the Russian Federation's view that the language of Article 300 is "hortatory," and submits that this provision "instead constitutes a specific articulation of the principle that treaty obligations 'must be performed by [parties] in good faith' as prescribed by

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2374 Reply, para. 391 *citing* Charter of the United Nations, San Francisco, 26 June 1945, Art. 2(3) (**Annex UAL-1**).

2375 Reply, para. 391 *citing South China Sea*, cit., n. 37, para. 1169 (**Annex UAL-11**).

2376 Reply, para. 391 *citing* UN General Assembly Resolution 37/10, UN Doc. A/37/590, Manila Declaration on the Peaceful Settlement of International Disputes (15 November 1982), Annex para. 8 (**Annex UA-851**); Hearing, 26 September 2024, 132:1-13 (Thouvenin).

2377 Reply, para. 391.

2378 Hearing, 26 September 2024, 136:11-16 (Thouvenin).

2379 Reply, para. 391, n. 873 *citing* Third United Nations Conference on the Law of the Sea, Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America: Working Paper on the Settlement of Law of the Sea Disputes, UN Doc. A/CONF.62/L.7, 27 August 1974, p. 86 (**Annex UA-854**). *See also* Hearing, 26 September 2024, 137:10-138:10 (Thouvenin); UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/25/2625, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970) (**Annex UA-853**) (hereinafter the "Friendly Relations Declaration").

2380 Hearing, 26 September 2024, 138:11-25 (Thouvenin).

2381 Revised Memorial, para. 284 *citing* UNCLOS, Art. 300.

Article 26 of the [VCLT]."[2382] Ukraine submits that "[a]ggravating ongoing disputes is not good faith performance of the obligation to resolve disputes peacefully."[2383]

1162. In addition, Ukraine recalls that the ICJ has held that States are under a specific obligation to settle disputes in good faith under Article 2, paragraph 2, of the UN Charter, which has "nearly identical" language to Article 300 of the Convention, and Ukraine contends that Article 300 thus imposes such an obligation on States Parties.[2384] While Ukraine agrees with the finding of ITLOS that a claim for breach of Article 300 "must first identify the obligations assumed under this Convention" which are alleged not to have been fulfilled in good faith, it argues that Article 279 constitutes such an obligation in the instant case.[2385]

1163. Further relying on *South China Sea*, Ukraine submits that Articles 279 and 300 of the Convention together "mean that a party to a dispute is prohibited from taking steps that—rather than attempt to settle the dispute—risk 'aggravating or extending the dispute [...] during the pendency of the settlement process.'"[2386] According to Ukraine, the *South China Sea* arbitral tribunal recognised that conduct which may aggravate or extend a dispute includes actions that "(i) 'render the alleged violation more serious'; (ii) 'frustrate the effectiveness of a potential decision'; (iii) 'render [...] implementation [of a potential tribunal decision] by the parties significantly more difficult'; or (iv) make the work of the tribunal 'significantly more onerous' or otherwise 'decrease the likelihood of the proceedings in fact leading to the resolution of the parties' dispute.'"[2387]

1164. Ukraine observes that, while the Russian Federation criticises this aspect of the *South China Sea* award and dismisses it as "isolated," "obscure," and "not clearly explained," it cites only one scholarly article in support of its view. Ukraine points out that the Russian Federation thus "ignores the vast weight of scholarship in support of the *South China Sea* decision,"[2388] which

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2382 Reply, para. 392.

2383 Reply, para. 392. *See also* Hearing, 26 September 2024, 133:3-9, 140:7-141:2 (Thouvenin) *citing Caratube v. Kazakhstan,* ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, para. 119 (**Annex UAL-229**).

2384 Reply, para. 393 *citing Aerial Incident of 10 August 1999 (Pakistan v. India)*, Judgment, I.C.J. Reports 2000, p. 12 at pp. 25-26, paras 53-55 (**Annex RUL-64**).

2385 Hearing, 26 September 2024, 139:20-140:6 (Thouvenin) *citing M/V "Norstar"*, cit., n. 1069, p. 67, para. 241 (**Annex UAL-138**).

2386 Revised Memorial, para. 284 *citing South China Sea*, cit., n. 37, paras 1169, 1172 (*referring to* UNCLOS Arts 279, 296, 300) (**Annex UAL-11**); *see also LaGrand (Germany v. United States of America)*, ICJ Judgment, I.C.J. Reports 2001, p. 466 at p. 503 (**Annex UAL-23**).

2387 Revised Memorial, para. 284 *citing South China Sea*, cit., n. 37, para. 1176 (**Annex UAL-11**); Reply, para. 394.

2388 Reply, para. 395 *citing e.g.*, P. Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Elgar International Law and Practice Series 2018), para. 1.051 (**Annex UAL-208**); Henrique Marcos & Eduardo Cavalcanti de Mello Filho, 'Peaceful

considered that the ruling "provides 'clarity' and is consistent with prior law, and that '[t]here is little doubt that parties are under the obligation not to aggravate a dispute in international law.'"[2389]

1165. Ukraine further rejects the Russian Federation's assertion that the *South China Sea* arbitral tribunal "relied on the ICJ case law developed within the framework of Article 41 of the ICJ Statute on provisional measures" and is thus inapplicable to the Convention.[2390] Ukraine counters that the *South China Sea* arbitral tribunal "first considered the 'principle universally accepted by international tribunals and likewise laid down in many conventions [...] [which does] not allow any step of any kind to be taken which might aggravate or extend the dispute.'"[2391] Ukraine further notes that the arbitral tribunal then found support for the duty of non-aggravation in Permanent Court of International Justice (hereinafter "PCIJ") and ICJ jurisprudence, treaty practice, UN Declarations, and the VCLT, and submits that "the same principles find expression in Article 279" of the Convention.[2392] Ukraine concludes that the *South China Sea* arbitral tribunal thus "located the non-aggravation duty within the text of the Convention itself" while recognising that the principle also exists as a matter of general international law.[2393]

1166. Ukraine also notes that "investment treaty tribunals have consistently recognised the existence of an independent duty not to aggravate an ongoing dispute."[2394]

1167. Ukraine adds that the Arbitral Tribunal is empowered to address the Russian Federation's aggravation of the dispute through Article 293, paragraph 1, of the Convention, which permits the Arbitral Tribunal to apply "other rules of international law not incompatible with this Convention."[2395] Ukraine asserts that "[t]he duty against aggravation thus constitutes one of the

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Purposes Reservations in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone', University of Pennsylvania Journal of International Law, 44(2) (2023), p. 436 n. 95 (**Annex UAL-209**).

2389 Reply, para. 395 *citing* Steven R. Ratner, 'The Aggravating Duty of Non-Aggravation', The European Journal of International Law, Vol. 31 no.4 (2021), 1317 (**Annex UAL-210**); Yoshifumi Tanaka, 'Lawfulness of Chinese Activities in the South China Sea', in *The South China Sea Arbitration: Toward an International Legal Order in the Oceans* (Oxford, Hart Publishing 2019), p. 158 (**Annex UAL-211**) [citations omitted].

2390 Reply, para. 396 *citing* Counter-Memorial, para. 600.

2391 Reply, para. 396 *citing South China Sea*, cit., n. 37, para. 1167 (**Annex UAL-11**) *citing The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)* (hereinafter "*Electricity Company of Sofia and Bulgaria*"), Order of 5 December 1939, PCIJ Series A/B, No. 79, p. 194 at p. 199 (**Annex RUL-130**).

2392 Reply, para. 396 *citing South China Sea*, cit., n. 37, paras 1167-72 (**Annex UAL-11**). *See also* Hearing, 26 September 2024, 130:12-20 (Thouvenin).

2393 Reply, para. 396 [emphasis omitted]. *See also* Hearing, 26 September 2024, 135:3-24 (Thouvenin).

2394 Hearing, 26 September 2024, 136:2-10 (Thouvenin).

2395 Reply, para. 397.

'other rules of international law not incompatible with this Convention' to which the Tribunal may have recourse under Article 293."[2396]

1168. Finally, in response to the Russian Federation's "clean hands" contention, Ukraine argues that the Russian Federation's invocation of the "clean hands" doctrine relying on "Ukraine's military defense against Russia's full-scale invasion" should be disregarded by the Arbitral Tribunal.[2397] Ukraine points out that "from a legal perspective, Russia's February 2022 invasion of Ukraine is not before this Tribunal."[2398] Ukraine also submits that the doctrine finds no support in recent case law, "even the case law between the same two Parties." [2399]

3. The Russian Federation's Alleged Aggravation

1169. In the view of Ukraine, not only has the Russian Federation "failed to engage meaningfully with Ukraine's efforts to settle this dispute," but its "continued, overt violations of UNCLOS since the filing of this arbitration have deepened and compounded the dispute between the Parties," thus violating Articles 279 and 300 of the Convention.[2400] Ukraine rejects the Russian Federation's assertion that Ukraine wishes its aggravation claim to operate as a "de facto injunction."[2401] According to Ukraine, the non-aggravation obligation implies "an obligation of restraint [...]" to preserve the Arbitral Tribunal's capacity to resolve the dispute.[2402]

1170. Ukraine refers to the construction of the Kerch Bridge as a "prime example" of the Russian Federation's aggravation of the dispute.[2403] According to Ukraine, the Russian Federation had not begun construction in 2015 when Ukraine sent it two diplomatic notes protesting against the construction of the bridge as a violation of Ukraine's rights under the Convention; and construction of the portion of the bridge over the navigable channel of the Kerch Strait had only begun in 2016 when Ukraine submitted its Notification and Statement of the Claim.[2404] Yet, the

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2396 Reply, para. 397. *See also* Hearing, 26 September 2024, 141:3-143:3 (Thouvenin) *citing M/V "Norstar"*, cit., n. 1069, p. 37-38 para. 137 (**Annex UAL-138**); *Duzgit Integrity*, cit., n. 2089, para. 207 (**Annex RUL-121**).

2397 Hearing, 26 September 2024, 143:11-17 (Thouvenin).

2398 Hearing, 26 September 2024, 144:1-2 (Thouvenin).

2399 Hearing, 26 September 2024, 144:4-6 (Thouvenin).

2400 Revised Memorial, para. 285.

2401 Hearing, 3 October 2024, 152:12-153:7 (Cheek).

2402 Hearing, 3 October 2024, 153:6-23 (Cheek).

2403 Revised Memorial, para. 286.

2404 Revised Memorial, para. 286 *citing Note Verbale* from Ukraine to the Russian Federation, No. 610/22-110-1132 (29 July 2015) (**Annex UA-233**); *Note Verbale* from Ukraine to the Russian Federation, No. 72/22-194/510/485 (23 February 2016) (**Annex UA-212-AM)**; Chronology of Bridge Construction, Official Information Site for the Construction of the Crimean Bridge (**Annex UA-198**); *Russia Installs Crimea Bridge Railway Arch in Unique Operation*, Russia Today (27 August 2017) (**Annex UA-676**).

