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PCA Case No. 2017-06

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

between

UKRAINE

and

THE RUSSIAN FEDERATION

in respect of a

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

Volume I – COUNTER-MEMORIAL OF THE RUSSIAN FEDERATION

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

REGISTRY:
The Permanent Court of Arbitration

14 October 2022

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CHAPTER 1.
INTRODUCTION

1. Pursuant to Procedural Order No. 9 of 22 July 2022, whereby the Arbitral Tribunal adopted the revised procedural timetable for further proceedings, the Russian Federation hereby submits this Counter-Memorial.

2. In the present Counter-Memorial, the Russian Federation maintains the position that it has previously submitted with regard to the lack of jurisdiction of this Arbitral Tribunal to consider the entirety of Ukraine's claims based on the declarations under Article 298(1)(a)(i) of the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention") to exclude the disputes involving historic bays or titles from the scope of jurisdiction under the Convention. Russia reiterates that the waters of the Sea of Azov and the Kerch Strait are internal waters as a historic bay or due to the historical title; therefore, all Ukraine's claims involving the Sea of Azov and the Kerch Strait fall outside the scope of the jurisdiction of the UNCLOS Tribunal.

3. This Counter-Memorial submits additional jurisdictional objections with regard to several specific claims that Ukraine has presented in its Revised Memorial of 20 May 2021, and that are not of an exclusively preliminary character. Importantly, this Counter-Memorial also sets out an objection to the jurisdiction of the Tribunal which ensues from the significant change of circumstances that has occurred since the filing of the Revised Memorial of Ukraine. More particularly, following the referendums held in the territories of the Donetsk People's Republic ("DPR"), the Lugansk People's Republic ("LPR"), the Zaporozhye Region and the Kherson Region, these territories acceded to the Russian Federation on 30 September 2022. As a result, first, Ukraine no longer qualifies as a coastal State in relation to the Sea of Azov, and second, this change of circumstances affects the ability of this Tribunal to decide Ukraine's claims in these proceedings, as Russia further explains.

4. Alternatively, and without prejudice to all Russia's objections on jurisdiction of this Tribunal, Russia also addresses Ukraine's claims raised in the Revised Memorial with regard to the alleged violations of UNCLOS and requests the Tribunal to reject them all as unreasonable and unsubstantiated.

I. Ukraine's Disregard for the Tribunal's Rulings in the 2020 Award

5. In February 2020, the Arbitral Tribunal issued the Award Concerning the Preliminary Objections of the Russian Federation (the "2020 Award"). The Tribunal upheld Russia's preliminary objection with regard to "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",[1] putting a decisive end to Ukraine's attempts to gain a ruling on the issues that have nothing to do with the law of the sea.

6. The Tribunal's ruling in the 2020 Award affects many of the claims and requests for relief articulated in different forms in Ukraine's Notification and Statement of Claim and Ukraine's Memorial, as the Tribunal admitted.[2] Accordingly, the Tribunal ruled that "it is in the interest of procedural fairness and expedition for Ukraine to revise its Memorial so as to take full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction as determined in the present Award".[3]

7. Ukraine, however, has disregarded the Tribunal's directions, regardless of how clear and precise they are, and failed to revise all of its claims that were, and indeed remain, dependent on the premise of its sovereignty over Crimea. Instead of scrupulously complying with the Tribunal's order in the 2020 Award, with *res judicata* effect, Ukraine decided to put through the back door several other sovereignty-based claims.

8. As Russia outlines in the relevant sections of the Counter-Memorial, Ukraine's claims with regard to (i) the practice of vessels' inspections in the Kerch Strait, (ii) temporary suspension of innocent passage of foreign governmental ships in Russia's territorial sea adjacent to Crimea, as well as (iii) jack-up drilling rigs claims, are in fact dependent on the (wrong) premise of Ukraine being sovereign over Crimea. In addition, Ukraine puts the issue of sovereignty back on the table by formulating its requests for remediating harm in what it calls "areas subject to Ukrainian sovereignty but presently under Russian jurisdiction and control".[4] All of the above is completely extraneous to the Tribunal's jurisdiction.

9. As if that would not be enough for procedural gamesmanship, Ukraine also sidestepped the Tribunal's directions with regard to the procedural schedule of its submissions. Likely in an attempt to remain under the radar, Ukraine used the Revised Memorial as a chance to raise for the very first time new claims, not previously raised in the original Memorial. This concerns Ukraine's belated claims in relation to the (i) jack-up drilling rigs and (ii) fibre-optic cable connection, as Russia explains in the relevant sections of the Counter-Memorial. To set the record straight, neither the Rules of Procedure, nor Procedural Order No. 6 following the 2020 Award permit the introduction of new claims at such stage of the proceedings, and they are therefore inadmissible.

10. A deliberate circumvention of the Tribunal's previous orders, this constitutes a sheer procedural abuse on behalf of the Claimant. Such conduct contradicts not only the procedural

[1] Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020 ("2020 Award"), para. 492.

[2] *Id.*, para. 198.

[3] *Ibid.*

[4] Sea also Revised Memorial of Ukraine, 21 May 2021 ("URM"), para. 312 ("Finally, certain of the actions set out above involve Russia remediating harm in areas subject to Ukrainian sovereignty but presently under Russian jurisdiction and control. In the event Ukrainian jurisdiction and control is restored before these actions are completed, Russia should be ordered to cooperate with Ukraine to ensure completion of its reparation, and to bear all associated costs.").

safeguards of integrity of these arbitral proceedings, as set out by the Tribunal in the 2020 Award and the Rules of Procedure. It also amounts to the violation of Article 300 of UNCLOS, prescribing the exercise of rights, jurisdiction and freedoms recognised in this Convention in good faith and in a manner that would not constitute an abuse of rights. The Tribunal should treat it accordingly, and Russia respectfully requests to completely strike those claims of Ukraine out as inadmissible.

II. Organisation of Russia's Counter-Memorial

11. In **Chapter 2** of this Counter-Memorial, Russia maintains its position that, at all relevant times, the waters of the Sea of Azov and the Kerch Strait have been internal waters based on the historic title or as a historic bay. As a consequence of the Parties' declarations made under Article 298(1)(a)(i) of UNCLOS, the Tribunal cannot exercise jurisdiction over a dispute involving historic bays or titles (**Section I**).

12. As a separate argument of Chapter 2 (**Section II**), Russia demonstrates that since both the Sea of Azov and the Kerch Strait constitute internal waters, a dispute concerning Russia's activities in internal waters is not a "dispute concerning the interpretation or application" of UNCLOS, as Article 288 (1) of the Convention mandates. The point of departure for the Tribunal's analysis here should be an express agreement between Russia and Ukraine that was reached, at the relevant period, in the Treaty on Cooperation in the Use of the Sea of Azov and the Kerch Strait (the "Azov/Kerch Cooperation Treaty")[5] that the Sea of Azov and the Kerch Strait historically "are" internal waters of the Russian Federation and Ukraine.[6] Likewise important is the practice confirming that both Russia and Ukraine treated these water areas as internal waters. To that end, Russia provides an ample set of practical examples of the Parties' conduct in such spheres as navigation, exploitation of natural resources and protection of the marine environment, demonstrating that, outside these arbitral proceedings, Ukraine treated the Sea of Azov and the Kerch Strait as internal waters and regularly acted consistently with that premise.

13. Finally, Chapter 2 makes an additional jurisdictional objection as to the competence of the Tribunal to render a decision that would potentially affect Russia's sovereign rights over its internal waters as part of territory under its sovereignty (**Section III**).

14. The focus of **Chapter 3** of the Counter-Memorial (**Section I**) is on the assertions of Ukraine with regard to the violations of UNCLOS as a result of the construction of a bridge over the Kerch Strait ("Kerch Strait Bridge", "Kerch Bridge", "Crimean Bridge" or "Bridge"). The need to connect the Crimean Peninsula to mainland Russia has been on the agenda for many years and has become all the more critical after Ukraine launched an indefinite state-

[5] Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003 (**RU-20-AM**), Article 1(1).

[6] The reference to the above provision of the Azov/Kerch Cooperation Treaty reflects the status of the Sea of Azov as it was prior to 30 September 2022.

sponsored blockade to cut off Crimea from all essential sources – water, energy, goods – without any regard to the most basic interests of the Crimean population. The economic and humanitarian importance of the Bridge thus justified the insignificant average interferences with navigation that typically arise in such large-scale infrastructure projects. It is no surprise that Ukraine turns a blind eye to this side of the situation and, instead, purports to paint a one-sided picture of a monster-like construction raised in the supposedly "busy international waterway", as Ukraine names it.[7]

15. Ukraine puts undue emphasis and clearly exaggerates the supposedly negative effects of the Bridge's construction on the navigation in the Strait. A thorough "cost vs. benefit" analysis preceding the construction of the Kerch Bridge ensured that the decision on its clearance – the main target of Ukraine's criticism – reflects the real and objective picture with regard to the navigation of various types of vessels in the Strait, cargo turnover, as well as its hydrographic conditions. The basic principle is that the bridges, like ships, are designed to reflect the parameters of the waters they cross. In navigational terms, the Kerch Strait is nowhere near to such busy commercial waterways with an intense pattern of traffic as the Bosporus Strait or the Panama Canal, not even the Oresund. It should be thus taken for its face value – playing an important role in maintaining regional trade and being sufficient for the needs of the region. There was no economic and navigational rationale in erecting high-clearance constructions in such shallow and narrow areas as the Kerch Strait so that large ocean-going vessels could enter into these waters. Their passage would be simply economically unreasonable and cost-ineffective.

16. Chapter 3 also addresses Ukraine's allegations on the non-cooperation under Articles 43 and 44 of UNCLOS (**Section II**), and the alleged impediments to navigation as a result of the general control measures applicable in the Kerch Strait to ensure the safety of navigation and mitigate the risks of collapsing and groundings, such as a permit-based system, pilotage requirement and one-way traffic in the Kerch-Yenikale Channel (**Section III**). These same navigation control measures have been in place in the Strait since the Soviet times, and after 1991, Ukraine itself applied them; it is thus rather appalling how Ukraine now distorts their reasonableness. Finally, **Section IV** explains that Ukraine's claims concerning the suspension of navigation for foreign warships and government vessels require the ruling on sovereignty of either Party over Crimea and, accordingly, fall outside the scope of the Tribunal's jurisdiction.

17. **Chapter 4** deals with Ukraine's accusations concerning Russia's inspections of vessels transiting through the Kerch Strait and the Sea of Azov. Inspecting vessels in its internal waters is a sovereign prerogative of Russia, and Ukraine's attempt to challenge Russia's exercise of its sovereignty in its own internal waters is in effect yet another attempt to bring up before this Tribunal, that put a decisive end to that tactics, the issue of sovereignty over Crimea. Moreover, Russia explains that the invoked provisions of UNCLOS do not apply in the internal waters;

[7] URM, para. 2.

for that reason also, the Tribunal lacks jurisdiction. In any event, the practice of vessels' inspections in those water areas is not novel and extraordinary, both the Russian Federation and Ukraine conducted them prior to 2014. With a more challenging and exacerbating security situation in the region after 2014, Russia had every legitimate concern to continue that practice to ensure national security and prevent crimes, including the threats from the Ukrainian authorities to blow up the Bridge, which materialized when the Crimean Bridge became the target of the terrorist attack on 8 October 2022. The alleged delays of vessels bound for the ports of Mariupol and Berdyansk were unrelated to border security checks, in contrast to the misleading connections between the two, which Ukraine bluntly insists on failing to provide any direct evidence thereof.

18. In **Chapter 5,** Russia sets out that Ukraine's requests related to jack-up drilling rigs are extraneous to UNCLOS and the Tribunal's jurisdiction, as the Convention does not provide the relevant framework for assessing the legality of transfer of their ownership titles. Here again, the real intent of Ukraine is to question the legality of Russia's sovereignty over Crimea. In any event, Russia's right to register the drilling rigs in its state registry does not depend on Ukraine's de-registration if the same rigs.

19. **Chapter 6** is dedicated to Russia's policies, measures and particular practical efforts aimed at protection and preservation of the marine environment of the Azov-Black Sea basin during the construction and operation of the Kerch Strait Bridge and related projects. Relying on a considerable set of evidence, most vividly – the environment impact assessments and monitoring reports – Russia amply demonstrates the speculative and hypothetical nature of Ukraine's allegations in this regard, full of misrepresentations, logical fallacies and baseless assumptions. Against that backdrop, Ukraine's request in the prayer for relief to modify the central span of the Kerch Strait Bridge is particularly cynical, as, unfortunately, it merely shows that Ukraine, in fact, is not truly concerned about the environmental consequences of the additional and unnecessary interference into the marine environment that such modification of the Bridge would entail. The recent explosion on the Crimean Bridge, devised, carried out and ordered by the Ukrainian government, is another evidence that marine environment protection is far from Ukraine's concerns, contrary to what it purports to declare in this arbitration.

20. **Chapter 7** demonstrates that Russia's legislation, policies and control measures in the field of protection of underwater culture heritage encompass international archaeological standards, which Ukraine willingly misconstrues to mislead the Tribunal and presents a simplistic account thereof. The framework that the Russian Federation enacted and developed ensures an appropriate level of protection of underwater objects. It also proves that, contrary to Ukraine's baseless assertions, the relevant protection standards were duly respected in all archaeological episodes that Ukraine picked up.

21. **Chapter 8** addresses Ukraine's allegations with regard to the aggravation of dispute by the Russian Federation. They are misplaced, as UNCLOS provides neither an express all-

encompassing legal obligation on States to refrain from aggravating their relations, nor the basis to claim jurisdiction as to the aggravation of dispute. In any event, what Ukraine purportedly labelled as the examples of aggravation is either explained and justified by the legitimate exercise of sovereign powers by Russia over its territory, or remains pure speculations.

22. Finally, this Counter-Memorial concludes with Russia's formal submission, requesting the Tribunal to adjudge and declare that it lacks jurisdiction in respect of the claims that Ukraine submitted in its Revised Memorial, or alternatively – to reject Ukraine's requests and prayers for relief in their entirety (**Chapter 9**).

23. It is noted that Ukraine did not fully articulate its requests in the Revised Memorial, in particular, elected to determine the claimed amount of monetary compensation at a later phase of the proceedings.[8] For the sake of efficiency, Russia reserves its right to address in detail Ukraine's set of claims to various forms of reparation, including any requests for financial compensation, in the next submissions, following the respective submissions of the Claimant.

24. Still, for the reasons explained in the following Chapters of this Counter-Memorial, Russia has breached no obligation under UNCLOS in the first place, and thus no responsibility may arise under international law. For the avoidance of doubt, Russia rejects all requests for any form of relief, as set out in the Claimant's Revised Memorial, for it failed to establish the reality of most of the alleged damages, as well as their precise and effective nature.

III. Change in Circumstances Substantially Affecting the Present Dispute

25. The Russian Federation submits that since the date of the filing of Ukraine's Revised Memorial, new circumstances have arisen that substantially affect the issues under consideration in the present arbitral proceedings. The changed circumstances should be taken into account when considering the matters that are pertinent to the resolution of the dispute in front of this Tribunal.

26. Specifically, on 30 September 2022, following the referendums held in the DPR, the LPR, the Zaporozhye Region and the Kherson Region, these areas, as a result of their accession to the Russian Federation, became part of the sovereign territory of the Russian Federation pursuant to the Treaties on the accession of the same date.[9] On 4 October 2022, a set of Federal Constitutional Laws was enacted that envisaged a legal framework regulating various aspects

[8] URM, paras. 292, 312, 316(i).

[9] Treaty between the Russian Federation and the Donetsk People's Republic On the Accession of the Donetsk People's Republic to the Russian Federation and the Formation of a New Constituent Entity of the Russian Federation of 30 September 2022 (**RU-553**); Treaty between the Russian Federation and the Lugansk People's Republic On the Accession of the Lugansk People's Republic to the Russian Federation and the Formation of a New Constituent Entity of the Russian Federation of 30 September 2022 (**RU-554**); Treaty between the Russian Federation and the Kherson Region On the Accession of the Kherson Region to the Russian Federation and the Formation of a New Constituent Entity of the Russian Federation of 30 September 2022 (**RU-555**); Treaty between the Russian Federation and the Zaporozhye Region On the Accession of the Zaporozhye Region to the Russian Federation and the Formation of a New Constituent Entity of the Russian Federation of 30 September 2022 (**RU-556**).

of the process of accession, including the status of new territories as the subjects of the Russian Federation and their borders.[10]

27. Importantly, since the accession to Russia of the areas that are littoral to the Sea of Azov – the DPR (including the Port of Mariupol), the Zaporozhye Region (including the Port of Berdyansk) and the Kherson Region - Ukraine ceased to be a coastal State with regard to the Sea of Azov. Regardless of Ukraine's stance on these events, they remain a matter of reality and, as such, are not to be disregarded by the Tribunal.

28. In light of the above described circumstances, the Russian Federation respectfully submits that the conclusions that this Tribunal reached in the 2020 Award, in relation to the lack of its jurisdiction over the matters that require the Tribunal to decide on the sovereignty over Crimea, are fully applicable to the present situation with the DPR, the Zaporozhye and Kherson Regions. As the Tribunal correctly concluded in the 2020 Award:

> "In light of the foregoing, the Arbitral Tribunal concludes that pursuant to Article 288, paragraph 1, of the Convention, it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea. As a result, the Arbitral Tribunal cannot rule on any claims of Ukraine presented in its Notification and Statement of Claim and its Memorial which are dependent on the premise of Ukraine being sovereign over Crimea".[11]

29. Consequently, the Tribunal does not have jurisdiction over Ukrainian claims that necessarily require it to decide, expressly or implicitly, on the sovereignty of either Party over the Sea of Azov and the Kerch Strait. Similarly, the Tribunal is not competent to make any pronouncements on the issues of international law that clearly fall outside the scope of its jurisdiction as an UNCLOS tribunal, or to provide legal assessment of the events described above, either in an express manner or by rendering an award with a tantamount ruling.

30. Should the Tribunal nevertheless decide to look into the situation prior to 30 September 2022, the Russian Federation submits below the jurisdictional objections that lead to the conclusion that the Tribunal in any event lacks jurisdiction over the dispute.

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[10] Federal Constitutional Law No. 5-FKZ "On the Accession of the Donetsk People's Republic to the Russian Federation and the Formation of a New Constituent Entity of the Russian Federation – the Donetsk People's Republic", 4 October 2022 (**RU-557**); Federal Constitutional Law No. 6-FKZ "On the Accession of the Lugansk People's Republic to the Russian Federation and the Formation of a New Constituent Entity of the Russian Federation – the Lugansk People's Republic", 4 October 2022 (**RU-558**); Federal Constitutional Law No. 8-FKZ "On the Accession of the Kherson Region to the Russian Federation and the Formation of a New Constituent Entity of the Russian Federation – the Kherson Region", 4 October 2022 (**RU-559**); Federal Constitutional Law No. 7-FKZ "On the Accession of the Zaporozhye Region to the Russian Federation and the Formation of a New Constituent Entity of the Russian Federation – the Zaporozhye Region", 4 October 2022 (**RU-560**).

[11] 2020 Award, paras. 197-198 (emphasis added).

CHAPTER 2.

THE TRIBUNAL LACKS JURISDICTION OVER UKRAINE'S CLAIMS PERTAINING TO THE SEA OF AZOV AND THE KERCH STRAIT

31. In one of its preliminary objections the Russian Federation submitted that "[i]ndependently of the lack of jurisdiction to decide the question of sovereignty over Crimea, this Tribunal also does not have jurisdiction over any of Ukraine's claims pertaining to the Sea of Azov and the Kerch Strait".[12] The 2020 Award correctly summarises the Russian argument as follows:

> "The Sea of Azov and the Kerch Strait, according to the Russian Federation, were historically internal waters of the Russian Empire, and later the USSR, and, since 1991, the common internal waters of Ukraine and the Russian Federation. The Russian Federation contends that the Convention does not regulate the regime of internal waters and concludes that issues concerning the Sea of Azov and the Kerch Strait are accordingly not issues concerning the interpretation or application of the Convention pursuant to Article 288, paragraph 1, of the Convention."[13]

32. In the 2020 Award, this Tribunal observed that this objection is "interwoven with the merits of the present dispute" and that it "may not adequately be addressed without touching upon the questions of the merits".[14] The Tribunal consequently found in the operative part of the 2020 Award that this objection "does not possess an exclusively preliminary character" and accordingly decided "to reserve this matter for consideration and decision in the proceedings on the merits".[15]

33. While not disputing at this stage the Tribunal's view that they "are interwoven with the merits", these arguments remain objections to the jurisdiction of this Tribunal and will be pleaded as such.

34. In the present Counter-Memorial, Russia maintains its position that the waters of the Sea of Azov and the Kerch Strait are internal waters and, consistently with its previous written and oral pleadings, submits two arguments in support of this position:

(i) Russia has sovereignty over these waters because they are part of a "historic bay" or Russia has a historic title over them;

(ii) Russia has sovereignty over these waters because their status of internal waters has not changed since the dissolution of the USSR.

[12] Preliminary Objections of the Russian Federation, 19 May 2018, ("RPO"), para. 66.

[13] 2020 Award, para. 199.

[14] *Id.,* para. 293.

[15] *Id.,* para. 492(b).

35. These arguments are submitted separately as alternatives[16] and are not mutually exclusive. Consequently, the Tribunal's support of either of them should suffice. The two arguments are dealt with separately in **Sections I** and **II** of the present Chapter.

36. In addition to the above stated two arguments and without prejudice to them, Russia submits that this Tribunal lacks competence to decide over the claims of Ukraine that necessarily require it to decide, expressly or implicitly, on the sovereignty of either Party over the Sea of Azov and the Kerch Strait, due to the sovereignty-related aspects of those claims. **Section III** of this Chapter addresses this argument.

I. Russia's Declaration under Article 298(1)(a)(i) of UNCLOS Excludes Jurisdiction of This Tribunal concerning Ukraine's Claims relating to the Sea of Azov and the Kerch Strait Because They are a Historic Bay or Subject of a Historic Title

37. As Russia stated in its previous submissions, 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(1)(a)(i) of UNCLOS.[17] This fact is not disputed by Ukraine. In case of Ukraine in 1999, there would simply be no point in making such a declaration under Article 298(1)(a)(i) to exclude from the jurisdiction disputes "involving historic bays or titles", for the reason that it had no other historic bays or claims to historic waters other than the Sea of Azov. This could stop the whole discussion at this point.

38. As remarked by the Tribunal, there is no disagreement between the Parties in recognising 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.[18]

39. The decades-long exercise of sovereignty over these waters justifies the conclusion that before the codification of the international law of the seas by the Geneva Conventions of 1958 there was a historic title to the waters of the Sea of Azov and the Kerch Strait. The Sea of Azov could be considered as a historic bay whose outlet was the Kerch Strait.

40. This is confirmed by the fact that the Sea of Azov is indicated as the first example of a historic bay in the well-known UN Secretariat's Memorandum on historic bays, prepared for the first UN Conference on the Law of the Sea.[19]

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[16] This was recognised by this Tribunal in para. 292 of the 2020 Award.

[17] RPO, paras. 165-175; Reply to the Written Observations and Submissions of Ukraine on Jurisdiction, 28 January 2019 ("Russia's Reply"), paras. 119-121.

[18] 2020 Award, para. 290.

[19] *Historic Bays: Memorandum by the Secretariat of the United Nations*, doc. A/CONF.13/1, extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Vol. I (Preparatory Documents), 30 September 1957 (excerpts) (**RU-5**), para. 12. This document refers to the opinions of P.C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, G. A. Jennings Co., 1927, p. 383; G. Gidel, *Le Droit international public de la mer*, Vol. III, Mellottée, 1934, p. 663; A.N. Nikolayev, Problema Territorialnykh Vod v Mezhdunarodnom Prave, Gosudarstvennoye Izdatelstvo Yuridicheskoi Literatury, 1954, pp. 207-208.

41. Considering that under the customary international law of the sea applicable in the decades preceding the 1958 Convention (and also for some time thereafter) the coastal State's jurisdiction extended to the then narrow limits of the territorial sea, 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."[20] The Russian Empire and later the USSR would not have been entitled to consider the waters of the Sea of Azov and those of its outlet as internal waters but for the fact that they had exercised their sovereignty undisturbed over those waters for a long time (before the qualification of these waters as a "juridical bay" under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone).

42. Even though, under the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the Sea of Azov qualified as a "juridical bay", and the Kerch Strait as its opening, this does not exclude that the reasons for considering these waters as internal because of being part of a historic bay and because of the existence of historic title remain. The USSR had never declared its refusal of the historic title and, indeed, Soviet legal doctrine had been supporting this following the entry into force of the Geneva Convention.[21] As the ICJ noted in relation to the *Gulf of Fonseca*, the qualification as a juridical bay would not "call in question or replace its historic status".[22] These waters were internal waters before the entry into force for the USSR (including Ukraine and Russia) of the Geneva Convention and continued to be internal waters after such entry into force. Whether they continued to be internal waters because they belong to a historic bay or as belonging to a juridical bay does not matter. What counts is that the riparian State, undisturbed, treated them as internal.

43. There have been no objections from the third States with regard to the status of the Sea of Azov and the Kerch Strait as historic internal waters.[23] Moreover, there are examples that other States considered the Sea of Azov as historic waters of the USSR. For instance, the report prepared by Lewis M. Alexander for the U.S. Department of Defence "Navigational Restrictions within the New LOS Context: Geographical Implications for the United States",[24]

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[20] *Fisheries Case (United Kingdom v. Norway)*, ICJ Judgment of 18 December 1951 (**UAL-124**), p. 130; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening),* Judgment, I.C.J. Reports 1992 (**RUL-19**), p. 588, para. 384.

[21] P. D. Barabolya *et al., Manual of International Maritime Law*, Military Publishing House of the Ministry of Defense of the USSR, Moscow, 1966 (**RU-304**), p. 216. See also A.T. Uustal, *International legal regime of territorial waters*, Transactions of the University of Tartu, Issue 66, 1958 (**RU-305**).

[22] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening),* Judgment, I.C.J. Reports 1992 (**RUL-19**), para. 393.

[23] See generally Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea*, Brill, 2019 (**RU-306**), p. 86 ("[…] treaties between Ukraine and Russia in the early 2000s (as in the Agreement of 2003) declared the waters of the Kerch Strait to be 'historically' the internal waters of both States. Insofar as no State seems to have objected to this publicly-proclaimed historic status it may be argued that this joint claim is now valid in international law; and that accordingly any passage through the strait is subject to littoral State agreement.").

[24] "Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the US" is a report prepared in 1986 and adopted in 1990 on the implications for the U.S. of UNCLOS. *See:* A. M. Lewis, *Navigational Restrictions*

set a table of claimed and potential historic bays, expressly mentioning the Sea of Azov (Soviet Union) in the section "A. Bays for which historic claims seem clearly to have been made".[25] Similarly, the Kerch Strait was expressly mentioned in the table "Straits which do not connect two parts of the high seas or an exclusive economic zone with one another", together with the Sea of Azov as claimed historic waters.[26]

44. The historic character of the waters of the Sea of Azov, moreover, was explicitly recognised by both Ukraine and Russia in the Azov/Kerch Cooperation Treaty, stating in Article 1(1) that: "[t]he Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine."[27] The same terminology was used in the Joint Statement of 24 December 2003 of the President of the Russian Federation and the President of Ukraine.[28]

45. The adverb "historically", after the verb "are", means that the present status (specified by the present tense term "are") of these waters as "internal" finds its origin in history. As the Expert Report of [redacted], a linguist specialising in Russian and Ukrainian languages ("[redacted] Report") explains, the adverb "historically" has among its meanings the following: "in the course of historical development", "in accordance with historical laws and principles".[29] It does not mean, as Ukraine would want to portray it,[30] that only in the past the status of the Sea of Azov and of the Kerch Strait was that of internal waters.[31] Apart from being completely incorrect under Russian and Ukrainian languages, such reading of Article 1(1), as suggested by Ukraine, deprives the provision of its meaning, as well as *effet utile*.

46. First, the provision of Article 1(1) "[t]he Sea of Azov and the Kerch Strait are historically internal waters of the *Russian Federation and Ukraine"* (emphasis added) cannot refer to the past, i.e. the period before the dissolution of the USSR, as Ukraine implies, from a geopolitical perspective. Before the dissolution of the Soviet Union, Ukraine and the Russian Federation were the USSR republics and their names were the Russian Soviet Federative Socialist Republic ("the Russian SFSR") and the Ukrainian Soviet Socialist Republic ("the Ukrainian SSR") accordingly. The Russian Federation and Ukraine – as Article 1(1) mentions them – came into being as such, i.e. sovereign States, only following the dissolution of the USSR in 1991. The Sea of Azov and the Kerch Strait were thus internal waters of the USSR, as a sovereign State, but not of the Russian SFSR and the Ukrainian SSR, in their status of the republics of the USSR. Had the Azov/Kerch Cooperation Treaty referred to that period, rather than to the date of

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within the New LOS Context, Leiden, The Netherlands: Brill | Nijhoff, 2017 (Reformatted and edited by J. Ashley Roach) (**RU-307**).

[25] *Id.*, p. 39.

[26] *Id.*, p. 112.

[27] Azov/Kerch Cooperation Treaty (**RU-20-AM**), Article 1(1).

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

[29] Expert Report of [redacted] ("[redacted] Report"), paras. 27, 31-32, 38.

[30] URM, para. 110.

[31] [redacted] Report, paras. 7, 49, 53-54.

signing of the Treaty, as Ukraine speculates, it would specify that internal waters belonged to the USSR, rather than refer to "*the Russian Federation and Ukraine*".

47. Second, to interpret Article 1(1) of the Azov/Kerch Cooperation Treaty and the identical sentence in the Joint Statement of the same date as merely stating a historical fact, without implication for the subsequent relationships covered by the Treaty, would deny the provision any *effet utile*. As illustrated during the hearing on Preliminary Objections, a provision of such purely historical character may be understandable in a preamble, but not in an operative provision, such as Article 1(1).[32] Even assuming (*quod non)* that the Parties had wished to use the past tense, thereby denoting the fact that the Sea of Azov and the Kerch Strait no longer constituted internal waters, they would no doubt have done so. Instead, they used the present tense.[33]

48. Moreover, not only would the purely historical and descriptive meaning Ukraine attributes to Article 1(1) of the Azov/Kerch Cooperation Treaty deprive it of any *effet utile*. Seen in the broader context of the Azov/Kerch Cooperation Treaty, it would have the effect that the provisions on navigation of foreign ships in the Sea of Azov and in the Kerch Strait, set out in Articles 2(2) and 2(3) of the Azov/Kerch Cooperation Treaty, would be in violation of UNCLOS. Only if the waters of the Sea of Azov and of the Kerch Strait were considered by the Parties to be internal waters (and if it were not contested by the third States[34]), could Russia and Ukraine legally limit navigation of foreign merchant ships in these waters to ships heading to or coming from the ports in the Sea of Azov.

49. The same applies to the limitation of entering into the Sea of Azov and passing through the Kerch Strait for foreign warships and other government vessels used for non-commercial purposes to such vessels when they are "making a visit or business call to a port of one of the Parties at its invitation or with its permission, approved by the other Party". Neither Ukraine nor Russia, both Parties to UNCLOS, may be deemed to have agreed to curtail the other States Parties' navigational rights granted under UNCLOS. It follows that Articles 2(2) and 2(3) of the Azov/Kerch Cooperation Treaty can be compatible with UNCLOS only if Article 1(1) is interpreted as it must, pursuant to its ordinary meaning, as setting out the Parties' common understanding that the status of the Sea of Azov and the Kerch Strait was that of internal waters.[35]

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[32] Transcript of Hearing on Preliminary Objections, 10 June 2019, p. 122.

[33] [redacted] Report, paras. 49-51.

[34] Notably, several third States expressly recognised the internal water status. *See* Resolution No. 42-8 of the Interparliamentary Assembly of the CIS Member Nations "On the Commentary to the Model Law 'On Border Security'", 16 April 2015 (**RU-308**), Commentary to Article 12. *See also*: European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)) (**UA-544**), preamble, rejecting Ukraine's interpretation adopted in these proceedings: "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 and gives both parties the power to inspect suspicious vessels".

[35] Transcript of Hearing on Preliminary Objections, 10 June 2019, pp. 122-123.

50. Therefore, Ukraine's weak linguistic argument based on the position of the word "historically" in the Azov/Kerch Cooperation Treaty is incorrect because, if the waters of the Sea of Azov and the Kerch Strait were not considered internal due to their historic character, the provisions on navigation of merchant and military ships of third States set out in Article 2(2) and 2(3) would be in contravention to UNCLOS.[36] The Parties, acting in good faith, could not enter into the Azov/Kerch Cooperation Treaty with an intent to contravene the Convention.

51. Moreover, the historic bay character of the Sea of Azov has been implicitly recognised by Ukraine when, in its declaration under Article 298(1)(a) of UNCLOS, it excluded from compulsory jurisdiction disputes concerning inter alia "historic bays or titles". As Ukraine did not have other bays, but the Sea of Azov, that can qualify as historic bays, this declaration could only refer to the Sea of Azov. In its briefs (not including the Revised Memorial), Ukraine argued that in its declaration it was merely paraphrasing Article 298(1)(a)(i) and that its decision to paraphrase the language of that provision "cannot be taken as evidence that Ukraine thereby implicitly acknowledged the existence of historic title in the Sea of Azov and Kerch Strait".[37] This argument is a mere affirmation without support. A declaration submitted to the Secretary General of the United Nations and communicated to all States members of the United Nations must be, and presumed to be, seriously prepared so that its contents have a real meaning. The "decision" to paraphrase does not meet the requirements of such serious preparation. Interpreting the declaration of Ukraine under Article 298(1)(a)(i) otherwise would simply deprive it of its intended meaning and legal consequences.

52. An important consequence of the historic character of the waters of the Sea of Azov and the Kerch Strait is that the Kerch Strait does not correspond to the description set out in Article 37 of UNCLOS of a strait to which transit passage applies. It does not connect the high seas and exclusive economic zones in the Black Sea to alleged "high seas" or "exclusive economic zones" in the Sea of Azov because the waters of the latter, as historic internal waters, are not high seas or exclusive economic zones. For the same reason, the Sea of Azov is not an area of the sea to which freedom of navigation (Article 58 of UNCLOS) applies.

53. Therefore, for the reason that the Sea of Azov/Kerch Strait are a historic bay or the subject of a historic title, as a consequence of the Parties' declarations under Article 298(1)(a)(i) of UNCLOS, the Tribunal cannot exercise jurisdiction over the dispute involving historic bays or titles.

[36] Transcript of Hearing on Preliminary Objections, 13 June 2019, pp. 52-53.

[37] Rejoinder of Ukraine on Jurisdiction, 28 March 2019, para. 97. *See also* Written Observations and Submissions of Ukraine on Jurisdiction ("UWO"), 27 November 2018, para. 96.

II. The Tribunal Has No Jurisdiction over Ukraine's Claims concerning the Sea of Azov and Kerch Strait since Both Maritime Areas Constitute Internal Waters

54. Even if the historic waters character of the Sea of Azov were not accepted by the Tribunal – a conclusion that would not be consistent with the arguments and evidence submitted in the previous section and in the prior submissions on the record[38] – the internal waters character of these waters would remain on the basis of general international law. Under the Geneva Convention, the waters of the Sea of Azov and Kerch Strait could be seen as internal because the Sea of Azov met the requirements for a juridical bay set out in Article 7 of the Geneva Convention (as well as of Article 10 of UNCLOS) and the USSR, with its Declaration 4450 of 25 January 1985, drew straight baselines including in them the Kerch Strait.

55. However, the waters of the Sea of Azov and of the Kerch Strait did not become internal waters only because of the Geneva Convention. As shown above, they already were uncontested internal waters because of a historic practice of the Russian Empire and the USSR of many decades preceding the adoption of the Geneva Convention.

56. When, with the dissolution of the USSR, the Sea of Azov and the Kerch Strait became surrounded by two riparian States – the Russian Federation and Ukraine, instead of one riparian State – the USSR, these waters remained internal waters not on the basis of the provisions on juridical bays, that refer to bays surrounded by one State only, but because they had always enjoyed the regime of the internal waters under the sovereignty of their riparian State. The fact that the riparian State was replaced by two riparian States, while bringing the Sea of Azov out of the scope of the provisions on juridical bays, cannot alter the status of the areas where the riparian States replacing the USSR exercise their sovereignty.

57. To consider, as Ukraine holds, that, because one riparian State was replaced by a continuator State and a successor State, areas of sea that have been for decades equivalent to part of the territory of the riparian State become territorial sea and exclusive economic zones, open to innocent passage and free navigation by third States,[39] would be as extraordinary as to accept that the replacement of one State by two entails the consequence of each of the two losing part of the territory it has inherited. The statement in *Oppenheim's International Law* referred to by Russia in its Preliminary Objections[40] vividly makes the point:

> "[I]t would seem anomalous if the coastal states of a pluristatal bay should…be supposed jointly to enjoy markedly inferior powers of jurisdiction and control over the waters of their bay than might be enjoyed by the littoral state of a single-state bay."[41]

[38] RPO, Chapter 3, Section B, Sub-Section 5; Russia's Reply, Chapter 3, Section V.

[39] URM, paras. 61-67.

[40] RPO, para. 86.

[41] Sir R. Jennings and Sir A. Watts (eds.), *Oppenheim's International Law*, Vol. I, Peace, Longman, 1992 (**RUL-18**), pp. 632-633.

58. The learned authors of *Oppenheim's International Law* further specify that "[t]he anomaly would be the greater in a pluristatal bay like the Gulf of Fonseca which formerly was a bay surrounded only by a single state".[42]

59. The fact that these waters are internal makes claims that Russia has allegedly committed violations concerning the Sea of Azov and the Kerch Strait, matters not regulated by UNCLOS, as further developed in Sub-Section E. Consequently, they do not give rise to disputes concerning the interpretation or application of the Convention and are thus excluded from the jurisdiction *ratione materiae* of this Tribunal.

60. Russia's further arguments in support of these conclusions are set out in its written and oral pleadings concerning preliminary objections. While they will not be submitted in detail in the present Counter-Memorial, they must be considered as repeated here. In the present section, attention will be focused on certain aspects of interest raised in Ukraine's Revised Memorial.

A. UNCLOS DID NOT PREVENT RUSSIA AND UKRAINE FROM EXERCISING SOVEREIGNTY OVER THE SEA OF AZOV, JOINTLY OR OTHERWISE

61. The first of these aspects is found in the Revised Memorial when Ukraine affirms that "UNCLOS bars Russia and Ukraine from claiming sovereignty over areas of exclusive economic zone in the Sea of Azov".[43] This affirmation is supported, in Ukraine's view, by Article 89 of UNCLOS that by virtue of Article 58(2) applies to the exclusive economic zone. Article 89 provides that: "No State may validly purport to subject any part of the high seas to its sovereignty".

62. Article 89 is unobjectionable. But it applies to purported submissions to sovereignty of areas of the high seas – while the waters of the Sea of Azov were never part of the high seas, including at the moment UNCLOS came into force for Russia and for Ukraine. The provision of Article 89 envisages the situation in which a State claims to exercise its sovereignty over areas of the sea that, at the moment the claim is made, are, as high seas, not subject to any State's sovereignty nor to any State's jurisdiction as exclusive economic zone. This is not the situation of the Sea of Azov whose waters were internal when UNCLOS entered into force.

63. Ukraine's Revised Memorial states that neither Russia nor Ukraine "may proclaim sovereignty over the areas beyond their respective territorial seas in the Sea of Azov".[44] But Russia is not proclaiming or claiming sovereignty, because Russia had and has such sovereignty over the Sea of Azov – even though, after the dissolution of the USSR and up to the recent

[42] Sir R. Jennings and Sir A. Watts (eds.), *Oppenheim's International Law*, Vol. I, Peace, Longman, 1992 (**RUL-18**), p. 633, fn. 4.

[43] URM, para. 72.

[44] *Id.*, para. 74.

events, jointly with Ukraine. A State does not claim sovereignty over an area in which it has sovereignty, and has had it for a long time.

64. Entry into force of UNCLOS may make illegal for States Parties to claim, for instance, to exercise customs police rights beyond 24 miles from the baselines (as envisaged in the *MV "Saiga"* case[45]) or to have a 200-mile territorial sea as some States did at the time of the entry into force of UNCLOS, because these claims do not correspond to rights accepted and respected by the international community. The exercise of sovereignty on the Sea of Azov, as consisting of internal waters, was a fact not contested by other States before the entry into force of UNCLOS.

65. Ukraine correctly states, that "no rules exist in the Convention" for pluri-State internal waters claims.[46] Not correct is, however, the consequence drawn by Ukraine from this lack of rules in UNCLOS: such consequence, as alleged by Ukraine, implies that in the Convention there are rules that would make existing internal waters disappear and curtail the scope of the riparian States' sovereignty by permitting the establishment of territorial seas and economic zones in which foreign States enjoy rights, such as innocent passage and freedom of navigation that they would not otherwise have in internal waters.

66. The correct consequence to be drawn from the fact that there exist no rules in UNCLOS concerning pluri-State bays is that such bays are not regulated under the Convention. Their waters remain under the sovereignty of the riparian State or States and are, thus, internal. To change their status automatically, because of the entry into force of UNCLOS, would entail a loss of sovereignty that a State Party cannot be presumed to accept as the result of its acceptance of being bound by the Convention. If any change to the status of these waters as internal waters is possible, it can only be effected by a mutual consent of both riparian States. This was obviously not the case as concerns the status of the Sea of Azov.

67. Ukraine argues that recognition of claims to internal waters in areas as the Sea of Azov "entirely changes the character of the waters from a shared resource for all States…to waters owned and used for the exclusive benefit of a small group of States".[47] It further argues that such recognition would deprive other UNCLOS State Parties not only of "navigational rights that they would otherwise enjoy" but also of rights concerning fishing and marine scientific research.[48] Again, Ukraine attacks the straw man of "claims" to the internal waters status of the Sea of Azov as something new that would change its supposedly different status. But such status was simply the consequence of Russia and Ukraine being the continuator and the successor in the exercise of sovereignty on the shores of the Sea of Azov respectively. Third States have

[45] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment, ITLOS Reports 1999 (**UAL-28**), p. 54, para. 127.

[46] URM, para. 77.

[47] *Id*., para. 78.

[48] *Ibid.*

never enjoyed navigational or other rights in the Sea of Azov by virtue of UNCLOS because these waters are – and not are claimed as – internal waters in which neither UNCLOS nor customary international law recognises rights to them.

B. THE THREE ALLEGED "NECESSARY CRITERIA" FOR THE INTERNAL WATERS STATUS OF NEW PLURI-STATE BAYS ARE NOT NECESSARY UNDER INTERNATIONAL LAW

68. A further notable element of the Revised Memorial is that it insists on the thesis, illustrated in Ukraine's previous written and oral pleadings, that the Sea of Azov does not meet the three "necessary criteria". Ukraine deduces these alleged "criteria" from three characteristics that the "limited exceptions" to the alleged "general rule", according to which "a sea surrounded by more than one State generally cannot be claimed as internal waters", happen to have in common.[49]

69. Serious doubts must be raised as to the very existence in public international law of such alleged "general rule" which in previous pleadings was rather pompously presented as a "strong…norm" of international law.[50] In its Revised Memorial, Ukraine abandons the untenable idea of the "strong norm", but resubmits it as a "general rule",[51] relying again on statements of Yehuda Blum and of Sir Gerald Fitzmaurice.[52] These are respected scholars, but their statements do not qualify as meeting the requirements for the existence of customary rules.

70. Be it as it may, Ukraine misrepresents the source by Yehuda Blum it relies upon. First, the phrase that Ukraine took out of the context is a quote from another author, Charles B. Selak, rather than Yehuda Blum.[53] Second, Yehuda Blum in fact takes issue with that passage of Selak, stating:

> "[t]he change of the character of such water areas from a closed sea into essentially high seas is, however, generally not brought about automatically through the territorial changes along the coast. As a rule, special treaty arrangements provide for the recognition of the new status of the maritime area in question".[54]

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[49] URM, para. 80.

[50] UWO, para. 68. Russia's Reply, para. 62, explains why the alleged "strong norm" invoked by Ukraine "rather than 'strong' is non-existent" (para 62). Russia relies, among other elements, on the following statement of Lucius Caflisch: "It is difficult to see why one should prevent two States with adjacent coasts from doing what one coastal State can do alone" (Russia's Reply, para. 65 quoting L. Caflisch, "Les zones maritimes sous jurisdiction nationale, leurs limites et leur délimitation", in D. Bardonnet and M. Virally (eds.), *Le nouveau droit international de la mer*, Pedone, 1983, pp. 37-40 (**RUL-54**), p. 38. (translation from the original French: "*on voit mal pourquoi on empêcherait que deux Etats dont les côtes sont adjacentes fassent ce qu'un Etat côtier peut faire seul*.").

[51] URM, para. 81.

[52] *Id.*, para. 80.

[53] Y.Z. Blum, *Historic Titles in International Law*, Martinus Nijhoff, 1965 (**UAL-56**), p. 279 referring to Selak, "A Consideration of the Legal Status of the Gulf of Aqaba," *AJIL,* Vol. 52, 1958, p. 693: "the Gulf of Fonseca situation appears to be unique. Water areas surrounded by the territory of a single coastal State, and thus having the status of 'closed seas,' which subsequently, because of political changes resulting in the establishment of more than one state on their shores, become multinational in character, generally have come to be regarded as essentially parts of the high seas, regardless of the narrowness of their entrances."

[54] Y.Z. Blum, *Historic Titles in International Law*, Martinus Nijhoff, 1965 (**UAL-56**), p. 279.

71. Ukraine also takes out of the context and misrepresents the statement of Sir Gerald Fitzmaurice that reads as follows: "It is not, in general, open to the coastal States of the bay (even by agreement *inter se*) to draw a closing line and, by claiming the waters of the bay as internal waters, to divide these up among themselves."[55] This statement addresses a situation different from that of the Sea of Azov. It hypothesises the case of the two newly riparian States of the bay that take the initiative of drawing a closing line with the purpose (not supported by the Geneva Convention or UNCLOS) of making internal the waters of the newly multi-State bay. In the case of the Sea of Azov, the internal character of its waters already existed when the bay became a multi-State one.

72. Even if this "general rule" existed in general international law, its alleged "exceptions" and, accordingly, their "criteria" cannot be considered as themselves being customary rules. Endorsing these descriptive "characteristics", which certain cases may have in common, and empowering them with a legal effect of prescriptive rules, would result in establishing a mandatory rule that will have to be followed in all similar cases.

73. Thus, the developments put forward by Ukraine in its Revised Memorial (as well as in its previous pleadings) to argue that the three "necessary requirements" are not met are built on a flawed foundation – namely, that there is a general rule and that it has three exceptions that are the requirements necessary for accepting that a multi-State bay's waters be considered as internal.

74. In light of the above-mentioned important caveat, it would be unnecessary to discuss each of the alleged requirements. However, for the sake of completeness we will briefly do so.

75. The alleged necessary requirements are: 1) that the bay is too small to contain areas of high seas or exclusive economic zones; 2) that the exercise of sovereignty over the waters of the bay does not cause prejudice to third States; 3) that "all littoral States have affirmatively agreed to an internal waters status".[56]

76. As regards the first alleged requirement, there is no doubt that the Sea of Azov is larger than the Gulf of Fonseca or the Bay of Piran. But the judgments concerning these bays to which Russia refers[57] 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. Moreover, in negotiations with Russia, Ukraine never argued that the Sea of Azov is too big to qualify as being constituted by internal waters.

77. In its Revised Memorial, Ukraine simply notes that "pluri-State internal waters have been recognized only in bodies of water covering what would otherwise constitute territorial sea",

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

[56] URM, para. 81.

[57] RPO, paras. 87-94.

without considering that such recognition was never justified by reliance on the small dimension of the bay.[58] In the Revised Memorial, Ukraine seems to base itself on the argument that the exercise of sovereignty over waters that "otherwise" would constitute exclusive economic zones or high seas would be inconsistent with Articles 58, 86 and 89 of UNCLOS[59] – namely with the prescription that "[n]o State may validly purport to subject any part of the high seas to its sovereignty". We have already shown that this argument is misconceived. Article 89 refers to new claims of sovereignty on areas of the high seas or the exclusive economic zone not to the maintaining of sovereignty in areas that have never been high seas or exclusive economic zones, as is the case of the Sea of Azov.

78. As regards the second requirement, a similar argument applies. To hold, as Ukraine does, that the exercise of sovereignty over the waters of the bay should not cause prejudice to third States, presupposes that such exercise introduces a change in the rights of third States. However, these States cannot be prejudiced unless there are rights these States enjoy that would disappear or be limited once the bay becomes a multi-State bay. This is not the case as regards the Sea of Azov. It was internal waters at the time of the dissolution of the USSR and foreign ships did not enjoy therein navigational and other rights but only those granted to them by the coastal State.

79. The transformation of the Sea of Azov into a multi-State bay in 1991 did not change this situation as the sea remained constituted of internal waters. And third Parties were not prejudiced by the fact that the Sea of Azov, after it became surrounded by two States in lieu of one, continued to be internal waters. These States did not lose rights they never had. The protests Ukraine refers to[60] are based on the wrong assumption that there is a claim by Russia to transform the status of these waters while this status has remained the same.

80. The third requirement that Ukraine claims must be met for a multi-State bay to be constituted by common internal waters is that there is "affirmative agreement of the States concerned".[61] The need for such agreement is, firstly, not supported by the cases and element of practice Ukraine relies upon. Secondly, in the case of the Sea of Azov, an "affirmative agreement" was not needed. Assuming, but not conceding, that there was such need, the alleged requirement was satisfied, as the Parties accepted the internal waters status of the Sea of Azov. Both Parties expressly confirmed this status in the Azov/Kerch Cooperation Treaty, with Article 1 stating that "[t]he Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine", as will be considered further in the following Section C.

[58] URM, para. 83.

[59] *Ibid.*

[60] *Id.*, paras. 88-91.

[61] *Id.*, para. 92.

81. The cases Ukraine refers to are those of the Gulf of Fonseca and of the Bay of Piran, while the element of practice is that concerning the Gulf of Riga.[62]

82. It is true that the *Gulf of Fonseca* judgment refers to all States bordering the bay "act[ing] jointly" to claim historic title to a bay.[63] However, "joint action" does not correspond to the description Ukraine submits of this sentence of the ICJ, by referring to "the fact that all bordering States had agreed to assert a historic claim to the Gulf of Fonseca's waters".[64] Contrary to what Ukraine holds, joint action is not the same thing as "affirmative agreement". The meeting of minds that is the necessary prerequisite of an agreement (even a tacit agreement) may be evidenced by joint action, but is not a necessary aspect of it.

83. As regards the Bay of Piran, Ukraine relies on the Arbitration Agreement of 4 November 2009 that "specifically disallowed the tribunal from considering any unilateral actions by either State post-dating the dissolution of Yugoslavia", arguing that it "in effect, constituted an agreement between the two States to continue their pre-dissolution regime"[65]. In arguing that this contrasts with the case of the Sea of Azov because there was (according to Ukraine) no agreement as regards the latter, Ukraine forgets that the arbitral Award in the *Croatia/Slovenia* case does not rely on the above recalled provision of the Arbitration Agreement. The Award relies on that "the effect of the dissolution of the SFRY is a question of State succession" so that "the Bay remains internal waters within the pre-existing limits".[66] It also states that:

> "the Bay was internal waters before the dissolution of the SFRY in 1991, and it remained so after that date. The dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status".[67]

84. The element of practice Ukraine relies upon concerns the Gulf of Riga. In Ukraine's view, Estonia's refusal to accept Latvia's proposal to declare the Gulf of Riga as the two countries' common internal waters, supports the view that for a newly multi-State bay's waters to be common internal waters, the agreement of the successor States is necessary.[68] In fact, as clarified by Russia in its previous pleadings,[69] a multitude of political considerations might explain Estonia's refusal of Latvia's proposal and the decision of the two countries to conclude in 1996 a treaty delimiting their territorial sea and exclusive economic zone in the Gulf of

[62] URM, paras. 93-96.

[63] *Id*., para. 93 citing *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening),* Judgment, I.C.J. Reports 1992 (**RUL-19**), p. 594, para. 394.

[64] *Ibid.*

[65] *Id.*, para 95.

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

[67] *Id*., para. 883.

[68] URM, para. 94.

[69] See Russia's Reply, para. 78.

Riga.[70] Moreover, the case of the Gulf of Riga should be distinguished from that of the Sea of Azov in the sense that there is no confirmation that Estonia and Latvia treated the Gulf of Riga as their shared internal waters prior to 1940, taking into account that upon the USSR dissolution, they declared themselves as continuators of the pre-1940 Estonia and Latvia, rather than the Soviet republics.[71]

85. A mere fact that Estonia and Latvia entered into an agreement regarding the status of the Gulf of Riga does not support the view that they considered themselves legally bound to follow this course, and such step says nothing about the legal regime of the Gulf of Riga during the six years between the dissolution of the USSR and the 1996 delimitation agreement between the two countries. There is no indication that, during this period, the internal waters status the Gulf enjoyed when Estonia and Latvia were the republics of the Soviet Union was automatically lost and replaced by territorial seas and high seas or exclusive economic zones, considering *inter alia* that Latvia in 1994 specified in its Maritime Code that the Gulf of Riga was "enclosed joint internal waters of Estonia and Latvia".[72]

C. There was an Agreement between the Russian Federation and Ukraine on the Internal Waters Status of the Sea of Azov and Kerch Strait

86. There was no need for an agreement between Russia and Ukraine as to the internal waters status of the Sea of Azov and the Kerch Strait because these had been internal waters since the dissolution of the USSR, in continuation of their prior status.[73] Nevertheless, the record shows that there was such an agreement.

87. As already illustrated, the dissolution of the USSR did not change the status of the Sea of Azov and the Kerch Strait, and as illustrated in Russia's Reply, no change to the regime of internal waters was agreed upon.[74] In fact, the actions of Ukraine outside these proceedings demonstrated its treatment of the Sea of Azov and the Kerch Strait as internal waters. As will be further demonstrated, the fact that Russia and Ukraine agreed that the Sea of Azov and the Kerch Strait remained internal waters is evident from the negotiations, the agreements between the two States and by their practice.

88. In its Revised Memorial, Ukraine confirms its position that it "made clear that it considered the Sea of Azov as containing its territorial sea and exclusive economic zone"[75] and that Ukraine "acted quickly to assert and secure these maritime rights" by depositing in 1992 "baselines with the United Nations Secretariat for measuring the breadth of its territorial sea, exclusive

[70] Agreement between the Republic of Estonia and the Republic of Latvia on the Maritime Delimitation in the Gulf of Riga, the Strait of Irbe and the Baltic Sea, 12 July 1996, *Law of the Sea Bulletin*, 1999, Vol. 39 (**UA-510**).

[71] A. Lott, *The Estonian Straits. Exceptions to the Strait Regime of Innocent or Transit Passage*, Brill Nijhoff, 2018 (**RUL-78**), pp. 127-128.

