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LEGAL STATUS OF THE SEA OF AZOV: RECENT DEVELOPMENTS
Master thesis

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INTRODUCTION

The Sea of Azov is a sea in Eastern Europe. It is in almost total isolation from the waters of the World Ocean. The sea is bounded by Ukraine and the Russian Federation in the northwest and in the southeast respectively. The Don and Kuban are the major rivers that flow into it. The Sea of Azov is the shallowest and the smallest sea in the World. However, the sea is crucial for the economy of Ukraine.

The Sea of Azov is an important transport highway of Ukraine. The favorable climate, the southern position of the water body, sand spits make the sea coast an important resort and recreational area. The Kerch Strait is the only passage between the Sea of Azov and the Black Sea.

On the coast of the Azov Sea there are two large commercial ports - Berdyansk and Mariupol. Precisely through them the vast majority of metallurgical products, one of the main categories of Ukrainian exports, are exported. However, after the annexation of Crimea by Russia in 2014 and the construction of a bridge across the Kerch Strait, Russia actually has control over the Sea of Azov.

Legally, both Ukraine and Russia have the freedom of navigation in the Sea of Azov in accordance with the Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait of December 24, 2003. Nevertheless, at the moment Russian border guards have begun to subject Ukrainian ships to their own inspection procedures for obtaining permission by Ukrainian vessel to cross the strait.

In addition, Ukraine's problems are aggravated by the construction of the Kerch Bridge, which is too low for Panamax vessels, which in 2016 accounted for about 23% of all shipping in the area. As a result, cargo traffic from Mariupol decreased by 27% - from more than 8.9 million tons in 2015 to 6.5 million tons in 2017, and from Berdyansk - by 47%, from 4.5 million tons in 2015 to just only 2.4 million tons in 2017. Before the conflict in Ukraine, cargo traffic was significantly higher: in 2013 alone, 15 million tons of cargo passed through Mariupol.

NATO has already called on Russia to ensure unhampered access to Ukrainian ports and allow freedom of navigation in the Black, Azov Seas and the Kerch Strait.

Also, the Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov contains provisions concerning the necessity of cooperation between two States in the spheres of navigation, fisheries, protection of marine environment, ecological

safety and life-saving in the Sea of Azov and the Kerch Strait. Nowadays, there are also problems of exhaustion of fish stocks in the Sea of Azov. According to the data of the Ministry of Environment of Ukraine, over the past decade, the volume of fish catch has decreased by 2-4 times, and the number of species has drastically decreased. Now the fish in the Sea of Azov is on the verge of extinction. Environmentalists consider the main reason to be irrational fisheries management and improper protection of aquatic living resources.

Since 1993, a special Agreement between Russia and Ukraine has been in force that regulates the joint use of aquatic biological resources of the Azov Sea basin. There is also a Russian-Ukrainian commission on fisheries in the Sea of Azov, which, judging by the state of aquatic living resources, does not cope with its responsibilities.

The absence of delimitation agreement between Ukraine and the Russian Federation causes such problem as distribution of the continental shelf for exploration and production of oil. It does not allow Ukraine to attract investors. The problem of efficient use of domestic energy resources on the shelf of the Azov Sea remains unresolved.

All of the above issues should be regulated jointly by Ukraine and Russia. There are a certain number of framework agreements relating to different areas. Nevertheless, there is no clear understanding of the distribution of jurisdictions of states in certain areas of the Sea of Azov. Due to the lack of an agreement on delimitation, the geographical scope of jurisdiction of each of the States in the Sea of Azov is unclear. The absence of delimitation does not allow taking full advantage of the resources of the Sea of Azov, to ensure their rational use and protection. In addition, the lack of the established boundaries allows the ships of the Russian Federation to navigate too close to the coast of Ukraine, which, in the light of current events, is a threat to territorial integrity.

The situation is complicated by the fact that Russia and Ukraine have made reservations under Article 298 UNCLOS. The inability to resolve the delimitation dispute in court leads to the need to search for appropriate methods by states independently. Ukraine should assess the possibility of termination the Agreement and establishing maritime zones in the Sea of Azov in accordance with UNCLOS.

Ukraine is a member of UNCLOS since 26 July 1999 while Russia – since 12 March 1997.¹

¹ Chapter XXI, United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, accessed 2019 April 04, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en

Researched problems:

1. Whether the Sea of Azov qualifies as historical waters under the international law of the sea?
2. Which methods under the international law are applicable for delimitation of historic waters during the negotiation between Ukraine and the Russian Federation?
3. Is Ukraine entitled unilaterally to establish the median line in the Sea of Azov for the purposes of delimitation under the international law?
4. Does Ukraine have the right either to denounce or terminate the Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait? Whether such denunciation or termination would change the status of the Sea of Azov and would it make the delimitation procedure easier?

Aim and objectives of the thesis

The aim of the research is to determine the status of the Sea of Azov after the collapse of the USSR taking into account international customary law and case law. Moreover, it is necessary to define the methods of delimitation which should be used by Ukraine and the Russian Federation during the negotiations.

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

- to assess the historical development of relations between Ukraine and the Russian Federation before the signing of the Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait 2003 for the purpose of analyzing the interest of both states in Azov-Kerch area;
- to establish whether the Sea of Azov falls within the definition of the “historically internal waters”;
- to analyze the rounds of negotiations between Ukraine and the Russian Federation concerning the delimitation to highlight the methods which have been already discussed by parties;
- to define the methods which are applicable under international law for delimitation of internal waters between States with opposite or adjacent coasts;
- to determine whether the denunciation or termination of Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait 2003 is lawful and whether it would change the Status of the Sea of Azov;

- to establish whether the median line in the Sea of Azov could be established by Ukrainian Government unilaterally under international law.

Relevance of the final thesis

The question of delimitation of the Sea of Azov is particularly relevant nowadays. Numerous rounds of negotiation between Ukraine and the Russian Federation were failed and boarder in the Sea of Azov was not established, despite the fact that the Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait contains such requirement. The delimitation is necessary for Ukraine to provide the possibility to exercise its jurisdiction under the certain area of the Sea of Azov and to protect the national borders.

Novelty and level of the analysis of a researched problem of the final thesis

The issue of status of the Sea of Azov and its delimitation was analyzed by Ukrainian, Russian and European scholars and politics. Those were Alexander Skaridov (Head of the International and Maritime law department of the Russian Admiral Makarov State University of Maritime and Inland Shipping), Philip C. Jessup (American diplomat, scholar, and jurist notable for his accomplishments in the field of international law), as well as Olga Romanukha, Oleksandr Zadorozhnii, Arkady Moshes, Oleksandr Shemyakin, Ulyana Us'ka, Adam Eberhardt and other scholars.

But there was no unified approach and conclusion. Certain issues have not been covered at all.

Academic novelty of this thesis is demonstrated by the analyzing the methods of delimitation of the Sea of Azov after the occupation of the Crimea and the aggression of Russia on the territory of Ukraine. It was put in priority the need for territorial security of Ukraine taking into account the absence of compromise.

Also, the Warsaw Institute, a Polish think tank, provided an overview of relations between Ukraine and the Russian Federation. In March, 2018 Ridvan Bari Urcosta published a special report "Russia's Strategic Considerations on the Sea of Azov". In this report the author examines the effect of the Russian annexation of the Crimea on exercising of control over the

Sea of Azov. He also assessed how the already tense situation in the Azov Sea affects the Ukrainian economy. And the last but not least, he came to the conclusion that the direct military confrontation with Russia in this particular area is not necessarily the best solution for Ukraine.²

Also, it is submitted in the thesis the approaches which could be used for delimitation drawing on the actual case law of Tribunal. It is the first thesis where it was applied the approach of Arbitral Tribunal between Slovenia and Croatia concerning the delimitation of internal waters. The dispute between the Republic of Croatia and the Republic of Slovenia was examined with an aim to discover the possible methods of delimitation of historically internal waters, as it was the first case which clarifies the approach through which the delimitation of internal waters of two States could be done.

This thesis is the first study in which the possibility of termination of Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait is analyzed and the consequences of it are assessed.

Also it was taken into accounts such cases, as the delimitation of the continental shelf of the North Sea between the Netherlands and Germany, the delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) and Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) about the Gulf of Fonseca.

Research methodology

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

1. Analytic method was used for providing the general overview of the Sea of Azov during the USSR and after its collapse. It was also applied for clarifying the consequences of possible termination of Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait.
2. Systematic method was used for establishment of positions both Ukraine and the Russian Federation and for defining the development of their relations.
3. Comparative method was used to assess the case law of the Arbitral Tribunal and to analyze the legal regulation of the historically internal waters in similar circumstances.

² Ridvan Bari Urcosta "Russia's strategic considerations on the sea of Azov" accessed 2019 April 27, <https://warsawinstitute.org/wp-content/uploads/2018/12/Russias-Strategic-Considerations-on-the-Sea-of-Azov-Warsaw-Institute-Special-Report.pdf>

4. Critical method was used in order to identify whether the actions of the Russian Federation violate any norms of UNCLOS.

5. Evaluation method was used for analyzing the known methods of delimitation of internal waters.

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 Sea of Azov. The Chapter which is divided into two subchapters describes the situation before and after the collapse of the USSR, the relations between Ukraine and the Russian Federation before the conclusion of Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait. Also it describes the conflict around Tuzla Island as the precondition for signing of the Agreement. Moreover, it contains analysis of whether the Sea of Azov qualifies as historically internal waters in accordance with the requirements for such maritime zone which established in international law of the sea.

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

Chapter 2 analyzes the applicable methods of delimitation of internal waters in accordance with international law. It also includes comparison of the Bay of Piran with the Sea of Azov. In this Chapter it was outlined the conclusion concerning the application of different methods of delimitation and their applicability to the Sea of Azov.

Chapter 3 examines the violations of international law by the Russian side and analyze whether the termination or denunciation of Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Kerch Strait is lawful and which consequences of it could be. This Chapter also deals with the evaluation whether it is possible to establish the median line in the Sea of Azov unilaterally.

Defence statement

Ukraine is entitled to raise the procedure of termination of Agreement according to the Vienna Convention, but the termination of Agreement *per se* doesn't change the Status of

Azov Sea and will not be beneficial for Ukraine. Moreover, UNCLOS will not being applicable for delimitation of the Sea of Azov.

The final delimitation of the Azov Sea is possible only on the basis of a compromise and common consent between Ukraine and the Russian Federation considering the methods of proportionality. Although, taking into account the status of the Sea of Azov and the current relations between States, Ukraine has the right to establish the median line in the Sea of Azov unilaterally until the common decision on delimitation will be reached. The rules of delimitation of other maritime zones should be applied *mutatis mutandis*.

LIST OF ABBREVIATIONS

EU - European Union

ICJ - International Court of Justice

UN – United Nations

UNCLOS - United Nations Convention on the Law of the Sea

USSR - Union of Soviet Socialist Republics

1. THE GENERAL OVERVIEW OF HISTORY OF THE SEA OF AZOV

1.1. Historical events before the collapse of the Union of Soviet Socialist Republics

The Azov Sea³ is an interior sea which lies between Ukraine and Russia in their southern coasts. In antiquity the Sea of Azov was called as *Palus Maeotis* (Lake Maeotis) and this name had the Latin origin.⁴ The Sea of Azov is located between mainland Ukraine in the north, the Crimea in the west, and the Kuban region in the east. In the northeast it is bordered by the Don region. Ukraine and the Russian Federation are the only adjacent coastal States.

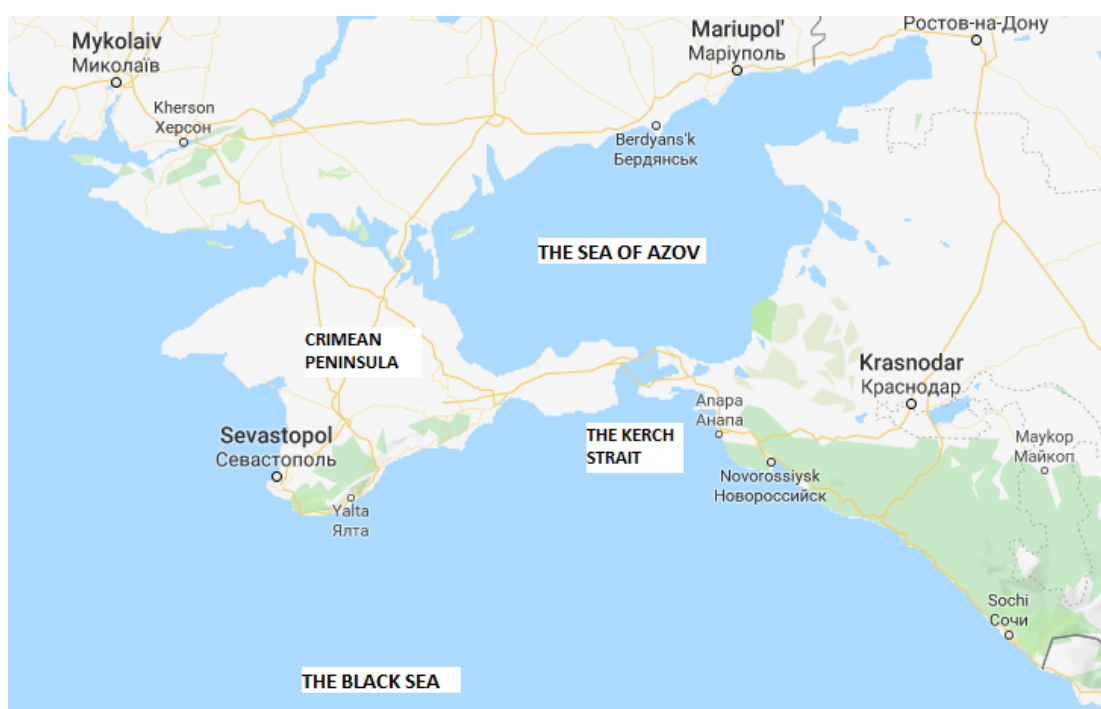


Table No. 1 The map of the Black Sea, the Sea of Azov and the Kerch Strait⁵

Since ancient time, during Greek colonization, the Black Sea, the Azov Sea and the Kerch Strait have been regarded as the area of constant dispute and the place of opposing political interests. This is due to the fact that this region has always been highly profitable to the countries that managed to gain control of it.

The Sea of Azov was important in ancient times when Greek colonies were founded on its shores. Panticapaeum and Phanagoria, both founded in the 6th century BC, and other colonies

³ 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).

⁴ “Sea of Azov”, The Editors of Encyclopedia Britannica, Encyclopedia Britannica, inc., July 08, 2009, accessed 2019 February 4, <https://www.britannica.com/place/Sea-of-Azov>

⁵ “The Black Sea, the Sea of Azov and the Kerch Strait”, Google Map, accessed 2019 April 05, <https://www.google.com.hk/maps/@45.479854,35.8019219,7z?hl=en>

controlled the entrance to the Sea of Azov through the Kerch Strait. The entrance from the other side was controlled by Tanais, built at the mouth of the Don River in the 7th century BC. The city-states belonged to the Bosporan Kingdom, which eventually gained control of other city-states on the Azov coast. In the 1st–3rd century AD these city-states were vassals of Rome. The Greek city-states traded with the inhabitants of the interior and supplied Greece, and later Italy, with fish and grain. The ancient city-states on the Azov coast fell to the invading Huns in the 4th century.⁶

For some time (8th–10th century) the influences of three states converged at the Sea of Azov: the Byzantine Empire, which controlled, among others, the city-states on the Kerch Strait; the Khazar Kaganate; and Kyivan Rus'. In the 13th century the Azov region was conquered by the Mongols and annexed by the Golden Horde. During the disintegration of the Golden Horde in the mid-fifteenth century, the region came under the control of the Crimean Khanate, which shortly thereafter became a vassal of Turkey. The Sea of Azov remained under Turkish domination for 300 years.⁷

The XVIII century was the turning point of Russian domination over Azov Sea and the Crimea. The Russian-Turkish War that lasted from 1768 to 1774 was the tool to establish power in this region. Russians had been destabilizing Crimean tatars for years and an overstretched and weakened Ottoman Empire was easily defeated by Russian forces. The Peace Treaty of Küçük Kaynarca brought peace to the region benefiting Russian interests. Under this treaty Turkey and Russia agreed to recognize the independence of the Crimean Khanate. Moreover, this treaty divided the Sea of Azov between the Russian Empire and the Crimean Khanate.