Russian Federation neither stopped its work on the bridge nor modified its plan or timeline, despite Ukraine's protests, resulting in the bridge's current obstruction of the passage of larger vessels. Ukraine claims that the completed construction "convert[ed] Russia's threatened violations of Articles 38, 43, and 44 into actual violations of those articles."[2405]

1171. Ukraine asserts that, taken together, the Russian Federation's "construction activities have increased the gravity of the Parties' dispute" and "show disregard for the dispute resolution process established by the Convention."[2406]

1172. In addition, Ukraine notes that the Russian Federation both completed construction of a submarine gas pipeline and laid undersea cables across the Kerch Strait after receiving Ukraine's Notification and Statement of Claim.[2407] Ukraine argues that the Russian Federation's construction activities were conducted without any apparent environmental assessment or monitoring program, risking lasting harm to the marine environment.[2408]

1173. In relation to navigation in the Kerch Strait and the Sea of Azov, Ukraine argues that the Russian Federation has aggravated the dispute and compounded the harm to Ukraine through illegal and discriminatory vessel stops and delays and by restricting the transit of certain vessels.[2409] Ukraine further argues that the Russian Federation aggravated its interference with navigation in April 2021, when it announced a six-month closure to foreign military and governmental vessels of parts of the Black Sea, including the southern entrance to the Kerch Strait.[2410]

1174. In relation to UCH, Ukraine contends that the Russian Federation has aggravated the dispute by "continu[ing] to disturb archaeological artifacts," at least some of which were removed by unqualified amateurs.[2411]

1175. Ukraine rejects the Russian Federation's characterisation of the allegedly aggravating acts as a "legitimate exercise of sovereign power over its territory – either in its internal waters or in its territorial sea" and its assertion that "Ukraine's allegations in essence constitute claims of sovereignty over Crimea and, therefore, are not covered by the Convention."[2412] Ukraine emphasises that its claims "are premised on the fact that the Sea of Azov is not internal waters

2405 Revised Memorial, paras 286-87.
2406 Revised Memorial, para. 287.
2407 Revised Memorial, para. 286.
2408 Revised Memorial, para. 286.
2409 Revised Memorial, para. 288.
2410 Revised Memorial, para. 288.
2411 Revised Memorial, para. 289.
2412 Reply, para. 401 *citing* Counter-Memorial, paras 607-08.

and the Kerch Strait is an international strait subject to the regime of transit passage."[2413] Ukraine adds that the Russian Federation would be bound to comply with the provisions of the Convention identified by Ukraine even if they were internal waters, as the Russian Federation claims.[2414]

1176. Ukraine likewise rejects the Russian Federation's contentions that it was justified in building the Kerch Strait bridge, conducting vessel inspections, and suspending innocent passage of foreign military and government vessels in parts of the Black Sea.[2415] Ukraine dismisses the Russian Federation's arguments as "duplicative of Russia's defenses to its violations of the navigational provisions of the Convention," which Ukraine considers "have been amply rebutted."[2416] In the same vein, Ukraine considers that it has established that the Russian Federation has caused lasting harm to the marine environment and interfered with UCH in these waters.[2417]

1177. Lastly, Ukraine argues:

> Russia has further aggravated and extended the dispute before this Tribunal by claiming exclusive sovereignty over the Sea of Azov, whereas it previously claimed sovereignty over those waters jointly with Ukraine. The status of the Sea of Azov is a central issue in dispute between the Parties, and Russia should not attempt to alter the facts during the pendency of the dispute by unilaterally declaring itself exclusive sovereign over the entire Sea of Azov.[2418]

Ukraine considers that the Russian Federation aggravates the dispute by taking such unilateral action and then "informing the Tribunal that it no longer needs to resolve the dispute."[2419] Ukraine submits that the Arbitral Tribunal can ignore this argument, as the dispute focuses on conduct prior to the new claim regarding the status of the Sea of Azov. However, should the Arbitral Tribunal choose to address the Russian Federation's recent conduct, it should recognise that it has aggravated the dispute by making it less amenable to settlement.[2420]

C. THE RUSSIAN FEDERATION'S POSITION

1178. The Russian Federation submits that the Arbitral Tribunal does not have jurisdiction over Ukraine's claim regarding the aggravation of the dispute. It further submits that it has not aggravated the dispute, and that the "clean hands" doctrine precludes Ukraine from making the claim.

2413 Reply, para. 401.
2414 Reply, para. 401.
2415 Reply, para. 402 *citing* Counter-Memorial paras 609-13.
2416 Reply, para. 402.
2417 Reply, para. 402.
2418 Reply, para. 403 *citing* Award Concerning Preliminary Objections, paras 199, 211 [citations omitted].
2419 Reply, para. 403.
2420 Hearing, 26 September 2024, 128:5-22 (Thouvenin).

1. Jurisdiction

1179. The Russian Federation advances three arguments in support of its position that the Arbitral Tribunal has no jurisdiction over the claim relating to the aggravation of the dispute.

a. The Arbitral Tribunal's Jurisdiction over the Aggravation Claim as Related to Ukraine's Main Claims

1180. The Russian Federation contends that "for the reason that the Tribunal lacks jurisdiction on the main dispute, the Tribunal equally lacks jurisdiction on Ukraine's claims regarding Russia's alleged aggravation of the dispute" and thus "should not entertain these claims."[2421]

1181. The Russian Federation argues that even if the Convention contained a duty of non-aggravation, which it denies, the purpose of the duty would be "to disincentivise the parties from taking measures which would jeopardise execution of the future award."[2422] In *South China Sea*, the Russian Federation recalls, the arbitral tribunal noted that it must be ascertained whether an aggravation claim depends on an underlying dispute or itself constitutes a distinct dispute.[2423] The Russian Federation considers that where the aggravation claim is dependent on the underlying dispute, the duty is "inherently ancillary – and can be brought before a tribunal only together with justiciable claims."[2424] The Russian Federation asserts that Ukraine's aggravation claim is dependent on its other claims, as it is based on actions which are "likewise pleaded as alleged substantive violations of the Convention."[2425] In the view of the Russian Federation, as the Arbitral Tribunal has no jurisdiction over Ukraine's main claims, the ancillary aggravation claim too must fail.[2426]

1182. Responding to Ukraine, the Russian Federation contends that the existence of a dispute over the interpretation and application of Article 279 and 300 of the Convention does not avoid these jurisdictional limitations: Ukraine's aggravation claim remains ancillary to its other claims.[2427] Further, the Russian Federation submits that the aggravation claim is a new claim, and that the

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2421 Counter-Memorial, para. 598; Rejoinder, para. 1003.
2422 Rejoinder, para. 1005.
2423 Hearing, 29 September 2024, 30:9-24 (Ortega Lemus) *referring to South China Sea,* cit., n. 37, para. 1159 (**Annex UAL-11**).
2424 Rejoinder, paras 1005-06; Hearing, 29 September 2024, 30:18-24 (Ortega Lemus).
2425 Hearing, 29 September 2024, 30:9-31:5 (Ortega Lemus).
2426 Rejoinder, paras 1005-06. *See also* Hearing, 29 September 2024, 31:5-7 (Ortega Lemus); Hearing, 5 October 2024, 165:7-166:25 (Ortega Lemus).
2427 Hearing, 29 September 2024, 31:8-15 (Ortega Lemus).

lateness of the new claim is a matter separate from its ancillary nature, which the Arbitral Tribunal should assess in line with pronouncements of ITLOS in *M/V "Louisa"*.[2428]

b. The Arbitral Tribunal's Jurisdiction under Articles 279, 293, and 300 of UNCLOS

1183. The Russian Federation argues that "[t]here can be no dispute regarding an obligation which is manifestly absent from the Convention"[2429] that is within the jurisdiction of the Arbitral Tribunal, as neither Article 279 nor Article 300 of the Convention "provides sufficient basis to establish jurisdiction."[2430]

1184. The Russian Federation asserts that Article 279 of the Convention does not contain an obligation to refrain from aggravation.[2431] In the view of the Russian Federation, Article 2, paragraph 3, of the UN Charter only requires that the parties not resort to the use of force.[2432] It adds that Article 33, paragraph 1, of the UN Charter elaborates on the obligation to settle disputes by peaceful means and lists possible dispute settlement methods. As such, the Russian Federation points out, "prominent commentators" have noted that "[j]udicial settlement [...] constitutes an ideal way of complying with Article 2, para[graph] 3 [of the] [UN] Charter."[2433] The Russian Federation concludes that Article 279 of the Convention "only provides that disputes between the Contracting Parties must be settled through 'peaceful means' pursuant to" Article 2, paragraph 3, of the UN Charter and does not address behaviour beyond proscribing the use of force.[2434]

1185. According to the Russian Federation, nor do the *travaux préparatoires* to the Convention "indicate any reference to the alleged obligation of non-aggravation."[2435] The lack of such reference demonstrates that "the drafters did not even discuss the duty of non-aggravation and therefore did not intend Article 279 to include it."[2436] The Russian Federation notes that the *Virginia Commentary* on the Convention "states that this article was supposed to 'incorporate[]

2428 Hearing, 5 October 2024, 166:16-167:3 (Ortega Lemus).
2429 Rejoinder, para. 1007.
2430 Counter-Memorial, para. 599.
2431 Counter-Memorial, paras 603-04; Rejoinder, para. 1010.
2432 Rejoinder, para. 1011 *citing Obligation to Negotiate Access to the Pacific Ocean*, cit., n. 368, p. 560, para. 165 (**Annex RUL-147**). *See also* David D. Caron, Christian Tomuschat, 'Article 2, Para. 3 UN Charter' in Andreas Zimmermann et al. (eds), *The Statute of The International Court of Justice: A Commentary* (3rd ed., OUP, 2019), pp. 131-32, paras 27-28 (**Annex RUL-207**).
2433 Rejoinder, para. 1011 *citing* David D. Caron, Christian Tomuschat, 'Article 2, Para. 3 UN Charter' in Andreas Zimmermann et al. (eds), *The Statute of The International Court of Justice: A Commentary* (3rd ed., OUP, 2019), pp. 132-33, para. 31 (**Annex RUL-207**).
2434 Rejoinder, para. 1012.
2435 Counter-Memorial, para. 599.
2436 Rejoinder, para. 1013.

by reference the peaceful means indicated in Article 33, paragraph 1, of the Charter of the United Nations" and thus did not envisage an additional obligation.[2437]

1186. The Russian Federation argues that Ukraine's references to the *travaux préparatoires* in fact support the view that Article 279 of the Convention includes no "self-standing obligations" of non-aggravation.[2438] It recalls that Ukraine refers to a working paper which included in the proposed initial version of Article 279 of the Convention a quotation from the Friendly Relations Declaration calling on States to refrain from aggravating situations.[2439] The Russian Federation notes that the working paper "in fact included several alternative versions of Article 279," and that "Alternative B," invoked by Ukraine, was rejected.[2440] Thus, the Russian Federation considers that the drafting history of the Convention supports the view that Article 279 reaffirms the principle set out in Article 2, paragraph 3, of the UN Charter, but does not establish an additional obligation prohibiting the aggravation of a dispute while it is being peacefully resolved.[2441] Further, the Russian Federation maintains that treaty drafters include express provisions where they intend to prohibit the aggravation of disputes, and thus the absence of clear wording suggests no intent here.[2442]

1187. In the same vein, the Russian Federation asserts that Article 300 of the Convention does not include a duty of non-aggravation.[2443]

2437 Rejoinder, para. 1013 *citing* Volume V: *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist et al., eds 1989), p. 18, para. 279.2 (**Annex RUL-14-AM**).