[72] *Id.*, p. 129, fn. 549.

[73] Russia's Reply, paras. 80-85.

[74] *Id*., para. 85.

[75] URM, para. 98.

economic zone, and continental shelf" in the Black Sea and the Sea of Azov.[76] These baselines were communicated to Russia only in 2002.[77]

89. However, this is in stark contrast with the position assumed by Ukraine during the negotiations regarding the Sea of Azov and the Kerch Strait. As shown in the previous Russian submissions,[78] both States proceeded from an understanding: that "the Sea of Azov is treated as internal waters of Ukraine and the Russian Federation."[79] The Parties were even more explicit stating that they were "proceeding from the premise that the Sea of Azov will retain [its] status as internal waters of Ukraine and the Russian Federation."[80]

90. It is therefore evident that Ukraine accepted that the status of the waters was that of internal waters,[81] also stating when addressing the issue of delimitation that "delimitation of the state border in the Sea of Azov would not change the status of internal waters."[82]

91. Statements such as these had already been made in previous years,[83] making clear that both States did not consider it necessary to enter into a new agreement to establish the internal waters status of the Sea of Azov. A new agreement would have been necessary only if there were to be changes to the existing status.

92. The existence of an agreement between the two States on the internal waters status of the Sea of Azov and the Kerch Strait was also confirmed at the highest level after 1998.[84] Of note is an exchange of letters of August 2001 between Vladimir Putin and Leonid Kuchma in which President Kuchma wrote in response to President Putin that he "would like to reiterate that

[76] URM, para. 99.

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

[78] Russia's Reply, para. 86.

[79] Minutes of the 3rd Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea, 27 April 1998 (**RU-309**).

[80] Minutes of the 5th Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea (26 March 1999) (**UA-522**).

[81] See also Minutes of the 6th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 28 January 2000 (**RU-63**), Minutes of the 7th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 12 May 2000 (excerpts) (**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) (**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) (**RU-73**).

[82] Minutes of the 5th Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea (26 March 1999) (**UA-522**).

[83] *See* RPO, para. 98; Russia's Reply, paras. 87-88.

[84] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 2378/2dsng, 30 March 1998 (**RU-62**). See also Letter of the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 (**RU-68**): "The high-level agreement between Russia and Ukraine to maintain the special status of the Azov-Kerch water area as internal waters of Russia and Ukraine was confirmed during our conversation in January 2000."

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."[85]

93. Ukraine still seeks to give an inaccurate presentation of the negotiations,[86] ignoring the instances quoted above from which it is clear that there was agreement as to the internal waters status. Ukraine also stresses the importance of the 2002 communication to Russia of its baselines for measuring the breadth of the territorial sea in the Sea of Azov. But as already stated in Russia's Reply,[87] Russia promptly reacted, reiterating its "commitment to the well-known high-level agreements concerning the preservation of the historically established and undisputed status of the Sea of Azov and the Kerch Strait as internal waters of both Russia and Ukraine", and emphasised that "the current regime of the maritime area, which is in common use by the two States, can be modified only by mutual agreement."[88]

94. Ukraine alleged that Russia at first acknowledged the application of UNCLOS to the Sea of Azov,[89] and further engaged in negotiations in order to "grant" these waters the internal waters status.[90] In addition to being both factually and legally incorrect, this is misleading, as Ukraine relied on an incorrect translation of the documents: the correct translation of the submitted minutes of Russia-Ukraine negotiations clearly demonstrates that Russia *affirmed* the internal waters status of the Sea of Azov, instead of suggested to "grant" it, as Ukraine's Revised Memorial misquoted it.[91]

95. The status of the Sea of Azov as common internal waters of Russia and Ukraine was also clear from the State Border Treaty, the Azov/Kerch Cooperation Treaty and the Joint Statement

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[85] Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 5211/13-011-268-2001, 13 August 2001 (**RU-70**). See also Russia's Reply, para. 91.

[86] URM, paras. 104-113.

[87] Russia's Reply, para. 92.

[88] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 6437/2dsng, 8 August 2002 (**RU-75**). In addition, Russia confirmed its position during subsequent negotiations: "The Ukrainian side announced the approval of geographical coordinates of the baselines for calculation of the breadth of the territorial sea of Ukraine in the Azov Sea and justified the necessity of its delimitation in accordance with the norms of international law. **The Russian side confirmed its disagreement with the attempts of unilateral delimitation of the Azov-Kerch water area**." (emphasis added) (Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of Delimitation (the Position of the Ukrainian Side) and Determination of Legal Status (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002) (**UA-514**)).

[89] URM, para. 104.

[90] *Id*., paras. 105-106.

[91] In fact, the Russian delegation was suggesting to "*affirm [the correct translation]* the internal waters status of the Sea of Azov and Kerch Strait" (emphasis added) and also "use them jointly without any delimitation of their maritime spaces" (*cf.* URM, para. 105 referring to Minutes of the Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea (17 October 1996), p. 2 (emphasis added) (**UA-517**) and (**RU-310**). Ukraine also refers to the Russian delegation's understanding of the consequence of such affirmation which was expressed as follows: "delimitation of the border in the Azov-Kerch waters according to the 1982 United Nations Convention on the Law of the Sea would make it impossible to *affirm [the correct translation]* the internal waters status of these waters" (emphasis added) (*cf.* URM, para. 106 referring to Minutes of the 3rd Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea (27 April 1998), p. 2 (**UA-520**) and (**RU-309**)).

of the Presidents of Russia and Ukraine adopted on the same date of the signing of the Azov/Kerch Cooperation Treaty.

96. According to Article 5 of the State Border Treaty:

> "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."[92]

97. According to Ukraine's Revised Memorial the language quoted "evinces no agreed position that the Sea of Azov and Kerch Strait were treated by the Parties as internal waters. Rather, it reflects that the two States had conflicting *positions* – in plural – as to how a *future* internal waters status for those bodies of waters could work in practice…"[93] Whereas, in fact, the "conflicting *positions*" concerned the views of Russia and Ukraine regarding whether the Sea of Azov and the Kerch Strait would have the status of shared internal waters of two States or whether they would be delimited by the state border. As Russia has already stated, Ukraine accepted that the starting point was that the Sea of Azov constituted internal waters of the two States, although it wanted the two Parties to establish a delimitation line of the state border between Ukraine and Russia.[94] The internal waters status was already a shared assumption of the Parties, and the task that was referred to be addressed in the future was the question of delimitation.

98. In addition, Article 1 of the Azov/Kerch Cooperation Treaty in two already quoted provisions reads as follows:

> "The Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine."

And that:

> "The Sea of Azov shall be delimited by the state border line in accordance with an agreement between the Parties."[95]

99. Also, the Joint Statement of President Putin and President Kuchma, in accordance with the Azov/Kerch Cooperation Treaty, provided an additional confirmation of the internal waters status of the waters of the Sea of Azov.[96]

100. In contrast to what Ukraine alleges, the use of the adverb "historically" in the Azov/Kerch Cooperation Treaty and in the Joint Statement of the Presidents does not somehow mean that it

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[92] Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, 28 January 2003 (without Annexes) (**RU-19**), Article 5.

[93] URM, para. 108 (emphasis in original).

[94] Russia's Reply, para 93.

[95] Azov/Kerch Cooperation Treaty (**RU-20-AM**).

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

"records a historical fact as to their past status",[97] as was already stated in Russia's Reply[98] and above.[99] [redacted] explains that, from the perspectives of grammar, lexis and syntax analysis, the adverb "historically" cannot *per se* indicate that the described status existed only in the past.[100] Article 1 of the Azov/Kerch Cooperation Treaty uses the verbs "являются [are]" (Russian) and "є [are]" (Ukrainian) in the present tense and thus describes an action existing in the present, stemming from historical prerequisites.[101] As mentioned above, the adverb points to the historical origin of the internal waters status of the Sea of Azov and the Kerch Strait, which is the basis of the present internal waters status of the Sea and the Strait.[102]

101. Contrary to Ukraine's misleading allegation,[103] the adverb "historically" in Russian and Ukrainian languages cannot modify the verbs that they accompany so as to render them past meaning. [redacted] notes that the adverb "historically" by itself cannot indicate a fact that would be relevant only to the past, without the verb, to which it relates, changing its form to the past tense.[104] Ukraine's interpretation would only be possible if the Parties used the verb in the past tense. However, even in such case, Ukraine's understanding would seem more plausible, if the Parties referred to the Sea of Azov and the Kerch Strait as internal waters of the USSR, rather than of the Russian Federation and Ukraine, but they did not, as explained above.[105]

102. In an attempt to downplay the significance of the Parties' confirmation of the internal waters status in the Azov/Kerch Cooperation Treaty, Ukraine characterises it as having "interim nature" and invokes the fact of further negotiations between Russia and Ukraine following the execution of the Azov/Kerch Cooperation Treaty.[106] While further negotiations between Russia and Ukraine indeed took place, they focused on the issues other than the status of the Sea of Azov and the Kerch Strait – in particular, delimitation and cooperation between the littoral States in other spheres, e.g., navigation, fishing and environmental protection.[107] The status of the Sea of Azov and the Kerch Strait could not remain "an outstanding issue for negotiation", as, in exchanging their positions on the issues on the agenda of negotiations, the States proceeded from the premises fixed in the Azov/Kerch Cooperation Treaty.[108] The *status quo*

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[97] URM, para. 110.

[98] Russia's Reply, para. 100.

[99] See above, para. 47.

[100] [redacted] Report, paras. 7, 42–57.

[101] *Id.*, paras. 6, 27, 31-33, 39.

[102] See above, para. 47; [redacted] Report, paras. 27–33, 38.

[103] URM, fn. 222.

[104] [redacted] Report, paras. 7, 42–57.

[105] See above, para. 46.

[106] URM, paras. 112-113.

[107] Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait (29–30 January 2004) (**UA-531**), pp. 1-2; 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) (**UA-532**), p. 1.

[108] URM, para. 112; Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait (29–30 January 2004) (**UA-531**), p. 1.

reached in the Azov/Kerch Cooperation Treaty did not change in the course of those negotiations.

103. In further negotiations about the delimitation of the Sea of Azov, the suggestion of Ukraine with regard to the location of the state border line in the Sea of Azov also proceeded from the premise that the delimited water areas enjoyed the internal waters status. The suggested state border in the Sea of Azov, being a line separating the State territories of Russia and Ukraine,[109] i.e. the territories where the States enjoyed full sovereignty, as opposed to the delimitation of the marine zones (EEZs, continental shelves), could have separated only the internal waters of the two States. Otherwise, in light of the dimensions of the Sea of Azov,[110] such state border would cross the area that would in other circumstances be the EEZ (but which was not the case in the Sea of Azov), where there can be no delimitation of the state border.[111]

104. Additionally, Ukraine's subsequent treatment of airspace above the Sea of Azov equally suggested the absence of the EEZ. Under Article 9(b) of the Convention on International Civil Aviation ("Chicago Convention") a State enjoys the right to "restrict or prohibit flying *over the whole or any part of its territory*".[112] In 2015, the Ukrainian authorities restricted the flights in the area of the airspace above the Sea of Azov that extended beyond the 12-mile zone off the coast.[113] This restriction that Ukraine introduced in the area of the airspace over the Sea of Azov tellingly corresponded to the characterisation of these waters as sovereign ones: Ukraine could only exercise its sovereign rights in that airspace if the Sea of Azov comprised its internal waters at that time.[114]

105. It is noteworthy that, even after commencing this arbitration, Ukraine endorsed such approach in its national legislation. Decree of the President of Ukraine of 12 October 2018 No. 320 ordered to "make public in accordance with the established procedure, by notifying the Secretariat of the United Nations and the Russian Federation, the determined coordinates of the median line in the Sea of Azov, the Kerch Strait and the Black Sea, which, until a bilateral agreement is concluded, shall be the line of delimitation, i.e. *the line of the state border between Ukrainian and Russian internal waters.*"[115]

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

[110] Maximum length of approximately 224 miles, maximum width of 109 miles (State Hydrographic Service of Ukraine, Oceanographic Atlas of the Black Sea and the Sea of Azov, No. 601 (**UA-01**)).

[111] See Russia's Reply, para. 106.

[112] Convention on International Civil Aviation, 7 December 1944 (**RU-311**) (emphasis added). Further, Article 2 of the Chicago Convention defines the territory of a state as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State".

[113] The European Union Aviation Safety Agency official website, "Airspace of Eastern Ukraine" (**RU-312**), Annex 1.

[114] See Map illustrating application of the A2594/15 NOTAMN to the alleged territorial sea in the Sea of Azov (**RU-313**).

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

106. As evidence of the practice on the use of the Sea of Azov, Ukraine heavily relied on the Agreement between the Government of Ukraine and the Government of the Russian Federation on Cooperation in the Fisheries Sector ("1992 Fisheries Agreement"), which in fact was not incompatible with the internal waters regime,[116] as well as navigation of third State flagged ships in the Kerch Strait.[117] The previous practice of the two States vis-à-vis each other and the third States demonstrated conformity with an internal waters status.

107. In terms of fishery practice, a year after the conclusion of the 1992 Fisheries Agreement, Ukraine and Russia created a joint authority – Russian-Ukrainian Commission on Fisheries in the Sea of Azov ("RUC") – which annually determines the total allowable catch, coordinates preservation and sustainable management of the living resources in the Sea of Azov.[118] The underlying 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 ("1993 Fishery Inter-Committee Agreement") explicitly affirmed exclusive fishing rights in the Sea of Azov only to the vessels under the flags of Ukraine and the Russian Federation (Article 1(3)), resting on the premise that "the living sources of the Sea of Azov shall be considered as common heritage of Azov littoral states".[119] These steps were in line with the regime of *shared* internal waters.

108. As regards navigation practice, navigation by third State merchant vessels is in principle not incompatible with the internal waters regime either, when the littoral States expressly authorise it. Especially, when the littoral States condition such navigation to the third State merchant vessels bound for or returning from their ports, like it was made in the Azov/Kerch Cooperation Treaty.[120] What was indeed in stark contrast with the UNCLOS regime was the maintained exclusive use of the Sea of Azov by warships of Russia and of Ukraine. The Parties on several occasions expressed their views that warships of third States could only enter the Sea of Azov and the Kerch Strait at an invitation of Ukraine or Russia authorised by the other State.[121] This practice was confirmed in the Azov/Kerch Cooperation Treaty binding on Russia and Ukraine.[122] There was no practice to the contrary (at the very least Ukraine has not demonstrated any).

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[116] See Section D below.

[117] URM, paras. 116-117.

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

[119] *Id*., Preamble.

[120] Azov/Kerch Cooperation Treaty (**RU-20-AM**), Article 2.

[121] Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003, *Law of the Sea Bulletin*, 2004, Vol. 54 (**RU-21**), p. 131; Minutes of the 12th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 19 April 2001 (excerpts) (**RU-67**): "Coinciding positions of the sides regarding preservation of the status of the Sea of Azov as internal waters of the Russian Federation and Ukraine and closed nature of water area of the Sea of Azov for navigation of warships of third states were noted."

[122] Azov/Kerch Cooperation Treaty (**RU-20-AM**), Article 2(3).

109. Ukraine's reference to the pilotage regime maintained in the Kerch Strait as evidence of practice that is allegedly consistent with the UNCLOS regime, rather than with an internal waters status,[123] is ill-founded and has nothing to do with either the internal waters status or the UNCLOS regime. The need to maintain the pilotage regime in the Strait is explained by its narrowness and shallowness. As the expert in navigation, [redacted] explains, compulsory pilotage is a reasonable control measure introduced to mitigate the risk of collisions and groundings of all types of ships in the Strait. It is typical of straits with challenging geographical, geological and hydrometeorological conditions, to which the Kerch Strait belongs.[124] It is thus can be introduced irrelevant of the status of the respective water area, as the need for pilotage is guided by other considerations, and is in no way indicative of the status of the waters.[125] In fact, there are examples of pilotage systems established in the water areas within internal waters and territorial sea.[126]

110. In its previous submissions, Russia has already exemplified numerous Ukraine's acknowledgments in its own domestic legislation that the status of the Sea of Azov and the Kerch Strait was that of internal waters.[127] The Revised Memorial failed to address specifically those instances. Instead, it referred to the general provisions of Ukraine's and Russia's domestic laws on internal waters, breadth of territorial sea and exclusive economic zone, as attesting to the allegation that the Sea of Azov contains territorial sea and EEZ.[128] Those references have no relevance to Ukraine's contention, much less support it.

111. First, the referenced domestic law provisions on the internal waters, 12-mile territorial sea and EEZ, while indeed mirroring the UNCLOS provisions, are of basic nature and general application, and it is impossible to infer from their mere existence that they specifically cover the Sea of Azov and the Kerch Strait or exclude the possibility of their internal waters status.

112. Second, the status of the Sea of Azov, as internal waters under the sovereignty of two States – Russia and Ukraine – was covered by an international treaty, rather than by the provisions of the national legislation referred to by Ukraine. Ukraine omits to mention that both Ukrainian and Russian Constitutions stipulate that international treaties are an integral part of national legislation of a respective State.[129]

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[123] URM, para. 116.

[124] Expert Report of [redacted] ("[redacted] Report"), para. 35.

[125] The USSR also maintained the pilotage system in the Kerch Strait, and Ukraine agrees in these proceedings that at that time, it enjoyed the status of internal waters.

[126] *E.g.*, Croatia and Poland maintain mandatory pilotage for entering the territorial sea and internal sea waters (*See*, Ordinance of the Ministry of the Sea, Transport and Infrastructure of the Republic of Croatia "On Sea Pilotage" No. 3059 of 21 September 2010 (**RU-314**); IMO Resolution "Adoption of a New Mandatory Ship Reporting System "On the Approaches to the Polish Ports in the Gulf of Gdańsk" No. MSC. 249(83) of 8 October 2007 (**RU-315**).

[127] Russia's Reply, para. 112.

[128] URM, paras. 101, 103.

[129] Constitution of Ukraine of 28 June 1996 (**RU-316**), Article 9(1), Constitution of the Russian Federation of 12 December 1993 (**RU-317**), Article 15(4).

113. Finally, the Revised Memorial of Ukraine relied on the current Russian position that, following 2014, the Kerch Strait has been under the full sovereignty of the Russian Federation. It also cited the inspections by the Russian state border authorities of the vessels transiting the Strait, as another example of practice that would be allegedly inconsistent with the internal waters status.[130] This is clearly misplaced and contradicts the Tribunal's decision in the 2020 Award that the Tribunal has no jurisdiction to decide on the sovereignty over the Crimean Peninsula, and, as a consequence of that ruling, on a related issue of the sovereignty over the Kerch Strait. In addition, as Russia further explains in the relevant section of this Counter-Memorial,[131] the practice of vessels' inspections was not new to the Sea of Azov and the Kerch Strait, since Ukraine and Russia cooperated in this area prior to 2014.

114. Ukraine's attempt to challenge the plain meaning of the terms of the Azov/Kerch Cooperation Treaty, regardless of its statements outside these proceedings that the Sea of Azov constituted internal waters, and notwithstanding the following negotiations that were "based on" the said Azov/Kerch Cooperation Treaty,[132] should therefore be dismissed.

D. THE 1992 FISHERIES AGREEMENT DOES NOT SUPPORT UKRAINE'S VIEW THAT UNCLOS APPLIES TO THE SEA OF AZOV AND THAT THERE WAS NO AGREEMENT ON THE INTERNAL WATERS STATUS

115. In its Revised Memorial Ukraine gives great weight to the 1992 Fisheries Agreement.[133] It relies on it, first, to support its affirmation that Ukraine and Russia "acknowledged the relevance of UNCLOS to their fishing activities in the Sea of Azov[134] and, second, to support the argument that "The Conduct of Ukraine and Russia Confirms the Absence of Agreement to an Internal Waters Status".[135] The 1992 Fisheries Agreement does not provide any basis for the first contention and therefore is of no relevance for the second one.

116. Ukraine states that with the 1992 Fisheries Agreement the two States acknowledged "the *relevance* of UNCLOS to their fishing activities in the Sea of Azov".[136] According to Ukraine, this follows from the alleged connection between a point in the Preamble stating that the Parties agreed to "[t]ake into account [in fact the text says "taking into account"] the UN Convention on the Law of the Sea, 1982"[137] and the provision in Article 1 stating that the Parties shall "seek

[130] URM, paras. 118-119.

[131] Chapter 4.

[132] Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait (29–30 January 2004) (**UA-531**), p. 1.

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

[134] URM, para 100.

[135] *Id.*, Title of Section IV(C) of Chapter 5 and para. 117.

[136] *Id.*, para. 100 (emphasis added).

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

to work together …for the purposes of research, optimum utilization, and preservation of living resources of the World Ocean, including the Black Sea and the Sea of Azov".[138]

117. The preambular point invoked is just one of nine such points and does not have a wording that by itself would be sufficient to conclude that the two States consider *all* the water areas mentioned in the 1992 Fisheries Agreement to be governed by UNCLOS at some point in the future. In particular, nothing confirms the view that the reference to the Sea of Azov means that it is regulated by UNCLOS.[139]

118. In the same paragraph of the Revised Memorial,[140] Ukraine recalls another preambular paragraph of the 1992 Fisheries Agreement in which the Parties confirm the UNCLOS rule on "fishing of stocks encountered in the zones of two or more states".[141] This reference is repeated in another paragraph invoking the 1992 Fisheries Agreement to support the view that there was no agreement on an internal waters status.[142] This preambular paragraph on its own is not suggestive of UNCLOS' application to the Sea of Azov either, nor is it indicative of the fact that there was no agreement on the internal waters status of the Sea of Azov.

119. Further, during the Hearing on Preliminary Objections, Ukraine affirmed that "any automatic renewal of internal waters status under principles of State succession was not on the mind of either party when, in September 1992, Ukraine and Russia entered into an agreement on cooperation in the fisheries sector that was applicable to both the Sea of Azov and the Black Sea."[143] This is a gratuitous surmise of what the Parties had or had not in mind when concluding the 1992 Fisheries Agreement.

120. It must be noted, moreover, that provisions on fisheries cooperation between Russia and Ukraine found in the Agreement were appropriate for conducting fishery activities in shared internal waters. Their application to the Sea of Azov did not have implications as regards the applicability of UNCLOS to the Sea of Azov as claimed by Ukraine.

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

[139] *Cf.* other bilateral treaties between Russia and Ukraine. The wording chosen by the Parties to clarify that certain relations between them are regulated by another instrument is different from the one used in the 1992 Agreement. For instance, the Agreement between the Russian Federation and Ukraine on the Settlement of Debt Obligations and Credit Claims of 3 October 1992 (**RU-318**) concluded in the same year contains the following provision: "This Agreement does not intend to infringe upon the interests of third states of the Rouble zone with whom Ukraine's payment and settlement relations **are regulated by separate agreements**" (emphasis added) (Article 6). See also the text of the Treaty between the Russian Federation and Ukraine on the Status and Conditions of the Presence of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine of 28 May 1997 (**RU-319**): "[r]elations between persons from military formations, their family members and legal entities and individuals of Ukraine beyond their areas of deployment **are regulated by relevant agreements of the Parties** and Ukrainian law" (emphasis added) (Article 6).

[140] URM, para. 100.

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

[142] URM, para. 117.

[143] Transcript of Hearing on Preliminary Objections, 14 June 2019, p. 37.

E. UNCLOS DOES NOT PROVIDE FOR A REGIME OF INTERNAL WATERS

121. As already mentioned, in its Preliminary Objections Russia held the view that 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.[144]

122. The thesis that UNCLOS does not establish a regime for internal waters was put forward observing 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. As for internal waters, the Convention does not cover matters that are regulated as regards the territorial sea. In particular, for internal waters UNCLOS contains no provision comparable to Article 2(2) extending the sovereignty of the coastal State to the airspace and to the bed and subsoil, nor a provision comparable to Article 15 concerning delimitation of the territorial sea between States with opposite or adjacent coasts. Moreover, as regards internal waters there are no provisions concerning matters such as fishing, the exploration and exploitation of mineral resources of the seabed, the laying of cables and pipelines, the conduct of marine scientific research.[145]

123. Russia relied and still relies on a wealth of scholarly literature[146] and also on the joint separate opinion of Judges Cot and Wolfrum in the *Ara Libertad* provisional measures Order of ITLOS.[147] The two judges state *inter alia* that "internal waters in principle are not covered by the Convention but by customary international law".[148] Analysing Article 2(1) they observe, in a passage referred to by Russia, that this provision

> "equates internal waters and archipelagic waters with the land territory whereas it 'extends the sovereignty to an adjacent belt of sea called the territorial sea'. This clearly establishes that internal waters originally belong to the land whereas the territorial sea so belongs but only on the basis of international treaty and customary international law. As a consequence thereof limitations of the coastal States' sovereignty over internal waters cannot be assumed."[149]

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[144] RPO, paras. 117-133.

[145] *Id.,* para. 121.

[146] *Id.,* paras. 123-126, quoting Churchill and Lowe, Vukas, Bangert, Rothwell and Stephens all stating that internal waters are not covered by detailed regulation in conventions for the codification of the law of the sea.

[147] *Id.*, para. 127.

[148] *"Ara Libertad" (Argentina v. Ghana),* Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012 (**RUL-34**), p. 370, para. 26.

[149] *Id.,* para. 25.

124. During the Preliminary Objections phase of the present case, Ukraine did not address these arguments in detail. It only did so briefly on the last day of the hearing, stating that Russia's position "is not correct" and that "[q]uestions concerning internal waters regulated by provisions of UNCLOS unquestionably are within the scope of UNCLOS and would also come within the scope of the dispute settlement mechanisms of Part XV of the Convention."[150] Counsel for Ukraine then referred to Articles, 7, 8(1) and (2) of UNCLOS to conclude that "[c]onsequently, the provisions on innocent passage of UNCLOS apply to those maritime internal waters" (referring to the newly established internal waters envisaged in the quoted provisions).[151] He further referred to an article by Professor Marcelo Kohen who lists several provisions of UNCLOS that, in his view, are "potentially applicable" to internal waters and concur to establishing a regime for these waters.[152] Counsel for Ukraine explicitly refrained from endorsing the list, although he considered it sufficient to indicate "the extent to which also internal waters are regulated by the UN Convention on the Law of the Sea".[153]

125. The 2020 Award, while leaving to the merits phase to determine whether the Sea of Azov and the Kerch Strait are internal waters,[154] recalls Article 8 of UNCLOS [155] and the ITLOS statement that Article 192 applies to "all maritime areas" including internal waters[156] and that some provisions in Part II of UNCLOS may be applicable to all maritime areas.[157] These references are presented in support of the statement that "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".[158]

126. In the Revised Memorial Ukraine asserts that "UNCLOS Governs Internal Waters in Important Respects".[159] It submits as an example Article 8(2) of the Convention that guarantees innocent passage in areas that were not considered internal before the drawing of straight baselines pursuant to Article 7. Ukraine adds that: "Relatedly, Articles 34 and 35 of the Convention recognize a right of transit passage for foreign vessels in internal waters contained

[150] Transcript of Hearing on Preliminary Objections, 14 June 2019, p. 61.

[151] *Id.*, p. 62.

[152] *Ibid.*

[153] *Id.*, pp. 62-63. The article referred to Marcelo G. Kohen, *Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?* in Lilian del Castillo (ed.), Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea (2015) (**UAL-67**), p. 123.

[154] 2020 Award, para 293.

[155] *Id.,* para. 294.

[156] *Id.,* para. 295. The statement referred to is in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Case No. 21 (**UAL-12**), p. 37, para. 120.

[157] 2020 Award, para. 295 referring to *"Ara Libertad" (Argentina v. Ghana),* Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012 (**RUL-34**), p. 341, paras. 64-65.

[158] 2020 Award, para. 294.

[159] URM, title Chapter Five, Section VI.

within an international strait where the waters were not considered internal before drawing straight base lines pursuant to UNCLOS Article 7."[160]

127. While the provisions mentioned are among those in which UNCLOS refers to internal waters, as duly mentioned in Russia's Preliminary Objections,[161] they are not good examples for the present case. Before the USSR drew in 1985 straight baselines including in them the Kerch Strait,[162] the waters of the Sea of Azov and of the Kerch Strait were already internal. Consequently they were not to use the language of Article 8(2) of UNCLOS "areas which had not previously been considered as [internal]", so that there was no right of innocent passage through them that could be preserved under Articles 8 or 35.

128. Ukraine also affirms that there are provisions in UNCLOS that apply to all maritime areas including internal waters so that questions concerning internal waters regulated by these provisions may "be properly before this Tribunal", even if the waters in question were to be considered common internal waters. [163]

129. The examples given are Article 192 on the duty to protect and preserve the marine environment, Articles 204-206 setting out the obligation to assess and surveil risks of pollution, and Article 303(1) providing for the duty to protect objects of an archaeological and historical nature found at sea and to cooperate for this purpose.[164]

130. It must be observed that Article 192 is the opening provision of Part XII of UNCLOS concerning the protection and preservation of the marine environment. The general duty set out in this Article must be read in connection with the provisions set out in Sections 5 and 6 specifying the legislative and enforcement competence of different categories of States as regards different categories of marine pollution. In none of the articles in these sections is there a reference to internal waters. Similarly, Article 303(1), that sets out in general terms the duty to protect objects of an archaeological or historical nature found at sea, 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 contiguous zone, and omitting references to internal waters.

131. Even accepting that there are some provisions in UNCLOS that, while not mentioning internal waters, may be applicable to them, the main point to be stressed remains that UNCLOS does not contain a provision comparable to the one, set out in Article 2(1), according to which the "sovereignty of a coastal State extends…to an adjacent belt of sea, described as the territorial sea" and completed by Article 2(2) specifying that such sovereignty "extends to the

[160] URM, para. 127.

[161] RPO, paras. 121 and 128.

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

[163] URM, para. 128.

[164] *Ibid*.

air space over the territorial sea as well as to its bed and subsoil" and by Article 2(3) stating that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law".

132. Article 2 sets out the legal framework of a regime of the territorial sea, while it abstains from doing the same as regards internal waters. These are simply mentioned in paragraph 1 in order to clarify where the territorial sea begins. Similarly, Article 7 concerns the baseline of the territorial sea, not the outer limit of the internal waters.

133. The "regime" of internal waters is referred to only once, in Article 7(3) without any description or prescription, clearly implying that it does not belong to the Convention. Such regime is based on rules extraneous to UNCLOS, belonging to customary law.

134. Consequently, a dispute concerning activities in the Sea of Azov or in the Kerch Strait is not a dispute concerning the interpretation or application of the Convention and is not covered by the jurisdiction of this Tribunal.

III. The Sovereignty-Related Aspects of the Issues Intertwined with the Dispute Deprive the Tribunal from Its Jurisdiction

135. As Russia demonstrated in Sections I-II of this Chapter and prior submissions, the Sea of Azov and the Kerch Strait are its internal waters and as such are part of its state territory over which the Russian Federation, as well as its predecessors – the USSR and the Russian Empire – have long exercised their sovereignty. Article 2(1) of the Convention explicitly recognises the sovereignty of a coastal State over its land territory and internal waters. International law also recognises that "[i]n the legal and political sense, internal waters are in principle equated with the land territory. A State exercises its sovereignty over internal waters in the same manner and ordinarily on the basis of the same laws as are applicable to the land domain".[165]

136. The previous sections of this Chapter present an ample set of practical examples of Russia's continuing exercise of its sovereign powers over the Sea of Azov and the Kerch Strait, and thus, Russia's territorial sovereignty over these water areas. This, as well as the recent change in circumstances described above, characterises the present dispute as sovereignty-related, and the sovereignty aspects of it, similarly to the Crimea-related claims that fall outside the Tribunal's jurisdiction, are far from being ancillary. The sovereignty aspects of the present dispute particularly manifest themselves through the two following angles.

137. First, as Russia explains in this Counter-Memorial, the internal waters status of the Sea of Azov and the Kerch Strait is a bar to Ukraine's claims for various reasons. Claims of Ukraine rely on the incorrect assumption of the absence of internal waters status of these water areas. Deciding those claims based on this erroneous premise would in fact amount to depriving

[165] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Merits, Judgment, Dissenting Opinion of Judge Evensen, I.C.J. Reports 1982 (**RUL-80**), p. 18, p. 313.

Russia of a part of its sovereign territory – either as of prior to 30 September 2022, or following this date and the recent territorial changes described above. Russia has never provided its consent for such a determination by an UNCLOS Tribunal, far less the hypothetical consequences that may follow out of such pronouncement.

138. The Tribunal decided in its 2020 Award to exclude the Crimea-related claims of Ukraine from the scope of its competence and recognised that the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the Convention.[166] Russia submits that the same rationale shall be applicable to any claims of Ukraine that are based on the premise that the Sea of Azov and the Kerch Strait are not the internal waters of the Russian Federation, either before or after 30 September 2022, since such a decision would inevitably involve an implicit decision on the sovereignty of Russia over its internal waters. Pursuant to Article 288, paragraph 1 of the Convention, the Tribunal "lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty" [167] of Russia.

139. Second, since 30 September 2022, when Russia has become the only coastal State with regard to the Sea of Azov and exercises its sovereignty over the territory of the DPR, the Zaporozhye and Kherson Regions, deciding the claims of Ukraine based on the (wrong) premise that the Sea of Azov and the Kerch Strait are not Russia's exclusive internal waters, would in fact mean depriving Russia of a part of its sovereign territory. Moreover, as already stated above,[168] this Tribunal is not empowered to make any pronouncements on the issues of international law that clearly fall outside the scope of its jurisdiction as UNCLOS tribunal, nor to provide legal assessment of the events described above, either in an express manner or by rendering an award with a tantamount ruling.

140. Therefore, inasmuch as Ukraine's claims in this arbitration rest on the erroneous premise that the Sea of Azov and the Kerch Strait lack their internal waters status and, as such, prejudge the sovereignty-related issues, they fall outside the scope of the Tribunal's jurisdiction. In case the Tribunal endorses Ukraine's artificial argument designed for the purposes of these proceedings that the Sea of Azov and the Kerch Strait are not internal waters, the implications of such pronouncement would involve the issues of sovereignty and fall outside the remit of what the Convention permits this Tribunal to decide.

[166] 2020 Award, para. 195.

[167] *Id.,* para. 197.

[168] Para. 29.

CHAPTER 3.
UKRAINE'S ALLEGATIONS CONCERNING NAVIGATION THROUGH THE KERCH STRAIT ARE MERITLESS

141. Ukraine accuses Russia of impeding transit passage through the Kerch Strait in violation of Articles 38, 43 and 44 of UNCLOS due to the construction of the Crimean Bridge and Russia's alleged failure to cooperate with regard to hypothetical threats to the safety of navigation posed by the said construction. Ukraine also contends that Russia undermined freedom of navigation by delaying and otherwise hampering passage of Ukrainian and third-State vessels through the Strait.[169]

142. As shown above, however, the Sea of Azov and the Kerch Strait are internal waters and are consequently not covered by the relevant provisions of UNCLOS that Ukraine invokes in its allegations.

143. Moreover, Article 35 of the Convention confirms that "[n]othing in [Part III of UNCLOS on Straits Used for International Navigation] affects: (a) any areas of internal waters within a strait […]".[170] This excludes application of any right of transit passage under Article 38 of the Convention which, in accordance with Article 37, is only envisaged through straits which connect "one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone" – and not in internal waters. Articles 43 and 44 that Ukraine invokes are therefore not applicable in internal waters either. In other words, Part III of UNCLOS does not contemplate the *sui generis* situation in the Kerch Strait constituted by the present case.

144. If, notwithstanding the above, the Tribunal were to assess on the merits the allegations of Ukraine, the present Chapter will show that the regime of transit passage would still not apply automatically to supersede the rights of the coastal State, and that there are no violations of UNCLOS that Ukraine invokes with regard to the safety of navigation in the Kerch Strait.

I. Construction of the Kerch Bridge Did Not Violate Articles 38, 43 and 44 of UNCLOS

145. With regard to the Kerch Bridge, Ukraine summarises its claim as follows:

> "[Russia] has constructed a bridge at half the height required for proper clearance, thereby preventing larger vessels from passing through the Strait and violating its obligations under Articles 38 and 44 not to impede or hamper transit passage. It has failed to share information with Ukraine about potentially significant threats to safe

[169] URM, para 131.

[170] "The effect of this paragraph is that the rights of transit passage or innocent passage enjoyed by foreign ships and aircraft in those portions of the strait comprising territorial sea do not extend to internal waters within that strait" (Myron H. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol. II, Martinus Nijhoff Publishers, 2003 (**RUL-81**), pp. 306-307).

navigation posed by its hasty construction of the Kerch Strait Bridge, in violation of its obligations under Articles 43 and 44."[171]

146. The provisions relied upon by Ukraine state the following:

> "*Article 38 Right of transit passage*
>
> 1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded […]
>
> 2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. […]
>
> "*Article 43 Navigational and safety aids and other improvements and the prevention, reduction and control of pollution*
>
> User States and States bordering a strait should by agreement cooperate:
>
> (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.
>
> *Article 44 Duties of States bordering straits*
>
> 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. […]"

147. As will be shown in the present Section, Ukraine distorts the scope of rights and obligations States bordering straits have under UNCLOS and also obviates their duties towards their population. The Convention does not establish a hierarchy between the right to erect structures, in particular, bridges, and navigational rights. To solve any contradiction between the two, it must first be noted, generally, that any legal evaluation concerning State's activities in its internal waters or territorial sea must take as a starting point the sovereignty that States enjoy over their territory.

148. Indeed, in the words of the *Island of Palmas* Award, "th[e] principle of the exclusive competence of the State in regard to its own territory" is "the point of departure in settling most questions that concern international relations".[172] And such competence can only be limited by

[171] URM, para. 132.

[172] *Island of Palmas Case (Netherlands v. USA)*, Award, 4 April 1928 (**RUL-82**), p. 838.

express provisions.[173] In the present case, this fundamental is precisely reflected in the texts of Articles 2, 34 and 35 (a) of UNCLOS.

149. Moreover, even if the right of navigation is expressly recognised, its limitations are also acceptable, as is the case, in particular, in Article 78(2) of UNCLOS which only prohibits "*unjustifiable* interference".[174] Even though this provision stands in the part of the Convention related to the continental shelf, the principle of finding a necessary balance between the rights of the coastal State and those of other States, which underlies this provision, is of general application. It also transpires from an obligation to give "due regard" for the interests of third States, set out in various provisions of UNCLOS, including, for example, Article 87 which provides that "freedom of navigation" on the high seas "shall be exercised by all States with due regard for the interests of other States […]".

150. In the words of the *Chagos* Award, a "balancing act between competing rights" is "based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue".[175] A justifiable interference must be assumed when the measures taken are proportionate and necessary for meeting the objectives legitimately pursued by a State. Thus, all interests at stake must be assessed, in this case those of Russia and its infrastructural and economic needs, as well as the existing and potential traffic through the Kerch Strait, notably, the types of vessels expected to call at the ports of the Sea of Azov and the type of cargo they might be carrying.

151. In the present case, the interference with navigation was both justifiable and proportionate in light of economic and humanitarian necessity to connect the Crimean Peninsula to mainland Russia, even more so after the imposition of a blockade by Ukraine in 2014; potential adverse environmental effects of the construction of a larger bridge – a concern Ukraine should share considering its heavy emphasis on the marine ecosystem; ability of a vast majority of vessels to pass through the Kerch Strait following the construction of the Bridge. Thus, on the part of Russia, there were no violations of Articles 38, 43 and 44, of UNCLOS.

A. Economic and Humanitarian Importance to Connect the Crimean Peninsula to Mainland Russia

152. Ukraine's professed surprise and indignation at the construction of the Bridge appear rather hypocritical under the scrutiny of history.

153. Proposals to build a bridge over the Kerch Strait were considered as early as in the late 19th century and survived the dissolution of the Soviet Union. Until Crimea's reunification with

[173] See e.g.: PCIJ, *The case of the S.S. "Lotus"*, Judgment, PCIJ Publications Series A, n° 10, 7 September 1927 (**RUL-83**), p. 18; *Free Zones of Upper Savoy and the District of Gex*, Judgment, PCIJ Publications Series A/B n° 46, 7 June 1932 (**RUL-84**), p. 167.

[174] Emphasis added.

[175] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015 (**RUL-85**), para. 540.

Russia, Ukraine was actually supportive of the project: the idea of building a road-rail bridge across the Strait was actively discussed by the Russian and Ukrainian authorities since the late 1990s,[176] and various surveys to this respect were conducted, especially until 2014. In 2010, in particular, Russia and Ukraine signed a memorandum on the construction of a bridge across the Kerch Strait.[177] On 17 December 2013, they signed an Agreement on Joint Steps to Organize the Construction of a Transport Crossing across the Kerch Strait, recognising its huge economic and humanitarian importance, its role in preserving and developing ethnic and familial ties, as well as "the need to ensure and develop reliable and stable year-round transport links".[178] The Russian-Ukrainian joint venture was still on the table in early 2014, and the Ministry of Economic Development and Trade of Ukraine was affirming that a bridge could be built in five years.[179]

154. However, after Crimea's reunification with Russia, Ukraine refused for political reasons to further engage with Russia on this matter – and eventually denounced prior agreements in October 2014.[180] Still, considering the circumstances, Russia had to proceed with the construction which eventually did take five years,[181] as Ukraine had previously expected.

155. It became all the more important to meet this timeline because in 2014 Ukraine imposed a full-scale indefinite blockade on Crimea. In fact, Ukraine reverted to all possible measures to cut the Peninsula off from the rest of the world. The measures, still in force now, include, in particular, the following:

a. As of April 2014, Ukraine prohibited transit passage through Crimea for foreigners and stateless persons[182] and imposed criminal liability for violating the procedure for entering and leaving Crimea.[183] This prohibition made it almost impossible to

[176] *TASS*, "Bridge over the Kerch Strait: the History of the Project", 21 April 2016 (**RU-320**).

[177] *Kyivpost.com*, "Azarov Creates Group for Bridging the Kerch Strait", 9 August 2010 (**RU-321**); Order of the Cabinet of Ministers of Ukraine No. 1595-r "On the Formation of the Inter-Departmental Working Group on the Construction of a Transport Bridge Crossing the Kerch Strait", 4 August 2010 (**RU-322**); President of the Russian Federation official website, "Meeting of the Russian-Ukrainian Interstate Commission", 26 November 2010 (**RU-323**).

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

[179] *Kmu.gov.ua*, "Crossing across the Kerch Strait is a Promising infrastructure project of Ukraine and the Russian Federation, - V. Muntiyan", 31 January 2014 (**RU-324**).

[180] *Note Verbale of the Ministry of Foreign Affairs of Ukraine* No. 72/23-612/1-2510, 8 October 2014 (**UA-98**).

[181] *Kommersant*, "Railway Freight Traffic Launched on the Crimean Bridge", 30 June 2020 (**RU-325**).

[182] "It is prohibited to carry out transit passage for foreigners and stateless persons through the temporarily occupied territory" (See Law of Ukraine No. 3773-VI "On the Legal Status of Foreigners and Stateless Persons", 22 September 2011 (**RU-326**), Article 20(4)). According to the rules for entering: entering and leaving Crimea is allowed only from mainland Ukraine through special checkpoints. Ukrainian citizens shall present their identity documents while foreign citizens shall additionally obtain special permits in the migration service (See Resolution of the Cabinet of Ministers of Ukraine No. 367 "On the Procedure for Entering and Leaving the Temporarily Occupied Territory of Ukraine", 4 June 2015 (**RU-327**)).

[183] Criminal Code of Ukraine, No. 2341-III, 15 April 2001 (**RU-328**), Article 332-1. The liability for unauthorised calls at the Crimean ports without the permission of the Ukrainian authorities takes the form of imprisonment for up to eight years.

use the Moscow–Belgorod–Kharkov–Simferopol motorway, previously known as the main and shortest traffic route from central regions of Russia to Crimea.[184]

b. Later that month, Ukraine shut off fresh water supply to the Peninsula via the North Crimean water canal, which covered nearly 85% of all the local water demand.[185]

c. In August 2014, to isolate Crimea from the sea, Ukraine announced closure of "Ukrainian" seaports in the Crimean cities of Yevpatoria, Feodosia, Yalta, Kerch and Sevastopol prohibiting foreign-flag ships from calling at these ports.[186]

d. In December 2014, Ukraine confirmed termination of railway and bus communication with Crimea; three international trains that ran between Crimea and Moscow and Crimea and Minsk were cancelled[187] – a threat that was lingering since April 2014.[188]

e. In September 2015, the so called "civil blockade", which was launched by the opponents of Crimea's reunification with Russia and supported by Ukraine's officials, including the then President Poroshenko,[189] resulted in the halt of delivery of all kinds of goods between Crimea and Ukraine.

f. In October 2015, Ukraine imposed a ban for all Russian airlines on flights in the airspace of Ukraine, both direct and connecting.[190]

g. In November 2015, energy supply from Ukraine was cut off as a result of the blow up of the pylons of the electricity power line in the Kherson region of Ukraine – an act of sabotage perpetrated by nationalists that was condoned by Ukrainian authorities and never properly investigated.[191]

h. A governmental decree of 16 December 2015 officially formalised Crimea's blockade, imposing a ban on delivery of goods, including food, work and services.[192]

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[184] [redacted]

[185] *RIA*, Ukraine Shuts off Canal That Gives Crimea 85% of its Water, 26 April 2014 (**RU-330**).

[186] See *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Accredited Diplomatic Missions of the foreign States No. 630/23-300-3716, 4 August 2014 (**RU-331**).

[187] *Interfax*, "Termination of Railway Communication with Ukraine from 29 December Announced in Crimea", 27 December 2014 (**RU-332**).

[188] *Kommersant*, "Ukraine Lay on the Rails", 11 April 2014 (**RU-333**).

[189] *Regnum*, "Poroshenko Said that the Aim of the Blockade is the Return of Crimea to Ukraine", 22 September 2015 (**RU-334**).

[190] *TASS*, "Ukrainian Sanctions Halt Flights with Russia", 25 October 2015 (**RU-335**).

[191] *Reuters*, "Crimea without Power from Ukraine after Electricity Pylons 'Blown Up'", 22 November 2015 (**RU-336**). The power supply was briefly restored in several weeks only to be terminated again in December 2015, this time indefinitely.

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

156. The blockade was implemented without any regard to the basic humanitarian needs of the Crimean population. Russia had to take emergency measures to connect Crimea to the infrastructure networks in mainland Russia, in order to protect more than 2 million Crimean residents and ensure their continuous access to food and other basic goods, as well as electricity and gas supply. For these purposes, not only had the Kerch Bridge been a high priority for the Russian Federation, but also the installation of undersea gas pipeline and power cables. Another urgent measure – laying the fibre-optic cables – had also been necessitated by the need to protect the Crimean people from cut-offs of cellular and Internet connections previously provided to the peninsula from the territory of Ukraine.

157. At the time, the only available communication route from mainland Russia to Crimea was the Kerch maritime ferry line. Russia made every effort to guarantee its sustainable work, notably by establishing new lines, purchasing additional high-capacity ferries and putting them into operation on a round-the-clock basis, however, it was not sufficient to match the considerably increased needs.[193] Traffic jams on the approaches to the ferries stretched for kilometres and the waiting time could be up to 40 hours, despite all the measures taken to settle the problem.[194] Additionally, unfavourable weather conditions could completely halt the operation of the ferries for several days.[195] The increased ferry traffic also risked adversely affecting the environment and safety of navigation in the Kerch Strait. Russia, thus, had to go ahead with the construction of a permanent structure.

158. The construction of the Bridge has had positive effects on the life in Crimea in the economic, humanitarian and other spheres. The highway part of the Kerch Bridge has now been successfully operating for more than four years. It has provided uninterrupted transport links between Crimea and other regions of Russia. In the first year of operation, traffic capacity of the Bridge turned out to be three times more than that of the Kerch Strait ferry in 2017б[196] and its intensity has been growing since then.[197] The construction of the Bridge has also prompted further development of transport infrastructure: reconstruction of old roads and building new ones. Since no toll fees apply for passing over the Bridge, in contrast to the ferry, users saved billions of roubles.[198] The launch of the freight motorway and railway communication over the Bridge has created favourable conditions for trade, reduced transportation costs and timing, as well as improved logistics of transport flows. The fuel supply crisis has stabilised.

[193] [redacted]

[194] [redacted]

[195] *Id.*, p. 97.

[196] *Interfax*, "5 Million Vehicles Have Crossed the Crimean Bridge in a Year of Operation", 15 May 2019 (**RU-339**).

[197] See Letter of the Ministry of Transport of the Republic of Crimea to the Ministry of Foreign Affairs of the Russian Federation (**RU-340**), Annex 5 (with 5,786,453 vehicles crossing the Bridge– for 2019; 5,965,419 vehicles – for 2020; 7,769,787 vehicles for 2021).

[198] *Interfax*, "5 Million Vehicles Have Crossed the Crimean Bridge in a Year of Operation", 15 May 2019 (**RU-339**).

159. Not only has the Bridge's launch contributed to the development of a transport network and trade in Crimea, it has also significantly increased tourist flow in the region: from 5.8 mln visitors in 2017 to more than 10 mln in 2021.[199] The Bridge construction has also encouraged investment growth in Crimea.[200]

160. Thus, only the launch of highway traffic over the Bridge has given an enormous impetus to the development of a transport system, tourism, trade, agriculture, industry and construction in the Crimean Peninsula – which account for more than 60% of the GDP of the Republic of Crimea and city of Sevastopol.[201]

B. The Kerch Bridge Was the Only Viable Option

161. It must be noted that, when building a bridge, or, more generally, developing a large infrastructure project, requirements of each and every end user may never be satisfied. Thus, a "cost vs. benefit" analysis must be performed in order to arrive at an informed decision.[202] As will be demonstrated below, in the case of the Kerch Bridge, such analysis underlay the key characteristics of the Bridge, including its location (**1**), design option (**2**) and, most importantly, clearance (**3**).

1. Site Options for a Transport Crossing

162. Overall, more than 70 options for the location of a Transport Crossing – the name used before it was decided that the Crimean and Taman Peninsulas would be connected by a bridge, rather than a tunnel – were considered as part of the feasibility study, including various combinations of bridges and underwater tunnels.[203] This study was undertaken by the Institute for Survey and Design of Bridge Crossings and subsequently reviewed by a specialised Inter-Agency Group,[204] as well as by the Expert Council.[205] The analysis preceding the final decision included, in particular, the following issues:

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[199] Letter of the Ministry of Economic Development of the Russian Federation to Ambassador-at-large No. D08I-4027, 15 February 2022 (**RU-341**) ("Letter of the Ministry of Economic Development of the Russian Federation"), p. 5.

[200] *Invest-in-Crimea.ru*, "The First Economic Effect of the Crimean Bridge Can Be Assessed Today", 2 October 2018 (**RU-342**).

[201] Letter of the Ministry of Economic Development of the Russian Federation (**RU-341**), p. 3.

[202] [redacted] Report, para. 45.

[203] *TASS*, "Avtodor Preferred Two Bridges across the Kerch Strait to a Tunnel", 5 June 2014 (**RU-343**). See also [redacted]

[204] The Inter-Agency Group comprises representatives from several specialised Russian authorities and academic institutions, including the Federal Railway Transport Agency, Federal Highway Agency, Russian Highways State Company, ROSMORPORT, Russian Federal Security Service, Russian Ministry of Defence, Russian Ministry of Construction, Housing and Utilities, Russian Ministry of Natural Resources and Environment, Federal Service for Supervision of Natural Resources, Moscow Automobile and Road Construction State Technical University (MADI), Sergeev Institute for Geo-Ecology of the Russian Academy of Sciences, Schmidt Institute of Physics of the Earth of the Russian Academy of Sciences.

[205] The Expert Council, under the auspices of the Avtodor Research and Development Board, comprises leading specialists from Russian research, educational, project and construction organisations, as well as independent experts, and has divisions focused on the design and construction of bridges and tunnels, operation and transport safety, geology and hydrology, environmental safety, as well as economy and pricing.

a. Calculation of the necessary car and train capacity in view of Crimea's infrastructural needs and other economic factors relevant to its prospective development;

b. Research and mathematical simulations to establish safety conditions for navigation during construction works and after them;

c. Analysis of previous practice of navigation through the Strait to establish the clearance of the Bridge;

d. Physical and geographical factors specific to the Strait and the Channel, including depth, width and ice conditions;

e. Environmental implications.

163. Four site options – the Tuzla, Yenikalsky, Zhukovsky and Severny routes – were shortlisted. The one eventually chosen – the Tuzla route – presented clear advantages. It was considered more preferable in terms of topography (with high coastlines which eliminate the need for lengthy low-gradient approaches on either side of the bridge for roadways and railways), a shorter length of the crossing, optimal timing and costs, practicability, further development of the transport system of the Republic of Crimea, better environmental conditions, safer navigation, and minimal interference with the current shipping and automobile traffic owing to its remoteness from the area of intensive navigation and the existing Kerch ferry crossing. [206] Generally, all the options as regards location and design, other than those adopted for the current Bridge, were recognised as ineffective due to higher risks to both safety and the environment, as well as cost of construction and operation.[207]

2. Design Options for a Transport Crossing

164. As regards design of the Bridge, two options in particular were carefully studied, but eventually rejected: a tunnel and a bridge with a movable span over the navigable channel.

165. As for the tunnel option, Ukraine's accusation in this regard is especially cynical in light of its own evidence: according to Mr Rosnovsky, an engineer who designed one of the projects of a transport crossing over the Kerch Strait in 1993:

> "[a] tunnel is a nonsensical idea. You cannot lay a tunnel in silt. It needs to rest on solid ground. […] it will end up being a super expensive and very dangerous thing".[208]

[206] [redacted]. See also, *Gazeta.ru*, "The Government Has Chosen the Road to Crimea", 31 July 2014 (**RU-344**).

[207] [redacted]

[208] Aleksei Baturin, Russian Bridge Across the Kerch Strait Will Not Stand Long - Georgiy Rosnovsky, *Focus*, 18 April 2016 (**UA-221**), pp. 4-8.

