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THE STATUS OF THE KERCH STRAIT

Master thesis

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INTRODUCTION

The Kerch Strait which is the only navigable route between the Azov Sea and the Black Sea is crucially important to the economy of Ukraine. Before the occupation of Crimea Ukrainian ports on the Azov Sea were highly successful with their potential being almost fully exploited.

According to the information provided by the Department for the Reformation and Operation of the Sea and River Transport of the Ministry of Infrastructure of Ukraine the capacity of Mariupol seaport is approximately 17 million tones of cargo per year. In 2013 this port handled about 15 499 010 tones of cargo and the statistics from the previous years indicates the increasing trend in this port. Another Ukrainian port in the Azov Sea is Berdyansk seaport which has a capacity of about 3 million tones. In 2013 cargo handling in this seaport amounted to 2 163 500 tones.

Due to its special geographical location the Kerch Strait not only has economical value for Ukraine but also bears strategic importance as the only one navigable way to access the eastern shores of the Ukrainian territory. It should be also mentioned that the Kerch Strait has significant ecological importance due to the fact that it ensures the natural water flow from and to the Azov Sea that is considered as the shallowest sea in the world.

However, everything has changed after occupation of Crimea in 2014.

Economically, in addition to losing its ports on Crimean peninsula, Ukraine has also lost control of the Kerch Strait itself with the loss of the management over the Kerch-Yenikalskiy Channel that is the only navigable way through the Strait. Furthermore, sanctions imposed by the European Union (EU) and restrictions on navigation through the Kerch Strait caused by construction of the bridge by the Russian Federation led to dramatic reduction in cargo handling both in Mariupol and Berdyansk seaports. Moreover, Russia unilaterally closed the navigation in the Kerch Strait due to construction works of the bridge more than once in 2017.

Strategically, after the occupation of Crimea Ukrainian state vessels are not using the Kerch Strait anymore. The use of it would be considered as acceptance of the Russian authority acting in the Kerch Strait which has been persistently challenged and denied not only by Ukraine but also by the majority of the international community. However, since there is no other way to reach Ukrainian ports on the Azov Sea, the Ukrainian private vessels as well as vessels under the flag of the foreign states still navigate in the Kerch Strait.

Furthermore, construction of the bridge over the Kerch Strait resulted in a fierce debate over the consequences of such construction and its potential impact on the environment. Ukraine argues that it would lead to huge ecological damages while Russia insists that the construction complies with applicable international and national rules. Moreover, due to this construction Russia

unilaterally imposed restrictions over the dimensions of vessels allowed to navigate in the Kerch Strait.

For the purpose of securing its legitimate rights, on 16 September 2016 Ukraine served the Russian Federation with a Notification and Statement of Claim under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) referring to a *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*.¹

In order to opine whether arbitral tribunal will have jurisdiction in this case over the issues related with the Kerch Strait and Ukraine will be able to proceed with the merits of the case, it is necessary to determine the legal status of the Kerch Strait and to establish whether any rules of UNCLOS are applicable in this case. Ukraine is a member of UNCLOS since 26 July 1999 while Russia – since 12 March 1997.²

Researched problems:

1. Whether the Kerch Strait is a “strait used for international navigation” under Part III of UNCLOS and if not, what are the maritime zones of its coastal states covering this Strait and consequently – what is the legal regime applicable in the Kerch Strait?

2. If Ukraine and Russia legitimately claim the Sea of Azov and the Kerch Strait historically to be their internal waters, are there any clauses of UNCLOS still applicable in the Kerch Strait which would make the dispute related with the Kerch Strait arbitrable under provisions of UNCLOS?

3. Whether the declarations under Article 298(a)(i) of UNCLOS about the disputes involving historic bays or titles by Ukraine and Russia will exclude any dispute related to the Kerch Strait as a strait with historic title?

Aim and objectives of the thesis

The aim of the research is to determine the status of the Kerch Strait with the purpose of assessing whether arbitral tribunal will have jurisdiction in respect of Ukraine’s submissions related with the Kerch Strait in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation).

In pursuance of the identified aim the following objectives are established:

– to determine the impact that the loss of control over the Kerch-Yenikalskiy Channel and the construction of the bridge over the Kerch Strait had on Ukraine’s economy;

¹ “Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)”, Permanent Court of Arbitration, PCA Case Repository, accessed 2018 May 1, <https://pcacases.com/web/view/149>.

² Chapter XXI, United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, accessed 2018 May 23, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en.

- to establish whether the Kerch Strait falls within the definition of the “strait used for international navigation” within the context of UNCLOS;
- to determine which maritime zones are connected by the Kerch Strait and, based thereon, to establish whether Section 2 or Section 3 of Part III of UNCLOS is applicable to the Kerch Strait;
- to analyze what maritime zones of the bordering states cover the Kerch Strait and how they are delimited between those states;
- to define the applicable legal regime in the Kerch Strait and to assess whether such regime is governed by any norms of UNCLOS or not;
- to establish whether construction of the bridge over the Kerch Strait initiated by the Russian Federation violates any norms of UNCLOS;
- to determine whether the dispute related to the delimitation of the Kerch Strait and the construction of the Kerch Bridge could be referred to compulsory dispute settlement procedures under UNCLOS.

Relevance of the final thesis

Even before occupation of Crimea the status of the Azov Sea and the Kerch Strait was debated. The level of uncertainty surrounding this issue is clearly demonstrated by the fact that Ukraine’s position on the legal status of those waters changed drastically throughout the years of its independent statehood. The problem became even more urgent after occupation of Crimea. Ukraine’s ability to defend its legitimate interests in the Kerch Strait on international level and admissibility of its claim to the Russian Federation entirely depends on the determination of the status of the Azov Sea and the Kerch Strait.

Novelty of the final thesis

Academic novelty of this thesis is predetermined by occupation of Crimea, loss of control over the Kerch-Yenikalskiy Channel and Ukraine’s desperate need to seek for legal remedies. This thesis is the first comprehensive study which determines the status of the Kerch Strait, defines the extent of applicability of UNCLOS in these waters and evaluates the possibility to invoke the dispute settlement procedures under UNCLOS. Moreover, the study is novel because for the first time in a legal doctrine admissibility of Ukraine’s claim in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation), which was submitted on 16 September 2016, is evaluated in respect of its submissions related with the Kerch Strait.

Level of the analysis of a researched problem of the final thesis

The issue of whether the Kerch Strait qualifies as the internal waters of Ukraine and Russian Federation or falls within the definition of straits used for international navigation which are subject to Part III of UNCLOS was analyzed by Adam Eberhardt, Alexander Skaridov, Ana G. Lopez Martin, Arthur Nicevich, Dmytro Koval, Irina Nossova, Olga Romanukha, Olexandr Shemyakin, Sergiy Kuznetsov, Timur Korotkyy, Tetiana Averochkina, Ulyana Us'ka, Valentin J. Schatz.

However, research of this thesis is broader in scope because it's aimed not only at determining the status of the Kerch Strait but also includes Ukraine's ability to defend its legitimate interests on international level and admissibility of its claim related to infringements in the Kerch Strait to the Russian Federation under UNCLOS. Due to novelty of the research there are very few sources in which arbitrability of the dispute over the Kerch Strait would be studied. By now there has been only two articles published on admissibility of Ukraine's claim to the Russian Federation.

The first one was the article written by Peter Tzeng in the 2017, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy". This article analyses the general grounds of jurisdiction and its legitimacy instead of focusing merely on the Kerch Strait.³

In January 2018, Valentin J. Schatz and Dmytro Koval published an article "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov" in which they presented two possible scenarios for the current legal status of Kerch Strait. Under the first scenario the waters of the Azov Sea and the Kerch Strait are considered as "internal waters of Russia and Ukraine as they form part of a single bay regime that has only later evolved into a border bay."⁴ Under the second one "the original bay regime dissolved with Ukraine's independence or thereafter and Kerch Strait and the Sea of Azov largely are part of the territorial sea of Ukraine and Russia. In addition, a patch of high seas (or potentially EEZs) exists in the central Sea of Azov."⁵ The Article is divided into three parts: The Legal Status of Kerch Strait and the Sea of Azov⁶, Ukraine's Rights of Passage through Kerch Strait⁷, The Jurisdiction of the Arbitral Tribunal⁸. This thesis goes further than the observations made in the aforementioned article because in addition to describing the possible scenarios it also examines and concludes which of the scenarios should be selected as the one confirming with the applicable international law.

³ Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy", *Denver Journal of International Law and Policy*, Vol. 46, No. 1 (2017): 1-19.

⁴ Valentin J. Schatz and Dmytro Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part I", *Völkerrechtsblog*, (January 10, 2018), <http://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/>.

⁵ Ibid.

⁶ Ibid.

⁷ Valentin J. Schatz and Dmytro Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part II", *Völkerrechtsblog*, (January 12, 2018), <http://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov-2/>.

⁸ Valentin J. Schatz and Dmytro Koval, "Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part III", *Völkerrechtsblog*, (January 15, 2018), <http://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov-3/>.

Due to the limited scope of the master's thesis, there is no examination made on all possible grounds that might be invoked by Russia to challenge the jurisdiction of the arbitral tribunal. The research is only limited to establishment whether the possible submissions related to the Kerch Strait actually qualify as the dispute relating to the interpretation or application of UNCLOS. Thus, this thesis determines the status of the Kerch Strait and also defines to what scope the provisions of UNCLOS is applicable in these waters for the purposes of evaluating the possibility to invoke compulsory dispute settlement procedures under UNCLOS.

Significance of the final thesis

The practical significance of the thesis is the following:

First of all, the study could be useful for Ukrainian governmental institutions while preparing the procedural documents and arguing the case *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* before the arbitral tribunal.

Secondly, the analysis presented in the thesis and the conclusions made might prove helpful for Permanent Court of Arbitration in deciding the case *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*.

Thirdly, on the basis of this study various seminars and workshops could be organized for the purposes of capacity building of state officers in order to ensure that Ukraine's official position would be consistent and in the future would exclude such controversies which surrounded the Kerch Strait until now.

Fourthly, this thesis should be also useful for academics lecturing the law of the sea as well as for preparing educative materials.

Research methodology

To achieve the aim of the thesis, the following methods were used:

1. Description method was used for providing the general overview of the Kerch Strait before and after the occupation of Crimea. It was also employed for determination of the impact that the loss of control over the Kerch-Yenikalskiy Channel and construction of the bridge over the Kerch Strait by the Russian Federation had on the economy of Ukraine.

2. Systematic method was used through the thesis for the purposes of analyzing the legal status of the Kerch Strait, its legal regime and whether such regime is governed by any norms of UNCLOS or not.

3. Comparative method was used to determine the differences in the legal regulation of the internal waters of one state with the legal regulation of the internal waters shared by two and more states.

4. Linguistic method and method of logic was used in order to interpret the provisions of UNCLOS, case law and bilateral agreements between Ukraine and Russia.

5. Critical method was used in order to identify whether the actions of the Russian Federation in constructing the Kerch Bridge over the Kerch Strait violate any norms of UNCLOS.

6. Analytical method was invoked in the analysis of possibility to raise compulsory dispute settlement procedure under UNCLOS between Ukraine and Russia regarding the Kerch Strait, namely the dispute related to the delimitation of the Kerch Strait and the construction of the Kerch Bridge.

Structure of research

The thesis is divided into the following parts: introduction and three substantial parts that are divided into smaller sections, conclusions and recommendations, bibliography, summary.

The general part of the thesis is included in the Chapter 1. It covers the general overview of the Kerch Strait. The Chapter which is split into two subchapters describes the situation before and after the occupation of the Crimean peninsula and analyses the consequences faced by Ukraine due to its loss of control over the Kerch Strait and the territory of Crimea.

The special part of the thesis is included in the Chapter 2 and Chapter 3.

In the Chapter 2 it is analyzed whether the Kerch Strait falls within the definition of a “strait used for international navigation” by applying the geographical and functional criteria from the *Corfu Chanel case*. Chapter 3 examines whether the Kerch Strait is the “strait used for international navigation” within the context of UNCLOS and determines not only the maritime zones that are connected by the Kerch Strait but also the maritime zones of the bordering states covering the Kerch Strait. This Chapter also deals with the definition of the applicable legal regime in the Kerch Strait and whether such regime is governed by any provisions of UNCLOS. Furthermore, it opines whether there was infringement of norms of UNCLOS by Russia’s construction of the Kerch Bridge and whether the dispute related to the delimitation of the Kerch Strait and the construction of the Kerch Bridge could be referred to the compulsory dispute settlement procedures under UNCLOS.

Defence statement

Even if the waters of the Kerch Strait are deemed internal on the basis of historical title, this does not prevent the dispute related with infringement of Ukraine’s rights and Russia’s violations of its obligations in the Kerch Strait to be arbitrable under UNCLOS since the internal waters are not entirely excluded from the scope of UNCLOS.

LIST OF ABBREVIATIONS

EU - European Union

ICJ - International Court of Justice

IMO - International Maritime Organization

RSFSR – Russian Soviet Federative Socialist Republic

UK - United Kingdom

Ukrainian SSR - Ukrainian Soviet Socialist Republic

UN – United Nations

UNCLOS - United Nations Convention on the Law of the Sea

USA - United States of America

USSR - Union of Soviet Socialist Republics

1. THE GENERAL OVERVIEW OF THE KERCH STRAIT

1.1. The Kerch Strait Before Occupation in 2014

The Kerch Strait connects the Sea of Azov which is bordered by Ukraine and the Russian Federation with the Black Sea and separates Crimea in the west from Russia's Taman Peninsula in the east. “Its northern end, opening into the Sea of Azov, is narrowed to a width of from 2 to 3 mi (3.2–4.8 km) by the narrow Chuska landspit; the southern end, opening into the Black Sea, is c.9 mi (14 km) wide. Its arm, the Taman Gulf, penetrates east into the Taman Peninsula”⁹. The Kerch Strait is navigable only by the Kerch-Yenikalskiy Channel. It is covered by ice floes during winter for two months. To get from one shore to another of the Kerch Strait is possible by a railway ferry and other boat services that maintain communications in the strait¹⁰.



Table No. 1 The map of the Kerch Strait¹¹

It should be emphasized that the Kerch Strait is the only navigable route from the Azov Sea to the Black Sea and *vice versa*.

The Black Sea¹² is an inland sea situated off in the east side next to Caucasia, in the west - the Balkan Peninsula, in the north - the East European massif and in the south - Asia Minor. The

⁹ "Kerch Strait", The Columbia Encyclopedia, 6th ed., Encyclopedia.com, accessed 2018 April 2, <http://www.encyclopedia.com/reference/encyclopedias-almanacs-transcripts-and-maps/kerch-strait>.

¹⁰ "Kerch Strait", The Internet Encyclopedia of Ukraine, accessed 2018 April 7, <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CK%5CE%5CKerchStrait.htm>.

¹¹ "The Kerch Strait", Google Map, (drawings were made by author), accessed 2018 April 19, <https://www.google.com.ua/maps/@46.1698774,37.326724,7.42z?hl=en>.

¹² "In Ukrainian language it is called as Chorne more (Чорне море), while in Russian Chornoye More or Chornoyoe More (Черное море). Modern names of the Sea are equivalents of the English name, "Black Sea," including Greek *Mavre Thalassa* (Μαύρη Θάλασσα), Bulgarian *Cherno more*

shorelines of the Black Sea and the Sea of Azov are a frame of the natural boundary of the Ukrainian regions in the south. Today the Black Sea coast is bordered by the Ukraine, the Russian Federation, Georgia, Turkey, Bulgaria, and Romania.¹³

The Black Sea is linked to the Sea of Marmara by the Bosphorus strait, and the long, island-bound strait of the Dardanelles connects the Black Sea to the Aegean Sea region of the Mediterranean¹⁴. “The Black Sea has a more or less oval shape. Its longitudinal axis is about 1,150 km long, and its latitudinal axis is 611 km. The sea surface has an area of 423,000 sq km. The average depth is 1,300 m, and the greatest depth is 2,245 m. The volume of the Black Sea is 547,000 cu km”.¹⁵

The Azov Sea¹⁶ is an interior sea which lies between Ukraine and Russia in their southern coasts¹⁷. In antiquity the Sea of Azov was called as *Palus Maeotis* (Lake Maeotis) and this name had the Latin origin¹⁸. The sea has an assessed surface zone of around 37,600 sq km. Its deepest distance from the top to the bottom of the seabed is 14 m and this fact makes this sea the shallowest sea on the planet. In spite of the challenges in navigation due to its shallowness, Azov Sea has noteworthy levels of cargo and passenger activity through its ports.¹⁹

The Ukrainians ports in the Azov Sea are listed by the Ukrainian Sea Ports Authority in the Register of Seaports dated 21st of December 2017²⁰ in accordance with the provisions of the Law of Ukraine ‘On Sea Ports of Ukraine’²¹ and consist of two ports – Berdyansk and Mariupol. Mariupol Sea Port is situated in the northwest part of the Taganrog Gulf while Berdyansk seaport is located close to the Berdyansk Gulf and Strait Tonka. Both of these ports are linked with the Black Sea by the Kerch Strait.

(Чорно море), Georgian *Shavi zghva* (შავი ზღვა), Laz Ucha Zuğa, or simply Zuğa 'Sea', Romanian Marea Neagră, Turkish *Karadeniz*.” Cited from “Black Sea”, New World Encyclopedia, accessed 2018 May 12, http://www.newworldencyclopedia.org/entry/Black_Sea.

¹³ “Black Sea”, The Internet Encyclopedia of Ukraine, accessed 2018 April 2,

<http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CB%5CL%5CBlackSea.htm>.

¹⁴ “Black Sea”, New World Encyclopedia, accessed 2018 May 12, http://www.newworldencyclopedia.org/entry/Black_Sea.

¹⁵ “Black Sea”, The Internet Encyclopedia of Ukraine, accessed 2018 April 7,

<http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CB%5CL%5CBlackSea.htm>.

¹⁶ It is also possible to call it as the Sea of Azov. In Ukrainian language it is called as Azovske More (Азовське море), while in Russian Azovskoye More or Azovskoe More (Азовское море).

¹⁷ “Sea of Azov”, The Editors of Encyclopedia Britannica, Encyclopedia Britannica, inc., July 08, 2009, accessed 2018 March 28, <https://www.britannica.com/place/Sea-of-Azov>.

¹⁸ “Sea of Azov”, World Water Database, accessed 2018 March 28, <http://www.waterdatabase.com/seas/sea-of-azov/>.

¹⁹ “Map Of Sea Of Azov - Sea Of Azov Map”, Location Facts, Sea Of Azov History, accessed 2018 March 28,

<https://www.worldatlas.com/aatlas/infopage/seaofazov.htm>.

²⁰ “Register of seaports”, The Ukrainian Sea Ports Authority, accessed 2018 March 30, <http://www.uspa.gov.ua/reestr-morskikh-portiv>.

²¹ “Закон України Про морські порти України від 17.05.2012 № 4709-VI”, accessed 2018 March 30, <http://zakon2.rada.gov.ua/laws/show/4709-17>.

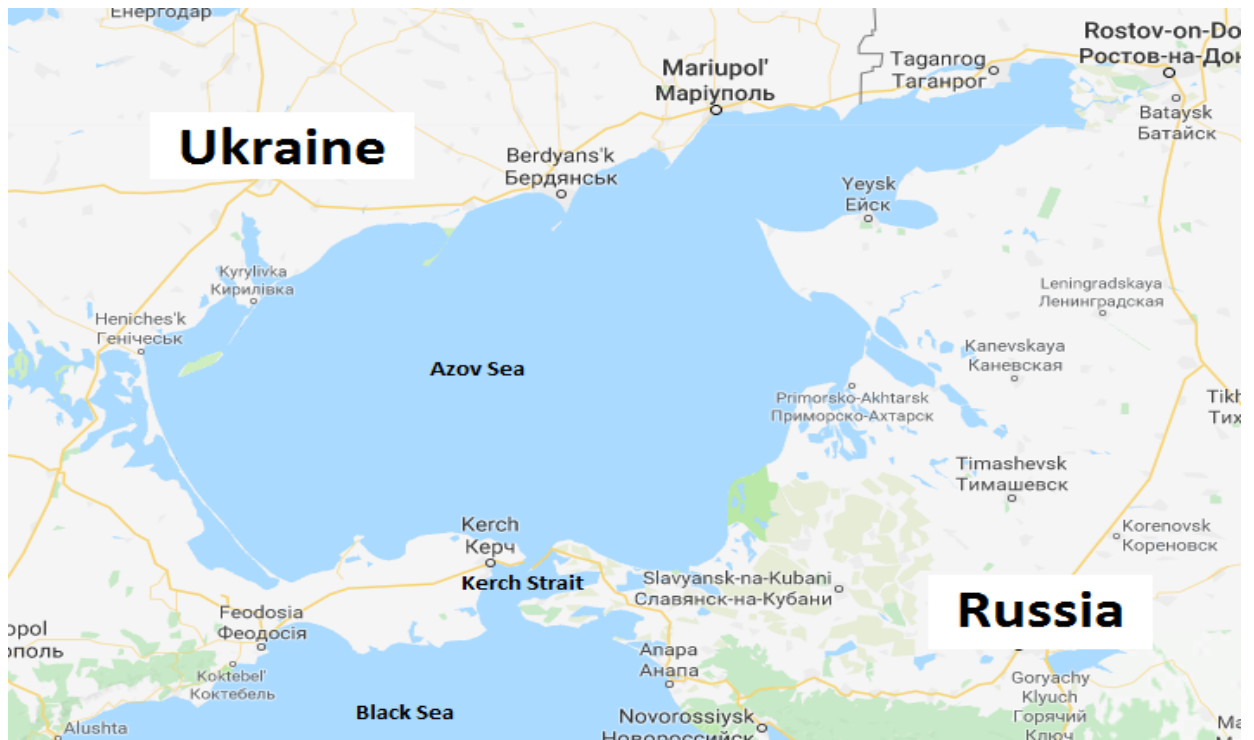


Table No. 2 The map of the Azov Sea²²

Mariupol seaport is one of the largest ports of Ukraine. Its capacity allows handling more than 17 million tones of cargo per year. According to the information provided by the Department for the Reformation and Operation of the Sea and River Transport of the Ministry of Infrastructure of Ukraine, in 2012 cargo handling in Mariupol seaport reached 14 908 640 tones while in 2013 further increased to 15 499 010 tones.

Berdyansk seaport is a smaller seaport located in the north-easter part of Berdyansk Bay. According to the information provided by the Department for the Reformation and Operation of the Sea and River Transport of the Ministry of Infrastructure of Ukraine, in 2013 cargo handling in this seaport amounted to 2 163 500 tones while in 2014 increased to 3 197 100.

Analysis of the information provided on the maritime database of MarineTraffic²³ allows concluding that the Berdyansk seaport and Mariupol seaport have been visited not only by Ukrainian vessels but also by vessels of the following flag countries: Panama²⁴, Moldova²⁵,

²² "The Azov Sea", Google Map, (drawings were made by author), accessed 2018 April 18, <https://www.google.com.ua/maps/@46.1698774,37.3267247,42z?hl=en>.

²³ "Live Ships Map and port information", MarineTraffic: Global Ship Tracking Intelligence | AIS Marine Traffic, accessed 2018 April 22, <https://www.marinetraffic.com/>.

²⁴ "BEHCET C (Bulk Carrier)", Latest Position is Azov Sea, Recent Port Calls: UA MARIUPOL (UTC +3), departure 2018-04-23 02:01 LT (UTC +3), accessed on 2018 April 23, <https://www.marinetraffic.com/en/ais/details/ships/shipid:420457/vessel:BEHCET%20C>.

²⁵ "LAURUS (General Cargo)", Latest Position is Azov Sea, Recent Port Calls: UA MARIUPOL (UTC +3), departure 2018-04-23 12:11 LT (UTC +3), accessed on 2018 April 23, <https://www.marinetraffic.com/en/ais/details/ships/shipid:148392/vessel:LAURUS>.