It was stated that “The fortresses of Jenicale and Kertsch situated in the peninsula of the Crimea, with their ports and all therein contained, and moreover with their districts, commencing from the Black Sea, and following the ancient frontier of Kertsch as far as the place called Bugak, and from Bugak ascending in a direct line as far as the Sea of Azow, shall remain under the full, perpetual, and incontestable dominion of the Empire of Russia”.⁸ The other part of area was under the Crimean Khanate control.

Thus, since then, Russia had dominance under the Azov and Kerch ports allowing the country to get direct access to the Black Sea.

⁶ “Azov, Sea of”, The Internet Encyclopedia of Ukraine, accessed 2019 February 04, <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CA%5CZ%5CAzovSeaof.htm>

⁷ Ibid.

⁸ “Peace Treaty of Küçük Kaynarca”, 1774, accessed 2019 February 04, http://www.fas.nus.edu.sg/hist/eia/documents_archive/kucuk-kaynarca.php

Catherine II, also known as Catherine the Great, weighed the advantages and disadvantages of annexing the Crimean Peninsula in violation of the Peace Treaty of Küçük Kaynarca. Since Turks and Crimean Tartars had aspirations at taking the entire peninsula, Russia aimed at having a presence in the region. Annexing Crimea would lead to a continuous border between the Black and the Azov Seas which would change the defense strategy of the southern border. Setting the defense of the southern border in Crimea would strengthen Russia's influence in the Black Sea. It would give Russia the power to monitor the mouths of the Danube and Dniper Rivers. Another benefit was that the Black Sea had no restrictions on the size and tonnage of vessels, unlike the Dniper estuary which could be blocked at any time by Turkish fleets. A Black Sea fleet would keep the Ottoman Empire in check.

Establishing a port in the Black Sea was strategically important for Russia as most of its ports freeze in winter and it was essential for trading and to support a strong navy.⁹

Catherine II was determined to continue her territorial expansion and preparations for annexation started over a year before the final annexation took place. In December 1782 she ordered the Foreign Affairs Board to start diplomatic work with European powers of the day such as Britain, France, Austria and Sardinia. Concluding that Russian ports would feel threatened by the Ottoman Empire, Catherine the Great issued a manifesto on April 1783 justifying the annexation of Crimea to the Russian Empire. The final documents were signed on February 2, 1784.¹⁰

In order to secure its borders Catherine the Great gave orders to build the fortress of Sevastopol and the Black Sea Fleet. The construction of the Black Sea Fleet was given to Prince Grigory Potemkin, the Governor and General in Chief of Novorossiysk.¹¹

After the Russian-Turkish Peace Treaty of Küçük Kaynarca in 1774 and the liquidation of the Crimean Khanate in 1783, the entire coast of the Sea of Azov belonged to the Russian Empire. The Russian Empire spread its sovereignty onto the waters of the Azov Sea. From 1792 the Kuban region was settled as the Black Sea Cossacks migrated to the lands east of the Sea of Azov. 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.¹²

⁹ "The First Annexation of Crimea", accessed 2019 February 3, <http://www.crimeahistory.org/>

¹⁰ Ibid.

¹¹ Ibid.

¹² "Украина в составе Российской империи 1795 г.", accessed 2019 February 3, <http://grandukraine.com/istoricheskie-zapiski/ukraina-v-sostave-rossiyskoy-imperii-1795-g.html>.

From XVIII century the whole water area of the Sea of Azov, including the Kerch Strait became an integral part of the Russian Empire and, accordingly, of the Soviet Union - as the successor, and because of geographical features and geo-strategic interests, they were used exclusively as internal waters of one independent State.

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 Geleznii Rog.¹³ This baseline was drawn in accordance with the UNCLOS¹⁴ 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 establishment of straight baselines was also effected at the national level by Council of Ministers in Regulation in 7 February, 1984¹⁵.

Philip C. Jessup, in his treatise "The Law of Territorial Waters and Maritime Jurisdiction" published in 1927, considered that a claim to the Sea of Azov as part of the Union of Soviet Socialist Republics' (USSR) territorial sea "seems reasonable and [...] would not be contested".¹⁶

1.2. Events after the collapse of the Union of Soviet Socialist Republics

The collapse of the USSR¹⁷ raised the question of the legal status of both the Sea of Azov and the Kerch Strait. Ukraine and the Russian Federation were the ones who had full jurisdiction under such maritime areas on equal shares. There was an urgent necessity to establish maritime boundary between Russia and Ukraine in the Sea of Azov for equitable use of such maritime area in accordance with international customary law and UNCLOS and for avoidance of contention between the two States.

¹³ 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.

¹⁴ USSR was a party to UNCLOS from 10 December 1982.

¹⁵ Olga Romanukha, "The Delimitation of the Modern Border of Ukraine", *Nauka. Relihiya. Suspilstvo* 4 (2009): 111, accessed 2019 February 05, <http://dspace.nbuv.gov.ua/bitstream/handle/123456789/33239/57-Romanukha.pdf?sequence=1>.

¹⁶ Philip C. Jessup "The Law of Territorial Waters and Maritime Jurisdiction", LL.B., Ph.D. 1927. (New York: G. A. Jennings Co., 548 pp.) C. John Colombos, *Journal of the Royal Institute of International Affairs*, Volume 7, Issue 1, January 1928, Page 74.

¹⁷ "Agreement establishing the Commonwealth of Independent States" (Minsk, 8 December 1991), accessed 2019 February 05 https://www.cvce.eu/en/obj/agreement_establishing_the_commonwealth_of_independent_states_minsk_8_december_1991-en-d1eb7a8c-4868-4da6-9098-3175c172b9bc.html

Establishing a clear border is one of the main targets of every State in the world. It defines the sovereign right of the state to organize its own political and socioeconomic system. A borders function is one of the pillars of territorial integrity.

Moreover, every State has to abide by the principle of territorial sovereignty. States are obliged to refrain from the threat of force or its use for the purposes not to violate the borders. Thus, the legally enshrined delimitation of the Sea of Azov would be the guarantee of security of borders.

Originally, the intent of Ukraine concerning the status of the Sea of Azov was different from Russian Federation. Ukraine demanded the delimitation of the Sea of Azov as a whole with defining the territorial sea and the exclusive economic zone in accordance to the UNCLOS, when Russia offered to divide only the bed and allocate the areas of special or predominant sovereign rights in subsoil use.¹⁸ Ukrainian diplomats were of the opinion that the effective control in the Sea of Azov could be possible only in the case of delimitation of maritime zone and jurisdiction between the adjacent States.

At this stage, the main issue of bilateral relations between Ukraine and the Russian Federation was the signing of a general intergovernmental agreement. Thus, after the collapse of the USSR both States started negotiations concerning the new form of their cooperation. Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation was signed on 31 May 1997¹⁹, while the issue of delimitation was postponed. It required separate rounds of negotiation and additional agreement.

The first step towards delimitation of Ukrainian border after the dissolution of the former USSA was the adoption of the Law “On the State Border of Ukraine”. Article 5 of this law stated that “the territorial sea of Ukraine includes coastal waters 12 nautical miles wide measured from the line of the lowest tide 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

¹⁸ Olga Romanukha “The Delimitation of the Modern Border of Ukraine”, *Наука. Релігія. Суспільство*, № 4, 2009 page 110), accessed 2019 February 05, <http://dspace.nbuv.gov.ua/bitstream/handle/123456789/33239/57-Romanukha.pdf?sequence=1>

¹⁹ “Agreement on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation” 31 May 1997, accessed 2019 April 06, https://zakon.rada.gov.ua/laws/show/643_006 (Agreement is no longer in force since 2019 April 01)

treaties of Ukraine, and in the absence of treaties - in accordance with generally accepted principles and norms of international law”.²⁰

Moreover, article 14 established the right of innocent passage through territorial sea of Ukraine corresponding to article 17 of UNCLOS. Therefore, Ukraine made reference to provisions of UNCLOS in its legislation process and used it as a base.

The requirement of adoption of geographical coordinates was fulfilled when 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 Azov on the 11th of November 1992.²¹ Later Ukraine called on Russia to delimit the Sea of Azov as quickly as possible based on the provisions of international law.²²

The next act of Ukrainian government was also consistent with Ukrainian intention not to treat the Sea of Azov and the Kerch Strait as internal waters. Cabinet of Ministers of Ukraine adopted Resolution ‘On Priority Measures for the Legal Formation of the State Border and its Further Settlement’ on June 5, 1993.²³ This resolution included an order to submit proposals on the delimitation of the territorial sea of Ukraine in the Azov Sea and the exclusive (maritime) economic zone of Ukraine in the Azov and Black Seas 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.

Some scholars believe that such actions on part of Ukrainian authorities were not legitimate, since they were aimed at establishing the legal regime of the Sea of Azov without

²⁰ “Закон України Про державний кордон України від 04.11.1991 № 1777-XII”, accessed 2019 February 07, <http://zakon5.rada.gov.ua/laws/show/1777-12>

²¹ “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

²² Arkady Moshes “Littoral States and Region Building Around the Black Sea, The Black Sea Region: Cooperation and Security Building”, edited by Oleksandr Pavliuk, Ivanna Klymush-Tsintsadze, (Routledge, 2016): 71, accessed 2019 February 07, <https://books.google.com.ua/books?id=i2SIDAAQBAJ&printsec=frontcover&hl=ru#v=onepage&q&f=false>.

²³ “Постанова Кабінету Міністрів України Про першочергові заходи щодо правового оформлення державного кордону та подальшого його облаштування від 05.06.1993 № 415”, accessed 2019 February 08, <http://zakon2.rada.gov.ua/laws/show/415-93-%D0%BF/conv>

determining the legal status of it.²⁴ Nevertheless, such conduct demonstrated the intent of Ukraine to establish regular maritime zones under UNCLOS in the Sea of Azov and to exercise therein sovereignty or jurisdiction independently as provided in UNCLOS.

Even in 2002 there was the attempt to adopt the Law ‘On Inland Waters, the Territorial Sea and the contiguous zone of Ukraine’, which in article 2 defined the territorial sea of Ukraine as including coastal waters in the Black and Azov seas with a width of 12 nautical miles, measured from the line of the lowest tide both on the mainland, on the islands belonging to Ukraine, or from straight baselines, 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.²⁵

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 contiguous zone of Ukraine. Nevertheless, the legislative procedure of adoption of this law was postponed as defined on the legal site of Verkhovna Rada of Ukraine. It should be presumed that the conflict around Tuzla Island was the reason for it.

All measures that were mentioned above illustrate the intention of Ukraine to treat the Sea of Azov 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. However, the territorial sea and the exclusive economic zone of Ukraine in the Azov Sea have never been delimited as well as the draft law has never been adopted 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.²⁶

The Russian Federation demonstrated its opposition for delimitation of the territorial seas and the exclusive economic zones in the Sea of Azov since the collapse of the USSR. Its aim was to maintain the existing status of the sea as internal waters which have to be used

²⁴ Shemyakin A. “The Sea of Azov and the Kerch Strait: current realities”, [“Азовське море та Керченська протока: реалії сьогодення”] // Право України. – 1998. – № 12. – С. 113–118

²⁵ “Проект Закону про внутрішні води, територіальне море та прилеглу зону України, No 2605 від 30.12.2002”, accessed 2019 February 08,

http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=2605&skl=5

²⁶ “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

mutually between Russia and Ukraine. In this manner, Russia sought to limit the freedom of navigation for the third countries vessels in the Sea of Azov.

On May 26, 1995, the Russian Federation signed an “Agreement on Cooperation with the Former Republics of the USSR on the protection of the frontiers of the Commonwealth of Independent States member states that are not part of the Commonwealth”²⁷. In this way, Russia tried to counteract the spread of NATO's influence on the countries of the post-Soviet space, hindering the development of any form of strategic partnership between them.²⁸

Ukraine did not sign this Agreement and chose a strategy of non-participation in multilateral cooperation between the Members of the Commonwealth of Independent States (“the CIS”). At that time, Ukraine has taken a course on cooperation with NATO. There were several reasons for Ukraine's refusal to participate in integration association between the post-soviet States. First of all, it was the unwillingness to be involved in military conflicts in the territory of the CIS. Secondly, it was an understanding of the danger of being cut off from European integration processes. Moreover, it was the high risk of unequal influence of countries and undeniable political dominance of Russia in region of the CIS. The Russian Federation had a strategic course for the development of supranational structures of the CIS under its control and intentions to unite the Post-Soviet States into a new powerful geopolitical bloc.

During negotiations in 1998, it became obvious that the Russian side would agree to delimit the land border between the Ukrainian Soviet Socialist Republic and the Russian Soviet Federative Socialist Republic based on administrative boundary. But there were no documentary evidences exist which confirmed the administrative maritime boundary on the Sea of Azov. Thus, for the delimitation of marine areas were required additional agreements. Moreover, Russian diplomats expressed their intention to delimit the land border, but not to demarcate it.

Border delimitation is the legal execution of contract concerning a state boarder line between neighboring states, which is graphically depicted on a topographic map, with a description, which can be part of the agreement or application to it.

²⁷ “Договір про співробітництво з охорони кордонів держав-учасниць Співдружності Незалежних Держав, що не входять в Співдружність” від 26.05.1995, accessed 2019 February 08, https://zakon.rada.gov.ua/laws/show/997_071

²⁸ Us'ka, Ulyana. “The Problem of Determination of Ukrainian-Russian Border: Stages of Negotiation Process and its Prospects.” Lviv Polytechnic National University Institutional. 2013: 153-158, accessed 2019 February 08, <http://ena.lp.edu.ua/bitstream/ntb/21125/1/27-153-158.pdf>

Demarcation is designation by means of special border signs the border between neighboring states with drawing up demarcation documents.²⁹ Demarcation is the process by which a boundary is physically marked on the ground, not on the water.

Generally speaking, Russia and Ukraine conducted several rounds of border-demarcation negotiations after the Soviet Union's collapse. The Russian-Ukrainian land border was finally agreed in January 2003.

At the end of 2002, the Agreement on the delimitation of the land boundary of the Ukrainian-Russian border was reached. On January 28, 2003, the parties signed the Agreement on the Ukrainian-Russian state border. The term "Ukrainian-Russian state border" means a line and a vertical surface passing along this line separating the state territories (land, water, subsoil and airspace) of the Contracting Parties from the point of contact between the state borders of Ukraine, the Russian Federation and the Republic of Belarus until a point located on the shores of the Taganrog Gulf.³⁰

Even though this agreement refers to the Sea of Azov and the Kerch Strait as internal waters of Ukraine and Russia, however, it did not contain any agreement on delimitation in the Sea of Azov and the Kerch Strait between two States.

The initial position of the Russian Federation was that the Sea of Azov and the Kerch Strait retain the status of internal waters of Ukraine and Russia and both States apply the principle of joint use. Nevertheless, the Russian side recognized the need for establishment of coastal areas of jurisdiction of certain State. Thus, it was discussed that the special agreement should define the functional maritime areas near the coasts of States where it could exercise its jurisdiction independently. The rest of territory should be used jointly.

Therefore, the controversial international relations the delimitation of borders in the Azov Sea and the Kerch Strait formed between the two states. Such relationships were even further jeopardized when Russia started building a dam as described below.