2438 Rejoinder, para. 1013.

2439 Rejoinder, para. 1014 *citing* Reply, para. 391, n. 873.

2440 Rejoinder, para. 1014 *citing* Third United Nations Conference on the Law of the Sea, Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America: Working Paper on the Settlement of Law of the Sea Disputes, UN Doc. A/CONF.62/L.7, 27 August 1974, p. 86 (**Annex UA-854**).

2441 Rejoinder, para. 1014.

2442 Rejoinder, para. 1015 *citing*, *e.g.*, The Revised General Act for the Pacific Settlement of International Disputes, done in Lake Success, New York on 28 April 1949, United Nations Treaty Series, Vol. 71, Article 33(3), p. 101: ("The parties undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute") (**Annex RUL-208**); The Convention on Conciliation and Arbitration within the Conference on Security and Co-operation in Europe, done in Stockholm on 15 December 1992, United Nations Treaty Series, Vol. 1842, Article 16, p. 150 ("During the proceedings, the parties to the dispute shall refrain from any action which may aggravate the situation or further impede or prevent the settlement of the dispute") (**Annex RUL-209**); The European Convention for the Peaceful Settlement of Disputes, done in Strasbourg on 29 April 1957, United Nations Treaty Series, Vol. 320, Art. 31 (3), p. 243 ("The parties shall abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, shall abstain from any sort of action whatsoever which may aggravate or extend the dispute") (**Annex RUL-210**).

2443 Rejoinder, para. 1016.

1188. The Russian Federation submits that Article 300 of the Convention enshrines the principle of good faith, but does not create an independent obligation. The *Virginia Commentary* on the Convention explains that the Article's reference to good faith "reflects Article 2, paragraph 2 of the [UN] Charter and the fundamental rule *pacta sunt servanda*."[2444] According to the Russian Federation, the *Virginia Commentary* likewise considers the concept of the abuse of rights in Article 300 to concern "the unnecessary or arbitrary exercise of rights, jurisdiction and freedoms or the misuse of powers by a State."[2445] The Russian Federation asserts that "Article 300 is worded in hortatory terms," and its location in Part XVI ("General Obligations") of the Convention "attests to the general nature of its pronouncements."[2446] The Russian Federation argues that Ukraine's interpretation would be overly capacious, potentially bringing within Article 300 "any other abstract duties not expressly embodied in the Convention, which would go against its jurisdictional scope, as well as the basic legal certainty."[2447]

1189. The Russian Federation is of the view that Article 300 of the Convention "can only be invoked in conjunction with other Articles of the Convention," and an applicant must specify the obligation under the Convention that was not performed in good faith.[2448] However, as Article 279 does not contain a duty of non-aggravation, Ukraine may not invoke Article 300 on its own to establish the Arbitral Tribunal's jurisdiction.[2449]

1190. The Russian Federation contends that Article 288, paragraph 1, of the Convention grants the Arbitral Tribunal jurisdiction solely over disputes concerning the interpretation or application of the Convention, and that this jurisdiction cannot be extended to "issues extraneous to the Convention" through the application of Article 293, paragraph 1, of the Convention.[2450] Accordingly, the Russian Federation submits that, as the Convention does not govern non-aggravation, the Arbitral Tribunal does not have jurisdiction over a claim "regarding the violation of the general principle of non-aggravation, even if one existed outside the Convention."[2451]

2444 Counter-Memorial, para. 605 *citing* Vol. V: *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist et al., eds 1989), p. 152 (**Annex RUL-14-AM**).

2445 Counter-Memorial, para. 605 *citing* Vol. V: *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist et al., eds 1989), p. 152 (**Annex RUL-14-AM**).

2446 Counter-Memorial, para. 605.

2447 Counter-Memorial, para. 605.

2448 Rejoinder, para. 1017 *citing Chagos MPA*, cit., n. 897, p. 118, para. 303 (**Annexes RUL-85, UAL-18**); *M/V "Louisa"*, cit., n. 1241, p. 43, para. 137 (**Annex RUL-36**); *M/V 'Virginia G' Case (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 109, para. 398 (**Annex UAL-9**); *M/V "Norstar"*, cit., n. 1069, p. 67, para. 241 (**Annex UAL-138**).

2449 Rejoinder, para. 1017.

2450 Rejoinder, para. 1018 *citing Duzgit Integrity*, cit., n. 2089, para. 207 (**Annex RUL-121**).

2451 Rejoinder, para. 1018.

c. The Arbitral Tribunal's Jurisdiction over Ukraine's Amended Claim

1191. The Russian Federation submits that Ukraine inappropriately changed its aggravation claim between its Revised Memorial and Reply, contending in the latter that the Russian Federation has aggravated the dispute also by "claiming exclusive sovereignty over the Sea of Azov, whereas it previously claimed sovereignty over those waters jointly with Ukraine."[2452]

1192. The Russian Federation argues:

> [...] this is just another manifestation of Ukraine's continuing attempts to bring within the Arbitral Tribunal's purview issues over which it lacks jurisdiction. Since the Arbitral Tribunal is without jurisdiction to consider claims concerning the Sea of Azov, it can neither exercise jurisdiction over this issue as artificially transformed into a separate aggravation claim.[2453]

2. The Russian Federation's Position on the Alleged Aggravation

1193. The Russian Federation denies that it has aggravated the dispute, asserting that "[w]hat Ukraine labels as examples of aggravation of a dispute by Russia constitute Russia's legitimate exercise of sovereign powers over its territory."[2454] The Russian Federation also argues that Ukraine merely reframes its primary claims "under the guise of aggravation."[2455]

1194. According to the Russian Federation, while Ukraine argues that a "notification of dispute should operate as a de facto injunction," such a claim is not founded in the Convention.[2456] Ukraine's approach, in the Russian Federation's view, would eliminate the distinction between the duty of non-aggravation and obligations arising under specific provisional measures ordered by a tribunal, in contradiction with international practice.[2457] It argues that the approach would likewise relieve States seeking provisional measures of the obligation to fulfil the criteria necessary to obtain such measures, and that the content of the duty is overly vague.[2458]

2452 Rejoinder, para. 1027 *citing* Reply, paras 403, 415.
2453 Rejoinder, para. 1028.
2454 Counter-Memorial, para. 607 [citations omitted].
2455 Hearing, 29 September 2024, 29:17-30:5 (Ortega Lemus).
2456 Hearing, 29 September 2024, 34:12-20 (Ortega Lemus).
2457 Hearing, 5 October 2024, 167:25-168:14 (Ortega Lemus) *referring to CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, para. 61 (**Annex RUL-214**); *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I), para. 49 (**Annex RUL-212**); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, para. 62 (**Annex RUL-213**).
2458 Hearing, 5 October 2024, 168:15-169:1 (Ortega Lemus) *referring to* Steven R. Ratner, 'The Aggravating Duty of Non-Aggravation', The European Journal of International Law, Vol. 31 no.4 (2021), p. 1308 at p. 1308 (**Annex UAL-210**).

1195. The Russian Federation disputes Ukraine's claim that it failed to meaningfully engage with Ukraine's efforts to settle the dispute, stating that Ukraine leaves unmentioned the fact that its protests about the Kerch Strait bridge rested on the premise that Ukraine has sovereignty over Crimea and its territorial sea, which the Russian Federation could not accept.[2459] Accordingly, as "Ukraine's allegations in essence constitute claims of sovereignty over Crimea," they are not covered by the Convention.[2460] The Russian Federation also emphasises that it has lawfully exercised sovereignty over the land and water areas in question.[2461]

1196. The Russian Federation further recalls that the construction of the Kerch Strait bridge is "lawful, necessary, justified, and proportionate,"[2462] especially given the "economic and humanitarian necessity to connect the Crimean Peninsula to mainland Russia," in part created by "the hostile actions of Ukraine, including the adverse effects of Crimea's blockade."[2463] The Russian Federation thus finds Ukraine's allegations that the Russian Federation did not stop or adjust its work "particularly hypocritical."[2464]

1197. The Russian Federation submits that civilian infrastructure construction "tailored at catering to humanitarian needs does not aggravate the dispute" and on that basis distinguishes the instant case from *South China Sea*,[2465] where the arbitral tribunal found China to have aggravated the dispute by building an artificial island but there were no circumstances of "pressing humanitarian necessity."[2466]

1198. In addition, the Russian Federation asserts that it has demonstrated that vessel inspections in the Kerch Strait and the Sea of Azov were "legitimate, [and] justified by valid security concerns."[2467] The Russian Federation asserts that Ukraine has made repeated provocations before and after the commencement of these proceedings, including an incident in November 2018 "when Ukrainian warships attempted an unlawful transit through the Kerch Strait."[2468] According to the Russian Federation, Ukraine's logic would require the Russian Federation to refrain from inspecting any

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2459 Counter-Memorial, para. 608.
2460 Counter-Memorial, para. 608.
2461 Counter-Memorial, para. 608.
2462 Rejoinder, para. 1030 [citations omitted].
2463 Counter-Memorial, para. 609; Rejoinder, para. 1030.
2464 Counter-Memorial, para. 609.
2465 Rejoinder, paras 1030-31.
2466 Rejoinder, para. 1031 *citing South China Sea*, cit., n. 37, para. 1022 (**Annex UAL-11**).
2467 Counter-Memorial, para. 610; Rejoinder, para. 1035.
2468 Counter-Memorial, para. 610. The Russian Federation notes that this incident is the subject matter of separate arbitral proceedings between the Parties (PCA Case No. 2019-28: *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation*)).

and all vessels related to Ukraine until the dispute is finally resolved, a proposition that it considers "unreasonable and unfounded."[2469]

1199. Likewise, the Russian Federation challenges the suggestion that its suspension of innocent passage of foreign military and government vessels in the Russian territorial sea adjacent to Crimea aggravated the dispute.[2470] As with vessel inspections, the Russian Federation claims that it had "legitimate security concerns that arose from Ukraine's own conduct after commencing this arbitration," such as its threats to destroy the Kerch Bridge.[2471] The Russian Federation also questions what distinguishes Ukraine's aggravation claim from the main claim related to navigation, as both deal with the same conduct.[2472]

1200. As concerns the marine environment, the Russian Federation submits that its actions could not aggravate the dispute "when they did not cause any actual environmental harm."[2473] The Russian Federation argues that Ukraine "fails to substantiate" either that the Russian Federation has caused any lasting harm or that the Russian Federation failed to complete the required EIAs.[2474] In the view of the Russian Federation, the lack of harm again distinguishes this case from *South China Sea*, where the arbitral tribunal found "permanent, irreparable harm" to the maritime environment. The Russian Federation notes that [redacted]'s report amply demonstrates the lack of harm in the present case, as Ukraine's claim is "entirely based on hypotheticals and lacks substantiation."[2475]

1201. Similarly, according to the Russian Federation, Ukraine has not substantiated its accusations that the Russian Federation has damaged UCH.[2476] The removed aircraft had already been severely damaged by the marine environment, and excavation "contributed to their preservation."[2477] It also points out that military aircraft wrecks additionally "pose objective threats for the marine environment and navigation" due to pollution from hazardous substances and the risk of explosions. The Russian Federation submits that the removals were thus justified and that it is unclear how these measures could have aggravated the dispute.[2478]

2469 Rejoinder, para. 1035.
2470 Counter-Memorial, para. 611.
2471 Counter-Memorial, para. 611.
2472 Hearing, 29 September 2024, 36:10-16 (Ortega Lemus).
2473 Rejoinder, para. 1034.
2474 Counter-Memorial, para. 612; Rejoinder, paras 1032-33.
2475 Rejoinder, para. 1034 *citing South China Sea*, cit., n. 37, para. 1181(b) (**Annex UAL-11**).
2476 Counter-Memorial, para. 613.
2477 Rejoinder, para. 1036.
2478 Rejoinder, para. 1036.