Malta²⁶, Niger²⁷, Vanuatu²⁸, Antigua Barbuda²⁹, and others. Similar information is provided online by the State Enterprise “Mariupol Commercial Sea Port” in its website.

According to the information provided at the author’s request by the Department for the Reformation and Operation of the Sea and River Transport of the Ministry of Infrastructure of Ukraine, 56% of all the vessels in Berdyansk seaport and 82% in Mariupol seaport were vessels flying under the flags of foreign countries. Thus, it should be emphasized that Berdyansk and Mariupol seaports have been important not only for Ukrainian but also for international navigation as well.

During the times of Union of Soviet Socialist Republics (USSR) the Ukrainian Soviet Socialist Republic (Ukrainian SSR) was in charge over the Kerch-Yenikalskiy Channel. Therefore, after the dissolution of the USSR Ukraine as the successor of the former republic gained full control over the channel. Nevertheless, it should be emphasized that before occupation of Crimea this control was challenged by Russia with a proposal to share the Kerch-Yenikalskiy Channel between two states.

The dispute over the control of the Kerch-Yenikalsky Channel arose not only due to its strategic importance as the only navigable way thorough the Kerch Strait but also due to its economic significance. Over 8500 vehicles per year passed through the Kerch-Yenikalsky Channel and paid fees for such passage to the Ukrainian authorities. These fees amounted per year to 150-180 million USD [126,577,189 - 151,897,057 EUR³⁰], of which 15-16 million USD [12,660,905-13,504,966.06 EUR³¹] was paid by the Russian side.³² However, it has also been known that Russia challenged its obligation to pay these fees to the Ukrainian authorities and, thus, the debt of Russian ships is estimated to have reached about 2 millions USD [1,697,011.60EUR³³].³⁴

Summarizing, before occupation of Crimea the factual control over the Kerch-Yenikalskiy Channel was possessed by Ukrainian authorities. This situation did not satisfy Russia, which subsequently presented numerous proposals for the Kerch Strait to be delimited in such a way that

²⁶ “VETLANA”, Latest Position is Azov Sea, Recent Port Calls: UA MARIUPOL (UTC +3), departure 2018-04-23 13:41 LT (UTC +3), accessed on 2018 April 23, <https://www.marinetraffic.com/en/ais/details/ships/shipid:3559651/vessel:VETLANA>.

²⁷ “NMS 67 (Tanker)”, Latest Position is Azov Sea, Recent Port Calls: UA MARIUPOL (UTC +3), departure 2018-04-23 15:28 LT (UTC +3), accessed 2018 April 23, <https://www.marinetraffic.com/en/ais/details/ships/shipid:762229/vessel:NMS%2067>.

²⁸ “MARE (General Cargo)”, Latest Position is Azov Sea, Recent Port Calls: UA MARIUPOL (UTC +3), arrival 2018-04-21 23:49 LT (UTC +3), departure 2018-04-23 03:54 LT (UTC +3), accessed 2018 April 23, <https://www.marinetraffic.com/en/ais/details/ships/shipid:1093706/vessel:MARE>.

²⁹ “LEIRIA (General Cargo)”, Latest Position is Azov Sea, Recent Port Calls: UA MARIUPOL (UTC +3), arrival 2018-04-22 01:20 LT (UTC +3), departure 2018-04-22 23:24 LT (UTC +3) accessed 2018 April 23, <https://www.marinetraffic.com/en/ais/details/ships/shipid:144661/vessel:LEIRIA>.

³⁰ Exchange rate that was used: 1 USD = 0.843848 EUR ↔ 1 EUR = 1.18505 USD. The rate is based on live mid-market rates provided by XE Currency Converter in its webpage: <https://www.xe.com/>, accessed 2018 May 15.

³¹ Ibid.

³² Shemyakin A., “Political and Legal Problems of the Sea of Azov, the Kerch strait and the Tuzla Islands”, *Maritime law*, № 2, (2004). Cited from Ulyana Us’ka, “The Problem of Determination of Ukrainian-Russian Border: Stages of Negotiation Process and its Prospects”, *Lviv Polytechnic National University Institutional*, (2013): 155, accessed 2018 May 15, <http://ena.lp.edu.ua/bitstream/ntb/21125/1/27-153-158.pdf>.

³³ Exchange rate that was used: 1 USD = 0.848506 EUR ↔ 1 EUR = 1.17854 USD. The rate is based on live mid-market rates provided by XE Currency Converter in its webpage: <https://www.xe.com/>, accessed 2018 May 16.

³⁴ Y. Kostenko, “Unregulated issue of borders - uncertainty factor in Russian-Ukrainian relations”, *Ukrainian Press Group LLC*, 26 April 2000, accessed 2018 May 16, <https://day.kyiv.ua/uk/article/den-planeti/yuriy-kostenko-nevregulovanist-pitannya-kordoniv-faktor-neviznachnosti-u>.

the channel would be shared between two coastal states. It is possible to conclude that even there was no delimitation agreement between Ukraine and Russia, until 2014 Ukraine was the one actually controlling and administering the channel.

Until 2014, the navigation of vessels along the Kerch-Yenikalsky Channel was regulated by the Rules of Navigation approved by the order of the Minister of Transport of Ukraine. As it was stated in para 1.1: “The rules for navigation of vessels by the Kerch-Yenikalsky Channel [. . .] establish the procedure for navigation of vessels regardless of flag and form of ownership in order to ensure the safety of navigation in the Kerch Strait, the protection of human life at sea and the prevention of environmental pollution.”³⁵

In accordance with these rules the navigation in the Kerch-Yenikalsky Channel was available for vessels up to 215 m, with a draft of up to 8 m. The width and height of the vessel were not regulated by the rules. The speed of the vessels throughout the course of the entering Kerch-Yenikalsky Channel was limited to 10 knots, except for the vessels with a draft of 5.0 meters and less. Inside the Kerch-Yenikalsky Channel the maximum speed was 7 knots, while in waters of the port was 3 knots.³⁶

Finally, the State Enterprise “State Shipping Company” Kerch Ferry Terminal was under the control by Ukrainian authorities and was engaged in the ferry crossings between the Crimean peninsula and its neighborhood.³⁷

1.2. The Kerch Strait After Occupation in 2014 and its Consequences

On the 17th of March 2014 the ‘Parliament of Crimea’ adopted the Decree ‘On the Independence of the Crimea’³⁸ and also the Resolution No. 1757-6/14 ‘On Nationalization of Some Companies Belonging to the Ukrainian Ministries of Infrastructure or Agriculture’. By these documents, Crimea’s parliament has formally declared independence from Ukraine, moreover, all Ukrainian state property within Crimea started to belong to an independent Crimea. Furthermore, the ‘Parliament of Crimea’ also appealed to Russia with an offer to admit the Republic of Crimea to Russia³⁹. And the day later, on the 18th of March 2014, the Republic of Crimea signed with the Russian Federation the Agreement on the Accession of the Republic of Crimea to the Russian

³⁵ “Наказ Міністерства Транспорту України Про затвердження Правил плавання суден Керч-Снікальським каналом і підхідними каналами до нього від 09.10.2002 N 721”, accessed 2018 May 6, <http://zakon2.rada.gov.ua/laws/show/z0973-02/conv>.

³⁶ Ibid.

³⁷ “In the Kerch sea trading port operates a ferry, «Kerch-Pot»”, *Shipping Company «Ukrferry»*, accessed 2018, April 26, <http://www.ukrferry.com/eng/about/news/In-the-Kerch-sea-trading-port-operates-a-ferry-Kerch-Pot>

³⁸ “Постановление ГС РК № 1745-6/14 “О независимости Крыма”, г. Симферополь, от 17 марта 2014 года”, accessed 2018 May 6, <http://crimea.gov.ru/act/11748>.

³⁹ Foreign Minister S. V. Lavrov’s Statements and Responses for the Questions of Senators during the 349th Extraordinary Session of the Federation Council of the Federal Assembly of the Russian Federation, Moscow, 21 March 2014, accessed 2018 April 6, http://www.mid.ru/brp_4.nsf/0/8009FE80B48FCDDDB44257CA2003AC683

Federation and the Formation of New Subjects in the Russian Federation⁴⁰. Article 1 of this agreement states that from its date of signing the Republic of Crimea is considered to be accepted into the Russian Federation.

A week later, on the 24th of March 2014, the Presidium of the Parliament of Crimea adopted a decision No. 1802-6/ 14 'On State-Owned Ferry Enterprise Kerch Ferry' declaring the appropriation of assets belonging to the state ferry enterprise 'Kerch Ferry' on behalf of the 'Republic of Crimea'⁴¹. Later, on the 2nd of April 2014, the Presidium of the Parliament of Crimea adopted resolution 'On Issues of Property Management of State Enterprise "Pilot-Crimea", State Enterprise "State Shipping Company" Kerch Ferry Terminal, State Enterprise "Crimean Sea Transport", State Enterprise "Crimean Seaports"⁴². So all of these facilities were expropriated from Ukrainian authority to the appointed Crimean body named as the Republican Committee on Transport and Communications⁴³. The nationalization by the self-proclaimed Crimean authorities of five seaports and two ferry crossings led to the loss of Ukrainian control over them⁴⁴.

According to the Press Center of the Ministry of Foreign Affairs of Ukraine: "In the light of the illegal annexation of Crimea by the Russian Federation, Ukraine informed International Maritime Organization (IMO) about Ukraine's inability to assure required level of maritime security and fulfil its international obligations [. . .] The ports of Yevpatoria, Kerch, Sevastopol, Feodosia and Yalta were occupied by the illegal groups of Russian Federation on 27 March 2014."⁴⁵

Prior to March 2014, Ukraine collected a channel charge for the passage of vessels along the Kerch-Yenikalsky Channel and the State Enterprise "Delta-pilot" located in the Kerch Port was engaged in its maintenance and support of the working order⁴⁶. The collection of information on the number of transits of Ukrainian, Russian and vessels under the foreign flag in the Kerch Strait to the Azov Sea each year was carried out by "Delta-pilot" with the help of its regional centers of

⁴⁰ "Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов, 18 марта 2014 года", accessed 2018, 4 April, <http://kremlin.ru/events/president/news/20605>. "Agreement on the accession of the Republic of Crimea to the Russian Federation", accessed 2018 April 4, <http://en.kremlin.ru/events/president/news/20604>.

⁴¹ "Решение Президиума ГС РК О Государственном предприятии "Государственная судоходная компания "Керченская паромная переправа" № 1802-6/14", г. Симферополь, 24 марта 2014 года", accessed 2018 April 4, <http://crimea.gov.ru/act/11807>.

⁴² "Решение Президиума ГС РК О вопросах управления имуществом ГП "Лощман-Крым", ГП "Государственная судоходная компания "Керченская паромная переправа", ГП "Крымский морской транспорт", ГП "Крымские морские порты", № 1902-6/14, г. Симферополь, 2 апреля 2014 года", accessed 2018 April 4, <http://crimea.gov.ru/act/11891>.

⁴³ "Crimea breakaway expropriates local ports", *Groupe EYSSAUTIER*, 19 March 2014, accessed 2018 April 4, <http://www.groupe-eyssautier.com/fr/actualites/revue-de-presse/crimea-breakaway-expropriates-local-ports.html?PHPSESSID=I9iqrgo88avtsoo2e22kvcvbn3>.

⁴⁴ "For example to evaluate the damage of it, the port of Feodosia was second only to Ukraine in terms of transshipment of oil and petroleum products, with the maximum volume of processing - up to 11.25 million tons of cargo per year. In the port of Sevastopol, transshipment of iron ore raw materials, coal and grain cargoes were carried out⁴⁴. By 2014, the port of Sevastopol was one of the most profitable state enterprises of the city. Since 2014, the volume of the freight terminal in the port of Sevastopol fell immediately by 100 times." This information was officially published by the Association of Sea Commercial Ports of Russia." Cited from "Грузооборот порта Севастополя упал в 100 раз", *SeafarersJournal*, accessed 2018 April 4, <http://www.seafarersjournal.com/news/view/gruzooborot-porta-sevastopolya-upal-v-100-raz->.

⁴⁵ "Ukraine informs IMO member-states on inability to assure required level of maritime security at the Crimean sea ports", 16 May 2014, accessed 2018 April 4, <http://uk.mfa.gov.ua/en/press-center/news/23515-ukraine-informs-imo-member-states-on-inability-to-assure-required-level-of-maritime-security-at-the-crimean-sea-ports>.

⁴⁶ Andrei Svirid, "Lost Crimea Stimulates the Development of Ports of Mainland Ukraine", 11 June 2014, accessed 2018 April 4, <http://www.uspa.gov.ua/ru/press-tsentr/analitika/analitika-2014/1793-poterya-kryma-stimuliruet-razvitie-portov-materikovoj-ukrainy>.

regulation of the movement of vessels. Automated radio-technical systems were used to collect information. From April 2014, “Delta-pilot” is not controlled by the regional center of traffic, located in the port of Kerch. The manager of this information is the Kerch commercial sea port which is under Ukrainian legislation is considered as closed port while under Russian one – as the port in operation.⁴⁷

The Rules of Navigation that were applicable in the Kerch-Yenikalskiy Channel were suspended by the Order of the Minister of Infrastructure of Ukraine dated February 27, 2015 № 80 ‘On Suspension of Certain Regulatory Acts of the Ministry of Transport of Ukraine, Ministry of Transport and Communications of Ukraine, Ministry of Infrastructure of Ukraine’.⁴⁸

Summarizing, before occupation of Crimea the administration of the navigation on the Kerch-Yenikalskiy Channel was performed by a branch of the State Enterprise “Delta-pilot” that was part of the Kerch commercial seaport. Due to the legislation adopted by Crimean authorities and also due to the factual situation Ukraine lost its control over the aforementioned branch of the State Enterprise “Delta-pilot”, which automatically lead to the loss of the control over the navigation in the Kerch-Yenikalskiy Channel as well.

Today, the Kerch Strait is controlled by Russia. If the vessel intends to pass through the Strait, it has to pay all the required fees (port fees, lighthouse fees and fees for the services, e.g. pilot navigations) to the Russian federal state enterprise – the Federal State Unitary Enterprise “Rosmorport”. The fees are received by the Kerch port, which operates on the territory of the illegally annexed Crimea⁴⁹. Thus, the fees for the passage through the strait are being collected by the Russian authorities. And merely the fact of paying these fees might be considered as acquisition of the legality of acts of Russian authorities in collecting these charges. Therefore, in order to avoid that the Ukrainian state-owned vessels have not passed through the Kerch Strait since March 2014⁵⁰.

⁴⁷ Information was provided upon request by Department for the reformation and operation of sea and river transport of Ministry of Infrastructure of Ukraine.

⁴⁸ “Правила плавання суден Керч-Єнікальським каналом і підхідними каналами до нього (дію призупинено)”, Delta-Lotsman branch of the state enterprise “Ukrainian Sea Ports Authority”, accessed 2018 April 5, http://www.delta-pilot.ua/prav_plav_KEK.

⁴⁹ Mikhail Shtekel, “The Secret of Meotids: How did the Ukrainian state ship pass through the Kerch Strait?” *Radio Svoboda*, 25 January 2018, accessed 2018 April 1, <https://ru.krymr.com/a/28997808.html>.

⁵⁰ “In June 2014, the Ukrainian government with its decision closed the Kerch Sea Port, captured by the Russians. Namely this port served the Kerch-Yenikalsky Channel, gave pilots for its passage and also collected passage charges. According to the Ministry of Infrastructure, the state-owned ships under the Ukrainian flag actually do not pass the Kerch Strait and therefore do not pay the charges to the Kerch port. The closure of the Kerch port leads to inability to transport the dredger “Meotida” from the Black Sea to the Sea of Azov for dredging works in the Azov ports of Ukraine. This works should be done each year and none vessel in Azov Sea can do it at the moment.” Cited from Volodymyr Kravchenko, “Lake of Azov”. The Kerch Bridge closes the Ukrainian Priazovye,” 18 September, 2017, accessed on 2018 April 1, <https://dt.ua/internal/azovske-ozero-kerchenskiy-mist-zakrivaye-ukrayinske-priazov-ya-254230.html>. However, “at the end of last year [December, 2017], “Meotida” ship arrived from the port of Yuzhny in the Black Sea to the port of Mariupol in the Azov Sea. This is the first case after the annexation of the Crimea, when a ship belonging to the Ukrainian state passes through the Kerch Strait. Who and how to ensure the passage of the vessel - this information is closed to the public as it was said by the the Ukrainian Sea Ports Authority. There is a possibility that it was a private company that could pay for the passage of this dredger, so that the state authorities would not cooperate with the administrations of the Crimean ports controlled by Russia.” Cited from Mikhail Shtekel, “The Meotida” secret: how did the Ukrainian state ship pass through the Kerch Strait?” *Radio Svoboda*, 25 January 2018, accessed 2018 April 1, <https://ru.krymr.com/a/28997808.html>.

After 2014, vessels sailing along the Kerch-Yenikalskiy Channel must comply with the Mandatory Regulations in the Kerch seaport approved by the order of the Ministry of Transport of the Russian Federation No. 313 of 21st of October 2015, according to which vessels up to 252 meters in length with a draft of up to 8 meters are allowed to sail along the Kerch-Yenikalskiy Channel.

Ukrainian position regarding all of the legislation adopted by the Republic of Crimea is clearly stated in Article 9 of the Law of Ukraine ‘On Ensuring the Rights and Freedoms of Citizens and Legal Regime in the Temporarily Occupied Territory of Ukraine’. According to the aforementioned article “any bodies, their officials and officers in the temporarily occupied territory and their activities are considered illegal if these bodies or persons were created, elected or appointed in an order not provided for by law, as well as any act (decision, document) issued by such bodies and/or persons, is null and void and does not create legal consequences.”⁵¹ A temporarily occupied territory is determined as “the land territory of the Autonomous Republic of Crimea and the city of Sevastopol, internal waters of Ukraine of these territories; internal waters and the territorial sea of Ukraine around the Crimean peninsula, the territory of the exclusive economic zone of Ukraine along the coast of the Crimean peninsula and the coastal continental shelf of Ukraine; subsoil within earlier specified territories and airspace over them.”⁵²

Thus, the aforementioned provisions of Ukrainian legislation clearly emphasize that the Crimea remains the territory of Ukraine and belongs to Ukraine. The same position was embodied by the General Assembly of the United Nations (UN) in its Resolution 68/262 on the ‘Territorial Integrity of Ukraine’ adopted on 27th of March 2014. This resolution “calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum [Crimean referendum dated on 16th of March 2014] and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.”⁵³

In general it is possible to state that the world community supports Ukraine and treats annexation of Crimea to be illegal. The convincing evidence of this statement is the fact that UN consists of 193 members and the previously mentioned resolution was adopted “by a vote of 100 in favour to 11 against, with 58 abstentions”.⁵⁴ Furthermore, in the Statement made by EU in respect of the partial opening of the Kerch Bridge on the 15th of May, 2018, it is stated: “The European Union continues to condemn the illegal annexation of Crimea and Sevastopol by Russia

⁵¹ “Закон України Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України від 15.04.2014 № 1207-VII”, accessed 2018 May 2, <http://zakon5.rada.gov.ua/laws/show/1207-18>.

⁵² Ibid, Article 3.

⁵³ Resolution 68/262 ‘Territorial integrity of Ukraine’ adopted by the UN General Assembly on 27 March 2014, accessed 2018 May 12, <https://guam-organization.org/en/un-ga-resolution-68-262-territorial-integrity-of-ukraine/>.

⁵⁴ “Backing Ukraine’s territorial integrity, UN Assembly declares Crimea referendum invalid”, *The UN on Social Media*, 27 March 2014, accessed 2018 May 16, <https://news.un.org/en/story/2014/03/464812-backing-ukraines-territorial-integrity-un-assembly-declares-crimea-referendum>.

and will not recognise this violation of international law”.⁵⁵ At the same day similar statement was made by United States of America (USA) saying “We once again reaffirm our commitment to Ukraine's sovereignty and territorial integrity and recall the international community’s expression of that commitment in UN General Assembly Resolution 68/262.”⁵⁶

On the 7th of May 2014 Ukraine informed IMO about Ukraine’s failure to guarantee required level of maritime security at the Crimean sea ports and satisfy its international obligations due to the unlawful annexation of Crimea by the Russia.⁵⁷

On the 16th of June 2014 the Ministry of Infrastructure of Ukraine adopted the Order ‘On the Closure of Seaports’⁵⁸ under which “the seaports of Kerch, Sevastopol, Feodosiya, Yalta, Yevpatoriya are closed till the moment of restoration of the constitutional order of Ukraine in the temporarily occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol.”⁵⁹

International sanctions imposed against the port of Kerch affected the number of ships passing through the Kerch Strait. USA, EU, United Kingdom, Australia, Japan, and Switzerland provided a list of the targeted sanctions against certain persons and legal entities, which included the port of Kerch as well⁶⁰. On the 25th of July 2014 EU adopted Regulation No 810/2014 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. This Regulation includes the expanded list of individuals and entities specified by this Regulation in accordance with previously adopted Regulation. Regulation No 269/2014 provided two type of sanctions, namely, travel bans and asset freezes. Article 2 of it stated: “1. All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen. 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I.”⁶¹

Among the entities listed in the Regulation there are the following: State ferry enterprise ‘Kerch ferry’ and State enterprise ‘Kerch commercial sea port’. The reason for the sanctions

⁵⁵ Statement by the Spokesperson on the partial opening of the Kerch Bridge, Bruxelles, Delegation of the European Union to Russia, 15 May 2018, accessed 2018 May 15, https://eeas.europa.eu/delegations/russia/44568/node/44568_en.

⁵⁶ Heather Nauert, “The Opening of the Kerch Bridge in Crimea”, Press Statement, Department Spokesperson, Washington, DC, May 15, 2018, accessed 2018 May 16, <https://www.state.gov/r/pa/prs/ps/2018/05/282116.htm>.

⁵⁷ “Ukraine informs IMO member-states on inability to assure required level of maritime security at the Crimean sea ports”, *Press Centre of Ministry of Foreign Affairs of Ukraine*, May 16, 2014, accessed 2018 April 11, <http://uk.mfa.gov.ua/en/press-center/news/23515-ukraine-informs-imo-member-states-on-inability-to-assure-required-level-of-maritime-security-at-the-crimean-sea-ports>.

⁵⁸ “Наказ Міністерства Інфраструктури України 16.06.2014 № 255 Про закриття морських портів”, accessed 2018 April 12, <http://zakon5.rada.gov.ua/laws/show/z0690-14>.

⁵⁹ “Notice to Mariners, Ministry of Infrastructure of Ukraine”, *State Hydrographic Service of Ukraine*, Notice No. 135-139, Edition No. 11, March 23, 2018, accessed 2018 May 1, [http://www.charts.gov.ua/ntm/2018/ntm11\(135-139\).pdf](http://www.charts.gov.ua/ntm/2018/ntm11(135-139).pdf).

⁶⁰ “International sanctions and criminal liability for Masters for visit ports in Crimea”, *CIS PANDI Services (Ukraine) LTD*, October 21, 2015, accessed 2018 April 23, <http://cispandi.com/2015/10/international-sanction-s-and-criminal-liability-for-masters-for-visit-ports-in-crimea/>.

⁶¹ “Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, Official Journal of the European Union, L 78/6, 17 March 2014”, accessed on 2018 April 13, <https://eur-lex.europa.eu/legal-content/EN/TEXT/HTML/?uri=CELEX:32014R0269&from=EN>.

imposed upon these enterprises is the fact that “the ownership of the entity was transferred contrary to the Ukrainian law” and “effectively confiscated by the Crimean ‘authorities’”.⁶²

Thus, the Kerch commercial sea port, which exerts control over the Strait of Kerch and the Kerch Channel, is a sanctioned entity under the USA and EU Sanctions legislation. Vessels going to or from the ports in the Azov Sea must make a transit through the Kerch Strait. The fees for such passage must be paid to the authorities in the Kerch commercial sea port. Thus, any vessel paying such fees is violating the provision of the Regulation No 269/2014 regarding the availability of funds and economic resources to the sanctioned entities.⁶³ It led to the fact that most of multinational companies (exporters, importers) stopped working at Azov Sea ports altogether, while others significantly reduced the volume of cargo transshipment in these ports⁶⁴. The difficulty of passing by the merchant ships through the Kerch Strait negatively affected exporters of agrarian products and metal products that were actively using the Mariupol port⁶⁵.

