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Memo

<http://neweurope.org.ua/>
info@neweurope.org.ua

<https://www.facebook.com/NECUkraine/>
https://twitter.com/NEC_Ukraine
https://t.me/n_e_c

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PRO ET CONTRA: SHOULD UKRAINE DENOUNCE THE AZOV AGREEMENT?

The denunciation of the Ukraine-Russia Agreement on Cooperation in the Azov Sea and the Kerch Strait of 2003 would narrow down the scope of Moscow's legal manipulations and establish at least a minimum of certainty. This is the main argument for termination of the Azov Agreement. In case of its denunciation, Ukraine and Russia would have to adhere to the provisions of the 1982 United Nations Convention on the Law of the Sea, which would allow to establish a territorial sea regime in the form of a 12-mile zone from the outgoing lines. The international status should deprive Russia of the grounds for arbitrary actions on the legal side. Finally, the denunciation would restore historic justice, since the Ukrainian President had signed the agreement in 2003 under considerable pressure from Moscow.

The most controversial issue, which obviously holds back the Ukrainian diplomats, is the possible impact of such a step on resolving the disputes between Ukraine and Russia in international judicial instances. It should be noted that not all lawyers in Ukraine support this position, considering that the existing agreement does not allow that. There is also a certain risk of a discrediting campaign that Moscow has actually already initiated against Ukraine.

The New Europe Center recommends informing the international partners about the situation in the Azov Sea as much as possible.

Representatives of the Ukrainian authorities should also speak with a single voice about the situation in the Azov Sea, as any ambiguous

statements would weaken Ukraine's position on the international scene.

The New Europe Center asked diplomats, military officers, lawyers, and scholars to assess the degree of risks and threats to Ukraine both in the event of denunciation of the agreement, and in the case of its survival. This memo should contribute to a balanced approach to the final decision. During the preparation of this analytical document, we used the Center's own expertise, as well as expert assessments by *Andriy Ryzhenko, Borys Babin, Volodymyr Vasylenko, Anton Korynevych, and Tymur Korotky*.

ARGUMENTS FOR DENUNCIATION

1 NARROW DOWN THE SCOPE OF RUSSIA'S LEGAL MANIPULATIONS. The agreement between Ukraine and the Russian Federation on cooperation in the use of the Azov Sea and the Kerch Strait does not resolve the main issue, as it does not contain any specifics about the state border line, which should be determined by an additional agreement. The lack of that border line allows Russia to perceive the entire Azov Sea as its own internal waters, including the coastal waters of Ukraine. This is a security threat. Russia is already making claims regarding the Azov Sea waters adjacent to Crimea, and the Gulf of Sivash.

2 LEGAL CERTAINTY. The application of the UN Convention on the Law of the Sea enables Ukraine to establish a territorial sea regime in the form of a twelve-mile zone from the outgoing lines and will provide clear regulation of the airspace over the territorial sea, as well as bed and subsoil. As of today, the territorial sea regime on the Azov Sea

is not established, and the outgoing lines are not defined. This means that Russian warships can reach even up to one meter to the coast of Ukraine. In terms of delimiting the line of the state border in the Azov Sea, Russia will base its argument on the fact that Crimea belongs to it. Therefore, Ukraine can rely only on the international law. Denunciation of the Agreement will change the status of the Azov Sea to the open sea, and the passage through the Kerch Strait will be regulated according to the rules of free transit passage. International status would deprive Russia of the grounds for arbitrariness on the legal side.

3 OPTION TO APPEAL TO INTERNATIONAL COURTS. The Agreement provides that all disputes between Ukraine and Russia related to the application of the Agreement shall be resolved "through consultations and negotiations, as well as other peaceful means of choice of the Parties" (Article 4). In fact, this means that Ukraine has the right to appeal to international courts only if Russia agrees. Any appeals to international legal bodies is not provided for in the document at all (unlike, for example, the Agreement between Ukraine and Romania of 1997). Denunciation would provide the clear international dispute settlement procedure and legal liability mechanism according to the provisions of the UN Convention on the Law of the Sea, which are mandatory for Russia.