166. Russian engineers also thoroughly analysed the possibility of constructing a tunnel in the Kerch Strait, but identified several serious risks. First, tectonic faults in the Kerch Strait and seismicity in the region in general (approximately 9 points) imply the risk that an earthquake may cause it to crack and flood.[209] Second, a colossal amount of excavation and storing ashore (more than 4.5 million m^3 of various rocks and other materials) would stir up sediments and negatively impact the environment.[210] Third, a much larger area (some 500,000 m^2) needs to be surveyed for numerous explosive hazards and shipwrecks inherited from World War II – which would significantly extend the construction period. All this would be accompanied by the need to interrupt navigation for the entire duration of the construction.[211] Finally, these difficulties were exacerbated by the fact that it would actually have been necessary to build not one, but at least three tunnels at a depth of more than 100m: one motorway, one railway track, and one service line to evacuate people in case of emergency; and even that would not have been enough to ensure a required traffic capacity of 40,000 cars and 47 train pairs a day.[212]

167. The second option – a bridge with a movable span – was abandoned because constructing such a span would not ensure the necessary railway traffic capacity and would incur additional operational costs. Furthermore, load on the piled foundations of supports of the movable span – which should have been as high as 70m – would have doubled, at the very least.[213] From an ecological perspective, constructing higher piled foundations could have done much more damage to the marine environment of the Azov-Black Sea basin. As [redacted], a leading environmental engineer at the Taman Highways Administration who was in charge of the environment-related issues during the Kerch Bridge construction, explained in her Witness Statement: "[a]ny increase in height of the arch of the Kerch Bridge would have caused more suspended solids to make it to the water and, consequently, damage to aquatic biological resources would have been more severe".[214]

3. Clearance of the Bridge

168. Clearance of the Kerch Strait Bridge – the focus of Ukraine's criticism – was carefully developed by a specialised institute taking into account numerous factors, including navigation and hydrographic conditions in the Strait, cargo turnover, the characteristics of "design ships" and ships actually calling at the Sea of Azov ports (**i**). An expert in navigation with many years of sea-going experience, [redacted] confirms the reasonableness of the 33m clearance of the Bridge and supports it with his alternative independent analysis of historical

[209] Rosavtodor official website, "Why Not a Tunnel?", 2 July 2015 (**RU-345**).

[210] *Ibid*.

[211] See [redacted]. See also Rosavtodor official website, "Why Not a Tunnel?", 2 July 2015 (**RU-345**).

[212] See the infographic "Why a bridge and not a tunnel will be built in the Kerch Strait", according to the information provided by SGM-Most LLC, a contractor of the Bridge's construction, in *RIA*, "Oleg Skvortsov: Building of the Grand Kerch Bridge on Time is Realistic", 20 July 2015 (**RU-346**).

[213] [redacted]

[214] Witness Statement of [redacted] 22 August 2022 ("[redacted] Statement"), paras. 96-97.

traffic in the Kerch-Yenikale Channel ("KYC") and unviability of passage of large-dimension ocean-going ships through the shallow and narrow Strait (**ii**).

i. Careful Consideration Preceded the Decision on the Bridge Clearance

169. As a major infrastructure project, the Bridge construction relied upon comprehensive engineering surveys in geodesic, geological, hydrometeorological and environmental spheres. Based on their results and following all-encompassing research and development works, one of Russia's oldest design institutes – the Design, Survey and Research Institute of Sea Transport "Soyuzmorniiproekt" ("Soyuzmorniiproekt")[215] developed the Bridge dimensions, which (as part of the research and design documentation)[216] were then approved by State experts.

170. First and foremost, bridges should be designed to reflect the parameters of the waters they cross,[217] which is equally true for ships. In light of this, Soyuzmorniiproekt started its research and design works with analysing the navigation and hydrographic conditions of the Strait.

171. Already in Soviet and Ukrainian times, navigation in the KYC was restricted to ships with a draft of up to 8 m and a length of up to 215 m to prevent collisions, groundings and other incidents.[218] They have remained mostly unchanged under Russian navigational rules.[219]

172. As perfectly summarised by experts in the Ministry of Transport of the Russian Federation,

> "The possibility of a passage through the Kerch-Yenikale Channel is premised on its hydrological features, including limiting areas that have a physical depth of up to 8 meters. Accordingly, permissible draft (the depth at which a ship sits when loaded to the maximum) to navigate in the Kerch-Yenikale Channel has not exceeded 8 metres throughout history since the 19th century when the channel was built."[220]

173. Thus, it is not the Bridge clearance that prevented large-sized ships from calling at the Sea of Azov ports, but rather the existing geographic, navigational and hydrographic conditions

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[215] Soyuzmorniiproekt - an institute specialising in designing and reconstructing sea ports, ship yards, berthing, protection and hydraulic engineering structures in Russia and beyond. Soyuzmorniiproekt was, *inter alia*, engaged in researching economic and legal matters related to the use of the World Ocean, as well as in developing cutting-edge transport and technological systems and technical regulation in the industry. *See* Website of the Design, Survey and Research Institute of Sea Transport "Soyuzmorniiproekt", About the Institute (**RU-347**).

[216] The research and design documentation for the Bridge was prepared by Russia's leading company for the design of bridges and transport structures – Giprostroymost-Saint Petersburg JSC ("**Giprostroymost**").To assist with designing the Bridge's dimensions, Giprostroymost engaged Soyuzmorniiproekt JSC for conducting the relevant research and development works.

[217] [redacted] Report, para. 69.

[218] Order of the Ministry of Transport of Ukraine No. 721 "On Approval of the Rules of Navigation in the Kerch-Yenikale Channel and its Approach Channels", 9 October 2002 (**UA-089-AM**).

[219] Order of the Ministry of Transport of the Russian Federation No. 313 "On Approval of the Mandatory Regulations in the Kerch Strait", 21 October 2015 (**RU-203**) ("2015 Kerch Mandatory Regulations"), para. 48.

[220] *TASS*, "Ministry of Transport: the Clearance of the Arches of the Crimean Bridge will Ensure the Passage of All Ships", 29 August 2017 (**RU-348**). See also State Unitary Enterprise of the Republic of Crimea "Crimean Sea Ports", Technical Data Sheet of the Kerch-Yenikale Channel, 27 April 2015 (**RU-204**), p. 4.

in the KYC (a complicated outline with four bends), 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.[221]

174. Second, Soyuzmorniiproekt carefully considered historical traffic in the Strait to confirm the Bridge clearance. A decision was taken on the basis of 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. When establishing characteristics of the design ship, Soyuzmorniiproekt identified only two types of large-sized ships that had been navigating through the Kerch Strait to Ukrainian ports prior to 2015, which sailed 30–40% loaded only. Thus, as long as these large-sized ships were very light-loaded, Soyuzmorniiproekt concluded that the handling of large-tonnage ocean-going ships at the relevant ports and their passage through the KYC appears to be unreasonable.[222]

175. Accordingly, having analysed the historical traffic data and the expected cargo turnover in the KYC, Soyuzmorniiproekt in its Report of 2015 concluded 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."[223]

ii. Alternative Analysis Confirms the Rationality of the Bridge's Clearance

176. [redacted] has performed an alternative independent analysis of traffic in the KYC confirming that the proportion of large-sized ocean-going ships transiting the KYC was negligible, with their transit being cost-ineffective.

177. Before proceeding to the analysis of the traffic broken down by DWT, it is necessary to look at the whole picture. The rate of crossings through the Kerch Strait has generally remained more or less constant, except for the years of 2017 and 2020 witnessing a significant increase. For the past ten years, the average rate has been around only 10,000 ships per year:

Table 1. Crossings through the Kerch Strait[224]

2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
11,838	10,978	11,353	10,952	9,969	11,523	19,451	10,212	9,361	29,943

[221] According to Mandatory Regulations in the Berdyansk Commercial Seaport, 1 September 1989 (**RU-349**) (para. 3.1), the port accommodates ships with a draft of 7.9m and a length of up to 205m. According to Mandatory Regulations in the Mariupol Commercial Seaport, 1999 (**RU-350**) (para. 1.10), the port accommodates ships with a draft of up to 8m and a length of up to 240m. See also [redacted] Report, paras. 17-24.

[222] [redacted]

[223] *Id.*, Section 8, paragraph 8.3. See further [redacted] Report, paras. 46-48.

[224] Rosmorport official website, VTS services, "General Information" (**RU-209**), "Statistics".

178. Interestingly, the critical dates identified by Ukraine, i.e. the installation of the railway and roadway arches across the Strait between August and October 2017, as well as the completion of the Bridge in December 2019,[225] were record years for the number of ships crossing the Strait since it doubled in 2017 and tripled in 2020.

179. Furthermore, the number of vessels transiting to or from the ports of Mariupol and Berdyansk has also remained on the pre-construction level:

Table 2. The number of vessels transiting to or from ports of Mariupol and Berdyansk[226]

	2015	2016	2017	2018	2019	2020	2021
To ports of Mariupol and Berdyansk	845	863	718	659	760	847	777
From ports of Mariupol and Berdyansk	910	882	737	687	768	873	828

180. Moving further to assessing the historical data on the frequency of vessel calls of different DWT ranges at the Mariupol and Berdyansk ports, [redacted] analysed the efficiency (in terms of cargo uplift) of these calls in the period preceding the Bridge construction.[227] According to the expert's conclusions, the most efficient (*i.e.* loaded with more than a half load of cargo, if not full) and most frequently calling categories of vessels are those with a DWT less than 20,000t (90.25% out of the total number of vessel calls) and of the 20,000t-30,000t DWT range (5.16%). While the proportion of vessels over 40,000t DWT – which transit was allegedly impeded by the Bridge, as Ukraine asserts – accounted for around 2.6%.[228]

181. [redacted]

[225] URM, para. 136.

[226] [redacted]

[227] Based on the VTS data from 1 January 2007 to 31 July 2017 (See 2007-2021 VTS Data on Traffic from Ukrainian ports (**RU-224**)).

[228] [redacted] Report, paras. 50-55.

[redacted]

[230] [redacted] Report, para. 56.

182. [redacted]

183. [redacted]

184. [redacted]

185. [redacted]

[231] [redacted] Report, paras. 57, 59-63.

[232] *Id.*, paras. 64-68.

[233] *Id.*, para. 50.

[234] *Id.*, para. 68.

[235] URM, paras. 139-149; Expert Report of [redacted] of [redacted], 18 May 2021 ("[redacted] Report"), para. 4.7.

[236] [redacted] Report, paras. 70-73.

[redacted]

[redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]					
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
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[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[237] [redacted] Report, paras. 74-76.

[238] *Id.*, para. 73.

186. While Ukraine's expert tried to put forward a case that all modern bridges should be built with a clearance of 60-70 m,[239] none of the so-called "comparable" examples should have been taken into consideration when designing the clearance of the Kerch Bridge. [redacted] points out that "each bridge is a unique construction which should be designed taking into account unique geographical and meteorological conditions specific to the region".[240] Respectfully, not only were the bridges selected by [redacted] incomparable, as there are much lower bridges spanning waterways of the similar depth, as the above examples in Table 3 demonstrate, but the whole methodology of comparing bridges across so different waterways is flawed by itself.

C. Interference with Navigation Was Minimal

187. Asserting that the Crimean Bridge had a negative impact on navigation in the KYC, Ukraine attempts to tie the general decrease in cargo traffic to and from the ports of Mariupol and Berdyansk to the Bridge construction only. Specifically, Ukraine contends that the number of vessels' calls over 30,000t DWT dramatically dropped following the Bridge construction. Ukraine's allegation that "vessels capable of passing under the Bridge since its construction will be, in general, less than 30,000t DWT"[241] is plainly misleading and has to be considered in a broader context.

188. [redacted] In a bigger picture, the number of Ukraine-bound

[239] [redacted] Report, paras. 2.8; 4.7.

[240] [redacted] Report, para. 69.

[241] URM, para. 143; [redacted] Report, para. 4.34.

[242] [redacted] Report, para. 112.

[243] *Id.*, para. 113.

[244] URM, paras. 143-144.

[245] Ukraine repeatedly uses approximations according to which, for instance, "such vessels *generally* require an air clearance above 33 meters" (URM, para. 143, emphasis added) or "[t]his is highly *suggestive* of a more restricted choice of vessels within the 30,000t – 40,000t DWT range" (URM, para. 146, emphasis added).

vessels over 30,000t DWT was always fluctuating around similar figures, with the number of such vessels in 2015 (45) – pre-construction – equal to 2019 – post-construction, as set out in Table 4 below.

Table 4. Vessel calls at Mariupol and Berdyansk – 30,000t DWT or more[246]

2015	2016	2017	2018	2019	2020	2021
45	58	61	37	44	38	31

190. The impact was all the more insignificant in practical terms due to many alternative options to the operation of vessels with an air draft of more than 33 metres. In 2017, the 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.[247]

191. Hence, as [redacted] concludes, the alleged decline of traffic cannot be linked to the construction of the Bridge solely.[248] It is much more likely to be consequential and results from an overall downturn in trade in the region,[249] economic unviability of sending large-dimension ocean-going vessels into the Strait and other factors.[250]

192. Furthermore, contrary to Ukraine's claims, the Kerch Bridge does not impede navigation of specialised vessel types, including jack-up drilling rigs ("JDRs"). Ukraine's expert in navigation – who is, besides, not qualified to opine on the matters related to oil and gas production – merely speculates on the desirability of these kinds of vessels transiting through the Strait.[251] Neither would the Bridge clearance of 60-70 m proposed by Ukraine be enough to accommodate any of the JDRs referred to in [redacted] Report.[252] Besides, as [redacted] himself admits, "removal and replacement of jack-up legs is a possibility to allow for [JDRs'] transit under bridges".[253] Such method of JDR's transportation was widely practised and used by Ukraine's state oil and gas company Naftogaz to transport two MODUs over the Bosporus Strait.[254]

193. Therefore, as Russia demonstrated, the Kerch Bridge's clearance was designed considering the safety requirements for navigation through the KYC and the Bridge has no

[246] Based on the [redacted]

[247] Center for Transport Strategies, "8 Statements on Grain Logistics in the Azov Region", 19 June 2017 (**RU-351**).

[248] [redacted] Report, para. 115.

[249] *Id.*, para. 112.

[250] *Id.*, paras. 114-115.

[251] *Id.*, paras. 117, 119.

[252] [redacted] Report, Figure 12. See also [redacted] Report, para. 122.

[253] [redacted] Report, para. 4.68.

[254] *Naftogaz.com*, "New Jack-up Rig Nezalezhnist Arrived at the Greek Seaport of Kavala and Leaved for the Bosporus Strait to Cross into the Black Sea", 2 October 2012 (**RU-233**); [redacted] Report, para. 122.

substantial impact on the passage of general cargo or specialised vessels. The proportion of large ocean-going vessels previously able to pass through the KYC, which are unable to do so after the construction of the Bridge, is negligible, their use is unreasonable and lacks any sound economic rationale.

II. Ukraine's Allegations of Non-Cooperation under Articles 43 and 44 of UNCLOS Are Baseless

194. Ukraine falsely claims that the Russian Federation violated Articles 43 and 44 of UNCLOS by failing to cooperate with Ukraine concerning navigational safety in the Kerch Strait.[255] Here, again, Ukraine tries to artificially endow Russia's internal waters with the status of an international strait, whereas, as Chapter 2 and Russia's previous submissions explained in depth,[256] the Sea of Azov and the Kerch Strait enjoy an internal waters regime. Thus, neither is this Tribunal entitled to decide on these claims, nor is applicable any obligation to cooperate under Articles 43 and 44 of UNCLOS (**Section A)**.

195. Should the Tribunal conclude that Articles 43 and 44 of UNCLOS still apply to the Kerch Strait, then Russia submits that none of these Articles 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 **(Section B)**. In any event, Ukraine's allegations on the failure to cooperate are meritless as 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, including the supposed possibility of the Bridge's collapse or ice build-up, are no more than hypothetical and are not based on facts (**Section C**).

A. The Tribunal Has No Jurisdiction to Decide on Ukraine's Claims under Articles 43 and 44 of UNCLOS as the UNCLOS Regime Is Not Applicable to the Kerch Strait

196. Articles 43 and 44 of UNCLOS – allegedly breached by the Russian Federation – fall within Part III of UNCLOS, which imposes obligations to cooperate and share information about threats to safe navigation on States bordering international straits. As has been repeatedly stated above,[257] the Sea of Azov and the Kerch Strait constitute internal waters. Therefore, given that the UNCLOS regime is not applicable to the Kerch Strait, this Tribunal has no jurisdiction to assess these claims.

197. Ukraine's claims must fail not only from a jurisdictional point of view, but from a substantial one as well. Due to the internal waters regime of the Kerch Strait, the UNCLOS

[255] URM, Chapter 6, Sub-Section I(A)(2).

[256] See Chapter 2, Section II.

[257] See paras. 34, 39-53 above.

rules on cooperation in international straits are not applicable to the Russian Federation as a State bordering the Strait.[258]

B. ALTERNATIVELY, UKRAINE MISCONSTRUES ARTICLES 43 AND 44 OF UNCLOS

198. Ukraine accuses Russia of violating Articles 43 and 44 of UNCLOS by failing to cooperate as to any danger to navigation in the Kerch Strait allegedly caused by what Ukraine labels as the "hasty construction of the bridge", including its supposed collapse, sedimentation and ice build-up. Yet, Ukraine's construction of both Articles is flawed.

199. First of all, Article 43 in principle does not contain an obligation to make public any of the above-alleged dangers. Instead, it concerns "the establishment and maintenance in a strait of necessary navigational and safety aids" and simply "points out the way in which the issue of navigational aids is to be handled between user and coastal States, i.e. by agreement", while "contain[ing] no duty upon the coastal State to provide navigational aids".[259]

200. The second ground, Article 44 of UNCLOS, in its turn, requires States bordering straits to give appropriate publicity to real and imminent navigational dangers. It finds its origins in Article 16 of the ILC Articles concerning the Law of the Sea and is meant to "confirm[…] the principles which were upheld by the International Court of Justice in its judgement of 9 April 1949 in the *Corfu Channel Case* between the United Kingdom and Albania."[260] In particular, the Court found 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".[261]

201. Yet, as notably transpires from paragraph 153 of the Revised Memorial and will be addressed below,[262] Ukraine's allegations are of hypothetical character and solely revolve around "the *possibility* of deterioration or even collapse" and "the *likelihood* of the build-up of sea ice", affirming that "any *potential* increase in sea ice concentration or the length of the ice season *may* impact navigation … Finally, traffic congestion *may* also increase".[263]

202. The "appropriate publicity" 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

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[258] See paras. 142-143 above.

[259] B. Jia, "Straits Used for International Navigation: Article 43", in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, Nomos, 2017 (**RUL-86**), p. 321.

[260] "Commentary to Article 16" in *Yearbook of the International Law Commission*, 1956, vol. II (**RUL-87**), p. 273.

[261] *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, I.C.J. Reports 1949, 9 April 1949 (**RUL-88**), p. 22 (emphasis added).

[262] See Chapter 6, Section I, Sub-Section C.4 for the discussion of the alleged possibility of Bridge collapse and paras. 396-397 for the discussion of the alleged impact on ice.

[263] Emphasis added.

information on real dangers to navigation. Consequently, Ukraine cannot demand Russia to provide it with "(1) 'all available information relating to the construction of the Kerch Strait bridge'; (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".[264] Neither is such wide scope of this obligation enshrined in Articles 43 and 44 of UNCLOS, nor is it justified in light of Ukraine's procedural bad faith.

203. The supposed threats that the Bridge allegedly poses to navigation in the Strait had hardly bothered Ukraine before these arbitral proceedings commenced, which in itself is rather telling of the real Ukrainian motivation behind its requests for specific documentation framed under the cover of "cooperation".

204. More particularly, on 12 July 2017, just some two months before Ukraine filed Notification and Statement of Claim in this arbitration, it requested in its *Note Verbale* that the Russian Federation promptly provide to Ukraine "all available information concerning the construction of the Kerch Strait Bridge", enumerating a specific set of documentation. It included, *inter alia*, "technical specification of the bridge and the process of its construction, any assessments made by the Russian Federation with regard to the environmental impact of its construction", as well as "all information that calls into question the short- or long-term structural integrity of the Kerch Strait Bridge".[265]

205. Ukraine has gone as far as to mislead the Tribunal about the real date of this *Note Verbale.* Instead of "12 July 2017", it was referred to as of "12 July 2016", likely in an attempt to conceal the true intent of Ukraine's request – a "fishing expedition".[266] Against a more general backdrop of the Russia-Ukraine diplomatic correspondence on the topic, Ukraine had always framed its *Notes Verbale*s challenging Russia's right to construct the Bridge across the Kerch Strait in allegedly Ukraine's internal waters – a territorial dispute carved out of this Tribunal's jurisdiction. When Ukraine decided to file this claim, it had to build a completely different case so as to fit it into the Tribunal's jurisdiction under UNCLOS. Thus, it was and remains perfectly clear that the request for the production of the documents was driven by Ukraine's needs to make a case before the Tribunal and constitutes nothing other than another abuse of process on behalf of it.

206. Not only is Russia not obliged to provide any of the above documents under UNCLOS, but also there were, and indeed persist, legitimate security concerns for not disclosing them. The Kerch Bridge has been and remains a high security facility, which, as will be illustrated below, various persons, including Ukrainian top officials, oftentimes threatened to destroy with

[264] URM, para. 154.

[265] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-663-1651, 12 July 2017 (**RU-352**).

[266] Noteworthy is that even the text of that *Note Verbale* mentions the events that occurred in 2017, such as Russia's notice of navigational restrictions in the Strait issued in August 2017.

military force.[267] The security risks associated with the disclosure of this information become even more evident in light of the recent publication of what Ukraine's authorities called the Bridge's "detailed technical documentation" on the website of the Defence Intelligence of the Ministry of Defence of Ukraine,[268] as well as the recent terrorist attack on the Bridge orchestrated by the Ukrainian special forces.

C. For the Sake of Good Order, Russia Has Been Giving Appropriate Publicity to Any Actual and Imminent Danger to Navigation in the Kerch Strait

207. In any event, all of Russia's attempts to cooperate with Ukraine would have been futile **(Section 1)**. Despite the above, the Russian Federation has been informing all interested States of any potential danger to navigation in the Strait **(Section 2)**, while other so-called "threats", as Ukraine speculates, have been carefully considered and mitigated, but never materialised so as to become imminent dangers, and, thus, should not have been made public **(Section 3)**.

1. Any of Russia's Attempts to Cooperate Would Have Been Futile as Ukraine Obstructed Cooperation on the Matters Related to the Bridge Construction

208. For many years, Russia and Ukraine had been hatching and mulling over the idea of the Kerch Bridge construction. Russia-Ukraine cooperation on this matter reached its peak in 2013, when both States signed an Agreement on Joint Steps to Organize the Construction of a Transport Crossing across the Kerch Strait.[269]

209. On 8 October 2014, Ukraine terminated the 2013 Cooperation Agreement,[270] making it absolutely clear that it would be utterly hopeless to expect any cooperation from the Ukrainian side. Despite that and 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.[271] In response, Ukraine manifested its non-cooperative attitude stating 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."[272]

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[267] See paras. 262-263 below.

[268] Defence Intelligence of the Ministry of Defence of Ukraine official website, "Detailed Technical Documentation of the "'Crimean Bridge'" Was Received. Document", 16 June 2022 (**RU-353**).

[269] On the Russia-Ukraine joint efforts with regard to the construction of the transport crossing over the Kerch Strait see paras. 154-155.

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

[271] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 2511/2dsng, 13 March 2015 (**RU-354**).

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

2. The Russian Federation Has Always Informed All Interested States of Any Real Danger to Navigation in the Strait

210. Ukraine and other User States have always been duly notified of any restrictions or potential threats to navigation in the Kerch Strait. For instance, in August 2017, the Russian Federation informed Ukraine of the planned technological operations:

> "As far as several restrictions on navigation scheduled for August-early September 2017 are concerned, these will be temporary (no longer than continuous 72 hours) and will be introduced only for the duration of the works and will be lifted immediately upon completion of technological operations. Masters of vessels will be notified in advance about each suspension of navigation." [273]

211. Other States have also been duly informed of any impediment to navigation in the KYC by means of navigational and coastal warnings of the Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation. For instance, in July-September 2017, mariners transiting the Strait were informed of all the construction works, which could affect their navigation, including the installation of a span above the navigable channel[274] and other auxiliary structures such as a lighted beacon of a temporary berth or the lights of a pile anchor for the duration of construction.[275]

212. Notably, throughout the construction process, the Strait mainly remained navigable. Those several restrictions to navigation scheduled for August-early September 2017 were temporary: they were introduced only for the duration of the works and lifted immediately upon their completion. Once the arched span was installed, its coordinates, height and width were made public as well.[276]

213. Generally, a bridge is not a navigational danger *per se*[277] and, thus, a State planning to construct one does not need to cooperate with other States within the meaning of Article 44 of UNCLOS.

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[273] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation, No. 10352/2DSNG, 4 August 2017 (**UA-223**). Ukraine has confirmed the receipt of the Ministry of Transport's Order on temporary restrictions on navigation in the Kerch Strait *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-1634, 7 August 2017 (**RU-355**).

[274] See Novorossiysk Coastal Warning 426/17 Maps 38138 38182 in Compilation of Selected Novorossiysk Coastal Warnings for July-September 2017 (**RU-356**).

[275] See *Id.*: Novorossiysk Coastal Warning 409/17 Map 38182.

[276] See *Id.*: Novorossiysk Coastal Warning 483/17 Map 38182.

[277] To minimise the risks of collision with the navigable arch or the supports of the Crimean Bridge, the warning signs were installed in the navigation section. In particular, three signs for day time showing the limits of the navigation channel, as well as luminous navigation signs installed on protective structures of supports in the navigation channel. To ensure that small ships can safely pass through, the structures of a span adjacent to the navigation span have in place two special-purpose signs showing the navigation channel for small ships. See "Nationally Significant Crossing" in *RUBEZH*, "Transport Safety", No. 5(31), 2018 (**RU-357**), p. 150.

214. Acting in good faith, however, Russia raised a question with IMO[278] whether a State planning to construct a bridge across a navigational channel had an obligation to notify the organisation of such intention. IMO's reply was that there was no such obligation under SOLAS, but rather a requirement to inform through navigational warnings of any dangers (such as might be caused to shipping due to construction works).[279] As demonstrated above, the Russian Federation duly performed that.

215. Based on the foregoing, all the User States have been given due notice of any danger to navigation in the Kerch Strait in full compliance with Articles 43 and 44 of UNCLOS.

3. None of the Potential "Threats" to Navigation Claimed by Ukraine Proved to be Actual and, As Such, Did Not Require Publicity

216. It is absurd on the side of Ukraine to claim that the Russian Federation should have given due publicity to the alleged "risk of collapse" of the Bridge, which is standing firm (even after the recent attack on the Bridge, the traffic was resumed within a matter of a day), or to the sedimentation of the KYC, which depth has not changed since 2015 and has always been 8.3 m,[280] or even to the alleged increased ice build-up that contradicts all scientific data about modern day hydrometeorological conditions in the Kerch Strait.[281]

217. As will be elaborated in Section 6 on Russia's compliance with its obligation to protect the marine environment, none of the abovementioned threats have ever materialised. Furthermore, all the risks were thoroughly studied and mitigated, and are still carefully monitored by the Russian competent agencies and organisations.

218. Particularly, Ukraine completely fails to substantiate its allegations that the Bridge is supposedly unsafe due to what it calls "hasty" construction,[282] not to mention the fact that the Bridge's design is a result of thorough engineering surveys on all possible natural effects, and its integrity is subject to constant monitoring.[283]

219. The timeline of the construction, which is at the base of these assertions, has nothing to do with supposed threats to safe navigation. The construction proceeded at a swift pace not because of an alleged lack of due diligence, but primarily due to the blockade of Crimea that Ukraine imposed in 2014 which prompted the need to resolve the humanitarian problems at the

[278] Letter of the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization Y. Melenas to the Director of Maritime Safety Division to the International Maritime Organization A. Winbow No. 003/156, 24 July 2015 (**RU-358**).

[279] Letter of the Director of Maritime Safety Division to the International Maritime Organization A. Winbow to the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization Y. Melenas, 29 July 2015 (**RU-359**).

[280] Letter of the Federal Agency of Maritime and River Transport of Russia No. DU-23/11169, 30 August 2022 (**RU-360**), p. 2.

[281] Expert Report of [redacted] ("[redacted] Report"), paras. 116-119. See also paras. 396-397, 422-423 below.

[282] See para. 400 below.

[283] See paras. 403, 407-417, 425-432 below.

Peninsula.[284] Several construction stages were refined and readjusted along the way: more effectiveness was in particular enabled by the rapid approval process of the site planning documentation, as well as the simultaneous implementation of preparatory works and state expert reviews of the design documentation.[285]

220. While Ukraine points the finger at such methods,[286] it failed to provide any concrete evidence of real threats to the safety of navigation in the Strait or that they otherwise constituted a violation of Articles 38, 43 and 44 of UNCLOS, related to the pace of the construction process. As will be outlined below,[287] simultaneous preparatory works and the state expert review of design documentation is common practice when it comes to such large-scale construction projects of national importance, as the Kerch Strait Bridge.[288] Preparatory works, according to [redacted], who was directly involved in the drafting of a list of such works, are aimed at developing infrastructure that would facilitate construction and delivery of construction materials.[289] They could not have any significant environmental impact,[290] or any bearing on the actual construction process. On the contrary, the pre-construction clearance, as follows from Ukraine's own references, enabled "sweeping of the area for any unexploded ordnance and military burial sites".[291] Thus, Ukraine failed to prove that there is any link between the timeline of the Bridge's construction and whatever it presents as imaginary "threats" to the safety of navigation in the Strait.

221. As far as the alleged ice build-up is concerned, there is nothing to suggest that the hydrodynamic effects of the Bridge would cause an increase in seasonal ice formation – on the contrary, the possible effect on hydrodynamics should be negligible.[292] Should ice appear in the Strait, the Russian authorities would release the relevant notice to mariners, plus, an ice-breaking fleet is always ready to provide ice-breaking assistance.[293]

222. As regards sedimentation, the alteration of natural conditions of a waterway is an ordinary consequence of any construction project, which could be easily mitigated by a dredging

[284] See paras. 155-156 above.

[285] See Chapter 6, Section I, Sub-Sections B.1 and B.2 below. See also [redacted] Statement, paras. 62, 64-66, 69, 70-72.

[286] URM, para. 152.

[287] See para. 354 below.

[288] See *e.g.* Federal Law No. 310-FZ "On the Organisation and Holding of the 22nd Winter Olympic Games and the 11th Winter Paralympic Games in Sochi in 2014, the Development of Sochi as a Mountain Climate Resort, and on Amending Certain Legislative Acts of the Russian Federation", 1 December 2007 (**RU-111**), Article 13.1-1; Federal Law No. 93-FZ "On the Organisation of a Meeting Involving Heads of State and Government of the Member Countries of the 'Asia-Pacific Economic Cooperation Forum' in 2012, the Development of Vladivostok as the Centre of International Cooperation in the Asia-Pacific Region, and on Amending Certain Legislative Acts of the Russian Federation", 8 May 2009 (**RU-110**), Article 4(17).

[289] [redacted] Statement, para. 72.

[290] *Ibid.*

[291] Chronology of Bridge Construction, *Official Information Site for the Construction of the Crimean Bridge* (**UA-214**).

[292] See paras. 387-392 and 397 below. See also [redacted] Report, para. 97.

[293] [redacted] Report, paras. 128-129.

programme.[294] As a matter of practice, vessels with a 8m draft – which is maximum permissible – have transited and continue transiting the Strait to this day.[295]

223. Ukraine's allegations thus must be taken for what they are: very unlikely and unrealistic "worst-case scenario[s]",[296] and by no means an "obvious threat to the safety of navigation".[297] Hence, none of the potential threats proved to be actual and, as such, did not require publicity.

224. All things considered, the Russian Federation did not violate Articles 43 and 44 of UNCLOS since the UNCLOS regime is not applicable to the Kerch Strait. Otherwise, Russia has been informing User States of all actual and imminent dangers to navigation in the area, with those claimed by Ukraine being no more than unfounded "possibilit[ies]".[298]

III. Navigation Regime in the Kerch Strait Does Not Violate Articles 38 and 44 of UNCLOS

225. Ukraine accuses Russia of imposing delays on vessels seeking to transit the Kerch Strait *en route* to or from the Sea of Azov ports, that is, according to Ukraine, in violation of Articles 38 and 44 of UNCLOS.

226. As part of an allegedly discriminatory pattern,[299] Ukraine's Revised Memorial denounces the general navigation control measures traditionally applied in the Kerch Strait, such as the existence of a permit-based system, pilotage requirement and one-way traffic in the KYC.[300] Ironically, these are the same measures that Ukraine itself had practised in the Kerch Strait prior to 2014.

A. Russia Has the Power to Regulate Navigation in the Kerch Strait

227. First and foremost, Ukraine fails to take into account the Kerch Strait's status as internal waters under the exclusive sovereignty of the Russian Federation, as discussed in the previous Chapter. Ukraine's position that the regime of transit passage applies to the Kerch Strait is itself contradictory, not only since Ukraine explicitly agreed in Article 1 of the Azov/Kerch Cooperation Treaty that the Sea of Azov and the Kerch Strait constitute internal waters, but also because Ukraine consented under Article 2 of the same Treaty to apply a restrictive passage regime through the Strait.

228. As a corollary to this, there is no legal basis whatsoever for Ukraine's claims challenging control measures practised to ensure the safety of navigation in the Kerch Strait, as it does not qualify as the strait used for international navigation in the meaning under Article 37 of the

[294] [redacted] Report, para. 126.

[295] *Id.*, para. 127.

[296] URM, para. 213.

[297] *Id.*, para. 153.

[298] *Ibid*.

[299] Ukraine's allegations with regard to the vessels' inspections are addressed separately in Chapter 4, Section II.

[300] URM, para. 158.

Convention. Thus, Articles 38 and 43 of UNCLOS, and in particular the right of transit passage, do not apply to the Kerch Strait.

229. In addition to that, and in any event, it should be underscored that transit passage is not an absolute right in international practice. In this regard, Professor Scovazzi has emphasised that "the transit passage regime has been the subject of a series of exceptions, reservations, declarations, qualifications and attenuations".[301] Professors Churchill and Lowe have also stressed that a general right of transit passage has not been accepted universally.[302] And it is foreseeable that it will be qualified in the future to reflect the higher shipping traffic that is potentially hazardous to navigation and the marine environment.[303]

230. Beyond practice, even the UNCLOS regime – which has been described by some as "fundamentally flawed" because it puts the entire burden of managing the straits on the bordering States[304] – provides nuances and limitations to the right of transit passage. From the outset, Article 34 recalls that, subject to other UNCLOS provisions, bordering States may exercise their sovereignty over straits used for international navigation.[305]

231. For its part, Article 39 imposes duties on transit passage ships, which include complying with "generally accepted international regulations, procedures and practices" for safety at sea and for the "prevention, reduction and control of pollution."[306] As affirmed by Sam Bateman and Michael White,

> "It may be seen from this that vessels exercising transit passage are to conduct themselves in accordance with good seamanship and practices. Good seamanship and practices include taking a compulsory pilot in many situations".[307]

232. Article 42 further expressly provides that "States bordering straits may adopt laws and regulations relating to transit passage through straits", including with respect to "the safety of navigation and the regulation of maritime traffic" by providing sea-lanes and traffic separation schemes.[308] Finally, Article 43 emphasises that it is not only bordering States, but also User

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[301] T. Scovazzi, "Management Regimes and Responsibility for International Straits", *Marine Policy*, 1995, Vol. 19, No. 2 (**RUL-89**), p. 146.

[302] R.R. Churchill and V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999 (**RUL-90**), p. 113. See also G. V. Galdorisi and K. R. Vienna, *Beyond the Law of the Sea-New Directions for U.S. Oceans Policy*, Praeger, 1997 (**RUL-91**), p. 147.

[303] See in this sense T. Scovazzi, "Management Regimes and Responsibility for International Straits", *Marine Policy*, 1995, Vol. 19, No. 2 (**RUL-89**), p. 139-142. See also S. Bateman, D.R. Rothwell, and D. Vanderzwaag, "Navigational Rights and Freedoms in the New Millennium: Dealing with 20th Century Controversies and 21st Century Challenges" in D.R. Rothwell and S. Bateman (ed.), *Navigational Rights and Freedoms and the New Law of the Sea,* Martinus Nijhoff, 2000 (**RUL-92**), pp. 314-335.

[304] B.A. Hamzah, "*Coastal States and SLOCs Security: The Search for an Equitable Straits Regime*", Paper for Eighth International Conference on the Sea Lanes of Communication (SLOC), Bali, 24-27 January 1993 (**RUL-93**), p. 6.

[305] This is without prejudice to the argument on the inapplicability of UNCLOS.

[306] UNCLOS, Article 39(2).

[307] S. Bateman and M. White, "Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment", *Ocean Development & International Law*, vol. 40, 2009 (**UAL-65**), p. 194.

[308] UNCLOS, Article 42(1)(a).

States, that too should agree and cooperate "(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". In light of Ukraine's obligations as a User State of the Kerch Strait, its comments with regard to the navigational and safety measures in the Kerch Strait can hardly be characterised as cooperative.

233. Ukraine's allegations thus also disregard Russia's rights of a State bordering the Kerch Strait to adopt and implement regulations relating to vessels' transit through the Strait that are necessary to ensure the safety of navigation there.

B. Regulations Implemented in the Kerch Strait Ensure Safe Navigation

234. There is no reason why safety of navigation should not include compulsory pilotage, permit-based systems or other requirements which User States should comply with to avoid risks for the vessel itself, for other ships and for the marine environment. Assisting and ensuring the safe passage of ships through the Strait, warranting the protection of the marine and coastal environment, as well as of coastal structures are the purposes of the navigation regime in place in the Kerch Strait.

235. The control measures, including Vessel Traffic Systems ("VTS") (**1**), compulsory pilotage (**2**) and one-way traffic (**3**) as will be shown below, are legitimate and do not amount to hampering or impairing the passage of vessels in the Strait.

1. Vessel Traffic System

236. In its Revised Memorial, Ukraine complains about the fact that "[i]n order to transit the Strait, vessels must communicate in advance their port of destination, and generally must obtain permission before proceeding to the entrance, waiting in designated anchorage areas adjacent to the Strait until they receive approval to proceed".[309] It is shocking how Ukraine distorts the nature of the reasonable navigational requirements, which, first, have been in place in the Kerch Strait since the Soviet times and have not changed in principle since then and, second, are common for many waterways all around the world.

237. The main characteristics of the Kerch Strait which necessitated the establishment of the VTS were noted by [redacted], Ukraine's own expert:[310]

> "The Kerch Strait is both narrow and shallow in international shipping terms, and various vessel traffic management systems, including traffic separation schemes,

[309] URM, para. 158

[310] [redacted], Ukraine's environmental expert, also points out peculiar navigational conditions in the KYC: "[A] shallow sea that has historically made it a risky environment for shipping" (See Expert Report of [redacted], 17 May 2021 ("[redacted] Report"), para. 56.

have been adopted to minimise navigational risk, both from collisions and groundings."[311]

238. As [redacted] explains, the reason for introducing a VTS in a waterway is "to ensure the safety of navigation and mitigate the risks of collisions and other vessel accidents."[312] Relatedly, according to IMO, the VTS is particularly appropriate, when a waterway is characterised, *inter alia*, by any of the following: high traffic density, ships carrying hazardous cargoes; conflicting and complex navigation patterns; difficult hydrographical, hydrological and meteorological elements.[313]

239. For these reasons[314] and in light of the difficult hydrographic, hydrometeorological, navigation conditions, the VTS was implemented in the Kerch Strait. According to [redacted], such VTS as in the Kerch Strait are "implemented all around the world" and are similar to those in the Suez or Panama Canals, or the Bosporus Strait.[315] Neither are they different from those in place in the Strait prior to 2014.[316] Thus, the Kerch Strait VTS "is in line with international practices" and is not discriminatory in any way as "these requirements apply to all vessels entering or exiting the Kerch Strait."[317]

2. Pilotage Services

240. IMO recommends governments to organise pilotage services in those areas where it "would contribute to the safety of navigation in a more effective way than other possible measures".[318] The necessity and effectiveness of pilotage services is evident in the Kerch Strait, as both navigational experts of Russia and Ukraine confirm.[319] The pilotage mechanism applies in the areas of the Kerch Strait with the most hazardous navigation conditions.[320] To tackle them, the Pilotage Service of the Sea of Azov and Black Sea Basin offers services of highly qualified pilots having vast practical experience.

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[311] [redacted] Report, para. 3.5.

[312] [redacted] Report, para. 29.

[313] International Maritime Organization, Assembly Resolution A.857 (20) "Guidelines for vessel traffic services", 27 November 1997 (**RU-361**), para. 3.2.2.

[314] According to the Federal State Unitary Enterprise Rosmorport the VTS is "created in order to raise the navigation safety and efficiency level, life protection in the sea, protection of the marine and coastal environment, coastal structures protection." (See Rosmorport official website, VTS services, "General Information" (**RU-209**)).

[315] [redacted] Report, para. 29.

[316] *Id.*, para. 31.

[317] *Id.*, para. 30.

[318] International Maritime Organization, Assembly Resolution A.159 (ES.IV) "Recommendation on Pilotage", 27 November 1968 (**RU-362**).

[319] [redacted] Report, para. 35; [redacted] Report, paras. 3.5, 3.8.

[320] 2015 Kerch Mandatory Regulations (**RU-203**), paras. 31-32.

241. Even Ukraine itself boasts in the Revised Memorial that its "post-independence management of the pilotage program has facilitated the safe and efficient transit of large numbers of foreign vessels through the Strait."[321]

242. Certain categories of ships in the Strait are exempted from the pilotage requirement due to, *inter alia*, their type, size, flag or mariner's experience.[322] Such a pilotage scheme is "broadly similar" to the one implemented by Ukraine prior to 2014 as well.[323] An experience-related exemption from mandatory pilotage is driven by the challenging navigational conditions in the Kerch Strait. In this respect, [redacted] clearly states that it is common and sensible to impose requirements for a certain level of experience and number of voyages performed by a Russian master to gain pilotage exemption, which makes it possible to mitigate risks of collisions/groundings of all types of vessels.[324] As long as the flag-related exemptions are concerned, it is also absolutely lawful for a coastal State to adopt them for the purposes of ensuring safe navigation in the Strait[325] and provide exemptions to the vessels flying the flag of that State.[326]

243. There are many parts in the world where compulsory pilotage applies, as Russia exemplified above,[327] as well as where similar pilot exemptions may be granted based on the local knowledge and experience criteria, as [redacted] explains.[328]

3. One-Way Traffic

244. Ukraine also alleges that "merchant vessels are now frequently subject to one-way traffic in the channel, which requires greater use of caravanning in the Strait than was necessary in the past."[329]

245. However, Ukraine's allegation is again misleading, since, as a default rule, there is a two-way traffic in the KYC.[330] One-way traffic is in place in two instances only: in the area of the underbridge crossing for vessels with length dimensions exceeding 20m;[331] and for large-dimension ships, ships carrying hazardous cargo or navigating in difficult navigation conditions.[332] The first condition was introduced to safeguard navigation under the central arch

[321] URM, para. 116.

[322] 2015 Kerch Mandatory Regulations (**RU-203**), para. 32.

[323] [redacted] Report, para. 3.10.

[324] [redacted] Report, paras. 36-38.

[325] See paras. 227-232 above.

[326] [redacted] Report, para. 37.

[327] See para. 109 above.

[328] [redacted] Report, para. 36.

[329] URM, para. 158.

[330] 2015 Kerch Mandatory Regulations (**RU-203**), para. 47.

[331] According to para. 47 of 2015 Kerch Mandatory Regulations (**RU-203**), "[o]ne-way traffic is envisaged for vessels more than 20 metres in length from a pair of buoys Nos. 19 and 20 to a pair of buoys Nos. 23 and 24 in the area of the underbridge crossing of the Kerch-Yenikale Channel."

[332] 2015 Kerch Mandatory Regulations (**RU-203**), para. 64. Please see [redacted] Report, para. 32.

of the newly constructed Kerch Bridge (which is typical for arch bridges around the world).[333] The one-way traffic for the second group of ships was already practised by Ukraine with the requirements for them being even stricter.[334] Accordingly, as explained by [redacted] both requirements, are "typical and absolutely make sense in a waterway with confined navigational conditions", such as the Kerch Strait.[335]

246. The above clearly demonstrates that the Russian Federation legitimately introduced the control measures ensuring safe navigation and protection of the marine and coastal environment in the Kerch Strait, including the VTS, pilotage system and one-way traffic.[336] In fact, there is nothing new or extraordinary in these control measures, as Ukraine tries to picture them, as they have been in place in the Kerch Strait since the Soviet times and Ukraine itself admits that it had adhered to them prior to 2014. No hampering or impairing of the vessels' passage in the Strait that would be in violation of Articles 38 and 44 of the Convention follows out of that.

IV. Suspension of Navigation for Foreign Warships and Government Ships Does Not Violate Articles 38 and 43 of UNCLOS

247. Ukraine claims that Russia's suspension of navigation for foreign warships and government ships in certain areas of the Black Sea violates Articles 38 and 44 of UNCLOS.[337] As has been confirmed in Sections I-III of Chapter 3, and as developed below in this Section, the Russian Federation imposed no arbitrary restrictions on navigation. The alleged "unlawful closure" of Black Sea areas is nothing but yet another case of Russia's legitimate exercise of its rights under the Convention to suspend temporarily innocent passage in its own territorial sea (Article 25(3) of the Convention).[338]

248. To decide whether the Russian Federation lawfully suspended the innocent passage of foreign warships and government ships in its territorial sea, this Tribunal will necessarily be required to rule "on the sovereignty of either Party over Crimea", thereby exceeding its own jurisdiction (**Sub-Section A**). Should the Tribunal decide that it has jurisdiction to rule on Ukraine's claim, notwithstanding Russia's strong objections, the suspension of the innocent passage of foreign warships and government ships was in full compliance with Article 25(3) of the Convention (**Sub-Section B**). Moreover, Ukraine itself has exercised its right to suspend innocent passage in different territorial sea areas of the Black Sea on repeated occasions (**Sub-**

[333] [redacted] Report, para. 34.

[334] *Id.*, para. 33.

[335] *Id.*, para. 34.

[336] *Id.*, para. 44.

[337] URM, paras. 164-165.

[338] The same right is also envisaged under Federal Law of the Russian Federation No. 155-FZ "On Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation", 31 July 1998 (**RU-118**), Article 12(2), which reads as:

> *"To ensure the security of the Russian Federation and to practice any weapon, the federal executive defence authority or the federal executive security authority may temporarily suspend in certain areas of the territorial sea the exercise of the right of innocent passage through the territorial sea for foreign ships, foreign warships and other government ships. Such suspension shall enter into force after giving due notice in Notices to Mariners".*

Section C). In any event, there are no violations of the regime of transit passage under Articles 38 and 44 of the Convention, as Ukraine misleadingly alleges, as it is not applicable to the Kerch Strait, which together with the Sea of Azov constitute internal waters (see paras. 34, 39-53 above).

A. The Tribunal Has No Jurisdiction To Rule on the Legality of the Temporary Suspension of Innocent Passage in Territorial Waters Adjacent to Crimea

249. In April 2021, "[i]n the interests of the Russian Federation security" the Russian Ministry of Defence[339] suspended the innocent passage of foreign warships and government ships in Russia's territorial sea areas adjacent to Crimea.

250. In its 2020 Award, this Arbitral Tribunal has concluded that:

> "pursuant to Article 288, paragraph 1, of the Convention, it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea".[340]

251. In light of that ruling and "in the interest of procedural fairness and expedition", the Arbitral Tribunal ordered Ukraine "to revise its Memorial so as to take full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction".[341] Instead of scrupulously complying with the Tribunal's Order, Ukraine decided to put through the back door one more sovereignty-related claim.

252. Ukraine's suspension claim necessarily requires that a determination be made on whether the sea areas adjacent to Crimea can be regarded as Russia's territorial sea, where, for the protection of its security, it may suspend the innocent passage of foreign ships. Assessing the legality of such suspension will inevitably necessitate ruling on the issue of sovereignty over Crimea, a matter that clearly falls outside of this Tribunal's jurisdiction, as ruled in the 2020 Award.

253. As confirmed by this very Tribunal, the issue of sovereignty over Crimea "is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention".[342] It was, is and will remain the real issue, and indeed, the very heart of the dispute. It is impossible to rule if the Russian Federation lawfully exercised its rights as a coastal State to suspend

[339] Ministry of Defence of the Russian Federation official website, Notices to Mariners, Edition No 18/2021 (**RU-363**), Notice No. 1833 (T).

[340] 2020 Award, para. 197.

[341] *Id*., para. 198. See also Procedural Order No. 7 Regarding the Revised Procedural Timetable for Further Proceedings, 17 November 2020, para. 1(a).

[342] 2020 Award, para. 195.

innocent passage in its territorial waters "without first examining and, if necessary, rendering a decision on the question of sovereignty over Crimea".[343]

254. The way Ukraine puts forward its claim in the present proceedings – alleging violation of the regime of transit passage, instead of claiming that Russia unlawfully suspended innocent passage in the territorial waters adjacent to Crimea – does not affect the real nature of the dispute. As Ukraine itself noted in a Communication sent to IMO in April 2021, "*[b]y issuing the above-mentioned coastal warnings the Russian Federation once again violated the rights of Ukraine as* ***the coastal state***".[344] Further, Ukraine asserted "*the Russian Federation has no jurisdiction over the* ***Ukrainian territorial sea*** *adjacent to Crimea*",[345] thereby putting the sovereignty-related issue squarely into this dispute.

B. THE RUSSIAN FEDERATION SUSPENDED INNOCENT PASSAGE IN ITS TERRITORIAL WATERS IN FULL COMPLIANCE WITH ARTICLE 25(3) OF UNCLOS

255. Should the Tribunal decide that it has jurisdiction to assess the legitimacy of the suspension of innocent passage – despite Russia's argument precluding the Tribunal from doing so – the Russian Federation submits that it lawfully restricted passage of foreign warships and government ships for the protection of its security in full compliance with Article 25(3) of UNCLOS.

256. Article 25(3) of UNCLOS entitles a coastal State to suspend the innocent passage of foreign ships in its territorial sea under the following 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.

1. The Russian Federation Suspended Innocent Passage of Foreign Warships and Government Ships for the Protection of Its Security

257. Considering the broader heightened political situation, Russia had legitimate security concerns, both from the perspective of national defence, as well as intelligence gathering by third States that arise from the presence of foreign warships and government ships in close proximity to Russian sovereign waters. These legitimate concerns included NATO and other States increasing its military presence in the Azov-Black Sea basin, conducting military exercises and staging acts of provocation involving foreign warships. Ukraine, for its part, was escalating the situation, by threatening to destroy the Kerch Bridge and actively building its naval base infrastructure in Berdyansk.

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[343] 2020 Award, para. 152.

[344] Embassy of Ukraine in the United Kingdom of Great Britain and Northern Ireland, Communication to the International Maritime Organisation No.6124/23-327/2-113, 16 April 2021 (**RU-364**) (distributed to all IMO Members, Intergovernmental organisations and non-governmental organisations in consultative status together with the IMO Circular letter No. 4402, 19 April 2021) (emphasis added).

[345] *Ibid*. (emphasis added).

258. The situation in the Azov-Black Sea basin, in the immediate vicinity to Russia's border, started to aggravate at the beginning of March 2021, when NATO commenced its military exercise "Defender Europe 2021" simulating a "scenario of armed confrontation with Russia", with an active phase planned for May-June 2021.[346] This military exercise, one of the largest NATO-led in Europe for decades, included near-simultaneous operations across over 30 training areas in 12 countries, involving 28,000 troops from 27 nations (including Balkans and Black Sea States).[347]

259. Generally, in July-October 2021, Ukraine conducted at least five large-scale military exercises with NATO and partner forces involving thousands of foreign troops.[348] By way of example, the "Breeze 2021" exercise held in July 2021 aimed "to enhance interoperability among participating units and strengthen NATO's readiness in the Black Sea region."[349] Another example – the Joint Endeavour exercises in September 2021 "involved about 12,5 thousand troops and more than 600 units of armaments and military equipment"[350] and covered "all major military training grounds, as well as in the Black and Azov Seas".[351] Nine further military exercises with various NATO forces were approved for 2022.[352]

260. Apart from the countless military exercises held in the Azov-Black Sea basin during that period, the area was exposed to numerous blatant provocations involving foreign warships. In early April 2021, shortly before the suspension of passage, two U.S. warships were expected to be deployed in the Black Sea in support of the Ukrainian Government.[353]

261. In June 2021, the British destroyer, *HMS Defender*, entered Russian territorial waters adjacent to Crimea, in a gross violation of the rules on innocent passage envisaged in the Convention. Notably, following the incident, Ukrainian Foreign Minister Dmytro Kuleba, did nothing less than call for more cooperation between NATO and Ukraine in the Black Sea.[354]

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[346] *UAWIRE*, "Ukraine: Purpose of Upcoming Defender Europe 2021 Exercise is to Practice for War with Russia", 4 April 2021 (**RU-365**).

[347] Ministry of Defence the Republic of Albania official website, "'Defender Europe 2021' Exercise Starts in Albania, Three Senior NATO Generals Attend the Ceremony", 4 May 2022 (**RU-366**).

[348] Apart from Defender Europe 2021, Breeze 2021 and Joint Endeavour 2021, these exercises included Sea Breeze 2021 (See NATO official website, "NATO Allies and Partners Ready for Exercise SEA BREEZE 21", 25 June 2021 (**RU-367**)) and Agile Spirit 2021 (See Ministry of Defence of Georgia official website, "Agile Spirit 2021 finished", 6 August 2021 (**RU-368**)).

[349] NATO Official website, "NATO Ships Exercise in the Black Sea", 19 July 2021 (**RU-369**).

[350] National Security and Defense Council of Ukraine official website, "Experts of the NSDC Staff are Observing Drills with a Special Composition of Territorial Defense Brigades within the Framework of the Strategic Command and Staff Exercise 'Joint Endeavour – 2021'", 28 September 2021 (**RU-370**).

[351] *Ukrainian News Agency*, "Joint Efforts-2021 International Exercises Will Be Held On September 22-30 At All Major Military Training Grounds In Ukraine", 10 September 2021 (**RU-371**).

[352] Law of Ukraine No. 1948-IX "On Approving the Decision of the President of Ukraine to Allow Units of the Armed Forces of Other States to Come to the Territory of Ukraine to Take Part in Multinational Exercises in 2022", 14 December 2021 (**RU-372**); For a description of the planned exercises, see *Izvestiya*, "Foreign Troops in Ukraine: Who is the OrigiNATOr?", 20 December 2021 (**RU-373**).

[353] *The Moscow Times*, "U.S. Cancels Black Sea Deployment of 2 Warships – Turkey", 15 April 2021 (**RU-374**).

[354] *Reuters*, "Russia Says it Chases British Destroyer out of Crimea Waters with Warning Shots, Bombs", 24 June 2021 (**RU-375**).

The next day, the Dutch navy frigate *Evertsen* was reported to be moving towards the Kerch Strait until Russian planes forced it to change course.[355]

262. Furthermore, Ukrainian authorities have repeatedly declared their intentions to destroy the Kerch Bridge, including when innocent passage was suspended. In this respect, in September 2021, Mr Alexander Turchinov, former Secretary of the National Security and Defence Council of Ukraine, announced that Ukraine intended to develop Neptun cruise missiles that "would have been able to […] sweep away the Kerch Bridge".[356]

263. In 2022, Ukrainian military officials have insistently reconfirmed their intentions. Secretary of the National Security and Defence Council of Ukraine, Alexey Danilov, stated in April 2022 that Ukraine would attack the Kerch Bridge once there is such opportunity.[357] In June 2022, Major General of the Ukrainian Armed Forces, Dmitry Marchenko, characterised the Crimean Bridge as "target number one for the Ukrainian Armed Forces".[358] Not only have Ukrainian authorities repeatedly threatened to destroy the Kerch Bridge, but also a former NATO commander, General Philip Breedlove, in July 2022, urged Ukraine to attack the Bridge using newly supplied Harpoon missiles.[359] As recently as on 8 October 2022, the Crimean Bridge was attacked as a result of the terrorist act and explosion organized by Ukraine, which Ukraine has never officially disavowed.