Moreover, another important factor which led to reduction of the vessels passing through the Kerch Strait was the sanctions imposed by Ukraine at the national level due to the closure of the Crimean ports. In accordance thereof, any vessel having visited any ports located on Crimean peninsula is immediately blacklisting⁶⁶ and afterwards will be arrested in case of visiting any Ukrainian ports on a mainland. The criminal cases for calls at Crimean ports commenced under para 1 Article 332-1 of the Criminal Code of Ukraine for violation the procedure of entry into the temporarily occupied territory of Ukraine and procedure of leaving it. The sanctions provided include confiscation of the vessel and up to 3 years of imprisonment for the master.⁶⁷

Furthermore, in April 2015 Russia unilaterally started activities aimed at building a bridge between Crimean peninsula and Taman peninsula. Thus, the reduction of the cargo handling in Ukrainian ports of Mariupol and Berdyansk was affected not only by the aforementioned sanctions but also by construction of the bridge across the Kerch Strait.⁶⁸

⁶² “Council Implementing Regulation (EU) No 810/2014 of 25 July 2014 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, Official Journal of the European Union, L 221/1”, accessed 2018 April 23, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0810&from=EN>.

⁶³ “Sanctions in Respect of Ukraine & Russia – Transit through Kerch Strait”, *West of England*, 12 August 2014, accessed 2018 April 23, <https://www.westpandi.com/Publications/News/Archive/Sanctions-in-Respect-of-Ukraine--Russia--Transit-through-Strait-of-Kerch/>.

⁶⁴ Yevheniya Luganovs'ka, “Deaf angle” by the sea: how to revive the Azov ports”, 8 November 2017, accessed 2018 April 21, <https://mind.ua/openmind/20178354-glujij-kut-bilya-morya-yak-vidrodity-azovski-porti>.

⁶⁵ “Crimean annexation and main consequences for Ukraine”, *Ukrainian Media Systems*, 27 March 2014, accessed 2018 April 21, <https://glavcom.ua/publications/124364-aneksija-krimu.-golovni-naslidki-dlja-ukrajini-doslidzhennja.html>.

⁶⁶ Blacklisting is provided in database of vessels that in violation of the Ukrainian legislation and international sanctions have docked at the ports of the occupied Crimean peninsula since the beginning of annexation on March 18, 2014. The database is provided by Black Sea News in their webpage: <http://www.blackseanews.net/read/130665>. “In December 31, 2016, the black list numbered 283 vessels. A year later, in December 31, 2017, the black list is included 325 ships.” Cited from “Violation of Crimean Marine Sanctions for 2014-2017: Statistics, Features, Trends”, 10 February 2018, accessed 2018 April 23, <http://www.blackseanews.net/read/138651>.

⁶⁷ “Кримінальний кодекс України від 05.04.2001 № 2341-III”, accessed 2018 April 21, <http://zakon2.rada.gov.ua/laws/show/2341-14:paran2315#n2315>.

⁶⁸ “Kerch Strait Bridge”, *Road Traffic Technology*, accessed 2018 May 4, <https://www.roadtraffic-technology.com/projects/kerch-strait-bridge/>.

According to the director of the Mariupol sea port Oleksandr Oliynyk, “when construction of the bridge began, the Russians requested information about technical characteristics of the vessels that come to Mariupol, but later this information was disregarded.”⁶⁹

According to the construction project of the Kerch Bridge, the height of the bridge in the place of passage of vessels should be 35 m. On May 24, 2017, for the sake of “safe passage” under the arches of the bridge, Russians set new overall requirements for ships: length 160 m, width - 31, draft - 8, and surface area - 33 m.⁷⁰

The Ukrainian Sea Ports Authority reported that “the average dimensions of vessels processed in the Ukrainian seaports of the Azov region are as follows: length is 175 meters, width is 27 meters and sediment is 9.6 m. Also vessels of the Panamax type that came in the Mariupol Sea Port were with the following dimensions: the length is 225 meters, the width is 32.5 meters, the maximum draft is 14 meters, the surface gauge is 37.5 meters.”⁷¹

These limitations on dimensions of the ships passing through the Kerch Strait are adequate for the ships that go to Russian ports, however, are not acceptable for the ships that call at the Berdyansk or Mariupol ports. In general, Ukrainian ports, such as Mariupol and Berdyansk, are deeper, compared to the Russian ports of the Azov Sea.⁷²

Therefore, the bridge will furthermore increase the isolation of Ukraine’s ports on the Sea of Azov.

Furthermore, it should be emphasized that the constructions works of the bridge already had a negative impact on the Ukrainian seaports. During its construction Russia closed the navigation through the strait on the 9th of August, 2017 for the first time⁷³. Then again the Kerch Strait was closed for passage from the 27th till the 29th of August, 2017. According to the information provided by Automatic Identification System live at 10 am of Moscow time on the 28th of August there were 24 vessels waiting the passage to the Azov Sea and 4 vessels aimed to go the Black sea, albeit day after it the amount of the vessels waiting the opening of the Kerch Strait for navigation became much higher.”⁷⁴ Another closure took place from the 11th till the 13th of October 2017⁷⁵.

⁶⁹ “The main trends in the development of the conflict in the East of Ukraine 1 - 15 April, 2018”, NGO Research Center of Donbass Social Perspectives; *OstroV news agency*, April 20, 2018, accessed 2018 May 13, <https://www.ostro.info/articles/231/>.

⁷⁰ Volodymyr Kravchenko, “Lake of Azov”. The Kerch Bridge closes the Ukrainian Priazovye”, September 18, 2017, accessed 2018 May 1, https://dt.ua/internal/azovske-ozero-kerchenskiy-mist-zakrivaye-ukrayinske-priazov-ya-254230_.html.

⁷¹ Liliya Rzhetskaya, “Will the Kerch bridge limit navigation on the Azov Sea?” June 30, 2017, accessed 2018 April 23, <http://p.dw.com/p/2fgmc>.

⁷² Volodymyr Kravchenko, “Lake of Azov”. The Kerch Bridge closes the Ukrainian Priazovye” September 18, 2017, accessed 2018 April 23, https://dt.ua/internal/azovske-ozero-kerchenskiy-mist-zakrivaye-ukrayinske-priazov-ya-254230_.html.

⁷³ “The Russian Federation banned walking on August 9 through the Kerch Strait to all ships other than the military and participating in the construction of a transport crossing”, [“РФ запретила ходить 9 августа через Керченский пролив всем судам, кроме военных и участвующих в строительстве транспортного перехода”], *the Crimean Conflict*, GORDON, August 9, 2017, accessed 2018 May 16, <http://gordonua.com/news/crimea/uf-zapretila-plyt-9-avgusta-cherez-kerchenskiy-proliv-vsem-sudam-krome-voennyh-i-uchastvuyushchih-v-stroitelstve-transportnogo-perehoda-201720.html>.

⁷⁴ Andrey Klimenko, “Kerch Strait blocked, dozens of ships lined up both sides”, *Maritime bulletin*, *Maritime and Crimean Shipping News*, August 29, 2017, accessed 2018 May 8, <http://maritimebulletin.net/2017/08/29/kerch-strait-blocked-dozens-of-ships-lined-up-both-sides/>.

⁷⁵ Valentin J. Schatz and Dmytro Koval, “Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov: Part II”, *Völkerrechtsblog*, (January 12, 2018), <http://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov-2/>.

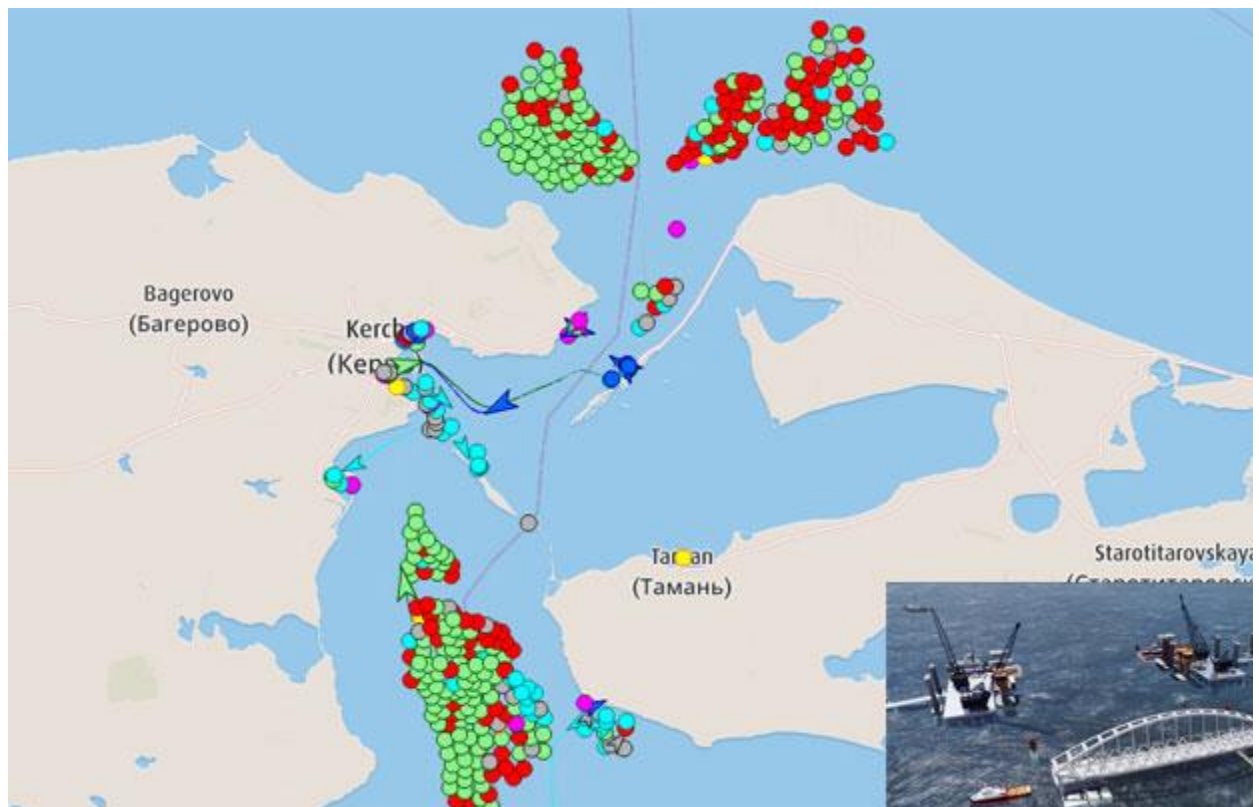


Table No 3. AIS live from 07:00 UTC August 29, 2017, in location in the Kerch Strait.⁷⁶

Due to the Russia's temporarily closure of the Kerch Strait Azovstal and Ilyich, Ukraine's second and third largest steel mills situated in Mariupol, were forced to stop using the Mariupol seaport and to sublimate their exports to other Ukrainian ports situated outside of the Azov Sea.⁷⁷

Due to all the reasons mentioned above the volume of cargo handling has dramatically decreased in Ukrainian ports. In 2013 Mariupol seaport had cargo turnover about 15 499 010 tones and then it steadily started decreasing through the next 4 years. In 2014 it was 13 003 200 tones, in 2015 - 8 984 040, in 2016 - 7 603 500 and in 2017 – only 6 514 470 tones. While in the Berdyansk sea port cargo turnover was 4 450 800 in 2015 and then it decreased to 3 800 700 in 2016 and 2 397 800 in 2017.⁷⁸

The construction of the bridge across the Kerch Strait has created restrictions on the overall dimensions of the vessels that can be used for loading in the Ukrainian ports of the Sea of Azov. At the same time, the size of the freight has increased. Thus, according to European Business Association “up to 25% of sea-going vessels, which had previously freely entered the ports of Mariupol and Berdyansk, are now deprived of this opportunity due to their size.”⁷⁹

⁷⁶ Andrey Klimenko, “Kerch Strait blocked, dozens of ships lined up both sides”, *Maritime bulletin, Maritime and Crimean Shipping News*, August 29, 2017, accessed 2018 May 8, <http://maritimebulletin.net/2017/08/29/kerch-strait-blocked-dozens-of-ships-lined-up-both-sides/>.

⁷⁷ Oleg Varfolomeyev, “Ukraine Details Claims Against Russia in Maritime Dispute, Says Russia Steals Gas”, *Eurasia Daily Monitor*, Volume 15, Issue 32, March 1, 2018, <https://jamestown.org/program/ukraine-details-claims-against-russia-in-maritime-dispute-says-russia-steals-gas/>.

⁷⁸ Information was provided upon author's request by Department for the Reformation and Operation of Sea and River Transport of Ministry of Infrastructure of Ukraine.

⁷⁹ Ibid.

According to the information given by Minister of Infrastructure of Ukraine Volodymyr Omelyan: “Losses related to the construction of the Kerch Bridge in 2017 in freight traffic and, as a result, missed port dues in the ports of Mariupol and Berdyansk are estimated as: the port of Berdyansk - the loss of 448.7 thousand tons of cargo, lack of port dues – 5,6 UAH million [174,878.22 EUR⁸⁰], Mariupol port - 705 thousand tons of traffic, lack of port dues – 3,5 million UAH [109,301.86 EUR⁸¹]”. In his opinion, the construction of the Kerch Bridge reduced the traffic of Berdyansk Port by 30%, Mariupol - by 43%⁸².

According to the Ministry of Infrastructure of Ukraine, adherence to the new rules of navigation in the Kerch Strait due to the Kerch Bridge will significantly aggravate the grain logistics of the Ukrainian Azov Sea. Firstly, it will significantly reduce the number of ships entering the ports of Mariupol and Berdyansk. Secondly, it will lead to a significant increase in the cost of freight of sea vessels that meet the new requirements for passage through the Kerch Strait. The size limitations will not only affect the cost of agricultural products, but will also significantly reduce the loading of grain terminals and ports Berdyansk and Mariupol.⁸³

Furthermore, as reported by the Institute of Water Problems and Melioration of the National Academy of Sciences of Ukraine “the estimated damage caused to the surrounding environment of the Black and Azov Seas during the construction of the Kerch Bridge, [. . .] will amount to at least 10 billion USD [836,971,680.00 EUR⁸⁴].”⁸⁵

According to the press release of the Ukrainian Crimean Prosecutor's Office “environmental disruptions during the construction of the bridge across the Kerch Strait can turn the Azov Sea into a Black Sea bay. The sharp change in the chemical composition of water will lead to the death of many living organisms.” So construction of the Kerch Bridge “may result in a regional environmental disaster.” Such conclusions were based on the information provided by the specialists of the Institute of Water Problems and Melioration of the National Academy of Sciences of Ukraine.⁸⁶

⁸⁰ Exchange rate that was used: 1 UAH = 0.0312283 EUR ↔ 1 EUR = 32.0223 UAH. The rate is based on live mid-market rates provided by XE Currency Converter in its webpage: <https://www.xe.com/>, accessed 2018 April 23.

⁸¹ Ibid.

⁸² Roman Gankevich, “From the actions of the Russian Federation to the sea outside the annexation of the Crimea, Ukraine lost \$ 20.61 billion”, [“Від дій РФ на морі поза анексією Криму Україна втратила \$20,61 млрд”], *ZaxidNet*, January 24, 2018, accessed 2018 April 29. <https://zaxid.net/vid-diy-rf-na-mori-poza-aneksiyeyu-krimu-ukrayina-vtratile-2061-mlrd-grn-n1447313>

⁸³ Volodymyr Kravchenko, “Lake of Azov”. The Kerch Bridge closes the Ukrainian Priazovye”, [““Азовське озеро”. Керченський міст закриває українське Приазов'я”], September 18, 2017, accessed 2018 April 23. <https://dt.ua/internal/azovske-ozero-kerchenskiy-mist-zakrivaye-ukrayinske-priazov-ya-254230.html>.

⁸⁴ Exchange rate that was used: 1 USD = 0.836972 EUR ↔ 1 EUR = 1.19478 USD (The rate is based on live mid-market rates provided by XE Currency Converter in its webpage: <https://www.xe.com/>, accessed 2018 May 13).

⁸⁵ “The Crimean prosecutor's office will involve NASA in investigating the case of the Kerch Bridge”, [“Кримська прокуратура залучить NASA до розслідування справи про Керченський міст”], June 28, 2017, accessed 2018 April 23. <https://humanrights.org.ua/material/krimska-prokuratura-zaluchit-nasa-do-rozsliduvannia-spravi-pro-kerchenskij-mist>.

⁸⁶ “Construction of a bridge across the Kerch Strait can lead to an ecological catastrophe”, [“Будівництво мосту через Керченську протоку може призвести до екологічної катастрофи”], official webpage of Prosecutor's Office of the Autonomous Republic of Crimea, May 11, 2017, accessed 2018 May 4. https://ark.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=207548.

Due to this, the Prosecutor's Office of the Autonomous Republic of Crimea⁸⁷ initiated the criminal proceedings for violating the rules of environmental safety by economic entities during the construction of the Kerch Bridge⁸⁸. The head of the supervision department for criminal proceedings Aleksandr Darakchi informed that in these proceedings Ukraine prepared an international legal request to NASA to assist in investigation of the case of a possible violation of environmental safety during the construction of the Kerch Bridge by Russia⁸⁹. Moreover, it was also stated by Yuriy Lutsenko, the Prosecutor General of Ukraine that “in case of confirmation of the probability of an ecological catastrophe, Kyiv will turn to the countries of the Black Sea (Bulgaria, Georgia, Romania, Turkey) with the proposal to set up a joint investigation team to conduct a pre-trial investigation, and then a judicial one on the construction of the Kerch Bridge.”⁹⁰

The main problem for the Azov ports is the possible loss of the exit from the Azov Sea to the Black Sea. The factual control of the Kerch Strait makes possible for Russia to block the Ukrainian ships flying through the strait despite that the waters in the Kerch Strait are considered Ukrainian and Russian waters under the bilateral agreements between these two countries. It might happen because the only way to the Black Sea from the Azov Sea passes through the Kerch Strait. In general even in the event of partial blockade of the Azov ports, the total financial losses of the Azov ports will amount to UAH 0,8 billion per year [24,981,157.27 EUR⁹¹]⁹².

In September 2016, Ukraine initiated a *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* against Russia at the Permanent Court of Arbitration under the provisions of UNCLOS. According to the Statement of Ukraine's Foreign Ministry on the Filing of its Memorial in Arbitration Proceedings against the Russian Federation under the UNCLOS, Memorial of Ukraine was filed on 19 February 2018. “The Memorial establishes that Russia has violated Ukraine’s sovereign rights in the Black Sea, Sea of Azov, and Kerch Strait” and, therefore, “Ukraine asks the Tribunal to end the Russian Federation’s violations of UNCLOS and vindicate Ukraine’s rights in the Black Sea, Sea of Azov, and Kerch Strait, including by ordering Russia to

⁸⁷ “In connection with the occupation of the Crimean peninsula by the Russian Federation and in accordance with the requirements of the Law of Ukraine ‘On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine’ by order of the Acting Public Prosecutor of Ukraine from 12.06.2014, the Prosecutor's Office of the Autonomous Republic of Crimea has been relocated to Kiev.” Cited from the official webpage of Prosecutor's Office of the Autonomous Republic of Crimea, accessed 2018 May 4. https://ark.gp.gov.ua/ua/subordinate_offices_.html.

⁸⁸ “Construction of a bridge across the Kerch Strait can lead to an ecological catastrophe”, [“Будівництво мосту через Керченську протоку може призвести до екологічної катастрофи”], official webpage of Prosecutor's Office of the Autonomous Republic of Crimea, May 11, 2017, accessed 2018 May 4. https://ark.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=207548.

⁸⁹ Roman Kravets, “The Prosecutor's Office of the Crimea will seek help from NASA”, [“Прокуратура Крима обратится за помощью к НАСА”], August 22, 2017, accessed 2018 April 23. <https://www.pravda.com.ua/rus/news/2017/08/22/7152883/>.

⁹⁰ “Lutsenko told about carrying out of ecological examination on the construction of the Kerch Bridge”, [“Луценко розповів про проведення екологічної експертизи щодо будівництва Керченського мосту”], December 12, 2017, accessed 2018 April 23, https://dt.ua/UKRAINE/lutsenko-rozpoviv-pro-provedennya-ekologichnoyi-ekspertizi-schodo-budivnictva-kerchenskogo-mostu-263119_.html.

⁹¹ Exchange rate that was used: 1 UAH = 0.0312283 EUR ↔ 1 EUR = 32.0223 UAH. The rate is based on live mid-market rates provided by XE Currency Converter in its webpage: <https://www.xe.com/>, accessed 2018 April 23).

⁹² Alexei Kushch, “The Putin Bridge to the Crimea must fall”, [“Путинский мост в Крым должен упасть”], *Sotsportal*, December 28, 2017, accessed 2018 April 23, https://sotsportal.info/2017/12/28/putinskij_most_v_krym_dolzhen_upast.html.

respect Ukraine's sovereign rights in its own waters, to cease its theft of Ukraine's resources, and to pay reparation for hydrocarbon resources Russia has wrongfully taken, among other relief.”⁹³

It is being claimed that “since 2014, Russia has unlawfully excluded Ukraine from exercising its maritime rights; it has exploited Ukraine's sovereign resources for its own ends; and it has usurped Ukraine's right to regulate within its own maritime areas. Through these violations of international law, Russia is stealing Ukraine's energy and fisheries resources, harming the livelihoods of Ukrainian fishermen, and blocking traffic to Ukrainian ports with its illegal bridge over the Kerch Strait, among other serious violations.”⁹⁴

Unfortunately, the documents of the proceedings are not publicly available and even from the press releases it is not possible to determine what will be Ukraine's argumentation in respect of the Azov Sea and the Kerch Strait. However, according to the information provided by Ministry of Foreign Affairs of Ukraine at the author's request, Ukraine will definitely invoke the fact that Russia blocked transit through the Kerch Strait, started the illegal construction of the land bridge and excluded Ukraine from regulating the pilot's affairs (aeronautics) along the channel.

So having in mind that Ukraine intends to argue its rights in the Kerch Strait under UNCLOS, it is necessary to determine the legal status of the Kerch Strait and based on that to assess whether the arbitral tribunal will have jurisdiction in respect of the claims related to the Kerch Strait.

⁹³ “Statement of Ukraine's Foreign Ministry on the Filing of its Memorial in Arbitration Proceedings against the Russian Federation under the UN Convention on the Law of the Sea”, Ministry of Foreign Affairs of Ukraine, Press Center, February 19, 2018, accessed 2018 April 21, <http://mfa.gov.ua/en/press-center/news/63052-zajava-mzs-ukrajini-shhodo-podachi-ukrajinoju-memorandumu-v-arbitrazhnomu-provazhenni-proti-rf-za-konvencijeju-on-z-morsykogo-prava>.

⁹⁴ Ibid.

2. CRITERIA FOR THE DETERMINATION THE KERCH STRAIT AS A “STRAIT USED FOR INTERNATIONAL NAVIGATION”

The Kerch Strait, due to its unique geographical location, is geostrategically important both for Ukraine and the Russian Federation. A well-developed transport infrastructure makes it one of the most promising transit routes from the areas of Azov Sea and the Black Sea. Today, the capabilities of Ukraine and Russia in the Azov-Black Sea region are completely asymmetrical, because Russia controls the Azov-Kerch water area, collecting a fee for the passage of vessels and constructing a bridge over the Strait⁹⁵. To protect its legitimate interests in the Strait, Ukraine instituted arbitral proceedings under UNCLOS.