The Russian Federation started construction of a dam in the Kerch Strait from the Taman Peninsula (Russian territory) to the Tuzla Island (Ukrainian territory). According to

²⁹ Guidebook on Delimitation and demarcation of state boundaries: current issues and ways to solve them, OSCE Secretariat / Transnational Threats Department / Border Management and Security Unit, 27 April 2018, accessed 2019 February 08, <https://polis.osce.org/guidebook-delimitation-and-demarcation>

³⁰ “Договір між Україною і Російською Федерацією про українсько-російський державний кордон від 28.01.2003”, accessed 2019 April 10, http://zakon1.rada.gov.ua/laws/show/643_157

analysts, the purpose of construction of this dam was to put pressure on Ukraine to delimit the border in the Kerch Strait and the Azov Sea.³¹

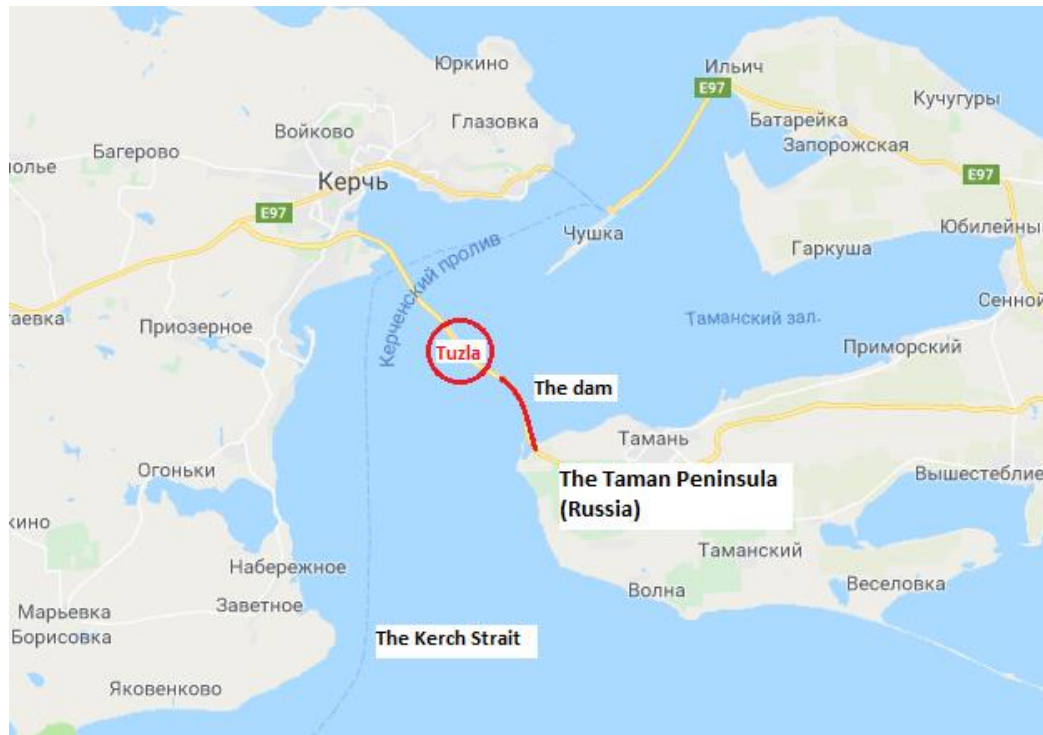


Table No. 2 The map the Kerch Strait and Tuzla Island³²

The island itself appeared in 1925: a strong storm eroded the spit on the Taman Peninsula of the Russian Federation, resulting in the formation of a separate small piece of land of length of about 6.5 km and a width of 500 m. In 1941, this newly formed island was transferred to the Crimean Autonomous Soviet Socialist Republic. Tuzla Island became part of Ukraine together with the Crimea in 1954 by the decision of the Presidium of the Supreme Council of the USSR.³³

Ukraine continued to exercise jurisdiction under the Tuzla Island after the dissolution of the USSR.

The Kerch Strait is divided by Tuzla Island in the middle. The circumstances were such that the ship canal between Tuzla and the Crimea (the territory of Ukraine) is deeper than canal

³¹ Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov, Dmytro Koval, Valentin J. Schatz, 10 January, 2018, accessed 2019 February 08, https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/?fbclid=IwAR3vonypZ8-0M7EfL7aJ8mqvXhOPA_UYK_fPSIDhxqpTHyEEA5y0fEb93ds

³² "The map the Kerch Strait and Tuzla Island", Google Map, accessed 2019 April 07, <https://www.google.com/maps/@45.2583241,36.5280095,10.03z>

³³ Закон СССР от 26 апреля 1954 г. "О передаче Крымской области из состава РСФСР в состав Украинской ССР", accessed 2019 May 02, <http://base.garant.ru/3946680/#ixzz5oFbg4zgt>

from Tuzla to the Taman Peninsula (the territory of the Russian Federation). That is why the last one is suitable only for the passage of small fishing boats, which is not profitable for Russia. Thus, the only navigable water way through the Kerch Strait is between the Tuzla Island and the Crimean Peninsula. Taking advantage of this situation, Ukraine started charging Russian vessels for the services of port pilots and for transit through the canal.

Russia's annual costs from this were approximately \$ 15–16 million. The best solution for Russia would have been to persuade Ukraine to withdraw from the delimitation of the territorial waters and to establish that the Kerch Strait excused under the joint administration of both States. Such regime of the Kerch Strait would have resulted in the cessation of the accrual of the charges or alternatively a reduction in the level of transit charges.

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. 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.³⁴

Moreover, by assuming sovereignty under the Tuzla Island, Russia could have completely control navigation of military vessels of third States and would have the right to prohibit the passage of NATO ships in the Azov Sea.

In September 2003, Russia made an attempt to gain control over Ukraine's Tuzla Island, by building a dam which would have connected the Taman Peninsula with Tuzla and would have made Tuzla the part of Russian mainland. Local Russian authorities argued that the dam was being built to stave off erosion and restore the original geography of the early 20th century, when Tuzla was attached to the Krasnodar region mainland by a slim strip of sandy ground, later washed away by strong storms.³⁵ That is why Russia insisted that the Tuzla were part of the Taman peninsula and the return of the island would be legal and reasonable.

The Russians started construction of the dam to Tuzla without Ukraine's permission. The works were very fast. According to the Ukrainian Naval Forces, each day from the Russian side unloaded up to 700 trucks with the necessary materials, the constructors worked in three

³⁴ Adam Eberhardt, "The Common Border Issue in Russian-Ukrainian Relations," *The Polish Foreign Affairs Digest*, 3, 2(7), (2003): 227-228.

³⁵ Russia/Ukraine: Prime Ministers Meet Today Over Tuzla Dam Dispute October 24, 2003, Sophie Lambroschini, the RFE/RL, accessed 2019 April 08, <https://www.rferl.org/a/1104782.html>

shifts. Every day there were of 150 m of dams constructed.³⁶ The dam almost reached the Tuzla Island; it remained literally 100 meters when the work was suspended. Moreover, the activity of the Russian military forces was noted in the region.

On October 2003 it the Decree of the Verkhovna Rada of Ukraine “On Removing the Threat to the Territorial Integrity of Ukraine, which arose as a result of the construction of the Russian Federation dam in the Kerch Strait” was adopted which resulted from construction of the dam in the Kerch Strait.

In this legal act it was stated that “the activities in the Kerch Strait started contrary to the existing international legal practice and the existing framework of international treaties between two States without prior informing the Ukrainian side.”³⁷

Moreover, the Decree emphasized that the Russian side challenged the administrative boundaries which were defined in 1973 and which were acknowledged by the Russia before.

Ukraine proceeds from the fact that all the contentious issues concern delimitation of sea borders in the Sea of Azov should be resolved solely on the basis of universally accepted principles of international law and within the framework of the United Nations Convention on the Law of the Sea rights of 1982.³⁸

Therefore, in this Decree the Verkhovna Rada of Ukraine decided to recognize the actions of Russia for the construction of a dam in Kerch the Strait as “an unfriendly act” that makes Ukraine to be viewed the current practice of relations with the Russian Federation.

1.3. Status of the Sea of Azov according to the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait

The Tuzla conflict was frozen after Ukraine’s second President, Leonid Kuchma, and Russian President, Vladimir Putin signed an Agreement between Ukraine and Russia on

³⁶ The Ukrainian Navy, “24 вересня 2003 року Російська Федерація розпочала будівництво дамби з російського берега Керченської протоки до українського острова Коса Тузла”. Accessed 2019 February 09, https://www.facebook.com/navy.mil.gov.ua/posts/1022162254653711?__tn__=-R

³⁷ Постанова Верховної Ради України “Про усунення загрози територіальній цілісності України, що виникла внаслідок будівництва Російською Федерацією дамби в Керченській протоці” від 23 жовтня 2003 року, accessed 2019 April 09, <https://zakon.rada.gov.ua/laws/show/en/1234-15>

³⁸ Ibid.

cooperation and the shared use of the Azov Sea and the Kerch Strait.³⁹ The threat of occupation of Tuzla and respectively the Kerch Strait forced Ukrainian government to agree on the common use of the Azov Sea and the Kerch Strait with Russia. Ukraine retained sovereignty over the Tuzla Island however it had to accede to the joint use of the Sea of Azov and the Kerch Strait.

After that, the States started the negotiations concerning the special Agreement. During the negotiations the Russian side placed emphasis on the statement that the Azov Sea and the Kerch Strait are the internal waters.

Seabed and subsoil, in turn, should be delimited into areas, where every State might have exclusive rights on exploration and exploitation of resources. Moreover, Russia has stated the importance of application of precedents for solving the issues, for example the dispute between Argentina and Uruguay concerning the status of the bay Rio de la Plata, where there are two kind of zones are exist - the zones of exclusive jurisdiction (each Party may exert its authority without interference from the other) and the zone of common jurisdiction (jurisdictions may be exercised concurrently and by special administration).⁴⁰

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, States enshrined the status as “historically is concerned to be internal waters”. Concerning the delimitation issue, article 1 establishes that “the Azov Sea is delimited by a line of state border in accordance with the agreement between the Parties.”⁴¹

Commercial vessels and warships, as well as others state vessels under the flag of Ukraine or the Russian Federation used for non-commercial purposes, exercise the freedom of navigation in the Sea of Azov and the Kerch Strait. Commercial vessels under the flag of third states may enter the Sea of Azov and pass through the Kerch Strait if they are heading to the Ukrainian or Russian port or return from it. Warships or other state-owned vessels of third states, which are operated for non-commercial purposes, may enter Sea of Azov and pass through the

³⁹ “Ukrainian-Russian conflict over Crimea and Azov Sea has long history” by Veronika Melkozerova. November 26, 2018, <https://www.kyivpost.com/ukraine-politics/ukrainian-russian-conflict-over-crimea-and-azov-sea-has-long-history.html?cn-reloaded=1> accessed 2019 February 08

⁴⁰ Treaty between Uruguay and Argentina concerning the Rio de la Plata and the Corresponding Maritime Boundary 19 November 1973, accessed 2019 May 14, <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/URY-ARG1973MB.PDF>

⁴¹ “Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24.12.2003”, accessed 2019 April 08, http://zakon5.rada.gov.ua/laws/show/643_205

Kerch Strait, if they are heading for a visit or a business visit to the port of one of the Parties upon its invitation or permission, agreed with the other Party (Article 2⁴²).

Thus, from this moment Ukraine has confirmed its intentions and agreed to recognize the Azov Sea and the Kerch Strait as internal waters of Ukraine and Russia. The delimitation of the maritime borders of Ukraine and the Russian Federation turned out to be a difficult question. The negotiation process regarding the question of delimitation and its methods continued. There were the numbers rounds of negotiations, where any compromise was not achieved.

Since 2003 the Ukrainian-Russian relations have changed a lot. After annexation of the Crimea in 2014 many disagreements arose between those two countries. These disagreements led to revision of the bilateral treaties concluded between Ukraine and the Russian Federation after the collapse of the USSR.

Deputy Minister of Foreign Affairs of Ukraine for the European Integration Olena Zerkal stated that “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”.⁴³

On 16 July 2015, a group of Ukrainian members of parliament submitted a Draft Law “On the Denunciation of the Treaty between Ukraine and the Russian Federation on Cooperation in the Use of the Azov Sea and the Kerch Strait” which was not, however, adopted. This is not surprising as Ukraine apparently relies on the Cooperation Agreement in its 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 in the Permanent Court of Arbitration.⁴⁴

On 6 December 2018, the Verkhovna Rada adopted the Law "On the Termination of the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation", introduced by the President of Ukraine. Termination of the treaty relieves Ukraine from any obligations regarding its implementation and does not affect the rights, obligations or legal position of Ukraine that arose as a result of the execution of the said agreement prior to termination of its operation.

⁴² Ibid

⁴³ “Ukraine and Russia have suspended or terminated 44 contracts since 2014” [“Україна і Росія з 2014 року призупинили або розірвали 44 договори”] <https://dt.ua/POLITICS/ukrayina-i-rosiya-z-2014-roku-prizupinili-abo-rozirvali-44-dogovori-274249.html> accessed 2019 March 05

1.3.1. Legal Requirements for Historic Waters

The states do not have absolute discretion just to start maintain that certain part of the waters are historical and that it will be under exclusive sovereignty and treated as internal waters. The international law should have certain requirements upon claiming the historic waters. Now it is necessary to analyze such requirements.

First of all we need to analyze the UNCLOS. The UNCLOS refers only to “historical bays” that regardless of the width of the entrance to them, are considered internal waters of a coastal state due to historical tradition. Even though it refers to historical bays it does not establish the requirements upon satisfaction of which the bays could be treated as historical. The convention itself is silent on the requirements for historic waters. We need to look into the other sources of international law for establishment of such requirements, due to the lack of provision in the conventions.

Although the UNCLOS only mentions the historical bays, international customary law entitles the states to claim as historical all the maritime areas including seas. Analyze of the national legislation reveals that many coastal states have adopted articles on “historical waters”. They reserve the right of the coastal state to declare different maritime zones as its “historical waters”. Regime such waters should be determined on the basis of both the requirements of international sea law and the provisions of the national legislation of the coastal states.⁴⁵

Attention should be paid to the fact that there is no legal definition of the term "historic sea", although the doctrine of international maritime law in principle has developed the grounds for recognizing marine zones historically internal. Thus, some scholars point out that such zones belong to internal waters of a certain state due to the fact that they are “traditionally because of geographical features, as well as economic and defense values belonged to this state, which can be qualified as a custom recognized by other states.”⁴⁶

The regime of historical waters was investigated during the UN Conference on the Law of the Sea in 1958, where a Memorandum of the UN Secretariat on historical waters was adopted. It reflects the positions of states in relation to some areas to which the “historical waters” regime should be extended (Sea of Azov, Kankal Bay, etc.), judicial precedents and

⁴⁴ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), 16 September 2016, accessed 2019 May 12, <https://pca-cpa.org/en/cases/149/>

⁴⁵ Gerold Antselevich “International Sea Law” - К.: Издательский дом «Слово», 2004. – 400 с. – с. 87-88

positions of research centers and scientists from the USA, France, Japan. In addition, the document contains a rather detailed analysis of the theory of “historical bays”.

“Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighboring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water. There is a growing tendency to describe these areas as “historic waters”, not as “historic bays”.⁴⁷

Moreover, this document described the Sea of Azov as a bay during the USSR, thus it has all characteristics which is needed for a bay.

As it was mentioned above, the waters under the historic title usually are considered to be excluded from the regulation by UNCLOS and primarily governed by customary international law.⁴⁸ 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 law.⁴⁹ For this reason, it is important to study the conclusions of this case as the requirements for historic waters were consolidated therein.

The case concerns the right of the Government of Norway to define the boundaries of the zone in which fishing rights have been reserved just for citizens of this country. The United Kingdom asked the Court to express an opinion as to whether such a delimitation of frontiers contradicts the provisions of international law. The Norwegian government refers to the historically established right to fishing and engage in whaling only for Norwegian citizens, referring to the fact that these waters always fell under the exclusive sovereignty of Norway, and the method of straight base lines was established in the Norwegian system and is confirmed by continuous and long enough practice.⁵⁰ Thus, in its decision, the Court determined that the method does not contradict international law.

⁴⁶ Международное право : учеб. для студентов вузов, обучающихся по спец. и направлению «Юриспруденция» [Текст] / Г. В. Игнатенко, О. И. Тиунов, В. Я. Суворова и др., М. : НОРМА-ИНФРА-М, 1999. – 569 с.

⁴⁷ “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, accessed 2019 April 09 http://legal.un.org/docs/?path=../diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf&lang=E

⁴⁸ Bangert, Kaare. “Internal waters”, in The Max Planck Encyclopedia of Public International Law, vol.V, ed. R.Wolfrum (Oxford: Oxford University Press, 2012), 310-316.

⁴⁹ 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.

⁵⁰ Summary decisions, Advisory conclusion and Rulings of the International Court of Justice, 1948 – 1991. Accessed 2019 March 13

http://legal.un.org/icsjsummaries/documents/russian/st_leg_serf1.pdf

The 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.⁵¹

The *Anglo-Norwegian Fisheries case* gave the ground for establishing specific requirements for the state to be able legitimately to claim the historical title over certain waters. Consolidated requirements were presented by UN Secretariat in the Study on Juridical Regime of Historic Waters including historic bays in 1962.