3. The "Clean Hands" Doctrine

1202. The Russian Federation contends that any of its alleged acts of aggravation "fade compared to Ukraine's own conduct."[2479]

1203. Recalling the "clean hands" doctrine, the Russian Federation submits that "the Arbitral Tribunal should not encourage a party that has engaged in bad faith behaviour with respect to the very subject of the relief sought."[2480] The Russian Federation contends that Ukraine's actions "fit squarely into the type of behaviour" to which the doctrine applies.[2481]

1204. The Russian Federation emphasises that Ukraine has repeatedly called for and carried out attacks on the Kerch Bridge since the commencement of this Arbitration.[2482] Attacks occurred in October 2022, July 2023, and August 2023, with Ukraine claiming responsibility and making additional threats to destroy it.[2483] The Russian Federation submits that the danger from these attacks to the marine environment, navigation, and security "completely outweighs any potential detrimental effects, if any, resulting from the construction of the Bridge."[2484]

1205. The Russian Federation submits that Ukraine's "repeated bombing in June 2022 of the JDRs *Tavrida* and *Sivash*," the JDRs that Ukraine asks the Russian Federation to return in this Arbitration, is "[a]nother glaring example" of Ukraine's aggravating conduct.[2485] The Russian Federation claims that explosions on hydrocarbon extraction equipment "create serious risks to marine environment and navigation," which Ukraine "claims to defend" in these proceedings.[2486] Moreover, Ukraine's bombing actions threaten the remedy that it seeks—the return of the JDRs—and thus "fit squarely into the criteria of aggravation set out in the *South China Sea* Award."[2487]

1206. The Russian Federation further submits that Ukraine has had a "regular pattern of provocative behaviour" throughout these proceedings, as "illustrated by numerous military exercises conducted, *inter alia*, in the Black Sea and the Sea of Azov" and by building a new naval base in

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2479 Rejoinder, para. 1038. *See also* Counter-Memorial, para. 614.
2480 Rejoinder, para. 1039; *see* Chapter VI.C.3 above.
2481 Rejoinder, para. 1040.
2482 Counter-Memorial, para. 610; Rejoinder, para. 1041.
2483 Rejoinder, para. 1041 *referring to* Josh Pennington et al., *Ukraine Claims Responsibility for New Attack on Key Crimea Bridge*, CNN (17 July 2023) (**Annex RU-585**); Olena Harmash, *Ukraine's SBU Claims Responsibility for Last Year's Crimea Bridge Blast*, Reuters (26 July 2023) (**Annex RU-586**); *Ukraine's Defence Intelligence Chief On Recent Explosions Near Crimean Bridge: There Was Another Target*, Ukrainska Pravda (24 August 2023) (**Annex RU-587**).
2484 Rejoinder, para. 1041.
2485 Rejoinder, para. 1042; Counter-Memorial, para. 302.
2486 Rejoinder, para. 1042.
2487 Rejoinder, para. 1042 *citing* Reply, para. 394; Revised Memorial, para. 284; *South China Sea*, cit., n. 37, para. 1176 (**Annex UAL-11**).

Berdyansk.[2488] Notably, the Russian Federation points out, "one particularly provocative intrusion of Ukrainian military vessels into the territorial sea of the Russian Federation even escalated to an armed confrontation" and a further Annex VII arbitration.[2489]

1207. At no point, the Russian Federation points out, did Ukraine cease its blockade of Crimea which had triggered the Kerch Bridge's construction.[2490]

1208. Finally, the Russian Federation asserts that "Ukraine's factories have been the main polluters of the environment in the region," and that Ukraine has "overlooked all relevant procedures, and disregarded the environment when implementing its own infrastructural projects."[2491]

D. ANALYSIS OF THE ARBITRAL TRIBUNAL

1209. The Arbitral Tribunal will now consider Ukraine's claim concerning the aggravation of the dispute. The Arbitral Tribunal observes at the outset that the Parties disagree as to whether a duty not to aggravate a dispute exists at all under the Convention and, if so, what the nature of such duty is.[2492] They further disagree on whether the Russian Federation violated a duty not to aggravate a dispute in the present case.[2493]

1210. Given this disagreement, in order to determine whether it has jurisdiction over Ukraine's claim concerning the aggravation of the dispute, the Arbitral Tribunal must first examine the existence and nature of the putative duty not to aggravate a dispute under the Convention. Only then will it turn to the facts of this case and consider whether it has jurisdiction over Ukraine's claim relating to aggravation in this particular case. If the Arbitral Tribunal finds that it has jurisdiction over Ukraine's claims, it will then proceed to consider whether the Russian Federation violated the duty not to aggravate the dispute, as Ukraine contends.

1. Existence and Nature of a Duty of Non-Aggravation of a Dispute

a. Existence of a Duty of Non-Aggravation

1211. Regarding the question of the existence of a duty of non-aggravation of disputes, the Arbitral Tribunal notes the Parties' opposing views. While Ukraine claims such a duty exists under

2488 Rejoinder, para. 1043.
2489 Rejoinder, para. 1043.
2490 Rejoinder, para. 1044.
2491 Rejoinder, para. 1045.
2492 Reply, paras 391-97; Rejoinder, paras 1007-19.
2493 Reply, paras 398-403; Rejoinder, paras 1029-37.

Articles 279 and 300 of the Convention and as "a matter of general international law"[2494] or "a rule of customary international law,"[2495] the Russian Federation denies its existence under the Convention, let alone as an independent obligation.[2496]

1212. In this regard, the Arbitral Tribunal notes that international courts and tribunals have frequently ordered parties to abstain from aggravating disputes in the context of provisional measures.[2497] However, the Arbitral Tribunal considers that States' duty to abstain from such aggravation is not tied exclusively to provisional measures. In the view of the Arbitral Tribunal, international courts and tribunals have long held that there exists a "principle universally accepted [...] to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."[2498] While this principle has been articulated primarily in relation to provisional measures, it constitutes a principle of general applicability governing the conduct of parties in the course of the dispute settlement proceedings. The Arbitral Tribunal recalls in this regard that the arbitral tribunal in *South China Sea* expressly found there to exist:

> [...] a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process [...] independently of any order from a court or tribunal to refrain from aggravating or extending the dispute and [which] stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding. Indeed, when a court or tribunal issues provisional measures directing a party to refrain from actions that would aggravate or extend the dispute, it is not imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings.[2499]

1213. The Arbitral Tribunal considers that the parties to a dispute are under a duty not to further aggravate that dispute, as doing so would run counter to the very purpose of dispute resolution.

2494 Reply, para. 396.

2495 Hearing, 26 September 2024, 143:1 (Thouvenin); *see* Reply, paras 396-97; Hearing, 26 September 2024, 130:12-143:10 (Thouvenin).

2496 Rejoinder, paras 1007-19.

2497 *E.g.*, *"Enrica Lexie" (Italy v. India)*, Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182 at p. 204, para. 131, p. 205, para. 141; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 297; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146 at p. 166, para. 108(1)(e); *Arctic Sunrise*, Provisional Measures, Order of 22 November 2013, p. 230 at p. 251 para. 98; *see also LaGrand (Germany v. United States of America)*, ICJ Judgment, I.C.J. Reports 2001, p. 466 at p. 503, para. 103 (**Annex UAL-23**) with references to further examples from ICJ jurisprudence.

2498 *LaGrand (Germany v. United States of America)*, ICJ Judgment, I.C.J. Reports 2001, p. 466 at p. 503, para. 103 (**Annex UAL-23**) *citing Electricity Company of Sofia and Bulgaria*, cit., n. 2391, p. 199 (**Annex RUL-130**); *see also South China Sea*, cit., n. 37, paras 1167-69 (**Annex UAL-11**).

2499 *South China Sea*, cit., n. 37, para. 1169 (**Annex UAL-11**).

This principle is recognised not only in the jurisprudence cited above, but also in the practice of States, as reflected in documents such as the Manila Declaration[2500] and the Friendly Relations Declaration,[2501] as well as by the inclusion of provisions to that effect in bilateral and multilateral treaties providing for the settlement of disputes.[2502]

1214. In the Arbitral Tribunal's view, such a duty of non-aggravation also exists under the Convention, namely in Article 279 and 300, which impose a general obligation on States Parties to:

> [...] settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, [...] seek a solution by the means indicated in Article 33, paragraph 1, of the Charter

and to:

> [...] fulfil in good faith the obligations assumed under this Convention and [...] exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

1215. The Russian Federation raises the concern that the "duty of non-aggravation cannot operate so as to impose a sweeping automatic injunction on [a State's] activities in dispute."[2503] The Arbitral Tribunal does not consider that the duty of non-aggravation necessarily entails a complete suspension of the activities of the State concerned during the pendency of dispute-settlement proceedings. Nor does it find that recognizing this duty risks undermining the stringent requirements for the issuing of provisional measures. Provisional measures and the duty not to aggravate a dispute pursue different objectives. While provisional measures are meant to preserve a party's rights until the final decision on the merits, the duty not to aggravate an ongoing dispute is aimed more broadly at not escalating that dispute and preserving the possibility of peaceful dispute settlement.

1216. The Arbitral Tribunal therefore finds that there exists a duty under Articles 279 and 300 of the Convention to refrain from aggravating a dispute in the course of the dispute settlement

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2500 UN General Assembly Resolution 37/10, UN Doc. A/37/590, Manila Declaration on the Peaceful Settlement of International Disputes (15 November 1982), Annex, para. 8 (**Annex UA-851**) ("States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute [...].").

2501 UN General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (24 October 1970) (**Annex UA-853**).

2502 *See South China Sea*, cit., n. 37, para. 1170, nn. 1468-69 (**Annex UAL-11**) listing examples from treaty practice.

2503 Hearing, 5 October 2024, 167:19-22 (Ortega-Lemus).

proceedings. The Arbitral Tribunal will now turn to the question of the nature of this duty, and whether it is an independent duty or tied to the underlying or original dispute.

b. Nature of Duty of Non-Aggravation

1217. The Arbitral Tribunal recalls Ukraine's position that the obligation to refrain from aggravating a dispute is an independent obligation and that the Parties' disagreement on the law and facts with regard to its aggravation claim suffices to establish the Arbitral Tribunal's jurisdiction under Article 288, paragraph 1, of the Convention.[2504]

1218. In the view of the Arbitral Tribunal, the very logic of a claim of non-aggravation of a dispute requires the existence of an underlying dispute capable of being aggravated by a party's actions. Consequently, any claim of non-aggravation of a dispute is inherently tied to that underlying dispute, and in order to assess whether that dispute has been aggravated, jurisdiction over the original dispute must exist.