In order to determine whether the arbitral tribunal has jurisdiction over the submissions of Ukraine related to the Kerch Strait and whether other states could intervene in the proceedings, it is necessary to establish whether UNCLOS is applicable to the Kerch Strait and, if yes, which rules govern navigation within the Strait – only the general or Part III as well.

Part III is applicable only to the straits used for international navigation. Therefore, at the very outset it is necessary to establish whether the Kerch Strait qualifies as a strait used for international navigation or not.

Having in mind that terminology used in UNCLOS is similar to that employed in *Corfu Channel* case, the phrase “a strait used for international navigation” implies two elements – geographical and functional. Therefore, each of the elements has to be analyzed separately.

2.1. Geographical criteria

Ordinary meaning of the “strait” refers to “a narrow area of sea that connects two larger areas of sea”⁹⁶. More precisely “a strait is a body of water which lies between two areas of land – continental land masses”⁹⁷. As it was cited by Ana G. Lopez Martin “from the purely geographical point of view, straits are considered to be “a narrow passage between two large bodies of water which have different density stratification and sea level elevations due to the independent, natural processes in each basin.”⁹⁸

⁹⁵ Nadia Serbenko, “On the use of the Kerch Strait, or why the Russian-Ukrainian Agreement Violates International law?”, Independent Analytical Center For Geopolitical Studies Borysfen Intel, November 20, 2015, <http://bintel.com.ua/en/article/kerch/>

⁹⁶ “Meaning of “strait” in the English Dictionary”, Cambridge Advanced Learner’s Dictionary & Thesaurus, Cambridge University Press, accessed 2018 April 7, <https://dictionary.cambridge.org/dictionary/english/strait>

⁹⁷ Donald R Rothwell, *International Straits*, (OUP Oxford: The Oxford Handbook of the Law of the Sea, 2015), 119. (114-133)

⁹⁸ Ana G. Lopez Martin, *International Straits: Concept, Classification and Rules of Passage*, (Springer Heidelberg Dordrecht London New York, 2010), 41.

As specified by E. Bruel, the geographical meaning of a strait is “a contraction of the sea between two territories, being of a certain limited width and connecting two seas otherwise separated at least in that particular place by the territories in question.”⁹⁹

Having in mind the abovementioned definition, it is possible to distinguish four elements or components for determination of a strait as satisfying the geographical criteria, namely, a natural sea passage, a contraction of the sea, separation of two land areas, and uniting two areas of the sea¹⁰⁰.

The first component - **a natural sea passage** – excludes the straits which have been created artificially.

The navigation in the Kerch Strait is possible within the Kerch-Yenikalskiy Channel. Until the 18th - 19th centuries natural depths in the Kerch Strait were sufficient for navigation - local sailors adhered to the natural fairways, distinguishing them along the coastal hills and landmarks. However, after Russia took control of the Azov Sea on July 10th, 1774, under Kuchuk Kaynardzhi Peace Treaty, the marine trade intensified through the port cities of the Azov-Black Sea region, including Mariupol, Taganrog and other cities along the Azov Sea. More and more foreign vessels began to enter the ports of the Azov Sea. In order to accommodate the interests of commercial navigation, in 1874 the construction of a navigable canal in the Kerch Strait began and its construction was finished in 1877.¹⁰¹

Thus, the Kerch Strait includes the artificial channel that allows vessels to pass through the strait. However, the strait by itself was not created artificially and the ships were passing through it even before the construction of the channel.

Therefore, further analysis should be made in order to determine whether the fact that the Kerch Strait was artificially improved seize it of the geographical criteria which is a precondition for any strait to classify as the strait used for international navigation. In the *Anglo-Norwegian Fisheries case* it was stated:

As has been conceded by the United Kingdom, the "skjærgaard" constitutes a whole with the Norwegian mainland; the waters between the base-lines of the belt of territorial waters and the mainland are internal waters. However, according to the argument of the United Kingdom a portion of these waters constitutes territorial waters. These are *inter alia* the waters followed by the navigational route known as the Indreleia. It is contended that since these waters have this character, certain consequences arise with regard to the determination of the territorial waters at the end of this water-way considered as a

⁹⁹ Bruel E, *International Straits. A treatise on international law*, (London: Sweet and Maxwell, 1947), 18–19 cited from Ana G. Lopez Martin, *International Straits: Concept, Classification and Rules of Passage* (Springer Heidelberg Dordrecht London New York, 2010), 45.

¹⁰⁰ Ana G. Lopez Martin, *International Straits: Concept, Classification and Rules of Passage* (Springer Heidelberg Dordrecht London New York, 2010), 45.

¹⁰¹ A.E. Simonovsky, “The Kerch-Yenikalsky Channel”, Science and Popular Encyclopedia, Water of Russia, accessed 2018 April 1, <http://water-rf.ru/a911>.

maritime strait. The Court is bound to observe that the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In these circumstances the Court is unable to accept the view that the Indreleia, for the purposes of the present case, has a status different from that of the other waters included in the “skjærgaard”.¹⁰²

The decision of the Anglo-Norwegian Fisheries case does not specify exactly what qualifies as “the means of artificial aids”, however, it is possible to revert to the practice of the States for the purposes of thereof. There are many notable straits recognized as such – for instance, the Turkish Straits, the Straits of Malacca and the Straits of Singapore – which were subject to artificial and technical work in order to make them more navigable. However, the fact of these improvements has never been suggested to deprive those straits of the geographical element and convert them into artificial canals.¹⁰³

Based on the foregoing it should be concluded that the Kerch Strait qualifies as a natural sea passage even though it has been improved artificially to allow passage of larger vessels than previously.

The contraction of the sea implies that the water in the straits, compared with the adjacent waters, is more reduced in extension than the latter. This feature is exceptionally uncertain as, from a geographical perspective, there is no description of the width that the contraction must have¹⁰⁴. However, this aspect will be covered when analyzing the impact of the width of the strait on the legal regime applicable therein, therefore, shall not be further elaborated on in this section.

The separation of two land areas means that the strait should separate either “two continental territories (*the Strait of Gibraltar, Bab El Mandeb, the Strait of Hormuz,...*), two islands (*the Menorca Channel, the Strait of Bonifacio, the Cook Strait,...*), or a continental territory and an island (*the Strait of Messina, the Strait of Corfu, the Channel of Zanzibar,...*).”¹⁰⁵

The Kerch Strait separates the Crimean peninsula and Taman peninsula, therefore, satisfies this requirement.

The strait also should **connect two areas of the sea**.

The Kerch Strait as a strait connected two seas: the Black Sea and the Azov Sea. Both of these seas are qualified as the enclosed or semi-enclosed seas under Art 122 of UNCLOS. Therefore, it should be concluded that the geographical element needed for classification of the strait as the one used for international navigation is present in the case of the Kerch Strait.

¹⁰² Fisheries (United Kingdom v. Norway), Judgment of December 18th, 1951, I.C.J. Reports (1951): 132, <http://www.icj-cij.org/files/case-related/5/005-19511218-JUD-01-00-EN.pdf>

¹⁰³ Ana G. Lopez Martin, *International Straits: Concept, Classification and Rules of Passage* (Springer Heidelberg Dordrecht London New York, 2010), 46.

¹⁰⁴ Ibid, 46.

¹⁰⁵ Ibid, 46-47.

Interestingly, in English version of the ICJ's judgment in *Corfu Channel* case it is stated that "the decisive criterion [for the strait] is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation". It might lead to the conclusion that geographical criteria has more value than functional, however, in the French version the wording constructed in such way that it gives equal weight to the both criteria¹⁰⁶. So it is necessary to proceed further with the analysis of functional criteria.

2.2. Functional criteria

The functional criteria requires the strait to be used for international navigation¹⁰⁷. UNCLOS does not define what straits are deemed to be used for international navigation and, therefore, does not specify which straits come within the scope of Part III. Convention on the Territorial Sea and the Contiguous Zone, 1958, is also silent on the interpretation of the functional criteria.

However, in the *Corfu Channel* case, it was stated:

It [the Corfu Strait] has nevertheless been a useful route for international maritime traffic. In this respect, the Agent of the United Kingdom Government gave the Court the following information...: "The following is the total number of ships putting in at the Port of Corfu after passing through or just before passing through the Channel. During the period of one year nine months, the total number of ships was 2,884. The flags of the ships are Greek, Italian, Romanian, Yugoslav, French, Albanian and British. Clearly, very small vessels are included, as the entries for Albanian vessels are high, and of course one vessel may make several journeys, but 2,884 ships for a period of one year nine months is quite a large figure. These figures relate to vessels visited by the Customs at Corfu and so do not include the large number of vessels which went through the Strait without calling at Corfu at all." There were also regular sailings through the Strait by Greek vessels three times weekly, by a British ship fortnightly, and by two Yugoslav vessels weekly and by two others fortnightly. The Court is further informed that the British Navy has regularly used this Channel for eighty years or more, and that it has also been used by the navies of other States¹⁰⁸.

Based on the aforementioned reasoning of the International Court of Justice (ICJ), the following circumstances should be taken into account when establishing whether the strait meets the functional criteria:

- the total number of the ships calling at the nearest port after passing through or just before passing through the strait;
- the total number of ships;
- the variety of the flags of those ships;

¹⁰⁶ *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of April 9th, 1949, I.C. J. Reports (1949): 29, <http://www.icj-cij.org/files/case-related/1/001-19490409-JUD-01-00-BI.pdf>

¹⁰⁷ *Ibid*, 28.

¹⁰⁸ *Ibid*, 28-29.

- the average size of the ship;
- regularity of the sailings through the strait;
- navigation in the strait by foreign warships.

Similar conclusions were reached by many scientists, however, as Ana G. Lopez Martin indicates “there is no agreement in the doctrine regarding what must be understood by the expression “used for international navigation”, moreover, “there is no unanimity as regards the degree of use of a strait required for it to be considered as international. This use has never been “quantified.”¹⁰⁹

As regards the Kerch Strait, there is no public access to the information on the total number of the ships calling at the Kerch port after passing through or just before passing through the strait, as the nearest port to the Kerch Strait. This is due to the closure of the port by Ukrainian authorities after the annexation of Crimea by Russia. However, according to the information provided by the Ukrainian Sea Ports Authority the total number of ships that called at the Berdyansk and Mariupol ports from January 2013 till March 2018 are 2182 and 2781 respectively (4963 in total)¹¹⁰. Thus, approximately 1000 ships are passing each year through the Kerch Strait with the purpose of calling at the Ukrainian ports. However, the total number of the ships using the Kerch Strait is much higher since it must also include the ships going to the Russian ports of the Azov Sea (i.e. Rostov-na-Dony, Taganrog, Azov, Temruk, Kavkaz and Yeysk). Unfortunately, there is no publicly available information neither on the number of such ships nor their nationality, average size nor regularity of their sailings through the Kerch Strait.

From January 2013 till March 2018 Berdyansk port was visited by the ships of 32 different nationalities (with exception of Ukrainian and Russian vessels) and the Mariupol port – by 48 nationalities (with exception of Ukrainian and Russian vessels). Majority of the ships that called at those ports were flying the flags of the following countries: the Republic of Panama, the Republic of Malta, Belize, the Republic of Turkey, the Republic of Liberia, the Kingdom of the Netherlands, Cook Islands, Republic of Moldova, and the Kingdom of Cambodia.¹¹¹

Taking into the account that the Kerch Strait has been quite frequently used by the vessels of different nationalities, it should be concluded that the Kerch Strait satisfies the functional criteria in addition to the geographical one. This consequently leads to another conclusion – that the Kerch Strait qualifies as the strait used for international navigation.

¹⁰⁹ Ana G. Lopez Martin, *International Straits: Concept, Classification and Rules of Passage* (Springer Heidelberg Dordrecht London New York, 2010), 55.

¹¹⁰ Information was provided upon request by Department for the reformation and operation of sea and river transport of Ministry of Infrastructure of Ukraine.

¹¹¹ Ibid.

3. LEGAL REGIME APPLICABLE IN THE KERCH STRAIT

Having concluded that the Kerch Strait qualifies as the strait used for international navigation within the context of UNCLOS, it is necessary to emphasize that legal regime applicable in a specific strait depends on the following aspects:

- 1) existence of long-standing international conventions specifically relating to such strait.
If such convention does exist, then under paragraph (c) of Article 35 of UNCLOS such strait is not affected by Part III of UNCLOS;
- 2) breadth of the strait. If there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics, under Article 36 of UNCLOS Part III is not applicable to such strait. In such case the general rules of the relevant parts of UNCLOS apply in such strait;
- 3) the maritime zones that are connected by the strait which does not have a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics:
 - a. if the strait connects one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone, then Section II of Part III of UNCLOS is applicable and the foreign ships enjoy the right of transit passage in such strait;
 - b. if the strait connects the high seas or an exclusive economic zone with the territorial sea, then Section III of Part III of UNCLOS is applicable and the foreign ships enjoy the right of non-suspendable innocent passage;
 - c. if the strait connects the high seas or an exclusive economic zone with internal waters, then Part III of UNCLOS is not applicable and legal regime of the strait will depend on the maritime zones covering the strait.

Therefore, we will proceed with analysis of the aforementioned aspects by starting from the last one.

3.1. The Status of the Black Sea

As it has been mentioned, the Kerch Strait connects two seas – the Black Sea and the Azov Sea which both qualify as the “enclosed or semi-enclosed sea” under Article 122 of UNCLOS.

The Black Sea is bordered by 6 states: Ukraine, Russia, Georgia, Turkey, Bulgaria, and Romania. Each of its coastal states has claimed both the territorial sea and the exclusive economic zone on this sea and has delimited them in accordance with UNCLOS. This has been done based

on Decree No. 142 of 25 April 1986 of the Council of State concerning the establishment of the exclusive economic zone of the Socialist Republic of Romania in the Black Sea¹¹², Decree No. 77 of 7 January 1987 of the State Council of the People's Republic of Bulgaria on the exclusive economic zone of the People's Republic of Bulgaria in the Black Sea, 7 January 1987¹¹³, Joint statement on the Agreement between the Republic of Turkey and the Republic of Bulgaria on the determination of the boundary in the mouth of the Rezovska/Mutludere River and delimitation of the maritime areas between the two States in the Black Sea, 4 December 1997¹¹⁴, Protocol between the Government of the Republic of Turkey and the Government of Georgia on the confirmation of the maritime boundaries between them in the Black Sea, 14 July 1997¹¹⁵, and also on the List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Black Sea, notified by note verbale dated 11 November 1992¹¹⁶. Moreover, in the case of the Maritime Delimitation in the Black Sea (Romania v. Ukraine) the Court has delimited maritime boundary of the continental shelf and the exclusive economic zones of Romania and Ukraine in the Black Sea¹¹⁷. Thus, it should be noted that the Black Sea is entirely covered by the territorial seas and the exclusive economic zones of the coastal states.



Table No. 4 Exclusive economic zones of the coastal States in the Black Sea¹¹⁸

¹¹² UN Law of the Sea Bulletin 8, (1986): 17.

¹¹³ UN Law of the Sea Bulletin 10, (1987): 10.

¹¹⁴ UN Law of the Sea Bulletin 36, (1998): 53.

¹¹⁵ UN Law of the Sea Bulletin 43, (2000): 108.

¹¹⁶ UN Law of the Sea Bulletin 36, (1998): 49.

¹¹⁷ Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports (2009): 131, para 219, <http://www.icj-cij.org/files/case-related/132/132-20090203-JUD-01-00-EN.pdf>

¹¹⁸ "File:Black Sea relief location map with exclusive economic zones.svg", *Wikimedia Commons*, accessed 2018 May 11, https://commons.wikimedia.org/wiki/File:Black_Sea_relief_location_map_with_exclusive_economic_zones.svg.

Having concluded that, now it is necessary to establish with which maritime zone of the Azov Sea does the Kerch Strait connect the relevant part of the exclusive economic zone on the Black Sea.

3.2. The Status of the Azov Sea

The Azov Sea is bordered by two states: Ukraine and Russia.

After the dissolution of the former USSR in 1991 Ukraine established its territorial sea. On the 4th of November of the same year, Verkhovna Rada of Ukraine adopted the Law ‘On the State Border of Ukraine’¹¹⁹. Article 5 of this law stated that “the territorial sea of Ukraine includes coastal waters 12 nautical miles wide calculated from the line of the largest outflow both on the mainland, on the islands belonging to Ukraine, or from straight baselines that connect respective points. The geographical coordinates of these points are approved in the order established by the Cabinet of Ministers of Ukraine. In some cases, another width of the territorial sea of Ukraine can be established by international treaties of Ukraine, and in the absence of treaties - in accordance with generally accepted principles and norms of international law”.

On the 16th of May 1995, Verkhovna Rada of Ukraine adopted the Law ‘On the Exclusive (Maritime) Economic Zone of Ukraine’. Determination of the exclusive economic zone of Ukraine was provided in Article 2 of the mentioned law. According to it “marine areas outside of the territorial sea of Ukraine, including areas around the islands that belong to it, constitute the exclusive (maritime) economic zone of Ukraine. The width of the exclusive (marine) economic zone is up to 200 nautical miles, measured from the same initial lines as the territorial sea of Ukraine.”¹²⁰

Earlier, on the 11th of November 1992, Ukraine through its Permanent Mission to the UN provided to the latter the list of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Sea of Azov¹²¹. In the same year Ukraine called on Russia to delimit the Sea of Azov as quickly as possible based on the provisions of international law.¹²²

¹¹⁹ “Закон України Про державний кордон України від 04.11.1991 № 1777-XII”, accessed 2018 April 16, <http://zakon5.rada.gov.ua/laws/show/1777-12>.

¹²⁰ “Закон України Про виключну (морську) економічну зону України від 16.05.1995 № 162/95-BP”, accessed 2018 April 15, <http://zakon5.rada.gov.ua/laws/show/162/95-%D0%B2%D1%80>

¹²¹ “List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Sea of Azov, notified by note verbale dated 11 November 1992”, UN Law of the Sea Bulletin 36, 1998, 51-52, http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE7.pdf

¹²² Arkady Moshes, *Littoral States and Region Building Around the Black Sea*, The Black Sea Region: Cooperation and Security Building, edited by Oleksandr Pavliuk, Ivanna Klympush-Tsintsadze, (Routledge, 2016): 71, accessed 2018 May 14, <https://books.google.com.ua/books?id=i2SIDAAQBAJ&printsec=frontcover&hl=ru#v=onepage&q&f=false>.

On the national level, in June 5, 1993, Cabinet of Ministers of Ukraine adopted Resolution ‘On Priority Measures for the Legal Formation of the State Border and its Further Settlement’¹²³. This resolution included an order to submit proposals on the delimitation of the territorial sea of Ukraine in the Azov Sea, the exclusive (maritime) economic zone of Ukraine in the Azov and Black Seas and the Kerch Strait status to the Cabinet of Ministers of Ukraine until July 5, 1993. It should have been done by State Committee for State Border Protection of Ukraine, Ministry of Foreign Affairs, Ministry of Defense, Ministry of Transport, State Committee on Fisheries and the Fishing Industry, the State Committee for Geology and Use of Mineral Resources, the Council of Ministers of Crimea, Donetsk, Zaporizhia and Kherson regional state administrations. However, the possible delimitation of the territorial sea and the exclusive economic zone of Ukraine in the Azov Sea has never been completed at the official level despite the fact that the list of the geographical coordinates of the points defining the position of the baselines for measuring these waters were provided to the UN.¹²⁴

Moreover, in 2002 there was a draft of the Law ‘On Inland Waters, the Territorial Sea and the adjacent zone of Ukraine’ presented. The draft included general provisions, as an example, Article 2 which defined the territorial sea of Ukraine as including coastal seawater in the Black and Azov seas with a width of 12 nautical miles, counted from the line of the largest outflow both on the mainland, on the islands belonging to Ukraine, or from direct outlying lines, which connect the corresponding points, as well as the waters of the Ukrainian part of the Kerch Strait. Article 3 and 4 dealt with the delimitation of the territorial sea and the baselines from which the breadth of the territorial sea should be measured. The draft also established provisions on the rules of navigation and presence of the vessels under the foreign flags in the territorial sea, internal waters and adjacent zone of Ukraine.¹²⁵

It is clear that by establishing the list of the geographical coordinates of the baselines in the Azov Sea, adopting the Resolution ‘On Priority Measures for the Legal Formation of the State Border and its Further Settlement’ and submitting the draft Law ‘On Inland Waters, the Territorial Sea and the adjacent zone of Ukraine’, Ukraine believed that the Azov Sea should be treated as an enclosed sea, having all the relevant maritime zones established in UNCLOS which were to be delimited in accordance with the provisions of the same convention. Thus, based on the initial position of Ukraine, the Azov Sea should have consisted the territorial seas, exclusive economic zones and continental shelves of the states bordering it. However, the territorial sea and the

¹²³ “Постанова Кабінету Міністрів України Про першочергові заходи щодо правового оформлення державного кордону та подальшого його облаштування від 05.06.1993 № 415”, accessed 2018 April 15, <http://zakon2.rada.gov.ua/laws/show/415-93-%D0%BF/cony>

¹²⁴ Ibid.

¹²⁵ “Проект Закону про внутрішні води, територіальне море та прилеглу зону України, No 2605 від 30.12.2002”, accessed 2018 April 15, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=2605&skl=5

exclusive economic zone of Ukraine in the Azov Sea have never been delimited as well as the draft law has never been adopted. Furthermore, there is no information found that the rights provided by Article 57 of UNCLOS granting freedoms of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms were granted to the other states by Ukraine as the state providing navigational service in the Kerch Strait.

Ukraine's demand for delimitation of the territorial seas and the exclusive economic zones in the Sea of Azov was met with strong opposition from the side of Russia. During the Soviet times both the Azov Sea and the Kerch Strait were considered as the internal waters of the USSR. Therefore, Russia firmly advocated the maintenance of the existing status of the basin as internal waters which have to be used mutually between them and Ukraine. Besides it, the Russian government also contended that the division of the basin in accordance with UNCLOS provisions that was proposed by the Ukrainian government would mean that the Azov Sea would include the freedom of the navigation to be guaranteed to all countries. This fact was not considered as beneficial to Ukraine and Russia. It was stated that it is in the economic and strategic interests of these two states to preserve this area as internal waters and not to allow any rights granted by UNCLOS to the vessels under the flag of the third states in the Azov Sea.¹²⁶

Despite the arguments of Russia, Ukraine was consistent in its position on the status of the Azov Sea and delimitation of the maritime zones therein till 2003. However, on January 28, 2003¹²⁷, the Treaty on the Ukrainian-Russian State Border was concluded between Ukraine and Russia and this Treaty established that that the Sea of Azov and the Kerch Strait historically are the internal waters of the signatory states. The same was repeated in the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait which was signed by Ukraine and the Russian Federation on December 24, 2003.

Thus, firstly, Ukraine submitted the list of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Sea of Azov to UN; secondly, instructed national authorities to present proposals on the delimitation of the territorial sea and the exclusive economic zone of Ukraine in the Azov Sea and the Kerch Strait; thirdly, kept adopting national legislation in accordance with the provisions of the UNCLOS. However, from 2003 Ukraine changed its position and started maintaining that the waters of the Azov Sea and the Kerch Strait are internal waters of Ukraine and Russia.

¹²⁶ Adam Eberhardt, "The Common Border Issue in Russian-Ukrainian Relations," *The Polish Foreign Affairs Digest*, 3, 2(7), (2003): 227-228.

¹²⁷ "Договір між Україною і Російською Федерацією про українсько-російський державний кордон від 28.01.2003", accessed 2018 April 15, http://zakon1.rada.gov.ua/laws/show/643_157.