In this study it was emphasized that “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”.⁵²

Thus, the waters should comply with such requirements to be claimed as “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.⁵³

This study refers to the forth factor which could be even more important than the others and could be used as alternative. This factor relates to “particular circumstances” such as geographical configuration, requirements of self-defense or other vital interests of the coastal State.⁵⁴ According to one view, such grounds 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.⁵⁵

Now it should be analyzed whether the Sea of Azov satisfies the first requirement established for historical waters namely the exercise of authority over the area by the State claiming the historic right.

⁵¹ C. H. M. Waldock, “The Anglo-Norwegian Fisheries Case”, *British Year Book of International Law* 28 (1951): 114.

⁵² “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.

⁵³ Ibid. para 80

⁵⁴ Ibid. para 134

Such authority is exercised through legal acts which “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 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.”⁵⁶ Such acts must emanate from the State or its organs. Acts of private individuals would not be sufficient.⁵⁷

Even after collapse of the USSR only Ukraine and Russia exercise the full jurisdiction in the Sea of Azov and the Kerch Strait. It is necessary to emphasize that the regulation of navigation in the Sea of Azov was done just by the legal acts of Ukrainian or Russian Government. The ships under the flag of third states were not allowed to enter the Azov-Kerch Strait and to exercise the freedom of navigation there. The third state ships had to pay charges to enter the Kerch Strait. It would be the breach of international law, in case if the Kerch Strait had been defined as strait used for international navigation. States restricted the foreign fishing and laying of submarine cables, collected taxes and provided police control.

One of the significant and recent indicator of exercising of authority over the area is Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on measures to ensure navigation safety in the Azov Sea and the Kerch Strait which was signed in 2012. The parties of the agreement emphasize that the Azov Sea and the Kerch Strait are important for the economic development of Ukraine and the Russian Federation. The States are also aware of the need for harmonization of the Parties' actions in the field of navigation in the Sea of Azov.⁵⁸ Moreover, it was stated that the data from the shore stations which was gathered by parties should not be transferred to the third states. Thus, it is exclusive jurisdiction of Ukraine and the Russian Federation to review compliance of vessels and crews with national requirements in the field of maritime safety and protection of the marine environment from pollution from vessels in the Azov Sea and the Kerch Strait.

Also, both States published the special law in different spheres concerning the control over the Sea of Azov, such as regulation of fishing and protection of water resources. There are

⁵⁵ Ibid. para 81

⁵⁶ Ibid. para. 97-98

⁵⁷ Ibid. para 95

no evidences that any other state exercise its jurisdiction over the Azov-Kerch area, except Ukraine and Russia.

Finally, the exercising of authority could be demonstrated through the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait between Ukraine and the Russia Federation which was signed on December 24, 2003. In this Agreement both States “agreed on cooperation on the use of the Sea of Azov”.

The second requirement concerns the continuity of this exercise of authority by State claiming the historic right over particular area.

The Study on Juridical Regime of Historic Waters including historic bays interprets the continued activity of the State as effective exercise of sovereignty which should be extend for certain passage of time. But there is no clear definition of length of time which is needed for enjoying the requirement.

“The State must have kept up its exercise of sovereignty over the area for a considerable time.”⁵⁹ It may also be important that no other State in the international community has exercised jurisdiction in the same level and for the same period of time as Ukraine and Russia together.

In this case, it is necessary to point out that Ukraine and Russia are successor states of the USSR. It is impossible to claim extended time of exercising of authority by Ukraine and Russia as independent States. It is important to treat countries as successors of the USSR and to start counting the exercising the authority over the Azov Sea from its collapse in 1991. This is due to the fact that there was no sense in claiming waters as internal on historical basis during the existing of the USSR as a single-State.

“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”.⁶⁰

⁵⁸ Угода між Кабінетом Міністрів України та Урядом Російської Федерації про заходи щодо забезпечення безпеки мореплавства в Азовському морі та Керченській протоці від 20 березня 2012, accessed 2019 April 09, https://zakon.rada.gov.ua/laws/show/643_409

⁵⁹ “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.

⁶⁰ Jerzy Tyranowski, “State Succession: Boundaries and Boundary Treaties,” *Polish Yearbook of International Law* 10 (1979-1980): p 123.

In any case, it should be adopted a more accurate understanding of the amount of effective control and the continuity of the exercising of authority to claim the historic waters. Moreover, no specific period of time is generally required to prove that the effective exercise of authority has developed into a longstanding usage.

The next requirement concerning the continuity of the exercising of authority is "a general conviction that the present condition of things is in conformity with the international order".⁶¹ As it was mentioned above, the concept of historically internal waters, as well as the grounds for assigning certain waters as internal in historical ground, has a customary character. The UN Charter establishes the definition of custom as evidence of universal practice recognized as law.⁶²

For that reason, the recognition of a certain maritime zones historically internal must be common and proceed from the consent of a significant number of States. That is why, at the bilateral level, Ukraine and Russia could only state the status of historically internal waters in relation to the Azov Sea and Kerch straits. Further establishment of the status of waters of the Sea of Azov and Kerch Straits as historically internal must be done by the international community as a whole and at least recognized by all interested States.

Notoriety and acquiescence are interrelated in that standards for what constitutes acquiescence cannot be separated from the degree of notice that the claimant must provide.⁶³ This is mean that the other States must know about claiming the historic waters and to be aware about all legal acts which form the basis of a historic title.

The concept of acquiescence is controversial in international law. It can be expressed through "the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights"⁶⁴ or to mean that the foreign States "have simply been inactive".

Most scholars believe that toleration, not explicit consent, by the entire international community is needed to prove acquiescence. Toleration must be obtained as against all nations

⁶¹ Leo J. Bouchez "The regime of bays in international law", (1964), p. 254.

⁶² Charter of the United Nations of 26.06.1945, accessed 2019 March 13, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

⁶³ 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): 63.

⁶⁴ McGibbon, "The Scope of Acquiescence in International Law", in *British Year Book of International Law*, vol. 31 (1954), page 143.

because the normal maritime regime ascribes sovereignty over prescribed waters to *res communis*.⁶⁵

Nowadays, the Agreement 2003 regulates the status of the Sea of Azov and establishes that the Sea of Azov and the Kerch Strait historically are the internal waters of Ukraine and the Russian Federation. Some articles of that agreement violate the rights of third states. For example, article 2 establishes that merchant ships under the flag of third states may enter in Sea of Azov and pass the Kerch Strait, if they are proceeding to the Ukrainian or Russian port or returning from it.

However, it is worth remembering that through the Kerch Strait, the Azov Sea, the Don, Volga and Volga-Don Canal, passes the only possible waterway connecting the Black and Caspian Sea. It can be used as transit by the Caspian states (Azerbaijan, Kazakhstan, Turkmenistan and Iran) without alternative. Therefore, consolidation in the Agreement 2003 the permission for merchant ships under the flag of third countries to enter the Azov Sea and pass the Kerch Strait only if they are proceeding towards Ukrainian or Russian ports or are returning from it, is evident violation of rights of landlocked countries for access to the sea and the freedom of transit passage provided by article 125 UNCLOS.⁶⁶

Moreover, article 123 UNCLOS regulates the issue of cooperation of States bordering enclosed or semi-enclosed seas. Paragraph (d) establish the recommendation for States to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of the article.⁶⁷ Such figure of speech as 'as appropriate' reduces the significance of article 123 partly. In fact, it allows coastal states to prevent third countries, such as Caspian States, from interfering in the exercise of jurisdiction over the Sea of Azov and makes the treaty between Ukraine and Russia exclusively bilateral.

The Caspian States knew this order of affairs and understood that if the Azov Sea is recognized as the internal waters of Ukraine and Russia on historical basis, their right to freedom of navigation in the Azov Sea would be limited by the will of the coastal states and their jurisdiction. Also, they will not be able to enjoy the rights which are provided during the transit

⁶⁵ Leo J. Bouchez "The regime of bays in international law", (1964), p. 254.

⁶⁶ Анатолій Чернявський "International legal problems of determination of the status of the Sea of Azov and the Kerch Strait" ["Міжнародно-правові проблеми визначення статусу Азовського моря та Керченської протоки"], Правовий вісник Української академії банківської справи, 2012 - №2 – с. 89-92
https://essuir.sumdu.edu.ua/bitstream/123456789/58596/4/Cherniavskiy_Mizhnarodno_pravovi_problemy.pdf
accessed 2019 March 14

passage in the Kerch Strait. However, none of the Caspian states declared disapproval of the historical status of the Sea of Azov and the Kerch Strait.

Although it is wrong to say that consent of international community is obligatory required, there is no doubt that if one of the State react negatively to the peaceful and continuous implementation of coastal state of sovereignty, historical status cannot be formed.

The Statement about signing the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait was presented to the UN and no state has objection concerning status of such maritime zones. The President of the Russian Federation and the President of Ukraine adopted a Joint Statement to the UN, which confirmed once again that “The Sea of Azov and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation and the regulation of issues relating to this area is carried out by agreement between Russia and Ukraine in accordance with international law.”⁶⁸

Moreover, nowadays, States refer to Agreement on Cooperation, which established that that the Sea of Azov and the Kerch Strait historically are the internal waters of the signatory states, during the negotiation concerning current events.

Summing up these requirements and applying them to the question of the status of the Sea of Azov, we can come to the conclusion that the Sea of Azov fulfills the features of historic waters. Both Ukraine and the Russia Federation satisfy the condition of continuous character of exercising of authority. Furthermore, international community had no objection regarding the status of the Azov Sea. Moreover, it is not the continuity of the exercise of authority has more importance, but the simultaneous and equally activity of Ukraine and the Russian Federation in the Azov-Kerch maritime zone.

1.3.2. Multi-State bay as historic internal waters.

Now it is necessary to define whether it is possible to claim as historic internal waters the maritime area which is surrounded by more than one State.

⁶⁷ United Nations Convention on the Law of the Sea of 10 December 1982, accessed 2019 March 14 http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm

⁶⁸ “Спільна заява Президента України і Президента Російської Федерації щодо Азовського моря і Керченської протоки, Керч, 24 грудня 2003 року”, accessed 2019 March 14, http://zakon5.rada.gov.ua/laws/show/643_206.

Since the multi-State bays are the very similar from the geographical and legal point of view to the Sea of Azov, the one of the case which could be useful for the present research is *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) about the Gulf of Fonseca as an historic bay with three coastal states. The International Court of Justice made the following statements, which may be useful in comparison with the Sea of Azov.

First of all, the International Court of Justice 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.”⁶⁹

Farhad Talaie concluded that as there is no 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.⁷⁰

Secondly, the ICJ analyzed whether the Gulf of Fonseca could be considered “in terms of the modern law [. . .] “internal waters” and reached the conclusion that “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”.⁷¹

Thirdly, the joint use established by the ICJ does not affect some areas of this Gulf. 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. Also, there is 3-mile belt where these states must respect the existing rights of innocent passage. And only the waters at the center 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.⁷²

The reasons for this conclusion are the following:

- as to the historic character of the Gulf waters, the consistent claims of the three coastal States, and the absence of protest from other States;

⁶⁹ *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>

⁷⁰ Farhad Talaie, “Delimitation of Multi-State Bays in International Law of the Sea”, *University of Tasmanian Law Review*, 18, 1, (1999): 38.

⁷¹ *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>

⁷² *Ibid*, para. 432.

- as to the character of rights in the waters of the Gulf: those waters were waters of a single-State bay during the greater part of their known history. They were, during the colonial period, and even during the period of the Federal Republic of Central America not divided or apportioned between the different administrative units which at that date became the three coastal States of El Salvador, Honduras and Nicaragua. There was no attempt to divide and delimit those waters according to the principle of *uti possidetis juris*. A joint succession of the three States to the maritime area seems in these circumstances to be the logical outcome of the principle of *uti possidetis juris* itself.⁷³

Conclusions of the ICJ in this case give the ground for certain statements concerning the Sea of Azov. The Sea of Azov was claimed as internal waters for a long period of time before the collapse of the USSR. Those waters also were waters of a single-State bay during the greater part of history.

Consideration of the case by the ICJ allows defining clearly the limitations of the sovereignty of states and the avoidance of disputes between them. Also, the ICJ define that the amount of coastal states does not prevent from claiming the historical title over their adjacent waters. So, according to the fact that the Azov Sea previously were recognized as internal waters of the USSR, it does not matter how many states are bordering it now.

1.3.3. Comparison the status of the Bay of Piran with the Sea of Azov.

Before the collapse of the USSR and the formation of the newly independent states the legal status and the mode of use of the Sea of Azov and the Kerch Strait was not an issue since the entire sea belonged to one state - first the Ottoman Empire, then the Russian Empire and the Soviet Union. During the Soviet times all activities in this region were regulated exclusively by jurisdiction of the Soviet Union according to provisions of international law of the sea regarding the internal waters of coastal State.

In 1991, after the collapse of the USSR, the Azov Sea and Kerch Strait ceased to be within territory of one State and became bordered by two independent States - Ukraine and the Russian Federation. It was agreed in Agreement on Cooperation on the Use of the Sea of Azov

⁷³ Ibid, para 405.

and the Kerch Strait that the waters of the Azov Sea and the Kerch Strait are internal waters of Ukraine and Russia on the historic basis.

Now it is necessary to define whether the collapse of the USSR *per se* changed the status of the Sea of Azov or it could be qualified as historical internal water even without conclusion of the Agreement. For this purpose, it is appropriate to examine the Dispute between Croatia and Slovenia concerning the Bay of Piran.

The Bay of Piran was defined as internal waters of the Socialist Federal Republic of Yugoslavia (“SFRY”) in the same way as the Sea of Azov was proclaimed as internal waters of the USSR. Both Croatia and Slovenia are successor States to the “SFRY”. Ukraine and the Russian Federation are successor States to the USSR. According to the laws, Ukraine became a successor of the Ukrainian SSR and 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”.⁷⁴

Both Croatia and Slovenia have endorsed the application of the *uti possidetis* principle to the determination of their borders.⁷⁵ The principle of *uti possidetis juris* developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new States at the moment of independence and converting existing lines into internationally recognized borders.⁷⁶

The Tribunal decided that the Bay was internal waters before the dissolution of the SFRY in 1991, and it remained so after that date. The dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status.⁷⁷ Thus, the dissolution of the USSR *ipso facto* could neither have had an impact on different status of the Sea of Azov and on delimitation of this area.

Moreover, the Arbitral Tribunal in case concerning the Bay of Piran clarifies the possibility to claim the bay which surrounded by two States as a bay in the meaning of the UNCLOS. There is no uniform position to the status of multi-State bays. Some scholars support the idea that the disputable questions related with such waters should be decided by the states

⁷⁴ “Закон України Про правонаступництво України від 12.09.1991 № 1543-XII” accessed 2019 March 25, <http://zakon5.rada.gov.ua/laws/show/1543-12>.

⁷⁵ <https://pcacases.com/web/sendAttach/2172> p. 80 accessed 25 March 2019

⁷⁶ Malcolm N. Shawt The Heritage of States: The Principle of *Uti Possidetis Juris* Today - British Yearbook of International Law, Volume 67, Issue 1, 1996, Pages 75–154, <https://doi.org/10.1093/bybil/67.1.75> accessed 30 March 2019

⁷⁷ <https://pcacases.com/web/sendAttach/2172> - 883 - accessed 2019 March 25

themselves, while others believe that the delimitation of such bays are regulated by international law.

During the existence of the USSR, the Sea of Azov undoubtedly fulfilled the requirements for the bay under UNCLOS and belonged to internal waters of single State. Article 10 of UNCLOS relates only to bays the coasts of which belong to a single State. According to UNCLOS “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.”⁷⁸ Also, 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”.⁷⁹

Thus, there was no necessity to claim the Sea of Azov as historic before the collapse of the USSR as it definitely had the features of the bay.