264. Moreover, starting from 2018, Ukraine was planning to build a Naval Base "East" in Berdyansk,[360] with an active construction phase unfolding in July-August 2021.[361] If constructed, the Berdyansk Naval Base would have constituted yet another source of military provocations against the background of a deteriorating political situation. All of the above has to be put in context of the long-term goal of the Ukrainian Government to "deoccupy" Crimea – a "key priorit[y]", according to President Zelensky.[362]

265. Accordingly, the Russian Federation had legitimate concerns that prompted to exercise its right to suspend the innocent passage of foreign warships and government vessels for the protection of its security in the Azov-Black Sea basin.

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[355] *TASS*, "Russia Scrambled Military Planes to Prevent Border Violation by Dutch Frigate", 3 June 2021 (**RU-376**).

[356] *Gazeta.Ru,* "Ukraine Announced that the Plan to 'Sweep Away' the Crimean Bridge Failed", 10 September 2021 (**RU-377**).

[357] *Gazeta.Ru,* "NSDC Promised to Attack the Crimean Bridge", 21 April 2022 (**RU-378**). ("If we had an opportunity (to attack the Crimean Bridge), we would do it. If we have such an opportunity, we will certainly do it.").

[358] *TASS*, Crimean Bridge Is Target Number One for Ukrainian Army, General Says, 15 June 2022 (**RU-379**).

[359] *RT, "*NATO ex-commander encourages attack on Crimea bridge*",* 8 July 2022 (**RU-380**).

[360] *Ukrinform*, "Two Ukrainian Warships Enter Sea of Azov to Become Part of Newly Created Naval Base", 24 September 2018, 24 September 2018 (**RU-381**).

[361] President of Ukraine official website, "Ukraine is Planning to Build a New Naval Fleet by 2035 - Volodymyr Zelenskyy", 19 August 2021 (**RU-382**).

[362] President of Ukraine official website, "Address by President of Ukraine Volodymyr Zelenskyy to the Verkhovna Rada on the Internal and External Situation of Ukraine", 20 October 2020 (**RU-383**).

2. *The Russian Federation Suspended the Innocent Passage of Foreign Warships and Government Ships Temporarily Without Discrimination and With Due Publicity*

266. The Russian Federation exercised its lawful right to suspend innocent passage temporarily. As 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.[363]

267. Here, the passage was suspended just before the announced deployment of two U.S. warships in the Black Sea. The suspension lasted for 6 months, which covered the period of successive military exercises, and consequently met the temporariness criterion.

268. With regard to other criteria for the suspension of innocent passage under Article 25(3) of the Convention, the passage of *all* foreign warships and government ships was suspended without any discrimination as to their flag or other possible characteristics, and the suspension was duly announced through the publication of 'Notices to Mariners' – a proper means[364] for giving publicity to navigational hazards.

C. UKRAINE HAS A RECORD OF SUSPENDING INNOCENT PASSAGE IN ITS TERRITORIAL SEA AREAS OF THE BLACK SEA

269. The practice of suspending innocent passage in one State's territorial sea for security reasons for a period of several months is not a recent phenomenon in the Black Sea region. Ukraine itself has exercised on repeated occasions its right to suspend innocent passage in different territorial sea areas of the Black Sea.[365] For instance, in December 2018, Ukraine prohibited passage in a specific area of the Black Sea until September 2020, successively renewing this prohibition every 3 months, with the same area being closed from June 2021 to March 2022 as well.[366]

270. Another area of the Black Sea was closed by Ukraine from December 2018 to September 2020[367] and from September 2021 to March 2022.[368] This closure overlaps with Russia's suspension of passage in its territorial sea and starts exactly in the midst of military exercises

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[363] R. A. Barnes, "Straits Used for International Navigation: Article 25" in A. Proelss (eds.), United Nations Convention on the Law of the Sea: A Commentary, München: Nomos Verlagsgesellschaft, 2017 (**RUL-94**), p. 226, para. 14.

[364] *Id.*, pp. 225-226, paras. 11-15.

[365] The Navigational warnings referred to in this section cover areas that extend beyond the territorial waters of Ukraine. Thus, as long as territorial waters are concerned, Ukraine prohibited innocent passage in the respective areas, while for the areas beyond the territorial sea, Ukraine gave notices of danger of navigation.

[366] See Navigational warning published at the Ministry of Defence of the Russian Federation official website ("NAVIP") 031 2196/18 Map 32101; NAVIP 031 430/19 Map 32101; NAVIP 031 1073/19 Map 32101; NAVIP 0311518/19 Map 32101; NAVIP 031 2160/19 Map 32101; NAVIP 031 327/20 Map 32101; NAVIP 031 730/20 Map 32101; NAVIP 031 752/21 Map 32101; NAVIP 031 1091/21 Map 32101; NAVIP 031 1480/21 Map 32101 in Compilation of Selected Navigational Warnings for 2018-2022 (**RU-384**).

[367] See *Id.*: NAVIP 031 2195/18 Map 32102; NAVIP 031 429/19 Map 32102; NAVIP 031 1074/19 Map 32102; NAVIP 031 1517/19 Map 32102; NAVIP 031 2161/19 Map 32102; NAVIP 031 328/20 Map 32102; NAVIP 031 729/20 Map 32102; NAVIP 031 1110/20 Map 32102.

[368] See *Id.*: NAVIP 031 1090/21 Map 32102; NAVIP 031 1479/21 Map 32102.

in the Black Sea region. The third Black Sea area was closed from March to June 2019[369] and from June 2021, when military exercises were in the active phase, to August 2021.[370]. As some of these closures overlap in time, Ukraine suspended passage in quite a substantial area of the Black Sea from March to June 2019,[371] and from September 2021 to March 2022.[372]

271. Thus, Ukraine itself has regularly practised suspension of innocent passage in its territorial sea of the Black Sea, with some of them overlapping in time with Russia's suspension.

272. By reference to all the above, Russia submits that the legality of the suspension of innocent passage in the territorial sea adjacent to Crimea is a sovereignty-related issue and, therefore, falls outside of this Tribunal's jurisdiction. Alternatively, Russia lawfully suspended innocent passage for the protection of its security in full compliance with Article 25(3) of UNCLOS.

[369] See Compilation of Selected Navigational Warnings for 2018-2022 (**RU-384**): NAVIP 031 427/19 Map 32100.

[370] See *Id.*: NAVIP 031 751/21 Map 32100.

[371] See *Id.*: NAVIP 031 427/19 Map 32100; NAVIP 031 430/19 Map 32101; NAVIP 031 429/19 Map 32102.

[372] See *Id.*: NAVIP 031 1478/21 Map 32100 and fn. 366, 368 above.

CHAPTER 4.
INSPECTIONS OF VESSELS IN THE KERCH STRAIT AND THE SEA OF AZOV DO NOT CONSTITUTE VIOLATIONS OF THE CONVENTION

273. In the Revised Memorial Ukraine accuses Russia of violating a number of UNCLOS provisions by conducting inspections of vessels transiting through the Kerch Strait and the Sea of Azov.

274. More particularly, with regard to the inspections in the Kerch Strait, Ukraine claims that they constitute violations of the right of transit passage (Article 38 of UNCLOS) and duty not to hamper transit passage (Article 44).[373] With regard to the Sea of Azov, Ukraine asserts that the vessels' inspections there amounted to the violations of the freedom of navigation (Article 58 and 87) that should be applicable, according to Ukraine, in the water area that Ukraine asserts in these proceedings as its "exclusive economic zone".[374] Ukraine also asserts that in the area of the Sea of Azov, that allegedly constituted its "territorial sea" according to its position in this arbitration, the inspections violated Ukraine's sovereignty (Article 2).[375]

275. As Russia stated in its previous submissions, and as explained above in Chapter 2,[376] the Sea of Azov and the Kerch Strait constitute internal waters, and UNCLOS provisions invoked by Ukraine with regard to the inspections of vessels there, are thus in principle not applicable to them (Section I). This should bar the Tribunal from assessing the legitimacy of the vessels' inspections under UNCLOS, as Ukraine suggests. In the alternative, if the Tribunal decides otherwise, Russia submits that inspections conducted by the Russian Border Guard Service represent a lawful and justified exercise of Russia's sovereign powers (Section II).

I. The Tribunal Has No Jurisdiction to Assess the Compliance of Vessels' Inspections with the Convention

276. Ukraine raises claims with regard to the inspections of vessels by the Russian Border Guard Service in two water areas – the Sea of Azov and the Kerch Strait – relying on different UNCLOS provisions for each of these areas. Neither of the invoked articles of the Convention, however, applies to the Sea of Azov and the Kerch Strait due to their internal waters status.[377]

277. An important consequence of the internal waters status of the Sea of Azov and the Kerch Strait is that the Kerch Strait, giving access to the sea composed only of internal waters, is not a strait used for international navigation as defined by Article 37 of UNCLOS. It is not a strait "between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone", as Russia has already stated in the previous submissions

[373] URM, paras. 155-156, 295.

[374] *Id.*, paras. 167-171, 295.

[375] *Id.*, para. 171.

[376] See Chapter 2, Sections II and III above.

[377] For the sake of clarity, this argument is in addition to Russia's jurisdictional objection that UNCLOS does not govern the regime of the Sea of Azov and the Kerch Strait as internal waters, as Russia stated in Chapter 2.

and above.[378] The status of a strait used for international navigation under Article 37 is an essential precondition for the invocation of other provisions of Section 2 of Part III of the Convention, and, in particular, Articles 38 and 44 that Ukraine relies on in its claims with regard to the vessels' inspections.[379]

278. Therefore, neither Article 38, providing for the right of transit passage specifically in "straits referred to in article 37", nor Article 44, imposing a duty on the States bordering straits not to hamper transit passage in such straits, can apply to the Kerch Strait and grant all ships the right of transit passage in this strait. Concluding otherwise would be clearly at odds with its internal waters regime.

279. Moreover, since Russia exercises exclusive sovereignty over the land on both sides of the Kerch Strait, Russia consequently exercises full sovereignty over the waters of the Kerch Strait as well, and the Strait is Russia's internal waters. In light of that, Ukraine's claims to challenge Russia's exercise of its sovereignty in its own internal waters by conducting inspections of vessels is in effect yet another attempt to bring up the issue of sovereignty over Crimea.

280. This is in apparent disregard for the 2020 Award and its *res judicata* effect, which is a procedural abuse on behalf of the Claimant and should be treated accordingly. The Tribunal has already unambiguously ruled on that issue and it is not subject to reconsideration – the Tribunal's jurisdiction as regards Ukraine's claims that necessarily require deciding on the sovereignty of either Party over Crimea was denied.[380] The same outcome should follow here and the Tribunal should reject these claims of Ukraine as well.

281. With regard to inspections in the Sea of Azov, Ukraine uses as a basis for its claims either Article 2 or Articles 58 and 87 of UNCLOS depending on the alleged location of the vessels' inspections. All these claims again rely on the wrong premise – that the Sea of Azov allegedly does not constitute internal waters. As has been shown previously, this allegation is untenable. Ukraine and Russia did not agree on the delimitation of the water areas of the Sea of Azov, so as to encompass Ukraine's "territorial sea" and the "exclusive economic zone", as Ukraine's claims purport to imply. Russia reiterates its position – 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.[381] Ukraine's claims based on Articles 2, 58 and 87 of UNCLOS are thus ill-founded and the invoked UNCLOS provisions are irrelevant.

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[378] RPO, para 130; see more generally Chapter 3 of the RPO; Chapter 3, Section IV of the Russia's Reply.

[379] The negotiating history of the Convention reflects that the States only considered that the right of transit passage exists in straits connecting non-sovereign maritime zones. *See*: Myron H. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol. II, Martinus Nijhoff Publishers, 2003 (**RUL-81**), p. 318, paras. 37.3-37.4.

[380] 2020 Award, para. 197.

[381] RPO, para. 177; Russia's Reply, paras. 84, 92. The ITLOS tribunal stated in the *M/V Norstar* case: "The Tribunal notes 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. To interpret the freedom of navigation as encompassing a right to leave port and gain access to the high seas would be inconsistent with the legal regime of internal waters. […]" (*M/V Norstar Case (Panama v. Italy)*, ITLOS Case No. 25, Judgment of 10 April 2019 (**UAL-138**), para. 221.

282. UNCLOS does not govern the regime of internal waters of the Sea of Azov and the Kerch Strait, as Russia previously stated.[382] The issues of navigation in these waters were regulated by a bilateral agreement between Russia and Ukraine – the Azov/Kerch Cooperation Treaty. The regime of the Sea of Azov and the Kerch Strait, as was expressly specified in the Treaty, implies that only the ships under the flags of Russia and Ukraine enjoyed the freedom of navigation in these waters (Article 2 (1)):

> "Merchant vessels and warships as well as other government vessels flying the flag of the Russian Federation or Ukraine used for non-commercial purposes shall enjoy freedom of navigation in the Sea of Azov and the Kerch Strait".[383]

283. In contrast, as it follows from the express wording of Article 2(2) of the same 2003 Treaty, merchant ships of third States did not enjoy the same regime of free navigation in any part of the Sea of Azov or the Kerch Strait. There was a specific qualification in this regard set by the Parties, and no right of transit or the freedom of navigation could be inferred from the relevant provision of the 2003 Treaty:

> "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."[384]

284. The above-cited provisions of the Azov/Kerch Cooperation Treaty are, however, clearly beyond the jurisdiction of this Tribunal, and any pronouncements as to its legal effect or nature would be *ultra vires*. The 2003 Treaty envisaged that "[d]isputes between the Parties related to the interpretation and application" of the 2003 Treaty "shall be resolved by means of consultations and negotiations, as well as other peaceful means as may be selected by the Parties".[385] While the Tribunal stated in the 2020 Award that Article 4 of the 2003 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",[386] this requires an express mutual consent of both Parties, which is apparently absent in the instant case.

285. It follows from the above that, for the reasons of inapplicability of specific rights and obligations under UNCLOS that Ukraine invokes to challenge the legitimacy of the vessels' inspections by the Russian Border Guard Service in the Kerch Strait and the Sea of Azov, these claims of Ukraine cannot and do not concern the interpretation or application of the Convention. They are therefore beyond the scope of the Tribunal's jurisdiction, as defined under Article 288(1) of UNCLOS, and should be rejected as such. Moreover, inasmuch as Ukraine's claims concern the exercise of sovereignty of Russia by conducting inspections of vessels transiting

[382] See Chapter 2, Section II, Sub-Section E.

[383] Azov/Kerch Cooperation Treaty (**RU-20-AM**).

[384] *Id.*, Article 2(2).

[385] *Id.,* Article 4.

[386] 2020 Award, para. 490.

through the Kerch Strait, which Russia considers its internal waters, they also 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 in the 2020 Award. The 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 sovereignty with regard to its new subjects – the DPR, the Zaporozhye Region and the Kherson Region – and shall fall outside the Tribunal's jurisdiction.

II. In Any Event, the Vessels' Inspections in the Sea of Azov and the Kerch Strait Constitute Legitimate Exercise of Russia's Sovereign Powers

286. The internal waters regime of the Sea of Azov and the Kerch Strait suggests full and exclusive sovereignty of Russia over these water areas. Article 2(1) of the Convention reflects such legal status of internal waters. As a general rule, "[i]n the legal and political sense, internal waters are in principle equated with the land territory. A State exercises its sovereignty over internal waters in the same manner and ordinarily on the basis of the same laws as are applicable to the land domain".[387]

287. Full sovereignty over the Sea of Azov and the Kerch Strait implies that foreign merchant vessels located in internal waters are subject to the administrative, legislative, judicial powers of the coastal State. The exercise of this jurisdiction derives from the principle of territoriality that gives a coastal State exclusive authority to regulate the matters within its territory. By voluntarily entering internal waters of another State, a foreign vessel submits to the jurisdiction of that State. As pointed out by Judges Cot and Wolfrum in their joint separate opinion in the ITLOS Order of 2012 in the *Ara Libertad* case:

> "[…] This clearly establishes that internal waters originally belong to the land whereas the territorial sea so belongs but only on the basis of international treaty and customary international law. As a consequence thereof limitations of the coastal States' sovereignty over internal waters cannot be assumed."[388]

288. Consequently, there is no basis for Ukraine's questioning of Russia's exercise of sovereignty in its internal waters by way of security inspections by the Russian Border Guard Service of vessels that enter into Russian internal waters to pass through the Kerch Strait. As Respondent highlighted above, the real purpose of Ukraine's allegations is to bring up again, in violation of the 2020 Award, the issue of sovereignty over Crimea and, as a consequence, of the Kerch Strait. The same concerns the vessels' inspections in the Sea of Azov, also enjoying the status of internal waters. The claims of Ukraine are thus purely superficial and lack proper grounds.

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[387] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Merits, Judgment, Dissenting Opinion of Judge Evensen, I.C.J. Reports 1982 (**RUL-80**), p. 18, p. 313.

[388] *"Ara Libertad" (Argentina v. Ghana),* Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012 (**RUL-34**), p. 370, para. 25.

289. Nevertheless, Russia will further demonstrate in more detail why it is necessary for security reasons that the Russian Border Guard Service inspect the vessels transiting the Kerch Strait. It should be highlighted that the inspections *per se* do not infringe upon the vessel's ability to transit the Strait and the Sea of Azov for entering the ports there, and do not have the effect of blocking or prohibiting such transit.

290. First, the practice of vessels' inspections by the border authorities of a coastal State is not novel to the Sea of Azov basin. For instance, acting within the framework of the 1993 Agreement, Ukraine and Russia repeatedly affirmed the right of each Party's competent organs to inspect vessels in any area of the Sea of Azov and the Kerch Strait.[389]

291. Also, since 2004, within the framework of cooperation between the border authorities at the Council of Commanders of the Border Guard Troops,[390] Russian and Ukrainian border authorities conducted joint crime-prevention operations in the Black-Azov Sea basin. The goal of those activities was prevention of trans-border crimes, maintenance of safe navigation, anti-poaching and protection of the marine environment in the Sea of Azov and the Kerch Strait.[391]

292. Moreover, within the framework of bilateral cooperation between the border authorities of Russia and Ukraine, the Parties expressly agreed on the coordination of activities of border services of the two States in the Black-Azov Sea basin. The purpose was joint combatting of illegal activities in those water areas, including illegal human, weapons, drugs trafficking, and intrusion of terrorist groups.[392] To that end, the border authorities of both States controlled navigation of vessels in the Sea of Azov and the Kerch Strait, which obviously implied, within their law enforcement powers, the power to inspect any vessels, if necessary. There was no record of protests from third States with regard to that joint inspection practice of Russia and Ukraine in the area.

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[389] See, for instance paragraph 4 of the Procedure for Control of Catching of Aquatic Biological Resources in the Sea of Azov and the Kerch Strait by Fishing and Other Vessels for 2017 attached to the Minutes of the 28th Session of the Ukrainian-Russian Commission on Fisheries in the Sea of Azov, 17-20 October 2016 (**RU-385**): "To monitor compliance with the regulatory measures for fisheries and other regulations on the catching of aquatic biological resources, officials of the designated authorities of the inspecting Party may stop, inspect and, in case of detecting violations, detain **any** vessel in order to perform actions provided for in paragraphs 6, 7, 8, 10 of the present Procedure" (emphasis added). See also paragraphs 4 and 5 of the Procedure for Control of Catching of Aquatic Biological Resources in the Sea of Azov and the Kerch Strait by Fishing and Other Vessels for 2012 attached to the Minutes of the 23rd Session of the Russian-Ukrainian Commission on Fisheries in the Sea of Azov, 19-22 October 2011 (**RU-386**); paragraph 10 of the 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 attached to the Minutes of the 8th Session of the Russian-Ukrainian Commission on Fisheries in the Sea of Azov, 28-30 July 1997 (**RU-387**).

[390] The Council of Commanders of the Border Guard Troops is an inter-state regional authority tasked with the coordination of the border policy of its members and cooperation between their border agencies. Before 2018, both Russia and Ukraine participate therein, but Ukraine has withdrawn from the Council since.

[391] Resolution No. 42-8 of the Interparliamentary Assembly of the CIS Member Nations "On the Commentary to the Model Law 'On Border Security'", 16 April 2015 (**RU-308**), the commentary to Article 10.

[392] [redacted]

293. Second, the vessels' inspections by the Russian Border Guard Service in the Sea of Azov and the Kerch Strait postdating 2014 in essence serve the same security and crime-prevention purposes, as prior practice of Russia and Ukraine. As the Russian Border Guard Service commented, "[a]ctivities of the authorities of the FSB [the Federal Security Service] of Russia in this direction are driven by the need to prevent the attempted intrusions by the persons involved in international terrorist and extremist organizations, illegal migrants, illegal trafficking of weapons into the territory of our state, ensuring the safety of navigation, as well as of the construction of the Crimean Bridge".[393]

294. Against the background of real threats to security in the Sea of Azov and the Kerch Strait, which intensified after 2014, activities of the Russian Border Guard Service, including security inspections of vessels in that water area, have gained critical importance for ensuring national security of the Russian Federation. Repeated intentions of Ukrainian authorities to destroy the Kerch Bridge,[394] as well as various acts of provocations by extremists, supported and endorsed by Ukrainian top officials,[395] have prompted the need to react on the part of Russia. The ships of the Ukrainian State Border Service repeatedly threatened the use of deadly force against the Russian Border Guard ships.[396]

295. As for the alleged delays on the vessels transiting through the Kerch Strait, of which Ukraine complains,[397] they have nothing to do with the practice of security inspections by the Russian Border Guard Service and should be attributed to other related factors. Ukraine did not provide any credible evidence that would unambiguously show a direct connection between the alleged delays of vessels and their inspections, because such connection in fact does not exist. The witness statement of [redacted] from the Ukrainian Armed Forces is not instructive either, as it mainly relies on the Automatic Identification System (AIS) data, which only tracks the vessels' location. Ukraine's witness himself admits the gaps and limitations in the AIS.[398]

296. The expert in navigation, [redacted], explains that the AIS data would only identify when a vessel arrived and departed from an anchorage, i.e. whether the vessel was moving or not. The AIS would not be able to show whether the delay was because of mechanical failures, adverse weather conditions, or the vessel was waiting for its cargo to become available for loading before proceeding onwards. There are many reasons for a vessel to remain at anchor and one cannot be certain what the delays were, the expert concludes.[399] Far less could the AIS

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[393] *INTERFAX.RU*, "Russian border guards explain inspections of ships in the Kerch Strait", 3 May 2022 (**RU-390**).

[394] See paras. 262-263 above.

[395] *INTERFAX.RU*, "The FSB reported detention of Ukrainian scout saboteurs in Sevastopol", 10 November 2016 (**RU-391**); *INTERFAX.RU*, "Ukrainian border guards report detention of a Russian flagged vessel in the Sea of Azov", 26 March 2022 (**RU-392**); *TASS*, "The FSB discloses details of detention of Ukrainian Navy officers in the Kerch Strait", 8 December 2018 (**RU-393**).

[396] *RIA Novosti*, "The Ukrainian Navy has been threatening Russian ships with weapons since August, the FSB says", 8 December 2018 (**RU-394**).

[397] URM, para. 159.

[398] Witness Statement of [redacted], 14 May 2021 ("[redacted] Statement"), paras. 7-8.

[399] [redacted] Report, paras. 39-43.

indicate whether the Russian border guards contacted the allegedly inspected vessels before or after their deviation from the so-called "standard navigation path" (and even more so, whether they boarded those vessels at all).

297. Even in the four selected examples of the vessels' delays that Ukraine picked up,[400] Ukraine's own references indicate that most of the inspections lasted on average not more than one hour. In light of the overall time of the alleged delays in those examples, this in itself tells that there are definitely other reasons for the delays. Ukraine's witness [redacted] admits that the majority of inspections they identified were conducted while vessels were waiting for the VTS permission to proceed through the Kerch Strait.[401] Indeed, to minimise the delays, the Russian Border Guard Service conducts security inspections specifically in the anchorage zones to make use of the waiting time while vessels await for pilots to arrive.[402] Such waiting time in the anchorage zones usually depends on the weather conditions, especially during the night-time, the number of other vessels waiting to proceed, availability of the pilots, formation of caravans for transit, etc. The inspections of the Russian border guards have thus no bearing on the alleged vessels' delays.

298. Ukraine hints that the vessels' inspections were likely discriminatory in that the vessels heading to and from Russian ports allegedly faced different treatment, as compared to the vessels travelling to or from ports of Mariupol and Berdyansk.[403] Ukraine fails to mention, however, that, in Russian ports, there is port control in place and all vessels undergo security inspections by the Russian Border Guard Service. In addition to that, it is undisputed that the vessels heading to and from Russian ports also undergo random security inspections upon their transit through the Kerch Strait,. In fact, the majority of inspections during the period, of which Ukraine complains, concerned Russia-bound vessels, which Ukraine does not contest either.[404] Also, Ukraine's witness suggested that vessels that had been travelling to Ukrainian ports were more likely to be larger than the ones that were bound for Russia.[405] As a consequence, their inspections naturally could take longer.

299. Furthermore, Ukraine's witnesses also rely on conversations with "vessel masters who had experienced these stops and inspections".[406] Clearly, this is nothing more than a record of a hearsay evidence, which by itself is not a sufficiently reliable source of information and should not be given undue weight. As the ICJ highlighted in the *Corfu Channel* case, when setting aside hearsay evidence, the statements attributed to third Parties, "of which Court has received

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[400] URM, para. 160.

[401] Witness Statement of [redacted], 14 May 2021, paras. 3-4.

[402] See *Kommersant*, "The Azov topic was intentionally thrown into the information space", 22 November 2018 (**RU-395**).

[403] URM, para. 161.

[404] Russia is not Blocking Ukrainian Ships in the Kerch Strait, Claims the Federal Security Service of Russia (FSB), Korrespondent.net, 8 December 2018 (**UA-568**); URM, paras. 157-163.

[405] [redacted] Statement para. 14.

[406] *Id.*, para. 7.

no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence".[407]

300. Finally, the practice of security inspections of vessels transiting the straits, which Ukraine portrays as something egregious, is not unusual for other water areas around the world. [redacted] confirms, based on his navigational and expert experience that almost each and every vessel transiting the Suez and Panama Canals is subject to inspection for compliance with the transit requirements "because an unfit vessel, if she breaks down and causes an issue within the canal or strait, can cause significant delays for the traffic to resume".[408] Following the overthrow of the President of Egypt Morsi in early July 2013, with civil unrest in various parts of the country, the Egyptian Navy carried out random inspections of vessels transiting the Suez Canal to ensure that "no weapons or illegal cargo passes through the Suez Canal to try to ensure safety of the Canal generally and ships during transit".[409] In the Panama Canal, the applicable rules of navigation as well confirm that vessels' security inspections and vessels' escort service are commonly in place.[410]

301. Therefore, should the Tribunal decide to entertain Ukraine's claim and assess the legitimacy of Russia's inspections of vessels in the Kerch Strait and the Sea of Azov, despite Russian objections, the Tribunal should find those inspections to be a legitimate exercise of Russian sovereign powers in its internal waters. The vessels remained perfectly able to transit the Strait and the Sea of Azov, to enter the ports there, and the security inspections were not a bar to the vessels' ability to do that.

[407] *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, I.C.J. Reports 1949, 9 April 1949 (**RUL-88**), pp. 16-17.

[408] [redacted] Report, para. 42.

[409] *The London P&I Club*, "Suez Canal: Random Inspections", 24 July 2022 (**RU-396**).

[410] Panama Canal Authority official website, OP NOTICE TO SHIPPING No. N-1-2022, 1 August 2022 (**RU-397**).

CHAPTER 5.
UKRAINE'S CLAIMS CONCERNING THE JDRs ARE DESIGNED TO CHALLENGE OWNERSHIP TITLE AND VIOLATE THE 2020 AWARD

302. Before proceeding to address Ukraine's allegations, it should be noted that the JDRs installed in the Black Sea near the Odesskoe gas field, including the JDR *Tavrida*, a subject matter of Ukraine's claims in this arbitration, have become the target of brazen repeated attacks of Ukrainian armed forces, resulting in a number of casualties.[411]

303. Consequences of these attacks could be even more dramatic and devastating for the marine environment of the Black Sea – a cause that Ukraine purports to protect so rigorously in this arbitration. The effects could spread over the water areas of all Coastal States, including Turkey, Romania and Bulgaria, just to remember an explosion at the Deepwater Horizon oil platform in the Mexican Bay, leading to an industrial disaster of catastrophic scale.

304. Against this backdrop, Ukraine's claims to return the JDRs are even more cynical, notwithstanding their legal side, which is penetrated with a number of abuses as well, as will be further demonstrated.

305. First of all, Ukraine did not raise in its 2018 Memorial any allegations with regard to the two JDRs – the *Tavrida* and the *Sivash* – which would be based on alleged violations of Article 91 of the Convention, but did so only in the Revised Memorial. In essence, this is an introduction of new claims by Ukraine in the merits phase of arbitral proceedings, covered under the guise of a Revised Memorial that the Tribunal directed to file, taking full account of the scope of its jurisdiction and its limitation, as the 2020 Award determined.[412]

306. Neither the Rules of Procedure, nor Procedural Order No. 6,[413] that followed the issuance of the 2020 Award, permit the introduction of new claims by the Claimant at such a late stage of the proceedings. This constitutes a misuse of procedural rights by Ukraine and the Tribunal should treat it accordingly, based on its inherent case management powers, and refuse to entertain these claims to ensure the integrity of the arbitral proceedings.[414]

307. However, this is not the only instance of disregard for procedural directions issued by the Tribunal with regard to the filing of Ukraine's Revised Memorial. Ukraine's requests to return the JDRs and to cancel their Russian registrations fall outside the scope of the Tribunal's jurisdiction, as determined in the 2020 Award. What Ukraine indeed seeks to challenge is the

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

[412] 2020 Award, para. 142.

[413] Rules of Procedure, Article 13(1); Procedural Order No. 6, para. 2(a): "Ukraine shall submit a revised version of its Memorial containing: a statement of any facts on which Ukraine relies; a statement of law; and the submissions of Ukraine".

[414] The requirement that "the precise nature of the claim" should be specified in the application is characterised as "essential from the point of view of legal security and the good administration of justice" *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 (**RUL-56**), pp. 266–267, para. 69).

current ownership title to the two JDRs – a matter clearly beyond the scope of the Tribunal's competence, as Russia further explains.

I. An UNCLOS Tribunal Is Not Competent to Assess the Legality of the Transfer of Ownership Title over the JDRs

308. First, Ukraine's claims rest on the same ill-founded premise – that Russia unlawfully seized the JDRs, which Russia contests. This follows from Ukraine's prayer for relief in the Revised Memorial, requesting that the Tribunal order Russia to "[r]elease to Ukraine the two Ukrainian-flagged JDRs it unlawfully seized and reflagged so as to re-establish Ukraine's exclusive jurisdiction over the vessels", as well as to "[w]ithdraw all claims to have re-flagged under the Russian flag the two Ukrainian-flagged JDRs it unlawfully seized".[415]

309. Ukraine's claims imply, and indeed necessitate, that the Tribunal undertake the assessment of legality of the transfer of the JDRs' ownership title. That is, however, beyond the scope of this Tribunal's competence, as a matter completely extraneous to the Convention. The Convention simply does not provide the relevant legal framework for such assessment and, even more so, neither is an UNCLOS Tribunal a proper forum for such claims.

310. The title over the JDRs is a subject of separate investment arbitration proceedings against the Russian Federation under the Russia-Ukraine bilateral investment treaty.[416] The Ukrainian "Chernomorneftegaz", a state-owned oil and gas company, notably represented by the same Ukraine's Counsel, challenges there the legality of ownership transfer with regard to the same assets that are in question in these proceedings, as well as requests compensation from the Russian Federation. This raises serious concerns with regard to the risk of double recovery for the same alleged damage[417] or conflicting decisions of different international fora.

311. Second, to assess the premise of Ukraine's claims, i.e. whether the transfer of ownership title over the JDRs was lawful or not, the Tribunal would inevitably need to turn to the issue of sovereignty over Crimea.

312. The Republic of Crimea obtained the ownership over the two JDRs in question, the *Tavrida* and the *Sivash*, together with other assets located in the territory of Crimea at that time, upon its secession from Ukraine and before the reunification of the Republic of Crimea with Russia in 2014.[418] Subsequently, a State Unitary Enterprise "Chernomorneftegaz", a new

[415] URM, para. 316.

[416] PCA official website, "NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation" (**RU-400**).

[417] G. Bottini, *Admissibility of Shareholder Claims under Investment Treaties,* Cambridge University Press, 2020 (**RUL-95**), p.12; See also, in elaborating the applicable compensation rules, the PCIJ cautioned to avoid "running the risk of the same damage being compensated twice over" and "awarding double damages" (*Case Concerning The Factory at Chorzów*, Claim for Indemnity, Merits, Judgment, PCIJ Series A. No 17, 13 September 1928 (**RUL-96**), pp. 48-49).

[418] Resolution of the State Council of the Republic of Crimea No. 1758-6/14 "On Matters of Energy Security of the Republic of Crimea", 17 March 2014 (**RU-401**), para. 1.

titleholder of the JDRs ("Crimean CNG"),[419] filed an application with the Russian Registry of Vessels to register the two JDRs, i.e. the "reflagging" of the JDRs, of which Ukraine complains now, was initiated upon the will and request of its new titleholder.

313. It follows that both aspects of Ukraine's claim, i.e. 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 secession from Ukraine. Thus, it implies the assessment of the lawfulness of the reunification of Crimea with Russia and presupposes a decision on the sovereignty-related issue, which the Tribunal excluded from the scope of its jurisdiction in the 2020 Award.

II. Russia's Right to Register the JDRs in Its State Registry Is Independent from Ukraine's De-listing

314. In any event, for the sake of completeness, Russia notes the following. In the Revised Memorial, Ukraine raises new allegations of violations of Article 91 of the Convention for the registration of the JDRs with the Russian registry while they were not de-registered from the Ukrainian one.[420] However, what it fails to mention is that Ukraine ignored the request to de-register the JDRs.

315. Before the registration of the JDRs *Sivash* and *Tavrida* with the Russian Registry of Vessels, in June 2014, Crimean CNG applied to the State Service of Ukraine for the Safety of Maritime and River Transport[421] to de-list from the State Registry of Vessels of Ukraine a number of vessels, over which it holds title, including the JDRs in question.[422]

316. Ukraine, although well aware of that, avoids mentioning those efforts that Crimean CNG took in good faith to de-list the JDRs from Ukraine's registry, as well as the fact that Ukrainian authorities ignored that application and never replied, which is quite telling for the tilted picture it is trying to present in this arbitration. There is also no record that Ukraine protested to Russia against that application of the JDRs' titleholder to delist them. In the absence of any reply or protest from the Ukrainian side within a reasonable time, Crimean CNG proceeded to registering the JDRs according to the procedure under the Russian law.[423] The Russian Registry of Vessels subsequently registered the JDRs. This does not contradict Article 91(1) of UNCLOS that authorises every State to fix its own conditions for the grant of its nationality to ships, "but

[419] Crimean CNG holds and operates the JDRs based on a right of economic management that its owner – the Republic of Crimea – delegated to Crimean CNG.

[420] URM, para. 180.

[421] State Service of Ukraine for the Safety of Maritime and River Transport (Ukrmorrichinspektsiya) was a Ukrainian state authority responsible for the vessels' registration prior to its reorganisation in 2016.

[422] Chernomorneftegaz Crimean Republican Enterprise, Letter No. 12/02-530 to the State Service of Ukraine for the Safety of Maritime and River Transport, 6 June 2014 (**RU-402**).

[423] Commercial Maritime Code of the Russian Federation (Federal Law No. 81-FZ, 30 April 1999) (**RU-403**), Article 37(2), para. 3. ("In case when, upon the expiration of 30 calendar days, no reply follows from a national maritime authority of a state of the previous registration with regard to the owner's application, the latter may apply to the state registration authority for the state registration of such vessel in one of the vessels' registries").

imposes no further specific requirements in that respect, this being left to the discretion of the individual State".[424]

317. Therefore, Russia's right to authorise the use of its flag is independent from Ukraine's de-flagging. Ukraine's deliberate failure to reply to the application for de-listing of the JDRs from its registry should not be interpreted as an impediment for Russia's exercise of its right to grant its nationality to ships and register them in its territory, as provided for in Article 91(1) of UNCLOS. A State should not be prevented from registering a vessel, when its titleholder duly complied with the procedure for registration that national law of that State may set in accordance with Article 91(1) of the Convention. Otherwise, refusing a vessel's registration in such case would mean a disregard for the titleholder's will – a matter that is no doubt in the realm of exercising its private autonomy.

318. Finally, the registration of the JDRs in the Russian Registry of Vessels has ensured consistency with the requirement of Article 91(1) of UNCLOS that "there must exist a genuine link between the State and the ship". Maintaining the registration of the JDRs with the Ukrainian vessels registry would vitiate compliance with this requirement. As the ILC concluded in its commentary to the Articles concerning the Law of the Sea of 1956, "[…] the grant of the [States'] flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possesses a real link with its new State".[425]

319. Russia thus asks the Tribunal to strike out the JDRs-related claims that Ukraine raised in violation of the 2020 Award, or alternatively – to rule that they fall outside the Tribunal's jurisdiction or to dismiss them.

[424] M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. III, Nijhoff, 1995 (**RUL-15-AM**), p. 106.

[425] *Id.*, p. 107, citing Report of the International Law Commission covering the work of its eighth session, in *Yearbook of the International Law Commission 1956*, Vol. II, New York, 1957 (**RUL-97**), p. 279, para. 3.

CHAPTER 6. THE RUSSIAN FEDERATION DID NOT VIOLATE UNCLOS PROVISIONS ON PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

320. In its Revised Memorial, Ukraine contends that the construction and subsequent operation of the Kerch Strait Bridge, undersea gas pipeline and cables (together referred to as the "Construction Projects" or "Projects") gave rise to the violations of Articles 123, 192, 194, 204, 205 and 206 of UNCLOS.

321. The Russian Federation reiterates that the Sea of Azov and the Kerch Strait – the location of the Construction Projects – are internal waters and, therefore, the Convention does not apply to them. Nevertheless, as will be shown below, not only did the Russian Federation comply with environment-related duties under the Convention, but made significantly more for the protection and preservation of the marine environment of the Kerch Strait and the Sea of Azov than UNCLOS could require.

322. Asserting the violations of Articles 192 and 194 of the Convention, Ukraine did not even bother to provide any solid evidence supporting its allegations of the supposedly negative impact on the marine environment as a result of the Construction Projects. Given the difficulties in proving facts that never happened, it seems prudent on the part of Ukraine to claim only "*likely* caused lasting damage"[426] and focus on the alleged "failure to assess and monitor the harm to the marine environment",[427] invoking along the way separate purported breaches of Articles 192 and 194.

323. Accordingly, this Chapter will present Russia's arguments as follows. **Section I** addresses international and national legal frameworks with regard to the environmental impact assessment ("EIA"), as well as describes the robust EIAs that Russia has carried out within the Construction Projects. **Section II** describes the large-scale monitoring activities that Russia conducted in the relevant period. **Section III** discusses various attempts to cooperate with Ukraine and the reasons why they failed. **Section IV** summarises why Ukraine's claims based on Articles 192 and 194 should fail in their totality. Finally, **Section V** explains why the alleged oil spill in the vicinity of Sevastopol neither required notifying Ukraine and cooperating with it, nor could breach the provisions of UNCLOS that Ukraine relies on.

I. The Russian Federation Conducted Robust EIAs within the Construction Projects

324. Ukraine falsely accuses the Russian Federation of failing to conduct an EIA to evaluate the effects of the Construction Projects on the marine environment.[428] Contrary to that, Russia

[426] URM, para. 184 (emphasis added).

[427] *Id.*, Chapter 6, Section II.A.4.

[428] *Id.*, para. 193.

carried out robust EIAs well before the Projects started, complying with the applicable regulatory framework.

325. In this section, Russia will demonstrate that Ukraine misconstrues both Article 206 of UNCLOS (A) and the relevant national legal framework (B). The Respondent further addresses Ukraine's misleading factual and legal allegations about the EIAs in relation to the Projects (C, D, E).

A. UKRAINE MISCONSTRUES ARTICLE 206 OF UNCLOS

326. Contrary to Ukraine's erroneous presumptions, neither general international law, nor Article 206 of UNCLOS in particular, determine the specific content or procedures to follow while performing an EIA. Russia further submits that Ukraine cannot substitute international law with the opinion of its expert and the so-called "international standards" that such expert arbitrarily picked.

327. As a preliminary matter, it would be incorrect to read into Article 206 any additional obligations beyond what flows from general international law. As the ICJ held when setting out the general international law requirements in *Pulp Mills*, the EIA's content squarely falls to be determined by the States:

> "The Court observes […] 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."[429]

328. Also, Judge Donoghue succinctly summarised in her separate opinion in *Certain Activities Carried Out by Nicaragua in the Border Area*:

> "[T]he Court does not presume to prescribe details as to the content and procedure of transboundary [EIA]. This leaves 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 in preventing transboundary environmental harm."[430]

[429] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment, 20 April 2010 (**UAL-152**), para. 205. The reference to *Pulp Mills* and the discussion of the general international law position therein is without prejudice to the Russian Federation's position that this Tribunal's jurisdiction does not extend to the assessment of the Russian Federation's compliance with general international law.

[430] *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* (**RUL-98**), para. 15.

329. Indeed, it has been even argued that international law contains *renvoi* to domestic law, and no autonomous binding standards under international law exist in respect of the conduct of an EIA:

> "[W]hile the *Pulp Mills* Judgment elevated the practice of conducting an EIA to an imperative under general international law when certain preconditions are met, at the same time it allowed for a *renvoi* to domestic law in terms of the procedure and content required when carrying out such an assessment. … [I]t could plausibly be argued there are presently no minimum binding standards under public international law that nation-States must follow when conducting an EIA."[431]

330. In the course of the International Law Commission's codification of the Articles on the Prevention of Transboundary Harm from Hazardous Activities, it was reinforced that "[t]he specifics of what ought to be the content of assessment is left to the domestic laws of the State".[432]

331. Article 206 of UNCLOS is consistent with the position under general international law and has to be construed in the light of that. It does not stipulate any particular details to follow in conducting an EIA and reflects the discretion afforded to the States in determining the contents of the EIA. In view of this, ITLOS found in the *Seabed Advisory Opinion* that Article 206 "gives only few indications of [the] scope and content" of EIAs.[433]

332. Strictly speaking, Article 206 does not mandate any kind of a formal EIA: it merely imposes an obligation to "assess the potential effects" of certain planned activities within the States' jurisdiction. The "assessments" required by Article 206 are best perceived as *sui generis* assessments without any particular format to follow[434] and they do not have to be the "EIA" to satisfy Article 206. The format and modalities of carrying out the assessment are thus clearly left to the Parties to articulate.

333. Another characteristic of *sui generis* assessment under Article 206 is that a State is to conduct an assessment "*as far as practicable*", which unequivocally reflects an element of discretion, according to *South China Sea,* on which Ukraine repeatedly relies.[435] Such discretion

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[431] *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* (**RUL-99**), para. 29.

[432] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Y*earbook of the International Law Commission* A/56/10*,* 2001, vol. II, Part Two (**RUL-100**), commentary to Article 7, para. 7.

[433] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Request for Advisory Opinion submitted to the Seabed Disputes Chamber, Advisory Opinion of 1 February 2011, ITLOS Reports 2011 (**RUL-101**), p. 10, para. 149.

[434] Accordingly, nothing in the present submission should be construed as an admission that Article 206 of UNCLOS would have required an EIA *stricto sensu*. See N. Craik, *The International Law of Environmental Impact Assessment. Process, Substance and Integration, Cambridge University Press,* 2008 (**RUL-102**), pp. 99, 128: "The use of the term ''assess" in [Article 206] indicates an intention that a broad range of assessment approaches beyond EIAs may satisfy this requirement."

[435] *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016 (**UAL-11**), para. 948. See also Myron H. Nordquist, Satya N. Nandan, and James Kraska (eds.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol. IV Martinus Nijhoff Publishers, 2002 (**RUL-103**), p. 124.

is all the more important considering the necessity to ensure basic needs of the Crimean population during Ukraine's blockade.[436]

334. In essence, Ukraine asks this Tribunal to act as a "court of appeal" over the EIAs that Russia conducted within the Projects. However, it is not for this Tribunal to substitute the analysis of compliance with Article 206 of the Convention with scientific assessment of particular methodologies and approaches the Russian Federation employed in the EIAs of the Projects, nor to assess its compliance with domestic law.[437] The Tribunal should not settle scientific or technical controversies, or pick one scientific approach to the EIA over another.

335. At various points in the Revised Memorial, Ukraine would have the Tribunal accept that Article 206 of UNCLOS mandates the application of certain "international standards" that Ukraine's expert, [redacted], identified, and that adherence to such standards should be somehow determinative of whether the Russian Federation complied with Article 206. Specifically, Ukraine insists that "[t]he application of Article 206 to any given project is informed by the consistent practice that has developed under the aforementioned standards."[438] By "aforementioned standards", Ukraine refers to "international standards developed by public and private international organizations involved in construction projects around the world".[439]

336. There is no proper legal basis for these suggestions. What constitutes an "assessment" under Article 206 is a question of law, for lawyers to answer, not experts.[440] Ukraine failed to substantiate how Article 31 of the Vienna Convention on the Law of Treaties (VCLT) should warrant recourse to the "international standards" in interpreting Article 206. Indeed, when the ICJ was confronted with such standards in *Pulp Mills*, it expressly pointed to the lack of their binding force.[441] If the Russian Federation and Ukraine intended to adopt binding international standards, they could have done so. The "international standards" invoked by Ukraine are not, however, sources of international law, nor do they constitute instruments which should inform the construction of Article 206 of UNCLOS. Notably, in contrast to Articles 207-211, Article 206 makes no reference to internationally agreed rules and standards.[442]

337. Accordingly, Ukraine's suggestion that this Tribunal should adjudicate its claims applying "accepted scientific methodologies", as purportedly identified by Ukraine's expert, is misconceived.

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[436] See paras. 155-156 above.

[437] See, by analogy: WTO, *Australia – measures affecting the importation of apples from New Zealand,* Report of the Appellate Body, 14 September 2010 (**RUL-104**), paras. 224-225.

[438] URM, para. 197.

[439] *Ibid*.

[440] A. Boyle, C. Redgwell (eds), *Birnie, Boyle & Redgwell's International Law and the Environment*, 4th ed., Oxford University Press, 2021 (**RUL-105**), p. 195.

[441] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment, 20 April 2010 (**UAL-152**), paras. 203, 205.

[442] Birnie, Boyle & Redgwell's International Law and the Environment (**RUL-105**), p. 197.

338. The assessments that the Russian Federation performed with regard to the Construction Projects are to be evaluated in light of UNCLOS, which does not prescribe implementation of any particular "accepted scientific methodology". In that sense, Ukraine's (and its expert's) lengthy discussion on how a hypothetical "EIA" may have been conducted is simply irrelevant and amounts to little more than a distraction from the key issues. Respectfully, this Tribunal should not use as a benchmark for its analysis [redacted] hypothetical consideration about the EIA, but rather determine whether the assessments required under Article 206 were in fact carried out and were adequate. On the facts, the answer to that question can only be in the affirmative, as demonstrated below.

B. UKRAINE GROSSLY MISREPRESENTS THE APPLICABLE RUSSIAN REGULATORY FRAMEWORK

339. The crux of Ukraine's argument appears to be the – false – claim that the Russian Federation "rushed" with the preparation of the Projects and, in that context, even departed from the default EIA rules to circumvent an ordinary EIA process. As explained in this section, Ukraine's pleadings are replete with gross misrepresentations of Russian law on this point.

340. Ukraine takes issue with the adoption of Federal Law No. 221-FZ on authorising the Construction Projects and seeks to portray it as an *ad hoc* exception to the ordinary EIA rules, adopted to press through the completion of the Projects within a timeframe that would not have allowed conducting a regular EIA. This is yet another falsehood.

1. Ukraine's Misinterpretation of Article 6(12) of Federal Law No. 221-FZ

341. The first point Ukraine makes is that Federal Law No. 221-FZ ensured that "construction activities and project implementation could commence before an EIA was completed", which, the argument goes, would not have been allowed but for the special rules under Federal Law No. 221-FZ.[443] The supposed "basis" of Ukraine's argument is Article 6(12) of the said law.[444] For the Tribunal's convenience, Article 6(12) is reproduced below in full:

> "Pending the issuance of a permit for the construction of an infrastructure facility, site preparation work may be carried out from the date when the design documents for the infrastructure facility are submitted for state expert review."[445]

[443] URM, para. 225.

[444] *Ibid*.

[445] 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" (**UA-187-AM**).

342. Article 6(12) is silent on the issue of an EIA. This provision deals with whether certain site preparation works may start upon the submission of design documentation to the state authority in charge of its approval.

343. The approval of design documentation is a process which is distinct from an EIA as a matter of Russian law and is conducted by a state authority Glavgosekspertiza.[446] Glavgosekspertiza, however, is not an environmental authority and is not responsible for conducting State Environmental Expert Review ("SEER") and issuing opinions on the EIA, which is within the competence of another state authority – Rosprirodnadzor.[447]

344. To put it simply, Ukraine's reference to Article 6(12) misses the point, as the provision is not relevant to the EIA under Russian law and indicates nothing as to the respective timing of the EIAs and construction works. In the case of the Kerch Bridge, the Taman Highways Administration – a state authority in charge of the Bridge construction[448] – submitted the design documentation to Glavgosekspertiza on 16 October 2015.[449] As [redacted] a then-chief environmentalist of the Taman Highways Administration, points out, the EIA had already been completed by that time and already submitted to Rosprirodnadzor for the SEER in September 2015.[450] Thus, Article 6(12) had no connection with the EIA and, as a matter of fact, ensured that the site preparation works started only after the completion of the EIA.

345. Finally, Ukraine failed to mention Article 6(13) of the same federal law that limits the types of permitted site preparation works to those which are expressly included in a list developed by the Ministry of Construction of the Russian Federation.[451] [redacted] who contributed to the preparation of that list, explained that "the list included only those works that could not have any significant environmental impact".[452] All main intrusive construction works commenced only after February 2016, when a construction permit was issued, as confirmed by [redacted][453] and even by [redacted].[454]

2. *Ukraine's Misinterpretation of Articles 6(5) and 6(4) of Federal Law No. 221-FZ*

346. Ukraine also takes issue with Article 6(5) of Federal Law No. 221-FZ. Unlike Article 6(12), Article 6(5) indeed addresses SEER, i.e., the process of assessment by Rosprirodnadzor of the EIA. According to Ukraine, Article 6(5) provides that the absence of a positive decision

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[446] Town Planning Code of the Russian Federation (Federal Law No. 191-FZ, 29 December 2004) (**RU-113**), Article 49, Parts 1 and 5. Glavgosekspertiza is subordinate to the Ministry of Construction, Housing and Utilities of the Russian Federation.

[447] "Rosprirodnadzor" is a short name of the Federal Service for Supervision of Natural Resources.

[448] Ukraine refers to it as the "Federal Highway Administration" (URM, para. 232).

[449] [redacted] Statement, para. 68.

[450] *Id.*, paras. 60, 71.

[451] Federal Law No. 221-FZ (**UA-187-AM**), Art. 6(13).

[452] [redacted] Statement, para. 72.

[453] *Ibid.*

[454] [redacted] Report, para. 27.

by the SEER panel regarding the design documents would not be an "impediment to continuing with the construction".[455]

347. In what can only be described as a particularly cynical stunt, Ukraine, using quotation marks, plainly misrepresents the contents of Article 6(5) to bolster its arguments. The wording of Article 6(5) is not what Ukraine claims it to be and reads as follows:

> "The absence of a positive decision by the [SEER] panel regarding the design documents for infrastructure facilities shall not be an impediment to *conducting a state expert review of the design documents for those facilities*."[456]

348. Article 6(5) does not include any stipulation on whether or not "continuing with the construction" would be possible absent the conclusion of an EIA. The language Ukraine purports to rely on is nowhere to be found. Article 6(5) merely deals with whether the *review* of design documents (by Glavgosekspertiza) may *commence* in parallel with the SEER of the EIA (by Rosprirodnadzor). However, it does not follow that, upon the adoption of Federal Law No. 221-FZ, the construction works became authorised prior to the completion of the SEER, much less the EIA, Ukraine's disingenuous attempt to misstate the contents of the provision is thus appalling.

349. Commenting on Article 6(5), [redacted] also argues that "removing the requirement for [SEER] approval as a prerequisite for overall project-design approval goes against all logic and established international ESIA practices."[457] However, contrary to [redacted], it does not follow from Article 6(5) that, in issuing the approval of the project design, Glavgosekspertiza would not consider the outcome of the EIA and the result of the SEER from Rosprirodnadzor.

350. Indeed, consistent with the above, on 20 November 2015, Glavgosekspertiza – reviewing the Kerch Bridge design documentation – informed the Taman Highways Administration that it would issue a negative expert opinion on the design documentation, unless provided with a positive expert opinion of Rosprirodnadzor within 10 days.[458] In other words, Glavgosekspertiza could not have issued its expert opinion without the completion of the SEER by Rosprirodnadzor. Finally, Glavgosekspertiza issued its opinion on the design documentation in February 2016, three months after Rosprirodnadzor had approved the EIA in November 2015.

351. In the same vein, Ukraine and its expert misrepresent the period envisaged for the completion of EIA under Article 6(4) of Federal Law No. 221-FZ. Ukraine avers that "the law

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[455] URM, para. 226.

[456] Federal Law No. 221-FZ (**UA-187-AM**), Art. 6(5) (emphasis added).

[457] [redacted] Report, para. 171.

[458] Letter of the Federal Autonomous Institution "Glavgosekspertiza of Russia" to the Taman Highways Administration No. 6601-15/GGE-10146/04, 20 November 2015 (**RU-115**), pp. 32-33, para. 1. As [redacted] explains, the Taman Highways Administration complied with the Glavgosekspertiza's requirement submitting the Expert Review by Rosprirodnadzor on 30 November 2015. See [redacted] Statement, para. 70.

required [EIAs] to be completed in just 45 days, whereas such assessments are otherwise allowed up to four months under Russian law."[459] Ukraine's argument is not consistent even with its own expert's evidence. As [redacted] describes, it was the "[SEER]/Expertiza review" process which had to be completed within 45 days.[460]

352. However, SEER is not equivalent to EIA: it merely indicates the review of the EIA by a competent authority – Rosprirodnadzor – once it has been provided with the already prepared EIA materials. The EIA process was not limited to 45 days. It is an administrative procedure – the SEER by Rosprirodnadzor – that was limited to 45 days.