In state practice there were numerous attempts to claim vast areas of oceans on the basis of an historical title. Usually those claims are highly contentious and are met with strong opposition from other states. Having in mind the inconsistency in the position of Ukraine itself, it is necessary to analyze in depth whether Ukraine and Russia are entitled legitimately to claim the entire Azov Sea and the Kerch Strait as their internal waters. For the purposes thereof, firstly, the bilateral agreements between Ukraine and Russia will be examined. Secondly, the norms of the general international law will be employed.

3.2.1. The Status of the Azov Sea as Established in Bilateral Agreements between Ukraine and Russia

From 1917 till 1991 the status of the Azov Sea was determined by the USSR. In this regard the Azov Sea was treated and considered as internal waters of the USSR. As it has been already mentioned, after the breakup of the USSR in 1991, Ukraine advocated for the Azov Sea to be treated as the enclosed sea having all the maritime zones established in UNCLOS while Russia aimed to maintain the status of the internal waters shared between two coastal states.

After numerous rounds of negotiations, Ukraine and Russia managed to agree in the Treaty on the Ukrainian-Russian State Border, which was signed on January 28, 2003¹²⁸, that the Sea of Azov and the Kerch Strait are their internal waters. Despite the fact that the treaty is a framework document determining mostly the land border between the two countries, including rivers and lakes, it also gives the fundamental approach to the issues related with the Azov Sea and the Kerch Strait. Article 5 of this Treaty for the first time officially defined the Azov Sea and the Kerch Strait as internal waters of the two states, namely declaring that “nothing in this Treaty is detrimental to the positions of Ukraine and the Russian Federation regarding the status of the Sea of Azov and the Kerch Strait as the internal waters of the two states”.

On December 24, 2003, Ukraine and Russia entered into the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait that was ratified by Verhovna Rada on April 20, 2004¹²⁹. Article 1 of this Agreement repeats Article 5 of the Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State Border and proclaims “the Azov Sea and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation”. On the same day the President of Ukraine Leonid Kuchma and the President of the Russian Federation

¹²⁸ “Договір між Україною і Російською Федерацією про українсько-російський державний кордон від 28.01.2003”, accessed 2018 April 15, http://zakon1.rada.gov.ua/laws/show/643_157

¹²⁹ “Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24.12.2003”, accessed 2018 April 15, http://zakon5.rada.gov.ua/laws/show/643_205, “Ратифікація від 20.04.2004, підстава Закон України Про ратифікацію Договору між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 20.04.2004 № 1682-IV”, accessed 2018 April 15, <http://zakon5.rada.gov.ua/laws/show/1682-15>

Vladimir Putin presented a Joint Statement regarding the Sea of Azov and the Kerch Strait to the UN¹³⁰.

In this Statement it was emphasized that “the Azov – Kerch area of water is preserved as an integral economic and natural complex used in the interests of both states”, that “historically the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia, and settlement of matters relating to the said area of water is realized by agreement between the Ukraine and Russia in accordance with international law.”¹³¹

Majority of the scholars interpret the provisions of the aforementioned documents as establishing that the Azov Sea and the Kerch Strait are considered to be internal waters of Ukraine and Russia. However, a few others have different opinion. For example, Alexander Skaridov by analyzing provisions in the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait concluded:

Article 1 of the Russian-Ukraine Agreement on Cooperation in using the Sea of Azov and Kerch Strait stated that . . . historically the Azov Sea and Kerch Strait appears to be internal waters of Russian Federation and Ukraine. In the author’s view, “appears to be . . .” cannot be interpreted as legal definition, moreover no further explanations were provided in the following provisions of the Agreement. This provision is more declarative than legal, otherwise the Parties should have stated that they consider the Azov Sea waters to be internal waters within the meaning of international law or UNCLOS. That is why “internal” may be explained as inland waters from a geographical, economical, historical or any other perspectives, but not legal¹³².

Before analyzing the texts of the Agreement on Cooperation on the use of the Sea of Azov and the Kerch Strait in Ukrainian and Russian language it should be noted that at the end of this agreement it is stated that “the Agreement was done [. . .] in the Ukrainian and Russian languages, both texts being equally authoritative”. This complies with Article 33 of Vienna Convention on the Law of Treaties which provides that “when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”¹³³

Russian version of Article 1 of the Agreement states that “*Азовское море и Керченский пролив исторически являются внутренними водами Российской Федерации и Украины*”. Such wording might be translated into English as “**appears to be** internal waters...” However, Ukrainian version does not leave space for any ambiguities – “Азовське море та Керченська

¹³⁰ “Спільна заява Президента України і Президента Російської Федерації щодо Азовського моря і Керченської протоки, Керч, 24 грудня 2003 року”, accessed 2018 April 15, http://zakon5.rada.gov.ua/laws/show/643_206.

¹³¹ Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, *Bulletin № 54, Law of the Sea*, Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, 24 December 2003, United Nations, New York, (2004): 131, http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf.

¹³² Alexander Skaridov, “The Sea of Azov and the Kerch Strait” in *Navigating Straits : Challenges for International Law*, David D. Caron, Nilufer Oral, (Leiden: Brill Nijhoff, 2014): 234.

¹³³ “Vienna Convention on the law of treaties (with annex)”, Vienna, May 23, 1969, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

протока історично є внутрішніми водами України і Російської Федерації”. Ukrainian version could only be translated as – “The Azov Sea and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation”. Furthermore, Russian word “являются” has two meaning in Ukrainian language: “є” (as “is/are) or “являються” (as “appears to be”). Having in mind that Russian word “являются” does not necessarily mean “appears to be” and taking into consideration that Ukrainian text is very clear in that respect, it should be concluded that Russian version of the Agreement also establishes that the Azov Sea and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation rather than they only “appear to be such”.

This leads to the conclusion that by signing the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait, Ukraine and Russia meant and stated that according to this Agreement the Azov Sea and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation and the issues with wording of this document does not have any legal ground for further discussion.

In support thereof both countries made the Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003, which was also presented to the UN. By this bilateral statement Ukraine and Russian Federation claimed that the Sea of Azov and Strait of Kerch are historic, internal waters of these two states.

Since 2003 the Ukrainian-Russian relations have changed a lot. After annexation of the Crimea in 2014 the tremendous disagreements arose between those two countries. These disagreements led to revision of the bilateral treaties concluded between these two states.

According to the statement of Olena Zerkal, Deputy Minister of Foreign Affairs of Ukraine for the European Integration: “Until 2014 Ukraine and the Russian Federation concluded 451 international treaties. After the beginning of the armed aggression, Ukraine began to inventory the legal framework of bilateral relations with Russia. As of April 2018, all the necessary domestic procedures were implemented and a decision was taken to suspend or suspend the operation of one interstate treaty, 25 intergovernmental agreements (20 on the initiative of Ukraine, 5 to Russia), and 18 inter-agency agreements”.¹³⁴

Nevertheless, the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait still remains in force. In the webpage of the Ministry of Foreign Affairs of the Russian

¹³⁴ “Дружба с Россией: в МИД Украины поставили точку”, *Obozrevatel.UA*, April 4, 2018, <https://www.obozrevatel.com/politics/druzhba-s-rossiej-v-mid-postavili-tochku.htm>.

Federation it is stated that the agreement entered into force on April 23, 2004, and is still valid¹³⁵. The same information is given on the webpage of the Ukrainian legislation¹³⁶.

Thus, it seems that despite the disagreements between Ukraine and Russian Federation over Crimea both countries still consider the Azov Sea and the Kerch Strait to be their internal waters. However, it should be emphasized that these waters are considered as internal based on historical title. The mere fact that both states bordering the Azov Sea agree on the historical title over those waters does yet make their claims legitimate. Therefore, it is necessary to examine general international law for the purposes of establishing whether Ukraine and Russia have valid grounds to claim the entire basin of the Azov Sea and the Kerch Strait as their internal waters.

3.2.2. International Legal Requirements for Historic Waters

In conventional international law there is no definition of ‘historical sea, strait or bay’. UNCLOS only refers to historical bays in para 6 of Article 10. Nevertheless, as it will be demonstrated later on, the customary international law allows recognition as historical also other maritime areas, seas included.¹³⁷

The requirements for historic waters crystallized in customary international law by the beginning of 1950s. The ICJ's decision in the *Anglo-Norwegian Fisheries* case denotes the moment when the doctrine of the historic waters was consolidated into a coherent institute of customary maritime law¹³⁸. Moreover; ICJ endorsed in this case the statements made by the United Kingdom and Norway that the doctrine of “historic waters” was not limited only to bays. It also established a new approach for assessing the claims to the historical waters. This test of legitimacy of the claims over the maritime areas was benefited the interests of each maritime state.¹³⁹

In the *Anglo-Norwegian Fisheries* case the Court analyzed the exercise of authority and its continuity over the area by the State claiming the historic right. More precisely, it was stated that “the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.” Regarding the attitude of foreign states the Court pointed out that “from the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.” By taking into the account the exercise of authority and its continuity as well as attitude of the attitude of foreign states “the Court [was] thus led to conclude

¹³⁵ “Bilateral agreements”, *Ministry of Foreign Affairs of the Russian Federation*, accessed 2018 April 1, 12,

http://www.mid.ru/foreign_policy/international_contracts/2_contract.

¹³⁶ “Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24.12.2003”, accessed 2018 April 12, http://zakon5.rada.gov.ua/laws/show/643_205.

¹³⁷ Olga Romanukha, “Делімітація Азовського моря та Керченської протоки”, *Visnyk Mariupol's'koho derzhavnoho universytetu. Seriya: Istoryia. Politolohiya*, 15 (2016):99-100, http://nbuv.gov.ua/UJRN/Vmdu_ip_2016_15_14.

¹³⁸ Christopher Mirasola, “Historic Waters and Ancient Title: Outdated Doctrines for Establishing Maritime Sovereignty and Jurisdiction”, *Journal of Maritime Law and Commerce* 47, 1 (January 2016): 41-44.

¹³⁹ C. H. M. Waldock, “The Anglo-Norwegian Fisheries Case”, *British Year Book of International Law* 28 (1951): 114.

that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.”¹⁴⁰

Thus, the requirements for the state to be able legitimately to claim the historical title over certain waters were formulated by the ICJ in the *Anglo-Norwegian Fisheries case*. These requirements were later analyzed and further interpreted by the Study prepared by the Secretariat on Juridical Regime of Historic Waters including historic bays in 1962. In this study it was emphasized that “it is universally recognized in the doctrine and practice of international law that States may under certain circumstances on historic grounds have valid claims to certain waters adjacent to their coasts”.¹⁴¹ The Study further establishes the elements required for the State to be able legitimately to claim title to “historic waters”: “there seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are:

- (1) the exercise of authority over the area by the State claiming the historic right;
- (2) the continuity of this exercise of authority;
- (3) the attitude of foreign States.”¹⁴²

In addition to the three factors just mentioned, a fourth one is also referred to by some scholars and governments. Although it is formulated as the alternative to the previous ones rather than a cumulative one to be used together. Under his approach, the title might be claimed not only on the basis of long usage but also due to the economic necessity, national security, vital interest or a similar ground. These grounds in the Study are called the “particular circumstances”¹⁴³ and “according to one view, [...] should even be considered to form the fundamental basis for a right to “historic waters”, so that they would be sufficient to sustain the right even if the historic element were lacking.”¹⁴⁴

Having established the pre-conditions for legitimacy of the claim over the historic waters, the status of Azov Sea will be further analyzed for the purposes of establishing whether it complies

¹⁴⁰ Fisheries (United Kingdom v. Norway), Judgment of December 18th, 1951, I.C.J. Reports (1951): 138 - 139, <http://www.icj-cij.org/files/case-related/5/005-19511218-JUD-01-00-EN.pdf>

¹⁴¹ “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 6, para 33, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf.

¹⁴² “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 13, para 80, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf

¹⁴³ “Historic Bays: Memorandum by the Secretariat of the United Nations”, United Nations Conference on the Law of the Sea Geneva, Switzerland 24 February to 27 April 1958, document: A/CONF.13/1, extract from *the Official Records of the United Nations Conference on the Law of the Sea*, I (Preparatory Documents), (2009) cited from “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 16, para 134, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf

¹⁴⁴ “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 13, para 81, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf

with each one of the aforementioned requirements and could be legitimately claimed by Ukraine and Russia as historic waters.

The exercise of authority over the Azov Sea by Ukraine and Russia

The first requirement for the determination of waters as historic is the exercise of authority over the area by the State claiming the historic right. In relation to the Azov Sea the exercise of authority by Ukraine and Russia was demonstrated by a joint Declaration in 2003 of the President of Ukraine and the President of the Russian Federation. Both States have not only claimed that “historically the Sea of Azov and the Kerch Strait are internal waters of Ukraine and Russia” but also agreed on cooperation on the use of the Sea of Azov¹⁴⁵. However, it was only the legal approval of the factual situation of the previous exercise of Ukrainian and Russian authority over the Azov Sea. This consequently requires to determine and mention all facts evidencing the exercise of the Ukrainian and Russian authority in the Azov Sea.

First of all, it is necessary to define **the scope of the exercise of authority**.

The scope of the exercise of authority means that “a claim to “historic waters” is a claim by a State, based on an historic title, to a maritime area as part of its national domain; it is a claim to sovereignty over the area. The activities carried on by the State in the area or, in other words, the authority continuously exercised by the State in the area must be commensurate with the claim. The authority exercised must consequently be sovereignty, the State must have acted and act as the sovereign of the area.”¹⁴⁶

Thus, Ukraine and Russia have to demonstrate that they exercised in the Azov Sea the authority amounting to sovereignty. The Azov Sea was always treated as part of internal waters of a responding state (Russian Empire of the tsar, then – the USSR and finally – Ukraine and Russia) and the rights of the foreign states were limited respectively. All these states which legally succeeded from one another had full control over the waters of the Azov Sea as a part of their internal waters.

To prove the exercise of Ukrainian and Russian authority over the Azov Sea it is also essential to point out the **acts by which authority is exercised**.

Firstly, such acts must emanate from the State or its organs. Such “acts must be public; they must be acts by which the State openly manifests its will to exercise authority over the territory. The acts must have the notoriety which is normal for acts of State. Secret acts could not form the

¹⁴⁵ “Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24.12.2003”, accessed 2018 April 9, http://zakon5.rada.gov.ua/laws/show/643_205. “Ратифікація від 20.04.2004, підстава Закон України Про ратифікацію Договору між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 20.04.2004 № 1682-IV”, accessed on April 9, <http://zakon5.rada.gov.ua/laws/show/1682-15>.

¹⁴⁶ “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 14, para 87, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf.

basis of a historic title; the other State must have at least the opportunity of knowing what is going on. [. . .] Another important requirement is that the acts must be such as to ensure that the exercise of authority is effective.”¹⁴⁷

From the end of the 18th century the Russian Empire started to exercise the authority over the Azov Sea as the result of the victory of the Ottoman Empire in the neighborhood of the Azov Sea, more precisely inside of the Kerch Strait. That status was confirmed by the Kuchuk Kaynardzhi Peace Treaty of July 10th, 1774. Under this Treaty the Russian Empire spread its sovereignty onto the waters of the Azov Sea.¹⁴⁸

Following the 1917 Revolution, four socialist republics were established on the territory of the former Russian empire: the Russian and Transcaucasian Soviet Federated Socialist Republics and the Ukrainian and Belorussian Soviet Socialist Republics. On December 30, 1922, these constituent republics established the USSR by the Treaty on the Creation of the Soviet Union¹⁴⁹. Thereby, the USSR became as the successor of the Russian Empire’s rights to exercise authority over the waters of the Azov Sea.

During the time of the USSR the Sea of Azov and the Kerch Strait were part of its internal waters. The straight baseline was drawn between Cape Kyz-Aul—Cape Geleznyi Rog¹⁵⁰. This baseline was drawn in accordance with the UNCLOS¹⁵¹ and made the Sea of Azov as USSR’s internal waters in which the legal regime was established by the national legislation of the USSR. This delimitation was also adopted at the national level by Council of Ministers in Regulation in 7 February, 1984¹⁵².

The breakup of the USSR took place on December 8, 1991¹⁵³ and therefrom the Azov Sea seized to be the internal waters of the USSR¹⁵⁴. Obviously, the Azov Sea was now bordered by Ukraine as former Ukrainian SSR and Russia as former the RSFSR. From the moment of the demise of the USSR till 2003 there was no international instrument that would regulate the status of the Azov Sea. In January 2003 the bilateral treaty on the Ukrainian-Russian state border was

¹⁴⁷ Ibid 14-15, para 94-97.

¹⁴⁸ Nadia Serbenko, “On the use of the Kerch strait, or why the Russian-Ukrainian agreement violates international law?”, Independent Analytical Center For Geopolitical Studies Borysfen Intel, November 20, 2015, <http://bintel.com.ua/en/article/kerch/>.

¹⁴⁹ Martin McCauley et al., “Soviet Union”, March 9, 2018, accessed 2018 April 12, <https://www.britannica.com/place/Soviet-Union>.

¹⁵⁰ Alexander Skaridov, “The Sea of Azov and the Kerch Strait” in *Navigating Straits : Challenges for International Law*, David D. Caron, Nilufer Oral, (Leiden: Brill Nijhoff, 2014): 220-221.

¹⁵¹ USSR was a party to UNCLOS from 10 December 1982.

¹⁵² Olga Romanukha, “The Delimitation of the Modern Border of Ukraine”, *Nauka. Relihiya. Suspilstvo* 4 (2009): 111, <http://dspace.nbuv.gov.ua/bitstream/handle/123456789/33239/57-Romanukha.pdf?sequence=1>.

¹⁵³ “In this day in the village of Viskuly, Belarus, the Heads of State and Governments of the three republics: Boris Yeltsin and Gennady Burbulis (RSFSR), Stanislav Shushkevich and Vyacheslav Kebich (Belarus), Leonid Kravchuk, and Witold Fokin (Ukraine) signed the so-called ‘Belovezha Accords’ on the demise of the USSR and the establishment of the Commonwealth of Independent States”. Cited from “The day in history: the Belavezha Accords signed in 8 December 1991”, *Presidential library materials: История Российского государства: территория и границы*, 2010, accessed 2018 April 11, <https://www.prilib.ru/en/history/619792>.

¹⁵⁴ “It happened due to the fact that USSR as a subject of international law and geopolitical reality ceases to exist by ‘Belovezha Accords’ that was mentioned in its the preamble by Russia, Belarus and Ukraine”. Cited from “The day in history: the Belavezha Accords signed in 8 December 1991”, *Presidential library materials: История Российского государства: территория и границы*, 2010, accessed 2018 April 11, <https://www.prilib.ru/en/history/619792>. The agreement on the establishment of the Commonwealth of Independent States can be found at <http://www.rusarchives.ru/projects/statehood/10-12-soglashenie-sng.shtml>.

adopted¹⁵⁵ and in December of the same year the Agreement on Cooperation on the use of the Sea of Azov and the Kerch Strait was also signed by the Azov Sea's coastal states. These international treaties stated that the Sea of Azov and the Kerch Strait are internal waters of Ukraine and Russia.¹⁵⁶

Based on the abovementioned it is clear the form of the acts and declared scope of the exercise of authority by the Ukraine and Russia complies with the requirements established in the international law. However, **the effectiveness of the authority exercised over the Azov Sea** needs further analysis.

According to the Study on Juridical Regime of Historic Waters including historic bays the effectiveness of the authority exercised can “be described as the effective exercise of sovereignty over the area by appropriate action on the part of the claiming States.”¹⁵⁷

It should be noted that transportation on the Sea of Azov became important in the 19th century as the steppes around it became settled. In the second half of the century, when railways connected the Sea of Azov with the interior of the continent, grain began to be exported in large quantities from its ports. By 1913 one-third of the grain exported from the Russian Empire by sea came from these ports. Even before 1917 Mariupol and Taganrog, because of their proximity to the Donbas, became important coal and metal exporting ports.¹⁵⁸

However, the access to the ports in the Azov Sea as well as the requirements for the ships that could navigate in the waters of the Azov Sea were regulated firstly by the Russian Empire, afterwards by Soviet Union and from the breakup of the USSR by Ukraine and Russia.

In the decree on the opening of the Kerch port dated 1821 it was stated that authorities in the Kerch port should check all vessels that were going to the waters of the Azov Sea. Such checking was mandatory for all vessels going to the ports of the Russian Empire as well as for vessels that were going to fish in those waters. All of these ships had to obtain the permission from the authorities of the Kerch port and all vessels proceeding to the Azov Sea had to comply with the established rules and if not – the legal consequences were applied by authorities of the Russian Empire.¹⁵⁹

¹⁵⁵ “Договір між Україною і Російською Федерацією про українсько-російський державний кордон від 28.01.2003”, accessed 2018 April 10, http://zakon1.rada.gov.ua/laws/show/643_157.

¹⁵⁶ “Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24.12.2003”, accessed on 2018, April 10, http://zakon5.rada.gov.ua/laws/show/643_205. “Ратифікація від 20.04.2004, підстава Зфкон України Про ратифікацію Договору між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 20.04.2004 № 1682-IV”, accessed on 2018, April 10, <http://zakon5.rada.gov.ua/laws/show/1682-15>.

¹⁵⁷ “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 15, para 100, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf.

¹⁵⁸ Volodymyr Kubijovyč, “Sea of Azov”, *Internet Encyclopedia of Ukraine*, accessed 2018 March 30, <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CA%5CZ%5CAzovSeaof.htm>

¹⁵⁹ «Полное собрание законов Российской империи с 1649 года: 1820-1821”, 37, *Типографии II Отдѣления Собственной Его Императорскаго Величества Канцелярии*, 874-878, <https://books.google.com.ua/books?id=jnJgAAAcAAJ&printsec=frontcover&hl=ru#v=onepage&q&f=false>)

During the Soviet times, the navigation of marine transport in the Azov Sea was seasonal. This was due to the fact that in winter time a thick layer of ice was covering the water areas of the Azov Sea, and since there were not enough icebreakers, the vessels were forced to spend winter in the ports of Azov. However, the services of icebreaking were provided exclusively by Soviet authorities. Also the system for managing sea transport through the administrations of the seaports of the Azov Sea was established and functioned successfully.¹⁶⁰ Moreover, another evidence of the effectiveness of the authority exercised over the Azov Sea was the actually exercise of it in respect of the third states: collecting charges, prohibiting any warships, permitting the foreign ships to enter the sea – all of this was done in accordance with USSR national legislation.

Summarizing, it should be concluded that the Azov Sea was always treated as part of internal waters of a responding state (Russian Empire of the tsar, then – the USSR and finally – Ukraine and Russia), that such state actually exercised in those waters authority amounting to sovereignty and the rights of the foreign states were limited respectively.

The continuity of exercise of authority by Ukraine and Russia in regard to the Azov Sea

The second requirement established in the international law is the continuity of this exercise of authority by State claiming the historic right over particular area.

According to the Study on Juridical Regime of Historic Waters including historic bays from one hand, “a historic title to a maritime area must be based on the effective exercise of sovereignty over the area by the particular State claiming it. The activity from which the required usage must emerge is consequently a repeated or continued activity of this same State. The passage of time is therefore essential; the State must have kept up its exercise of sovereignty over the area for a considerable time.”¹⁶¹

“On the other hand, no precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgment when sufficient time has elapsed for the usage to emerge.”¹⁶²

Ostensibly, Russia and Ukraine as states claiming the historic right over the Sea of Azov became the subjects of international law only in the 90^{ies} of the 20th century and therefrom started exercising the authority over the Azov Sea. However, legal continuity between those states and their predecessors should be emphasized.

¹⁶⁰ “Руководители морского и речного флота Советского Союза и Российской Федерации”, РИЦ «Редакция газеты «Морские вести России» при содействии РИЦ «ИД «Магистраль», Moscow, (2015):10 and 59, accessed 2018 April 1, <http://www.morflot.ru/files/doclist/20150727164432-%D0%A0%D1%83%D0%BA%D0%BE%D0%B2%D0%BE%D0%B4%D0%B8%D1%82%D0%B5%D0%BB%D0%B8-2015-%D1%84%D0%BE%D1%82%D0%BE%D0%B0%D0%BB%D1%8C%D0%B1%D0%BE%D0%BC.pdf>

¹⁶¹ “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 15, para 103, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf.