1219. The ancillary nature of Article 300 of the Convention has been confirmed by ITLOS.[2505] Ukraine recognises this, but argues that Article 279 of the Convention serves as the necessary positive and unconditional legal obligation assumed under the Convention which is not fulfilled in good faith.[2506] However, the Arbitral Tribunal considers that neither Article 279 of the Convention, nor the general obligation to refrain from aggravating a dispute, can itself serve as the sole and independent basis or "docking point" for Ukraine's claim. As the arbitral tribunal in *South China Sea* observed:

> Neither the Convention, nor international law, go so far as to impose a legal duty on a State to refrain from aggravating generally their relations with one another, however desirable it might be for States to do so. Actions must have a specific nexus with the rights and claims making up the parties' dispute in order to fall foul of the limits applicable to parties engaged in the conduct of dispute resolution proceedings.[2507]

1220. A party requesting a finding of a violation of the duty not to aggravate a dispute must therefore identify both the action it considers to have aggravated the dispute and the dispute it considers to be aggravated by said action and the substantive provisions of the Convention engaged in that dispute. The two questions are inseparably linked and the duty not to aggravate a dispute cannot serve as the basis for an independent claim that could be examined in a vacuum, separate from

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2504 Reply, paras 389-90; Hearing, 26 September 2024, 129:9-16 (Thouvenin).
2505 *M/V "Louisa"*, cit., n. 1241, p. 43, para. 137 (**Annex RUL-36**).
2506 Hearing, 26 September 2024, 139:20-140:6 (Thouvenin).
2507 *South China Sea*, cit., n. 37, para. 1174 (**Annex UAL-11**).

the underlying or original dispute. In order for the Arbitral Tribunal to be able to address claim of aggravation, therefore, it must have jurisdiction over the underlying dispute.

2. The Arbitral Tribunal's Jurisdiction over Ukraine's Aggravation Claim

1221. The Arbitral Tribunal now turns to the question of its jurisdiction over Ukraine's aggravation claim, taking into account its findings on jurisdiction regarding Ukraine's underlying claims.

1222. Ukraine refers to the Russian Federation's alleged aggravation of the dispute broadly, without differentiation between its various claims. Given the nature of the duty to refrain from aggravating a dispute as set out above, however, a claim of aggravation cannot be used as a vehicle to bring within the Arbitral Tribunal's jurisdiction a claim over which the Arbitral Tribunal otherwise lacks jurisdiction. Instead, each claim and dispute must be assessed separately.

1223. The actions of the Russian Federation complained of by Ukraine with regard to its claim of aggravation relate to the continued construction and completion of the Kerch Strait bridge and the other construction projects without conducting adequate environmental assessment and monitoring, the continued alleged interference with international shipping and the alleged continued disturbance of UCH.[2508] In its Reply, Ukraine also submitted that the Russian Federation aggravated and extended the dispute by claiming exclusive sovereignty over the Sea of Azov after having previously claimed sovereignty over these waters jointly with Ukraine.[2509]

1224. The Arbitral Tribunal does not find it necessary to address any claim relating to the sovereignty over the Sea of Azov, as Ukraine itself states that "Russia's change of position can, of course, simply be ignored by this Tribunal, as this dispute is focusing on conduct prior to Russia's new claim regarding the status of the Sea of Azov."[2510] For the remainder of Ukraine's claim of aggravation, the Arbitral Tribunal's jurisdiction depends on its jurisdiction over the underlying disputes.

1225. The Arbitral Tribunal has concluded above that it has jurisdiction over the Parties' disputes relating to navigation, protection of the marine environment and UCH.[2511] Accordingly, the Arbitral Tribunal finds that it has jurisdiction over Ukraine's claim relating to non-aggravation of the dispute.

2508 Reply, para. 398.
2509 Reply, para. 403.
2510 Hearing, 26 September 2024, 128:14-17 (Thouvenin).
2511 *See* paras 624, 632, 691, 870, 1103 above.

3. The Russian Federation's Objection Based on the "Clean Hands" Doctrine

1226. In its Rejoinder, the Russian Federation also objected to Ukraine's aggravation claim on the basis of the "clean hands" doctrine.[2512]

1227. Applying the same reasoning as in paragraphs 1098-1102 above, the Arbitral Tribunal rejects the Russian Federation's objection based on the "clean hands" doctrine, both to the admissibility of, and as a defence to, Ukraine's claim of aggravation of the dispute.

4. Alleged Aggravation of the Dispute

1228. Having found that it has jurisdiction over Ukraine's non-aggravation claims, the Arbitral Tribunal must now consider whether the respective actions of the Russian Federation complained of by Ukraine amount to an aggravation of the underlying disputes with which the Arbitral Tribunal is seized.

1229. The Arbitral Tribunal recalls that, in its Award Concerning Preliminary Objections, it:

> *Uph[eld]* 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.[2513]

1230. The Arbitral Tribunal is of the view that the standard for determining whether a State's actions amount to an aggravation of a dispute is a high one. Thus, the mere continuation of the conduct in dispute would not necessarily constitute the aggravation of the existing dispute. In this respect, the Arbitral Tribunal recalls the statement of the arbitral tribunal in *South China Sea*:

> […] the conduct of either party may aggravate a dispute where that party continues during the pendency of the proceedings with actions that are alleged to violate the rights of the other, in such a way as to render the alleged violation more serious. A party may also aggravate a dispute by taking actions that would frustrate the effectiveness of a potential decision, or render its implementation by the parties significantly more difficult. Finally, a party may aggravate a dispute by undermining the integrity of the dispute resolution proceedings themselves, including by rendering the work of a court or tribunal significantly more onerous or taking other actions that decrease the likelihood of the proceedings in fact leading to the resolution of the parties' dispute.[2514]

1231. The *South China Sea* arbitral tribunal identified three categories of conduct that can constitute aggravation of a dispute. The latter two relate to situations where a party's conduct undermines

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2512 Rejoinder, paras 1038-46.
2513 Award Concerning Preliminary Objections, para. 492(a).
2514 *South China Sea*, cit., n. 37, para. 1176 (**Annex UAL-11**).

the effectiveness and integrity of the dispute resolution process itself, setting a high bar for a finding of aggravation.

1232. If conduct falling within the first category of "rendering an alleged violation more serious by continued conduct" can be considered to be a case of aggravation of a dispute, it must reach a comparable level of gravity to those cases where the resolution of the dispute has been made more difficult by the conduct of a party.

1233. In the Arbitral Tribunal's view, none of the Russian Federation's conduct complained of by Ukraine rises to this level of seriousness. There is no evidence that any of that conduct resulted in additional serious or irreparable harm to the marine environment or UCH beyond that alleged in Ukraine's Revised Memorial. Even the completion of the Kerch Strait bridge would not necessarily have frustrated the effectiveness of the Arbitral Tribunal's decision because the Arbitral Tribunal would have been able to order the removal or modification of the bridge as a remedy.[2515] Equally, the Arbitral Tribunal does not find that any of the Russian Federation's conduct complained of by Ukraine made the Arbitral Tribunal's task significantly more difficult.

5. Conclusion

1234. In light of the foregoing, the Arbitral Tribunal finds that none of the Russian Federation's actions complained of by Ukraine amount to aggravation of the dispute with which the Arbitral Tribunal is seized, in the sense as described above. Accordingly, the Arbitral Tribunal concludes that the Russian Federation did not violate Articles 279 and 300 of the Convention.

VIII. ENTITLEMENT TO RELIEF

1235. The Arbitral Tribunal will now address Ukraine's requests for relief. Ukraine submits that it is entitled to complete relief with respect to the internationally wrongful acts of the Russian Federation.[2516] For its part, the Russian Federation asserts that Ukraine's requests must be dismissed in their entirety.[2517]

2515 *Cf.*, *Passage through the Great Belt*, cit., n. 740 paragraphs 31-34 of the Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 12 at p. 19, paras 31-34 (**Annex RUL-237**).

2516 Revised Memorial, para. 291; Reply, para. 405; Hearing, 3 October 2024, 156:9-19 (Cheek).

2517 Rejoinder, para. 1047.

A. UKRAINE'S POSITION

1236. Ukraine submits that the Russian Federation has breached its obligations under the Convention and harmed not only the rights and interests of Ukraine, but also those of all States Parties to the Convention.[2518] Accordingly, Ukraine asserts that it is entitled to complete relief for the injuries it has suffered, and continues to suffer, as a result of the Russian Federation's internationally wrongful acts.[2519] In particular, Ukraine asserts that: first, the Russian Federation must bring itself into compliance with the Convention by ceasing its violations and providing Ukraine with appropriate assurances and guarantees of non-repetition; second, under Articles 293 and 304 of the Convention, the Russian Federation must make reparations consistent with general principles of international law; and third, Ukraine is entitled to compensation for all damage caused by the Russian Federation's unlawful acts.[2520]

1. Declaratory Relief

1237. Ukraine claims that the Russian Federation has violated numerous obligations under the Convention and that it is entitled to a declaration of the Russian Federation's violations of the Convention.[2521]

1238. In the area of navigation, Ukraine submits that the Russian Federation has violated the right to transit passage under Articles 38, 43, and 44 of the Convention by constructing a low-clearance bridge across the Kerch Strait that permanently impedes the ability of large vessels to transit the Strait, by failing to share information as to the potentially significant threats to safe navigation caused by its hasty construction of the bridge, by imposing disproportionate delays on vessels passing through the Strait navigating to and from Ukrainian ports, and by closing the Strait to foreign governmental traffic for a period of over six months.[2522] Additionally, Ukraine submits that the Russian Federation has violated the right to free navigation under Articles 58 and 87 of the Convention, and Ukraine's sovereignty over its territorial sea under Article 2 of the Convention, by stopping and inspecting vessels in the Sea of Azov traveling to and from Ukrainian ports.[2523] Regarding those stoppages and inspections that involved Ukrainian-flagged vessels, Ukraine submits that the Russian Federation further violated Ukraine's exclusive

2518 Hearing, 3 October 2024, 157:1-16 (Cheek).
2519 Revised Memorial, para. 291; Reply, para. 405; Hearing, 3 October 2024, 156:9-19 (Cheek).
2520 Revised Memorial, para. 292; Reply, para. 405.
2521 Revised Memorial, para. 294.
2522 Revised Memorial, para. 295.
2523 Revised Memorial, para. 295.

jurisdiction under Articles 58 and 92 of the Convention.[2524] Finally, according to Ukraine, in seizing two Ukrainian-flagged JDRs and reflagging them to itself, the Russian Federation violated its obligations under Article 2, paragraph 3, and Article 91 of the Convention.[2525]