The Tribunal in Case between Slovenia and Croatia stated that the limitation of the scope of application of article 10 (1) does not, however, imply that they exclude the existence of bays with the character of internal waters, the coasts of which belong to more than one State.⁸⁰

That is why dissolution of the USSR per se and the fact that is seized to be surrounded by the coast of a single State cannot change the status of the Sea of Azov if all the geographic and mathematic criteria set out in the provisions are met. Following the reasoning of the Tribunal, the Sea of Azov automatically qualifies as the internal waters of Ukraine and Russia even without the conclusion of 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.

⁷⁸ http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf accessed 30 March 2019

⁷⁹ “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): accessed 2019 March

⁸⁰ <https://pcacases.com/web/sendAttach/2172-884> - accessed 2019 March 25

2. DELIMITATION OF THE SEA OF AZOV

It was established in previous part that the Sea of Azov is internal waters of two States on historic basis. The Agreement between Ukraine and Russia on cooperation in the use of the Azov Sea and Kerch Strait envisages that the delimitation will be conducted with the consent of both States.⁸¹ The most significant disadvantage of the Agreement 2003 is extremely unsuccessful formulation of article 1, which does not contain criteria for delimitation. All rounds of negotiations concerning the delimitation were unsuccessful.

The delimitation is important for providing the opportunity of navigation through the internal waters without unjustified obstacles, whether by ships belonging to the littoral State not located at the entrance, or by foreign ships.⁸²

The position of Russia consists of granting the Azov Sea and the Kerch Strait the status of the internal waters of the two states and delimiting only the sea bed while leaving the water column with its leaving natural resources in common use. Moreover, from the very beginning, the Russian Federation considered the borders with CIS member states as internal and refused any discussions about their delimitation, stuffed with incompatible "partner relations" in the sense in which they understood by the Russian side.⁸³

Instead, the Ukrainian side continued to proceed on the assumption that the border method should comply with international standards. The delimitation should be made by the method of the median line and the principles of justice and proportionality.

Moreover, Ukraine insisted that the delimitation should be performed on the basis of the line of the administrative border that existed at the time of the Soviet Union between the Ukrainian SSR and the Russian SSR.

The Russian side denied the existence of an administrative border at the time of the Soviet Union between the former RSFSR and the Ukrainian SSR at sea.⁸⁴ Also, the Russian Federation has proposed using the example of Argentina and Uruguay in establishing the legal

⁸¹ "Договір між Україною і Російською Федерацією про українсько-російський державний кордон від 28.01.2003" – accessed 2019 April 16 - http://zakon1.rada.gov.ua/laws/show/643_157

⁸² <http://www.austlii.edu.au/au/journals/UTasLawRw/1999/3.pdf> accessed 25 March 2019

⁸³ Zhurzhenko T. "Ukraine's Border with Russia before and after the Orange Revolution"// Österreich Beundesheer. – 2005. – 28 p. -

http://www.bundesheer.at/pdf_pool/publikationen/ukraine_zerissen_zw_ost_u_west_m_malek_ukraines_border_t_z_hurzhenko.pdf

⁸⁴ Царьов Ю. О. Сучасний стан та перспективи договірно-правового оформлення морських кордонів України / Ю. О. Царьов. // Державне управління: удосконалення та розвиток. - 2011. - № 3. - Режим доступу: http://nbuv.gov.ua/UJRN/Duur_2011_3_3.

regime of the Gulf of Rio de la Plata, which is subject to the common sovereignty of the two states without the delimitation of the bay itself. It was unacceptable for Ukraine, because de facto Russia would control the entire area since they had a more powerful economic potential.

The delimitation of the water area under the conditions of Ukraine was not in line with the interest of Russia. After all, with such a delimitation, the proportion of the Russian part of the water area to the Ukrainian would have been 40 to 60. Russia sought to shift the line towards Ukraine in order to ratio to be 50 to 50. Russian diplomats were reluctant to agree on delimitation line because “the Russian-Ukrainian border should be the border of friendship, understanding and interaction. The border should not divide the nations of the two countries, and the creation of artificial barriers will interfere with communication, economic activity, especially in the border areas.”⁸⁵

As previously stated, Ukraine and the Russian Federation 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 decisions. In contrast, taking into account the example of Slovenia and Croatia dispute, it is important to point out that these States signed the Arbitration Agreement, which gives the Arbitral Tribunal the necessary jurisdiction to adjudicate this dispute.

Despite the fact that Ukraine was claiming that the line of administrative border did exist at the time of Soviet Union, unfortunately, the analysis of publicly available documents did not support this conclusion. Therefore, for the purposes of this thesis we will assume that there is no administrative boundary in the Sea of Azov.

Thus, taking into account, that there is no convention which would establish the rules applicable for delimitation of internal waters nowadays and that Ukraine and Russia did not reach agreement concerning delimitation despite numerous rounds of negotiation, it is essential to establish the delimitation line in accordance with customary law. Practice of other States, case law and the doctrine should be also referred to for the purposes of establishing such customary law.

⁸⁵ Zhurzhenko T. Ukraine's Border with Russia before and after the Orange Revolution// Österreich Beundesheer. – 2005. – 28 p. - http://www.bundesheer.at/pdf_pool/publikationen/ukraine_zerissen_zw_ost_u_west_m_malek_ukraines_border_t_z_hurzhenko.pdf

2.1. Methods of maritime delimitation used in international law

The question of delimitation is incredibly important for peace, security and economic well-being of States. However, conventional rules of international law of the sea do not contain the strict rules of delimitation of any maritime zone and leave it at the discretion of States.

First of all, it is necessary to examine the rules which are applied in the territorial sea. Article 15 of UNCLOS establishes that “where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

Article 74 and 83 of UNCLOS establish the brief rules of delimitation of the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts.

Article 74 suggest that “the delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.”⁸⁶

Article 83 provides the same rules for delimitation of the continental shelf.

During the Third Conference on the Law of the Sea in Montegoba in 1982, attention was paid to the issue of maritime delimitation of the exclusive economic zone and the continental shelf.

In the process of these negotiations, there was a division of states into two main groups with opposite positions. This opposition was due to the peculiarities of the economic, political, military situation of countries, their historical character in various marine spaces and other

⁸⁶ https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf accessed 2019 April 17

factors. Contradictions were expressed in various approaches to the concepts of principles, methods applicable in the delimitation of marine areas.

The first group, which included Great Britain, Spain, Italy, Canada, Sweden, Yugoslavia and other states, considered that the delimitation of the exclusive economic zone and the continental shelf between adjacent and opposite states should be carried out by agreement using the general principle of the median line or equal distance line considering all circumstances.

Another group, which included Argentina, Turkey, France and other countries, believed that the delimitation of the exclusive economic zone and the continental shelf should be carried out by agreements in accordance with the principle of equity, taking into account all significant circumstances.

Thus, the first group challenges the principle of equity, citing the fact that it was not sufficiently defined to be applied. The second group insisted that the median line is only a possible method, while justice and equity are the fundamental principles. Under special circumstances, both groups had in mind the specifics of the regions, historical rights, and the geological structure of the shelf. Compromise was achieved in article 74 and 83 of UNCLOS.⁸⁷

Even though there are specific articles relating delimitation of the territorial sea, the exclusive economic zone and the continental shelf, unfortunately the Convention is silent on delimitation of the internal waters. Thus, we need to analyze the customary law for clarify approaches which could be used for delimitation of internal waters.

The first principle which the customary law identifies is the necessity to effect the maritime boundary delimitation by agreement. The principle constitutes a special application of the general principle of peaceful settlement of international disputes and puts emphasis on a State obligation to negotiate in good faith with a view to conclude agreement.⁸⁸

The Chamber in the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) Case defined strictly that “what general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows:

⁸⁷ Аббаслы, Г. А. Делимитация международных морских пространств с противолежащими и смежными побережьями /Г. А. Аббаслы. //Вестник Московского университета : Серия 11, Право. -2003. - № 2. - С. 99 - 111

⁸⁸ Nudzar Dundua “Delimitation of maritime boundaries between adjacent States”

(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.”⁸⁹

This approach must be taken into account during conclusion of the treaties on borders between States and resolving disputes in case of their occurrence. The International Court of Justice, in resolving disputes over the state border, on a case-by-case basis made decisions on the basis of different principles. Every State has the right to propose methods of delimitation within the scope of international law during the negotiation process.

The common approach is possible to be developed and achieved on the basis of such principles of maritime delimitation as *uti possidetis*, *effectivités*, *proportionality* and *others*.

Uti possidetis is a principle of international law that relates to the transformation of the former administrative boundaries of one State into the international boundaries of newly formed independent states.⁹⁰ In turn, Croatia and Slovenia did not apply this principle as there was no relevant administrative boundary in the Bay of Piran during the existence of the Socialist Federal Republic of Yugoslavia to transform into an international frontier. Thus, the administrative boundary issue is important for *uti possidetis* principle to be applied. Since there is no boundary, the Tribunal shifted to the principle of *effectivités*.

The principle of *effectivités* developed in Croatia/Slovenia Arbitration concerning the Bay of Piran. It was stated that the conduct of administrative authorities, regulation of fisheries and police patrol are the evidences of effective exercise of territorial jurisdiction. The day-to-day activity of every State should be analyzed.

The next principle which is necessary to take into account is the principle of *proportionality*. The Chamber in case of the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) define that “a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally

⁸⁹ <https://www.icj-cij.org/files/case-related/67/067-19841012-JUD-01-00-EN.pdf> accessed 2019 April 17

⁹⁰ European Community: Declaration on Yugoslavia and Guidelines on the Recognition of New States. UN Doc S/23293, (1991) Annexes 1 & 2 // International Law Materials №31. 1992. P. 1485-1486, accessed 2019 May 09

certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction.”⁹¹ Thus, during the delimitation it should also be assessed whether the substantial disproportion to the lengths of the coasts has arisen.

Unfortunately, despite the fact that those principles are applicable, Ukraine cannot recourse to the compulsory dispute settlement procedure.

The delimitation of the borders after the collapse of the USSR became a priority for Ukraine. Achievement of delimitation would have demonstrated a strengthening of the formal attributes of national sovereignty. Nowadays, the regulation of delimitation of internal waters could be done just by the cooperation and consent of coastal States.

The Azov Sea plays an important role in relations between Ukraine and Russia. Powerful economic complexes of both countries with developed port infrastructure exists there. Both states are interested in the use of the natural resources of the Azov Sea, since it has both many valuable fish species and significant reserves of gas. The waterways of the Azov Sea can be integrated into advanced international transport communications.

The maritime delimitation process, although of a legal nature, is nevertheless determined by the political and economic interests of the states. This is confirmed by the fact that the principle of justice, in the opinion of the judge of the International Court of Justice V.M. Koretsky in the case of the Delimitation of the continental shelf of the North Sea between the Netherlands and Germany, is more political than legal in nature.⁹² The reasoning of a dispute by political reasons can lead to very dangerous consequences, for example, a dispute can overgrow into a military conflict.

In May 2008 the government delegations of Russia and Ukraine agreed on methods of determining the state border between Russia and Ukraine in the Azov Sea on the basis of the combination of methods of the median and equidistance lines. Later, the experts had to calculate the length of the coast of the Azov Sea in the Russian and Ukrainian side to determine the dividing line. But soon, the Russian side announced that this technique required further clarification and it did not agree with it.⁹³ The border line should be established in such a way

⁹¹ The Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) case, para 185, accessed 2019 April 17, <https://www.icj-cij.org/files/case-related/67/067-19841012-JUD-01-00-EN.pdf>

⁹² <https://www.icj-cij.org/en/case/51> accessed 30 March 2019

⁹³ Serbenko Nadia. “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/>.

that most of the Sea of Azov is Ukrainian territory and the smaller area by virtue of geographical data should belong to Russia.

It would seem that an important step in this context was the signing on the 17th of May 2010 of the Agreement between Ukraine and the Russian Federation “On the Demarcation of the Ukrainian-Russian State Border” (came into force July 29, 2010⁹⁴) which provided for formation of the Joint Ukrainian-Russian Demarcation Commission.

Nowadays, the Azov Sea is surrounded by two States who exercise full sovereignty and jurisdiction over this area. Foreign vessels and states are deprived of all rights and freedoms that they would otherwise enjoy in the territorial sea or the exclusive economic zone of another state. Since today the maritime boarder on the Azov Sea is not established and the baselines are not defined. It means that the Russian warships may be as close as one meter to the coast of Ukraine. Moreover, the danger is that in the question of the delimitation of the state border line in the Sea of Azov, Russia proceeds from the fact that Crimea belongs to it

The UNCLOS establishes the access to dispute settlement procedures in case of disagreements. However that does not mean that every delimitation dispute is certainly subject to judicial settlement. Article 298 allows reservations in case of delimitation dispute. A flexible and “soft” system of norms allows the parties to resolve the dispute not only to resort to a convention, but also to agreements concluded between them. It is worth noting that the parties can take into account the practice of the court on this issue and apply the methods used by the tribunal when deciding on the issue of delimitation.

The recourse to the compulsory dispute settlement procedure is not possible in case of delimitation of the Sea of Azov. Russia and Ukraine both have made declarations under Article 298 of UNCLOS that excluded any sea boundary delimitation disputes from the compulsory procedures entailing binding decisions.⁹⁵ Thus, delimitation in the Sea of Azov and the Kerch Strait could only be achieved by mutual agreement of Ukraine and Russia.

⁹⁴ Угода між Україною і Російською Федерацією про демаркацію українсько-російського державного кордону, accessed 2019 April 26 https://zakon.rada.gov.ua/laws/show/643_365

⁹⁵ “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

However, for the purposes of preparing for the further negotiations between Ukraine and Russia concerning the delimitation and for supporting the position of Ukraine, it is necessary to understand the precise scope of the principles that could be applicable.

2.2. Principle of *effectivités*

Due to the absence of conventional norms on delimitation of internal waters it is necessary to look for the similar precedence in the International Courts. The dispute between Slovenia and Croatia concerning the Bay of Piran has a lot of common features with the Sea of Azov.

For many years, Croatia and Slovenia, the former countries of the Socialist Federal Republic of Yugoslavia (“SFRY”), have been arguing about the maritime boundary line in the Bay of Piran. The parties could not overcome differences since 1991, when both republics of the former Yugoslavia declared independence. Croatia insisted on holding the border in the middle of the bay, and Slovenia fear that, as a result, access to the international waters will in fact be closed to it and declared its rights to the whole Bay of Piran.

On 4 November 2009, the Prime Ministers of Croatia and Slovenia signed an Arbitration Agreement, by which Croatia and Slovenia submitted their territorial and maritime dispute to arbitration. The Arbitration Agreement⁹⁶ was subsequently ratified by Croatia and Slovenia in accordance with their respective constitutional procedures.⁹⁷

The case concerning the Bay of Piran was the first one which clarified the method to be applied for the delimitation of internal waters of two States. There was no formal division of the Bay prior to the dissolution of the “SFRY”. In the same way, there was no administrative boundary in the Sea of Azov between Ukraine and Russia during the USSR. That is why the Tribunal did not apply the *uti possidetis juris* principle and applied the method of *effectivités* at the date of independence.

In the present case, the Parties agree that there had been no formal division of the Bay between the two Republics prior to the dissolution of Yugoslavia and that they inherited no legal title from that time. They also agree that no condominium had ever been established in the Bay. Delimitation must thus be made on the basis of the *effectivités* at the date of independence. Both

⁹⁶ Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, done in Stockholm on 4 November 2009, Annex HRLA-75 / Annex SI-395.

⁹⁷ <https://pca-cpa.org/en/cases/3/> accessed 25 March 2019

Parties invoke various *effectivités*, mainly relating to regulation of fisheries and police patrol. On those bases, Slovenia submits that it exercised exclusive jurisdiction over the whole of the Bay which must be considered as Slovenian territory. In contrast, Croatia contends that it exercised jurisdiction over the south-west half of the Bay and that Slovenia exercised jurisdiction over the other half. The Bay must thus be shared along the median line.⁹⁸

Parties recognized that the criterion for the determination of the boundary was the municipal law applicable during the time of the SFRY, and not what was called the “practical” boundary, such as the allocation of public services, that is to say, what “persons in some locations treat as the boundary for day-to-day purposes”⁹⁹ (*effectivities*).¹⁰⁰

The Tribunal analyzed the level of exercising of authority in the Bay by Slovenia and Croatia before their independence. After researching the various *effectivités*, the Tribunal came to such way of delimitation as it is illustrated on the following map.