¹⁶² Ibid 15, para 104.

“The practice of States explicitly shows that with regard to traditional cases of succession of States (annexation, cession, uniting and dissolution of States) a customary rule of international law has been developed, according to which the successor inherits *ipso jure* boundary treaties of the predecessor”.¹⁶³

Thus, it could be presumed that the Azov Sea continued to remain as internal waters from the time of the Russian Empire till nowadays. As it was already mentioned, Kuchuk Kaynardzhi Peace Treaty in 1774 confirmed that the Russian Empire spread its sovereignty over the waters of the Azov Sea¹⁶⁴. A few decades later, in 1795 almost the entire territory of modern Ukraine became part of the Russian Empire and by it, the shores of the Azov Sea in their full length started to belong only to one state.¹⁶⁵ In the beginning of the 20th century the Russian Empire was replaced by USSR that exercised its authority over the Azov Sea. It should be emphasized that during that time the shores of the Azov Sea were shared between two USSR’s republics: the Ukrainian SSR and the RSFSR.

Following the dissolution of the former USSR in 1991 the status of the Sea of Azov and Kerch Strait changed as it was no longer internal waters of one state. According to the laws Ukraine became a successor of the Ukrainian SSR and while the Russian Federation – of RSFSR. Article 7 of the Law of Ukraine ‘On the succession of Ukraine’ adopted on the 12th of September, 1991, stated that “Ukraine is the legal successor of the rights and obligations according to the international treaties of USSR which are not contradicting the Constitution of Ukraine and interests of the republic”.¹⁶⁶

On December 25, 1991 the Law of the RSFSR ‘On changing the name of the state of the Russian Soviet Federative Socialist Republic’ changed it to “the Russian Federation” (“Russia”).¹⁶⁷

Undisputable, the status of these two republics was changed as they were no longer parts of one state. However, they still remained to be coastal states of the Azov Sea which always possessed the status of internal waters. Although it should be admitted that such status was established in the bilateral agreement of those two independent states only in 2003. The Agreement on Cooperation on the use of the Sea of Azov and the Kerch Strait was adopted on the 24th of December, 2003, and ratified by Ukraine on the 20th of April, 2004. This Agreement became binding upon Russia as of the 23rd of April, 2004. Only 14 years passed have passed since 2004 – is this sufficient to be

¹⁶³ Jerzy Tyranowski, “State Succession: Boundaries and Boundary Treaties,” *Polish Yearbook of International Law* 10 (1979-1980): p 123.

¹⁶⁴ Nadia Serbenko, “On the use of the Kerch strait, or why the Russian-Ukrainian agreement violates international law?”, *Independent Analytical Center For Geopolitical Studies Borysfen Intel*, November 20, 2015, <http://bintel.com.ua/en/article/kerch/>.

¹⁶⁵ “Украина в составе Российской империи 1795 г”, accessed on 2018 April 2, <http://grandukraine.com/istoricheskie-zapiski/ukraina-v-sostave-rossiyskoy-imperii-1795-g.html>.

¹⁶⁶ “Закон України Про правонаступництво України від 12.09.1991 № 1543-XII” accessed 2018 April 13, <http://zakon5.rada.gov.ua/laws/show/1543-12>.

¹⁶⁷ “Закон РСФСР Об изменении наименования государства Российская Советская Федеративная Социалистическая Республика от 25 декабря 1991 г. N 2094-1”, accessed 2018 April 13, <http://base.garant.ru/105917/>.

deemed “continuous exercise of authority”? However, even before adoption of the abovementioned agreement, the Azov Sea was actually treated by these two countries as their internal waters – after becoming independent in 1991 they kept regulating the Azov Sea domestically as their internal waters without granting any navigational rights or freedoms to third countries. Before 1991 the Azov Sea was part of internal waters of USSR, Ukraine and Russia exercised control over the Azov Sea as the republics of the USSR: the Ukrainian SSR and the Russian Soviet Federative Socialist Republic. Furthermore, both states were constituent republics of the USSR which in its turn was the successor of the former Russian Empire. So the effective, continual exercise of sovereignty on the Azov Sea was constantly held by Ukraine and Russia.

According to the Study on Juridical Regime of Historic Waters including historic bays “there seems to be practically general agreement that besides this national usage, consideration must also be given to the international reaction to the said exercise of sovereignty. It is sometimes said that the national usage has to develop into an “international usage”. This may be a way of underlining the importance of the attitude of foreign States in the creation of an historic title; in any case, a full understanding of the matter requires an analysis of the question how and to what extent the reaction of foreign States influences the growth of such a title.”¹⁶⁸

So there is a need to go further and analyze the attitude of foreign States in respect of Ukraine’s and Russia’s attempts to claim the Azov Sea as their historic waters.

The attitude of foreign States

Basically, this requirement refers to the so-called acquiescence of foreign States. “The State which claims “historic waters” in effect claims a maritime area which according to general international law belongs to the high seas. As the high seas are *res communis omnium* and not *res nullius*, title to the area cannot be obtained by occupation [. . .] Title to “historic waters”, therefore, has its origin in an illegal situation which was subsequently validated. This validation could not take place by the mere passage of time; it must be consummated by the acquiescence of the rightful owners.”¹⁶⁹

During the Soviet period, some scholars doubted the status of the Azov Sea as internal waters. Although in literature it is possible to find different opinions on the status of the Azov Sea¹⁷⁰, however, the state practice suggests that the waters of this sea was treated as internal waters and none of the States objected it.

¹⁶⁸ “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 15-16, para 105, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf.

¹⁶⁹ Ibid 16, para 106.

¹⁷⁰ Alexander Skaridov, “The Sea of Azov and the Kerch Strait” in *Navigating Straits : Challenges for International Law*, David D. Caron, Nilufer Oral, (Leiden: Brill Nijhoff, 2014): 220-221.

In preparatory documents for the UN Conference on the Law of the Sea, the Azov Sea was referred among the examples of historic bays in the practice of states as a bay the coasts of which belong to a single State:

The Sea of Azov is ten miles across at its entrance. It is situated entirely within the southern part of the territory of the Union of Soviet Socialist Republics and extends a considerable distance inland, its dimensions being approximately 230 by 110 miles. [. . .] A. N. Nikolaev regards the Sea of Azov as part of the “internal waters of the USSR” [. . .] Gidel is of the opinion that certain maritime areas — of which the Sea of Azov is one — should not be treated as falling within the category of historic waters “because, pursuant to the rules of the ordinary international law of the sea, these areas are in any case internal waters”.¹⁷¹

The Azov Sea provides access to the Ukrainian and Russian vessels via the Kerch Strait to the Black Sea and to further water areas. It also provides access to the foreign vessels going to Ukrainian and Russian port through the Kerch Strait. However, the construction of the canal between the Volga River and Don River in 1954 gave the possibility of transportation between the Caspian Sea and the Black Sea through the Sea of Azov¹⁷². Therefore, the vessels under the flag of Azerbaijan, Kazakhstan, Turkmenistan and Iran should have been concerned about the status of the Azov Sea and specifically about their rights of navigation through the mentioned sea. Nevertheless, none of them objected the status of the Azov Sea as historical waters. Up to 1991, there were no protests on behalf of third states that would aim at challenging the historic title of the USSR over the Azov Sea.

In opinion of Adam Eberhard, “up to the break-up of the USSR, the legal status of the Sea of Azov and the Kerch Strait did not give rise to any doubts whatsoever-these were internationally acknowledged internal waters under complete and exclusive Soviet authority. It was only when the independent Russia and Ukraine arose that controversies were incited over exercising control over the basin.”¹⁷³

In 2003 Joint Statement was made by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch under which it was claimed that “historically the Sea of Azov and the Strait of Kerch are internal waters of Ukraine and Russia”¹⁷⁴. This statement was also published by the UN Division for Ocean Affairs and the Law of the Sea

¹⁷¹ “Historic Bays: Memorandum by the Secretariat of the United Nations”, United Nations Conference on the Law of the Sea Geneva, Switzerland 24 February to 27 April 1958, document: A/CONF.13/1. Extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Volume I (Preparatory Documents, 2009): 3, accessed 2018 April 26, http://legal.un.org/docs/?path=../diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf&lang=E

¹⁷² Abbas Maleki, “Getting Out of the Caspian Sea is Still Difficult”, 18 August 2010, <http://irdiplomacy.ir/en/page/1453/Getting+Out+of+the+Caspian+Sea+is+Still+Difficult.html>.

¹⁷³ Adam Eberhardt, “The Common Border Issue in Russian-Ukrainian Relations,” *The Polish Foreign Affairs Digest*, 3, 2(7), (2003):227.

¹⁷⁴ “Спільна заява Президента України і Президента Російської Федерації щодо Азовського моря і Керченської протоки, Керч, 24 грудня 2003 року,” accessed 2018 May 12, http://zakon5.rada.gov.ua/laws/show/643_206.

Office of Legal Affairs in its Bulletin¹⁷⁵. Despite that none of the states lodged any formal protest as regards the status of the Azov Sea.

For example, in case when Cambodia and Vietnam made a claim to consider the Gulf of Thailand as “historic waters” their position was met with strongly worded international protests, notably from Thailand and the United States¹⁷⁶. It is obvious that the opposition must be expressed in some kind of action. However, none has been present in case of the Azov Sea.

Up to 1991, there were no protests on behalf of third states that would aim at challenging the historic title of the USSR over the Azov Sea. Moreover, after the 2003 Joint Statement of Ukraine and Russia regarding the status of the mentioned waters, the attitude of foreign states did not change either.

So, as there were no any opposing remarks from any state, it means that foreign states do recognize that the Azov Sea is historically internal waters of Ukraine and Russia. Probably the attitude of the international community is based on the fact that the Azov Sea had been considered to be internal waters of one or another state for more than two centuries and that the mere fact that sea is now bordered by two instead of one state does not change that fact.

In regard to the Sea of Azov it seems reasonable to apply the ideas mentioned about multi-State bays as these bays are the very similar from the geographical and legal point of view.

Therefore, “neither the ILC[International Law Commission], the UNCLOS I [the First UN Conference on the Law of the Sea], nor the UNCLOS III [the Third UN Conference on the Law of the Sea] presented any definite answer to the question of the legal status of bays surrounded by two or more States. This is why no provision on multi-State bays exists either in the TSC [the Convention on the Territorial Sea and Contiguous Zone] or the LOSC [UNCLOS].”¹⁷⁷

According to the opinion of McDougal and Burke the absence in the content of the international conventions of the law of the sea provisions that could regulate multi-State bays leads

¹⁷⁵ “Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch,” UN Law of the Sea Bulletin (54), December 2003, United Nations, 2004: 131, http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf.

¹⁷⁶ “On 7 July 1982, the Agreement on Historic Waters of Vietnam and Kampuchea [Cambodia] was signed. This agreement provides for a joint Cambodian and Vietnamese claim to “historic waters”, which are “placed under the juridical regime of ... internal waters,” over a roughly oblong-shaped area of maritime space projecting into the Gulf of Thailand offshore the parties' respective mainland territories.” Cited from Clive Schofield; May Tan-Mullins, “Maritime Claims, Conflicts and Cooperation in the Gulf of Thailand,” *Ocean Yearbook* 22 (2008): 92. “Thailand made a Statement dated 9 December 1985 by the Ministry of Foreign Affairs of Thailand concerning Viet Nam's territorial waters and the drawing of baselines. By this statement Thailand said that regarding the claims to the so-called “historic waters”, which purport to appropriate and subject certain sea areas in the Gulf of Thailand and in the Gulf of Tonkin (Gulf of Bac Bo) to the regime of internal waters, the Government of Thailand is of the view that such claims cannot be justified on the basis of the applicable principles and rules of international law.” Cited from UN Law of the Sea Bulletin 7, April (1986): 111, http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE7.pdf. “United States made a Note from the Permanent Representative of the United States to the United Nations which refers to an accord entitled “Agreement on the historical waters of the Socialist Republic of Viet Nam and the People's Republic of Kampuchea” of 7 July 1982 . By this note they pointed out that the United States has not acquiesced in this claim, nor can the community of States be said to have done so. Given the nature of the claim first promulgated in 1982, such a brief period of time would not permit sufficient acquiescence to mature.” Cited from UN Law of the Sea Bulletin 10, November (1987): 23, http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE10.pdf.

¹⁷⁷ Farhad Talaie, “Delimitation of Multi-State Bays in International Law of the Sea”, *University of Tasmanian Law Review*, 18, 1, (1999): 38.

to the idea that “the several states indented by a bay are not regarded as authorized jointly to claim these areas as internal waters as a single State could do in the same circumstances”.¹⁷⁸

Farhad Talaie concluded that as there is no any codification of the rules in regard to the bays surrounded by two or more States this leads to the uncertainty who should define the status of such bays. In his viewpoint, it should be done either by the coastal States interested in it, or there should be provided international rules that can determine the status of these bays.¹⁷⁹

The mainstream opinion is that the bays surrounded by two or more States may not be enclosed and claimed as internal waters. The criterion of it is their size. In this regard it is necessary to take into account the width of the each particular multi-plural bay: whether it is more extensive than double the breadth of the territorial sea (24 nautical miles) or not.¹⁸⁰

So not only in the legislative level but also according to the scientists opinions, the situation with multi-State bays resulted in uncertainty to whether the determination of the status of waters within these bays should be left to the littoral States concerned, or whether there should be international rules for delimitation of these bays, the same happened to the Sea of Azov situation as well. However, having in mind that the Azov Sea is bordered by two states, it might be helpful to look into the example of the Gulf of Fonseca as an historic bay with three coastal states.

In the case *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) about the Gulf of Fonseca the ICJ stated that “the particular historical régime established by practice must be especially important in a pluri-State bay; a kind of bay for which there are notoriously no agreed and codified general rules of the kind so well established for single-State bays.”¹⁸¹

The peculiarity of the Azov Sea is that this sea is considered as internal waters of two States. It is reasonable to have a look on example of the Gulf of Fonseca as an historic bay with three coastal States. In this case the Chamber constituted by the Court determined the legal status of the islands in the Gulf of Fontseca and made delimitation of the maritime zones within and outside the closing line of that Gulf.¹⁸²

In this decision the ICJ analyzed whether the Gulf of Fonseca could be considered “in terms of the modern law [. . .] “internal waters”¹⁸³ and reached the conclusion that “the essential juridical

¹⁷⁸ Cited from Ibid.

¹⁷⁹ Ibid. 63.

¹⁸⁰ Ibid. 63-64.

¹⁸¹ *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (11 September, 1992): 386-387, para 42, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

¹⁸² Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice, case concerning land, island and maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), Judgment of 11 September 1992, <http://www.icj-cij.org/files/case-related/75/6673.pdf>.

¹⁸³ *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (11 September, 1992): 604 – 605, para 412, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

status of these waters is the same as that of internal waters, since they are claimed *à titre de souverain* and, though subject to certain rights of passage, they are not territorial sea”.¹⁸⁴

In the decision it was stated that the Gulf of Fonseca is an historic bay the waters whereof were succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua as successors of Spain and the Federal Republic of Central America, jointly, and continue to be so held. According to the decision the joint use established by the ICJ does not affect some areas of this Gulf.¹⁸⁵

First of all, it does not affect the belts which are in the exclusive sovereignty of the coastal State that were established from the shore of each of the three States. Secondly, there is 3-mile belt where these states must respect the existing rights of innocent passage. And only the waters at the centre of the Gulf that are not covered by two previous mentioned belts are the subject to the joint entitlement of all three states of the Gulf.¹⁸⁶

Regarding the legal situation of the waters outside the Gulf the court decided that the Gulf of Fonseca being an historic bay with three coastal States, the closing line of the Gulf constitutes the baseline of the territorial sea; the territorial sea, continental shelf and exclusive economic zone entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua; and that any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law.¹⁸⁷

Comparison of the Azov Sea with the Gulf of Fonseca leads to the conclusion that in both cases there is joint use of the area in question, however, the regulation of such use in the Gulf of Fonseca is resolved by the decision of the ICJ while in case of the Azov Sea there is no clarity in how this joint use should be exercised between Ukraine and Russia. It also leads to conclusion that ICJ believes that amount of coastal states does not prevent from claiming the historical title over their adjacent waters. So it does not matter how many states are bordering the Azov Sea if previously these waters were recognized as internal waters of the one state that officially got divided into a few ones.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, 616 – 617, para 432.

¹⁸⁶ “... the legal situation of the waters of the Gulf of Fonseca is as follows : the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf, that is to say, between a point on that line 3 miles (1 marine league) from Punta Arnapala and a point on that line 3 miles (1 marine league) from Punta Cosiguina, are subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area be effected.” Cited from Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (11 September, 1992): 616 – 617, para 432, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

¹⁸⁷ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (11 September, 1992): 617, para 432, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

To sum up, there is no doubt that the Sea of Azov and the Kerch Strait are historic waters of two states – Ukraine and Russia. Based on the research made it should be concluded that there was not only the exercise of authority over the Azov Sea by both states together but also this exercise of authority has continuous character due to the fact that the Azov Sea being as a part of internal waters of USSR was under the control of former Ukrainian SSR (Ukraine) and the former Russian Soviet Federative Socialist Republic (Russia). Additionally, none of states had made any objection regarding the status of the Azov Sea.

Based on the foregoing it should be concluded that the Kerch Strait connects relevant part of the exclusive economic zone on the Black Sea with the internal waters on the Azov Sea. In this case, the legal regime applicable in this strait depends on the maritime zones covering that Strait.

3.3. Maritime Zones Covering the Strait

As it has been mentioned before, after the break-up of the USSR Ukraine treated the Azov Sea as the enclosed sea under UNCLOS and called for delimitation of the territorial sea and exclusive economic zone with Russia.

If these zones were established and delimited, the Kerch Strait would have connected relevant part of the exclusive economic zone of the Black Sea with the relevant part of the exclusive economic zone of the Azov Sea. Furthermore, in such case the Kerch Strait would have been covered entirely by the territorial seas of Ukraine and Russia since due to its narrowness it would not have any exclusive economic zone. Additionally, as there is no any alternative navigation route on the exclusive economic zone or high seas and there is no long-standing international convention specifically relating to such strait, section 2 of Part III would have been applicable to such strait and the ships of all states would have enjoyed the right of transit passage in this strait.

However, in 2003 the Treaty on the Ukrainian-Russian State Border and the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait were concluded. These agreements declared that both the Azov Sea and the Kerch Strait historically are the internal waters of Ukraine and Russia.

Some scholars interpret the change in Ukraine's position and conclusion of those agreements as unlawfully impairing the right of transit passage in the Kerch Strait. In this regards, according to the view point of Ana G. Lopez Martin:

Ukraine and Russia have claimed that "historically the Sea of Azov and the Kerch Strait are internal waters of Ukraine and Russia" and, consequently, "military vessels flying the flags of other States can only enter the Sea of Azov and cross the Kerch Strait by invitation of Ukraine or of Russia

agreed to with the State”¹⁸⁸. In this case, it does not seem that there are any of the parameters required for the proclamation of historic waters, therefore, such a declaration, subjecting the passage of foreign military vessels to the consent of the coastal States, is a clear infringement of the right of passage in transit which should be in force in the Kerch Strait in accordance with the provisions in article 37 of the Convention of 1982, which both States are parties to.¹⁸⁹

It seems reasonable that some scientist interpreted the proclamation of the historic title in the Azov Sea and Kerch Strait as a breach of the provisions of UNCLOS. However, having in mind that those waters were lawfully claimed as historic internal waters of Ukraine and Russia (please see section [3.2.2. International Legal Requirements for Historic Waters]) and that none of the other states objected such claim as infringing their rights, it should be concluded that the Kerch Strait consists of the internal waters of the bordering states – Russia and Ukraine.

According to opinion of Ana G. Lopez Martin, “there are two different classes of straits in internal waters, each with a different legal regime although, in both cases, the legal nature of these waters is not affected”. The first type is straits which are formed by internal waters which have always been internal waters. The second type is straits formed by internal waters which do come under the scope of application of Part III in case if the waters of the strait are internal as a consequence of the establishment of straight baselines.¹⁹⁰

It should be reminded that during the Soviet period the Sea of Azov and the Kerch Strait were part of the internal waters of the USSR and by law the straight baseline was drawn between Cape Kyz-Aul – Cape Geleznyi Rog¹⁹¹. This baseline was drawn in accordance with the UNCLOS¹⁹² and made the Sea of Azov as USSR’s internal waters in which the legal regime was established by the national legislation of the USSR. This delimitation was also adopted at the national level by the Council of Ministers in Regulation in 7 February, 1984¹⁹³. However, it should be emphasized that this straight baseline has the effect of enclosing as internal waters areas which were considered internal ones as well before the straight baseline was drawn.

Since the Kerch Strait is covered by internal waters that have always been internal waters, it falls outside the scope of application of the Part III of UNCLOS. The legal regime applicable in the Kerch Strait is the legal regime of the internal waters. Therefore, the strait comes within the ambit of Article 2 of UNCLOS which provides that the internal waters are subject to the exclusive

¹⁸⁸ Law of the Sea Bulletin, No. 54, (2004): 117. Cited from Ana G. Lopez Martin, *International Straits: Concept, Classification and Rules of Passage* (Springer Heidelberg Dordrecht London New York, 2010), 71.

¹⁸⁹ Ana G. Lopez Martin, *International Straits: Concept, Classification and Rules of Passage* (Springer Heidelberg Dordrecht London New York, 2010), 71.

¹⁹⁰ Ana G. Lopez Martin, *International Straits: Concept, Classification and Rules of Passage* (Springer Heidelberg Dordrecht London New York, 2010), 69-72.

¹⁹¹ Alexander Skaridov, “The Sea of Azov and the Kerch Strait” in *Navigating Straits : Challenges for International Law*, David D. Caron, Nilufer Oral, (Leiden: Brill Nijhoff, 2014): 220-221.

¹⁹² From 10 December 1982 USSR was a party to UNCLOS.

¹⁹³ O.M. Romanukha, “The Delimitation of the Modern Border of Ukraine”, Nauka. Relihiya. Suspilstvo 4 (2009): 111, accessed 2018 April 3, <http://dspace.nbuv.gov.ua/bitstream/handle/123456789/33239/57-Romanukha.pdf?sequence=1>.

sovereignty of the littoral state. As regards this type of strait, there is no right of transit passage to be enjoyed therein by foreign vessels.

At this point it is necessary to emphasize that the waters of the Kerch Strait does not consist of the internal waters of only one state. The Kerch Strait includes the internal waters of both Ukraine and Russia. In order to know in which part of the strait the sovereignty should be exercised by Ukraine and in which – by Russia, it is necessary to examine how the internal waters of the two states are delimited within the strait.

Maritime delimitation in the Kerch Strait became urgent as of the moment of the dissolution of the USSR. If previously the Strait was covered by the internal waters of one state, after the break-up of the USSR the Sea of Azov and the Kerch Strait both had two bordering states – Ukraine and Russia. The question who exactly would gain the control over the Kerch Strait and, more specifically, over the Kerch-Yenikalsky Channel was the most disputed. The process of the delimitation in the Azov Sea was considered impossible without agreement related to the Kerch Strait. More precisely Ukraine and Russia agreed to solve both delimitations at the same time. So if there were no consent on the delimitation of the Kerch Strait, the delimitation in the Azov Sea remained unsolved and *vice versa*.