1239. Concerning the marine environment, Ukraine submits that the Russian Federation has disregarded its duties to protect the marine environment as well as its duties to cooperate with other States to prevent and mitigate potential and actual environmental harms.[2526] It has violated its obligations under Articles 123, 192, 194, 204, 205, and 206 to assess, monitor, and protect against potential adverse effects on the ecosystem of the Black Sea Basin caused by its construction activities in the Kerch Strait.[2527] Ukraine also maintains that the Russian Federation violated its duties under Articles 123, 192, 194, 198, and 199 to protect and preserve the environment by failing to notify potentially affected States of pollution events and to cooperate with those States to mitigate the harmful effects thereof.[2528]

1240. With regard to UCH, Ukraine submits that the Russian Federation violated Article 303, paragraph 1, of the Convention and risked, and in some instances caused, harm to the common heritage of all humankind.[2529]

1241. Finally, Ukraine submits that, in connection with all of the foregoing episodes, the Russian Federation further violated its duty under Articles 279 and 300 of the Convention not to aggravate the present dispute.[2530] According to Ukraine, after initiation of this Arbitration, the Russian Federation "continued to construct and finish the Kerch Strait bridge, began its harassment of vessels traveling to and from Ukraine's Sea of Azov ports, risked further harm to the marine environment, and continued to disturb and remove UCH."[2531] Further, Ukraine submits, it "unilaterally declar[ed] itself sovereign over the Sea of Azov, whereas it previously claimed sovereignty over those waters jointly with Ukraine."[2532]

1242. Ukraine adds that these violations of core areas of the Convention, harming not only Ukraine but also all UNCLOS States Parties, must be recognised and condemned.[2533]

2524 Revised Memorial, para. 295.
2525 Revised Memorial, para. 295.
2526 Revised Memorial, para. 296; Reply, para. 409.
2527 Revised Memorial, para. 296; Reply, para. 409.
2528 Revised Memorial, para. 296.
2529 Revised Memorial, para. 297; Reply, para. 411.
2530 Revised Memorial, para. 298; Reply, para. 412.
2531 Revised Memorial, para. 298.
2532 Reply, para. 412.
2533 Revised Memorial, para. 299.

2. Cessation and Assurances and Guarantees of Non-Repetition

1243. Ukraine claims that it is entitled to an order for the cessation of all aspects of the Russian Federation's wrongful conduct, as well as appropriate assurances and guarantees of non-repetition in accordance with Article 30 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility").[2534] According to Ukraine, these assurances and guarantees must include "specific measures [...] to avoid repetition" of the Russian Federation's unlawful actions across all three substantive areas of the Convention implicated by this Arbitration.[2535] Ukraine maintains that given the Russian Federation's past conduct, in particular with regard to the orders of other international tribunals, "there is every reason to suppose that Russia's violations will continue unless there is an order of cessation and appropriate assurances and guarantees of non-repetition."[2536] Referring to the treatment by the ICJ of assurances and guarantees in *LaGrand (Germany v. United States of America)* (hereinafter "*LaGrand*"), Ukraine adds, the Russian Federation has not given any assurances or indicated any substantial activities it would undertake that would bring itself into compliance with the Convention and make the ordering of assurances and guarantees of non-repetition unnecessary.[2537]

1244. Regarding the Russian Federation's arguments related to the alleged change in circumstances brought about by the referenda held in the Donetsk, Zaporizhzhia, and Kherson Oblasts, Ukraine submits that they do not affect the Arbitral Tribunal's ability to reward relief for violations that occurred before the alleged change in circumstances.[2538]

1245. Accordingly, Ukraine requests, first, that the Russian Federation be ordered to "immediately cease efforts to stop, delay, and otherwise impede free navigation and transit passage of Ukrainian and third-State vessels in and through the Kerch Strait and Sea of Azov."[2539] It contends that the Russian Federation's "actions have harmed Ukrainian and foreign shipping to and from Ukraine's Sea of Azov ports" and that "the Russian Federation should, accordingly, provide appropriate assurances and guarantees of non-repetition of its conduct."[2540] In the view of Ukraine, these assurances and guarantees "should include specific commitments that Russia will not hamper or

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2534 Revised Memorial, para. 300.
2535 Revised Memorial, para. 300 *citing* ILC Articles on State Responsibility, 2001, Art. 30, para. 13 (**Annex UAL-24**).
2536 Hearing, 26 September 2024, 146:1-148:6 (Cheek).
2537 Hearing, 3 October 2024, 159:14-22 (Cheek). *See LaGrand (Germany v. United States of America)*, ICJ Judgment, I.C.J. Reports 2001, p. 466 at p. 466, para. 124.
2538 Hearing, 3 October 2024, 160:24-162:1 (Cheek). *See* section III.D above.
2539 Revised Memorial, para. 301.
2540 Revised Memorial, para. 301; Reply, paras 407-08.

impede transit passage in the Kerch Strait, including for foreign government vessels, nor interfere with free navigation of vessels traveling to or from Ukraine's Sea of Azov ports".[2541]

1246. Second, Ukraine requests that the Russian Federation be made to provide assurances and guarantees of non-repetition with regard to protection of the marine environment, including assurances that it will take all appropriate steps to protect the marine environment, such as by conducting all appropriate environmental assessments and monitoring in accordance with accepted, internationally recognised scientific standards.[2542] Further, Ukraine claims, the Russian Federation must also provide appropriate assurances and guarantees of non-repetition with regard to its failure to communicate to Ukraine, other potentially affected States, and competent international organisations, appropriate assessments of the potential effects on the marine environment of its construction activities in the Kerch Strait, as well as its failure to report on the results of any subsequent environmental monitoring.[2543]

1247. Finally, Ukraine requests that the Russian Federation be ordered to cease excavating UCH sites until it can guarantee that any further excavation will comply with internationally accepted archaeological standards, and provide appropriate assurances and guarantees of non-repetition in this regard.[2544]

1248. Ukraine adds that "several of the specific measures necessary to effect reparation [...] also are necessary to ensure cessation of Russia's violations of the Convention."[2545]

3. Reparation

1249. Ukraine claims that the Russian Federation is required to make reparation to undo the effects of its violations of the Convention.[2546] This reparation, Ukraine submits, "must, as far as possible, wipe out all the consequences of the illegal act."[2547] It adds that the Russian Federation must make full reparation "in adequate form."[2548] Ukraine recalls the ICJ's finding that "what constitutes 'reparation in an adequate form' clearly varies depending upon the concrete

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2541 Revised Memorial, para. 301.
2542 Revised Memorial, para. 302; Reply, para. 409.
2543 Revised Memorial, para. 302.
2544 Revised Memorial, para. 303; Reply, para. 411.
2545 Revised Memorial, para. 304.
2546 Revised Memorial, para. 305.
2547 Revised Memorial, para. 305 *citing M/V "Saiga"*, cit. n. 1167, p. 65, para. 170 (**Annex UAL-28**).
2548 Revised Memorial, para. 306 *citing* ILC Articles on State Responsibility, 2001, Art. 31, para. 1 (**Annex UAL-24**); *Case Concerning the Factory at Chorzów*, Claim for Indemnity (Jurisdiction), PCIJ Series A, No. 9, p. 2 at p. 21 (**Annex UAL-140**).

circumstances surrounding each case."[2549] In the view of Ukraine, the circumstances surrounding this case demand that adequate reparation include specific actions necessary to wipe out the consequences of the Russian Federation's wrongful acts and, where that is not possible, compensation.[2550]

1250. Concerning the violations of the Russian Federation's obligations related to freedom of navigation and transit passage, Ukraine submits that the Russian Federation must dismantle the central span of the Kerch Strait bridge to restore passage for merchant and other vessels that historically transited the Strait, and that foreseeably may seek to transit the Strait in the future.[2551] Ukraine rejects the Russian Federation's claim that its own interests must also be taken into account, and that dismantling the bridge would place a disproportionate burden on the Russian Federation.[2552] According to Ukraine, the Russian Federation has an obligation to make restitution unless it is materially impossible to do so, which is not the case and has also not been argued by the Russian Federation.[2553] Further, Ukraine maintains that, as the benefit to all States Parties to UNCLOS of being able to once again transit the Kerch Strait without impediment outweighs any burden on the Russian Federation, dismantling the bridge is not out of all proportion to the benefit deriving from restitution instead of compensation.[2554] Further, Ukraine claims that the obligation to dismantle the bridge also arises from the Russian Federation's obligation of cessation, which in any case does not involve a balancing of interests test.[2555] In support of its position that an unlawfully built structure must be dismantled, Ukraine refers to the ICJ's conclusions in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that Israel had an obligation to dismantle the wall.[2556]

1251. With respect to the violations of Ukraine's rights as a flag State, Ukraine asserts that the Russian Federation must release the two Ukrainian-flagged JDRs it unlawfully seized and re-flagged so as to re-establish Ukraine's exclusive jurisdiction over those vessels, and must withdraw its claim to have re-flagged those vessels under the Russian flag.[2557]

2549 Revised Memorial, para. 306 *citing Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12 at p. 59, para. 119 (**Annex UAL-143**).
2550 Revised Memorial, para. 306.
2551 Hearing, 26 September 2024, 151:3-20 (Cheek); 3 October 2024, 176:19-22 (Cheek).
2552 Hearing, 3 October 2024, 176:22-177:12 (Cheek).
2553 Hearing, 3 October 2024, 177:9-12 (Cheek).
2554 Hearing, 3 October 2024, 177:13-179:6 (Cheek) *referring to* ILC Articles on State Responsibility, 2001, Art. 35, para. 11 (**Annex UAL-33**).
2555 Hearing, 3 October 2024, 177:3-6 (Cheek).
2556 Hearing, 26 September 2024, 151:21-152:12 (Cheek); 3 October 2024, 182:17-183:25 (Cheek).
2557 Revised Memorial, para. 308; Reply, para. 407.

1252. Regarding the marine environment, Ukraine submits that the Russian Federation must conduct such further monitoring and studies as are necessary to determine the measures most capable of identifying and repairing any remaining environmental harm from the construction phase of the projects in the Kerch Strait, and of mitigating the anticipated continuing impacts associated with operation of those projects.[2558] In the view of Ukraine, at a minimum, the Russian Federation must undertake the environmental monitoring and analysis outlined by Ukraine and its expert Mr. Aronson, and implement suitable mitigation measures based on the results of that monitoring and analysis as described in Chapter Six, sections II.A.2 and II.A.3 of the Revised Memorial.[2559] Further, Ukraine submits that the Russian Federation must invite international participation in such monitoring and studies, including by representatives of other littoral States of the Black Sea Basin and relevant regional organisations, such as the Commission on the Protection of the Black Sea Against Pollution, and make the results thereof available to the general public.[2560] Ukraine continues that, taking account of the outcome of the monitoring and studies, the Russian Federation must implement reparatory and mitigation measures designed to restore the marine environment of the Black Sea Basin as closely as possible to its condition prior to the construction projects, and to manage as comprehensively as possible the continuing risks of environmental harm associated with the operation of the projects.[2561] Considering the urgency of the threat to the sensitive environment of the Black Sea Basin, Ukraine submits, the Russian Federation must be required to act expeditiously, including by publishing a comprehensive report on the reparatory and mitigation measures it will undertake within 15 months of the issuance of the award in this Arbitration, and by commencing implementation of the measures in question no later than three months thereafter.[2562]

1253. To accommodate this timeframe, Ukraine requests that Article 22 of the Rules of Procedure be amended to increase from six months to 24 months the period in which the Parties may submit requests for interpretation of the final award or concerning the manner of its implementation. According to Ukraine, any shorter timeframe would fail to give effect to the Arbitral Tribunal's power to hear interpretation and implementation disputes, as provided under Article 12, paragraph 1, of Annex VII to the Convention.[2563]

2558 Revised Memorial, para. 309; Reply, para. 410.
2559 Revised Memorial, para. 309.
2560 Revised Memorial, para. 309.
2561 Revised Memorial, para. 310.
2562 Revised Memorial, para. 311.
2563 Revised Memorial, para. 311.