353. Thus, [redacted] criticism that "a period of 45 days cannot be adequate to conduct the necessary public hearings and consultations"[461] only serves to confirm his failure to properly assess and understand (or to accurately represent the contents of) the applicable regulatory framework. By the time the 45-days period for the SEER commenced, public hearings and consultations had already been completed in the course of the already finalised EIA. The applicable regulations allowed ample time for the Taman Highways Administration to arrange public hearings and consultations.[462]

354. In any event, as [redacted] explains, a 45-day period for the SEER completion is nothing extraordinary or unusual, when compared with similar large scale projects in Russia.[463] In respect of the Kerch Bridge EIA, a team of 13 experts worked full time during the 45-day period,[464] which cannot be considered insufficient or unrealistic.

3. Ukraine's Misinterpretation of Article 14 of Federal Law No. 221-FZ

355. Lastly, Ukraine's plagued "account" of Federal Law No. 221-FZ concludes with false statements on the alleged "suspension" of certain water regulations. Specifically, Ukraine contends that Federal Law No. 221-FZ "suspend[ed the] enforcement of provisions concerning the 'prevention of adverse environmental impact' contained in certain water sanitization laws."[465] This is untrue.

356. Article 14 of Federal Law No. 221-FZ, to which Ukraine refers, suspended the application (generally, not only in respect of the Projects) of certain provisions of the Federal Law "On

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[459] URM, para. 227.

[460] [redacted] Report, para. 170.

[461] *Id.*, para. 171.

[462] See paras. 366-368 below for the description of public hearings and other co-operation activities.

[463] [redacted] Statement, para. 64 referring to the construction of the Russky bridge in Vladivostok, Olympic facilities in Sochi and facilities for the 2018 FIFA World Cup. See also Russian legislation that reduced the timeframe of the SEER to 45 days for all construction projects implemented in the Kaliningrad region as well as in the so-called "Priority Development Areas": Federal Law No. 16-FZ "On the Special Economic Zone in the Kaliningrad Region and on Amending Certain Legislative Acts of the Russian Federation", 10 January 2006 (**RU-404**), Article 19.2(2); Federal Law No. 473-FZ "On Priority Social and Economic Development Areas in the Russian Federation", 29 December 2014 (**RU-405**), Article 27(2).

[464] [redacted] Statement, para. 64.

[465] URM, para. 228.

Water Supply and Wastewater Disposal" (the "**WSWD Law**"). The relevant provisions had long been criticised,[466] leading to their consecutive suspensions thrice prior to the adoption of Federal Law No. 221-FZ.[467] These provisions had never been actually implemented and were finally replaced in July 2017 as a result of a major reform of the WSWD Law.[468]

357. Most importantly for the present purposes, the provisions would not have applied to the Projects in any event. Specifically, the WSWD Law establishes obligations incumbent upon the so-called "*subscribers*" in relation to the prevention of water pollution.[469] Within the meaning of the WSWD Law, "subscribers" are parties who enter into contracts with operators of wastewater disposal systems to ensure the disposal and treatment of their wastewater.[470] These provisions do not apply to the Projects, since the wastewater at the construction sites was treated and disposed of on-site, without the use of wastewater disposal systems and its operators.[471]

358. Given that the suspended provisions of the WSWD Law would not have been relevant to the Projects anyway, Ukraine's suggestion that Article 14 of Federal Law No. 221-FZ was devised to release the Projects from compliance with water sanitization laws rings hollow.

C. THE RUSSIAN FEDERATION CONDUCTED AN APPROPRIATE EIA FOR THE KERCH BRIDGE

359. As a preliminary point, it is clear from Ukraine's submissions that neither Ukraine nor its expert relied on the primary EIA materials in relation to the Kerch Bridge. Exhibited with this submission, the Russian Federation supplies relevant documents of the Kerch Bridge EIA related to the protection of the marine environment as well as the results of the SEER by

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[466] See, for instance, Explanatory Note to November 2013 draft Federal Law No. 379138-6 "On Amendments to Article 43 of Federal Law on Water Supply and Water Disposal" (**RU-406**): "[coming into force of the suspended provisions] will lead to serious negative consequences for thousands of industrial enterprises in Russia and as a result – to serious negative consequences for the economy of the Russian Federation as a whole." "[Implementation of the suspended provisions] is impractical, involves high operational, financial and economic risks, and has a significant potential for corruption."

[467] The relevant provisions had been suspended until 1 January 2014, 1 January 2015 and 1 July 2015. See Federal Law No. 291-FZ "On Amending Certain Legislative Acts of the Russian Federation Concerning Improvement of Tariff Regulation in the Sphere of Electric Power, Heat, Gas, Water Supply And Water Discharge", 30 December 2012 (**RU-407**), Article 7(9)(b); Federal Law No. 411-FZ "On Amending Article 23 of the Land Code of the Russian Federation and Certain Legislative Acts of the Russian Federation", 28 December 2013 (**RU-408**), Article 3(2)(b); Federal Law No. 458-FZ "On Amending the Federal Law "On Production and Consumer Waste", Certain Legislative Acts of the Russian Federation and on the Invalidation of Certain Legislative Acts (Provisions of Legislative Acts) of the Russian Federation", 29 December 2014 (**RU-409**), Article 18(2).

[468] Federal Law No. 225-FZ "On Amending the Federal Law 'On Water Supply and Wastewater Disposal' and Certain Legislative Acts of the Russian Federation", 29 July 2017 (**RU-410**), Article 1(9).

[469] Federal Law No. 416-FZ "On Water Supply and Wastewater Disposal", 07 December 2011 (**RU-411**), Articles 1(1) and (2), 2(1) and (2).

[470] *Id*, Article 2(1), (2), (6), (15) and (28).

[471] Indeed, during the discussion of the draft law, the State Duma Committee on Land Relations and Construction specifically noted that the suspension of these provisions of the WSWD Law "go[es] beyond [the] concept [of the draft law as it is] not related to the construction or reconstruction of [the Projects in the Kerch Strait]. *See* State Duma Committee on Land Relations and Construction, Opinion on Draft Federal Law No. 812639-6 "On the Features of Regulation of Certain Legal Relations Arising in Connection with the Construction, Reconstruction of Federal and Regional Transport Infrastructure Facilities Intended to Ensure Transport Communications between the Taman and Kerch Peninsulas and Federal and Regional Engineering Infrastructure Facilities on the Taman and Kerch Peninsulas and on Amending Certain Legislative Acts of the Russian Federation" (**RU-412**).

Rosprirodnadzor.[472] Ukraine, instead of making fact-based arguments, submitted to the Tribunal a speculative story based on its erroneous understanding of the Russian legislation and timeframe of the Kerch Bridge EIA.

360. First, Ukraine asserted that "no study compatible with Federal Law No. 221-FZ could have properly assessed the potential effects of Russia's construction activities on the marine environment".[473] Russia has already demonstrated that Ukraine grossly misinterpreted amendments introduced by this federal law, and that they in no way affected the quality of the assessments with regard to the Construction Projects.[474]

361. The second point of Ukraine is the supposed "accelerated timetable" for the EIA and the alleged absence of public consultations.[475] This does not correspond to the reality: as **Sub-Section C.1** will explain, the timeframe was adequate to complete the Kerch Bridge EIA and public consultations, without compromising its quality.

362. Third, the Ukrainian expert opined that the assessment of potential effects "did not include the conduct of adequate and proper baseline studies"[476] and is "grossly inadequate".[477] This is, again, untrue. As will be shown in **Sub-Section C.2**, the Kerch Bridge EIA included comprehensive baseline studies, whose quality cannot be questioned by the Ukrainian expert.

363. Fourth, Ukraine enumerated "likely impacts" of the Kerch Bridge that were not properly assessed in the Kerch Bridge EIA.[478] **Sub-Section C.3** describes in detail the impacts assessed in the Kerch Bridge EIA and explains why certain impacts indicated by the Ukrainian expert were exaggerated.

364. Finally, Ukraine and its expert purported to present an image of the Bridge on the brink of collapse, with the associated "far-reaching environmental consequences".[479] **Sub-Section C.4** explains why this is misguided: it provides a detailed account of how the engineers ensured that the design of the Kerch Bridge would respond to its natural setting.

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[472] [redacted] (**RU-108**); Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 4, Surface and Ground Water Protection. Aquatic Biological Resources Protection, Book 1, 12/02-PIR-OOS4.1, 2015 (**RU-93**); Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 6, Industrial Environmental Control (Monitoring) Programme, Book 1, 12/02-PIR-OOS6.1, 2015 (**RU-133**); Kerch Bridge Design Documentation, Graphic Annexes to the Industrial Environmental Control (Monitoring) Programme, 12/02-PIR-OOS6.1, 2015 (**RU-132**); Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 8, Environmental Impact Assessment in Potential Emergencies, Book 1, 12/02-PIR-OOS8.1, 2015 (**RU-131**).

[473] URM, para. 227.

[474] See Chapter 6, Section I, Sub-Section B above.

[475] URM, paras. 221-225.

[476] [redacted] Report, para. 159.

[477] *Id.*, para. 163.

[478] See URM, Chapter Six, II.A.2.i.

[479] *Id.*, paras. 153, 218. See [redacted] Report, paras. 14, 119-125.

1. *Timeframe and Transparency of the Kerch Bridge EIA*

365. Russian authorities had commenced the EIA well before any actual construction-related activities. Specifically, in September 2014, STG-Eco LLC started collecting environmental baseline data[480] and the Zubov State Oceanographic Institute ("Zubov Institute")[481] – hydrometeorological baseline data.[482] Giprostroymost – a company that was in charge of the Kerch Bridge design documentation – sub-contracted both these organisations.

366. The process of baseline data collection was conducted with the involvement of local residents, academia, civic organisations and mass media, and the baseline data materials were available for public access. Following a number of publications in official media outlets in April 2015, the Taman Highways Administration organised public hearings on the collected baseline data.[483] The hearings were held in the cities of Taman and Kerch in May 2015 and received a wide media coverage.[484] In August 2015, Rosprirodnadzor and Glavgosekspertiza issued expert opinions approving the quality of the collected baseline data.[485]

367. In parallel to this process, STG-Eco LLC was preparing the EIA documentation.[486] On 19 February 2015, the Ministry of Natural Resources and Environment of the Russian Federation created an expert group for environmental support of the Kerch Bridge construction.[487] Within the expert group, leading research institutes consulted the Taman Highways Administration, STG-Eco LLC and other involved organisations to ensure that best environmental solutions are implemented in the project. All interested third parties could contribute to the EIA preparation through this expert group. For instance, in June 2015, the World Wildlife Fund (WWF) raised the issue of the marine mammals' protection and recommended the expert group a list of organisations specialising in marine mammals.[488] Ukraine notably did not engage with this expert group.

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[480] [redacted] Statement, paras. 14, 17-28.

[481] The Zubov Institute is a leading Russian scientific institute in the field of hydrometeorological and hydrochemical studies of the marine environment, with a significant experience of providing environmental support for large construction projects.

[482] [redacted] Statement, paras. 30-34.

[483] *Id.*, paras. 36-37.

[484] *RIA,* Ecologists: Environmental Aspect is Important for Design of the Bridge across the Kerch Strait, 25 May 2015 (**RU-413**); *5-TV*, "Preparations for Construction of the Bridge across the Kerch Strait Entered Their Final Phase", 26 May 2015 (**RU-414**); *Kryminform*, "Public Discussion of Environmental Impact during Preparations for Construction of the Bridge to Be Held in Kerch", 19 May 2015 (**RU-415**).

[485] [redacted] Statement, paras. 36-37.

[486] *Id.*, para. 11.

[487] Order of the Ministry of Natural Resources and Environment of the Russian Federation No. 62 "On the Setting-Up of an Environmental Support Expert Group for the Project "Transport Crossing across the Kerch Strait", 19 February 2015 (**RU-416**).

[488] Letter from the World Wildlife Fund Russia to the Chairman of the Environmental Support Expert Group of the project "Transport Crossing across the Kerch Strait" No. 173, 11 June 2015 (**RU-417**). The WWF recommended that the expert group involves, in particular, specialists from the Southern Research Institute of Fisheries and Oceanography (YugNIRO) that, as Ms [redacted] noted, was in fact involved in the baseline data collection. See [redacted] Statement, para. 14.

368. 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:

a. In June-July 2015, the Taman Highways Administration published in a series of official federal, regional and local newspapers 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, mentioning the specific addresses where the complete sets of the EIA materials were available.[489]

b. In mid-July 2015, local administrations published on their websites the texts of their resolutions informing the public about the upcoming public hearings and specific addresses where the complete sets of the EIA materials were available.[490]

c. In June-July 2015, the Taman Highways Administration submitted the Terms of Reference for the EIA, preliminary EIA as well as full versions of the EIA materials to local administrations of Taman, Kerch and Temryuksky District.[491] The local administrations provided free access to these documents and any person could review them.[492]

d. In July-August 2015, with the involvement of local authorities, roundtables and public hearings were organised in Kerch and Taman, with the participation of the representatives of civil society, academia, industry and journalists.[493]

369. Upon the completion of the public hearings, state agencies proceeded to review the Bridge's design documentation. The Taman Highways Administration submitted the completed EIA materials to Rosprirodnadzor for the SEER on 7 September 2015[494] and, on 19 November 2015, Rosprirodnadzor issued its expert opinion endorsing the Kerch Bridge EIA.[495] On 30 October 2015, the Federal Agency for Fishery, within its powers to ensure the conservation of aquatic biological resources during construction projects in internal waters of Russia, approved the Kerch Bridge project on condition that the fish would be reproduced in accordance with the developed programme.[496] Finally, in February 2016, Glavgosekspertiza approved the design

[489] [redacted] Statement, paras. 43-44, 52-53.

[490] *Id.*, para. 51 referring to the relevant publications.

[491] *Id.*, paras. 42, 47-49.

[492] *Id.*, para. 57.

[493] *Id.*, paras. 46, 54, 55. See also relevant publications: *Meduza*, "Bridge across Sanctions. How Taman Prepares for the Construction of the Kerch Bridge. Report by Ilya Zhegulev", 10 August 2015 (**RU-102**), *Grazhdanskiye sily.ru*, Kerch Bridge Construction through Ecologist's Eyes, 21 August 2015 (**RU-418**), *Kyminform*, Public Hearings on Environmental Issues Held in Kerch and Taman before Final Stage of Bridge Construction, 1 September 2015 (**RU-419**).

[494] [redacted] Statement, para. 60.

[495] [redacted]

[496] [redacted] Statement, paras. 12(b), 91. See description of this programme in para. 383 below.

documentation and Rosavtodor issued a construction permit, following which the main construction works commenced.[497]

370. As follows from the above timeline, the EIA preparation had commenced well before the 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. It is thus incorrect for Ukraine to argue that the EIA was confined to an unduly short period.

371. The transparency and publicity of the EIA process went far beyond the threshold that Articles 205 and 206 of the Convention can imply. [redacted] questions (on the sole ground that he "ha[s] been unable to locate any EIA materials") that the Kerch Bridge EIA materials were, in fact, made available for interested parties.[498] The Taman Highways Administration ensured that, at all relevant moments during authorising the Projects, the interested stakeholders would be able to access and comment on the Kerch Bridge EIA. The purpose of the public hearings and publication of the EIA materials is to inform the interested stakeholders and decision-makers while authorising the project, which explains that the Russian law requires to make the EIA available until the decision on the project's authorisation.[499] If [redacted] had consulted the applicable Russian regulations governing EIA – to which Ukraine itself refers[500] – he would have understood that information about the means of accessing the EIA materials was to be disseminated in the media, including periodicals, and the EIA materials themselves were freely available. This should put to rest Ukraine's speculations about the transparency of this process.

2. *The Russian Federation Procured the Compilation of Baseline Data Prior to the Kerch Bridge Construction*

372. Ukraine and [redacted] tried to display the Kerch Strait as a completely uncharted area. However, the Strait had been long subject to extensive scientific research and monitoring even before the Projects commenced. [redacted], an environmental expert with extensive experience in oceanography and the Kerch Strait environment, summarises the regional environmental studies and concluded that prior to the Projects, "much of the necessary "baseline" data, as well as some insights into the response of the Kerch Strait system to

[497] [redacted] Statement, paras. 68, 72.

[498] [redacted] Report, para. 165: "[G]iven that I have been unable to locate any "EIA materials," I do not understand how it could be that the public would have been informed of and able to comment on those alleged materials."

[499] Order of the State Environmental Protection Committee of the Russian Federation, No. 372, On Approving the Regulation on Environmental Impact Assessments of Planned Economic and Other Activity in the Russian Federation (16 May 2000) (**UA-216**), para. 4.11. Due to inaccuracies in Ukraine's translation of the relevant Order, the Russian Federation exhibits its more accurate translation. See Order of the State Committee of the Russian Federation for Environmental Protection No. 372 "On Approving the Regulation on the Assessment of Environmental Impact of the Proposed Economic and Other Activities in the Russian Federation", 16 May 2000 (**RU-101**).

[500] Order No. 372 (**UA-216**).

anthropogenic stresses, had already been available."[501] Thus, the set of baseline data was compiled against this overall backdrop of abundant historical studies.

373. STG-Eco LLC sub-contracted a number of scientific organisations to compile the Kerch Strait baseline data. First, in autumn 2014, Analitik LLC sampled water and bottom sediments and, in summer 2015, it conducted additional sampling in the areas that were supposed to be most significantly impacted.[502] Second, the Kerch-based Southern Research Institute of Fisheries and Oceanography ("YugNIRO") analysed the historical data on the Kerch Strait hydrobiology and ichthyology accumulated prior to 2014.[503] Third, the All-Russian Research Institute of Fisheries and Oceanography ("VNIRO") analysed the historical data as well and conducted field research in November 2014. VNIRO studied plankton, benthos and fish in this area and compared the results with 2010-2011 Ukrainian-Russian collaborative surveys to account for seasonal factor.[504]

374. In addition to the studies organised by STG-Eco LLC, the Zubov Institute reviewed the historical data (collected from 1891 to 2013) on temperature, salinity, ice, current, disturbance, water levels and sediment dynamics of the Kerch Strait.[505] On top of that, it conducted the field research of the Kerch Strait from summer 2014 to March 2015.[506] Having reviewed the baseline studies himself, [redacted] confirms that the compiled baseline data were "more than adequate and representative".[507]

3. The Russian Federation Adequately Assessed and Mitigated the Potential Effects of the Kerch Bridge on the Marine Environment

375. [redacted] enumerated a number of hypothetical impacts that, in his view, should be assessed when conducting the Kerch Bridge EIA. Without explaining why Ukraine considered that the Kerch Bridge EIA does not account for these impacts, Ukraine makes a logical leap claiming that "Russia's failure to address these likely impacts in an EIA […] has likely resulted in negative environmental effects […]."[508]

376. This position is erroneous both conceptually and factually. As a matter of principle, Ukraine's position rests on a colossal *non sequitur*. Ukraine and [redacted] Report provide a list of relevant and, mostly, irrelevant impacts and mitigation measures trying to paint a picture that a failure to address some of them renders the whole EIA inadequate. The alleged failure to

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[501] [redacted] Report, para. 28.

[502] [redacted] Statement, para. 18.

[503] *Id.*, para. 27. [redacted] notes that the EIA materials also rely on a collection of historical studies available on the website of YugNIRO and specialised works of various scientists who studied the Kerch Strait environment (See *Id.*, para. 24).

[504] *Id.*, para. 28.

[505] *Id.*, para. 32.

[506] *Id.*, para. 33.

[507] [redacted] Report, para. 40.

[508] URM, para. 200.

cover each and every aspect indicated by [redacted] cannot prove a violation of any supposed duty to conduct an EIA. *A fortiori*, even the national case law of the UK and US, establishing far more stringent requirements to the content of the EIA comparing to international standards, straightforwardly establishes that the primary purpose of an EIA is to assist the decision-maker and, therefore, the EIA *need not test every possible hypothesis*.[509]

377. Nevertheless, as a matter of fact, the Kerch Bridge EIA provides evaluations and mitigation measures for all relevant environmental impacts. It is further outlined how the Kerch Bridge EIA accounts for impacts on water, aquatic bioresources and hydrodynamics, as well as why certain impacts did not require assessment. For the latter purpose, the section presents a position of [redacted] explaining in detail why [redacted] grossly exaggerates potential impacts on hydrodynamics, salinity, eutrophication process, ice formation and migration patterns, and why [redacted] deliberations on these matters should be disregarded.

i. Impact on Water Quality

378. The Kerch Bridge EIA evaluated impact on water quality[510] and envisaged robust measures to prevent and counteract any potential deterioration thereof, both during the construction and operation of the Bridge.

379. [redacted] explains that water pollution was primarily mitigated through the construction of local treatment facilities and collection of polluted water from floating craft engaged in construction.[511] [redacted] himself acknowledged these measures as "laudable", but arbitrarily concluded that they do "not appear realistic",[512] which looks especially confusing, as these measures are mandatory under Russian law. The Russian legislation explicitly sets forth a construction of local treatment facilities as a requirement to proceed with construction in water areas[513] and prohibits a discharge of pollutants in the territorial sea and internal waters.[514] Therefore, robust mitigation measures – that even Ukraine's expert praised

[509] *Belize Alliance of Conservation Non-Governmental Organisations v. Department of Environment & Anor*, UKPC (2003) No.63 (**RUL-106**), para. 43: "The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute or the regulations […]"; *R (on the application of Blewett) v Derbyshire CC*, EWHC 2775 (Admin), 7 November 2003 (**RUL-107**), para. 41: "In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the ''full information'' about the environmental impact of a project."; *Robertson v. Methow Valley Citizens*, U.S. Supreme Court, 1 May 1989 (**RUL-108**), p. 490 U.S. 346: "[T]here was no duty to prepare a "worst case analysis" because the relevant information essential to a reasoned decision was available."

[510] Kerch Bridge EIA for Water and Aquatic Bioresources (**RU-93**), pp. 59-98.

[511] [redacted] Statement, paras. 76-83, [redacted] Report, para. 68, relying on Temryuksky District official website, "Local Treatment Facilities to Ensure Environmentally Safe Operation of the Crimean Bridge", 23 April 2018 (**RU-248**).

[512] [redacted] Report, paras. 179-180.

[513] Water Code of the Russian Federation (Federal Law No. 74-FZ, 3 June 2006) (**RU-119**), Article 65(16).

[514] Federal Law of the Russian Federation No. 155-FZ "On Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation", 31 July 1998 (**RU-118**), Article 37.

– were implemented in accordance with Russian law and ensured an adequate protection of the Kerch Strait water.

380. Ukraine, however, presses a speculative point that "the likelihood of a spill of any of those substances occurring during the construction process 'is almost a certainty'",[515] relying on [redacted] and materials he used to support his conclusions.[516] This statement is a mere speculation. No one can opine credibly on oil spills certainties without adequate substantiation. [redacted] reviewed [redacted] materials, but concluded that they "say[] nothing about the construction activities or certainties of having oil spills."[517] Therefore, Ukraine's and [redacted] statements on the "certainties" of oil spills are unfounded allegations.

381. In fact, as [redacted] states, not a single spill requiring emergency response and subsequent emergency environmental monitoring occurred throughout the construction.[518] In any event, even if some spill had occurred (which was not the case), the EIA contains an emergency response plan that would have triggered, among other things, the use of protective floating booms and the involvement of the Marine Rescue Service.[519]

382. Finally, having reviewed the monitoring reports (described in detail in the following **section II**), [redacted] concludes that "[t]he results of environmental monitoring corroborate the absence of tangible impact on water quality."[520] No decrease of water quality in the Kerch Strait, that would have far-reaching consequences in terms of time and distance, has ever been recorded during the construction and operation of the Bridge.

ii. Impact on Aquatic Bioresources

383. The Kerch Bridge EIA developed a detailed programme of mitigation and compensation of harm to aquatic bioresources where it assessed, *inter alia*, the impact of surface and particulate disturbance, as well as noise and vibration. VNIRO, relying on a mathematical modelling of the suspended solids dispersion, calculated the potential damage to aquatic bioresources in accordance with a methodology approved by the Federal Agency for Fishery. As a mitigation measure, VNIRO proposed a programme of the artificial reproduction subsequently approved by the Federal Agency for Fishery.[521] From 2017 to 2019, 1,500,000

[515] URM, para. 204.

[516] [redacted] Report, para. 83 (citing Mace Barron, et al., *Long-Term Ecological Impacts from Oil Spills: Comparison of Exxon Valdez, Hebei Spirit, and Deepwater Horizon*, 54 Environ. Sci. & Tech. 6456 (2020) (**UA-641**)).

[517] [redacted] Report, para. 67.

[518] [redacted] Statement, paras. 103, 136.

[519] *Id.*, paras. 101-102.

[520] [redacted] Report, para. 72.

[521] [redacted] Statement, para. 91.

specimens of the Russian sturgeon[522] were released in the Sea of Azov to compensate for any potential negative impact.[523]

384. [redacted] adds that these compensatory measures should be viewed in a broader context of a Russian fish reproduction initiative.[524] The Federal Agency for Fishery approves annual plans of fish reproduction, where project-specific compensatory measures are incorporated in a comprehensive programme of state-funded fish rehabilitation that provides for the release of millions of various species.[525] [redacted] describes these fish reproduction measures as a significant effort to compensate any potential negative impact on aquatic bioresources.[526]

385. Ukraine itself praised the fish reproduction efforts of the Russian Federation. For instance, the RUC stated in 2016:

> "[The RUC] noted the positive role of the Sides' efforts aimed at the artificial and natural reproduction of the stocks of aquatic biological resources of the Sea of Azov. […]
>
> [The RUC] took into account information provided by the Russian Side on the annual release of juvenile sturgeon species in the Sea of Azov in the amount over 9.5 million specimens, including the Russian sturgeon – over 6.5 million specimens, and starry sturgeon – over 600 thousand specimens. The Russian Side breeds and releases juvenile sturgeon species in the Sea of Azov, *using federal budget funds* as well as by taking *compensation measures when economic entities implement construction and reconstruction projects* impacting aquatic biological resources and their habitats."[527]

386. Moreover, the EIA accounted for the impact of construction works in periods of migration and spawning of most vulnerable species. [redacted] points out that the work schedule did not prescribe construction in the water area when gobies and garfish spawn and during spring and autumn migrations of marine mammals.[528] This provided an adequate mitigation of noise and vibration impacts on most vulnerable species.[529]

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[522] Russian sturgeon is an endangered species of fish in the Azov-Sea water basin.

[523] [redacted] Statement, paras. 93-94.

[524] [redacted] Report, para. 85.

[525] See, for instance, Order of the Federal Agency for Fishery No. 676 "On Approval of The Plan of Artificial Reproduction of Aquatic Biological Resources on 2017", 28 October 2016 (**RU-254**) that stipulates the release of 5.2743 billion roaches, 120 million Zanders, 3.587 million Russian sturgeons, 8.412 million vimba breams, 263 hundred starry sturgeons.

[526] [redacted] Report, para. 85.

[527] Minutes of the 2016 RUC session (**RU-385**), Articles 5.3, 5.5 (emphasis added).

[528] [redacted] Statement, paras. 98-99.

[529] [redacted] Report, paras. 89-91.

iii. Impact on Hydrodynamics

387. While Ukraine's expert asserts that "the potential for hydrodynamic influences" was not "quantitatively assessed",[530] the requisite analysis had already been at the Russian authorities' disposal before the construction started. The Zubov Institute conducted a modelling of waves and currents in the Kerch Strait in a scenario when a dam created for the Kerch Bridge would partially block the Strait.[531] A construction of a dam would be a far more intrusive project comparing to the approved design of the Kerch Bridge. Nevertheless, even in this highly intrusive scenario, the model indicated that the current velocity in the direct vicinity of the Kerch Bridge would change only by 2-5 cm/s and remain essentially the same in other parts of the Strait.[532] Therefore, the hydrodynamic impact was assessed and found to be marginal.

388. Ukraine, however, insists that the Kerch Bridge "has likely altered the hydrodynamics… [of] the Kerch Strait."[533] Ukraine and [redacted] call attention to the number of piles, alleging that "the introduction of 7,000 pilings and 595 broad stanchions" would interact with the general hydrodynamics of the Strait, which, according to Ukraine, "is only logical".[534] This is not logical. [redacted] explains that the number of supports or piles does not matter; what matters is the ratio of the piles' width to the Strait's width. Having analysed this ratio and based on his expertise in oceanography, the expert concluded that "the piles could not alter the Kerch Strait hydrodynamics beyond its natural variability range."[535]

389. [redacted] also notes that Tuzla Island (an island in the middle of the Kerch Strait that the Bridge crosses) had been a part of the Tuzla Spit prior to the 1925 storm that washed out a considerable part of the Spit.[536] Historically, the Tuzla Spit had altered the Strait's hydrodynamics, blocking a quarter of the Strait, but no environmental consequence described by [redacted] was recorded.[537] According to [redacted], any impact on hydrodynamics by the Bridge "pales in comparison to the historical impact of the Tuzla Spit"[538] and, therefore, all further environment-related speculations of [redacted] lack credibility.

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[530] [redacted] Report, para. 90.

[531] [redacted], paras. 99-100, referring to [redacted]

[532] [redacted] Report, paras. 100-101.

[533] URM, para. 206.

[534] *Ibid*. Ukraine and [redacted] make yet another mistake since the motorway and railway bridges have only 85 offshore stanchions each (other stanchions are onshore). See *Interfax,* Construction of All Supports of Roadway Section of Bridge across Kerch Strait is Complete, 4 December 2017 (**RU-420**).

[535] [redacted] Report, para. 97.

[536] *Id.,* paras. 102-103.

[537] *Id.,* para. 104.

[538] *Ibid*.

390. Finally, the results of currents monitoring carried out by the Crimean Directorate for Hydrometeorology and Environmental Monitoring confirm that the pattern of currents in the Kerch Strait has not changed.[539]

391. To support his theory on hydrodynamic changes, [redacted] asserted (although rightfully admitting that he is "not privy to primary data")[540] that the KYC is shallowing[541] and that "merchant ships ran aground in the [KYC] in 2018".[542] In essence, this argument is a compilation of unrelated facts that, when viewed carefully, do not hold water. As it follows from [redacted]'s Expert Report, it is the Kerch Passage Channel that was shallowing, not the KYC.[543] The shallowing of the former, however, cannot be attributed to the Kerch Bridge, as the sedimentation of an artificial waterway is a natural process when the waterway is undredged. As a matter of fact, in 2017, the Kerch Passage Channel reached its natural depth and its shallowing ceased.[544] Moreover, the incidents of ships "running aground in the KYC", that ostensibly must have proved its sedimentation, took place in Fairway No. 50, i.e., in a shallow navigable channel located in another part of the Kerch Strait. The causation between these groundings and the Kerch Bridge has never been even asserted, much less proven.[545]

392. Thus, all arguments of Ukraine on the changes in hydrodynamics have neither theoretical, nor empirical underpinning.

iv. Impact on Salinity, Eutrophication Process, Ice Formation and Migration Patterns

393. Ukraine and [redacted] claim that the alleged changes in hydrodynamics may ostensibly lead to "fluctuations in salinity levels",[546] "increased rates of eutrophication",[547] and "increase in seasonal ice formation".[548] The latter, according to Ukraine, will "have potential impacts" on the salinity and migration patterns.[549] The lack of changes in hydrodynamics shatters all these arguments of Ukraine. Nevertheless, the Respondent finds it pertinent to additionally address the likelihood of these impacts.

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[539] Letter of the Federal Service for Hydrometeorology and Environmental Monitoring of Russia No. 31-09081/21i, 24 September 2021 (**RU-264**), p. 2; Letter of the Federal State Budgetary Institution "Crimean Directorate of Hydrometeorology and Environmental Monitoring" No. 690, 12 November 2021 (**RU-265**), pp. 6-7.

[540] [redacted] Report, para. 93.

[541] *Id.*, para. 91 referring to Kerch Canal Poses Safety Threat, *Safety at Sea (IHS Markit), 4 April 2019* (**UA-724**).

[542] [redacted] Report, para. 92.

[543] [redacted] Report, para. 126.

[544] Letter of the Federal Agency of Maritime and River Transport of Russia No. DU-23/11169, 30 August 2022 (**RU-360**).

[545] See in this regard press reports of Kerch FM local news outlet referred to in Kerch Canal Poses Safety Threat, *Safety at Sea (IHS Markit), 4 April 2019* (**UA-724**): *Kerch FM*, New Threat to Navigation in the Kerch Area, 29 January 2019 (**RU-234**); *Kerch.fm,* Dry Cargo Vessel Stranded with a Puncture Hole in the Kerch Strait, 10 October 2018 (**RU-421**), *Kerch.fm*, Motor Vessel from Astrakhan Stranded in Kerch, 7 June 2018 (**RU-422**); *Kerch.fm,* Barge Stranded in the Kerch Strait (Updated), 5 December 2017 (**RU-423**); *Kerch.fm,* Another Vessel Stranded in the Kerch Strait, 10 October 2017 (**RU-424**).

[546] URM, para. 207.

[547] *Id.*, para. 209.

[548] *Id.*, para. 213.

[549] *Id.*, para. 214.

394. As for the salinity change, [redacted] opined that the Kerch Bridge has the potential to obstruct the outflow of low salinity water from the Sea of Azov to the saltier Black Sea,[550] which would decrease the salinity level of the Sea of Azov and Kerch Strait. [redacted] stresses that, on the contrary, the salinity levels in the Kerch Strait and Sea of Azov increase every year.[551] Ukraine preferred to gloss over the contradiction between the words of its own expert and the salinisation process that Ukraine explicitly recognised in the framework of the RUC:

> "[The RUC] noted that increased water salinity, which has reached its maximum level of 14 ppm that was also seen during the previous period from 1972 to 1978, is becoming an important factor determining the species composition, number, distribution, reproduction and state of the stocks of aquatic biological resources in the Sea of Azov.
>
> [The RUC] stated that increased water salinity – as it was also in 1972-1978 – was mainly caused by climate change, reduced volumes of atmospheric precipitation and fresh water river flow, including the Don River flow."[552]

395. Ukraine avers that the Kerch Bridge "may tend to make the Sea of Azov more stagnant", which allegedly will increase the likelihood of eutrophication.[553] Even if the Bridge could change the hydrodynamic regime (*quod non*), its impact on eutrophication would still be negligible. [redacted] explains that the primary cause of eutrophication is "an excessive supply of nutrients" determined by the river run-off and the so-called "local sources of biogenic elements" (e.g., farmlands).[554] The Bridge is not a source of nutrients and it cannot affect the level of eutrophication, as the results of environmental monitoring confirmed.[555] The Ukrainian Strategy on the Protection of the Marine Environment reiterates this common knowledge, stating that "the river run-off is decisive in the pollution and eutrophication of the seas".[556] This notwithstanding, Ukraine decided to turn a blind eye to basic scientific knowledge trying to strengthen its fragile position.

396. Ukraine's allegation of increased ice formation stands out peculiarly, as it reaches a new level of fallacy. First, [redacted] notes that, due to a warming of the Sea of Azov (started in the mid-1990s), ice appears in the Strait increasingly rarely, covers smaller area and becomes thinner.[557] Indeed, since the start of the construction, ice appeared only once, in

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[550] [redacted] Report, para. 94.

[551] [redacted] Report, para. 109.

[552] Minutes of the 2016 RUC session (**RU-385**), para. 5.1.

[553] URM, para. 210.

[554] [redacted] Report, para. 112.

[555] *Id.*, paras. 113-114.

[556] Decree of the Cabinet of Ministers of Ukraine No. 1240-r, "Marine Environmental Strategy of Ukraine", 11 October 2021 (**RU-425**).

[557] [redacted] Report, paras. 116-117.

February 2017,[558] the case that Ukraine and [redacted] relied on.[559] Second, even when ice does appear in the Strait, it tends not to hold for long because of the highly changeable weather conditions, coupled with the "low heat storage capacity" determined by the shallowness of the Strait.[560] Thus, Ukraine's experts significantly overstate the modern ice situation in the Kerch Strait, painting a veneer that is as daunting as it is unrealistic.

397. Furthermore, even if the Bridge could affect the ice regime (*quod non*), the February 2017 ice situation is the least appropriate case to prove that. First, [redacted] points out that ice accumulated in the Strait in the manner similar to that of February 2017 far before the Bridge's construction, as was the case in 2003, 2006, 2008, 2012 and 2014.[561] Beyond its normal character, migration of ice from the Sea of Azov cannot demonstrate that "more numerous, thicker and longer-lasting"[562] ice formed in the Strait itself, especially considering that the ice build-up noted by [redacted] only lasted for several days – which is characteristically short for the Strait.[563] Second, [redacted] omits the fact that in February 2017, the Kerch Strait was crossed by many auxiliary construction structures. These structures offered very limited space for ice to pass compared to the future Kerch Bridge, which marine sections were then in their very early stages of construction.[564] As the above auxiliary structures were removed after the completion of the construction works, their "continuing impact" cannot be even hypothesised, while the actual Kerch Bridge "would be substantially less obstructive for the passage of ice".[565] Therefore, [redacted] concludes, the February 2017 short-lived accumulation of ice cannot be attributed to the Kerch Bridge, nor can it demonstrate any increase in ice formation in the Strait, while the Bridge's own effects on ice could only be marginal and would be further negated by the existing monitoring and mitigation frameworks.[566]

398. As Ukraine claimed, the alleged change in ice regime – that Russia proved to be unrealistic – may cause changes in migration patterns. [redacted] went as far as asserting that "ice dams could form between stanchions that would prevent the migration of certain species entirely",[567] as if the Kerch Bridge were built in the Arctic Ocean and not in the regions of beach resorts. [redacted] noted that this speculation is "clearly divorced from reality",

[558] [redacted] Report, para. 117, relying on Letter of the Federal Service for Hydrometeorology and Environmental Monitoring No. 31-07883/22i, 25 August 2022 forwarding a note of the Zubov State Oceanographic Institute (**RU-274**), p. 8.

[559] URM, para. 213; [redacted] Report, para. 111.

[560] [redacted] Report, para. 118.

[561] *Id.*, para. 124.

[562] URM, para. 213.

[563] [redacted] Report, paras. 118, 120-121, 123.

[564] *Id.*, paras. 125-126.

[565] *Id.*, paras. 127-128.

[566] *Id.*, paras. 120-128.

[567] [redacted] Report, para. 112.

since such "ice dams" cannot form in the Kerch Strait and fish starts its migration after the ice melts.[568]

4. *Russia Took All Necessary Measures to Ensure Safety and Structural Integrity of the Kerch Bridge*

399. Even though [redacted] does not seem to have any engineering experience, Ukraine relied on his opinion to allege that the Kerch Bridge has a "higher-than-normal risk of failure" entailed by "geological and climatic challenges".[569] At the same time, Ukraine's own evidence reveals that huge advancements in technology make these challenges (geology, ice, wind, waves) irrelevant today.[570] As will be shown, Russian engineers extensively studied the geological and climatic characteristics of the construction area and adopted robust, state-of-the-art engineering protection measures.

400. The design and construction process was very open and extensively publicised. Ukraine clearly had access to this extensive array of information and even appended some detailed sources,[571] but chose not to include in its Revised Memorial or expert reports anything that could cast a shadow on its arguments. In contrast to this evidentiary "cherry-picking", Ukraine found nothing to show for its allegations of a "hasty" and "unsafe"[572] construction but sensationalist press,[573] some irrelevant and far-fetched comparisons,[574] and the immaterial question of prompt approvals. Facts, however, leave no room for doubt: the Kerch Bridge was built to last.

401. What is more, Ukraine's loud concern over the environmental impact of a hypothesised Bridge failure stands in stark contrast with the continuing threats by the Ukrainian authorities to destroy the Kerch Strait Bridge with military force, and more strikingly – their recent attack on the Bridge.[575] Clearly, Ukraine's allegations as regards the Bridge's safety and structural

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[568] [redacted] Report, paras. 133-136.

[569] URM, paras. 153, 218. Notably, it is unclear which "normal" risks Ukraine refers to, considering that all construction projects in Russia are subject to mandatory requirements of safety and reliability.

[570] Neil MacFarquhar & Ivan Nechepurenko, Putin's Bridge to Crimea May Carry More Symbolism Than Traffic, New York Times, 11 November 2017 (**UA-213**), p. 4.

[571] The Kerch Bridge: Engineering Protection From Design to Implementation, Engineering Protection Magazine, 1 July 2016 (**UA-624**) offers a particularly comprehensive account of the key aspects of design and construction. For terminological consistency, the Russian Federation provides a more accurate translation of the key excerpts from this source: see Translation of the article *Engineering Protection*, "Kerch Bridge: Engineering Protection from Design to Implementation" contained in **UA-624** (**RU-426**). For another example see The Construction Project of the Century, Or How the Crimean Bridge is Being Built, Union of Builders of the Republic of Crimea, 11 May 2017 (**UA-626**).

[572] URM, para. 151.

[573] In particular, URM, para. 153, referring to Aleksei Baturin, Russian Bridge Across the Kerch Strait Will Not Stand Long - Georgiy Rosnovsky, *Focus*, 18 April 2016 (**UA-221**); para. 218, referring to Putin's Bridge to Crimea Is Doomed to Collapse, Newsweek, 13 January 2017 (**UA-643**). URM, para. 153 also refers to Institute of Water Problems and Land Reclamation, NAAS, About Some Environmental Consequences of Kerch Strait Bridge Construction, Hydrology, Vol. 6, No. 1 (2018) (**UA-220**); however, this publication says nothing directly of any definite risk of collapse, and has nothing to say on the actual specifics of construction.

[574] See paras. 420-422 below.

[575] See paras. 206, 262-263 above.

integrity are not indicative of any sincere environmental concern and were construed specifically for the purposes of this arbitration. The following demonstrates that, contrary to its disingenuous claims, Ukraine itself remains the only real threat to the Kerch Bridge.[576]

402. First, Russia will briefly demonstrate that the design and construction of the Bridge involved increased safety precautions, the implementation of which was subject to continuous administrative control. Second, the Respondent will summarise how the engineers studied and addressed all relevant geological conditions. Third, Ukraine's fallacious claims as regards the alleged hydrometeorological risks will be addressed.

i. The Bridge's Design and Construction Involved Increased Safety Precautions and Administrative Control

403. Giprostroymost prepared several sets of Special Technical Specifications ("STS"), that the Russian Ministry of Construction further approved:[577] for the engineering surveys; for the design, construction and operation of the bridge; and for its seismic safety. These specified regulations ensured that the design process fully accounted for the particular hydrometeorological, geological and seismotectonic conditions of the Kerch Strait and provided appropriate and up-to-date engineering protection.[578]

404. The STS set out increased safety requirements for the Kerch Bridge, as entailed by the "increased level of importance" assigned to some of its core structures in accordance with Russian law.[579] In particular, the designers had to incorporate higher loads estimations and to account for possible emergencies, including earthquakes.[580]

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[576] Ukraine's continued threats towards the Kerch Bridge present a legitimate and persisting security concern, as stated in para. 206, thus, the Russian Federation is limited in the amount of the related documentation it can disclose without facing significant security risks.

[577] Complex construction projects may require more extensive or detailed regulation on reliability and safety than provided in the relevant technical regulations. To account for such aspects, design organisations prepare STS that are subject to the approval by the Ministry of Construction. The requirements of STS are mandatory and have priority over the ordinary technical regulations. See Resolution of the Government of the Russian Federation No. 87 "On the Scope of Design Documentation Sections and Requirements to the Contents Thereof", 16 February 2008 (**RU-114**), part 5; Order of the Ministry of Regional Development of the Russian Federation No. 36 "On the Procedure for Developing and Approving Special Technical Specifications for the Preparation of Design Documentation for the Capital Construction Facility", 1 April 2008 (**RU-427**), part 4; Resolution of the Government of the Russian Federation No. 1038 "On the Ministry of Construction, Housing and Utilities of the Russian Federation", 18 November 2013 (**RU-428**), parts 5, 5.4.8; Federal Law No. 384-FZ "Technical Regulations on the Safety of Buildings and Structures", 30 December 2009 (**RU-429**), Articles 5(2), 6(4).

[578] [redacted]

[579] Russian law regards some objects as "technically sophisticated" (e.g. public railway infrastructure facilities) and "unique" (e.g. capital construction objects with spans of more than 100 metres): see Town Planning Code (**RU-113**), Article 48.1. Article 4(8) of the Technical Regulations on the Safety of Buildings and Structures (**RU-429**) assigns the "increased level of importance" to these categories of structures.

[580] [redacted]

405. The competent Russian agencies controlled the quality of the Bridge's design and its thorough implementation. As noted above,[581] in February 2016, Glavgosekspertiza reviewed and approved the design documentation for the Bridge. Thereby, Glavgosekspertiza officially established that the engineering surveys and the design itself complied with all relevant technical regulations, and in particular with the mandatory requirements for stability and safety of construction objects.[582]

406. As required by Russian law,[583] Rostekhnadzor continuously observed the consistent implementation of this state-approved design. As explained by [redacted], this included the constant presence of Rostekhnadzor employees in the construction area and regular scheduled and unscheduled inspections.[584] After the final inspections were completed, Rostekhnadzor issued its Statements of Compliance for the motorway (April 2018) and railway (December 2019) bridges, by which it confirmed that they fully correspond to the requirements of the design documentation.[585]

ii. The Bridge's Geological Setting was Duly Accounted for

407. [redacted] expresses particular concern over the alleged presence of mud volcanoes, seismic safety and overall stability of the Bridge. He asserts that these factors should have been evaluated and addressed,[586] as well as supported by on-site monitoring "to discern the different sources of bridge movements."[587] [redacted] is unaware that the engineers diligently studied and accounted for all relevant geological conditions, and that the safety of the Bridge is additionally ensured through continuous structural monitoring and readily available emergency response capabilities.

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section 1.7; reflecting the requirements established by Articles 16(6) and 16(7) of the Technical Regulations on the Safety of Buildings and Structures (**RU-429**).

[581] See para. 369 above.

[582] [redacted] Statement, paras. 67-68.

[583] The Town Planning Code requires state construction supervision by Rostekhnadzor over construction projects which design documentation was approved by Glavgosekspertiza. State construction supervision concerns, *inter alia*, conformity with the requirements of the approved design documentation of the works performed, their results, materials and products used, and is carried out in the form of scheduled and unscheduled inspections. See Town Planning Code (**RU-113**), Articles 6(1)(5.1), 49(3.4), 54(1)(1), 54(2)(1) and 54(5); Resolution of the Government of the Russian Federation No. 54 "On State Construction Supervision in the Russian Federation", 1 February 2006 (**RU-432**), part 2.

[584] [redacted] Statement, paras. 138-141.

[585] *Id.*, paras. 146-147.

[586] [redacted] Report, paras. 119-121, 124-125.

[587] *Id.*, para. 125.

a. Thorough Geological Engineering Surveys Preceded the Construction of the Bridge

408. The relevant STS required conducting two stages of geological engineering surveys:[588] design documentation (first stage, conducted in August 2014 – July 2015)[589] and detailed design documentation (second stage, conducted in August 2015 – June 2016).[590] While the first stage surveys determined the general geological picture of the construction area, the second stage surveys verified and adjusted those baseline data for the locations of each separate support of the future bridge.[591]

409. Giprostroymost contracted InzhGeo LLC, a prominent Russian survey organisation, to conduct the geological engineering surveys for the Bridge. The surveys aimed to, *inter alia*, select the foundation soils to which the piles should be driven and to identify potential geological risks (e.g. mud volcanoes).[592] This included an extensive scope of works: e.g. processing of existing research materials, various laboratory tests on soil, groundwater and surface water obtained at various depths,[593] integrated engineering and geophysical studies.[594]

410. Pursuant to the STS requirements,[595] specialists of the Schmidt Institute of Physics of the Earth of the Russian Academy of Sciences ("Schmidt Institute"), the leading Russian geophysical institute, were also engaged to conduct a thorough seismic and geological hazard assessment as a part of these surveys. Through a wide range of studies, the Schmidt Institute assessed the possible seismic impact parameters in the area of construction.[596] It also investigated the bridge construction area for all possible hazardous geological phenomena, including mud volcanoes, which they only found to be situated onshore and away from the

[588] [redacted]

[589] [redacted]

[590] [redacted]

[591] *Id.*, p. 5. Also see Kerch Bridge: Engineering Protection from Design to Implementation (**RU-426**), p. 5.

[592] [redacted]

[593] Several prominent research institutes assisted with the laboratory studies, such as the Vedeneev All-Russian Research Institute of Hydraulic Engineering OJSC, the Soil Dynamics Testing Laboratory of the Lomonosov Moscow State University, and the Sergeev Institute for Geo-Ecology of the Russian Academy of Sciences. For the full lists of assisting organisations, see: [redacted]

[594] For the full lists of conducted works, see [redacted]

[595] Special Technical Specifications for the Engineering Surveys of the Kerch Bridge (**RU-430**), section 2.3.

[596] See Schmidt Institute of Physics of the Earth of the Russian Academy of Sciences, "Final Report under Agreement No. 01/02-15/SI of 6 February 2015 on the performance of works on the topic 'Seismic Impact Assessment for Five Sites as part of the Construction of the Transport Crossing across the Kerch Strait'", 2015 (**RU-435**), pp. 3-9 for the Table of Contents and a brief summary of the studies.

Bridge,[597] leading to the conclusion that there were "no manifestations of mud volcanism in the designed section proper".[598]

411. One of the key tasks before the engineers was to find appropriate soils to secure the Bridge structures firmly in place, making them resilient not only when they operate under regular conditions, but also under possible seismic loads. A wide range of studies allowed the Schmidt Institute to establish accurate seismic hazard parameters for the Bridge.[599] Then, using those data and the results of soil profiling within a set of field and laboratory tests, the surveys determined the soil that would provide the most robust foundation for the Bridge.[600] The second stage surveys involved additional studies for each of the Bridge's 595 supports to guarantee that their piles would reach this firm soil.[601]

b. The Engineers Ensured that the Kerch Bridge Would Best Respond to Its Geological Setting

412. Guided by the determined geological conditions in the area, the engineers devised and adopted a wide variety of engineering measures that guarantee the integrity of the Kerch Bridge, which they also verified in practice through extensive field tests and geodetic monitoring.

413. Even the basic scheme of the Bridge envisioned seismic protection: in particular, the design specifically incorporated an increased number of supports to ensure the distribution of weight that is optimal for offsetting seismic loads.[602]

414. Advanced engineering technologies ensure that Bridge structures are geared to the worst possible seismic effects. The supports were designed to incorporate raking (angled) piles that are better at withstanding seismic loads.[603] The Bridge's spans are connected with expansion joints – flexible elements that allow the spans to accommodate movement from seismic activity, temperature changes, or heavy traffic.[604] These are supported by special technologies (hydraulic "shock transmitter" devices, fixed and guided expansion bearings) that provide a secure structural connection while ensuring an even distribution of seismic load, "like safety belts in a

[597] Kerch Bridge Seismic Impact Assessment Report (**RU-435**), pp. 92, 288-289.

[598] [redacted]

[599] The Schmidt Institute scientists studied historical materials, examined the sites and signs of past earthquakes in the region (field seismotectonic studies), observed the local seismic regime through a seismic stations grid (field seismological studies), established the seismic intensity for each section of the bridge based on its unique geological features (seismic microzoning), calculated the propagation of seismic movement. See Kerch Bridge Seismic Impact Assessment Report (**RU-435**), pp. 3-9; Kerch Bridge: Engineering Protection from Design to Implementation (**RU-426**), p. 9.

[600] [redacted]. Institute Giprostroymost St. Petersburg CJSC, "*Bridge Formula. Institute Giprostroymost – St. Petersburg: 50 Years*", 2018 (**RU-436**), p. 196 demonstrates that the engineers used as the foundation the firm soil determined by the surveys.

[601] [redacted]. 4-6 for the aims of the studies and pp. 8-11 for the list of conducted works; also see Kerch Bridge: Engineering Protection from Design to Implementation (**RU-426**), p. 5.

[602] See *Kryminform*, "Seismic Shock. What the Crimean Bridge is Capable of", 22 January 2018 (**RU-437**), p. 7; Bridge Formula. Institute Giprostroymost – St. Petersburg: 50 Years (**RU-436**), p. 188.

[603] Seismic Shock. What the Crimean Bridge is Capable of (**RU-437**), p. 5.

[604] Federal Road Agency official website, "Crimean Bridge: 2019 Goals", 27 December 2018 (**RU-438**).

car".[605] Although the arched spans above the navigational channel were themselves designed "within the ample margins of safety", special mechanisms that absorb horizontal load generated during a typhoon or earthquake (horizontal force bearings) guarantee rigid fixation of the arches.[606]

415. Based on the survey data, the designers calculated the optimal parameters for the foundations of the Bridge supports. To verify them, the engineers conducted a large scope of field experimental works.[607] For example, the STS required testing piles in their natural conditions on at least three occasions.[608] These tests ensured that the piles would hold the largest possible loads as part of the Bridge structure and in their particular soil conditions.[609]

416. It should be evident by now that the designers would not have been satisfied with anything short of complete safety assurance. At the final quality control stage of each (motorway and railway) bridge construction, the reliability of the load-bearing elements (supports, spans, arches) was verified through simulating real operation with heavy-loaded trucks and trains.[610] To ensure that the results endure, the Kerch Bridge was subject to geodetic deformational monitoring: special devices controlled that the stress-strain state and subsidence of the load bearing structures would not exceed the design values.[611]

c. Safety and Structural Integrity of the Kerch Bridge is Further Ensured through Continuous Automatic Monitoring and Emergency Response Capabilities

417. To prevent any emergency risks, the Kerch Bridge is fitted with modern structural monitoring technology. The Utilities and Engineering Structure Monitoring System observes the condition of structural elements (including all possible strains, vibrations and movements) in real time and notifies the duty and emergency dispatch services of any hazardous natural effects or potential defects.[612]

[605] Seismic Shock. What the Crimean Bridge is Capable of (**RU-437**), pp. 5-6.

[606] *Rossiyskaya Gazeta*, "Crimean Bridge Builders Launch Unique Maritime Operation", 11 October 2017 (**RU-439**).

[607] For a brief summary of these works see Kerch Bridge: Engineering Protection from Design to Implementation (**RU-426**), pp. 5-6.

[608] This included testing (i) in the areas with most complex geological conditions, (ii) at each site distinguished by its geological properties, and (iii) check testing of a test pile on each support during construction. See [redacted]

[609] Kerch Bridge: Engineering Protection from Design to Implementation (**RU-426**), p. 5.

[610] Federal Road Agency official website, "Motorway Section of Crimean Bridge Passed Acceptance Tests", 26 April 2018 (**RU-440**); Kerch Bridge official website, "Railway Structures of Crimean Bridge are Tested for Heavy Loads", 23 October 2019 (**RU-441**).

[611] Letter of Institute Giprostroymost St. Petersburg CJSC to SGM-Most LLC and the Taman Highways Administration No. 26999, 7 June 2019 (**RU-442**) regarding geodetic monitoring of the motorway crossing, for example, discusses the positive results of the monitoring in regards of the motorway bridge and the plans for further monitoring of the railway bridge. For an example of a public source see: Federal Road Agency official website, "Engineering Monitoring Confirms that the Railway Arch of the Crimean Bridge was Installed with 100% Accuracy", 3 September 2017 (**RU-443**).