Russia has more than once denied the proposal of the delimitation in the Kerch Strait by applying the principle of the *uti possidetis juris* according to which the Soviet administrative borders would become as international ones. The Russian proposal was to make delimitation by drawing a modified median line equidistantly from both littoral states. Such method of delimitation would have resulted in equal rights of both states over the Kerch-Yenikalskiy Canal.¹⁹⁴

In turn, Ukraine has repeatedly pointed out to Russia that, for example, the Russian-Estonian border in the Narva and the Finnish Gulf was, at the insistence of Russia, carried out explicitly on the former Soviet administrative border. Ukraine demanded to divide the Kerch Strait in the same way in accordance with international law.¹⁹⁵

The Treaty on the Ukrainian-Russian State Border and the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait failed to provide any delimitation between the two States in respect of the Azov Sea and the Kerch Strait despite the fact that one of them is a framework document namely on the state border between the two countries on land, including rivers and lakes.

On July 2012, a few newspapers released the information that “Russian President Vladimir Putin and his Ukrainian counterpart Viktor Yanukovich signed a preliminary agreement on the

¹⁹⁴ Irina Nossova, “Russia’s Strive from the Land to the Sea Based on International Law and Doctrine of Sovereignty”, *CEURUS EU-Russia Papers*, 13, (2014): 7-8, accessed 2018 May 15, http://ceurus.ut.ee/wp-content/uploads/2011/06/EU-Russia-Papers-13_Nossova.pdf.

¹⁹⁵ Вікторія Матола, “Україні найважче домовитися про розмежування кордонів з колишніми “братами”, 24 червня, 2013, accessed on 2018, April, 3. <http://tyzhden.ua/News/82883>.

delimitation of the maritime border between the two countries in the Kerch Strait, according to which the island of Tuzla and the Kerch-Yenikalskiy Channel would be considered Ukraine's territory, while Russia maintains its "right of the key" to the Kerch Strait meaning that Russian vessels shall enjoy the right of free and unimpeded passage through the strait waters".¹⁹⁶

However, there was no agreement officially adopted neither by the Ukrainian legislation, nor by Russian that would deal with the delimitation of the maritime border between Ukraine and Russia in the Kerch Strait.

On the 1st of August 2012 the Cabinet of Ministers of Ukraine did adopt the Resolution 'On approval of the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on measures to ensure the safety of navigation in the Azov Sea and the Kerch Strait', however, first of all, this agreement was signed by parties on the 20th of March 2012 and secondly, the agreement established mostly procedure for organizing data exchange of automatic identification systems in the mentioned areas and did not include any provisions on the delimitation in the Kerch Strait.¹⁹⁷

After the aforementioned agreement of 2012, there were no other international treaties between Ukraine and Russia that would include provisions on the delimitation of the Kerch Strait. Thus, it should be concluded that the waters of the Kerch Strait are considered as the internal waters of two states which unfortunately have not yet been delimited.

It is quite clear that delimitation dispute of the Kerch Strait will not be examined as part of the merits in the case initiated by Ukraine. The arbitral tribunal will not deal with any delimitation issues between Ukraine and Russia due to the fact that Russia and Ukraine made declarations under Article 298 of UNCLOS that excluded any sea boundary delimitation dispute from the jurisdiction of the courts regarding compulsory procedures entailing binding decisions¹⁹⁸. It makes necessary to seek new approaches to the solution of the dispute on the maritime delimitation between these two states.

¹⁹⁶ "Russia, Ukraine Agree on Maritime Border Delimitation", *Ria Novosti*, 13 July 2012, accessed on 2018, May 10, <https://sptnkne.ws/h6N9>. Cited from Irina Nossova, "Russia's Strive from the Land to the Sea Based on International Law and Doctrine of Sovereignty", *CEURUS EU-Russia Papers*, 13, (2014): 7-8, accessed 2018 May 15, http://ceurus.ut.ee/wp-content/uploads/2011/06/EU-Russia-Papers-13_Nossova.pdf. The same information was provided by News.Az. Cited from "Russia, Ukraine agree on maritime border delimitation", *News.Az*, 13 July 2012, <https://news.az/articles/russia/64312>.

¹⁹⁷ "Постанова Кабінету Міністрів України Про затвердження Угоди між Кабінетом Міністрів України та Урядом Російської Федерації про заходи щодо забезпечення безпеки мореплавства в Азовському морі та Керченській протоці від 1 серпня 2012 р. № 694", accessed 2018 May 10, <http://zakon5.rada.gov.ua/laws/show/694-2012-%D0%BF>. "Угода між Кабінетом Міністрів України та Урядом Російської Федерації про заходи щодо забезпечення безпеки мореплавства в Азовському морі та Керченській протоці від 20.03.2012", accessed 2018 May 10, http://zakon5.rada.gov.ua/laws/show/643_409.

¹⁹⁸ "The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations". Cited from "Declarations and statements." Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Russian%20Federation%20Upon%20signature.

Furthermore, since UNCLOS does not govern delimitation of the internal waters, the delimitation dispute continues to be governed by the rules and principles of general international law. However, since Russia has not recognized the compulsory jurisdiction of the ICJ, there is no forum which would be entitled to hear such a dispute and rule on its merits. Therefore, delimitation in the Kerch Strait could only be achieved by mutual agreement of these two countries. However, having in mind the current state of relationships between Ukraine and Russia, there is hardly any hope that Ukraine and Russia would be able to reach an agreement on delimitation of the Kerch Strait in the nearest future. The illegal annexation of Crimea by the Russian Federation in 2014 leads to inability of making any new bilateral agreement or finding compromises between Ukraine and Russia. Each country has totally different position about the delimitation of maritime borders. Russia claims that Crimea and its adjacent waters belong to Russia while Ukraine insists that Crimea with its adjacent waters were illegally annexed and the situation remained unchanged from 2014.

Having concluded that the Kerch Strait is covered by the historical internal waters of the coastal states, it should be emphasized that it is being advocated that internal waters are excluded from the realm of international law and are simply governed by domestic legislation of the coastal states¹⁹⁹. If this is the case, then the dispute between Ukraine and Russia regarding other aspects of the Kerch Strait (excluding delimitation) would neither be arbitrable since it would not fall within the definition of a dispute “concerning the interpretation or application of this Convention” as required by Article 279 of UNCLOS.

In order to be able to opine whether the arbitral tribunal will have competence to rule on any submissions of Ukraine related with the Kerch Strait, it is necessary to examine whether the legal regime of the Kerch Strait is entirely excluded from the regulation of UNCLOS and given to the exclusive sovereignty of the coastal states or is it still affected by the norms of UNCLOS and, therefore, arbitrable in accordance with its provisions.

3.4. Provisions of UNCLOS Applicable in the Kerch Strait

The Kerch Strait historically consists of the internal waters of Ukraine and Russia. The waters under the historic title usually are considered to be excluded from the regulation by UNCLOS and primarily governed by customary international law.²⁰⁰

¹⁹⁹ “The Legal Regime of Internal Sea Waters,” Soviet Statutes and Decisions 6, no. 2 (Winter 1969-70): 207. Also see Wilfred A. Hearn, “Special Aspects of Jurisdiction at Sea,” International Law Studies Series. US Naval War College 61 (1980): 294.

²⁰⁰ Kaare Bangert, “Internal waters”, in *The Max Planck Encyclopedia of Public International Law*, vol. V, ed. R. Wolfrum (Oxford: Oxford University Press, 2012), 310-316. Cited from Marcelo G. Kohen, “Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?” in *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, (Leiden, The Netherlands: Brill | Nijhoff, 2015): 123, https://doi.org/10.1163/9789004283787_010.

It should be noted that after adoption of UNCLOS different scientists have variety of views on the consequences of its adoption over the status of historical waters. Some of them took approach that only the rights clearly mentioned in UNCLOS still exist, so the historic rights could no longer be applicable. In opposite, others stated that as UNCLOS did not directly and explicitly nullify such rights, they continue to exist in international customary law. The third ones pointed out that “certain UNCLOS compatible historic rights, even if not expressly referred to in the UNCLOS text, might nonetheless exist by necessary implication under what might be called the ‘treaty-compatibility’ test...”²⁰¹

In *the South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), China argued that “historic rights existing independently of, and allegedly preserved by, the Convention”²⁰². Moreover, China also has made the declaration under Article 298 while ratifying UNCLOS²⁰³. The position of Philippines was that UNCLOS went above the historic rights by replacing and making them invalid. However, the tribunal ruled on its jurisdiction and admissibility as follows: “This is accordingly not a dispute about the existence of specific historic rights, but rather a dispute about historic rights in the framework of the Convention. A dispute concerning the interaction of the Convention with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention.”²⁰⁴

The tribunal in the mentioned case confirmed that the disputes concerning the waters with the historic title are not entirely excluded from the scope of UNCLOS. Moreover, in evidence of this conclusion, Article 298 could be relied upon since it refers to the disputes related to historic bays and titles.

Thus, at this point it is necessary to examine to what extent UNCLOS is applicable in the internal waters and, then to establish, what rights and duties are imposed by UNCLOS related to the Kerch Strait.

Under para 1 of Article 2 of UNCLOS the sovereignty of a coastal State extends to its land territory and internal waters. Article 8 establishes that “except as provided in Part IV UNCLOS [on archipelagic states], waters on the landward side of the baseline of the territorial sea form part

²⁰¹ Clive R. Symmons, “Historic Rights and the ‘Nine-Dash Line’ in Relation to UNCLOS in the Light of the Award in the Philippines v. China Arbitration (2016) concerning the Supposed Historic Claims of China in the South China Sea: What now Remains of the Doctrine?”, Visiting Research Fellow, Trinity College, Dublin, in CIL International Conference: The South China Sea Award: The Legal Dimension, (5-6 January 2017): 17-18, accessed 2018 May 18, <https://cil.nus.edu.sg/wp-content/uploads/2017/01/Session-2-on-Historic-Rights-Clive-Symmons-Paper.pdf>.

²⁰² The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award on Jurisdiction and Admissibility, (October 29, 2015): 66, para 168, <https://www.pcacases.com/web/sendAttach/1506>.

²⁰³ “Declarations and statements.” Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, accessed on 2018, May 13, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

²⁰⁴ The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award on Jurisdiction and Admissibility, (October 29, 2015): 66, para 168, <https://www.pcacases.com/web/sendAttach/1506>.

of the internal waters of the State”. This provision repeats the respective provision of the Convention on the Territorial Sea and the Contiguous Zone, namely para 1 of Article 5 which establishes that “waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.”²⁰⁵

It should be noted that both the Convention on the Territorial Sea and the Contiguous Zone and UNCLOS refers to the internal waters of one state and keeps silent on the possibility of sharing internal waters by two states.

In the *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) which dealt with the Gulf of Fonseca as historical bay shared by three coastal states the ICJ specified that this Gulf is considered as neither internal waters, nor including the territorial seas and exclusive economic zones of the adjacent states.

More precisely in this case the ICJ pointed out that “the Gulf waters are [. . .] internal waters subject to a special and particular régime, [. . .] if the waters were delimited, they would then become “internal” waters of each of the States; but even so presumably they would need to be subject to the historic and necessary rights of innocent passage, so they would still be internal waters in a qualified sense. Nevertheless, the essential juridical status of these waters is the same as that of internal waters, since they are claimed *à titre de souverain* and, though subject to certain rights of passage, they are not territorial sea”.²⁰⁶

Thus, the reasoning of the ICJ in *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) allows concluding that even though UNCLOS does not refer to the internal waters shared by two countries, the fact that they are bordered by more than one country does not deprive them of the status of internal waters.

Now it is necessary to examine whether UNCLOS merely defines the limits of the internal waters or it also regulates those internal waters by establishing certain rights and obligations for the state parties.

According to Gilbert Gidel, “internal waters are maritime waters. They should not be confused with inland fresh waters, which are subject to a completely different regime”.²⁰⁷

In opinion of Marcelo G. Kohen, “internal waters constitute a specific maritime area, one in which the coastal State enjoys the maximum of competencies. This specificity does not mean that their situation is exactly the same as that of land territory or waterways. As part of the seas, they are governed by the law of the sea and the Convention that comprehensively deals with it. The

²⁰⁵ “Convention on the Territorial Sea and the Contiguous Zone”, International Law Commission, 29 April 1958, *United Nations, Treaty Series*, 516 (1958):205, accessed 2018 April 11, https://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf.

²⁰⁶ *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (September 11, 1992): 604 – 605, para 412, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

²⁰⁷ Gilbert Gidel, *Le droit international public de la mer, Tome II : Les eaux intérieures* (Paris: Sirey, 1932): 10. Cited from Marcelo G. Kohen, “Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?” in *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, (Leiden, The Netherlands: Brill | Nijhoff, 2015):123, https://doi.org/10.1163/9789004283787_010.

determination of what constitutes internal waters is not a matter of domestic law but is governed by the UNCLOS.”²⁰⁸

Having stated that, one should determine what are the provisions of UNCLOS that are applicable in the internal waters.

Applying the reasoning of the ICJ *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) *mutatis mutandis* to the waters of the Azov Sea and Kerch Strait, it should be concluded that the status of the waters of the Kerch Strait are internal waters subject to a special and particular regime as they are historic waters of the Ukraine and Russia. Obviously, the legal regime in these waters is subject to the full sovereignty of coastal states; albeit, there are certain provisions of UNCLOS that still applicable in such waters.

According to the opinion of the Marcelo G. Kohen:

Considering that everything what coastal States do in their internal waters falls outside the regime of the UNCLOS also flies in the face the essential object and purposes of the Convention, as expressly affirmed in its Preamble: 1) “the desire to settle, in a spirit of mutual understanding and cooperation, *all issues* relating to the law of the sea”, 2) the consciousness that “problems of ocean space are closely interrelated and need to be considered *as a whole*” and 3) “the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a *legal order of the seas and oceans* which will *facilitate international communication*”.²⁰⁹

In Preamble of UNCLOS it is also stated that “the States Parties to this Convention, [. . .] *recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”. Moreover, Part XII (Protection and preservation of the marine environment), Part XIII (Marine scientific research) and Part XIV (Development and transfer of marine technology) and also Part XV (Settlement of disputes) of UNCLOS apply to all waters on the seas, including internal as well as historical waters.

According to international law, the Sea of Azov qualified as “enclosed or semi-enclosed sea” within the context of UNCLOS²¹⁰. Part IX of UNCLOS deals with the enclosed or semi-enclosed seas. So the provisions of Article 122 and Article 123 of UNCLOS are applicable to these waters

²⁰⁸ Marcelo G. Kohen, “Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?” in *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, (Leiden, The Netherlands: Brill | Nijhoff, 2015):123, https://doi.org/10.1163/9789004283787_010.

²⁰⁹ Marcelo G. Kohen, “Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?” in *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, (Leiden, The Netherlands: Brill | Nijhoff, 2015): 123, https://doi.org/10.1163/9789004283787_010.

²¹⁰ Alexander Skaridov, “The Sea of Azov and the Kerch Strait” in *Navigating Straits: Challenges for International Law*, David D. Caron, Nilufer Oral, (Leiden: Brill Nijhoff, 2014): 223.

and also to the waters of the Kerch Strait. The historical status of the analyzed waters does not exclude the application of those provisions.

Article 122 of UNCLOS gives the definition of “enclosed or semi-enclosed sea”. It “means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”.

Thus, according to the first part of the definition, which provides that “enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet”, the Sea of Azov fully satisfies the requirements for “enclosed or semi-enclosed sea”²¹¹. It is well known that the Azov Sea is surrounded by two states – Ukraine and Russia and is connected to the Black sea by the Kerch Strait. It should also be clarified that UNCLOS does not provide two separate definitions for “enclosed” and “semi-enclosed” seas. Since the beginning of the seventies of the last century it was consistently stressed that both (the enclosed and semi-enclosed seas) are relatively small basins surrounded by the territories of two or more states”. Thus, there is one concept and the only legal institution of the “enclosed or semi-enclosed sea”.²¹²

Article 123 of UNCLOS establishes cooperation of States bordering enclosed or semi-enclosed seas:

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Article 123, with its wording “should cooperate with each other” and “shall endeavor to coordinate,” imposes the requirement upon the States bordering an enclosed or semi-enclosed sea to cooperate in order to coordinate among themselves such three spheres: (1) the management, conservation, exploration and exploitation of the living resources of the sea; (2) the protection and

²¹¹ Timur Korotkiy, “Теоретичні проблеми еволюції правового статусу і режиму Азовського моря,” *Актуальні проблеми політики: Збірник наукових праць* 39 (2010): 429, <http://dspace.onua.edu.ua/bitstream/handle/11300/452/Korotkiy.pdf?sequence=1&isAllowed=y>.

²¹² Janusz Symonides, “The Legal Status of the Enclosed and Semi-Enclosed Seas,” *German Yearbook of International Law*, 27 (1984): 317.

preservation of the marine environment; and (3) the scientific research policies and undertaking joint scientific research programs.²¹³

Thus, Article 123 of UNCLOS requires Ukraine and Russia “to cooperate with each other in the exercise of their rights and in the performance of their duties” under UNCLOS. As example, under Article 192 of UNCLOS “states have the obligation to protect and preserve the marine environment”, while under Article 235 “states are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment”.

The value of the Kerch Strait is not only estimated by its economical and strategical value but also by its considerable ecological importance. As the Kerch Strait is the only way from Azov Sea to the Black Sea, it ensures the water exchange between these seas.²¹⁴

On the 15th of May 2018 the ceremony was held for the partial opening of the Kerch Bridge for cars and buses. It allows crossing the Kerch Strait from Crimean peninsula to Taman peninsula and *vice versa*. From the moment Russia began construction of this bridge Ukrainian maintained that such construction is illegal.

The same opinion was expressed by other countries. For example, according to the Statement of Heather Nauert, State Department Spokesperson: “The United States condemns Russia’s construction and partial opening of the Kerch Strait Bridge between Russia and occupied Crimea, which was done without the permission of the government of Ukraine. Crimea is part of Ukraine. Russia’s construction of the bridge serves as a reminder of Russia’s ongoing willingness to flout international law.”²¹⁵

The opinion of European Union was expressed by its Spokesperson Maja Kocijancic. As it was stated by her, “the Russian Federation has constructed the Kerch Bridge to the Crimean Peninsula without Ukraine's consent. This constitutes another violation of Ukraine's sovereignty and territorial integrity by Russia. The construction of the bridge aims at the further forced integration of the illegally-annexed peninsula with Russia and its isolation from Ukraine of which it remains a part. The bridge limits the passage of vessels via the Kerch Strait to Ukrainian ports in the Azov Sea.”²¹⁶

²¹³ Janusz Symonides, “The Legal Status of the Enclosed and Semi-Enclosed Seas,” *German Yearbook of International Law* 27 (1984): 332.

²¹⁴ Mykhailo Romashchenko et al., “About Some Environmental Consequences of Kerch Strait Bridge Construction”, *Institute of Water Problems and Land Reclamation NAAS*, Kyiv, Ukraine, (16 January 2018): 2, accessed 2018 May 1, <http://article.sciencepublishinggroup.com/pdf/10.11648.j.hyd.20180601.11.pdf>.

²¹⁵ Heather Nauert, “The Opening of the Kerch Bridge in Crimea”, Press Statement, Department Spokesperson, Washington, DC, May 15, 2018, accessed 2018 May 16, <https://www.state.gov/r/pa/prs/ps/2018/05/282116.htm>.

²¹⁶ “Statement by the Spokesperson on the partial opening of the Kerch Bridge”, Bruxelles, Delegation of the European Union to Russia, 15 May 2018, accessed 2018 May 16, https://eeas.europa.eu/delegations/russia/44568/node/44568_en.

The idea to build a bridge over the Kerch Strait is not a new one. There were some agreements between Ukraine and Russia on 2000²¹⁷, afterwards in August 2010²¹⁸, March 2012²¹⁹ and December 2013²²⁰. However, all the mentioned agreements that remained valid till the beginning of 2014 were terminated in the next two years²²¹.

Due to the fact that the decision to construct the Kerch Bridge was made by Russia without acceptance of Ukraine, it violated Ukrainian sovereign rights in the Kerch Strait to decide what installations could be built there. Thus, Russia violated Article 2 of UNCLOS by starting unilaterally construction of the Kerch Bridge. Moreover, the construction of the Kerch Bridge provided limits for characteristics of vessels that can navigate in the Kerch Strait. Furthermore, there was the closure of the navigation in the Kerch Strait due to the construction of the Kerch Bridge and not even once. Passage in the Kerch Strait is subject to the full sovereignty of its littoral states. The unilateral actions of Russia to close navigation in the Kerch Strait definitely is in violation of the aforementioned Agreement and UNCLOS in part that legal regime in these waters should be regulated by both coastal states and not only by one. However, all of these claims could be deemed inadmissible because they include the dispute over territorial sovereignty. Thus, it is necessary to find such breaches of UNCLOS provisions that would not be related with the occupation of Crimea.

From the moment construction of the Kerch Bridge began there were a lot of discussions on its impact to the environment. Ukrainian experts argued that construction of the Kerch Bridge will significantly alter the living conditions of the fishing resources within the Sea of Azov and conditions of their migration to the Black Sea. It will also have the negative impact on the water quality and the use of sea for recreational purposes. Moreover, “the construction of the Kerch Strait Bridge creates real preconditions for gradual transformation of the Sea of Azov into the Black Sea

²¹⁷ “Протокол к Соглашению между органами представительной и исполнительной власти Автономной Республики Крым и города Москвы о сотрудничестве в торгово-экономической, научно-технической и гуманитарно-культурной областях в части строительства транспортного перехода через Керченский пролив от 29.07.2000”, *Крымские известия* 139 (2143), (August 1 2000), accessed 2018 May 11, http://zakon5.rada.gov.ua/laws/show/643_129.

²¹⁸ “Розпорядження Кабінету Міністрів України Про утворення Міжвідомчої робочої групи з питань будівництва транспортного мостового переходу через Керченську протоку від 04.08.2010 р. № 1595-р”, accessed 2018 May 11, <http://zakon3.rada.gov.ua/laws/show/1595-2010-p>.

²¹⁹ “Угода між Кабінетом Міністрів України та Урядом Російської Федерації про заходи щодо забезпечення безпеки мореплавства в Азовському морі та Керченській протоці (укр/рос)”, accessed 2018 May 11, http://zakon2.rada.gov.ua/laws/show/643_409.

²²⁰ “Угода між Кабінетом Міністрів України та Урядом Російської Федерації про спільні дії з організації будівництва транспортного переходу через Керченську протоку”, accessed 2018 May 1, http://zakon5.rada.gov.ua/laws/show/643_430.

²²¹ “Постанова Кабінету Міністрів України від 4 березня 2015 № 77 Про ліквідацію деяких консультативних, дорадчих та інших допоміжних органів, утворених Кабінетом Міністрів України”, accessed 2018 May 1, <http://zakon3.rada.gov.ua/laws/show/77-2015-%D0%BF>. “Постанова Кабінету Міністрів України від 1 жовтня 2014 № 493 Про припинення дії Угоди між Кабінетом Міністрів України та Урядом Російської Федерації про спільні дії з організації будівництва транспортного переходу через Керченську протоку”, accessed 2018 May 1, <http://zakon5.rada.gov.ua/laws/show/493-2014-%D0%BF/paran5#n5>.

Gulf, and losses caused for natural environment of the Black and the Azov Seas will reach billions of UAH [1,000,000,000 UAH = 32,217,329.86 EUR²²²].”²²³

At the beginning of the construction of the Kerch Bridge, Russian experts maintained that “the project [of the Bridge] provides all the necessary measures to protect aquatic biological resources, the atmosphere, flora and fauna.” Additionally, the program of environmental monitoring and monitoring of changes in environmental components was adopted and implemented by Russian authorities. This was done to maintain the ecological balance in the bridge construction area.²²⁴

However, not all Russian experts agreed with such conclusions. According to Yuriy Medovar, the senior researcher of the Institute of Water Problems of the Academy of Sciences of the Russian Federation and the candidate of geological and mineralogical sciences, the arches of the Kerch Bridge are built on semi-solid water-saturated floating clays while should be installed on clay soil²²⁵. This means that this bridge will collapse sooner or later and the impact of its downfall to the environment will even more detrimental than its construction.