1254. Ukraine concludes by stating that, at this stage in the Arbitration, and due to "the Russian Federation's lack of transparency, as well as Ukraine's present inability to reliably access the areas of sea in which Russia's violations have occurred," Ukraine is unable to determine whether additional reparation may be required, which is why a number of the measures requested are intended to assist the Arbitral Tribunal in determining whether and how the Russian Federation can undo the consequences of its wrongful acts.[2564] Similarly, Ukraine adds, it is currently unable to determine the amount of compensation it is owed by the Russian Federation, and reserves the right to seek adequate compensation at a later stage.[2565] Finally, Ukraine submits that certain of the actions set out above "involve Russia remediating harm in areas subject to Ukrainian sovereignty but presently under Russian jurisdiction and control. In the event that Ukrainian jurisdiction and control is restored before these actions are completed, Russia should be ordered to cooperate with Ukraine to ensure completion of its reparation, and to bear all associated costs."[2566]

1255. Concerning relief for the Russian Federation's aggravation of the dispute, Ukraine claims that it is entitled to "full reparation, which must wipe out all consequences of Russia's unlawful conduct, including not only Russia's initial violations of UNCLOS, but also the further steps Russia took after this dispute was launched, in contravention of Articles 279 and 300 [of the Convention]."[2567]

1256. Ukraine requests that the Arbitral Tribunal award Ukraine its costs for these proceedings, pursuant to Article 25 of the Rules of Procedure.[2568]

B. THE RUSSIAN FEDERATION'S POSITION

1257. The Russian Federation submits that the catalogue of remedies Ukraine requests the Arbitral Tribunal to afford must be rejected in its entirety, because the Russian Federation did not breach any of its duties under the Convention and therefore did not incur any international responsibility.[2569] Additionally, according to the Russian Federation, in several instances, the relief sought by Ukraine would require the Arbitral Tribunal to address questions of sovereignty, contrary to the Award Concerning Preliminary Objections.[2570]

2564 Revised Memorial, para. 312.
2565 Revised Memorial, para. 312.
2566 Revised Memorial, para. 312.
2567 Reply, para. 412.
2568 Ukraine's Final Submissions, para. 6
2569 Rejoinder, para. 1047.
2570 Rejoinder, para. 1047.

1258. The Russian Federation recalls a number of principles of the law of State responsibility.[2571] The Russian Federation asserts that Ukraine's request for reparation is excessive and inconsistent with these basic tenets of the law of State responsibility.[2572]

1259. Concerning the request that the Russian Federation should give assurances of non-repetition "across all three substantive areas of the Convention implicated in this case," the Russian Federation argues that Ukraine fails to explain why the circumstances of the present case would warrant such assurances.[2573] The Russian Federation emphasises that it is part of the *jurisprudence constant* of international courts and tribunals that a State's good faith must be presumed and its bad faith must be proven,[2574] and Ukraine has failed to demonstrate any reasons why the Russian Federation's good faith should not be presumed.[2575] Concerning Ukraine's references to the Russian Federation's alleged "track record" of not following international tribunals' orders, the Russian Federation counters that it was found to be in compliance with most of the provisional measures ordered by the ICJ referred to by Ukraine, and it also complied with measures ordered in a separate arbitration between the Parties.[2576] The Russian Federation adds that Ukraine's comparison with the *LaGrand* case is mismatched in fact and law.[2577]

1260. Concerning Ukraine's request that the Arbitral Tribunal order the Russian Federation to dismantle the central span of the Kerch Strait bridge, the Russian Federation submits that ordering such relief would put a disproportionate burden on the Russian Federation.[2578] In this regard, the Russian Federation refers to the finding of the ICJ that "where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction."[2579] According to the Russian Federation, this customary principle applies, *inter alia*, to infrastructure projects, as evidenced by Denmark's arguments in *Passage through the Great Belt* that claims regarding the hindrance of passage of Finnish drill ships and oil rigs by the planned Danish bridge "could not be dealt with by an order for restitution,

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2571 These principles include that reparation must wipe out all the consequences of the illegal act as far as possible and in adequate form; that reparation is only owed to the extent that an injury is caused by the internationally wrongful act; that restitution may be awarded if it is not materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation; and that compensation may only be awarded in respect of financially assessable damage insofar as it is established. Rejoinder, para. 1048 *citing Factory at Chorzów (Merits)*, cit. n. 1191, p. 47 (**Annexes RUL-96, UAL-27**); ILC Articles on State Responsibility, 2001, Arts. 31, 35-36 (**Annex UAL-33**).

2572 Rejoinder, para. 1049.

2573 Rejoinder, para. 1051.

2574 Rejoinder, para. 1051.

2575 Rejoinder, para. 1053.

2576 Hearing, 29 September 2024, 39:8-40:16 (Ortega Lemus); 5 October 2024, 174:14-176:6 (Ortega Lemus).

2577 Hearing, 5 October 2024, 173:18-174:13 (Ortega Lemus).

2578 Hearing, 29 September 2024, 41:10-42:6 (Ortega Lemus); 5 October 2024, 178:12-16 (Ortega Lemus).

2579 Rejoinder, para. 1055 *citing Pulp Mills*, cit., n. 1447, p. 103, para. 273 (**Annex UAL-152**).

but could only be satisfied by damages inasmuch as restitution in kind would be excessively onerous [...].”[2580] While the case never reached the merits phase, the Russian Federation argues that it is notable that as part of the settlement, Finland agreed to compensation of approximately USD 15 million from Denmark and withdrew its case from the ICJ and gave up any claims concerning the modification of the bridge.[2581] In the present case, the Russian Federation claims, the dismantling of the Kerch Strait bridge would bring with it enormous environmental, humanitarian, and financial burdens.[2582] Moreover, the Russian Federation reiterates that it does not hamper freedom of navigation in the Kerch Strait, as the “discrete number of vessels that are allegedly prevented from traversing the Strait have scarcely used it anyway” and the bridge “had no effect on the trends noticed in trade volumes.”[2583] The Russian Federation contends that Ukraine has also not shown any economic damage sustained as a result of the Kerch Strait bridge’s construction, let alone any circumstances that would necessitate rebuilding the bridge.[2584] Concerning Ukraine’s reference to the ICJ’s findings in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Russian Federation argues that Ukraine’s reading of this case is beside the point, as the wall was built on occupied territory and, in contrast to the bridge, was the source of humanitarian concerns, not a response to such concerns.[2585] In response to Ukraine’s claim that the alleged obligation of cessation obliged the Russian Federation to dismantle the bridge, the Russian Federation states that this is a *non sequitur* as the ILC Articles on State Responsibility recognise that “a literal return to the status quo ante [can be] excluded or can ... be achieved in an approximate way.”[2586] In other words, the Russian Federation notes, “cessation does not entail a particular course of action by a State.”[2587]

1261. Regarding Ukraine’s request for the implementation of reparatory and mitigation measures to protect the marine environment of the Black Sea Basin, the Russian Federation submits that this relief is not adequately justified. According to the Russian Federation, if it comes to alleged breaches of procedural obligations, the remedy of restitution is disproportionate in circumstances where following the correct procedures would have led to the same result.[2588] In the case at hand, the Russian Federation states that Ukraine bases its claims on hypotheticals and has failed to show

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2580 Rejoinder, para. 1056 *citing Passage through the Great Belt*, cit., n. 741, Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 12 at p. 19, para. 31 (**Annex RUL-237**).
2581 Rejoinder, para. 1056.
2582 Hearing, 5 October 2024, 178:17-180:24 (Ortega Lemus).
2583 Rejoinder, paras 1060.
2584 Rejoinder, para. 1062.
2585 Hearing, 5 October 2024, 181:1-20 (Ortega Lemus).
2586 Hearing, 5 October 2024, 173:2-6 (Ortega Lemus) *citing* ILC Articles on State Responsibility, 2001, Art. 30, para. 7 (**Annexes UAL-24**, **UAL-33**).
2587 Hearing, 5 October 2024, 173:8-10 (Ortega Lemus).
2588 Rejoinder, paras 1063-64 *referring to Pulp Mills*, cit., n. 1447, p. 104, para. 275 (**Annex UAL-152**).

any environmental harm to the Black Sea and the Sea of Azov as a result of the construction projects.[2589] Further, the Russian Federation argues that international law does not specify the scope and content of an EIA, which is instead for each State to determine in its domestic legislation or in the authorisation process for the project.[2590] Should the Arbitral Tribunal find that the Russian Federation breached its environmental obligations under the Convention, any relief granted would have to take these principles into account and Ukraine cannot impose the "speculative and one-sided views of a single scientific expert on the Russian Federation."[2591] Equally, the Russian Federation submits that it would not be appropriate to set a specific time limit for it to comply with any potential relief.[2592] According to the Russian Federation, Ukraine provides no justification for its proposed time periods and setting such a specific time limit would not be in line with the practice of other courts and tribunals.[2593] Consequently, the Russian Federation objects to the request for an amendment of Article 22 of the Rules of Procedure made by Ukraine.[2594]

1262. As regards Ukraine's requests relating to the alleged aggravation of the dispute, the Russian Federation submits that these are "extremely vague and unsubstantiated, and the Russian Federation cannot comment on [them] properly."[2595] To the extent that Ukraine is addressing issues relating to territorial sovereignty, the Russian Federation asserts that the request must be rejected because it lies beyond the jurisdiction of the Arbitral Tribunal.[2596] The Russian Federation adds that the same holds true concerning Ukraine's submissions on actions involving "Russia remediating harm in areas subject to Ukrainian sovereignty but presently under Russian jurisdiction and control."[2597]

1263. Regarding Ukraine's reservation of its right to request compensation at a later stage of the proceedings, the Russian Federation asserts that "[i]t will be for Ukraine to demonstrate, should it ever decide to demand compensation, that any alleged injury is the result of an internationally wrongful act by the Russian Federation, within the limits of what the Arbitral Tribunal may decide

2589 Rejoinder, para. 1065.
2590 Rejoinder, para. 1066.
2591 Rejoinder, para. 1067.
2592 Rejoinder, para. 1068.
2593 Rejoinder, para. 1068.
2594 Rejoinder, para. 1069.
2595 Rejoinder, para. 1070.
2596 Rejoinder, para. 1070.
2597 Rejoinder, para. 1072.

in its award on the merits."[2598] The Russian Federation notes that Ukraine has failed to show any damage to itself but reserves all its rights in that respect.[2599]

1264. Finally, the Russian Federation requests that the Arbitral Tribunal award the Russian Federation its costs for these proceedings, pursuant to Article 25 of the Rules of Procedure.[2600]

C. ANALYSIS OF THE ARBITRAL TRIBUNAL

1265. In its final submissions, Ukraine requests declaratory relief, cessation and assurances and guarantees of non-repetition, reparation, and an amendment to Article 22 of the Rules of Procedure.[2601] The Russian Federation, in its final submissions, requests the Arbitral Tribunal to dismiss Ukraine's requests in their entirety.[2602] Both Parties request that the Arbitral Tribunal award them their costs for these proceedings.[2603] The Arbitral Tribunal considers these requests *seriatim*.