[612] *RUBEZH*, "Transport Safety", No. 5(31), 2018 (**RU-357**), pp. 146-147, 149, 151; Motorway Section of Crimean Bridge Passed Acceptance Tests (**RU-440**), p. 2.

418. Even if some emergencies occur, the emergency services under the Ministry of Emergency Situations of the Russian Federation ("EMERCOM") will be able to respond promptly and effectively. Several municipal emergency services are stationed nearby and have been bolstered and supplied with modern equipment specifically for these purposes.[613] Special fire trains can promptly support them via the railway bridge.[614] Large-scale EMERCOM training exercises involving the Bridge staff are also regularly carried out.[615]

iii. The Bridge's Hydrometeorological Setting Was Duly Accounted for

419. [redacted] asserts that the Bridge's location entails hydrometeorological risks that he is "not confident" to have been addressed, with reference to the failure of the 1944-1945 Kerch railway bridge ("the 1944-45 bridge").[616] Ukraine suggests that the Bridge itself contributes to these risks by fostering increased ice formation.[617] As will be shown, Ukraine's suggestions rest on a selective and misleading presentation of facts, while the concerns of [redacted] have been fully addressed by the engineers. In fact, the engineers have consistently opted for a much greater margin of protection than would be expected considering the actual level of meteorological hazard in the Strait.

a. Ukraine Exaggerates Hydrometeorological Risks to the Bridge

420. Ukraine and [redacted] seem to use the collapse of the 1944-45 bridge purely for its shock value,[618] even though this comparison is not grounded in the actual circumstances of construction and thus lacks any real relevance or merit.

421. Beyond the clearly sophistic nature of Ukraine's argument, its own exhibits evidence that the 1944-45 bridge was built without the luxury of modern materials and equipment, in accordance with now-obsolete construction standards and without any survey data. Furthermore, crucial structures were not finished in time due to planning and logistical issues. It is those unfinished structures that gave way under ice drift in 1945.[619] Ukraine omits these nuances for the sake of its argument.

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[613] *TASS*, "New Fire Station to be Built near Crimean Bridge in 2020", 8 September 2018 (**RU-444**).

[614] *TASS*, "Fire Trains from Novorossiysk and Anapa to be Engaged in Case of Emergency on Crimean Bridge", 8 September 2018 (**RU-445**).

[615] For some examples see: *Kryminform*, "EMERCOM Was Learning How to Extinguish Fire on Crimean Bridge and to Rescue Builders from Water", 22 December 2017 (**RU-446**); Ministry of Emergency Situations of the Russian Federation official website, "EMERCOM Exercises Held on Crimean Bridge under Construction", 5 May 2017 (**RU-447**); Ministry of Emergency Situations of the Russian Federation official website, "EMERCOM of Russia Held Joint Exercises on Crimean Bridge", 21 May 2019 (**RU-448**).

[616] [redacted] Report, para. 187.

[617] URM, para. 213.

[618] *Ibid.*; [redacted] Report, paras. 122-123.

[619] Foreword: The Bridge Over the Kerch Strait, *Russian Federal Archive Agency* (2016) (**UA-642**), p. 3-4; Aleksei Baturin, Russian Bridge Across the Kerch Strait Will Not Stand Long - Georgiy Rosnovsky, *Focus*, 18 April 2016 (**UA-221**), pp. 2-3.

422. The two bridges are also located in completely different parts of the Strait, and are thus subject to markedly different hydrogeological and meteorological conditions. The 1944-45 bridge was constructed in the northern part, which is the gateway for ice drift from the Sea of Azov and is thus subject to maximum ice impact.[620] Ice that does reach the southern Tuzla Spit (along which the Kerch Bridge lies) does so in a "significantly dispersed state".[621] This location also enjoys a much more favourable temperature regime due to the inflow of warmer waters from the Black Sea.[622] Expectedly, the project feasibility study found the Tuzla Spit option to have the most favourable ice conditions,[623] which is supported by scientific research.[624] It is worrying that Ukraine's expert appears so oblivious of the area's most basic geography.

423. Furthermore, as mentioned above,[625] Ukraine and its experts significantly overstate the potential hydrometeorological risks by overriding scientific facts. [redacted] explains that, contrary to Ukraine's assertions that ice appears in the Strait each year, it has only appeared once since the beginning of construction.[626] The ice-related risks suggested by Ukraine do not hold up to one crucial fact: due to climatic change, the actual relevance of ice as a hazardous factor in the Strait is very limited and continues to decline.[627] The hydrometeorological situation in the Kerch Strait is also highly changeable and generally does not favour prolonged ice coverage, if it appears in the first place. The short-lived ice build-up in February 2017 used by Ukraine is, ironically, a very indicative example of this pattern: the ice then retreated from the Bridge in just a few days.[628]

424. [redacted] also points to high winds, waves and currents as potential hazards, relying on an article by the scientists of the Zubov Institute that, however, does not regard these factors as separate risks.[629] Meanwhile, other scientists of the Zubov Institute concluded, based on monitoring and numerical modelling data, that "wind waves and storm surges will not have a significant impact on the safe operation of the bridge".[630]

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[620] [redacted]

[621] *Id.*, p. 7.

[622] [redacted] Report, para. 119.

[623] [redacted]

[624] N.N. Dyakov *et al*, On Possible Risks in Construction and Operation of Bridge Transition over the Kerch Strait (**RU-273**), p. 233.

[625] See paras. 396-397.

[626] [redacted] Report, para. 117.

[627] *Ibid.*

[628] *Id.*, paras. 118-119, 123.

[629] [redacted] Report, para. 122, referring to A.V. Kholoptsev et al., *The Influence of Anticyclonic Movement Over the Sea of Azov on Variations of Maximum Instantaneous Current Speed in the Kerch Strait During 1948-2017 Ice Seasons*, Physical and Mathematical Modeling of Earth and Environmental Processes (2018) (**UA-735**). As regards the Bridge's integrity, this source merely discusses these factors as being able to influence risks from drifting ice (pp. 9-10). The actual state of ice-related risks has already been discussed, see paras. 397, 424.

[630] N.N. Dyakov *et al*, On Possible Risks in Construction and Operation of Bridge Transition over the Kerch Strait (**RU-273**), p. 233.

b. The Engineers Studied and Addressed All Potential Hydrometeorological Risks

425. Ukraine's assertions of any dangers to the Kerch Bridge posed by the hydrometeorological factors also fail on the simple grounds that the engineers studied and addressed all relevant risks.

426. The surveys regarded all pertinent hydrometeorological factors. The Respondent described above that the Zubov Institute collected hydrometeorological baseline data.[631] Based on that set of data, scientists of the Zubov Institute estimated the possible wind-wave, ice and current loads through hydrometeorological modelling and calculations.[632] This ensured a robust design that corresponds to all hydrometeorological conditions. As discussed earlier,[633] the engineers began by choosing the location with the most favourable hydrometeorological regime. Furthermore, in accordance with the survey results, the load-bearing structures of the Bridge were geared to all possible loads.[634] The raking piles were also incorporated due to their increased capability to sustain ice impact, and not just seismic loads.[635]

427. Finally, to verify the design's effectiveness in practice, the engineers tested it under simulated ice and aerodynamic conditions at a specialised experimental centre[636] in accordance with the STS.[637]

428. In the course of the ice tests, a bridge mock-up was submerged in a special ice basin, subjected to simulated ice drift, and withstood pressure consistent with an ice cover of 72 cm in thickness,[638] which is much greater even than the maximum thickness of drifting ice observed in the northern Kerch Strait (60-62 cm).[639] For reference, ice floes observed in February 2017, with their maximum thickness of 16 cm,[640] would have been absolutely innocuous to the Bridge – which is in concert with the opinion of the Zubov Institute.[641]

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[631] See paras. 365-366. Exhibited with this submission, the Russian Federation provides materials that summarise the works undertaken in the course of the hydrometeorological surveys: see Kerch Bridge Design Documentation, Section 10, Other Documentation Provided for by Federal Law, Part 3, Hydrometeorological Engineering Surveys, Book 1, Technical Report on the Results of Hydrometeorological Engineering Surveys, Hydrometeorological Conditions of the Kerch Strait, 12/02-PIR-II.3.1, 2015 (**RU-97**), pp. 24-26, 28-29, 41-44.

[632] [redacted] Statement, para. 34, referring to Kerch Bridge Report on Hydrometeorological Baseline Data (**RU-97**), pp. 24-26.

[633] See para. 422 above.

[634] Kerch Bridge: Engineering Protection from Design to Implementation (**RU-426**), p. 6.

[635] Seismic Shock. What the Crimean Bridge is Capable of (**RU-437**), p. 5.

[636] Bridge Formula. Institute Giprostroymost – St. Petersburg: 50 Years (**RU-436**), pp. 190-191; also see Kerch Bridge: Engineering Protection from Design to Implementation (**RU-426**), pp. 10-12.

[637] [redacted]

[638] Bridge Formula. Institute Giprostroymost – St. Petersburg: 50 Years (**RU-436**), p. 191.

[639] N.N. Dyakov *et al*, On Possible Risks in Construction and Operation of Bridge Transition over the Kerch Strait (**RU-273**), pp. 220-221; [redacted] It has been discussed before that the ice conditions in the area of the Kerch Bridge are much more favourable: see para. 422 above.

[640] Letter of the Crimean Directorate of Hydrometeorology No. 690 (**RU-265**), p. 3.

[641] Opinion of the Zubov State Oceanographic Institute (**RU-274**), p. 4.

429. With respect to the aerodynamic tests, the Bridge was studied for response to gale force winds in a special landscape wind tunnel. While the baseline studies determined the maximum wind velocities of 28-30 m/s (with gushes of wind up to 33-34 m/s), which are an exceptional and rare occurrence,[642] the mock-up was tested for velocities up to 56 m/s.[643] This demonstrates that the Bridge is designed within a large margin of safety. The test results also allowed designing wind deflectors that further protect the large motorway bridge arch by streamlining the wind flow.[644]

c. Potential Ice Situations Are Subject to Thorough Monitoring and Appropriate Mitigation

430. Rosgidromet institutions constantly monitor the meteorological situation in the Strait, including the ice situation, through a network of onshore stations and posts,[645] as well as with satellite means. In particular, two Rosgidromet institutions carry out regular satellite monitoring: the Scientific Research Centre of Space Hydrometeorology "Planeta"[646] and the Hydrometeorological Research Centre of the Russian Federation.[647] Each winter, both institutions produce detailed weekly ice maps based on their satellite data that depict the location and quality (type, size, thickness, consistency, etc.) of ice. The results of this satellite monitoring are publicly available.[648] Finally, the Sevastopol branch of the Zubov Institute collects and analyses all the above monitoring data.[649]

431. The winter of 2016-2017 – as the only winter since the beginning of construction when ice actually appeared – saw particularly exhaustive monitoring efforts. On the request of Giprostroymost, the Sevastopol branch of the Zubov Institute conducted daily ice monitoring directly from the construction site. This monitoring combined usual (station and satellite) monitoring data with "hands-on" monitoring efforts (direct observation, field and laboratory

[642] See Kerch Bridge Report on Hydrometeorological Baseline Data (**RU-97**), pp. 56-59, 61 for data on wind observations and the determined average velocities, including Tables 4.14, 4.15, 4.17, 4.18 for data on maximum recorded wind velocities. The maximum velocities above were last noted in the mid-20th century. In practice, weak winds (1-5 m/s) dominate in the region, see p. 57.

[643] Bridge Formula. Institute Giprostroymost – St. Petersburg: 50 Years (**RU-436**), p. 191.

[644] Federal Road Agency official website, "Wind Deflectors Installation at Crimean Bridge Motorway Arch Completed", 5 April 2018 (**RU-449**).

[645] Letter of the Crimean Directorate of Hydrometeorology No. 690 (**RU-265**), pp. 1-2; Kerch Bridge Report on Hydrometeorological Baseline Data (**RU-97**), pp. 40-41.

[646] Planeta Research Centre is the main institution concerned with satellite research for hydrometeorological, oceanographic and environmental purposes.

[647] Hydrometcentre of Russia is the national meteorological service responsible for meteorological forecasting.

[648] Planeta Research Centre offers the latest ice maps on its website through simple registration, together with the original satellite images (http://planet.rssi.ru/index.php?lang=en&page_type=oper_prod&page=section&section_id=59), while maps for past ice seasons can be accessed by individuals upon request. Addendum 2 to Letter of Rosgidromet No. 31-09081/21i (**RU-264**) contains a year-by-year compilation of these maps since 2014. Hydrometcentre of Russia maintains open access to all its ice maps since the 2007-2008 winter season, with written summaries, through the database of the Unified State System of Information on the World Ocean (ESIMO), publicly available at http://193.7.160.230/web/esimo/azov/ice/ice_azov.php. Website of The Unified State System of Information on the World Ocean (ESIMO), "Ice Conditions in the Sea of Azov on 1 February 2022" (**RU-450**) offers an example of such an ice map.

[649] Opinion of the Zubov State Oceanographic Institute (**RU-274**), p. 6.

studies, drone surveillance)[650] to allow the Bridge's Ice Management Service to timely determine and mitigate any potential ice hazards.[651] Although the need or opportunity for such monitoring has not arisen since, the Ice Monitoring Regulations adopted for the period of operation retain the necessary framework for the future.[652] Beside the Kerch Bridge staff itself, the VTS may perform continuous monitoring if ice appears.[653]

432. Finally, in accordance with the STS requirements,[654] Giprostroymost developed a detailed ice management programme setting out the relevant mitigation efforts (e.g. ice-breaking) and listing all fleet and resources available for these purposes.[655] If ice appears, the Bridge's staff would coordinate these works based on the monitoring data,[656] and could even engage EMERCOM and military blasting crews for these purposes if needed.[657]

D. THE RUSSIAN FEDERATION CONDUCTED AN EIA FOR THE UNDERSEA GAS PIPELINE AND POWER CABLES

433. With the same train of thought as with the Kerch Bridge EIA, Ukraine continues with an utterly misguided accusation that Russia "failed altogether" to conduct an EIA for the other construction projects in the Kerch Strait.[658] Most offensive of all, it does so, by all indications, without an attempt at even the simplest research. In fact, Russia conducted EIAs in respect of both the submarine gas pipeline and power cables in a manner that was open, transparent, and compliant with Russian law. Exhibited with this submission, the Russian Federation provides relevant materials that demonstrate the scope of the conducted EIAs.[659]

1. The Gas Pipeline Was Subject to an Open and Transparent EIA Process

434. SGM LLC,[660] the general contractor for the gas pipeline construction, contracted Giprogazcentr JSC to design the pipeline.[661] Giprogazcentr JSC sub-contracted

[650] Opinion of the Zubov State Oceanographic Institute (**RU-274**), pp. 6-7.

[651] SGM LLC, "Ice Management Efforts in the Kerch Strait for the Period of Construction. 2016-2017 ice season", 2017 (**RU-279**), pp. 4, 8-9.

[652] See MTSM-Service LLC, "Ice Monitoring Regulations" (**RU-280**). MTSM-Service LLC is the organisation in charge of the motorway bridge's operation.

[653] Letter of the Maritime Transport Agency No. DU-23/11169 (**RU-360**), p. 3.

[654] [redacted]

[655] Kerch Bridge Ice Management Efforts (**RU-279**), pp. 15-21. The Maritime Transport Agency also confirms that manpower and equipment are readily available for ice-breaking, see Letter of the Maritime Transport Agency No. DU-23/11169 (**RU-360**), p. 3.

[656] Kerch Bridge Ice Management Efforts (**RU-279**), pp. 9-10.

[657] *Id.,* pp. 9, 20.

[658] URM, para. 246.

[659] See [redacted]

[660] SGM-LLC was the owner of SGM-Most LLC at the time.

[661] Agreement No. 4700/1 between SGM LLC and Giprogazcentr JSC, 24 July 2015 (**RU-453**).

Morgazservis LLC to gather baseline data in the Kerch Strait[662] and Expert Centre LLC to perform the EIA.[663] In addition to its own research, Morgazservis LLC used a plethora of existing baseline data, including that collected by STG-Eco LLC in the course of the Kerch Bridge environmental engineering surveys.[664]

435. The results of the gas pipeline EIA were also made available for public scrutiny:

a. On 8-13 September 2015, Giprogazcentr JSC published in a series of official federal, regional and local newspapers[665] information on the start of the EIA, including a link to the Terms of Reference for the EIA.[666]

b. On the request of Giprogazcentr JSC, local administrations of the Leninsky District of the Republic of Crimea and the Temryuksky District of the Krasnodar Region arranged the dates and places for the public hearings on the EIA, which they communicated on their websites.[667]

c. On 4-8 October 2015, Giprogazcentr JSC published in a series of official federal, regional and local newspapers 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.[668] The Taman newspaper in particular published information about the hearings both in hard copy and online.[669] The

[662] [redacted] SGM LLC also contracted Production and Research Institute for Engineering Surveys in Construction JSC ("PNIIIS JSC"), a long-established institute in the sphere, to exercise quality control over the entire survey process, including its environmental part. See Agreement No. PNIIS-SGM-07/15 between SGM LLC and PNIIS JSC, 31 July 2015 (**RU-455**).

[663] Agreement No. 4700/1/ETs between Giprogazcentr JSC and Expert Centre LLC, 10 August 2015 (**RU-456**).

[664] [redacted]

[665] Including: publication of the Ministry of Transport of Russia "*Transport Rossii*" No. 37 (896) of 7-13 September 2015; publication of the executive organs of the Republic of Crimea "*Krymskaya Gazeta*" No. 135 (19690) of 11 September 2015; publication of the executive organs of the Krasnodar Region "*Kubanskie Novosti*" No. 137 (5897) of 8 September 2015; publication of the Leninsky District "*Reporter Vostochnogo Kryma*" No. 40 (493) of 11 September 2015; publication of the Temryuksky District "*Taman*" No. 36 (10596) of 10 September 2015. See [redacted]

[666] According to the newspaper notices, the Terms of Reference for the EIA had been available on the then-website of Giprogazcentr JSC (http://гипрогазцентр.рф/) since 10 September 2015: see [redacted]

[667] Resolution of the Administration of the Temryuksky District of the Krasnodar Region No. 738 "Concerning Public Discussions (in the Form of Hearings) on the Environmental Impact Assessment Materials with Regard to the Main Gas Pipeline "Krasnodar Region – Crimea" (to the Extent the Object Runs in the Water Area of the Kerch Strait and Across the Lands of the Zaporozhsko-Tamansky State Zoological Zakaznik of Regional Significance)", 2 October 2015 (**RU-458**); Leninsky District official website, "Public Hearings on the Krasnodar Region - Crimea Gas Pipeline" (**RU-459**).

[668] Including: "*Transport Rossii*" No. 40 (899) of 28 September–4 October 2015; "*Krymskaya Gazeta*" No. 151 (19706) of 6 October 2015; "*Kubanskie Novosti*" No. 152 (5912) of 2 October 2015; "*Reporter Vostochnogo Kryma*" No. 44 (497) of 2 October 2015; "*Taman*" No. 40 (10600) of 8 October 2015. See [redacted]

[669] *Taman*, "The Public to Discuss the Project", 6 November 2015 (**RU-460**). This announcement makes it clear that the scientific community had the opportunity to review the relevant EIA materials. For instance, the online announcement published by the *Taman* newspaper contains comments on the EIA process by Professor V.V. Strelnikov, Head of the Department of Applied Ecology of the Kuban State University, and by Professor L.P. Yarmak, Director of the Research Institute

online announcement was also shared on the Temryuksky District website[670] and prompted online discussion.[671]

d. Public hearings took place on 5 and 9 November 2015 in the Leninsky District and the Temryuksky District, where the public (including the representatives of civil society, academia, and local residents) had the opportunity to give their comments and suggestions.[672]

436. Following the EIA's completion, Rosprirodnadzor conducted a SEER, which it also discussed on its website.[673] Rosprirodnadzor issued its positive expert opinion on the EIA of the gas pipeline on 19 February 2016, as evidenced by its open online registry of SEERs.[674]

2. The Submarine Power Cables Were Subject to an Open and Transparent EIA Process

437. The Federal State Budgetary Institution "Russian Energy Agency" ("Russian Energy Agency") was the contracting authority for the power cable laying project. Centre of Engineering and Management of Construction of the Unified Energy System JSC acted as the general contractor for the project under a contract with the Russian Energy Agency.[675] Sub-contracted to act as the general design organisation for the project, Yuzhenergosetproekt OJSC engaged Dalenergosetproekt OJSC to prepare the EIA materials.[676]

438. The results of the submarine power cables EIA were also made available for public scrutiny:

a. On 19-27 October 2014, a series of official federal, regional and local newspapers published information on the upcoming public hearings, including the dates and places where the hearings took place and the addresses where the EIA materials

of Applied and Experimental Ecology at the Kuban State Agrarian University. Professor Strelnikov discussed the environmental feasibility of the project, acknowledging that the chosen construction option entailed significantly less environmental impact, while Professor Yarmak discussed the main elements and results of the EIA.

[670] Temryuksky District official website, "The Public to Discuss the Project", 7 October 2015 (**RU-461**).

[671] *TemryukInfo*, "Attention! Project to Build a Gas Pipeline to Crimea across Tuzla Lake", 8 November 2015 (**RU-462**).

[672] The public hearings were covered in the local media: for instance, see *Argumenty Nedeli Kerch*, "Gas Pipeline Construction not to Cause Damage to the Kerch Peninsula Environment", 13 November 2015 (**RU-463**); Temryuksky District official website, "The Public has Discussed the Project", 12 November 2015 (**RU-464**).

[673] Federal Service for Supervision of Natural Resources official website, "The Federal Service for Supervision of Natural Resources Starts Environmental Expert Review of Project to Build Main Gas Pipeline to Crimea" (**RU-465**).

[674] Federal Service for Supervision of Natural Resources, "Notice of Results of the 2016 Federal State Environmental Expert Review by the Central Office of the Federal Service for Supervision of Natural Resources", 2016 (**RU-466**).

[675] Letter of the Centre for Engineering and Construction Management of the Unified Energy System JSC No. 40/SD/335, 19 November 2021 (**RU-467**), p. 1.

[676] [redacted]

were available.[677] These notices also included a link to access the EIA materials.[678] The forthcoming hearings in the Temryuksky District were also announced on its website and in the regional media.[679]

b. Public hearings took place on 24 and 28 November 2014 in the Temryuksky District and the Leninsky District, where the public also had an opportunity to give their comments and suggestions.

439. Following the EIA's completion, Rosprirodnadzor conducted a SEER, which was also covered on its website,[680] and issued a positive expert opinion on 23 July 2015.[681]

440. The above demonstrates that the EIAs for the gas pipeline and the submarine power cables were not only undertaken, but received proper expert and public evaluation. Despite the fact that the website of Rosprirodnadzor provides an open registry of all SEERs completed since 2011, and that the EIA process for both projects received much coverage, Ukraine did not even deign to consult the above sources.

E. UKRAINE'S CLAIMS CONCERNING THE FIBRE-OPTIC CABLE SHOULD BE REJECTED

1. Ukraine's Claims concerning the Fibre-Optic Cable Are Belated and Inadmissible

441. In its Memorial, as originally submitted, Ukraine did not take issue with the lack of an EIA in relation to the laying of the fibre-optic cable, confining its case only to "submarine power cables".[682] In the Respondent's submission, Ukraine's introduction of its "fibre-optic cable claim" for the very first time in its Revised Memorial is inconsistent with the Rules of Procedure, therefore inadmissible. Pursuant to Article 13 of the Rules of Procedure, Ukraine was required to "*state the facts*" on which it relies by 19 February 2018. The Tribunal's

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[677] Including: publication of the Government of the Russian Federation "*Rossiyskaya Gazeta*" No. 242 (6514) of 23 October 2014 and No. 245 (6517) of 27 October 2014; "*Kubanskie Novosti*" No. 173 (5720) of 21 October 2014; publication of the executive organs of the Republic of Crimea "*Krymskie Izvestiya*" No. 214 (5625) of 25 October 2014; "*Taman*" No. 106 (10550) of 13-19 October 2014 and No. 107 (10551) of 20-26 October 2014. See Newspaper Publications Containing Notices of Public Hearings on the Submarine Power Cables EIA (**RU-468**).

[678] According to the published notices, the EIA materials were available on the then-website of Yuzhenergosetproekt OJSC (http://uesp.ru/download/ovos.pdf), see *Ibid*.

[679] Resolution of the Administration of the Temryuksky District of the Krasnodar Region No. 2109 "Concerning Public Hearings on the Environmental Impact Assessment Materials with Regard to the Construction of the Electric Power Supply Bridge "Russian Federation – Crimean Peninsula", Cable Crossing Across the Kerch Strait", 11 November 2014 (**RU-469**); *Kuban RBK*, "A Submarine Cable Crossing from the Krasnodar Region to Crimea Will Cost RUB 13.5 Billion", 23 October 2014 (**RU-470**).

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

[681] As provided in Rosprirodnadzor's open registry of SEERs: Federal Service for Supervision of Natural Resources, "Notice of Results of the 2015 Federal State Environmental Expert Review by the Central Office of the Federal Service for Supervision of Natural Resources", 2015 (**RU-473**).

[682] Original memorial of Ukraine, paras. 181, 192, Map 11 on p. 85; *cf.* Map 1 on p. 8 of [redacted] Report.

permission for Ukraine to revise its Memorial did not amend this Rule. In the circumstances, Ukraine's claims concerning the fibre-optic cable are belated and should not be allowed to proceed.

2. The Russian Federation Was Not Required under UNCLOS to Assess Potential Effects of the Laying of the Fibre-Optic Cable

442. Ukraine insists that the Russian Federation laid the undersea fibre-optic communication cable without adequately assessing its impact on the marine environment.[683] Ukraine's claim is predicated on the proposition that an EIA would have been required for this project.[684]

443. According to Article 206 of UNCLOS, a State should conduct assessments when they "have reasonable grounds for believing" that planned activities may cause substantial pollution of or significant and harmful changes to the marine environment. However, what constitutes "reasonable grounds" is not spelled out in Article 206 and remains subject to the State's evaluation.[685] To substantiate its position, Ukraine would have to demonstrate that the Respondent's decision-making in this regard was beyond the ambit of the wide discretion UNCLOS grants to State Parties as to whether a particular activity requires an assessment. Ukraine has abjectly failed to make its case out on this point.

444. Russian legislation does not require conducting an EIA for laying of fibre-optic communication cables. The laying of communication cables (including fibre-optic)[686] in the Russian territorial sea and internal waters is regulated by the Federal Law on Communication that delegates the power to adopt relevant rules to the Russian Government.[687] The Resolution adopted by the Government does not require conducting an EIA or SEER to obtain a permit for laying of communication cables in the territorial sea and internal waters.[688] This contrasts with a Regulation for laying of pipelines and power cables in the territorial sea and internal waters that requires conducting an EIA and SEER, but explicitly states that it does not apply to laying of communication cables.[689] In furtherance of this approach, the Ministry of Natural Resources and Environment equally does not name the EIA and SEER reports among the requisite

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[683] URM, paras. 183-184.

[684] *Id.,* para. 198.

[685] This discretionary element was pointed out by the Tribunal in the *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016 (**UAL-11**), para. 948.

[686] Fibre-optic cables are considered as "communication lines" in accordance with Article 2(7) of Federal Law No. 126-FZ "On Communications", 7 July 2003 (**RU-474**) (see Letter of the Ministry of Communications and Mass Media of the Russian Federation No. P12-7172-OG "On Communication Lines", 14 April 2015 (**RU-475**)).

[687] Federal Law No. 126-FZ (**RU-474**), Article 9.

[688] 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 (**RU-476**), para. 8.

[689] Resolution of the Government of the Russian Federation No. 68 "Approving the Procedure for the Laying of Submarine Cables and Pipelines in the Internal Sea Waters and Territorial Sea of the Russian Federation", 26 January 2000 (**RU-477**), paras. 1, 6(1).

documents for issuing a permit for laying of communication cables in the territorial sea and internal waters.[690]

445. The Russian legislation on this matter is in line with international standards. It is common practice to distinguish between power cables and telecommunication cables for the purposes of an EIA, given their different functions, technical characteristics and environmental impacts.[691] The relevant scientific literature conclusively demonstrates that EIAs are typically not required for laying of fibre-optic submarine cables, as such projects have minor impact on the marine environment.[692] The International Cable Protection Committee, a union comprising 97% of the world's subsea telecom cables,[693] confirms this position.[694] Moreover, no international instrument related to EIA (which, for the avoidance of any doubt, should not be viewed as standards of compliance with Article 206) lists fibre-optic and other communication cables among the projects requiring an EIA.[695] Indeed, it is widely accepted that the installation and operation of fibre-optic cables has a record of little or no harm to the marine environment,[696] even when cables are damaged.[697]

446. Finally, Ukraine once again takes a key infrastructure project out of its context. The laying of the fibre-optic cable started shortly after Crimea's reunification with Russia. Securing access

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[690] 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 (**RU-478**), para. 28.

[691] OSPAR Commission, *Guidelines on Best Environmental Practice (BEP) in Cable Laying and Operation*, 2012 (**RUL-109**), p. 2: "As a matter of principle, a distinction should be made between power cables and telecommunication cables on the basis of their different functions, technical characteristics and environmental impacts."

[692] D. Burnett, R. Beckman, T. Davenport, *Submarine Cables: the handbook of Law and Policy,* Martinus Nijhof Publishers, 2014 (**RUL-110**), p. 201: "Given the relatively benign nature of submarine cables and cable operations, including the fact that they do not cause significant harm to the marine environment, there are grounds for arguing that there is no obligation to require an EIA." l. Carter, D. Burnet , S. Drew, *Submarine Cables and the Ocean Connecting the World*, UNEP-WCMC Biodiversity Series No. 31., 2009 (**RU-479**), p. 54: "As outlined in this report, the weight of evidence shows that the environmental impact of fibre-optic cables is neutral to minor." International Seabed Authority, *Submarine Cables and Deep Seabed Mining Advancing Common Interests and Addressing UNCLOS "Due Regard" Obligations*, ISA TECHNICAL STUDY: No. 14, 2015 (**RUL-111**), p. 47: "A substantial peer-reviewed literature shows conclusively that submarine telecommunications cables have nil to minimal impact on the marine benthic environment." D. Burnett, D. Freestone, T. Davenport, *Workshop Report, Submarine Cables in The Sargasso Sea: Legal And Environmental Issues in Areas Beyond National Jurisdiction*, 16 January 2015 (**RU-480**), p. 3: "The environmental impact of submarine communications cables on the marine environment in the deep ocean is minimal and this is evinced by a range of peer-reviewed scientific reports."

[693] The website of the organisation is available at: https://www.iscpc.org/.

[694] International Cable Protection Committee, *Submarine Cables and BBNJ*, 29 August 2016 (**RU-481**), slides 17, 52: "Cables have statistically no effect on the abundance and diversity of seabed organisms. On the basis of present knowledge, telecommunications cables have little effect on the deep ocean environment – a conclusion shared by other studies"; "Based on scientific review and history, EIAs are not normally required for laying fibre optic submarine cables in international waters."

[695] See, for instance, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), 25 February 1991 (**RUL-112**), Appendix I; Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment (**RUL-113**), Annex I; Protocol on Environmental Impact Assessment in a Transboundary Context to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea, 20 July 2018 (**RUL-114**), Annex I.

[696] *ECO Magazine*, "Sustainable Development: Submarine Cables in the Marine Environment", November-December 2016 (**RU-482**), p. 3: "Submarine cables and marine protected areas are not mutually exclusive; fiber optic cables already exist in such areas with a record of little or no harm, a point that contrasts with other ocean uses (shipping, fishing, oil and gas exploitation, and deep sea bed mining) that impact the marine environment."

[697] *Id.,* p. 2: "When a cable is damaged, unlike a pipeline, there is no pollution or oil spill, just lost communication."

to internet connection serves the essential needs of modern society. Establishing a new, direct channel of communication with Crimea, instead of using the infrastructure of foreign telecommunications companies, was a security issue for the Russian Federation and residents of Crimea.

II. The Russian Federation Did Not Violate Articles 204 and 205 of UNCLOS

447. Ukraine accuses the Russian Federation of failing to monitor the risks and effects of Construction Projects on the marine environment. It is common ground, however, that the Russian Federation has conducted environmental monitoring of the Kerch Bridge construction and operation, as well as published its results, as required under Articles 204 and 205 of the Convention.[698] The nub of Ukraine's case is, however, that the environmental monitoring has not been *"adequate"*,[699] or that it has not been conducted in a "*scientifically recognized manner*".[700] Ultimately, Ukraine expects the Tribunal to conduct a review of the scientific soundness of environmental monitoring performed by the Russian authorities. However, to proceed in the manner Ukraine suggests would be contrary to UNCLOS and clearly exceed the remit of the Tribunal (**Sub-Section A).**

448. Nevertheless, as a matter of fact, the Russian Federation has ensured robust environmental monitoring in relation to the Kerch Bridge (**Sub-Section B**) and gas pipeline and power cables (**Sub-Section C**). Apart from the project-specific monitoring, the Russian Federation conducts a state-sponsored monitoring that Ukraine completely ignored (**Sub-Section D**). In further compliance with Article 204, Russian state agencies vigilantly supervised the Bridge's construction (**Sub-Section E**). Finally, the scope of published monitoring results clearly indicates Russia's compliance with Article 205 (**Sub-Section F**).

A. Ukraine's Claims Do Not Meet the Standards of Review Established by Article 204

449. Ukraine fails to apply properly the pleading standard under Article 204 of UNCLOS. For Ukraine's case on this point to succeed, Ukraine would have to demonstrate that the Russian Federation has failed to "endeavour, as far as practicable" to carry out environmental monitoring. The phrase "endeavour" indicates that the obligation in question is not one of result, but one which has to be assessed on a "best effort" basis.[701] In other words, the Russian Federation has no obligation to *monitor* the environmental consequences of the Projects under UNCLOS. Its obligations are confined to *endeavouring*, *as far as practicable,* to monitor the risks or effects of pollution. Notably, the "as far as practicable" reference did not appear in the

[698] [redacted] Report, paras. 212-213.

[699] URM, paras. 231, 241.

[700] *Id.,* Chapter Six, heading of Section II.A.3.

[701] A. Proelss (ed.), "Protection and Preservation of the Marine Environment" in *United Nations Convention on the Law of the Sea: A Commentary*, München: Nomos Verlagsgesellschaft, 2017 (**RUL-115**), p. 1360, referencing to *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015 (**RUL-85**), para. 539.

original draft of the Convention. It was inserted, upon a proposal by Kenya, precisely in order to allow more flexibility in implementing the Convention.[702]

450. Even if Ukraine presented evidence that such monitoring was incomplete or inaccurate (which, for the avoidance of any doubt and as will be explained below, is not the case), that would still not amount to a breach of Article 204 of UNCLOS, absent a discrete showing that the Russian Federation has also failed to comply with its best effort obligations.

451. Consequently, the legally relevant question in determining whether a State has complied with Article 204 is not whether a *particular* scientific method was or was not applied (let alone whether any such method was applied entirely correctly); but whether an "endeavour, as far as practicable" has been undertaken to carry out environmental monitoring. On this test, however, Ukraine and its expert revealingly have nothing to say.

452. In any event, the Russian Federation's environmental monitoring has exceeded, by far, what Article 204 of UNCLOS actually requires. The balance of this section provides a general account of the environmental monitoring undertaken and rebuts the particular factual allegations made in Ukraine's Revised Memorial on this point.

B. The Russian Federation Has Ensured Robust Environmental Monitoring of the Kerch Bridge

453. Quite apart from the above threshold points, Ukraine anyway does not make its case out on the Kerch Bridge environmental monitoring. To begin with, it is uncontroversial that Ukraine has *not* reviewed the monitoring documentation prepared for the Kerch Strait Bridge construction. It is therefore unclear on what basis Ukraine (and for that matter its expert, [redacted]) jump to conclusory assertions as to the *adequacy* of environmental monitoring. [redacted] appears all too willing to draw definitive conclusions without in fact conducting a substantive review of any actual documents of the environmental monitoring.

454. Exhibited with this submission, the Russian Federation provides the documentary record of the particular monitoring exercises related to the Kerch Bridge [redacted] takes issue with (by way of "illustration"), for the first, second, third and fourth quarters of 2017, which demonstrates that the environmental monitoring was robust and adhered to the generally applicable – and scientifically *not* contested – approach to environmental monitoring under the applicable law.[703]

[702] A. Proelss, *United Nations Convention on the Law of the Sea: A Commentary* (**RUL-115**), p. 1362.

[703] First quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (**RU-142**); Second quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (**RU-139**); Third quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (**RU-143**); Fourth quarter 2017 Report on Environmental Monitoring of the Kerch Bridge construction (**RU-290**).

455. The following Sub-Section rebuts the arguments of Ukraine on the supposed "inadequacy" of the Kerch Bridge environmental monitoring.

1. Contribution of Prominent Russian Scientific Institutes

456. The Kerch Bridge EIA envisaged a programme of environmental monitoring designed specifically for the Kerch Bridge construction and operation ("Monitoring Programme")[704] that has been successfully implemented by the Institute of Land-Use Ecology LLC ("Institute of Ecology").[705] [redacted], a senior manager of the Institute of Ecology, explained that the most prominent and reputable Russian researchers and practitioners contributed to the development of the EIA, and the Monitoring Programme in particular.[706] The Programme then received approval of Rosprirodnadzor in the course of the SEER.[707] When the construction works started, environmental monitoring was carried out by "the most reputable, renowned and respected Russian research institutions".[708]

457. This collaboration between renowned scientific institutions guaranteed – and should serve in these proceedings as *prima facie* evidence of – the observance of "accepted scientific methodologies" in the development and implementation of the Monitoring Programme. Ukraine's baseless attempts to discredit these processes (and a considerable number of reputable experts involved) should find no traction with the Tribunal.

2. Content of the Monitoring Programme

458. The Monitoring Programme prescribed the preparation of quarterly environmental monitoring reports during the construction and operation of the Bridge.[709] [redacted] describes the Monitoring Programme providing relevant maps and tables of controlled parameters.[710] Particularly, the Institute of Ecology carried out monitoring in three areas of the Kerch Strait:

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[704] Kerch Bridge Environmental Monitoring Programme (**RU-133**), pp. 81-148, 316-328.

[705] On 26 May 2015, SGM-Most LLC – a subcontractor responsible for the Kerch Bridge construction – commissioned the Institute of Ecology to perform the Monitoring Programme. The Institute of Ecology has been conducting the environmental monitoring for the Kerch Bridge ever since. See [redacted] Statement, para. 109.

[706] See [redacted] Statement, paras. 9-11. Particularly, the following institutes were involved: the State Institute of Environmental Geoscience of the Russian Academy of Sciences, the Clean Seas International Environmental Fund; the Laboratory of the State Institution "Hydrometeorological Centre" (the leading research institute in hydrometeorology in Russia), the All-Russian Research Institute "Ecology" (the oldest Russian institute in environmental protection), the Shirshov Institute of Oceanology of the Russian Academy of Sciences (the oldest and largest research centre in oceanology), the Lomonosov Moscow State University (the leading university in the country), the All-Russian Research Institute of Fisheries and Oceanography ("VNIRO") and the Azov Research Institute of Fisheries ("AzNIIRKh") (the main research institutes studying the fisheries in the Sea of Azov and Black Sea).

[707] See para. 369 above.

[708] See [redacted] Statement, paras. 13-15. For instance, for the monitoring of the aquatic area, the Institute of Ecology sub-contracted VNIRO (the main research institute of the fishing industry in Russia) and AzNIIRKh (the main research institute of Russia in studying the Sea of Azov and Black Sea basins).

[709] Kerch Bridge Environmental Monitoring Programme (**RU-133**), pp. 316-328.

[710] [redacted] Statement, paras. 104 – 108. Ms [redacted] explained that following the examination of these materials, "anyone can get a full picture of the performed environmental monitoring".

(1) in the vicinity of the construction site; (2) in the area of water outlets discharging treated water from the local treatment facilities; (3) in the protected area of the Zaporozhsko-Tamansky Nature Reserve.[711]

459. The Monitoring Programme provided, in particular, for the sampling and analysis of water and bottom sediments and monitoring of aquatic bioresources.[712] Moreover, additional meteorological stations were set up at the construction site to ensure continuous hydrometeorological monitoring.[713] These are indeed appropriate components of what Ukraine's expert himself describes as an "adequate" monitoring system.[714] [redacted] reviewed the Monitoring Programme, compared it with what [redacted] considers an "adequate monitoring system" and concluded that the Monitoring Programme fully corresponds to [redacted] criteria.[715]

460. Criticising the publications that [redacted] deemed to be monitoring reports, Ukraine also noted two supposed drawbacks of the Monitoring Programme. First, Ukraine takes issue with the frequency of aquatic bioresources monitoring and its expert insists that "[t]ri-annual monitoring is insufficient".[716] Contrary to Ukraine's position, [redacted] insists that winter monitoring of aquatic bioresources was unnecessary and could accomplish little, as none of the key fish species migrates through the Kerch Strait in the winter season.[717]

461. Second, Ukraine and [redacted] suggest that bottom sediments monitoring should have been conducted "on a continual basis".[718] [redacted] disagrees with the need for a continuing monitoring noting that Russian regulations on bottom sediments monitoring require only tri-annual sampling,[719] because a sharp change in the concentration of pollutants is not typical of bottom sediments.[720] [redacted] explained that experts of the Azov Research Institute of Fisheries ("AzNIIRKh") sampled bottom sediments three times a year in the construction area and the Nature Reserve's territory and four times a year in the area of water outlets.[721] Overall, considering together the quarterly sampling near the water outlets and tri-

[711] [redacted] Statement, paras. 106-107.

[712] *Id.*, paras. 116, 120, 121, 125, 129-134.

[713] [redacted] Report, Addendum A, response to paras. 187, 192-193 of [redacted] Report, relying on *RIA News Crimea*, "Crimean Bridge Builders to be the First to Know if Storm is Coming", 15 October 2015 (**RU-288**).

[714] [redacted] Report, paras. 191-201.

[715] [redacted] Report, paras. 148-150 and Addendum A.

[716] URM, para. 240; [redacted] Report, para. 230.

[717] [redacted] Report, para. 154.

[718] URM, para. 240, [redacted] Report, para. 225.

[719] Order of The Ministry of Natural Resources and Environment of The Russian Federation No. 112 "Methodological Guidelines on State Monitoring of Bodies of Water in Terms of Organising and Exercising Supervision over Concentration of Contaminants in Bottom Sediments of Bodies of Water", 24 February 2014 (**RU-286**), para. 29 and Appendix 4.

[720] [redacted] Report, para. 152.

[721] [redacted] Statement, paras. 127-128.

annual sampling in other parts of the Kerch Strait, [redacted] concluded that the frequency of bottom sediments monitoring was adequate.[722]

3. *Implementation of the Monitoring Programme*

462. Upon the conclusion of each quarterly monitoring, the Institute of Ecology compiled reports on the results of environmental monitoring ("EM Reports") described by [redacted] as "enormously extensive documents".[723] Based on the EM Reports, every quarter, the Taman Highways Administration published on its website brief results of environmental monitoring.[724] The EM Reports were also quarterly submitted to the Ministry of Natural Resources and Environment of the Russian Federation and Rostekhnadzor, the Russian supervisory body.[725]

463. [redacted] appears to have proceeded on an incorrect (and the Respondent submits – indefensible) assumption that the public *summaries* of the EM Reports represent the totality of the relevant materials. The documents exhibited with Ukraine's Revised Memorial are publications of the Taman Highways Administration containing brief results of the environmental monitoring ("EM Summaries").[726] These documents were not intended, and under the applicable 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. Nor is it expected from the EM Summaries to provide a springboard for reflection on the EM Reports by the scientific community.

464. Since Ukraine purported to "illustrate" the supposedly deficient content of and methodologies underpinning the EM Reports through the example of the 2017 quarterly EM Summaries,[727] [redacted] was instructed to consider in detail the merits of Ukraine's (and [redacted]) criticism generally, and with particular references to the 2017 quarterly EM Reports.[728]

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[722] [redacted] Report, para. 153.

[723] [redacted] Statement, para. 112. As [redacted] explained, following the completion of, for instance, the second quarter 2017 monitoring alone, the Institute of Ecology compiled an EM Report comprising six volumes with detailed monitoring information.

[724] *Id.*, para. 111.

[725] *Id.*, para. 110.

[726] Russian Federal Highways Administration, Results of Environmental Monitoring Over the First Quarter of 2017 at the Site of the Construction of the Bridge to Crimea (**UA-747**), Russian Federal Highways Administration, Comparative Analysis of Environmental Monitoring Findings in Relation to the Crimea Bridge Construction Site for 2016 Quarter 4 against Previous Periods (21 February 2017) (**UA-756**), Russian Federal Highways Administration, Results of Environmental Monitoring Over the Third Quarter of 2017 at the Site of the Construction of the Bridge to Crimea (**UA-757**), Russian Federal Highways Administration, Results of Environmental Monitoring Over the Fourth Quarter of 2017 at the Site of the Construction of the Bridge to Crimea (**UA-758**), Russian Federal Highways Administration, Results of Environmental Monitoring Over the Second Quarter of 2017 at the Site of the Construction of the Bridge to Crimea (**UA-759**).

[727] [redacted] Report, paras. 217-257.

[728] While Ukraine and [redacted] allege various deficiencies of monitoring in respect of atmospheric air, onshore soil, animal kingdom, avifauna or the use of compensation sites, [redacted] was not instructed to consider these aspects, as none of them pertains to the "*marine*" environment and, accordingly, falls within the ambit of Article 204 of UNCLOS. On its plain

465. At the outset, Ukraine alleged that the environmental monitoring proceeded without reliable and contemporaneous baseline data.[729] Contrary to Ukraine's allegations and as explained above,[730] 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.[731]

466. Ukraine and [redacted] complained that the EM Summaries "contain only generalizations and basic, stated conclusions [with] a minimal amount of relevant or useable […] data presented."[732] [redacted] reviewed the 2017 EM Reports with underlying materials and confirmed that [redacted] points of criticism are baseless.[733] As [redacted] explains, the EM Reports 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.[734] Hence, Ukraine's argument on the alleged scarcity of information does not hold water.

467. Moreover, Ukraine's allegation that the EM Summaries contain "unsubstantiated conclusions"[735] is made out of thin air. Ukraine and its expert find fault with ordinary findings that "certain pollutants were detected"[736] and that their concentrations were "on average" below the maximum allowable concentrations "at most" of the stations.[737] In the view of Ukraine, these findings are not in line with a conclusion on the absence of significant impact on the ecosystem.[738] As Ukraine relies on the EM Summaries instead of the EM Reports, these speculations are meaningless. The EM Reports contain a detailed substantiation of the conclusions reached.[739] For the sake of completeness, the Russian Federation provides the Tribunal with the relevant EM Reports.[740]

468. Furthermore, [redacted] failed to demonstrate a basic awareness of fundamental Russian environmental regulations. In respect of [redacted] remark that "maximum tolerable or acceptable limits", against which the results of monitoring should be contrasted, are "undefined", [redacted] notes that these limits are "basic mandatory environmental

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reading, Article 204 is *not* intended to apply to any and all effects on or pollution of the environment. Ukraine's attempt to expand the reach of Article 204 is misconceived.

[729] URM, para. 236.

[730] See Chapter 6, Section I, Sub-Section C.2 above.

[731] See, for instance, First quarter 2017 Monitoring Report (**RU-142**), p. 111.

[732] URM, para. 234.

[733] [redacted] Report, paras. 148-150 and Addendum B.

[734] *Ibid*.

[735] URM, 238-239.

[736] *Id.*, para. 238.

[737] *Id.*, para. 239.

[738] *Ibid*.

[739] [redacted] Report, Addendum B, response to para. 227 of [redacted] Report.

[740] See First quarter 2017 Monitoring Report (**RU-142**), pp. 112-122; Third quarter 2017 Monitoring Report (**RU-143**), pp. 160-174, Fourth quarter 2017 Monitoring Report (**RU-290**), pp. 272-286.

standards applicable in Russia" that are public and should have been accessible (or indeed familiar) to [redacted] given his work experience in the Russian jurisdiction.[741] [redacted] also stresses that the maximum acceptable concentration is a "pivotal term in Russian environmental science", its values were established by the Russian state agencies and, therefore, anyone can access them.[742]

469. Similarly, Ukraine and [redacted] argued that the hydrochemical index of water pollution ("WPI") classification (such as "clean" or "moderately polluted") is "meaningless without a scale against which to judge [it]".[743] The programme of environmental monitoring for the Kerch Bridge clearly defines the WPI classification used by the Institute of Ecology.[744] As [redacted] explains, "[t]he WPI is a fundamental indicator of water quality generally recognised in post-Soviet countries. It is virtually impossible to deal with the protection of the marine environment in Russia and to be unaware of the WPI [classification]."[745] Yet, Ukraine – putting words in the mouth of its own expert – argues that conclusions drawn from the (supposedly "generalized") WPI classification are "unscientific".[746]

470. Finally, Ukraine and [redacted] constantly bemoan that the sampling or analysis methodologies used are unclear.[747] However, the Monitoring Programme and EM Reports extensively describe the sampling and measurement methodologies followed in compliance with respective standards.[748] The standards in question are available for experts (or indeed members of the public) to consult and widely known and relied upon by members of the scientific community in the Russian Federation.[749] For instance, while [redacted] opines that sampling methodologies in respect of the assessment of surface water quality are not provided,[750] official and public state standards (the "GOST" standards) provide the relevant framework of analysis and were indeed applied in the EM Reports.[751] Thus, the relevant national standards unequivocally provide the applicable methodologies for various aspects of

[741] [redacted] Report, Addendum B, response to para. 215 of [redacted] Report.

[742] [redacted] Statement, para. 77.

[743] URM, para. 239, referring to para. 221 of [redacted] Report.

[744] Kerch Bridge Environmental Monitoring Programme (**RU-133**), pp. 103-107.

[745] [redacted] Report, para. 72.

[746] URM, para. 239.

[747] *Id.*, para. 237.

[748] [redacted] Statement, para. 115; [redacted] Report, Addendum B, responses to paras. 220, 226 referring to relevant documentation.

[749] Sampling and analysis were carried out in accordance with relevant ISO standards, Russian State Standards (the "GOST" standards approved by the Federal Technical Regulation and Metrology Agency), Guideline Documents (approved by Rosgidromet) and Procedures of Measurements (approved by organisations accredited by the Federal Service for Accreditation). See [redacted] Statement, para. 115.

[750] [redacted] Report, para. 220.

[751] For surface water sampling, relevant standards were GOST 318681-2012 and GOST 17.1.5.01-80. See [redacted] Report, Addendum B, response to para. 220 of [redacted] Report.

environmental monitoring. Ukraine presents no evidence to cast a scintilla of doubt on the applied standards being consistent with accepted scientific methodologies.

471. Overall, [redacted] failed to show the basic knowledge of the Russian environmental standards and regulations. This failure is also married to [redacted] confusion between the EIA and SEER processes.[752] As if that were not enough, it is worrisome that [redacted] is ready to jump to hasty or, at times, absurd conclusions[753] or comment on the Bridge engineering issue that clearly goes beyond the scope of his expertise. With due regard to this pattern of intentional or unintentional mistakes, the Tribunal should attach little weight to the [redacted] Report, at least in the part concerning the Kerch Bridge environmental monitoring.

472. As is clear from the above, no Ukraine's point of criticism remains standing. The Kerch Bridge monitoring was designed and implemented with the involvement of the renowned Russian scientific institutes. The Monitoring Programme covers all necessary environmental aspects and provides for the adequate monitoring frequencies. Ukraine's criticism of the EM Summaries proves nothing, as these publications cannot be required to contain information that [redacted] expects to find, while the analysis of the EM Reports clearly indicates that the EM Reports contain all necessary data. Finally, the Russian environmental regulations set forth all standards and methodologies that [redacted] woefully considered undetermined.

C. The Russian Federation Ensured Environmental Monitoring of the Undersea Gas Pipeline and Power Cables

473. Ukraine claims the absence of monitoring in respect of the undersea gas pipeline and power cables.[754] These allegations could not be further from the truth.

474. 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.[755] The monitoring, *inter alia,* included observation of marine water and bottom sediments, marine biota, and the geological environment, which is confirmed by the monitoring materials.[756] The environmental monitoring of the submarine power cables was carried out by the Clean Seas International Environmental Fund ("Clean Seas Fund") in compliance with the monitoring requirements contained in the EIA.[757] AzNIIRKh also participated in the monitoring, in

[752] See para. 353 above.

[753] Take, for instance, his statement that ice dams could "prevent the migration of certain species entirely" (see [redacted] Report, para. 112) discussed in para. 398 above.

[754] URM, para. 232.

[755] See [redacted]

[756] See the Table of Contents and summary materials provided in the Summary Report on Environmental Monitoring of the Main Gas Pipeline "Krasnodar Region – Crimea" Construction, Book 1, Textual section, U-19/16-SO-PEM, 2017 (**RU-483**).

[757] See [redacted]

particular, in relation to ichthyologic studies.[758] The monitoring reports issued by the Clean Seas Fund confirm that it monitored, *inter alia*, marine water, bottom sediments, and aquatic bioresources through sampling and laboratory studies.[759]

475. Exhibited with this submission, the Russian Federation supplies the relevant monitoring materials summarising the extent of the monitoring efforts in respect of the undersea gas pipeline and power cables.[760]

D. THE RUSSIAN FEDERATION HAS AN EFFECTIVE SYSTEM OF STATE-SPONSORED SITE-SPECIFIC ENVIRONMENTAL MONITORING

476. The Russian Federation has a system of state environmental monitoring of the Kerch Strait area that had been carried out prior to and during the construction of the Projects and presently continues. As will be shown below, the Russian scientific institutes regularly publish the monitoring results and share them with Ukraine. Ukraine cannot but be aware of these extensive monitoring activities. Instead, Ukraine preferred to stay silent on the state monitoring, ignoring an enormous elephant in the room.

1. Environmental Monitoring Carried Out by the Zubov Institute

477. In the Russian Federation, the State Directorates for Hydrometeorology and Monitoring of Environment[761] conduct continuous environmental monitoring. The Directorates collect raw data and transfer it to scientific institutes for the latter to process the materials and prepare monitoring reports. The Zubov Institute prepares annual reports on the marine water quality, including the quality of the water in the Kerch Strait. As is clear from the annual reports, the Zubov Institute evaluates the results of weekly water monitoring and publishes its findings.[762] While these annual reports are publicly available online,[763] Ukraine and its expert have failed to reference them.

478. By way of illustration, the Russian Federation exhibits with this submission the environmental raw data collected in the northern part of the Strait in 2017[764] and an excerpt from the table with information collected on 25 April 2017 and 3 May 2017.[765] On the basis of

[758] For the full list of contractors see Final Report on Environmental Monitoring of the Electric Power Supply Bridge "Russian Federation – Crimean Peninsula" Construction, 28 December 2016 (**RU-484**), p. 3.