According to the UNCLOS states **do** have general obligations to protect and preserve the marine environment as it is stated in Article 192. Under Article 194 para 2 “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.” Further the same Article specifies that measures necessary to the prevention of the pollution from installations operating in the marine environment means “measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices”.

First of all, Russia neglected the fact that sovereign rights in the Kerch Strait are shared with Ukraine, so there is a direct obligation to receive consent of Ukraine for any installations in the Strait. Secondly, Russia violated its obligation to take all necessary measures for preventing accidents related to the construction of the Kerch Bridge. The experts in this case pointed out not only the direct damage of the building of the Bridge, but also mentioned that it is highly possible that the Bridge will be collapse and this downfall would cost tremendous damage for the maritime

²²² Exchange rate that was used: 1 UAH = 0.0322173 EUR ↔ 1 EUR = 31.0392 UAH. The rate is based on live mid-market rates provided by XE Currency Converter in its webpage: <https://www.xe.com/>, accessed 2018 May 16.

²²³ Mykhailo Romashchenko et al., “About Some Environmental Consequences of Kerch Strait Bridge Construction”, *Institute of Water Problems and Land Reclamation NAAS*, Kyiv, Ukraine, (2018): 7-9, accessed 2018 May 1, <http://article.sciencepublishinggroup.com/pdf/10.11648.j.hyd.20180601.11.pdf>.

²²⁴ “Строительство моста через Керченский пролив”, (2015): 18, accessed 2018 May 14, http://rosavtodor.ru/storage/app/media/PRESSKIT_MOST_05052016.pdf.

²²⁵ “Окончание “стройки века”: чем грозит Украине открытие Керченского моста”, *Segodnya Mul'timedia*, 16 May, 2018, <https://www.segodnya.ua/ukraine/okonchanie-stroyki-veka-chem-grozit-otkrytie-kerchenskoy-perepravy-ukraine-1138272.html>.

environment in the all neighboring waters. The reasons of such outcome are following: 1) there is the danger of seismic manifestations; 2) the Kerch Strait consists water flow that during the winter become as glacier flow; 3) there are several tectonic faults and mud volcanoes; 4) there is seismically active zone and due to it, it is expected approximately 9 points on the Richter scale (9.0 and greater are the highest ones and considered during great earthquakes).²²⁶

Thus, it is highly doubtful whether there was a need to build the bridge exactly in such unstable region that would cost that freely movable waterflow in the Kerch Strait would have been changed. It will lead to the changes in salinity and chemical composition of water and due to it many species of organisms and fish, including dolphins living in the Sea of Azov, will die. The consequences of such changes also would be that the Azov Sea can turn into a Black Sea gulf.²²⁷

This results in infringement of other articles of UNCLOS by Russia. Article 204 should be mentioned at this point. This Article of UNCLOS obliges states to make monitoring of the risks or effects of pollution, precisely the obligation to determine whether the state activities are likely to pollute the marine environment or not. The results of such monitoring should be published according to the Article 205. Moreover, Article 206 obliges the States to assess potential effects of activities if the planned activities may cause substantial pollution or significant and harmful changes to the marine environment.

It is clear that there is a huge distinction between Ukraine and Russia in the position over the impact of the Kerch Bridge on the marine environment. Moreover, in May 2017, Ukraine initiated under its national legislation a criminal case against infringements of environment safety rules during building of the Kerch Bridge.²²⁸

Internal waters in the Kerch Strait are not entirely excluded from the scope of UNCLOS and that the actions of Russian Federation in these waters resulted in infringement of the following clauses of UNCLOS – Art. 2, 123, 192, 194, 204, 205, 206. Thus, it seems that the arbitral tribunal could not deem the submissions of Ukraine related with the Kerch Strait as inadmissible due to the fact that there is no dispute related with the interpretation and application of the UNCLOS.

These conclusions are partially supported by the statement of Olena Zerkal, the representative of Ukraine in the Permanent Court of Arbitration in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* in her Facebook page: “The

²²⁶ Mykhailo Romashchenko et al., “About Some Environmental Consequences of Kerch Strait Bridge Construction”, *Institute of Water Problems and Land Reclamation NAAS*, Kyiv, Ukraine, (16 January 2018): 2-4, accessed 2018 May 1, <http://article.sciencepublishinggroup.com/pdf/10.11648.j.hyd.20180601.11.pdf>.

²²⁷ “Керченский мост убьет Азовское море и дельфинов”, *Real-Vin*, May 11, 2017, <http://real-vin.com/kerchenskij-most-ubet-azovskoe-more-i-delfinov>.

²²⁸ “Infrastructure ministry proposes to send protest note about Russia sealing off Kerch Strait for bridge construction”, *Interfax-Ukraine*, 22 June 2017, accessed 2018 May, 11, <https://en.interfax.com.ua/news/general/430733.html>.

construction of the bridge violates at least Articles 2, 43, 44, 123, 192, 194, 204, 205, 206 of the United Nations Convention on the Law of the Sea”.²²⁹

In this regard it is possible to make such analysis. Article 2 of UNCLOS defines the sovereignty of Ukraine and Russia to its internal waters in the Kerch Strait, so as there are two coastal states – the sovereignty is subject to the joint use.

Article 43 and 44 establish provisions in regard to navigational and safety aids and other improvements and the prevention, reduction and control of pollution and duties of states bordering straits. From the first glimpse it might seem reasonable to apply such provisions. Logically, the Kerch strait is a strait bordered by two coastal states and considered as “strait used for international navigation”. Article 43 and 44 is part of the Section 2 of Part III of UNCLOS and under Article 37 the scope of this section is “to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”, moreover, under Article 35 the Part III of UNCLOS does not affect any areas of internal waters within a strait.

In this regard, firstly, the Azov Sea with its historical internal waters which have not been delimited between Ukraine and Russia does not consist the exclusive economic zone to make the Kerch Strait is applicable under the Section 2 of the UNCLOS. But even if it would be differently, the Kerch Strait itself is internal waters with historic title. The fact that these waters have always been internal ones excludes the waters of the Kerch Strait from the application the Part III of UNCLOS as whole.

It should be summarized that since the Kerch Strait qualifies as historical internal waters of Ukraine and Russia, the legal regime applicable therein is predominantly dependent on the discretion of the coastal states. However, the discretion of the coastal states is not absolute since certain provisions of UNCLOS, namely the Preamble, Article 2, 123 and Part XII, Part XIII and Part XIV and also Part XV, are still applicable in those waters. Therefore, in author’s view, Russia has violated such Articles of UNCLOS as 2, 123, 192, 194, 204, 205, and 206. As it has been mentioned, Ukraine has instituted arbitration proceedings against the Russian Federation under the UNCLOS to vindicate *inter alia* the aforementioned rights in the Kerch Strait. Thus, at this point it should be further analyzed whether the dispute related with these breaches is arbitrable under the provisions of UNCLOS.

²²⁹ Lana Zerkal, “Керченський міст веде з країни окупанта до окупованих українських територій...” Facebook, May 15, 2018, <https://www.facebook.com/lana.zerkal/posts/1956783654354802>.

3.5. Jurisdiction of the Arbitral Tribunal Over the Ukraine's Claimed Violations of its Rights in the Kerch Strait.

It is obvious that these breaches of Ukraine's rights were predetermined by occupation of Crimea. Therefore, there is a risk that the dispute might be qualified by the tribunal as the sovereignty dispute and might be deemed inadmissible. The scope of its jurisdiction is prescribed by Article 288 of UNCLOS which provides that the court "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention". Thus, when the dispute implicates issues of territorial sovereignty, it might not be considered as concerning the interpretation or application of UNCLOS.²³⁰

The example of ruling over the dispute implicated issues of territorial sovereignty was made by court in the *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom) where "the Tribunal concludes that the Parties' dispute with respect to Mauritius' First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago."²³¹ It also stated that "the Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention."²³²

In para 153 of *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China) was established:

The Tribunal might consider that the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty. Neither of these situations, however, is the case. The Philippines has not asked the Tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the Tribunal refrain from so doing. The Tribunal likewise does not see that any Award on Jurisdiction and Admissibility 29 October 2015 of the Philippines' Submissions require an implicit determination of sovereignty.²³³

According to Peter Tzeng, Ukraine could provide argumentation in favour of absence of any legal dispute concerning sovereignty over Crimea. Furthermore, "under the principle of *ex injuria jus non oritur*, "facts which flow from wrongful conduct [cannot] determine the law."²³⁴ "Moreover, the U.N. General Assembly, the Venice Commission, the Chair of the Organization

²³⁰ Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy", *Denver Journal of International Law and Policy*, 46, 1 (2017): 3.

²³¹ *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), Award, (March 18, 2015): 88, para 212, <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>.

²³² *Ibid.*, 90 para 221.

²³³ *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), Award on Jurisdiction and Admissibility, (October 29, 2015): 59-60, para 153, <https://www.pcacases.com/web/sendAttach/1506>.

²³⁴ Peter Tzeng, "Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy", *Denver Journal of International Law and Policy*, 46, 1 (2017): 3-4.

for Security and Co-operation in Europe, and many commentators have considered the Crimea referendum to be invalid. Under this theory, Ukraine would argue that its sovereignty over Crimea is a factual matter, such that the only relevant legal dispute for the UNCLOS tribunal is whether Russia interfered with its rights in the maritime zones adjacent to Crimea.”²³⁵

Therefore, there is should be explicit differentiation: in argumentation provided related to the Kerch Strait by Ukraine should not be any link to the illegal occupation of Crimea, because the dispute about the territorial sovereignty is completely out of the scope of the court, moreover, it should be stated that Ukraine’s sovereignty over Crimea. To invoke *ratione materiae* of the arbitration it should be the dispute is about concerning the interpretation or application of UNCLOS regarding the rights and obligations in the waters of the Kerch Strait that the name of the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Straits* describes. The fact of the illegal occupation of Crimea implicates the issues of territorial sovereignty to the court and as not a dispute concerning the interpretation or application of UNCLOS, it falls outside the jurisdiction of the tribunal.²³⁶ In this regard the tribunal needs to be truly unconventional and non-conformist to follow such an approach, therefore, Ukraine should not risk to base their claim for jurisdiction exclusively on this ground.

So Ukraine should definitely elaborate on those submissions which claim breaches of UNCLOS irrespective of occupation of Crimea. And the legal status of the Kerch Strait provides precisely this opportunity. Even if Russia were legitimately controlling Crimea, construction of the Kerch Bridge would nevertheless have violated the clauses of UNCLOS. Thus, in order to establish Russia’s violations of the aforementioned clauses, the tribunal would not be required to first render a decision on the sovereignty. Thus, the risk of the tribunal ruling that these submissions of Ukraine implicate issues of territorial sovereignty is lesser that in case of other submissions claiming violation of Ukraine’s rights in maritime zones generated by Crimea.

In para 217 of the arbitral award in *the South China Sea Arbitration* it was stated that: “Article 298(1)(a)(i) of the Convention provides for an exception for disputes involving ‘historic titles’. While the ordinary meaning of this term already implies a notion of property, the Tribunal considers that the meaning of the Convention’s reference to ‘historic titles’ should be understood in the particular context of the evolution of the international law of the sea.” This statement does not result in every dispute concerning historic claims inevitably being subject to the jurisdiction of the court, however, it implies that the dispute regarding the historic rights would be arbitrable if it were linked with the rights provided in UNCLOS.²³⁷

²³⁵ Ibid.

²³⁶ Ibid, 7.

²³⁷ Raphael G. Toman, "Jurisdictional Requirements for Arbitration under UNCLOS: Does the South China Sea Decision Bring Long Sought Clarity to the Scope of Historic Claims," *New York University Journal of International Law and Politics* 49, no. 2 (Winter 2017): 627.

Having stated that, it necessary to examine the declaration made by Ukraine and Russia which *excluded* not only any sea boundary delimitation dispute but also *any dispute related to historic title* from the jurisdiction of the courts regarding compulsory procedures entailing binding decisions²³⁸. Article 298 UNCLOS provides the optional exceptions for parties of UNCLOS, and establishes that: "... a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a)(i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles..."

At this point it should be determined what exactly falls within the scope of a dispute **"involving historic bays or titles"** and whether the dispute related to the Kerch Strait as historic internal waters is excluded by Ukraine and Russia from jurisdiction of the court.

First of all, interpreting the term "historic bay", one could refer to the opinion of Antonio T. Carpio which states that "the term "historic bays" refers to waters in deeply indented bays or gulfs that have acquired the status of internal waters."²³⁹

In opinion of Guo Yuan, "historic bays" refers to the bays, the coasts of which belong to a single State, the bays which the coastal State enjoys historic rights to and have always been recognized as internal seas, even though the mouths of such bays are more than twice the breadth of the territorial sea."²⁴⁰

Article 10 of UNCLOS defines: "a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast."

Based on the abovementioned, the Kerch Strait cannot be considered as a bay or gulf due to the fact that according to abovementioned analyses of its geographical characteristics, the Kerch Strait is a strait linking two seas. The Kerch Strait has its historic title by being recognized as historic internal waters of Ukraine and Russia.

Secondly, it is necessary to analyze the meaning of an "historic title". Clive R. Symmons by commenting the merits in *the South China Sea Arbitration* pointed out that according to the court "there can today only (effectively at least) be two categories of maritime historic rights; namely,

²³⁸ "The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations." Cited from "Declarations and statements." Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, accessed on 2018, May 13, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

²³⁹ Antonio T. Carpio, "The South China Sea Dispute: Philippine Sovereign Rights and Jurisdiction in the West Philippine Sea," *Philippine Law Journal* 90, no. 3 (March 2017): 490.

²⁴⁰ Guo Yuan, "On Historic Rights under the Law of the Sea," *China Oceans Law Review* 2008, no. 1 (2008): 192.

on the one hand, sovereign historic rights (taking in historic title), and, on the other, ‘non-sovereign’ historic rights (‘historic rights’ in the narrow sense).”²⁴¹

Raphael G. Toman uphold the same view stating that “the term “historic title” - as used in UNCLOS - is more narrow, and refers specifically to historic sovereignty to land or maritime areas [. . .]. UNCLOS article 298 (1)(a)(i) only excludes jurisdiction over historic sovereignty.”²⁴²

Having in mind the abovementioned, if the dispute concerning the Kerch Strait would be limited to the question whether the Ukraine and Russia poses sovereign rights over the Strait and legitimately claims it as historic waters it would be the dispute related to historic title of aforesaid waters. Such kind of disputes is excluded from the jurisdiction of the courts regarding compulsory procedures entailing binding decisions. So the court will have its compulsory jurisdiction only over ‘non-sovereign’ historic rights in the Kerch Strait.

According to Guo Yuan:

Historic rights connote a State's rights and obligations to exercise sovereign jurisdictions over a land or sea area. That is to say, rights and obligations are important manifestations of all historical and current relationships between countries under the international law. From the perspective of pursuing national interests, historic rights are reflected in a sovereign State’ exercise of sovereignty and territorial jurisdictions over the area of territory within its traditional and historical boundary or the one recognized by the international community; and historic obligations mean that a sovereign State should perform its duties to the international community in certain sea areas while it exercises territorial jurisdictions and sovereignty thereover.²⁴³

Summarizing, the ‘non-sovereign’ historic rights refer to the rights and obligations provided to a state by international law. They do not deal with the sovereignty of a state in such waters but include the rules that a state accepts to follow by ratifying or accepting any international instrument which provides such rules. In this particular case such international instrument would be UNCLOS.

Therefore, the dispute over infringement of Ukraine’s rights in the Kerch Strait does qualify as the dispute concerning interpretation and application of UNCLOS. Furthermore, if other submissions of Ukraine might be deemed inadmissible due to the fact that they implicate issues of territorial sovereignty or ‘sovereign’ historic rights, jurisdiction *ratione materiae* in respect of the claims over infringement of Ukraine’s rights in the Kerch Strait would be more difficult to challenge by the Russian Federation.

²⁴¹ Clive R. Symmons, “Historic Rights and the ‘Nine-Dash Line’ in Relation to UNCLOS in the Light of the Award in the Philippines v. China Arbitration (2016) concerning the Supposed Historic Claims of China in the South China Sea: What now Remains of the Doctrine?”, paper in *CIL International Conference: The South China Sea Award: The Legal Dimension*, (5-6 January 2017): 18, accessed 2018 May 18, <https://cil.nus.edu.sg/wp-content/uploads/2017/01/Session-2-on-Historic-Rights-Clive-Symmons-Paper.pdf>.

²⁴² Raphael G. Toman, “Jurisdictional Requirements for Arbitration under UNCLOS: Does the South China Sea Decision Bring Long Sought Clarity to the Scope of Historic Claims,” *New York University Journal of International Law and Politics* 49, no. 2 (Winter 2017): 627.

²⁴³ Guo Yuan, “On Historic Rights under the Law of the Sea,” *China Oceans Law Review* 2008, no. 1 (2008): 208.

CONCLUSIONS AND RECOMMENDATIONS

1. The results of the research allows concluding that the the aim of the research has been achieved, the objectives have been fulfilled and the defence statement formulated in the introduction of the thesis has proven to be correct. This is substantiated by the conclusions and recommendations set out below.

2. The Kerch Strait meets the geographical and functional criteria necessary for any strait to qualify as the “strait used for international navigation” within the context of UNCLOS. The geographical criteria is satisfied because the Kerch Strait is a strait connected two seas – the Black Sea and the Azov Sea. As this Strait has been quite regularly used by the vessels of different nationalities the functional criteria is also fulfilled.

3. The Azov Sea qualifies as the historic waters of Ukraine and Russia in accordance with the requirements of the general international law. Since the Kerch Strait connects part of the exclusive economic zone on the Black Sea with the internal waters on the Azov Sea, neither Section 2 nor Section 3 of Part III of UNCLOS is applicable to the Kerch Strait. Furthermore, since the Strait is entirely covered by internal waters of Ukraine and Russia, Part III of UNCLOS does not affect in any way the legal regime within the Strait. Thus, the Strait falls outside the scope of application of Part III of UNCLOS as a whole and its legal regime is predetermined by the maritime zone (zones) covering the Strait.

4. Ukraine and Russia legitimately claim the Kerch Strait historically to be their internal waters. However, the waters have not been delimited between the two states and this issue has been a bone of contention between them for year. Unfortunately, due to Russia’s and Ukraine’s declarations under Article 298 of UNCLOS any dispute related to the delimitation of the Kerch Strait has been excluded from compulsory dispute settlement procedures under UNCLOS.

5. Concerns have been raised that Ukraine’s claims over the infringement of its rights in the Kerch Strait would fall outside the jurisdiction *ratione material* of the arbitral tribunal since they would not qualify as the “dispute concerning the interpretation or application of [the] Convention”. However, the sovereignty of the coastal states over their internal waters is not absolute. These waters are not excluded entirely from application of UNCLOS and the dispute related with such waters could qualify as the dispute concerning the interpretation or application of the Convention. The provisions of UNCLOS, namely, the Preamble, Article 2, 123 and Part XII, Part XIII and Part XIV and also Part XV, are still applicable in the internal waters and could be invoked by Ukraine in arguing the case.

6. It should be emphasized that majority of the breaches that Ukraine relies in the arbitral proceedings were predetermined by occupation of Crimea. Therefore, there is a high risk that the

dispute might be qualified by the tribunal as the sovereignty dispute and might be deemed inadmissible.

7. Having in mind the aforementioned risk, Ukraine should definitely elaborate on those submissions which claim breaches of UNCLOS irrespective of occupation of Crimea. And the legal status of the Kerch Strait provides precisely this opportunity. Russia violated its obligation to take all necessary measures for protection and preservation of the marine environment when constructing the Kerch Bridge, thereby, breaching Articles 123, 192, 194, 204, 205, and 206 of UNCLOS. Construction of the Kerch bridge would nevertheless have violated the aforementioned clauses of UNCLOS, even if Russia were legitimately controlling Crimea. Thus, in order to establish Russia's violations of the aforementioned clauses, the tribunal would not be required to first render a decision on the sovereignty. Thus, the risk of the tribunal ruling that these submissions of Ukraine implicate issues of territorial sovereignty is lesser than in case of other submissions claiming violation of Ukraine's rights in maritime zones generated by Crimea.

8. For the purposes of strengthening its position in respect with Russia's infringements of UNCLOS provisions related to protection and preservation of the marine environment in the Kerch Strait and neighboring waters because of the construction of the Kerch Bridge there is a need to conduct independent environmental expertise to be carried out by international environmental organizations, IMO and acclaimed international experts in these sphere.

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ABSTRACT

The status of the Kerch Strait plays significant role in the determination whether the dispute between Ukraine and Russia related to it could be referred to compulsory dispute settlement procedures under UNCLOS. The Kerch Strait includes historic internal waters of Ukraine and Russia without any delimitation between those two countries. Unfortunately, due to Russia's and Ukraine's declarations under Article 298 of UNCLOS any dispute related to the delimitation of the Kerch Strait has been excluded from compulsory dispute settlement procedures under UNCLOS.

The legal regime in the Kerch Strait is considered as full sovereignty of its coastal states, however, it is still governed by UNCLOS and its provisions could be invoked by Ukraine in arguing in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation) as a dispute concerning interpretation and application norms of UNCLOS without referring to the occupation of Crimea making it as the sovereignty dispute.

Keywords: the Kerch Strait, the Kerch-Yenikalskiy Channel, UNCLOS, the Kerch Bridge, regulation of historic internal water under UNCLOS.

SUMMARY

Due to the illegal occupation of Crimea Ukraine lost control over the Kerch Strait and was negatively influenced by the construction of the Kerch Bridge. In a light of this situation Ukraine submitted a case *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* against Russia to the Permanent Court of Arbitration. This thesis is dealing with the question of the status of the Kerch Strait with the assessing whether arbitral tribunal have jurisdiction in respect of Ukraine's submissions.

The Kerch Strait qualifies as "strait used for international navigation" in regard of satisfying the geographical and functional criteria, however, it is not a "strait used for international navigation" under UNCLOS and therefore neither Section 2 nor Section 3 of Part III of UNCLOS is applicable in the Kerch Strait.

The strait includes historic internal waters of Ukraine and Russia. There was no delimitation done between those two countries in the Kerch Strait and due to Russia's and Ukraine's declarations under Article 298 of UNCLOS any dispute related to the delimitation of the Kerch Strait has been excluded from compulsory dispute settlement procedures under UNCLOS.

The legal regime in the strait is considered as full sovereignty of its coastal states, however, it is still governed by some provisions of UNCLOS, namely the Preamble, Article 2, 123 and Part XII, Part XIII and Part XIV and also Part XV and could be invoked by Ukraine in arguing the case.

As the majority of the breaches that Ukraine relies in the arbitral proceedings were predetermined by occupation of Crimea, therefore, there is a high risk that the dispute might be qualified by the tribunal as the sovereignty dispute and might be deemed inadmissible. However, the part of the breaches of UNCLOS can be claimed irrespective of occupation of Crimea, such as Russia violated its obligation to take all necessary measures for protection and preservation of the marine environment when constructing the Kerch Bridge, thereby, breaching Articles 123, 192, 194, 204, 205, and 206 of UNCLOS. Construction of the Kerch Bridge would nevertheless have violated the aforementioned clauses of UNCLOS, even if Russia were legitimately controlling Crimea. Thus, in order to establish Russia's violations of the aforementioned clauses, the tribunal would not be required to first render a decision on the sovereignty. Thus, the risk of the tribunal ruling that these submissions of Ukraine implicate issues of territorial sovereignty is lesser than in case of other submissions claiming violation of Ukraine's rights in maritime zones generated by Crimea.

HONESTY DECLARATION

17/05/2018

Vilnius

I, Olesia Gorbun, student of
(name, surname)

Mykolas Romeris University (hereinafter referred to University),

Faculty of Law, International and European Union Law Institute, International Law
(Faculty /Institute, Programme title)

confirm that the Master thesis titled

“The Status of the Kerch Strait”:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.


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