1. Declaration

1266. Ukraine requests a declaration of the Russian Federation's breaches of the Convention.[2604] The Russian Federation submits that no declaration is necessary where no violation has occurred.[2605]

1267. Where the Arbitral Tribunal has found in the above Chapters that certain conduct of the Russian Federation was incompatible with its duties under the Convention, the Arbitral Tribunal considers that this Award is itself sufficient to constitute appropriate declaratory relief.

1268. In this regard, the Arbitral Tribunal found in Chapter V that (i) the EIAs conducted by the Russian Federation for the Kerch Strait bridge, the power cables and the gas pipelines were inconsistent with the requirements under Article 206 of the Convention; (ii) the Russian Federation did not meet the requirements under Articles 205 and 206 to publish reports of the results of the EIAs or provide such reports to the competent international organizations; and (iii) by conducting the EIAs inconsistent with requirements under Article 206 and failing to communicate reports of their

2598 Rejoinder, para. 1071.
2599 Rejoinder, para. 1071.
2600 Russian Federation's Final Submissions, para. 2.
2601 *See* above, para. 108.
2602 *See* para. 111 above.
2603 *See* paras 108, 111 above.
2604 Revised Memorial, paras 294, 299; Hearing, 26 September 2024, 145:20-22 (Cheek).
2605 Hearing, 29 September 2024, 28:16-20 (Ortega Lemus).

results in the manner provided in Article 205, the Russian Federation did not fulfil its due diligence obligations under Article 123, 192 and 194 of the Convention.

2. Cessation and Assurances and Guarantees of Non-Repetition

1269. Ukraine seeks orders both of cessation and of assurances and guarantees of non-repetition.[2606] The Russian Federation submits that there is no reason to order cessation as it did not violate the Convention and adds that there are no "special circumstances that would warrant assurances of non-repetition."[2607]

1270. The Arbitral Tribunal considers that orders for cessation and assurances and guarantees of non-repetition are extraordinary measures.[2608] As the ICJ stated in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, "there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct."[2609] Having provided declaratory relief, the Arbitral Tribunal does not find it necessary to order cessation nor assurances and guarantees of non-repetition.

1271. The Arbitral Tribunal underlines that its decision not to order such remedy has no impact on States' obligations under international law to cease wrongful conduct and to give assurances of non-repetition of such activity.[2610] In this regard, the Arbitral Tribunal draws the attention of the Parties to their continuing obligations: (i) to monitor any activities which may pollute the marine environment and to communicate the results of such monitoring under Articles 204 and 205 of the Convention;[2611] and (ii) to cooperate for the protection and preservation of the marine environment under Articles 123, 192, and 194 of the Convention.[2612] In particular, the Arbitral Tribunal found above that both Parties fell short of fulfilling their respective duty to cooperate for the protection and preservation of the marine environment in the Black Sea, the Sea of Azov and the Kerch Strait. Accordingly, it reiterates its findings that the Parties remain under continuing duties to cooperate even in times of tension and hostility.

2606 Hearing, 26 September 2024, 145:17-18 (Cheek).
2607 Hearing, 29 September 2024, 38:16-18, 40:13-16 (Ortega Lemus).
2608 *See, e.g.*, ILC Articles on State Responsibility, 2001, Art. 30, para. 13 (**Annex UAL-24**). *See also Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, I.C.J. Reports 2009, p. 213 at p. 267 para. 150 (**Annex RUL-231**).
2609 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, I.C.J. Reports 2009, p. 213 at p. 267 para. 150 (**Annex RUL-231**).
2610 *See, e.g.*, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J Reports 2005, p. 201 at p. 256 para. 257 (**Annex UAL-32**); ILC Articles on State Responsibility, 2001, Art. 30 (**Annex UAL-24**).
2611 *See* paras 915-925 above.
2612 *See* paras 944-954 above.

3. Reparation

1272. Ukraine asks the Arbitral Tribunal to order the Russian Federation to provide full reparation to Ukraine for its violations of the Convention.[2613]

1273. As noted in *Factory at Chorzów*, "reparation must, as far as possible, wipe out all the consequences of the illegal act."[2614] Where there is no illegal act, there are no consequences to wipe out, and thus no reparation due. The Arbitral Tribunal recalls that it has rejected Ukraine's claims relating to (i) navigation arising under Articles 2, 38, 43, 44, 58, 87, 92 of the Convention; (ii) UCH under Article 303 of the Convention; and (iii) aggravation of the dispute under Articles 279 and 300 of the Convention.[2615] Accordingly, the Arbitral Tribunal declines Ukraine's requests for reparation arising under these claims.

1274. The Arbitral Tribunal has considered Ukraine's request for reparation arising from its claims related to (i) the JDRs under Article 2, paragraph 3, and Article 91 of the Convention and (ii) the marine environment under Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention.

1275. Regarding the JDRs, the Arbitral Tribunal determined above at paragraphs 703-705 that it does not have jurisdiction over Ukraine's claims relating to their seizure and requested release. As a consequence, the Arbitral Tribunal does not grant Ukraine's request that the Arbitral Tribunal order the Russian Federation to release the JDRs to Ukraine.[2616] Furthermore, the Arbitral Tribunal has found at paragraphs 720-725 above that the Russian Federation may grant its nationality to the JDRs in accordance with Article 91 of the Convention. Consequently, the Arbitral Tribunal rejects Ukraine's request for an order to the Russian Federation to "de-register [...] and withdraw all claims to have re-flagged" the JDRs.[2617]

1276. As concerns the marine environment, the Arbitral Tribunal has already declared that (i) the EIAs conducted by the Russian Federation were inconsistent with the requirements under Article 206 of the Convention; (ii) the Russian Federation did not meet the requirements under Articles 205 and 206 to communicate the results of the EIA; and (iii) by the aforementioned conduct, the Russian Federation did not fulfil its due diligence obligations under Article 123, 192, and 194 of

2613 Hearing, 26 September 2024, 150:15-17 (Cheek).
2614 *Factory at Chorzów (Merits)*, cit., n. 1191 p. 47 (**Annex UAL-27**); *see also* ILC Articles on State Responsibility, 2001, Art. 30 (**Annex UAL-24**).
2615 *See* paras 726, 1152, VII.D.5 above.
2616 *See* para. 106 above *citing* Ukraine's Final Submission, paras 3, 3(b).
2617 *See* para. 106 above *citing* Ukraine's Final Submission, paras 3, 3(c).

the Convention. The Arbitral Tribunal does not find it necessary to grant further relief in the circumstances of the present case.

4. Article 22 of the Rules of Procedure

1277. Ukraine asks the Arbitral Tribunal to "amend Article 2[2] of the Rules of Procedure to increase from six to 24 months the period in which Parties may submit requests for interpretation of the final award or concerning a manner of its implementation."[2618] The Russian Federation objects to the amendment.[2619]

1278. The Arbitral Tribunal does not consider it necessary to amend the Rules of Procedure.

5. Costs

1279. Finally, both Parties seek their costs for the proceedings under Article 25 of the Rules of Procedure. Article 25 reads:

> Unless decided otherwise by the Arbitral Tribunal, each Party shall bear its own costs. The Arbitral Tribunal may make an award in respect of the costs incurred by the Parties in presenting their cases, as appropriate.

1280. In the present case, the Arbitral Tribunal sees no reason to depart from the general rule that each Party shall bear its own costs.[2620]

2618 *See* para. 106 above.

2619 Rejoinder, para. 1069.

2620 For good order, the Arbitral Tribunal recalls Article 24(1) of the Rules of Procedure provides that "[t]he expenses of the Arbitral Tribunal, including the renumeration of its members, shall be borne by the Parties in equal shares."

IX. DISPOSITIF

1281. For the reasons set out in this Award, the Arbitral Tribunal

In relation to jurisdiction and admissibility

(1) *Finds*, unanimously, that it has jurisdiction over Ukraine's claims made in its Final Submissions 1(a), (b), (c), (e), (f), (g), (h), and (i);[2621]

(2) *Finds*, unanimously, that it lacks jurisdiction over Ukraine's claims regarding the seizure of two Ukrainian-flagged JDRs made in its Final Submissions 1(d);

(3) *Finds*, unanimously, that it has jurisdiction over Ukraine's claims regarding the reflagging of two Ukrainian-flagged JDRs made in its Final Submissions 1(d);

(4) *Rejects*, unanimously, the Russian Federation's objections to the admissibility of Ukraine's claims made in its Final Submissions 1(a), (b), (c), (d), (e), (h), and (i), and *finds* that the aforementioned claims are admissible;

In relation to the merits of the dispute between the Parties

(5) *Decides*, unanimously, that the Russian Federation violated Article 206 of the Convention by conducting the EIAs for the Kerch Strait bridge, power cables, and gas pipelines in a manner inconsistent with the requirements under that provision;

(6) *Decides*, unanimously, that the Russian Federation violated Articles 205 and 206 of the Convention by failing to publish reports of the results of the EIAs for the Kerch Strait bridge, power cables, and gas pipelines or provide such reports to the competent international organisations in a manner consistent with the requirements under those provisions;

(7) *Decides*, unanimously, that the Russian Federation violated Articles 123, 192, and 194 of the Convention by conducting the EIAs for the Kerch Strait bridge, power cables, and gas pipelines in a manner inconsistent with the requirements under Article 206 of the Convention, by failing to communicate reports of their results in a manner provided in

[2621] For Ukraine's Final Submissions, *see* para. 106 above.

Article 205 of the Convention, and by failing to fulfil its duty to cooperate with respect to the protection and preservation of the marine environment in and around the Kerch Strait;

(8) *Rejects*, unanimously, all other claims made by Ukraine in its Final Submissions;

In relation to entitlement to relief

(9) *Considers*, unanimously, that the decisions made in subparagraphs (5), (6), and (7) of this Dispositif constitute appropriate declaratory relief;

(10) *Finds*, unanimously, that, having provided declaratory relief, it is not necessary to order cessation, assurances and guarantees of non-repetition, or reparation;

(11) *Decides*, unanimously, that it is not necessary to amend the Rules of Procedure to increase from six months to 24 months the period in which the Parties may submit requests for interpretation of this Award or concerning the manner of its implementation;

In relation to costs

(12) *Decides*, unanimously, that each Party shall bear its own costs.

Done at the Peace Palace, The Hague, the Netherlands, this twenty-second day of April, two thousand and twenty-six:

For the Arbitral Tribunal:

Professor Vaughan Lowe KC

Professor Aleksandr Vylegzhanin

H.E. Judge Boualem Bouguetaia

H.E. Judge Alonso Gómez-Robledo

H.E. Judge Jin-Hyun Paik
President

For the Registry:

Dr. Levent Herberstein
Registrar