4 ELIMINATING CERTAIN LIMITATIONS OF THE INTERNATIONAL LAW. The Azov Agreement partially limits the effect of the 1982 United Nations Convention on the Law of the Sea, ratified by Ukraine in 1999. For instance, the Convention regulates the free passage for military vessels of third



countries. The present Agreement, however, demands Russia's approval for the passage of warships of third states (Article 3, Clause 3). From the very beginning of the relevant negotiation process with Ukraine, Russia has been blocking the issue of defining the international legal status of the Azov Sea.

5 OPERATIVE ADVANTAGE. 12-mile territorial waters would bring greater clarity in the legal regime, and thus would provide Ukraine with a certain operational advantage in terms of the defense of the Azov Sea coast. In turn, continuation of the Agreement would facilitate Russia's seizure of the sea area and Ukrainian coast, preserve Russia's advantage in capturing the territory of Ukraine, and ensure further loss of sovereign rights of Ukraine on the Azov Sea.

6 INTERNATIONAL SUPPORT. The US and the EU condemned Russia's violations in the Azov Sea. For example, in a statement issued by the State Department on August 30, 2018, the US condemned Russia's violation of the trade maritime law in the Azov Sea and the Kerch Strait. Thus, we could partially argue that there is reason to hope for international support in the event of denunciation (however, for these hopes to be fulfilled, appropriate negotiations before the denunciation are required).

7 ADHERENCE TO THE VIENNA CONVENTION. In the case of denunciation, Ukraine has the right to refer to the Vienna Convention on the Law of Treaties. For instance, in accordance with article 60 of this document, a significant violation of a bilateral agreement by one of the parties enables the other party to refer to that violation as a ground for termination of the agreement.

Russia's violation of the Agreement is beyond any doubt.

8 COUNTERING INTERNAL POLITICAL TENSIONS. Ukrainian politicians have been criticizing the state authorities for a long time because of their inactivity in this regard. The relevant resolution calling on the President of Ukraine to denounce the Agreement has been submitted to the Verkhovna Rada as early as on July 10, 2018. Since then Russia has only intensified its violations in the Azov Sea. The denunciation of the Agreement would also decrease the flow of criticism regarding consistency of actions of the Ukrainian authorities, which is sometimes accused of secret cooperation with the Russian authorities during the war.

9 FACILITATING THE FUTURE PEACEKEEPING MISSION. The international community and Ukraine are seeking to establish a United Nations peacekeeping mission in the occupied territories. In this context, there is the question of the presence of peacekeepers in the Azov Sea, since Russia could provide military support to insurgents and Russian army by sea. The presence of international peacekeeping forces is regulated by the UN Convention on the Law of the Sea, but the Agreement between Ukraine and Russia of 2003 does not include any relevant clause.

10 RESTORATION OF HISTORICAL JUSTICE. At the time of Leonid Kuchma's Presidency, who was weakened by numerous internal scandals and virtually cut off from the dialogue with Western partners, Ukraine signed the Agreement under Vladimir Putin's pressure. Under different conditions, Russia sought to complete the construction of a

dam to the island of Tuzla, which would affect the delimitation of the state border line in the Azov-Kerch water area. Maritime law specialists highlight the absurdity of the document that was prepared in a hurry.

11 ADDITIONAL SANCTIONS. If Russia violates international law in the event of denunciation of the bilateral Agreement, e.g. if Moscow resorts to a blockade, Ukraine will have grounds not only to appeal to international courts for protection and appropriate compensation, but also to expect from the partners (the US and the EU) to immediately strengthen the sanctions against Russia. It is essential to launch the relevant negotiation process before the beginning of the denunciation procedure.

ARGUMENTS AGAINST DENUNCIATION

1 CHARGES AGAINST UKRAINE. Russia could blame Ukraine for destabilizing the situation in the region, demonizing Ukraine in front of the global community as the initiator of a new wave of tensions. There is a risk that Moscow would use the denunciation as an excuse for other provocations, including the military plan.

2 USE OF MILITARY ADVANTAGE. Russia could resort to the use of its military naval capabilities in the Azov Sea to intimidate Ukraine or other countries of the region and the world (project force).