[759] See *Id.,* pp. 2, 4-5 containing the relevant Table of Contents and summary materials.

[760] *Ibid.*; Summary Report on Submarine Gas Pipeline Monitoring (**RU-483**).

[761] The Directorates are state institutions subordinate to the Federal Service for Hydrometeorology and Environmental Monitoring of Russia (Rosgidromet).

[762] See, for instance, Zubov State Oceanographic Institute, 2016 Report on Marine Water Pollution (**RU-250**), p. 67; Zubov State Oceanographic Institute, 2019 Report on Marine Water Pollution (**RU-251**), p. 71.

[763] 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.

[764] Table on the results of the Zubov Institute's 2017 monitoring in the Kerch Strait (**RU-485**).

[765] Table on the results of the Zubov Institute's monitoring in the Kerch Strait carried out from 25 April 2017 to 3 May 2017 (**RU-486**).

the monitoring results, the Zubov Institute confirmed that "the quality of water in the Kerch Strait cannot be asserted to have degraded", the monitoring results are consistent with the outcome of assessments over the last decades and the data do not indicate any changes that would correlate with the construction of the Projects.[766]

479. On top of that, the Zubov Institute additionally monitored the Kerch Strait environment in the context of the "EMBLAS-II Project", where Ukraine as well participated, implemented under the aegis of the European Union and the United Nations Development Programme.[767] The monitoring results were published on the website of the EMBLAS Project[768] and were subject to scientific analysis and scrutiny.[769] The Zubov Institute transferred the monitoring results to the Black Sea Commission data centre located in Odessa (Ukraine)[770] and the raw data are still available online in the Black Sea database.[771]

480. As is clear from the EMBLAS-II Monitoring Reports, the Zubov Institute conducted weekly monitoring in the Kerch Strait in 2016 and 2017 as well as carried out large-scale sampling throughout the whole area of the Kerch Strait in August 2016.[772] Notably, EMBLAS-II Monitoring is a separate type of monitoring activities that the Zubov Institute conducted independently from the environmental monitoring related to the Construction Projects and state monitoring reflected in its annual reports described above.

2. State Environmental Monitoring of Aquatic Bioresources

481. In addition to the water quality monitoring, the Russian Federation has a system of state environmental monitoring of aquatic bioresources. AzNIIRKh carries out this type of monitoring in the Sea of Azov and Black Sea on a regular basis.[773] For the purposes of illustration and considering the volume of the monitoring reports, the Russian Federation

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[766] Letter of the Zubov State Oceanographic Institute No. 956, 23 December 2021 (**RU-487**), paras. 1.5, 1.7 and 1.8.

[767] See description of the EMBLAS-II project on its website: https://emblasproject.org/activities.

[768] EMBLAS Project, Scientific Report - 12-Months Monitoring Studies in Georgia, Russian Federation and Ukraine, 2016-2017, publicly available at: https://emblasproject.org/wp-content/uploads/2019/07/EMBLAS-II_NPMS_12_months-2016_2017_FinDraft2.pdf, pp. 110-120

[769] EMBLAS Project, Scientific Report – Joint Black Sea Surveys 2016, publicly available at: https://emblasproject.org/wp-content/uploads/2018/08/EMBLAS-II_NPMS_JOSS_2016_ScReport_Final3.pdf; See also EMBLAS Project, Scientific Report – Joint Black Sea Surveys 2017, publicly available at: https://emblasproject.org/wp-content/uploads/2019/07/EMBLAS-II_NPMS_JOSS_2017_ScReport_FinDraft2.pdf, pp. 326-328.

[770] Opinion of the Zubov State Oceanographic Institute (**RU-274**), p. 3.

[771] The database is publicly available at: http://blackseadb.org/.

[772] EMBLAS Project, Scientific Report - 12-Months Monitoring Studies in Georgia, Russian Federation and Ukraine, 2016-2017, publicly available at: https://emblasproject.org/wp-content/uploads/2019/07/EMBLAS-II_NPMS_12_months-2016_2017_FinDraft2.pdf, pp. 110-120; EMBLAS Project, Scientific Report – Joint Black Sea Surveys 2016, publicly available at: https://emblasproject.org/wp-content/uploads/2018/08/EMBLAS-II_NPMS_JOSS_2016_ScReport_Final3.pdf, pp. 23-26;

[773] AzNIIRKh also acted as a subcontractor for the Institute of Ecology in performing the environmental monitoring for the Kerch Bridge and the submarine power cables. For the avoidance of doubt, the state environmental monitoring of aquatic bioresources is ordered by the Federal Agency for Fishery and performed separately from and in addition to the monitoring related to the Construction Projects.

provides the Tribunal with the results of the monitoring with regard to Azov anchovy[774] – a sub-species of anchovy that Ukraine's expert, [redacted], focused on.[775]

482. Ukraine's deliberate failure to address this type of monitoring is disingenuous, since Ukraine was perfectly aware of its results: the Russian Federation provided them to Ukraine within the framework of the RUC. For instance, the protocol to the 2016 RUC session unequivocally confirms that Russia shared the results of state monitoring of aquatic bioresources in the Kerch Strait with Ukraine, and the RUC – including Ukraine's representatives – referred directly to the environmental measures and monitoring of the Russian authorities:

> "[The RUC] took notice of information provided by the Russian Side on the results of environmental monitoring performed by AzNIIRKh in the Sea of Azov, which has revealed no significant negative impact on the quantity, distribution, migration, quality and breeding of aquatic biological resources, their habitats and fish forage resources. […] The ichthyologic monitoring data indicate that the Azov and Black Sea fish species freely migrate between the Azov and Black Seas, which is also collaborated by the fishery statistics showing an increase in production of the Black Sea fish species (horse mackerel, goatfish, garfish, mullet: golden grey mullet and flathead grey mullet) in 2016 against 2015 and 2014."[776]

483. Finally, Russia monitors the state of aquatic bioresources through a system of automated fisheries monitoring. The Russian legislation sets forth that all fishing vessels in the Sea of Azov and Kerch Strait must regularly transmit information on the amount of harvested fish to the Azov-Black Sea Territorial Directorate of the Federal Agency for Fishery.[777] The Directorate exchanges this information with Ukraine on a weekly basis, which is reflected in the RUC protocols as well.[778]

484. Ukraine did not deign to reference any of these monitoring and cooperation efforts in its submissions.

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[774] Azov Research Institute of Fisheries, Report on 2016 State Monitoring of Aquatic Biological Resources (**RU-488**); Azov Research Institute of Fisheries, Report on 2020 State Monitoring of Aquatic Biological Resources (**RU-489**).

[775] Expert Report of [redacted], paras. 44-50.

[776] Minutes of the 2016 RUC session (**RU-385**), para. 5.6.

[777] Order of the Ministry of Agriculture of the Russian Federation No. 293 "Approving Fishing Rules for the Azov and Black Sea Fishery Basin", 1 August 2013 (**RU-490**), para. 9.1; Resolution of the Government of the Russian Federation No. 994 "Approving Regulations on State Monitoring of Aquatic Biological Resources and Application of its Data", 24 December 2008 (**RU-491**), paras. 6, 12.

[778] See, for instance, Minutes of the 2016 RUC session (**RU-385**), para. 8.6: "[The Commission] instructed the Sides to inform each other about […] the actual number of fishing vessels, objects and amount of catch of aquatic biological resources on a weekly basis, as well as the cumulative total since the beginning of the year, the start and end of the fish kill period and the catch within that period, bycatch of sturgeons and other fish species. […] This information is to be exchanged weekly on Fridays (daily, if necessary), receipt of information is to be confirmed by – for the Russian Side – the Azov-Black Sea Territorial Directorate of the Federal Agency for Fishery; […]."

E. Russian Supervisory Bodies Kept the Kerch Bridge Construction under Surveillance

485. Quite apart from the monitoring carried out by the Institute of Ecology, the Zubov Institute, AzNIIRKh and the Azov-Black Sea Territorial Directorate of the Federal Agency for Fishery, three supervisory agencies of the Russian Federation – Rostekhnadzor, Rosprirodnadzor and the Federal Agency for Water Resources (Rosvodresursy, referred to as "Water Agency") – have also controlled compliance with environmental regulations during the construction and operation of the Kerch Bridge.

486. In the course of ongoing constructions, it is generally Rostekhnadzor's responsibility to supervise environmental compliance under Russian law.[779] As [redacted] explains in detail, officials of Rostekhnadzor were "in fact present at the [Kerch Bridge] construction site every day", conducting scheduled and unscheduled inspections and "undertaking vigilant environmental supervision".[780] The environmental monitoring was also subject to robust supervision: the officials of Rostekhnadzor examined the Institute of Ecology's Monitoring Reports quarterly submitted to the agency.[781]

487. Over and above the supervision by Rostekhnadzor, another Russian agency, Rosprirodnadzor, is entitled to conduct *ad hoc* unscheduled inspections of construction works in internal waters.[782] Russian legislation allows such inspections only in limited circumstances, for instance, when the Government issues specific instructions to conduct an inspection.[783] The Russian Government, of course, considered the Kerch Bridge as a project requiring special vigilance from the Russian supervisory bodies. On 8 September 2016, the Government issued an Instruction pursuant to which Rosprirodnadzor initiated unscheduled onsite inspections of the Taman Highways Administration, SGM LLC and SGM-Most LLC, involving numerous officials and specialists of testing laboratories.[784] According to [redacted], Rosprirodnadzor officials inspected the construction site for three weeks (from 7 November 2016 and 29

[779] [redacted] Statement, para. 138; Federal Law No. 7-FZ "On Environmental Protection", 10 January 2002 (**RU-146**), Article 65(8): "If construction or reconstruction of any capital construction facilities provides for state construction supervision, then state environmental supervision is to be exercised as part of state construction supervision by the executive bodies being in charge of construction state supervision, in compliance with the town planning legislation."

[780] [redacted] Statement, paras. 139-141.

[781] *Id.*, paras. 110(e), 138(b).

[782] Town Planning Code (**RU-113**), Article 54(7): "It is prohibited to perform any other types of state supervision during the construction […] except for the state construction supervision provided for by this Code, as well as federal state environmental supervision in relation to objects, the construction, reconstruction of which are performed […] in the internal sea waters, territorial sea of the Russian Federation […]."

[783] Order of the Ministry of Natural Resources and Environment of the Russian Federation No. 191 "Approving Administrative Rules for the Federal Service for Supervision of Natural Resources Performing a State Function of Federal State Environmental Supervision ", 29 June 2012 (**RU-492**), para. 47.

[784] Order of the Department of the Federal Service for Supervision of Natural Resources for the Southern Federal District of 31 October 2016 No. 850-KND "On conducting an unscheduled onsite inspection at SGM LLC" (**RU-493**); Order of the Department of the Federal Service for Supervision of Natural Resources for the Southern Federal District of 31 October 2016 No. 847-KND "On conducting an unscheduled onsite inspection at SGM-Most LLC" (**RU-494**); Order of the Department of the Federal Service for Supervision of Natural Resources for the Southern Federal District of 31 October 2016 No. 849-KND "On conducting an unscheduled onsite inspection at the Federal Government Institution "Taman Federal Highways Administration" of the Federal Road Agency" (**RU-495**).

November 2016), sampling and analysing water and bottom sediments, but did not detect any non-compliance with environmental regulations.[785]

488. Besides these entity-specific inspections, Rosprirodnadzor conducts *site-specific* "scheduled raid examinations".[786] The aim of these examinations is to ensure that environmental conditions in a particular area do not indicate environmental breaches requiring further entity-specific investigation.[787] For instance, in 2017, Rosprirodnadzor carried out three scheduled raid examinations, sampled and analysed water in the central part of the Kerch Strait, including the Kerch Bridge area, but revealed no exceedances of Maximum Allowable Concentrations.[788]

489. Lastly, the Water Agency[789] controlled compliance with the "decisions on a provision of a water body for use" ("water use decision"). The Russian legislation prescribes that any entity performing construction works in a water body must obtain a water use decision[790] that establishes a set of environmental obligations. For instance, the water use decision issued to SGM LLC imposed obligations to prevent, mitigate and compensate any damage to the Kerch Strait environment.[791] It also envisaged monitoring of the Kerch Strait water in accordance with the monitoring programme approved by the Water Agency and quarterly submission of monitoring results.[792] In compliance with this water use decision, SGM LLC provided the Water Agency with sampling and laboratory test protocols on a quarterly basis.[793] Therefore, the Water Agency possessed and indeed used an effective mechanism of ensuring that the Kerch Bridge does not deteriorate the quality of the Kerch Strait water.

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[785] [redacted] Statement, paras. 143-144.

[786] Federal Law No. 294-FZ "On The Protection of Rights of Legal Entities and Individual Entrepreneurs During State Control (Supervision) and Municipal Control", 26 December 2008 (**RU-496**), Articles 8.3(1)(1) and 13.2(1).

[787] *Id.,* Article 13.2(2).

[788] Black Sea-Azov Directorate for Technical Support of Supervision at Sea, Expert Opinion following laboratory tests of sea water samples taken during a raid effort in the water area of the Kerch Strait, 30 May 2017 (**RU-497**); Centre for Laboratory Analysis and Technical Measurements for the Krasnodar Region, Expert Opinion No. 268 following the expert support of federal state environmental supervision, 10 August 2017 (**RU-498**); Black Sea-Azov Directorate for Technical Support of Supervision at Sea, Expert Opinion following laboratory tests of sea water samples taken during a raid effort across the water area of the Black Sea along the coasts of the Republic of Crimea, the water area of the Kerch Strait of the Sea of Azov from the Kamysh-Burun Bay to the village of Zavetnoe, 11 September 2017 (**RU-499**).

[789] In the Republic of Crimea, the functions of the Water Agency were delegated to the Ministry of Environment and Natural Resources of the Republic of Crimea, but – for the sake of simplicity – the Russian Federation will refer to the competent body as "Water Agency".

[790] Water Code of the Russian Federation (**RU-119**), Article 11(2).

[791] Decision of the Ministry of Environment and Natural Resources of the Republic of Crimea No. 91-00.00.00.000-M-RABV-S-2016-00148/00 "On a provision of a water body for use", 29 July 2016 (**RU-500**), pp. 2-3, 5-6.

[792] *Id.,* pp. 2, 5; Approval of the State Committee for Water Management and Land Reclamation of the Republic of Crimea of the Programme of Regular Monitoring of the Kerch Strait and Its Water Protection Area by SGM LLC No. 4374/220-03, 30 September 2016 (**RU-501**).

[793] See, for instance, Letter of SGM LLC to the Minister of Ecology and Natural Resources of the Republic of Crimea No. 20-15230, 6 April 2017 (**RU-502**); See also examples of protocols attached to the letter: Azov Research Institute of Fisheries, Sampling certificate No. 108, 7 March 2017 (**RU-503**); Azov Research Institute of Fisheries, Laboratory Test Protocol No. 92, 3 April 2017 (**RU-504**).

F. THE RUSSIAN FEDERATION HAS PUBLISHED THE RESULTS OF ENVIRONMENTAL MONITORING, IN ACCORDANCE WITH ARTICLE 205 OF UNCLOS

490. As it is clear from the text of Article 205 of UNCLOS, the publication obligation is limited to the publication of "*reports* of the results" obtained in the course of environmental monitoring. Article 205 does not require the wholescale publication of thousands of pages of environmental documentation. Nor is it – contrary to what Ukraine appears to suggest – the purpose of Article 205 to provide a platform for scientific analysis or discussion of environmental monitoring results.

491. In the case at hand, the results of environmental monitoring have been published in the format of EM Summaries, in the annual reports of the Zubov Institute and EMBLAS-II reports. These publications remain available online. In addition, Russia shared the results of the state monitoring of aquatic bioresources with Ukraine in the framework of the RUC. Thus, there were no violations of Article 205 of the Convention on behalf of the Russian Federation.

III. The Russian Federation Made Efforts to Cooperate with Ukraine

492. Ukraine seeks a declaration that the Russian Federation failed to cooperate and share information with Ukraine concerning the environmental impact of the Construction Projects.[794]. It was Ukraine, not the Russian Federation, who made any cooperation impossible, unnecessarily turning the issue of environmental protection into a political dispute around sovereignty over Crimea. Against this backdrop, Ukraine's claim is plainly cynical. Cooperation implies common effort of both parties. As will be shown below, instead of constructively engaging with the Russian Federation concerning the marine environment, Ukraine consistently refused to address environmental matters separately from its sovereignty-related claims with regard to Crimea. As a result, Ukraine intentionally excluded any possibility of constructive dialogue and cooperation with regard to the marine environment.

493. By a *Note Verbale* of 13 March 2015, the Russian Federation informed Ukraine of its decision to build the Kerch Bridge.[795] Instead of at least attempting to cooperate with 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.[796] Ukraine raised no environmental concern. In February 2016, Ukraine once again asserted its alleged status of a costal State and, instead of offering cooperation on environmental matters, Ukraine bluntly insisted on the need to obtain its consent to any construction.[797]

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[794] URM, paras. 190-192, 243, 245-246, 248, 314(f).

[795] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 2511/2dsng, 13 March 2015 (**RU-354**).

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

[797] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22 194/510 485, 23 February 2016 (**RU-505**).

494. At the same time, in February 2016, the Russian Federation made a good faith effort to establish cooperation with Ukraine and confirmed its readiness to exchange information on the activities of Russia and Ukraine in the Black Sea and the Sea of Azov, and, in particular, to discuss the collaboration in exploitation of biological resources and the marine environment protection. The Russian Federation also proposed holding a meeting in Minsk and showed its readiness "to consider suggestions on the time of a meeting".[798]

495. However, Ukraine unilaterally blocked all subsequent cooperation attempts. In June 2016, Ukraine stated that "[t]he Russian Side's response and its proposed agenda related to cooperation in exploitation of biological resources and marine environment protection would not provide an opportunity to discuss serious and continuing violations of international law referred to by Ukraine", turning again the issue of the environmental protection into a political dispute on "the sovereignty and the sovereign rights" alleged by Ukraine.[799] In light of the above, Ukraine has no tenable basis to pin the responsibility on the Russian Federation for the lack of cooperation.

496. Neither in the preceding diplomatic correspondence, nor in the application instituting these proceedings, has Ukraine raised environmental concerns in connection with the Construction Projects.[800] It was only in July 2017 (and not in July 2016 as Ukraine falsely stated),[801] right after the Tribunal set a deadline for the submission of Ukraine's Memorial,[802] when Ukraine for the first time requested the Russian Federation to provide "information concerning the construction of the Kerch Strait Bridge, [and] any related threats to the marine environment […]."[803] The timing of this diplomatic note clearly indicates that Ukraine had no genuine concerns about the marine environment and only invoked the issue once to manufacture a claim on this point.

497. Ukraine's position on the alleged non-cooperation is all the more disingenuous amid its conduct in front of the relevant international organisations. For instance, before the Black Sea Commission, Ukraine consistently maintained the absurd position that the Russian Federation should be prohibited from sharing information on the Crimean marine environment. In October 2016 and July 2017, in diplomatic notes to the Permanent Secretariat of the Black Sea Commission, Ukraine vehemently opposed "the submission by the Russian Federation to the Permanent Secretariat or the Commission's working or advisory bodies of the official statistical

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[798] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in the Russian Federation No. 1599/2dsng, 16 February 2016 (**RU-506**).

[799] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-194/510-1409, 15 June 2016 (**RU-507**).

[800] In the Statement of Claim, Ukraine only complained about the construction activities in the Kerch Strait that commenced "without […] authorization from Ukraine" (paras. 26-28) and the section D "Protection and Preservation of the Marine Environment" concerned only the alleged oil spill.

[801] URM, para. 154.

[802] Rules of Procedure, Article 13(1).

[803] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-663-1651, 12 July 2017 (**RU-352**).

or any other data which might refer [to the] Republic of Crimea and the city of Sevastopol."[804] Finally, Ukraine requested the Permanent Secretariat "not to reflect in the Commission's documents any information which might be interpreted as a recognition of any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol as a part of the territory of Ukraine and remove from the Commission's website such information if any",[805] which, in practical terms, prevented the sharing of any environmental information relating to the Republic of Crimea within the framework of the Black Sea Commission. In the circumstances, Ukraine's complaints concerning a lack of information sharing are baffling.

498. Nevertheless, Russia proceeded on the basis that cooperation with Ukraine on purely environmental matters was possible. For instance, on 11 August 2016, the Russian Federation participated in Minsk consultations where Ukraine voiced its concerns. The Russian Federation requested the representatives of Ukraine to present Ukraine's concerns in writing so that Russia could provide Ukraine with a corresponding response.[806] While Ukraine declared its readiness to provide a written request, it eventually failed to do so despite follow up inquiries from the Russian Federation.[807] On 5 September 2016, the Russian Federation again requested Ukraine to supply written materials,[808] to no avail. Instead, Ukraine instituted the present proceedings, refusing to engage with the Russian Federation.

499. Thus, Ukraine's own behaviour, that undermined any potential for substantive cooperation on the protection of the marine environment, should put to rest its claims of Russia's alleged failure to cooperate.

IV. The Russian Federation Protected and Preserved the Marine Environment and Took Measures to Prevent, Reduce and Control Its Pollution

500. Ukraine does not present a separate factual basis for its claims brought under Articles 192 and 194 of UNCLOS. It merely references and repeats the factual allegations that form the basis of its claims under Articles 123, 204, 205 and 206, arguing that the Russian Federation's impugned conduct also violates Articles 192 and 194.[809]

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[804] *Note Verbale o*f the Ministry of Foreign Affairs of Ukraine to the Permanent Secretariat of the Commission on the Protection of the Black Sea Against Pollution Istanbul No 51/23-010-2404, 7 July 2017 (**RU-508**). In *Note Verbale* of the Ministry of Foreign Affairs of Ukraine No 61318/51-207/1-1197, 4 October 2016 (**RU-509**), Ukraine made almost identical statement, asserting that "submission of the above-mentioned information by the Russian Federation […] should be considered as further infringement of the sovereignty and territorial integrity of Ukraine." In these diplomatic notes, Ukraine also protested against nomination by the Russian Federation of experts from the Republic of Crimea and the city of Sevastopol as members and focal points to the Black Sea Commission's working or advisory bodies, thus depriving itself and other members of the Black Sea Commission of the first-hand knowledge about the marine environment of this region.

[805] *Note Verbale* of 4 October 2016 (**RU-509**); *Note Verbale* of 7 July 2017 (**RU-508**).

[806] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 10949/2dsng, 5 September 2016 (**RU-43**).

[807] *Ibid.*

[808] *Ibid.*

[809] URM, paras. 242-248.

501. As explained above, those factual allegations are demonstrably baseless. The Russian Federation did conduct all necessary EIAs for the Construction Projects[810] and established an effective monitoring regime, both project-specific and area-specific.[811] All Ukraine's speculations on "serious warning signs of environmental harm" were based on insufficient information and the Russian Federation rebuts them with ease by extensive supporting evidence.[812] Ukraine grossly misinterpreted amendments to the Russian legislation and, therefore, its distorted account of the Russian legal framework is meritless.[813] Robust EIAs, effective monitoring regimes, numerous measures to mitigate effects on the marine environment[814] and vigilant administrative supervision exercised by the Russian state agencies[815] cannot but lead to an inevitable conclusion that the Russian Federation demonstrated exceptional diligence and took all measures necessary to protect the marine environment and remedy any possible effects on it. The Russian Federation succeeded in the aforementioned, even though it had to do so without the input of Ukraine[816] that, in any event, could bring no practical benefits to the protection and preservation of the Russian sovereign waters.[817]

502. That said, and without prejudice to the foregoing, Ukraine in any event misrepresents the contents and meaning of additional provisions it relies on. Ukraine cursorily described the Articles 192 and 194 obligations consistently ignoring their due diligence nature stressed by the Arbitral Tribunal in the *South China Sea* Award.[818] The International Law Commission noted 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".[819]

503. Moreover, Ukraine has not discharged its burden of proof under Article 194(2) of UNCLOS. The text of that Article explicitly requires demonstration of "damage by pollution".

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[810] See Chapter 6, Section I, Sub-Sections C and D above.

[811] See Chapter 6, Section II, Sub-Sections B, C and D above.

[812] See para. 467 above.

[813] See Chapter 6, Section I, Sub-Section B above.

[814] See Chapter 6, Section I, Sub-Sections C and D; Section II, Sub-Sections B, C and D above.

[815] See Chapter 6, Section II, Sub-Section E above.

[816] See Chapter 6, Section III above.

[817] Supporting the allegations that a failure to cooperate leads to separate violations of Articles 192 and 194, Ukraine in para. 245 of the URM refers to *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment, 20 April 2010 (**UAL-152**). The analogy between the *Pulp Mills* case and the dispute before this Tribunal is unacceptable. In *Pulp Mills*, the ICJ interpreted specific provisions of the 1975 Statute of the River Uruguay that established the Administrative Commission of the River Uruguay (CARU) entrusted with the management of the river which forms the border between Argentina and Uruguay. The cooperation with CARU was indispensable to ensure equitable use of the River of Uruguay. The Kerch Strait, however, is located exclusively in the Russian sovereign waters and no system for the management of the Strait has been established. Therefore, cooperation with Ukraine is not an indispensable requirement for compliance with the general duty of prevention.

[818] *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016 (**UAL-11**), para. 944 referring to *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Case No. 21 (**UAL-12**), para. 131; quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment, 20 April 2010 (**UAL-152**), p. 14, at p. 79, para. 197.

[819] United Nations General Assembly, 56th Session, *Official Records, Supplement No. 10*, Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10, 2001 (**RUL-116**), p. 154, commentary 7 to Article 3.

In interpreting an analogous due diligence obligation under Article 139(2) of UNCLOS, ITLOS noted that "it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities", which is "in line with the rules of customary international law on this issue."[820] Article 194(2) warrants a similar approach. It should also be construed consistent with the customary international law position and cannot not be interpreted as imposing more onerous obligations on States than Article 139(2). Consequently, any suggestion that States may incur responsibility for a violation of Article 194(2) without the occurrence of actual damage is misconceived. Since Ukraine has not demonstrated any damage to the marine environment caused by the Projects (let alone directly by the conduct of the Russian Federation's authorities), Ukraine has no case on state responsibility under Article 194(2).

V. Russia Did Not Violate Articles 123, 192, 194, 198, 199, 204 and 205 of UNCLOS with Regard to the Alleged Oil Spill

504. Ukraine submits that the Russian Federation should have notified and cooperated with Ukraine regarding an alleged "oil spill" in the vicinity of Sevastopol; and that it was under an obligation to prepare the relevant monitoring reports and share them with Ukraine.[821]

505. Pursuant to Article 198 of UNCLOS, "[w]hen a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations." As is clear, the duty of notification under Article 198 is contingent on two conditions: (1) the marine environment is in imminent danger of being damaged or has been damaged by pollution; and (2) other States should be "deem[ed] likely to be affected by such damage".

506. As will be demonstrated below, the alleged oil spill was most likely caused by natural processes, inherently local and so insignificant that it could not have inflicted and did not in fact inflict any damage to the marine environment (excluding the application of the first limb of Article 198). Moreover, the Russian Federation had no reasonable grounds to deem Ukraine "affected" by the alleged oil spill (excluding the application of the second limb of Article 198) and, hence, had no obligation to notify.

1. The Alleged Oil Spill Did Not Damage the Marine Environment

507. Initially, Rosprirodnadzor considered that the Sevastopol beach was polluted by oil products discharged from an unidentified vessel.[822] The discharge of oil products was at first

[820] ITLOS, *Activities in the Area* Advisory Opinion (**RUL-101**), para. 182.

[821] URM, para. 252.

[822] News of Rosprirodnadzor, *Rosprirodnadzor: The Federal Service for Supervision in the Sphere of Natural Management*, 11 May 2016 (**UA-224**); An Unidentified Vessel Poured Oil Products into the Black Sea Near the Villages of Uchkuevka and

the most intuitive and natural explanation for the presence of the residuals of hydrocarbons on the Sevastopol beach.

508. However, the expert study by [redacted], a Russian specialist in remote sensing of the marine environment who has been studying this area of the Black Sea for decades, shows that a natural process called "downwelling" was the most likely cause of the pollution. As a result of downwelling, warm surface waters reach the seabed, melt oil products that have been preserved there in solid form for years, causing them to surface.[823] According to [redacted], global warming leads to an increased heating of surface water and, consequently, results in a more massive melting of oil products on the seabed.[824] In 2019, [redacted], joined by his colleagues, published the first study dedicated specifically to this phenomenon in that water area, based on the satellite imagery of the Black Sea.[825] The scientific surveys frequently registered a fair amount of downwelling-related slicks in the satellite images of the Black Sea, including the area near the Sevastopol beach, over the recent years and even before 2014.[826]

509. Oil surfacing as a result of downwelling requires a combination of certain temperature, wind and currents patterns. Hydrometeorological historical data demonstrates that these patterns did coincide on 6-7 May 2016.[827] Therefore, oil products could have surfaced from the seabed and, as the expert explains, the currents could have transported the slicks to the Sevastopol beach.[828]

510. What also distinguishes downwelling from an oil spill is the way the oil products manifest themselves on the coast. In particular, as compared to oil spills, oil products related to downwelling, due to the lack of light fractions, are stickier, denser in structure and cast ashore in the form of scattered fragments.[829] Based on the photographs taken on the Sevastopol beach, [redacted] concluded that the oil products there resemble oil products elevated from the seabed as a result of downwelling, rather than recently spilled oil products.[830] Finally, [redacted] reviewed the available satellite images. Satellite images from 2 May 2016 and 8 May 2016 demonstrate minor slicks not far from the Sevastopol beach, which confirms that the downwelling process was underway at that time.[831]

Lyubimovka, *Rosprirodnadzor: The Federal Service for Supervision in the Sphere of Natural Management*, 11 May 2016 (**UA-225**).

[823] Expert Report of [redacted], paras. 19-21.

[824] *Id.*, para. 22.

[825] The results of the study were first published on the website of the Marine Hydrophysical Institute of the Russian Academy of Sciences where [redacted] works as Head of the Remote Sensing Department: Remote Sensing Department of Marine Hydrophysical Institute of the Russian Academy of Sciences official website, "Downwelling as a Source of Surface Filmy Pollution" (**RU-300**).

[826] [redacted] Report, paras. 15-18.

[827] *Id.*, paras. 25-26.

[828] *Id.*, para. 36.

[829] *Id.*, paras. 27-28, 31.

[830] *Id.*, paras. 32-33.

[831] *Id.*, paras. 34-35.

511. To draw the above threads together, given (1) the repetitiveness of downwelling-associated slicks in the area of the Black Sea to the north-west of Sevastopol, (2) the hydrometeorological conditions prevailing at that time, (3) the photographs of the oil residues on the Sevastopol beach and the satellite images, [redacted] concluded that the pollution of the Sevastopol beach was most likely downwelling-related, rather than caused by an oil spill.

512. [redacted] also calculated the approximate volume of hydrocarbons in water in the slicks visible in the satellite image dated 8 May 2016 and concluded that the total volume in all slicks detected near the coast was insignificant and could not exceed several dozen litres.[832] This is also corroborated by the fact that these slicks left no traces of pollution in a satellite image from the following day – 9 May 2016.[833] As the pollution was "small in volume and short-term in duration", [redacted] unequivocally concluded that "this pollution was not likely to have caused any considerable harm to the marine environment".[834]

513. Therefore, the surfacing of slicks on 8 May 2016 did not trigger the duty of notification under Article 198. Moreover, given the lack of damage to the marine environment, there was no requirement to monitor the effects of the slicks under Articles 204 and 205, and their presence could not have even conceivably given rise to violations of Articles 192, 194 and 199.

2. *In Any Event, the Alleged Oil Spill Was Not Significant Enough to Have Affected Ukraine*

514. Ukraine submits that it should have been notified by Russia of the alleged oil spill due to its "obvious interest as a neighbouring littoral state in the discharge of pollutants in such a delicate marine ecosystem."[835] However, the wording of Article 198 restricts the notification duty only to the States that a notifying State "deems likely to be affected" which clearly affords the notifying State "a great deal of latitude".[836] It is, hence, a matter within the discretion of the notifying State whether the damage to the marine environment of a certain State or its risk is so "obvious" as to necessitate notification.

515. As a corollary to that margin of discretion, the notification duty under Article 198 can logically arise only when the notifying State, after conducting necessary inspections, becomes aware of actual or potential damage from marine pollution to the marine environment of another State. Hence, notification should not be required unless the notifying State has grounds to

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[832] [redacted] Report, paras. 39-42.

[833] *Id.*, paras. 43, 47.

[834] *Id.*, para. 45.

[835] URM, para. 250.

[836] S. Lee, L. Bautista, *Part XII of the United Nations Convention on the Law of the Sea and the Duty to mitigate Against Climate Change: Making Out a Claim, Causation, and Related Issues*, Ecology Law Quarterly, Vol. 45, 2019 (**RUL-117**), p. 142. As it follows from the preparatory works of UNCLOS, Brazil proposed that the words "they deem" be included before "likely to be affected" to inject a subjective element to the duty of notification, see: A. Proelss, *United Nations Convention on the Law of the Sea: A Commentary* (**RUL-115**), p. 1336.

believe that the incident is likely to affect a particular State by causing "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."[837]

516. When the alleged "oil spill" was discovered, the Russian authorities had no grounds whatsoever to assume that it would affect the water areas of the Black Sea closer to the coast of Ukraine in any way. First, it was evident from the outset that the minor volume of hydrocarbons that settled on the beach, amounting in essence to nothing more than just a handful of small stains, was anything but significant – by the most pessimistic estimates of Russian authorities it was around 50-100 litres.[838] As [redacted] points out, he "do[es] not see any chance of such an insignificant volume of hydrocarbons having any impact on the marine environment in the water areas of the Black Sea closer to the coast of Ukraine."[839] Second, the slicks surfaced in the vicinity of the Sevastopol shore would have had to cross more than 150 km to reach the territorial sea or the exclusive economic zone of Ukraine. According to the expert, the slicks would "partly evaporate, get dissolved by water and settle at the seabed".[840]

517. In light of the above, and against the backdrop of Ukraine framing its requests as another pretext to raise a sovereignty issue,[841] Russia did not deem Ukraine – and did not have reasonable grounds to do so – to be likely affected by the alleged "oil spill" and, therefore, was not required to notify Ukraine about it or to engage in any fruitless cooperation.

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[837] UNCLOS, Article 1(1).

[838] See the statement by the acting head of the Sevastopol Department of Ecology made on 11 May 2016: *Regnum,* Coastal Belt in a Sevastopol District Contaminated with Mazut, 11 May 2016 (**RU-510**); *FlashCrimea,* Oil-Polluted Sand is Removed from Sevastopol Beaches, 12 May 2016 (**RU-511**). These estimates have been confirmed by the calculations made by Professor [redacted] on the basis of the satellite images depicting the oil slicks near the coast: [redacted] Report, paras. 39-42.

[839] [redacted] Report, para. 46.

[840] *Ibid*.

[841] In the diplomatic note of 12 May 2016, Ukraine based its demands on its alleged "sovereign rights in maritime areas appertaining to Crimea" that it possesses as "the coastal state"; Ukraine also pleaded its right "to ensure that the marine environment in its maritime areas is protected" and required from Russia to "honor their obligations to prevent and control pollution in Ukraine's maritime areas". See *Note Verbale* of the Ministry of Foreign Affairs of Ukraine, No. 72/22-663-1146, 12 May 2016 (**UA-226**). In its Original Memorial, Ukraine went as far as claiming that the alleged oil spill affected Ukraine due to its "obvious interest in a discharge of pollutants in its territorial sea" and "has impeded Ukraine's ability to exercise its Article 220 right to enforce its laws and regulations on the protection of the marine environment" (Original Memorial of Ukraine, paras. 214, 216).

CHAPTER 7.
RUSSIA COMPLIED WITH ITS OBLIGATION TO PROTECT UNDERWATER CULTURAL HERITAGE UNDER ARTICLE 303 OF UNCLOS

518. In Chapter 6(III) of its Revised Memorial, Ukraine claims that Russia is in breach of its obligation "to protect objects of an archaeological and historical nature found at sea" under Article 303(1) of UNCLOS. Should the Tribunal proceed to assess this claim notwithstanding Russia's jurisdictional objection that UNCLOS does not apply to the Sea of Azov and Kerch Strait as internal waters, this claim should still be rejected.

519. There 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 underwater cultural heritage ("UCH"), including to adopt appropriate rules and implement measures to prevent, reduce and control harm to UCH. As this is a "due diligence" obligation,[842] it implies that this is not an obligation of result: "[t]he duty of due diligence … is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so".[843] Instead, "due diligence" obligation requires the "introduction of policies, legislation, and administrative controls which are capable of preventing or minimizing the risk"[844] of damage to the protected interest.

520. Consequently, 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.[845]

521. Nevertheless, Ukraine offers no evidence that Russia failed in its efforts to implement policy necessary to protect and preserve UCH. Surprisingly, Ukraine did not cite and analyse a single provision of Russian law related to the UCH protection. Its whole case rests on mass media articles describing selected examples of archaeological expeditions where, in Ukraine's view, accepted scientific and technical methodologies provided by international instruments, other than UNCLOS, were violated. When describing the expeditions, Ukraine managed to misinterpret both the invoked archaeological standards and the factual background, thereby misleading the Tribunal.

522. This Chapter proceeds as follows. **Section I** stresses that an UNCLOS Tribunal is not empowered to establish the alleged violations of international treaties, other than the

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[842] See URM, para. 260.

[843] A. Boyle, C. Redgwell (eds), *Birnie, Boyle & Redgwell's International Law and the Environment*, 4th ed., Oxford University Press, 2021 (**RUL-105**), p. 164, referring to United Nations General Assembly, 56th Session, *Official Records, Supplement No. 10*, Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10, 2001 (**RUL-116**), p. 154, para. 7.

[844] A. Boyle, C. Redgwell (eds), *Birnie, Boyle & Redgwell's International Law and the Environment*, 4th ed., Oxford University Press, 2021 (**RUL-105**), p. 164.

[845] T. Koivurova, "Due diligence", in *Max Planck Encyclopedia of Public International Law* (Oxford online edition last updated February 2010) (**RUL-118**), para. 30: "A State does not breach the article merely by causing damage; a potentially affected State has to show a lack of diligent efforts on the part of the origin State."

Convention, in the individual UCH-related episodes, as Ukraine essentially suggests. **Section II** proceeds to demonstrate that Russia complies with its due diligence obligation to protect UCH under UNCLOS. Russia's legislative framework and law enforcement practice encompass international archaeological standards. For the sake of good order and without prejudice to the above stated Russia's position on the scope of obligation under Article 303(1) of the Convention, this Section will also show that, contrary to Ukraine's groundless allegations, the relevant standards of the UCH protection were duly respected in all episodes that Ukraine picked up.

I. An UNCLOS Tribunal Cannot Establish Alleged Violations of Other UCH-Related Treaties

523. In its Revised Memorial, Ukraine claims that duty to protect UCH under Article 303(1) of UNCLOS must be interpreted "consistent[ly] with current scientific and technological knowledge".[846] Having said that, Ukraine argues that Russia "has not satisfied its duty under the Convention" since, allegedly, Russia has failed to uphold contemporary international standards of conduct, as reflected in the Rules Concerning Activities Directed at Underwater Cultural Heritage (the "UCH Rules") that are set out in the Annex to the 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage (the "UCH Convention"), as well as the European Convention on the Protection of Archaeological Heritage (the "Valetta Convention").[847] Hence, while Ukraine's claim is formally rooted in an UNCLOS provision, its central component necessitating evaluation is an allegation of breaches of other international treaties.

524. Article 288(1) of UNCLOS limits the Tribunal's jurisdiction to the disputes "concerning the interpretation or application of this Convention". Although under Article 293(1) of UNCLOS, to resolve a dispute the tribunal shall apply "other rules of international law not incompatible" with UNCLOS, this article "should not be interpreted as an expansion of the jurisdiction of UNCLOS tribunals beyond UNCLOS".[848]

525. As the Annex VII Tribunal in the *Arctic Sunrise* case pointed out, "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."[849] Also, in a slightly different, but relevant context, Judge Buergenthal neatly expressed the following in his Separate Opinion in *Oil Platforms* case:

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[846] URM, para. 261.

[847] *Id.*, paras. 269 and 282; see also *id*., footnotes 570–571, 574, 580, 586, 592 referring to the UCH Convention, the UCH Rules and the Valetta Convention.

[848] P. Tzeng, "Jurisdiction and Applicable Law under UNCLOS", *Yale Law Journal*, Vol. 126(1), 2016 (**RUL-119**), p. 248. See also A. Proelss, "The Limits of Jurisdiction *Ratione Materiae* of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics*, Vol. 46, 2018 (**RUL-120**), pp. 59–60: "it would be highly problematic to set aside a provision of the treaty providing the jurisdiction of the Court or Tribunal by referring to other rules or principles enshrined in international treaty law".

[849] *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits Award of 14 August 2015 (**UAL-04**), para. 192. The approach was also confirmed in *The Dugzit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Award, 5 September

> "If it were otherwise, a State that has submitted itself to the Court's jurisdiction for the interpretation of one treaty would suddenly find that it has opened itself up to judicial scrutiny with regard to other more or less relevant treaties between the parties to the dispute that are not covered by the dispute resolution clause of the treaty which conferred jurisdiction on the Court in the first place."[850]

526. This clearly means that the interpretation of the scope of the State's duty to protect UCH under Article 303(1) of UNCLOS with reference to other UCH-related treaties cannot and should not be substituted with the direct incorporation of obligations under those treaties into the scope of UNCLOS jurisdiction. The UNCLOS Tribunal is not empowered to subject Russia to judicial scrutiny under the legal framework of the UCH protection imported from other treaties, as it is extraneous to the jurisdiction of an UNCLOS Tribunal. This is especially so with regard to the UCH Convention and UCH Rules, as they do not bind Russia. Russia is not a Party to the UCH Convention, and although Ukraine states that "the UCH Rules have been widely recognized […] as best practices for the preservation of UCH",[851] they are far from obtaining the status of customary international law.

527. Therefore, the Tribunal is not empowered to establish the alleged violations of the UCH Convention and the Valetta Convention, or other UCH-related international treaties, in the four archaeological expeditions that Ukraine selected. The Tribunal should only assess whether Russia made diligent efforts in protecting UCH, as UNCLOS requires it.[852] As will be demonstrated in detail below, Russia complied with its obligation under Article 303(1) of the Convention.

II. Russia Takes Actions Necessary to Protect UCH in the Black Sea, Sea of Azov and Kerch Strait

528. In the Revised Memorial, Ukraine accuses Russia of violating the following UCH protection standards:

a. Access to and control over artefacts is to be limited to "qualified underwater archaeologist[s] with scientific competence appropriate to the project";

b. UCH is to be "preserved *in situ* to the extent possible".[853]

2016 (**RUL-121**), para. 207: "Article 288(1) limits the jurisdiction of this Tribunal to disputes concerning the interpretation or application of the provisions of the Convention. Article 293(1) provides that the Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention. The combined effect of these two provisions is that the Tribunal does not have jurisdiction to determine breaches of obligations not having their source in the Convention […] as such, but that the Tribunal 'may have regard to the extent necessary to rules of customary international law […] not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions […]'".

[850] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Buergenthal, I.C.J. Reports 1996 (**RUL-122**), p. 279, para. 22.

[851] URM, para. 268.

[852] For the avoidance of doubt, this is without prejudice to Russia's position that the Tribunal does not have jurisdiction to assess Ukraine's claims as UNCLOS does not apply to the Sea of Azov and Kerch Strait as internal waters.

[853] URM, para. 270.

529. To support its contention Ukraine relies on only four episodes related to the UCH in Crimea, which, in its view, demonstrate that "[c]ontrary to these accepted international standards […] Russia has allowed unqualified persons to explore and, at times, excavate various UCH sites".[854]

530. Ukraine's accusations cannot hold water. It presents a simplistic and erroneous understanding of international UCH protection standards in the Revised Memorial (**Sub-Section A**). The relevant international standards, in their proper interpretation, are implemented within the Russian UCH protection framework (**Sub-Section B**) and, contrary to Ukraine's allegations, were carefully observed and duly respected in all episodes related to the exploration of UCH in Crimea (**Sub-Section C**).

A. UKRAINE MISINTERPRETS THE RELEVANT UCH PROTECTION STANDARDS

531. Although Ukraine's whole case in this part rests on Russia's alleged violation of two international standards of UCH protection, mentioned above, Ukraine conveniently does not elaborate on their content. Its critique implies that divers are not allowed to participate in archaeological expeditions, and under no circumstances can UCH be removed from the seabed.[855]

532. This is simply not true. If one digs deeper, it becomes clear that divers are allowed and even encouraged to assist archaeologists in underwater expeditions (**1**) and that, although *in situ* preservation of the discovered UCH should be the first option to be considered, *ex situ* preservation, i.e. removal of UCH from the seabed, is in principle not prohibited (**2**).

1. Restricting Access to UCH to Qualified Underwater Archaeologists

533. To prove that divers should not have access to UCH, Ukraine refers to the Valetta Convention which requires States to "ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially authorised persons",[856] as well as to the UCH Rules similarly prescribing that "[a]ctivities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist with scientific competence appropriate to the project."[857]

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[854] URM, para. 270.

[855] See e.g. *id.*, para. 282: "Russia […] allowed amateur dive club members unfettered access to culturally significant sites; and repeatedly disturbed and removed UCH from the seabed — all in a manner contrary to international best practice."; see also *id.*, para. 276: "Publicly-available information confirms that on numerous other occasions, UCH has been interfered with or removed from waters around the Crimean Peninsula, whether by Russian government officials or by private Parties allowed to do so by the Russian authorities, thereby contravening modern technical and archaeological standards that recommend UCH be preserved *in situ* to the extent possible".

[856] European Convention on the Protection of Archaeological Heritage (Revised) (1992) (**UA-121**), Article 3(ii).

[857] Convention on the Protection of Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001) (**UA-120**), Annex, Rule 22.

534. Evidently, these rules do not imply that an expedition group should consist exclusively of professional archaeologists or that participation of non-archaeologists is unacceptable. As confirmed by the official Explanatory Report to the Valetta Convention:

> "This [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."[858]

535. The Explanatory Report to the Valetta Convention further notes that "[n]on-professionals have in fact contributed greatly to the development of knowledge through assistance in excavation of the archaeological heritage".[859] This holds true especially for the diving community, which may help professional archaeologists to access and explore UCH at great depths.

536. In its submission, Ukraine utterly ignores the fact that UNESCO actively encourages collaboration between professional archaeologists and the diving community with respect to the UCH protection. The preamble of the UCH Convention proclaims that cooperation among States, scientific institutions, archaeologists and divers "is essential" for the protection of UCH.[860] The Manual for Activities Directed at UCH ("UNESCO Manual"),[861] which was prepared to help specialists and decision-makers to better understand the UCH Rules, similarly states that:

> "Archaeologists and competent authorities must encourage responsible participation and involvement by the wider diving community in investigating and managing underwater heritage. An informed and enthusiastic diving community is a wonderful ally and asset in the work of managing and investigating underwater cultural heritage."[862]

537. To ensure a worldwide respect for underwater heritage by individual divers, the State Parties to the UCH Convention adopted the Code of Ethics for Diving on Submerged Archaeological Sites ("Code of Ethics").[863] To engage the diving community in responsible underwater archaeology, UNESCO further signed a letter of understanding with the World

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[858] Council of Europe, *Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised)*, ETS No. 143, 16 January 1992 (**RUL-123**), p. 5.

[859] *Ibid.*

[860] Convention on the Protection of Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001) (**UA-120**), Preamble, para. 11: "Believing that cooperation among States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large is essential for the protection of underwater cultural heritage."

[861] T. J. Maarleveld, U. Guérin and B. Egger (eds), *Manual for Activities directed at Underwater Cultural Heritage. Guidelines to the Annex of the UNESCO 2001 Convention*, UNESCO, 2013 (**RUL-124**), p. 7.

[862] *Id*., p. 174 (emphasis added).

[863] Notably, Rule 5 of the Code of Ethics urges divers not to "move or recover objects other than in the framework of an official archaeological excavation and under the supervision of a professional archaeologist authorized by the competent authorities". This clearly means that participation of divers in archaeological excavations is in principle not prohibited. UNESCO Code of Ethics for Diving on Submerged Archaeological Sites (**RUL-125**), Rule 5 (emphasis added); see also UNESCO official website, "UNESCO Presents a Collection of Underwater Heritage & Diving Cards to Raise Awareness on the Protection of the Underwater Cultural Heritage", 18 February 2015 (**RU-512**).

Underwater Federation ("CMAS"), whereby CMAS undertook to implement a course on underwater archaeology and scientific diving, as well as to make the Code of Ethics its official document.[864]

538. In practice, both foreign and Russian research institutions often call for divers to assist archaeologists in underwater expeditions.[865] Underwater archaeological expeditions conducted by the Advisory Council on Underwater Archaeology ("ACUA")[866] may serve as a good illustration: each of the ACUA underwater archaeological projects "is being undertaken by professional archaeologists often working with dedicated volunteers".[867] Another representative example is the very recent research of Greek marine archaeologists into the 1500 years old shipwreck found near the Greek island of Fourni. In that expedition, underwater works were carried out by 25 divers from among archaeologists, architects, environmental specialists, photographers and cameramen.[868]

539. The above clearly shows that international archaeological standards do not prohibit divers from participating in the UCH expeditions. Quite to the contrary, divers are encouraged to participate, and in practice actively participate, in archaeological works under the control and supervision of qualified archaeologists.

2. Preservation of *UCH* In Situ *As the First Option to Be Considered*

540. Both the Valetta Convention and the UCH Convention cited by Ukraine rely on the principle of *in situ* preservation of UCH,[869] which in the UCH Convention reads as follows:

> "The preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage."[870]

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[864] Letter of Understanding between United Nations Educational, Scientific and Cultural Organization (UNESCO) and World Underwater Federation (CMAS), 2012 (**RU-513**).

[865] See e.g. Archaeological Institute of America official website, "Underwater archaeological expedition, St. Eustatius" (**RU-514**) (Archaeological Institute of America, North America's oldest and largest organisation devoted to archaeology, is looking for experienced divers to explore St. Eustatius in the Dutch Caribbean in summer 2022); Russian Geographical Society official website, "RGS Invites Volunteers to Go to the 'Crimean Atlantis'", 28 February 2019 (**RU-515**) (Russian Geographical Society publicly invited skilful divers to explore the ancient city of Acra located in the waters of Crimea). In fact, as the UNESCO Manual claims, successful projects have been run in many places around the world using avocational staff. See also UNESCO Manual (**RUL-124**), p. 174: "One of the best-known projects in which large numbers of non-archaeologists participated was the excavation between 1979 and 1982 of the Tudor warship, the *Mary Rose* in Portsmouth in the United Kingdom."

[866] A non-governmental organisation accredited by UNESCO to promote ethical and scientific underwater research.

[867] ACUA official website, "Projects Worldwide. Around the World" (**RU-516**).

[868] *Planet Today*, "Marine Archaeologists in Greece Explore 1500-year-old Shipwreck", 5 March 2022 (**RU-517**).

[869] European Convention on the Protection of Archaeological Heritage (Revised) (1992) (**UA-121**), Article 3; Convention on the Protection of Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001) (**UA-120**), Annex, Rules 1 and 4.

[870] Convention on the Protection of Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001) (**UA-120**), Article 2(5).

541. However, *in situ* preservation is only "the first option"; it is not "the only right way forward"[871] or "an overriding objective" of UCH protection.[872] As Professor Mariano J. Aznar aptly noted,

> "Perhaps one of the biggest and most frequent mistakes made by those considering the protection of underwater cultural heritage for the first time (or, in some cases, those who do so with an agenda) is to believe that it must always, and in all cases, be protected in its original location. The in situ preservation of underwater cultural heritage is thus conceived of as a mandatory rule that brooks no exception, which is simply false or, at the very least, not entirely true."[873]

542. The truth is that, in certain cases, partial or total excavation of an archaeological site "might guarantee the preservation of cultural objects at sea in a more direct manner than *in situ* protection".[874] Hence, although *in situ* preservation must be considered before anything else is done, "there may be good grounds for rejecting it".[875]

543. UCH Rules, which Ukraine treats as best practice for the preservation of UCH, prescribe that activities directed at UCH, including excavation, may be authorised "for the purpose of making a significant contribution to protection or knowledge or enhancement" of UCH.[876] Rule 4 further clarifies that "[i]f excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains."[877] The same conclusion follows from the Valetta Convention and the Explanatory Report thereto.[878] This means that when conditions of the site or the need to enable better study, conservation or enhancement of the UCH objects "make it preferable to remove them and

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[871] M. Manders, "*In Situ* Preservation: 'the preferred option'", in I. Vinson (ed), *Museum International*, Vol. 60(4), 2008 (**RUL-126**), p. 31.

[872] P. J. O'Keefe, "Underwater Cultural Heritage", in F. Francioni, A. F. Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, 2020 (**RUL-127**), p. 302.

[873] M. J. Aznar, "In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle", *Journal of Maritime Archaeology*, Vol. 13(1), 2018 (**RUL-128**), pp. 67–68 (emphasis added).

[874] P. Vigni, "The Enforcement of Underwater Cultural Heritage by Courts", in F. Francioni, J. Gordley (eds), *Enforcing International Cultural Heritage Law*, Oxford University Press, 2013 (**RUL-129**), p. 148.

[875] P. J. O'Keefe, "Underwater Cultural Heritage", in F. Francioni, A. F. Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, 2020 (**RUL-127**), p. 302. See also UNESCO Manual (**RUL-124**), p. 25: "Rule 1 indicates that *in situ* preservation shall be considered as the first option and that in authorizing any activity, this possibility should be considered first as well. However, 'first option' is not the same as 'only option', or 'preferred option'. Partial or total excavation may be necessary under certain circumstances and preferable for a number of reasons."

[876] Convention on the Protection of Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001) (**UA-120**), Annex, Rule 1.

[877] *Id.*, Annex, Rule 4.

[878] Council of Europe, *Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised)*, ETS No. 143, 16 January 1992 (**RUL-123**), p. 3: "the aim of the revised Convention is consistent with the [Icomos Charter], which states that 'archaeological knowledge is based principally on the scientific investigation of the archaeological heritage' and that excavation is a last resort in the search for that information. This is not to say that the heritage must remain inviolate."; see also *id.*, pp. 4–5.

conserve them or display/musealize them somewhere other than where they were found underwater", it is allowed to remove UCH objects from the seabed.[879]

544. One of the specific reasons for *ex situ* preservation can be development projects "for which many sites need to make way".[880] A notable example of a responsible approach to UCH within an infrastructure project is Nord Stream, a twin gas pipeline running across the Baltic Sea from Russia to Germany. The project team, in close cooperation with national authorities, examined how the project may impact UCH and developed measures that could mitigate the risks identified.[881] Although the pipeline was rerouted where possible, some of the discovered UCH objects had to be removed from the seabed.[882] For instance, in Germany, a shipwreck "was removed in a controlled manner to create a corridor wide enough for laying the pipeline".[883]

545. Excavation of an archaeological site can be also prompted by the need to gain valuable new information "to understand our past".[884] As Swiss archaeologist O. Berger notes, "[i]t is a utopia to think of being able to study a site without having artefacts on the surface."[885] This is especially true for shipwrecks, the study of which necessitates analysing the ship's cargo and taking samples to date the wreck.[886] This approach is confirmed by the Black Sea Maritime Archaeological Project, which Ukraine provides as an example of an expedition conducted with "rigor and responsibility".[887] An expedition team that discovered a 2,400 year old ancient Greek vessel removed a small piece of the vessel from the seabed in order to date the shipwreck.[888]

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[879] M. J. Aznar, "In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle", *Journal of Maritime Archaeology*, Vol. 13(1), 2018 (**RUL-128**), p. 77.