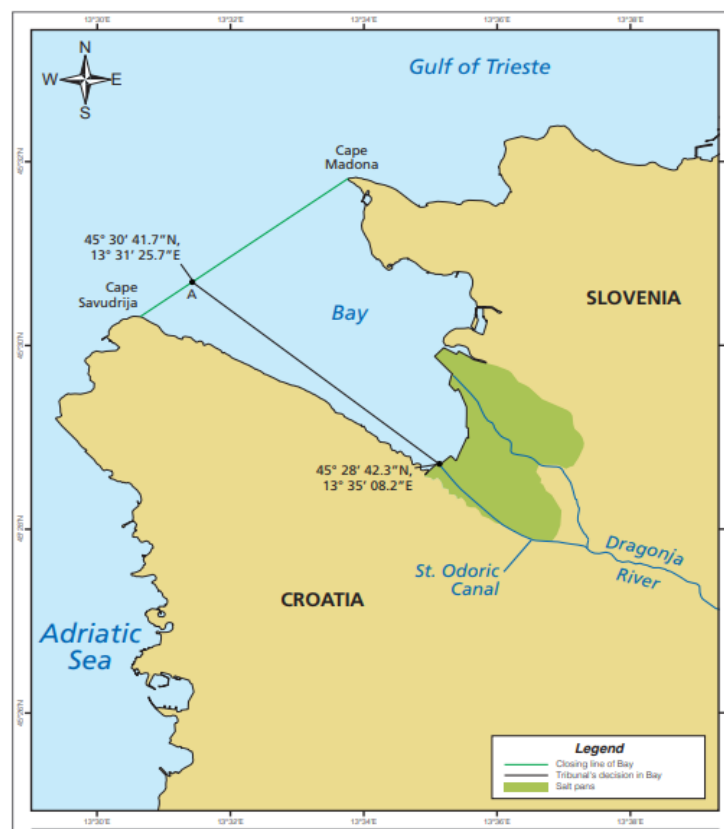


Table No. 3 The map of the Bay of Piran ¹⁰¹

⁹⁸ Ibid.

⁹⁹ Croatia/Slovenia Arbitration, para. 338, accessed 2019 April 10, <https://pcacases.com/web/sendAttach/2172>

¹⁰⁰ Research Handbook on Territorial Disputes in International Law, Marcelo G. Kohen, Mamadou Hébié, accessed 2019 April 10, <https://www.e-elgar.com/shop/eep/preview/book/isbn/9781782546870/>

¹⁰¹ <https://pcacases.com/web/sendAttach/2172> - 86 - accessed 2019 April 16

This method theoretically could be used for delimitation of boundary in the Sea of Azov taking into account the lack of agreement between Ukraine and Russia. It is necessary to analyze the relations between Ukraine and the Russian Federation before and after the dissolution of the USSR and to take into account how jurisdiction in the Sea of Azov divided.

The official status of the internal waters of the Sea of Azov and the Kerch Strait was confirmed one more time when the list of geographical coordinates of the points determining the position of the baselines for the width of the territorial waters, the economic zone and the continental shelf was established by a Decree of the Government of the USSR of 15 January 1985.¹⁰² All waters delimited by this line were declared the internal waters of the USSR in which the jurisdiction of one state was exercised.

Adjustment of activities in the area of the Sea of Azov and the Kerch Strait was regulated on the principles of cooperation and friendship through conclusion of treaties and establishment of common institutions in various spheres. It is possible to analyze the activities of States after the dissolution of the USSR, as there is not enough official data in free access on the exercising of jurisdiction under the Sea of Azov before collapse of the USSR.

The regulation of fishing in the Sea of Azov is carried out by the Ukrainian-Russian Fishery Commission. The agreement between the State Committee of Ukraine on Fisheries and the Fish Industry and the Committee of the Russian Federation on Fisheries on fisheries in the Sea of Azov has been in force since September 14, 1993. During the meeting of the Commission, issues relating to the assessment of the status of water resources and fishing quota allocation are reviewed.¹⁰³

Both Ukraine and the Russian Federation adopted the laws concerning the rules of fishing. In February 1999, the Decree of the State Committee for Fisheries of Ukraine approved the Rules of Amateur and Sports Fisheries.¹⁰⁴ The provisions of this Decree said that “the area of the Fisheries Rules covers the areas of Azov” without clarification of coordinates. The Ministry of Agriculture of the Russian Federation, in turn, by Decree of August 1, 2013, approved Fishing

¹⁰² Постановление Совета Министров СССР от 7 февраля 1984 г. и от 15 января 1985 г., цит. по «Морское законодательство РФ», ГУНиО МО РФ, № 9055.1. С. 54.

¹⁰³ Alexander Yankovsky “Fishing during the annexation: the work of the Ukrainian-Russian Commission in the Sea of Azov” [“Рыбалка во время аннексии: о работе украинско-российской комиссии в Азовском море”], October 25, 2018, <https://ru.krymr.com/a/rybalka-vo-vremia-anneksii-rossiya-ukraina-azov-krym/29563070.html> accessed 2019, March 31

¹⁰⁴ “Про затвердження Правил любительського і спортивного рибальства”, accessed 2019 April 01, <https://zakon.rada.gov.ua/laws/show/z0269-99>

rules for the Azov-Black Sea fishery basin.¹⁰⁵ It establishes, “the Azov-Black Sea Fishery Basin includes the Black and Azov Seas with basins of the rivers flowing into them and all water bodies of fishery importance.” Thus, both States extend their regulations to the whole territory of the Sea of Azov without delimitation.

The problem of pollution is also exists in the Sea of Azov and cooperation in this area is intensive. Both Ukraine and the Russian Federation participated in development and implementation of protection measures

In 2001, the Verkhovna Rada of Ukraine approved the law “The State Program for the Protection and Restoration of the Black and Azov Seas”¹⁰⁶. This comprehensive document includes a description of goals and objectives, priorities, an action plan and a timeline, responsible government agencies, a budget assessment, and financial sources. According to the law, the Ministry of Environment Protection of Ukraine is responsible for monitoring and coordinating actions aimed at achieving the objectives of the Program.

The program provides for international cooperation, first of all, with Russia in protecting and recreating the environment of the Sea of Azov. It is also planned to develop a joint Ukrainian-Russian comprehensive program protection and reproduction of the environment of the Sea of Azov with the participation of the government bodies.

It is interesting to highlight the investigation of pollution with heavy metals by Russian scientists. Researching was carried out for the concentration of lead, copper and zinc in water.

¹⁰⁵ “Приказ Министерства сельского хозяйства Российской Федерации от 1 августа 2013 г. N 293 г. Москва "Об утверждении правил рыболовства для Азово-Черноморского рыбохозяйственного бассейна", 2019 April 01, <https://rg.ru/2013/11/18/pravila-site-dok.html>

¹⁰⁶ “Про затвердження Загальнодержавної програми охорони та відтворення довкілля Азовського і Чорного морів”, 22 March 2001, accessed 2019 March 31, <https://zakon.rada.gov.ua/laws/show/2333-14>



Рис.1. Схема отбора проб воды в 2010-2014 гг.
Fig.1. Water sampling in the period of 2010-2014

Under the selection scheme (provided above), we can assume the area of Russia's most intensive activity.¹⁰⁷ However, research in these regions demonstrates only an approximate distribution of jurisdiction.

The question of navigation in the Sea of Azov is also regulated by the cooperation of Ukraine and the Russia Federation. On November 17, 2007 Maritime Administrations of the Ukrainian and Russian sides signed the Provisional Regulations on the Procedure for passing ships in the Kerch Strait. According to this rules, the parties should exchange data on weather forecasts and storm warnings for informing ships and, upon receiving a storm warning twice a day. Respectively, the control functions are carried out by the captains of the Kerch Sea Commercial Port (Ukraine) and the "Caucasus" port (the Russian Federation) in their areas of responsibility.¹⁰⁸

In 2012 the relations in the sphere of safety of navigation have developed. The Government of Ukraine and Russia signed the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on measures to ensure navigation safety in the Azov Sea and the Kerch Strait. It establishes the common efforts and concerned actions of both States.

¹⁰⁷ Marina V. Bufetova "Pollution of the Sea of Azov with heavy metals", *SOUTH OF RUSSIA: ECOLOGY, DEVELOPMENT* Vol.10 no.3 2015, 2019 March 31, <https://cyberleninka.ru/article/v/zagryaznenie-vod-azovskogo-morya-tyazhelymi-metallami>

¹⁰⁸ "The Temporary Regulation on the procedure for passing ships in the Kerch Strait has been signed" ["Підписано Тимчасове положення про порядок проходження суден в Керченській протоці"], 19 November 2007, 2019 April 01, <https://daily.rbc.ua/ukr/show/podpisano-vremennoe-polozhenie-o-poryadke-prohozhdeniya-sudov-v-kerchenskom-prolive-1195486429>

As a result of analysis, we can make a conclusion that, unfortunately, there are no available *effectivities* at this point on the basis of which we could definitely draw the delimitation line based just on this principle. Considering the lack of official data on the existence of an administrative border in the Sea of Azov during the USSR and recognizing the absence a precise distribution of jurisdictions in the Sea of Azov between Ukraine and the Russian Federation, there is no possibility to apply the principle of *effectivities* in the Sea of Azov in the same way as it was in case of Bay of Piran.

2.3. Principle of proportionality

Having in mind that we cannot apply the principle of *effectivities* in the Sea of Azov we need to look into the other principles that could be used in delimitation process between Ukraine and Russia. The vital interests of Ukraine and the Russian Federation should be taken into account to apply the principle of proportionality and the principle of good neighborly relations. The interpretation of such principles were not incorporated into provisions of conventions, but are established in customary law as demonstrated by the case law and doctrine.

The question of delimitation of sea areas remains one of the most difficult in practice and not fully resolved in the doctrine. Nevertheless, the interest of States and the specialties of the maritime area should be taken into account.

We do not have many Courts decisions that would list the principles of delimitation of internal waters. But the case law, which deals with the delimitation of other zones on the basis of the customary law, could be useful for development of approach of delimitation of internal waters.

Actually, scholars have observed in relation to the territorial sea, the exclusive economic zone, and the continental shelf that “they all seem to be delimited by common principles regardless of their differing legal nature and legal regime.”¹⁰⁹ It could be also presumed, that the legal nature of internal waters is very similar to the territorial sea, as both of it maritime areas could be qualified as a territory of a State.

The practice of the UN International Court of Justice and international arbitration has shown that geographic factors play a predominant role in delimiting the sea's areas between states. Most often, this is the difference in the length of the relevant coasts of the parties and the

presence of islands. Relevant circumstances that do not relate to geographic factors may potentially include the security concerns, conduct of States, and access to fish resources.

For example, the International Court of Justice in disputes between Libya and Tunisia¹¹⁰ (1982), Denmark and Norway¹¹¹ (1993) made a decision on the delimitation of disputed areas not in accordance with median line, but taking into account the proportionality of the extent of the coasts of the parties.

Now it is necessary to analyse the possibility to apply the principle of proportionality to delimit the Sea of Azov. There was no precedent where the States used such method to delimit their internal waters. That is why it is reasonable to take into account the practice of Arbitral Tribunal.

The Tribunal applied the proportionality rule in such disputes as *Peru v. Chile*, *Romania v. Ukraine*, *Nicaragua v. Colombia*. The methodology which the Court usually employs in seeking an equitable solution involves three stages. In the first, it constructs a provisional equidistance line unless there are compelling reasons preventing that. During the second stage, it considers whether there are relevant circumstances which may call for an adjustment of that line to achieve an equitable result. During the third stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted, is such that the Parties' respective shares of the relevant area are markedly disproportionate to the lengths of their relevant coasts.¹¹²

This convergence of the principles applicable to the territorial sea and to other maritime zones is further evidenced by the fact that a maritime boundary may separate adjacent maritime zones of different juridical character, such as the territorial sea of State A and the exclusive economic zone of State B.¹¹³

Thus, it could be presumed that such methodology could be used for delimitation of internal waters also. States should access all relevant features to leave each Party with maritime areas that are proportionate when compared with the lengths of their relevant coasts. The formula which could be used for the application of the principle of proportionality is the greater the

¹⁰⁹ C. Yacouba & D. McRae, "The Legal Regime of Maritime Boundary Agreements," in *International Maritime Boundaries*, Vol. V, p. 3281 at p. 3920 (D.A. Colson & R.W. Smith eds., 2005).

¹¹⁰ <https://www.icj-cij.org/en/case/63>

¹¹¹ <https://www.icj-cij.org/en/case/78>

¹¹² <https://pcacases.com/web/sendAttach/2172> – para. 999 – accessed 2019 April 19

¹¹³ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61 at p. 73, para. 26. Cf., D. Colson, "The Legal Regime of Maritime Boundary Agreements", in *International Maritime Boundaries*, Vol. I, p. 41 at pp. 43-44 (J.I. Charney and L.M. Alexander eds., 1993).

length of the coastline, the larger water area, over which establishes the sovereignty of the state. Moreover, the estuaries could extend the coastline.

Nevertheless, taking into account the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) case, the Chamber considered that “in certain circumstances, the appropriate consequences may be drawn from any inequalities in the extent of the coasts of two States into the same area of delimitation”. It then further elaborated on this point by stating “[...] that to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for a delimitation, or a method that can be used to implement such delimitation. [...] The Chamber’s views on this subject may be summed up by observing that a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction.”¹¹⁴

Thus, the principle of proportionality is not the basis itself, but it is used as a measure to check whether the delimitation already achieved is equitable. During the delimitation it should also be assessed whether the substantial disproportion to the lengths of the coasts has arisen.

The analysis of the geographical situation (in particular the length of the coastline of Ukraine and Russia in the Sea of Azov) and the principles and norms of marine delimitation (in particular the application of the principle of proportionality) creates the legal basis for Ukraine to claim a larger area in the Sea of Azov. At the same time, different technical options for measuring the length of the coastline of both states in the Sea of Azov were taken into account.¹¹⁵ The publicly available documents contain the information that Ukraine owns 70 per cent of the Sea of Azov coastlines, thus it would be entitled to a larger share of the Sea than the Russian Federation under the 12 nautical mile coastal element of the UNCLOS treaty.

Considering the fact that there are no conventional rules applicable for delimitation of internal sea waters, Ukraine and Russia should apply *mutatis mutandis* the customary law established for delimitation of other maritime zones, namely the principle of proportionality.

¹¹⁴ The Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) case <https://www.icj-cij.org/files/case-related/67/067-19841012-JUD-01-00-EN.pdf> para 185, accessed 2019 April 17

¹¹⁵ Трюхан, М. Релевантні обставини : визначення протяжності берегової лінії північно-західної частини Чорного моря / М. Трюхан // Зовнішні справи. - 2008. - № 9. - С. 33-36

3. RECENT COURSE OF EVENTS

Having in mind the recent developments of relations between Ukraine and the Russian Federation, it is necessary to examine the possibility of termination of the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait and its consequences. In addition, it is necessary to review the possibility of establishment of the median line in the Sea of Azov unilaterally.

Historically, the Sea of Azov was the internal waters of the Russian Empire, and then the USSR, which provided a formal basis for the conclusion in 2003 of the Agreement between Ukraine and the Russian Federation on cooperation in the use of the Azov Sea and the Kerch Strait 2003.

However, there are the opinions of politicians, who believed, that the actions of Ukraine after the dissolution of the USSR and its draft laws gave the weighty grounds to suppose the quite serious intentions to establish in the Azov Sea the regular maritime zones in accordance with the norms of UNCLOS. The Law 'On the State Border of Ukraine' 1991, Cabinet of Ministers of Ukraine adopted Resolution 'On Priority Measures for the Legal Formation of the State Border and its Further Settlement' 1993, 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 1998, the Law 'On the Exclusive (Maritime) Economic Zone of Ukraine' 1995, Draft Law 'On Inland Waters, the Territorial Sea and the adjacent zone of Ukraine' 2002 demonstrated the attempts of Government to establish international status of the Sea of Azov.

Nevertheless, based on the Bay of Piran case, we have to conclude, that even if the Agreement 2003 was not concluded, still the Sea of Azov would have remained the internal waters irrespective of the actions of Ukraine after the dissolution of the USSR.