3 ARGUMENT IN THE COURT. Russia could use the decision to denounce the Agreement as an argument during the resolution of the dispute between the two

countries in the UN International Tribunal for the Law of the Sea and distort the situation, presenting it as it was Ukraine's decision that led to the violations in the Azov Sea. According to lawyers, denunciation will not affect the existing lawsuit to the International Tribunal, as the Agreement was in force at that time. In the case of new lawsuits, Ukraine should refer to the UN Convention on the Law of the Sea. However, there are also specialists who call to take into account the "psychological effect," as it is hard to predict how the court's position may change under the influence of a particular argument (regardless of the relevant provisions of the international law). For instance, the International Court of Justice has 15 judges and decisions are taken by a majority (if the international law was interpreted unambiguously, there would always be unanimous decisions).

4 GROUNDLESS HOPES FOR THE INTERNATIONAL LAW. Russia has already violated several international treaties, and therefore will keep resorting to violations and provocations in the Azov Sea. Ukraine's expectations that the United Nations Convention on the Law of the Sea of 1982 will establish a more reliable legal framework for navigation may not be justified.

5 THE GLOBAL COMMUNITY MAY NOT SUPPORT UKRAINE. Certain international partners may not accept such a step, believing that it would only destabilize the situation. In this case, it is important for Kyiv to ensure reliable support from the USA, key EU member states, and other countries (in particular, the Black Sea region) before denouncing the Agreement.



6 RESERVATIONS OF THE THIRD STATES. Hopes that the warships of third states will be able to enter the Azov Sea freely in accordance with the 1982 United Nations Convention on the Law of the Sea may be groundless. Third parties may be afraid to face a conflict with Russia, and therefore will refrain from such a move. In 2003, Ukrainian diplomats explained that they agreed to the article in the Agreement on the passage of warships of third states to Azov only on the grounds that the sea is not deep, and therefore is not suitable for military vessels. Today, the Ukrainian side argues that in this way diplomacy actually justified its weakness against Russia, since the third countries have different types of military naval vessels.

7 DENUNCIATION WILL NOT CHANGE THE STATUS. There is a concern that denunciation will not change the status of the Azov Sea and the Kerch Strait as internal waters of Ukraine and Russia. Article 5 of the Agreement on the Ukrainian-Russian state border states that “nothing in this Agreement is detrimental to the positions of Ukraine and the Russian Federation regarding the status of the Azov Sea and the Kerch Strait as the internal waters of the two states.” Some Ukrainian lawyers believe that this article is not an obstacle to changing the status. However, it is also believed that Ukraine will need to amend this article or to resort to denunciation this Agreement as well due to serious violations on the part of Russia (starting from the annexation of Crimea). After the denunciation, the legal basis for relations with Russia should be the international norms of the United Nations and the Helsinki Final Act.

8 DISCREDITATION OF UKRAINIAN AUTHORITIES. Denunciation of the Agreement may lead to criticism of Ukraine on the uncoordinated actions of the authorities and discrepancies between their assessments and views. The leadership of the Ministry of Foreign Affairs of Ukraine publicly opposed the denunciation of the Agreement. The denunciation could become another example for depicting Ukraine as a failed state, a country with weak institutions.

9 BLOCKADE OF THE KERCH STRAIT. Russia is already creating maximum obstacles for the passage of Ukrainian ships, and it could use the denunciation to organize even tighter blockage, although this would be a violation of the international law. Under such conditions, commercial shipping in the Azov Sea could be effectively terminated.

10 INCITING CIVIL UNREST. Russia could resort (directly or through its agents) to the incitement of civil unrest among Ukrainian citizens (in particular, Azov fishermen) who benefit from the Agreement. As of today, the port of Berdyansk has 1,056 employees, and the port of Mariupol provides jobs to 3,274 persons. As a result of Russia’s blockade, profitable operation of these enterprises would be impossible. This would exacerbate social tensions in a rather volatile region. However, it should be taken into account that Russia has already resorted to such a blockade, and the ports have already declared their losses in this regard.