[880] UNESCO Manual (**RUL-124**), p. 25; see also Council of Europe, *Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised)*, ETS No. 143, 16 January 1992 (**RUL-123**), p. 6: "In certain circumstances, it may be decided that the project has to go ahead even though this will damage some aspect of the archaeological heritage. The Icomos Charter specifically states that excavation should be carried out in these circumstances."

[881] Nord Stream Espoo Report: Key Issue Paper. Maritime Cultural Heritage, February 2009 (**RU-518**), Sections 3, 4 and 5.

[882] In Denmark, a historic rudder was lifted and sent for preservation to the National Museum near Copenhagen "in order to safeguard the rudder against potentially being damaged during construction works". In the Russian waters, "two admiralty anchors dating back to the 18th to 19th centuries were salvaged". Nord Stream, "Fact Sheet. Underwater Cultural Heritage in the Baltic Sea", November 2013 (**RU-519**), p. 2.

[883] *Ibid*. See also Nord Stream Espoo Report: Key Issue Paper. Maritime Cultural Heritage, February 2009 (**RU-518**), p. 39, Section 4.6.

[884] D. Gregory, M. Manders (eds), *Best practices for locating, surveying, assessing, monitoring and preserving underwater archaeological sites, SASMAP Guideline Manual 2*, 2015 (**RU-520**), p. 85; see also Council of Europe, *Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised)*, ETS No. 143, 16 January 1992 (**RUL-123**), p. 5: "when resort is made to excavation in order to resolve some scientific problem, there must be conservation facilities available and a plan of management in place to deal both with what is found and the remains of the site".

[885] O. 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 (**RU-521**), p. 5.

[886] *Id.*, p. 1.

[887] URM, para. 279.

[888] Kevin Rawlinson, World's Oldest Intact Shipwreck Discovered in the Black Sea, *The Guardian* (22 October 2018) (**UA-588**).

As open sources reveal, the team also "brought back amphorae — narrow-necked Greek or Roman jars with two handles — and other [artefacts]".[889]

546. To sum it up, although *in situ* preservation is the first option to be considered, it is only one of the options, along with the *ex situ* preservation. International archaeological standards in principle do not prohibit removal of UCH from the seabed, and valid considerations, which should be individually assessed in each case, could justify such removal.

B. RUSSIA'S UCH PROTECTION FRAMEWORK ENCOMPASSES THE RELEVANT INTERNATIONAL STANDARDS OF UCH TREATMENT

547. Before turning to the specifics of the Russian UCH protection framework, a few preliminary observations are worth being made.

548. First, the main legislative act in the field of cultural heritage protection in Russia 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 ("Federal Law No. 73-FZ"). Federal Law No. 73-FZ does not use the term "underwater cultural heritage". Instead, UCH is captured within a broader definition of "archaeological heritage objects", i.e. traces of human existence from the past epochs that are "partially or completely hidden in the ground or under water" and could be explored mostly in the course of archaeological expeditions.[890] Movable items that may be part of archaeological heritage objects are called "archaeological artefacts".[891]

549. Second, under Federal Law No. 73-FZ, state protection is accorded to the archaeological heritage objects and artefacts that are more than 100 years old.[892] The underwater Second World War ("WWII") objects,[893] thus, do not qualify as archaeological heritage objects under Russian law. They enjoy a distinct and specific legal regime.

550. For these reasons, this section proceeds first to address the Russian framework of archaeological heritage protection (**1**) and thereafter outlines the specifics of protection of the WWII objects found at sea (**2**).

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[889] *The Day*, "Avery Point professor helps find ancient shipwrecks in Black Sea", 26 September 2017 (**RU-522**), p. 3.

[890] Federal Law No. 73-FZ "On Cultural Heritage Objects (Historical and Cultural Monuments) of the Peoples of the Russian Federation", 25 June 2002 (**RU-171**), Article 3, para. 2.

[891] *Id*., Article 3, para. 3.

[892] *Id*., Article 18(12). See also Rules for Archaeological Fieldworks in the Body of Water Areas approved by Resolution of the History and Philology Department Bureau of the RAS No. 29, 21 May 2019 (**RU-523**), para. 1.3. The approach is in line with the UCH Convention, which in the same manner qualifies as underwater cultural heritage those objects that "have been partially or totally under water, periodically or continuously, for at least 100 years". See Convention on the Protection of Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001) (**UA-120**), Article 1(a).

[893] Such as air jets Kitty Hawk and Airacobra mentioned in URM.

1. Protection of Archaeological Heritage Objects

551. Under Russian law, archaeological heritage objects are state property.[894] Any field operation aimed at the exploration or excavation of such objects may only be conducted based on a prior authorisation by the Ministry of Culture of the Russian Federation.[895] Non-authorised exploration constitute administrative and criminal offences.[896]

552. A permit can be granted only to a professional archaeologist from a research institution who possesses "the scientific and practical knowledge required for conducting archaeological fieldworks and preparing a scientific report".[897] Before the Ministry of Culture issues a permit, the Russian Academy of Sciences ("RAS") reviews application documents and provides its opinion as to the advisability of an archaeological expedition.[898] During this scrutiny, the RAS checks the applicant's background, qualification and experience as well as a tentative plan of the coming expedition.[899] The RAS's negative opinion means that a permit cannot be granted.[900]

553. A permit-holder bears full responsibility for the conduct of an archaeological expedition, quality of works, appropriate treatment of obtained materials and artefacts as well as for the preparation of a scientific report.[901] A permit-holder shall be present at an archaeological site and cannot delegate responsibility for fieldwork management to any other person.[902] This implies that, in line with international standards, all activities with archaeological heritage objects (including by divers as a part of an expedition team[903]) are subject to supervision by a professional archaeologist authorised by the State.

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[894] Federal Law No. 73-FZ (**RU-171**), Article 50(1).

[895] *Id*., Article 45.1(1).

[896] Code of the Russian Federation on Administrative Offences (Federal Law No. 195-FZ, 30 December 2001) (**RU-524**), Article 7.15; Criminal Code of the Russian Federation (Federal Law No. 63-FZ, 13 June 1996) (**RU-525**), Article 243.2. It is reported that several criminal cases were initiated to punish "black" archaeologists in Crimea, while artefacts discovered by them were seized and transferred to Crimean museums. *Rossiyskaya Gazeta*, "In Crimea, Two 'Black Diggers' Were Sentenced to Probation", 14 May 2020 (**RU-526**). This stands in stark contrast to Ukraine's policy towards the protection of UCH. Reportedly, in Ukraine the situation with looting of underwater monuments is catastrophic. "Black" archaeologists are rarely arrested and, in fact, the law enforcement agencies back them. See e.g. *Freedom Radio*, "Underwater Archaeology. The Situation with the Theft of Monuments Is Catastrophic – Kobalia", 28 June 2018 (**RU-527**); *Istorychna Pravda*, "Does Crimean Police Cover Up 'Black Archaeologists'?", 27 May 2011 (**RU-528**).

[897] Federal Law No. 73-FZ (**RU-171**), Article 45.1(4).

[898] Rules for Issuing, Suspending and Cancelling Authorisations (Archaeological Excavation Permits) for Operations to Identify and Explore Archaeological Heritage Sites approved by Resolution of the Government of the Russian Federation No. 127, 20 February 2014 (**RU-529**), paras. 10(b) and 11.

[899] Guidelines for Archaeological Fieldworks and Scientific Reporting Documents approved by the Resolution of the History and Philology Department Bureau of the RAS No. 32, 20 June 2018 (**RU-530**), para. 9.2. See also Guidelines for Archaeological Fieldworks and Scientific Reporting Documents approved by the Resolution of the History and Philology Department Bureau of the RAS No. 85, 27 November 2013 (**RU-170**), paras. 9.1–9.2.

[900] Resolution of the Government of the Russian Federation No. 127 (**RU-529**), para. 13(c).

[901] RAS Guidelines of 2018 (**RU-530**), paras. 1.12, 1.14; see also RAS Guidelines of 2013 (**RU-170**), para. 1.11.

[902] RAS Guidelines of 2018 (**RU-530**), paras. 1.12, 1.14; see also RAS Guidelines of 2013 (**RU-170**), para. 1.13.

[903] Russian law does not prohibit participation of volunteers including divers in archaeological expeditions. See Letter from the Institute of Archaeology of the Russian Academy of Sciences No. 14102/2115 OP-1762, 28 June 2022 (**RU-531**), p. 2; Witness Statement of [redacted], 21 August 2022, para. 19.

554. Another important safeguard for the preservation of archaeological heritage objects under Russian law is that expeditions are to comply with scientific standards developed by the RAS. Federal Law No. 73-FZ empowers the RAS to determine "the procedure for conducting archaeological fieldworks [as well as] methods of scientific research of archaeological heritage objects".[904] The RAS has enacted elaborate guidelines on the exploration and excavation of archaeological heritage objects,[905] as well as the specific rules for underwater works.[906]

555. Both RAS Guidelines and Rules expressly acknowledge that they take into account international archaeological standards.[907] This can be well illustrated by the fact that, in line with international practice, these sets of rules proceed from the requirement to preserve archaeological heritage objects *in situ* to the extent possible.

556. Under Russian law, excavation of an archaeological heritage object is generally allowed based on a need to preserve it *ex situ*, for example, due to planned economic development.[908] Exceptionally, removal of objects, not at risk of loss or damage could be justified by the need to solve fundamental scientific problems.[909] Archaeological artefacts are allowed to be collected in order to identify and study an archaeological heritage object if it is otherwise impossible at the site.[910] Other than that, archaeological fieldworks should be conducted using non-intrusive methods and employing all necessary safety measures ensuring preservation of archaeological heritage objects and artefacts *in situ*.[911]

557. RAS Rules of 2019, applicable to underwater works, expressly state that:

> "First option to preserve an archaeological heritage object and related archaeological artefacts is their abandonment in situ and minimization of anthropogenic effect. If an archaeological heritage object is not at risk of loss or damage due to anthropogenic effect or impact of the natural environment, its movement is prohibited."[912]

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[904] Federal Law No. 73-FZ (**RU-171**), Article 45.1(10).

[905] See RAS Guidelines of 2013 (**RU-170**) and RAS Guidelines of 2018 (**RU-530**).

[906] RAS Rules of 2019 (**RU-523**), para. 1.2.

[907] RAS Guidelines of 2018 (**RU-530**), para. 1.3; RAS Rules of 2019 (**RU-523**), para. 1.1 ("These Rules were developed in accordance with Federal Law No. 73-FZ […] and take into account essential rules of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972, United Nations Convention on the Law of the Sea (UNCLOS) of 1982, International Charter for the Protection and Management of the Archaeological Heritage of 1990, European Convention on the Protection of the Archaeological Heritage (revised) of 1992, UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2 November 2001"). See also RAS Guidelines of 2013 (**RU-170**), para. 1.3.

[908] Federal Law No. 73-FZ (**RU-171**), Article 40(2); RAS Guidelines of 2018 (**RU-530**), para. 4.3; RAS Rules of 2019 (**RU-523**), paras. 3.16, 3.18, 4.3; see also RAS Guidelines of 2013 (**RU-170**), para. 4.4.

[909] RAS Guidelines of 2018 (**RU-530**), para. 4.2; RAS Rules of 2019 (**RU-523**), para. 4.2; see also RAS Guidelines of 2013 (**RU-170**), para. 4.2.

[910] RAS Guidelines of 2018 (**RU-530**), para. 3.1; RAS Rules of 2019 (**RU-523**), para. 3.18; see also RAS Guidelines of 2013 (**RU-170**), para. 3.1.

[911] See e.g. RAS Guidelines of 2018 (**RU-530**), paras. 3.3, 3.7, 3.16; RAS Rules of 2019 (**RU-523**), paras. 3.4, 3.6, 3.9; see also RAS Guidelines of 2013 (**RU-170**), paras. 3.7–3.8, 3.13.

[912] RAS Rules of 2019 (**RU-523**), para. 3.16. Anthropogenic effect in this context means, for example, hydraulic engineering construction, dredging or regular shipping near an archaeological heritage object.

558. Russian law guarantees safety of excavated artefacts as well. The permit-holder shall transfer them to the state division of the Museum Fund of the Russian Federation.[913] Before transferring those to the state museum, the permit-holder shall ensure that all artefacts are properly recorded, labelled, packed and stored.[914] Museums, in turn, perform all necessary restoration works, ensure physical preservation and security of these artefacts, as well as guarantee public access to them.[915]

559. Conduct of archaeological works and the permit-holders' compliance with their obligations is monitored by competent authorities. Under Federal Law No. 73-FZ, a permit-holder is obliged to notify regional and local authorities of the start of an expedition and inform them about the discovery of any archaeological heritage objects, as well as to submit a detailed scientific report on the conducted works to the RAS within three years after the permit expiration date.[916]

560. Scientific reports of permit-holders are subject to examination by the Scientific Council for Field Research ("Scientific Council") within the RAS. The Scientific Council assesses compliance with the requirements to the methodology of archaeological works and preparation of scientific reports that the RAS Guidelines and Rules envisage.[917] In case such examination reveals any incompliance, the Scientific Council may either decide to approve the report leaving methodological comments for the record or to recognise the scientific report as unsatisfactory.[918] Such decisions can significantly restrict the ability of a permit-holder to perform archaeological works in future.[919] Information about an unsatisfactory assessment of the report should also be provided to the competent authorities.[920] The violations of the permit-holder's statutory obligations, as well as of the standards provided in the RAS Guidelines and Rules, can lead to administrative liability under Russian law.[921]

561. The above demonstrates that Russia's legal, as well as law enforcement framework of archaeological heritage protection takes into account the relevant international standards of UCH protection. Russia takes its regulatory responsibilities in respect of UCH seriously. It is

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[913] Federal Law No. 73-FZ (**RU-171**), Article 45.1(13). Failure to transfer to the state discovered archaeological artefacts, as well as illegal traffic in archaeological artefacts, can lead to administrative or criminal liability under Russian law. See Code of the Russian Federation on Administrative Offences (**RU-524**), Articles 7.15.1, 7.33; Criminal Code of the Russian Federation (**RU-525**), Article 243.3.

[914] RAS Guidelines of 2018 (**RU-530**), paras. 3.18, 4.28, 4.32; RAS Rules of 2019 (**RU-523**), paras. 3.18, 4.13; see also RAS Guidelines of 2013 (**RU-170**), paras. 3.15, 4.26, 4.30.

[915] Federal Law No. 54-FZ "On the Museum Fund of the Russian Federation and Museums in the Russian Federation", 26 May 1996 (**RU-532**), Articles 5 and 35.

[916] Federal Law No. 73-FZ (**RU-171**), Article 45.1(6, 11–12, 15).

[917] RAS Guidelines of 2018 (**RU-530**), paras. 7.1–7.2; see also RAS Guidelines of 2013 (**RU-170**), paras. 7.1–7.2.

[918] RAS Guidelines of 2018 (**RU-530**), para. 7.5.

[919] *Id*., para. 7.5; see also RAS Guidelines of 2013 (**RU-170**), para. 7.3.

[920] RAS Guidelines of 2018 (**RU-530**), para. 7.6; see also RAS Guidelines of 2013 (**RU-170**), para. 7.3.

[921] Code of the Russian Federation on Administrative Offences (**RU-524**), Article 7.13; Tazovsky District Court, Case No. 5-36/2020, Decision, 14 May 2020 (**RU-533**); Supreme Court of Kabardino-Balkarian Republic, Case No. 12-84/2020, Decision, 29 July 2020 (**RU-534**).

constantly developing its legislation to implement measures necessary to prevent, reduce and control harm to cultural heritage in general and UCH specifically.[922]

2. Protection of Military Objects of the WWII

562. Management of the WWII underwater heritage has several specific issues. Sunken military objects are not only of historical importance to the nations, but they are also often civilian or military gravesites.[923] Such objects may carry unexploded ordnance, oil or other materials that can pose threat to public safety and environment.[924] Military equipment, mostly made of metal, is subject to corrosion that makes its destruction under water inevitable.[925] Besides, given that "[b]y their very nature, modern war-related sites have a considerable amount of associated small portable objects", looting still remains the main threat to their preservation.[926]

563. In light of that, many States recognise that military objects from the WWII, especially sunken ones, deserve special attention and treatment.[927] As UNESCO highlights, the value and significance of the WWII objects for a particular State will depend on "the level of impact of the war on local people".[928]

564. In Russia, the legacy of the WWII (or the Great Patriotic War) is subject to a protection regime aimed at perpetuating the victory of the Soviet people and especially of those killed in

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[922] In 2013, Russia amended its laws to tighten liability for the violations in the field of cultural heritage protection (and especially "black digging") and to align the Russian legislation with the ratified. Valetta Convention. See Explanatory Note to the Draft Federal Law "On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Suppression of Illegal Activities in the Field of Archaeology", December 2013 (**RU-535**). In 2022, Russian regions were expressly authorised to protect UCH and keep a list of discovered objects in the water areas adjacent to their respective territory. See Federal Law No. 73-FZ (**RU-171**), Article 9.4.

[923] U. Guérin, A. Rey da Silva, L. Simonds (eds), *The Underwater Cultural Heritage From World War I, Proceedings of the Scientific Conference on the Occasion of the Centenary of World War I, Bruges, Belgium, 26 and 27 June 2014*, UNESCO, 2015 (**RU-536**), pp. 120–121.

[924] *Safeguarding Underwater Cultural Heritage in the Pacific: Report on Good Practice in the Protection and Management of World War II-related Underwater Cultural Heritage*, UNESCO, 2017 (**RU-537**), p. 11; see also Guidelines for Permitting Archaeological Investigations and Other Activities Directed at Sunken Military Craft and Terrestrial Military Craft Under the Jurisdiction of the Department of the Navy, Federal Register, Vol. 80, No. 168, 31 August 2015 (**RU-538**), p. 52593.

[925] U. Guérin, A. Rey da Silva, L. Simonds (eds), *The Underwater Cultural Heritage From World War I, Proceedings of the Scientific Conference on the Occasion of the Centenary of World War I, Bruges, Belgium, 26 and 27 June 2014*, UNESCO, 2015 (**RU-536**), p. 102: "Indeed, the deterioration of iron hulls, armour plating, explosives and sealed containers is inevitable. As such, all metal wrecks are destined to disappear. It is just a question of time."

[926] *Safeguarding Underwater Cultural Heritage in the Pacific: Report on Good Practice in the Protection and Management of World War II-related Underwater Cultural Heritage*, UNESCO, 2017 (**RU-537**), p. 32; see also U. Guérin, A. Rey da Silva, L. Simonds (eds), *The Underwater Cultural Heritage From World War I, Proceedings of the Scientific Conference on the Occasion of the Centenary of World War I, Bruges, Belgium, 26 and 27 June 2014*, UNESCO, 2015 (**RU-536**), pp. 5, 99–101.

[927] For instance, in the USA, the Department of the Navy established a permitting programme to allow for controlled "disturbance, removal, or injury of sunken military craft and terrestrial military craft" in order to make "the protection of war-related and other maritime graves, the preservation of historical resources, the proper handling of safety and environmental hazards, and the safeguarding of national security interests more effective, efficient, and affordable". Guidelines for Permitting Archaeological Investigations and Other Activities Directed at Sunken Military Craft and Terrestrial Military Craft Under the Jurisdiction of the Department of the Navy, Federal Register, Vol. 80, No. 168, 31 August 2015 (**RU-538**), p. 52589.

[928] *Safeguarding Underwater Cultural Heritage in the Pacific: Report on Good Practice in the Protection and Management of World War II-related Underwater Cultural Heritage*, UNESCO, 2017 (**RU-537**), p. 53.

the defence of the Fatherland. It is established that all military graves, as well as monuments and other memorial objects perpetuating their memory, must be protected, preserved and restored.[929] Destruction of military objects or damage thereto triggers criminal liability.[930]

565. Military search operations carried out to discover unknown military graves and unburied remains, to establish the names of those killed or went missing, to find the weapons and military equipment and other property of military-historical significance are supervised by the Ministry of Defence of the Russian Federation.[931] The Ministry of Defence itself conducts operations for the search of military equipment,[932] as well as authorises governmental and non-governmental public associations to conduct search operations in accordance with the approved annual plan.[933] Upon the completion of the search operations, authorised public associations shall draw up a report and submit it with the Ministry of Defence.[934] Russian law strictly prohibits search operations in places of hostilities and military graves, as an amateur initiative.[935]

566. Weapons, documents and other property of the deceased, as well as military equipment and other military items found in search operations must be recorded and transferred to the military administration bodies at the place of their discovery for examination and expertise.[936] Once equipment is "brought to a state that precludes [its] combat use", it may be transferred to museums for exhibition.[937]

567. For better preservation of the WWII legacy that could qualify under Russian law as objects of military-technical history and fortification ("MTHF Objects"), Interdepartmental

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[929] Law of the Russian Federation No. 4292-1 "On the Perpetuation of the Memory of Those Killed in the Defence of the Fatherland", 14 January 1993 (**RU-539**), Articles 6, 13; Federal Law No. 80-FZ "On the Perpetuation of the Victory of the Soviet People in the Great Patriotic War of 1941–1945", 19 May 1995 (**RU-540**), Article 5.

[930] Criminal Code of the Russian Federation (**RU-525**), Article 243.4.

[931] Law of the Russian Federation No. 4292-1 (**RU-539**), Article 8; Order of the President of the Russian Federation No. 37 "Issues of the Perpetuation of the Memory of Those Killed in the Defence of the Fatherland", 22 January 2006 (**RU-541**), para. 1.

[932] Directive of the Minister of Defence of the Russian Federation No. D-30 "On the Procedure for Organisation and Conduct of Operations in the Ministry of Defence of the Russian Federation to Search for Weapons and Military Equipment Related to the Perpetuation of the Memory of Those Killed in the Defence of the Fatherland", 27 September 1999 (**RU-542**), paras. 9–10, 15.

[933] Law of the Russian Federation No. 4292-1 (**RU-539**), Article 8; Order of the President of the Russian Federation No. 37 (**RU-541**), para. 1. Engagement of public associations, including divers, in military search operations is in line with international practice. For example, in France numerous diving associations contribute actively to the preservation of the heritage from the World Wars. Every year since 2000, French Underwater Archaeology Research Department "has been granting them permits, and often finances their surveys in order to precisely locate contemporary wrecks, especially those of the two World Wars." See U. Guérin, A. Rey da Silva, L. Simonds (eds), *The Underwater Cultural Heritage From World War I, Proceedings of the Scientific Conference on the Occasion of the Centenary of World War I, Bruges, Belgium, 26 and 27 June 2014*, UNESCO, 2015 (**RU-536**), p. 103.

[934] Order of the Minister of Defence of the Russian Federation No. 845 "On Approval of the Procedure for Organization and Conduct of Search Operations by Governmental Public Associations, Public Associations Authorized to Carry out Such Operations, Carried out in order to Identify Unknown Military Graves and Unburied Remains, to Establish the Names of Those Killed and Went Missing in the Defence of the Fatherland and to Perpetuate their Memory", 19 November 2014 (**RU-543**), para. 12.

[935] Law of the Russian Federation No. 4292-1 (**RU-539**), Article 8.

[936] *Id*., Article 9; Directive of the Minister of Defence of the Russian Federation No. D-30 (**RU-542**), para. 19; Order of the Minister of Defence of the Russian Federation No. 845 (**RU-543**), paras. 7 and 8.

[937] Law of the Russian Federation No. 4292-1 (**RU-539**), Article 9.

Commission on the Identification and Preservation of the MTHF Objects ("MTHF Commission") was established under the auspices of the Ministry of Defence of the Russian Federation.[938] The MTHF Commission exercises public control over the safety and use of the MTHF Objects on the Russian territory, interacts with regional authorities with regard to their preservation, as well as controls transfer of MTHF Objects to military and civil museums, exhibition centres or their further use as monuments.[939]

568. Hence, although the underwater legacy of the WWII does not qualify as archaeological heritage under Russian law, Russia treats it with great respect and honour. It takes all necessary actions to protect and commemorate the underwater heritage of the WWII, taking into careful consideration specific issues that their treatment raises.

C. In All the Episodes Relied on by Ukraine the Relevant Standards of UCH Protection Were Carefully Observed and Complied with

569. Specific episodes Ukraine relies upon to contend that Russia has violated its obligation to protect UCH in the Black Sea, Sea of Azov and Kerch Strait will be now addressed in turn. With respect to each episode, it is demonstrated that appropriate steps were taken to protect and preserve UCH in line with the Russian law requirements and informed by the best international practices of UCH protection and preservation. The Section starts with the two cases concerning the exploration and excavation of a sunken Byzantine-era ship (**1**) and a fragment of the terra-cotta Greek sculpture (**2**). It goes further to discuss two cases of removal of the wartime aircraft from the seabed: P40 "Kitty Hawk" fighter jet (**3**) and Bell P-39 Airacobra aircraft (**4**).

1. Episode with the Sunken Byzantine-era Ship

570. In its Revised Memorial, Ukraine focuses mostly on the episode with the exploration of a large sunken Byzantine-era ship, arguing that contrary to international standards, the excavation procedures were conducted by "amateur dive club members" who removed five amphorae from the shipwreck, instead of leaving them *in situ*.[940] However, when describing this expedition Ukraine grossly misinterprets the facts.

571. The Byzantine-era shipwreck was explored and excavated not simply by "a private Russian diving club", "with no obvious expertise", as Ukraine suggests,[941] but within the framework of scientific archaeological fieldworks organised and supervised by a professional

[938] Ministry of Defence of the Russian Federation official website, "Regulations on the Commission on the Identification and Preservation of Objects of Military-Technical History and Fortification, Located outside Public and Private Military-Historical and Military-Technical Museums, Displays and Vaults" (**RU-544**). According to para. 1.3 of the Regulations on the MTHF Commission, MTHF Objects include samples of weapons and military special equipment, other material means, fortifications and other buildings and structures that are significant for the military history of the Russian Federation.

[939] *Id*., paras. 2.2, 2.5, 3.1.10.

[940] URM, paras. 272–275, 282.

[941] *Id*., paras. 272, 281.

archaeologist with significant experience, [redacted].[942] He was authorised to conduct the fieldworks under the permit of the Ministry of Culture of the Russian Federation.[943]

572. At the centre of Ukraine's criticism is participation of divers. They took part in the expedition on a volunteer basis and provided only technical support by sailing a vessel and deep diving to the archaeological site.[944] The divers' involvement was particularly crucial taking into account that the shipwreck was discovered at the depth of 86 metres, where only experienced and professional technical divers can go. According to [redacted], before engaging professional divers in archaeological works, he ensured that they were allowed to dive to 100+ metres and were certified by CMAS in underwater archaeology.[945] Hence, the divers could not be described as mere "amateurs" "with no obvious expertise", as Ukraine labels them.

573. Furthermore, in line with international standards,[946] the divers acted under the supervision of [redacted] at all times. He "gave detailed instructions to the team of divers" before each stage of the expedition, as well as controlled their deep-dives via an unmanned submersible and even descended to the shipwreck himself in a manned submersible.[947] [redacted] was responsible for decision-making during the expedition, "including the decision to remove a number of artefacts for further examination".[948] Hence, the divers never acted at their own initiative, but strictly under the guidance of [redacted].

574. As [redacted] explains, the expedition had two stages. First, the team visually examined the shipwreck, measured it and took photos and videos to prepare its general plan and a 3D model.[949] Upon the completion of the non-intrusive works, [redacted] decided to lift several amphorae to clarify "the shipwreck's age, chemical composition of the ceramic material and nature of the cargo the Byzantine vessel could be carrying".[950] This approach is in line with archaeological standards that allow removing certain artefacts to enable better study of the site, as it was highlighted above.[951] A post-excavation examination of the amphorae enabled the archaeologists to establish the route of the vessel and the nature of its cargo, provoking an extensive academic discussion within the scientific community of archaeologists.[952]

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[942] [redacted] is a candidate of historical sciences (Ph.D.) and the head of the Centre for Crimean Studies at the Institute of Oriental Studies of the RAS. He has been leading underwater expeditions in the eastern part of the Black Sea for more than 20 years. [redacted] Statement, paras. 2–5; CV of [redacted].

[943] [redacted] Statement, paras. 7, 12–13.

[944] *Id.*, para. 18.

[945] [redacted] Statement, para. 17 ("The Byzantine shipwreck was discovered at the 86-meter depth, and diving to such depth is associated with a significant risk to human life and health. For that reason, it would have been impossible to explore the object without engaging experienced and professional technical divers who can safely descend to such depth.").

[946] See paras. 534–535 above.

[947] [redacted] Statement, paras. 18, 33.

[948] *Id.*, para. 14.

[949] *Id.*, paras. 24–28.

[950] *Id.*, para. 31.

[951] See paras. 543, 545 above.

[952] [redacted] Statement, paras. 47–48.

575. In its Revised Memorial, Ukraine provides a picture of five amphorae lying on board the vessel to argue that the expedition team left them "exposed in rough fish netting", "without provision being made for their proper preservation, conservation and management".[953] However, this allegation is speculative. As [redacted] explains, the expedition team temporarily placed the amphorae on the deck to record and tag them, as required by Russian law.[954] A fishing net was used to avoid any possible damage to the amphorae from their contact with the deck.[955] With an aim to ensure the artefacts' preservation, they were immediately put into a container with sea water and transported to the Tauric Chersonese Museum for conservation works.[956] Up to date, the amphorae are kept in the museum's collection, which ensures their safety.[957]

576. Ukraine further provides several pictures that, in its submission, show the divers "passing the [excavated] amphorae around among themselves" although they are not technically competent to observe proper scientific protocols.[958] This allegation does not correspond to reality either. [redacted] explains that these pictures were taken at the Tauric Chersonese Museum "after the artefacts [had] undergone necessary conservation procedures" undertaken by competent specialists.[959] Apart from the head of the Rostov-Dive club, they also depict two painters studying and sketching the recovered amphorae, as well as [redacted] supervising the whole process.[960] Hence, contrary to Ukraine's allegations, examination of the artefacts was conducted by competent specialists and not "amateurs".

577. Therefore, as the above shows, Ukraine's criticism of the episode with the Byzantine-era shipwreck is baseless. Exploration and excavation of the shipwreck was conducted under the control of a qualified and seasoned archaeologist, who was duly authorised under the permit of the Ministry of Culture of the Russian Federation and ensured the expedition's full compliance with the relevant archaeological standards.

2. Episode with the Terracotta Sculpture Fragment

578. Ukraine dedicates one more paragraph of its Revised Memorial to another UCH episode, which in its submission, contravened "modern technical and archaeological standards".[961] It reads as follows:

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[953] URM, para. 272, Figure 6.

[954] [redacted] Statement, paras. 36–37.

[955] *Id.*, para. 36.

[956] *Id.*, paras. 37–38, 40.

[957] *Id.*, para. 44.

[958] URM, paras. 273–274, Figures 7, 8 and 9.

[959] [redacted] Statement, para. 42.

[960] *Ibid.*

[961] URM, para. 276.

> "By way of example, during construction of the Kerch Strait bridge, divers discovered, excavated, and removed a terra-cotta sculpture of ancient Greek origin that is believed to be 'unique for the North Black Sea area.'"[962]

579. Ukraine offers no explanation as to the alleged violations of those technical and archaeological standards. This is of no surprise, given that the two standards, on which Ukraine's whole case rests, were duly respected during that expedition.

580. First, as Russian law and international archaeological standards prescribe,[963] the expedition was led by a professional and experienced archaeologist, Dr Sergey Olkhovsky, authorised by the Ministry of Culture of the Russian Federation.[964] Ukraine conveniently ignores this fact, although its own reference suggests that archaeological works were carried out by an underwater group of the Institute of Archaeology of the Russian Academy of Sciences ("IA RAS") headed by Dr Olkhovsky.[965]

581. Second, excavation of this archaeological site was justified by the need to preserve it *ex situ* as a major infrastructure project was under development in the area. This is allowed in principle, as was established above.[966]

582. The fragmented terra-cotta sculpture was removed during the construction of the Kerch Strait Bridge. Before the commencement of construction works, the IA RAS archaeologists were engaged to conduct surveys in the Kerch Strait with an aim to identify potential archaeological heritage sites that the project could affect, as well as to develop strategies for their preservation. As a result, an accumulation of archaeological artefacts was discovered at the seabed of the Kerch Bay near Cape Ak-Burun (further designated as the discovered archaeological heritage site "Ak-Burun Bay"). After assessing possible site preservation strategies, the IA RAS was tasked to perform salvage works to remove all discovered artefacts, including the terra-cotta sculpture, from the seabed and to ensure their *ex situ* preservation.[967] Along with other artefacts, the terra-cotta sculpture underwent necessary conservation procedures and was transferred to a state museum for safekeeping.[968]

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[962] URM, para. 277.

[963] See paras. 533–534, 552–553 above.

[964] Dr Olkhovsky is a historian by education. He received a candidate of historical sciences degree, underwent training in underwater archaeological expeditions in Egypt, Great Britain and Croatia. In Russia, he has been leading an underwater group of the Phanagoria expedition organised by the IA RAS for more than 10 years. IA RAS official website, "Olkhovsky Sergey Valerievich", 5 April 2019 (**RU-545**); Letter from the Institute of Archaeology of the Russian Academy of Sciences No. 14102/2115 OP-1762, 28 June 2022 (**RU-531**), p. 3.

[965] Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge, *Official Information Site for the Construction of the Crimean Bridge*, 22 March 2017 (**UA-235**).

[966] See para. 544 above.

[967] Letter from the Institute of Archaeology of the Russian Academy of Sciences No. 14102/2115 OP-1762, 28 June 2022 (**RU-531**), pp. 2–3.

[968] *Id*., pp. 4–5; see also Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge, *Official Information Site for the Construction of the Crimean Bridge*, 22 March 2017 (**UA-235**).

583. Ukraine is correct in saying that the terra-cotta sculpture is unique for the North Black Sea area.[969] The scientific community of archaeologists has repeatedly emphasised the importance and significance of this discovery. The IA RAS interacted with scientists from the National Research Centre "Kurchatov Institute" (Russia) and the Centre for Applied Isotope Studies at the University of Georgia (USA), as well as with other leading international archaeologists, to recreate the original appearance of ancient terra-cotta and to determine its possible age and origin.[970] As a result, the IA RAS managed to establish that the sculpture was made in the region of Latium (Italy) in the V century BC,[971] rather than in Greece, as the first guess of the researchers was.

584. Thus, the removal of the terra-cotta sculpture from the seabed was not only essential to ensure its preservation, but moreover led to an important discovery that enriched the existing mankind's knowledge about the history of navigation in Crimea.

3. Episode with the Kitty Hawk Fighter Jet

585. As another example of Russia's allegedly casual approach to UCH, Ukraine refers to the removal of the WWII fighter jet Kitty Hawk from the seabed by a Russian "historical reconstruction group" that allegedly damaged the aircraft.[972] Ukraine's accusation is again groundless.

586. First, the removal of the Kitty Hawk, as the legacy of the Great Patriotic War, was conducted by the competent specialists duly authorised by the Ministry of Defence of the Russian Federation, as Russian law requires.[973] The aircraft was removed in the course of the "Great Landing Force Expedition – 2017" aimed at the exploration of the sunken aircraft[974] in accordance with the annual plan approved by the Ministry of Defence.[975] The expedition to explore and lift the Kitty Hawk was conducted by a non-governmental organisation "Battery 29 BIS" with the support from the Black Sea Centre for Underwater Research[976] and Exploratory Movement of Russia.[977] "Battery 29 BIS", erroneously labelled by Ukraine as a

[969] URM, para. 277.

[970] Letter from the Institute of Archaeology of the Russian Academy of Sciences No. 14102/2115 OP-1762, 28 June 2022 (**RU-531**), p. 5.

[971] *Ibid*.

[972] URM, para. 271.

[973] See para. 565 above.

[974] Lost in the Eltigen area in November–December 1943.

[975] Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), p. 2.

[976] The Black Sea Centre for Underwater Research is a state institution of the Republic of Crimea specialising in studying and protection of UCH.

[977] The Exploratory Movement of Russia is the largest organisation engaged in field and archival search operations.

"historical reconstruction group", is a public organisation regularly engaged in military search expeditions and restoration of the Great Patriotic War objects.[978]

587. Second, the removal of the fighter jet from the seabed was necessary for its ultimate protection, which is in line with international standards.[979] The fighter airframe 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.[980] The aircraft lying at accessible depth was also under the risk of looting as its location became widely known.[981] In reality, given that the aircraft was made of metal, its destruction underwater due to corrosion was just a matter of time.

588. Ukraine argues that "the aircraft suffered significant damage as it was extracted from the water".[982] This is simply not true. The Kitty Hawk was recorded as severely corroded and damaged prior to its lifting from the seabed. Its left wing and keel were damaged, the frontal section of the fuselage, the propeller and gearbox were missing, while the tail was fractured in its weakest part.[983] Ukraine's own evidence also confirms that "[t]he plane has significantly deteriorated after spending seven decades underwater."[984]

589. The Kitty Hawk's extraction from the water was conducted with due care. Since the aircraft was heavily silted and partially buried in soil, it was necessary to conduct preparatory works before the actual lifting. Due to the pre-existing damage to the tail, the expedition team decided not to lift the aircraft by its tail, but rather to pull special towel-type slings under the aircraft body and lift it by a crane.[985] Such method of removal of sunken aircrafts is an internationally accepted practice.[986] Although prior serious damage to the keel made it

[978] One of the main projects of Battery 29 BIS is the restoration of the Coastal Artillery Battery 29 of the Black Sea Fleet of the USSR. The 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. Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), pp. 1–2.

[979] See para. 543 above.

[980] In the course of a visual examination Mr Elkin even detected several anchors lying next to the fighter. See Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), pp. 3–4; Report of Search Operations at the Site of the Destruction of the Aviation Equipment No. 1, 12 May 2017 (**RU-547**), p. 1. 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)*, 06 May 2017 (**UA-236**): "The machine has not been plundered, although this is an anchoring position and sooner or later ships remaining off harbor could have damaged it with their anchors."

[981] Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), p. 4.

[982] URM, para. 271.

[983] Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), p. 3; Report of Search Operations at the Site of the Destruction of the Aviation Equipment No. 1, 12 May 2017 (**RU-547**), p. 1.

[984] Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2, *Russia Today*, 06 May 2017 (**UA-237**).

[985] Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), p. 4.

[986] Sunken military aircraft are removed from the seabed by cranes not only in Russia and Ukraine, but also in Greece, Germany, Norway, England and the United States. See e.g. *Skalko.Livejournal*, "On the Ground, in the Air and under Water", 13 April 2010 (**RU-548**); *Drive2.RU,* "Echo of the Great War… \ part 3 \", 6 June 2017 (**RU-549**); *GOV.UK*, "RAF Museum Successfully Raises Dornier Do17", 11 June 2013 (**RU-550**); *Getty Images*, "World War II Era Fighter Plane Recovered From Lake Michigan", 7 December 2012 (**RU-551**).

impossible to keep the tail completely intact, it was not lost. The aircraft is currently under restoration in one of the largest antique vehicle museums in Europe located in the Moscow Region, with further plans for its exhibition.[987]

590. It is therefore clear that, given the aircraft's condition and significant risks to its safety, the decision to lift the Kitty Hawk's remains and preserve them *ex situ* was the most reasonable. Contrary to Ukraine's accusations, the extraction process followed the standards accepted in the field.

4. Episode with the Airacobra Aircraft

591. Finally, Ukraine refers to the removal of another WWII object, the Bell P-39 Airacobra aircraft, and accuses Russia of using "a similar crane hoist system", which allegedly had already damaged the Kitty Hawk.[988] However, as Russia stated above, the use of a crane to lift sunken aircrafts is in line with international practice.[989] All other aspects of the expedition to remove the Airacobra were also in compliance with the relevant legal requirements and accepted standards of treatment of such objects.

592. The expedition to explore the Airacobra aircraft proceeded in two stages. First, in 2019, the Ministry of Defence of the Russian Federation, together with the Crimean Institute of Archaeology of the RAS and Mr Elkin, examined and identified the aircraft.[990] It was removed a year later, in 2020, in the course of a joint expedition of the Expeditionary Centre of the Ministry of Defence of the Russian Federation and the Russian Geographical Society, with the assistance of Underwater Technical Works Enterprise "Petr".[991] The expedition was carried out in accordance with the annual plan approved by the Ministry of Defence.[992]

593. The *ex situ* preservation of the Airacobra aircraft was essential to protect it from looting[993] and further natural deterioration due to corrosion.[994] The aggressive marine environment resulted in its destruction.[995] The part of its tail was missing, the fuselage was rotten, the engine

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[987] Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), p. 4.

[988] URM, para. 278.

[989] See footnote 986 above.

[990] Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), pp. 4–5.

[991] *Id*., p. 5; Letter from the Ministry of Defence of the Russian Federation No. 174/1790, 24 November 2021 (**RU-552**), p. 2; WWII Fighter Lifted From the Bottom of the Black Sea, *Russian Geographical Society* (1 October 2020) (**UA-670**).

The Enterprise "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.

[992] Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), p. 5; Letter from the Ministry of Defence of the Russian Federation No. 174/1790, 24 November 2021 (**RU-552**), p. 2.

[993] Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**), p. 5: "The flight instruments in the cockpit were partially dismantled. Somebody may have been there before 2019."

[994] *Ibid.* See also Letter from the Ministry of Defence of the Russian Federation No. 174/1790, 24 November 2021 (**RU-552**), p. 3.

[995] Letter from the Ministry of Defence of the Russian Federation No. 174/1790, 24 November 2021 (**RU-552**), p. 3; see also WWII Fighter Lifted From the Bottom of the Black Sea, *Russian Geographical Society* (1 October 2020) (**UA-670**), p. 3: "'The

was exposed, a wing was torn off, both wings were corroded, one cockpit door was torn off and laid near the aircraft.[996] The additional survey of the seabed also revealed many small fragments from the fuselage.[997]

594. The aircraft was removed with due care so as not to inflict additional damage. Soft slings were placed under the aircraft, it was pulled to the shore with the use of soft pontoons and then lifted by a truck crane.[998] In order to prevent further corrosion and destruction, the Airacobra aircraft is currently placed in a fresh water reservoir in Crimea.[999] The aircraft will then be transferred to a museum for restoration and exhibition.

595. The above facts tellingly demonstrate that there is no merit to any of Ukraine's allegations regarding Russia's supposed failure to protect UCH objects. All expeditions that Ukraine mentioned in the Revised Memorial followed the internationally accepted archaeological standards that Russia duly implemented in its legal framework and practice of UCH protection. Thus, if the Tribunal proceeds to assess Ukraine's claim, despite Russia's jurisdictional objection that UNCLOS does not apply to the Sea of Azov and the Kerch Strait, the Tribunal should find that Russia complied with its duty to protect UCH in the Black Sea, Sea of Azov and Kerch Strait under Article 303(1) of UNCLOS.

plane lay in the water for 75 years, this affected its condition. In addition, apparently, someone else tried to lift it and damaged it. Therefore, the state of the 'Airacobra' is not very good. But as an object of military-technical history, it has great museum value,' noted the Head of the expedition, specialist of the Expeditionary Center of the Ministry of Defense of the Russian Federation, Anatoly Kalemberg."

[996] Letter from the Ministry of Defence of the Russian Federation No. 174/1790, 24 November 2021 (**RU-552**), p. 3.

[997] *Ibid*.

[998] *Ibid*.

[999] *Ibid*.

CHAPTER 8.
THE TRIBUNAL HAS NO JURISDICTION OVER THE AGGRAVATION OF DISPUTE CLAIMS

596. One of Ukraine's submissions is that the Tribunal should adjudge and declare that "[t]he 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".[1000] Ukraine accuses Russia of failing "to engage meaningfully with Ukraine's efforts to settle this dispute",[1001] as well as goes on to enumerate examples of what, according to Ukraine, "deepened and compounded the dispute between the Parties, in violation of Russia's obligations under Articles 279 and 300".[1002]

597. Ukraine claims that Russia did not "stop its work on the [B]ridge or even modify its plans or timeline",[1003] continued the practice of inspecting vessels transiting the Kerch Strait,[1004] suspended the innocent passage of foreign military and government vessels in parts of the Black Sea, including the Southern entrance to the Kerch Strait,[1005] and continued the UCH-related activities.[1006]

I. UNCLOS Provides No Basis to Claim Jurisdiction as to the Aggravation of Dispute Claims

598. First and foremost, 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. For this reason alone, the Tribunal should not entertain these claims of Ukraine.

599. Another reason why the Tribunal lacks jurisdiction in this regard is that the UNCLOS provisions Ukraine invokes to justify its "aggravation" claim – Article 279 ("Obligation to settle disputes by peaceful means") and Article 300 ("Good faith and abuse of rights") – are irrelevant, as neither of them provides sufficient basis to establish jurisdiction. Nothing in the *travaux preparatoires* to the Convention indicates any reference to the alleged obligation of non-aggravation either. Ukraine misconstrues these articles of UNCLOS so as to instil into their meaning what they do not manifestly stipulate, and by that, to import the jurisdiction of an UNCLOS Tribunal where there should be none.

600. In support of its interpretation, Ukraine relies on the *South China Sea* Award, which in turn relied on the ICJ case law developed within the framework of Article 41 of the ICJ Statute

[1000] URM, para. 314(i).
[1001] *Id.*, para. 285.
[1002] *Ibid.*
[1003] *Id.*, para. 286.
[1004] *Id.*, para. 288.
[1005] *Ibid.*
[1006] *Id.*, para. 289.

on provisional measures.[1007] According to the interpretation given by the ICJ, Article 41 of the ICJ Statute applies the principle, according to which "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".[1008]

601. The power to indicate provisional measures by such international fora as the ICJ, PCIJ or ITLOS is granted by an explicit authorisation of an underlying legal instrument (the ICJ Statute, the PCIJ Statute or the Convention respectively). The duty of "refraining from aggravating or extending the dispute" imposed by international courts or tribunals in provisional measures indicated under this express authorisation differs from a general principle of "refraining from aggravating or extending the dispute" that has no specific origin. Whatever the merits of this interpretation of Article 41 of the ICJ Statute may be, neither Article 279 of UNCLOS, which has no similarity to Article 41 of the ICJ Statute, nor Article 300 of UNCLOS are an expression of such principle.

602. The *South China Sea* Award, the only relevant source that Ukraine heavily relied upon to assume the existence of such obligation under UNCLOS, is notably isolated in considering that the principle of non-aggravation is contained in the said articles of UNCLOS.[1009] The origin of this obligation is obscure and is not clearly explained by the *South China Sea* Tribunal, which was subject of criticism of the award in that case.[1010] Neither the Convention, nor international law go so far as to impose a general all-encompassing legal obligation on States to refrain from aggravating their relations.

603. Ukraine itself points out 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'".[1011] According to the Commentary to the Convention, Article 279 refers in the first place to the basic general obligation of all States Parties to the Convention, which is derived from Article 2, paragraph 3, of the UN Charter, to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not

[1007] URM, para. 284, relying on *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016 (**UAL-11**), paras. 1169, 1172.

[1008] *LaGrand (Germany v. United States of America)*, ICJ Judgment of 27 June 2001 (**UAL-23**), p. 503, para. 103, citing *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria),* Interim Measures of Protection, Order, 5 December 1939, PCIJ Series A/B, No. 79 (**RUL-130**), p. 199.

[1009] It is moreover significant that the Special Chamber of ITLOS in its Judgment in the *Ghana/Côte d'Ivoire* case, when dealing with the question of its jurisdiction to adjudicate Côte d'Ivoire's claim that Ghana had not complied with the provisional measures prescribed, made no reference to either Article 279 or 300 of UNCLOS (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire),* Judgment, ITLOS Reports 2017 (**RUL-131**)).

[1010] See Chris Whomersley, "The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique", *Chinese Journal of International Law*, Oxford University Press, 2017 (**RUL-132**).

[1011] URM, para. 284.

endangered".[1012] Another function of Article 279 is that it incorporates by reference the peaceful means indicated in Article 33, paragraph 1, of the UN Charter ("negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means" of their "own choice"").[1013]

604. Therefore, there is nothing in the plain text of Article 279 of the Convention to suggest that it encompasses the alleged obligation to refrain from aggravation.

605. The same concerns Article 300 of UNCLOS. According to the Commentary to the Convention, the reference to "good faith" reflects Article 2, paragraph 2 of the UN Charter and the fundamental rule *pacta sunt servanda*.[1014] The notion of "abuse of rights" in Article 300 concerns the unnecessary or arbitrary exercise of rights, jurisdiction and freedoms or the misuse of powers by a State.[1015] Article 300 is worded in hortatory terms and its place in the text of UNCLOS (Part XVI "General Obligations") additionally attests to the general nature of its pronouncements. Following Ukraine's logic, one can read into 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.

606. Therefore, Ukraine arbitrarily establishes the links between the provisions of UNCLOS and the alleged obligation of "refraining from aggravating and extending the dispute". Nowhere in the Convention such express obligation can be found. Consequently, Ukraine's non-aggravation claims shall fall outside the scope of this Tribunal's jurisdiction as not concerning the interpretation or application of UNCLOS, as Article 281(1) of the Convention requires.

II. In Any Event, Ukraine's Aggravation Claims Are Unfounded and Should Be Rejected

607. What Ukraine labels as examples of aggravation of a dispute by Russia[1016] constitute Russia's legitimate exercise of sovereign powers over its territory – either in its internal waters or in its territorial sea adjacent to the Crimean Peninsula. This aspect is crucial for the assessment of Ukraine's assertions and should not be disregarded by this Tribunal.

608. The accusation of failing "to engage meaningfully with Ukraine's efforts to settle this dispute" is distorted. What Ukraine fails to mention is that its protests as to the Bridge's

[1012] By incorporating this provision into the Convention, it has been extended also to States Parties that are not UN Members (M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989 (**RUL-14-AM**), p. 18).

[1013] In some earlier versions of this article, these means were repeated verbatim (M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989 (**RUL-14-AM**), pp. 17-18).

[1014] The Vienna Convention on the Law of Treaties formulates this rule in relation to a treaty in lapidary form (Article 26): "Every treaty in force is binding on the parties to it and must be performed by them in good faith". (M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989 (**RUL-14-AM**), p. 152).

[1015] M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989 (**RUL-14-AM**), p. 152.

[1016] See para. 597 above.

construction rested on the premise Russia could not accept – Ukraine's alleged sovereignty over Crimea and the territorial sea adjacent to it. All diplomatic notes that Ukraine referenced in the Revised Memorial[1017] are underpinned by its claims of sovereignty, as a coastal State, over the waters of the Black Sea and the Sea of Azov adjacent to the Crimean peninsula. Ukraine's allegations in essence constitute claims of sovereignty over Crimea and, therefore, are not covered by the Convention. Russia consistently dismissed these claims and, as repeatedly indicated, lawfully exercised sovereignty, its sovereign rights and jurisdiction over the water areas in question.[1018]

609. As Russia explained in detail in the relevant sections of this Counter-Memorial, the decision to construct the Kerch Bridge was taken against the backdrop of an economic and humanitarian necessity to connect the Crimean Peninsula to mainland Russia. This was even more urgent following Ukraine's own efforts to cut off Crimea from all vital resources, in essence amounting to a full state-sponsored blockade.[1019] Ukraine's allegations that Russia did not "stop its work on the [B]ridge or even modify its plans or timeline" thus seem particularly hypocritical.

610. Russia also demonstrated above that the practice of vessels' inspections in the Kerch Strait and the Sea of Azov was legitimate, justified by valid security concerns in the region and serve the security and crime-prevention purposes.[1020] Amid the tensed situation in the Azov-Black Sea basin and repeated provocations on the part of Ukraine, including after the commencement of these arbitral proceedings (for instance, the November 2018 incident when Ukrainian warships attempted an unlawful transit through the Kerch Strait[1021]), Ukraine's condemnations in this regard are ridiculous and abusive.

611. The same concerns Ukraine's claims with regard to the suspension of innocent passage of foreign military and government vessels in the Russian territorial sea adjacent to Crimea. Similar to the inspections practice, Russia had legitimate security concerns that arose from Ukraine's own conduct after commencing this arbitration. The continued threats by Ukrainian authorities to destroy the Kerch Bridge are but one example.[1022]

612. Ukraine fails to substantiate and provide any kind of evidence to its accusation of "lasting harm to the fragile marine ecosystem of the Black Sea basin".[1023] This remains pure speculation and, as such, was amply rebutted in Chapter 6 above, with references to specific results of

[1017] URM, footnote 611.

[1018] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 10949/2dsng, 5 September 2016 (**RU-43**); Transcript of the Russian-Ukrainian Consultations on the United Nations Convention on the Law of the Sea, Minsk, 11 August 2016 (**RU-41**); *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation, No. 10352/2DSNG, 4 August 2017 (**UA-223**).

[1019] Chapter 3, Section II (A), (B).

[1020] Chapter 4.

[1021] Subject matter of separate arbitral proceedings between Ukraine and Russia (PCA Case No. 2019-28).

[1022] Paras 262-263.

[1023] URM, para. 287.

current surveys and constant monitoring, all of which have indicated that there is no unmanageable harm to the marine environment of the Azov-Black Sea basin as a result of the Bridge's construction.[1024]

613. In a similar manner, Ukraine completely fails to back up with any solid evidence its accusations of alleged harm with respect to the UCH. They remain nothing more than unsubstantiated assertions, and, as Russia at length explained in Chapter 7 above,[1025] all archaeological artefacts mentioned by Ukraine were treated with due care and respect of the applicable standards of the UCH protection.

614. Finally, if anything indeed can be viewed as an aggravation of the dispute, it is the recent explosion on the Crimean Bridge orchestrated by the Ukrainian special services on 8 October 2022. It once again demonstrates to the world that the only real threat to the safety of the Bridge has always been Ukraine itself. .

615. To sum up, for the reason that Ukraine's assertions as to the aggravation of the dispute are grounded on the wrong interpretation of UNCLOS, as well as due to the lack of jurisdiction over the main dispute, the Tribunal has no jurisdiction over these claims of Ukraine. In any event, these claims are meritless and the Tribunal should treat them as such.

[1024] Chapter 6, Section II, IV.

[1025] Chapter 7, Section C.

CHAPTER 9.
SUBMISSION

616. 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.

Moscow, 14 October 2022

Dmitry Lobach

Agent of the Russian Federation