International law allows States to establish independently territorial waters up to 12 nautical miles along their coasts. In this case, the external side of these territorial waters is recognized as a line of state border. And just in the process of negotiations should be discussed the delimitation of the exclusive economic zone and the continental shelf. Ukraine did not use this right and instead signed the agreement in 2003.

As it was mentioned above, this Agreement was concluded under pressure of the Russian Federation - as evidenced by the conflict around the island of Tuzla. In the legal plane, it could even be presumed that the circumstances of the Agreement 2003 are relevant to the possibility to declare the treaty void, as in accordance with art. 52 Vienna Convention on the

Law of Treaties 1969 “its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations”.¹¹⁶ However, the ratification of Agreement by Ukraine makes it extremely unlikely to refer to the circumstances of its conclusion in the context of the application of the said article of the Vienna Convention on the Law of Treaties of 1969.

After that, Ukraine more than once considered changing the international legal status of the Sea of Azov. Thus, on June 2006, the first deputy minister of Foreign Affairs of Ukraine A. Buteyko insisted that the Sea of Azov border line be identified according to the norms of international law. The Russian Government rejected that the sea could have all regular maritime zones under UNCLOS and instead called on Ukraine to abide by an agreement signed by the previous Ukrainian Government in December 2003.¹¹⁷ The reason for this is since proportion of Ukraine’s coastline on the Sea of Azov amounts to 70 per cent, it would be entitled to a larger share of the Sea than the Russian Federation under the 12 nautical mile coastal element of the UNCLOS treaty. While under the Agreement the Sea of Azov was designated ‘internal waters’ of Russia and Ukraine, which are jointly managed and not regulated by international law.

As it was decided above, Article 4 of the Agreement 2003 provides that all disputes between Ukraine and Russia arising from the application of the treaty must be resolved "through consultation and negotiation, as well as other peaceful means of choice of the parties". This means that Ukraine has the right to recourse to international courts only if Russia agrees to this. 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 decisions.

3.1. The violations of international law by the Russian side

In 2014, Russia had annexed the Crimean Peninsula, which is dominantly internationally recognized as Ukrainian territory. It later constructed the Kerch Bridge across the strait. The Kerch Bridge’s construction in 2016 by Russian was criticized by many States and should be qualified as illegal. Moreover, the bridge is being used by Russia as part of a hybrid blockade of Ukrainian ports in the Azov Sea, and that Russian inspections of ships have risen sharply since the bridge opened in May 2018, with some reportedly being forced to wait

¹¹⁶ Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969, accessed 2019 May 13. <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

¹¹⁷ “Украина предлагает сделать Азовское море международным.”, accessed 2019 March 05, <http://lenta.ru/news/2006/06/06/sea>

between three and seven days before being allowed through.¹¹⁸ Under the Agreement 2003, both Russia and Ukraine have the right to inspect vessels sailing into or out of the Sea of Azov. But actually, the increase of inspections by the Russian coast guard following the opening of the bridge represents an abuse of that right.

On 19 February 2018, Ukraine filed a Memorial with the UNCLOS Tribunal establishing that Russia has violated Ukraine's sovereign rights in the Black Sea, Sea of Azov, and Kerch Strait. Ukraine's Memorial showed 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."¹¹⁹

The Sea of Azov as a whole, without separation into Russian and Ukrainian parts, could be defined from the point of view of international law - according to Part IX of the UN Convention on the Law of the Sea of 1982, the Sea of Azov is "closed or semi-closed the sea". The historical status of the Sea of Azov does not exclude the application of those provisions.

The clear definition of enclosed sea we can find in provisions of UNCLOS. Namely, part IX of the Convention is devoted to this type of sea. Article 122 define that for the purposes of this Convention, "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 or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.¹²⁰

From this definition we can distinguish such features of enclosed or semi-enclosed sea:

- surrounded by two or more States
- 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

¹¹⁸ Fisher, Jonah (27 November 2018). "Why Ukraine-Russia sea clash is fraught with risk". BBC News. Accessed 2019 March 02, <https://www.bbc.com/news/world-europe-46345853>

¹¹⁹ "Statement of the MFA of Ukraine on the Jurisdiction Phase of Proceedings in its Case Under UNCLOS Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait", 31 August 2018, accessed 2019 March 05, <https://www.kmu.gov.ua/en/news/zayava-ministerstva-zakordonnih-sprav-ukrayini-shchodo-yurisdikcijnoyi-stadiyi-provazhennya-u-spravi-shchodo-prav-priberezhnoyi-derzhavi-v-chornomu-ta-azovskomu-moryah-ta-u-kerchenskij-protoci-ukrayina-proti-rosijskoyi-federaciyi> accessed on 02 March 2019

¹²⁰ Chapter XXI, United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, accessed 2019 April 26, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en

The Sea of Azov fully satisfies the requirements for “enclosed or semi-enclosed sea” as it 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.¹²¹

The text of the Convention does not contain provisions regarding the legal status or legal regime of enclosed or semi-enclosed seas, which suggests that only the coastal states establish an appropriate regime by concluding international treaties taking into account their interests and generally accepted norms of international law.

That is why Part IX of UNCLOS contains article which provides necessity of cooperation of States bordering enclosed or semi-enclosed seas with each other in the exercise of their rights and in the performance of their duties under 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.

Part IX is supplementary norms to all the general provisions.

Each state in those “enclosed or semi-enclosed seas” does have the regular maritime zones however in addition to the general obligation it has also the obligation to cooperate with each other in the forms and directions specified in the Convention. For example, the neighboring States have to cooperate with each other in protection and preservation the marine environment (article 192 of UNCLOS). Under Article 235 “states are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment”.

Thus, the provisions of UNCLOS require Ukraine and the Russian Federation certain conduct towards one another despite the Agreement between them. The violations of such behavior which prescribed by Part IX UNCLOS by Russia can be resulted in impositions of certain sanctions by Ukraine and other European States.

¹²¹ Тимур Короткий, “Теоретичні проблеми еволюції правового статусу і режиму Азовського моря,” *Актуальні проблеми політики: Збірник наукових праць* 39 (2010): 429, accessed on 2019 March 02, <http://dspace.onua.edu.ua/bitstream/handle/11300/452/Korotkiy.pdf?sequence=1&isAllowed=y>

Olena Zerkal, Deputy Minister of Foreign Affairs of Ukraine for the European Integration, states that Ukraine should prove in international arbitration such statements:

- The actions of the Russian Federation in the Kerch Strait and the Black Sea are the use of force on the territory of Ukraine, which violates the basic rule of international law enshrined in Article 4, paragraph 2, of the UN Charter.
- The actions of the Russian Federation that took place in the territorial sea of Ukraine in the Black Sea and the Kerch Strait are the usurpation of the sovereign rights of Ukraine, guaranteed by Article 2 of the UN Convention on the Law of the International, to which Russia is a party.
- The conduct of the Russian Federation is a violation of the freedom of navigation. Articles 38 and 44 of the UN Convention on the Law of the Sea strictly prohibit the obstacle of peaceful transit through the Kerch Strait. It should be added that the Russian Federation, by its actions, confirms the insignificance of bilateral agreements concerning the Kerch Strait and the Sea of Azov, since the Russian Federation did not have or intends to adhere to them.
- In accordance with the UN Charter, Ukraine will seek ways of peaceful settlement of the dispute, as provided for in Article 33 of the Statute, and reserves the right to apply the right to self-defense, as defined by Article 51 of the Charter.¹²²

Now the Tribunal is hearing Ukraine's case against the Russian Federation under the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"). Rather than respond to the merits of Ukraine's case, the Russian Federation filed objections to the jurisdiction of the UNCLOS Tribunal on 22 May 2018, as permitted by the Tribunal's rules of procedure. As is common practice in inter-state disputes, the UNCLOS Tribunal has elected to hear these objections in a preliminary phase of the proceedings, before hearing the case on the merits.¹²³

On July 2018, draft law on denunciation of Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait, 2003, was registered in Verhovna Rada of Ukraine with proposition of further delimitation in the Azov Sea.¹²⁴

¹²² Olena Zerkal "Aggression on Azov: What will Ukraine prove in international courts?"// Юридичний вісник України – 2018 - №48 – с. 13

¹²³ "Statement of the MFA of Ukraine on the Jurisdictional Phase of Proceedings in its Case Under UNCLOS Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait", 31 August 2018, accessed 2019 March 05, <https://mfa.gov.ua/en/press-center/news/66927-zajava-ministerstva-zakordonnih-sprav-ukrajini-shhodo-jurisdikcinoji-stadiji-provadžhennya-u-spravi-shhodo-prav-priberezhnoji-derzhavi-v-chornomu-ta-azovsykomu-mori-ta-u-kerchenskyj-protoci-ukrajina-proti-rosijskoji-federaciji>

¹²⁴ "Проект Постанови про Звернення Верховної Ради України до Президента України, Міністра оборони України стосовно Договору між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки, 8583 від 10.07.2018", accessed 2019 March 05, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64400

On September 21, 2018 Pavlo Klimkin, Minister of Foreign Affairs of Ukraine, declared "Of course, we all understand that Azov is not an internal, but a territorial sea. To this we must come. But now international arbitration is examines the claim regarding the violation by Russia of Ukraine's rights both in relation to the Black Sea, the Sea of Azov, the Kerch Strait and the illegal construction of the Crimean Bridge. In order not to threaten these proceedings, as well as other processes, both legal and political, I deliberately do not speak about the plans - they are coordinated, they are".¹²⁵

The Kerch Strait Incident is one of the most serious confrontations of the almost 5-year long conflict between Ukraine and the Russian Federation. It occurred on 25 November 2018 when the Russian Federal Security Service (FSB) coast guard fired upon and captured three Ukrainian Navy vessels attempting to pass from the Black Sea into the Sea of Azov through the Kerch Strait on the way to the port of Mariupol.¹²⁶

The Russian coast guard said they repeatedly asked the Ukrainian vessels to leave what they referred to as "Russian territorial waters". They said that the vessels had not followed the formal procedure for passage through the strait, that the Ukrainian ships had been manoeuvring dangerously, and that they were not responding to radio communications. Ukraine said that it had given advance notice to the Russians that the vessels would be moving through the strait, that the ships had made radio contact with the Russians, but received no response, and cited the 2003 treaty against the assertion that the ships had entered Russian territorial waters.

The Russians tried to halt the Ukrainian ships, but they continued moving in the direction of the bridge. As they neared the bridge, the Russians authorities placed a large cargo ship under it, blocking their passage into the Azov Sea. The Ukrainian ships remained moored in the strait for eight hours, before turning back to return to port in Odessa. The Russian coast guard pursued them as they left the area, and later fired upon and seized the vessels in international waters off the coast of Crimea.

Three Ukrainian crew members were injured in the clash, and all twenty-four Ukrainian sailors from the captured ships were detained by Russia.¹²⁷

The conflict on 25 November 2018 could be the precondition for termination of Agreement 2003 and for sanction against the Russian Federation.

International community expressed support to the Ukrainian side. Thus, on an emergency meeting of the United Nations Security Council called by Russia on 26 November,

¹²⁵ "Klimkin announced the termination of the agreement with Russia on the Sea of Azov", 2019 February 21, accessed 2019 March 05, <https://ukraina.ru/news/20190221/1022769935.html>

¹²⁶ "Tension escalates after Russia seizes Ukraine naval ships", 26 November 2018, accessed on 2019 March 02, <https://www.bbc.com/news/world-europe-46338671>

United Nations dismissed by seven votes to four Russian proposal and the question of the "violation" of its borders by the Ukrainian Navy.

Ukraine also called for an emergency meeting of the UN SC over what it described as the "attack" of Russia. This was confirmed by US Ambassador to the UN Nikki Haley. She recalled that her country along with European Union member States and many others have for years imposed sanctions against the Russian Federation for its unacceptable conduct in Ukraine. The events on 25 November are part of a pattern of abuses by Moscow, further stoking a conflict which has already claimed the lives of tens of thousands of people and which "shows no sign of decreasing". Emphasizing that Ukrainian ships set sail on 25 November from one Ukrainian port to another via the Kerch Strait, she said the Russian Federation decided to prevent their passage, rammed them and opened fire. "This is no way for a law-abiding, civilized country to act," she stressed, describing such behavior as "an arrogant act that the international community must condemn". The United States will continue to stand with Ukraine and expects the European Union to lead efforts to resolve the situation through the Normandy format. Meanwhile, Moscow must de-escalate the tensions it has created. "The United States would welcome a normalized relationship with [the Russian Federation]," she said, but such outlaw actions make that impossible. Noting that Washington, D.C. will maintain the sanctions currently imposed against Moscow, she said such actions as the ones on 25 November will only serve to sour that relationship.¹²⁸

Condemning the Russian Federation's deplorable use of military force against Ukrainian ships, Jonathan Guy Allen Deputy Permanent Representative of the United Kingdom said the building of the Kerch Bridge and the events on 25 November continue to violate Ukraine's sovereignty and try to destabilize the Ukrainian economy.

France's Representative Anne Guegue said that the Russian Federation must respect the right to free passage in the Kerch Strait and pledged further work by the European Union to de-escalate tensions in eastern Ukraine, stressing that adherence to the Minsk agreements are the only way forward towards a peaceful resolution to the conflict.

European Union also responded to the incident and in Resolution 433 of 12 December 2018 condemned Russian aggression in the Kerch Strait, demanded the release of all Ukrainian vessels and sailors. The resolution calls on the EU and its member states to introduce targeted

¹²⁷ "Kerch Strait incident", accessed 2019 March 02, https://en.wikipedia.org/wiki/Kerch_Strait_incident

¹²⁸ "Top Political Official Urges Restraint from Ukraine, Russian Federation in Emergency Security Council Meeting on Seized Ukrainian Vessels", 26 November 2018, accessed 2019 March 02, <https://www.un.org/press/en/2018/sc13601.doc.htm>

sanctions against Russia if the Ukrainian servicemen are not released and if there is any further military escalation.¹²⁹

Such actions of the Russian Federation demonstrate the aggression and violation of the United Nations Convention on the Law of the Sea 1982 and Agreement between Ukraine and the Russian Federation 2003.

According to the Article 2 of the Agreement, merchant vessels and navy vessels, as well as other government vessels, sailed under the flag of Ukraine or the Russian Federation, which are operated for non-commercial purposes, enjoy the right of freedom of navigation in Azov Sea and Kerch Strait.

Thus, such as merchant vessels have the right to proceed unhampered through Kerch Strait without the necessity to go through any permitting procedures.

The conflict in the Kerch Strait once again demonstrates that Russia disregard the norms of international law of the sea and the Agreement 2003. Its actions are condemned by the international community and give grounds for the application of sanctions. However, such negative measures against Russia should be properly assessed, taking into account the consequences and further development of relations.

On 18 December 2018 the Ministry of Foreign Affairs of Ukraine published the Statement on the adoption of the Resolution of the United Nations «Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), as well as parts of the Black sea and the Sea of Azov».¹³⁰

In this Resolution was expressed the utmost concern about unjustified use of force by the Russian Federation against three vessels of the Naval Forces of Ukraine in the Black Sea resulted in the serious wounding of individual crews members and calls on the Russian Federation to release without delay the vessels and their personnel. The Resolution calls on the Russian Federation to refrain from impeding the lawful exercise of navigational rights and freedoms in the Black Sea, the Sea of Azov and the Kerch Strait in accordance with applicable international law, in particular provisions of the 1982 United Nations Convention on the Law of the Sea.

¹²⁹ “MEPs commend Ukraine’s reform efforts and denounce Russian aggression”, 12 December 2019, accessed 2019 March 02, <http://www.europarl.europa.eu/news/en/press-room/20181205IPR20940/meps-commend-ukraine-s-reform-efforts-and-denounce-russian-aggression>

¹³⁰ “Statement of the MFA of Ukraine on the adoption of the Resolution of the United Nations «Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), as well as parts of the Black sea and the Sea of Azov”, 18 December 2018, accessed 2019 March 05, <https://mfa.gov.ua/en/press-center/comments/9658-zajava-mzs-ukrajini-shhodo-uhvalennya-rezolyuciji-ga-on-problema-militarizaciji-avtonomnoji-respubliki-krim-ta-msevastopoly-ukrajina-a-takozh-chastin-chornogo-i-azovsykogo-moriv>

Ukraine, in turn, confirms its adherence to the political and diplomatic settlement of conflict between Russia and Ukraine and is grateful for every state that gave its voice for the UN GA Resolution “Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), as well as parts of the Black Sea and the Sea of Azov”.

Statements of the Ukrainian authorities have become more decisive in relation to the status of the Sea of Azov and the legal relations with the Russian Federation as a whole. The above-mentioned circumstances and the violations of Russia give the ground to presume the unilateral activity of Ukraine.

3.2. Termination of Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait.

Taking into account today's realities and relations between Ukraine and the Russian Federation, it is increasingly possible to hear from the representatives of the Government of Ukraine and politics the statements about the intentions to break the relations in certain spheres of cooperation with Russia.

It is necessary to mention that the President of Ukraine Petro Poroshenko signed a Law on the termination of the Treaty on Friendship and Cooperation between Ukraine and Russia on 10 December 2018. Such termination was possible according to article 40 where it was mentioned that “This Agreement is concluded for a period of ten years. Its action will then automatically continue for the next decade periods if none of the High Contracting Parties declares to the other High Contracting Party about its desire to terminate its action by written notice not less than six months before the end of the next ten-year period”.

The President noted that the non-renewal of the treaty with Russia should be seen “not as an episode, but as part of our strategy for the final break with the colonial past and reorientation towards Europe”.¹³¹

Thus, the termination of the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait could be considered as the part of Ukrainian strategy on revision of relations between Ukraine and Russia.

This Agreement and international law are nowadays violated by Russia through:

1) the occupation and annexation of the Crimea, including the internal waters of Ukraine in the Kerch Strait;

¹³¹ “Poroshenko signed a Law on the termination of the Treaty on Friendship for Russia” [“Порошенко підписав закон про припинення Договору про дружбу за Росією”], 2019 December 10, accessed 2019 April 26, <https://tsn.ua/politika/poroshenko-pidpisav-zakon-pro-pripinennya-dogovoru-pro-druzhbu-z-rosiyeyu-1263210.html>

2) control over navigation in the Kerch Strait in the area of responsibility of Ukraine (Kerch-Yenikalsky Canal);

3) construction of the bridge across the Kerch Strait;

4) restriction of navigation through the Kerch Strait;

5) restriction of navigation in the Sea of Azov;

6) interference with other legitimate uses of Ukraine by the Azov Sea and the Kerch Strait.

It is important to point out that there is no provision in Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait about suspension, termination or denunciation of it.

According to the Vienna Convention on the law of treaties 1969 the termination of a treaty, the withdrawal of a party or the suspension of the operation may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

Nevertheless, article 60 gives the opportunity to terminate or suspend of the operation of a treaty as a consequence of its breach. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Concerning the denunciation, the Vienna Convention on the law of treaties noted that a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.¹³²

Thus, taking into account absence of provision about termination or suspension in Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait, recognizing the impossibility of denunciation of it, we could come to conclusion that the only possible way is applying article 60 and to refer to material breach of a treaty by the Russian Federation having in mind the construction of Kerch Bridge and other violations.

¹³² Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969, accessed 2019 April 26, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

Now it is necessary to assess the consequences of termination of Agreement for Ukraine.

3.2.1. The consequences of termination

In the light of current events, it is extremely important to clarify whether the termination of Agreement will have benefits for Ukraine. We have to define the best option for Ukraine relying on statements of government of Ukraine and other States. Moreover it needs to take into account the conflict on 25 November 2018 as precondition for revision of status.

Nowadays, Ukraine has the option to act in a manner to initiate termination of Agreement between Ukraine and the Russian Federation on cooperation in the use of the Azov Sea and the Kerch Strait according to the procedure which is established in article 60 of the Vienna Convention on the Law of Treaties if such violations are recognized as a material breach of a treaty.

It is obviously that there is no sense in this agreement with regard to delimitation procedure. Agreement does not contain any special rules concerning the establishment of boarder line. Such line should be determined by means of an additional agreement, which had remained uncompleted for several years. The absence of such line allows Russia to perceive the entire Sea of Azov as its internal waters and to have an access to Ukrainian coastal waters.

There is an opinion that the advantages of termination of Agreement is possibility to establish the regime of territorial sea by Ukraine, which

- would enable Ukraine to extend its jurisdiction to the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with UNCLOS;
- could have the effect of making the borders secure and eliminate the aggression of the Russian Federation¹³³;
- would define the particular area of exercising jurisdiction of Ukraine;
- would give access to the war ship of third States without the consent of Russia. Thus, the NATO ships have no chance to get the Sea of Azov and Ukrainian ports.

Consequently, the supporters of termination of Agreement insisted that Ukraine will have more freedoms in the Azov-Kerch area.

On the other hand, such opinion could be contradicted. Based on the Case between Croatia and Slovenia, the Sea of Azov would remain the internal waters, even if the Agreement

¹³³ Denunciation of the Agreement on the Sea of Azov with Russia: 10 Pros and Cons [“Денонсация соглашения с Россией по Азовскому морю: 10 аргументов за и против”], New Europe Center, 2019 October 04, accessed 2019 April 26 , <https://www.eurointegration.com.ua/rus/articles/2018/10/4/7087769/>

was not terminated. This conclusion is also supported by Deputy Minister for Foreign Affairs of Ukraine on European Integration Olena Zerkal, which says that the “denunciation of the Agreement between Ukraine and Russia on cooperation in the use of the Azov Sea and the Kerch Protocol does not give Ukraine any additional rights and may also lead to a new territorial dispute.”¹³⁴

Furthermore, if the Agreement is terminated, there is a risk that the Russian authorities will use the termination as a pretext for military provocations and blockade of the Kerch Strait. Russia has already violated more than one document of an international character, and therefore will also resort to violations and provocations in the Sea of Azov.

Nowadays it is important to have the legal ground which provides the common jurisdiction of both Ukraine and the Russian Federation. At the time when Russia proceeds from the fact that the Crimea belongs to it and practically controls the Kerch Strait, the Agreement 2003 continued to guarantee the regime of internal waters in the Azov Sea and the Kerch Strait.

As the international rules, which establish the regime applicable in internal waters of two states, are absent, there is the need for bilateral agreement. The termination of Agreement 2003 will lead to uncertainty in Azov-Kerch area. Ukraine risked losing any influence in this region.

Moreover, the international community may not support Ukraine and perceive termination as an attempt to destabilize the situation.

3.2.2. Establishment of the median line in the Sea of Azov

Ukrainian Government can commit one more action in response to Russian violations. It is necessary to review the possibility of establishment of the median line in the Sea of Azov unilaterally. There's not been a precedent like this and the practice of international law and case law require the cooperation and reciprocity between States in delimitation issues.

As it was mentioned above, the Chamber in the Delimitation of the Maritime Boundary in the Gulf of Maine Area Case defined strictly that “what general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows:

(1) No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine

¹³⁴ “Денонсація договору з РФ щодо Азовського моря може призвести до нової територіальної суперечки”, 30 October 2018, accessed 2019 March 06, <https://ua.112.ua/polityka/denonsatsiia-dohovoru-z-rf-po-azovskomu-moriu-mozhe-pryzvesty-do-novoi-terytorialnoi-superechky-zerkal-467790.html>

intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.

(2) In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.”¹³⁵

But, on the other hand, it is necessary to take into account the following circumstances. All 32 rounds of negotiations concerning the delimitation between Ukraine and the Russian Federation have failed. No agreement has been achieved. Such dispute cannot be examined by the Arbitral Tribunal.

The aggression from the side of Russia is continued and could not be predictable nowadays. The absence of delimitation line makes it impossible to define the State Border of Ukraine which needs protection by Border Service. The obligation of government is to provide security for people in country and for territory.

That is why, on 12 October 2018 the President of Ukraine, Petro Poroshenko, signed a decree, which entered into force the decision of the National Security and Defense Council of Ukraine "On urgent measures to protect national interests in the South and East of Ukraine, in the Black Sea and the Sea of Azov and the Kerch Strait"¹³⁶ which requires the introduction of the coordinates of the median line to the Verkhovna Rada. It was stated that in order to protect national interests, rebuffing armed aggression of the Russian Federation, strengthening the combat and mobilization readiness of the Armed Forces of Ukraine, other military formations and law enforcement agencies of Ukraine, stabilizing the socio-economic situation in the South and East of Ukraine, the National Security and Defence Council should take the next actions. First of all, it should to develop a mechanism for interaction between public authorities, local governments and economic entities engaged in fishing activities in internal sea waters and territorial sea to reduce the risks of crisis situations caused by aggressive actions of the Russian Federation. Secondly,

The draft laws on internal waters, the territorial sea and the contiguous zone of Ukraine should be introduced to the Verkhovna Rada with the definition of the coordinates of the median line.

¹³⁵ <https://www.icj-cij.org/files/case-related/67/067-19841012-JUD-01-00-EN.pdf> accessed 2019 April 17

¹³⁶ “Указ Президента України № 320/2018 Про рішення Ради національної безпеки і оборони України від 12 жовтня 2018 року «Про невідкладні заходи щодо захисту національних інтересів на Півдні та Сході України, у Чорному та Азовському морях і Керченській протоці»”, accessed 2019 April 17, <http://www.rnbo.gov.ua/documents/484.html>

The Ministry of Foreign Affairs of Ukraine should inform the UN Secretariat and the Russian Federation about the identified coordinates of the median line in the Azov Sea, the Kerch Strait and the Black Sea, which will be considered as the line of delimitation and respectively the line of state border between Ukrainian and Russian internal waters before the conclusion of the bilateral agreement.

Moreover, it is necessary to take into account the interests and rights of other states such as Caspian States. It was mentioned in Gulf of Fonseca Case that “the rights of passage through internal waters must be available to vessels of third States, it observes that it might be sensible to regard those waters, in so far as they are the subject of the condominium or co-ownership, as *sui generis*.”¹³⁷ The third States should not be limited in their rights of navigation as land-locked states according to the provisions of UNCLOS. That is why it is recommended to provide the specific area of the Sea of Azov with special regime.

"Historic waters" as such did not and do not exist as an independent institution in the law of the sea.¹³⁸ Some scholars admit for the Sea of Azov the *sui generis* regime. It seemed reasonable to regulate the relations around this maritime zone in special way concerning the exclusivity of circumstances.

Ukraine and Russia should also take into account international judicial practice in the field of maritime delimitation, as international judicial and arbitration practice deepen understanding of principles and norms. Also, it is appropriately to refer to the rules established for delimitation of territorial sea. It should be applied *mutatis mutandis* for delimitation of internal waters.

Differently from exclusive economic zone and continental shelf, article 15 of UNCLOS establishes that in art 15 it is being stated “where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

¹³⁷ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), page 32, accessed 2019 April 29, <https://www.icj-cij.org/files/case-related/75/6673.pdf>

¹³⁸ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Dissention opinion of Judge Oda, para. 44, accessed 2019 April 29, <https://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-04-EN.pdf>

Thus, this article provides the possibility to establish the median line in case of absence of agreement. In turn, there is no such possibility for delimitation of exclusive economic zone or continental shelf in case of disagreement. This can be explained by the fact that the exclusive economic zone or continental shelf could not be treated as the territory of the State. At the same time, the territorial sea is the subject to the territorial jurisdiction of that state. The absence of agreement on delimitation leads to losing of territory by State, that is why convention allows going up to the medial line. Having in mind, that the internal waters are also the territory of the state, where it have complete sovereignty, it would be rational to conclude that the same approach should be used for delimitation of internal waters *mutatis mutandis*.

At the moment, the situation looks frozen, since in fact the control over Crimea, the Kerch Strait is carried out by Russia and there is no possibility to delimit the Sea of Azov in a legal way. But there is the sense in searching the appropriate method of delimitation.

Thus, it is reasonable to establish the median line in the Sea of Azov in order to ensure protection of national interests and territorial integrity of Ukraine rebuffing armed aggression of the Russian Federation. The actions of Ukrainian Government should be aimed at protection of sovereignty by any means.

Summing up, the termination of the Agreement will not give Ukraine more rights over the Sea of Azov in the present circumstances. Although the international community does not recognize the territory of Crimea as a territory of Russia, there is the risk of blockade of ships in the Kerch Strait by Russian border guards and denial of entry into Ukrainian ports in Mariupol and Berdyansk, as well as aggravation of territorial disputes. Actually, the existence of a valid international agreement with Russia, which regulates the status of Azov Sea and Kerch Strait, is beneficial for Ukraine in the present conditions and its termination will only aggravate the situation. Thus, this conflict should be assessed both by Ukraine and Russia so as not to exacerbate the situation around such disputable maritime zones as the Sea of Azov and the Kerch Strait. In spite of everything, the negotiation should be continued applying the reviewed above methods and principles and taking into consideration the rights of third states.

CONCLUSIONS AND RECOMMENDATIONS

1. The Sea of Azov complies with all three factors that under the customary international law have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. The exercise of authority over the area by Ukraine and Russia is confirmed by exclusive regulation of navigation in the Azov Sea. The continuity of this exercise of authority is evidenced by the predecessor character of Ukraine and Russia as the successor-States of the USSR. The condition of consent of a significant number of States was enjoyed by the knowledge of other States about intent of Ukraine and Russia to keep treating the Sea of Azov as internal waters and the absence of protests in this regard.
2. Even if it did not comply with the aforementioned factors, it would still qualify as historical waters based on the argumentation of the Arbitral Tribunal presented in the Case concerning the Bay of Piran (Slovenia v. Croatia). Since the Sea of Azov was internal waters of the USSR, its dissolution does not affect the status of the Sea of Azov and its delimitation since Ukraine and Russia are both successor states of the former USSR. Furthermore, the Sea of Azov would automatically qualify as the internal waters of Ukraine and Russia even if the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait was not concluded.
3. Moreover, the case law entitles to treat as internal waters even those maritime zones which are surrounded by two States. The ICJ concluded that the amount of coastal states does not prevent from claiming the historical title over their adjacent waters. Thus, taking into consideration that the Azov Sea had previously been recognized as internal waters of the USSR, it retains the same status despite the fact that it is surrounded by Ukraine and Russia now.
4. Ukraine is not entitled to submit the delimitation dispute in the Sea of Azov to compulsory dispute settlement procedures under UNCLOS due to the fact that Russia has made a declaration under Article 298 of UNCLOS that has excluded any sea boundary delimitation dispute from the jurisdiction of the court/tribunals under UNCLOS. Therefore, delimitation in the Sea of Azov and the Kerch Strait could only be achieved by mutual agreement of Ukraine and Russia.
5. There are no conventional rules applicable for delimitation of internal waters on the sea, thus Ukraine and Russia should apply *mutatis mutandis* the customary law established for delimitation of other maritime zones, namely the principle of proportionality.

6. Under international law Ukraine has the right to terminate the Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait according article 60 of the Vienna Convention on the Law of Treaties 1969. Nevertheless, it will not change the status of the Sea of Azov as historic internal waters, taking into account the reasoning of the Arbitral Tribunal in the Case concerning the Bay of Piran.
7. It is reasonable to establish the median line in the Sea of Azov unilaterally in order to ensure protection of national interests and territorial integrity of Ukraine. Such line should be established until the agreement on delimitation between States has been reached. Taking into account the possibility to establish the median line in territorial sea under article 15 of UNCLOS, it would be rational to conclude that the same approach should be used for delimitation of internal waters *mutatis mutandis*.

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ABSTRACT

According to the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait, the Sea of Azov is historically the internal waters of Ukraine and the Russian Federation. The delimitation of it should be conducted only with the consent of both States. The previous rounds of negotiations were unsuccessful, delimitation was not carried out, and agreement was not reached. Due to Russia's and Ukraine's declarations under Article 298 of UNCLOS any dispute related to the delimitation of the Sea of Azov has been excluded from compulsory dispute settlement procedures under UNCLOS. It is necessary to seek new approaches to the solution of the dispute on the maritime delimitation between these two states, taking into account current relations between Ukraine and the Russian Federation.

Ukraine is considering the possibility of termination of the Agreement. The termination of Agreement is possible according to the Vienna Convention on the Law of Treaties, but the benefits of it should be evaluated in detail.

Also, nowadays it is reasonable to establish the median line in the Sea of Azov in order to ensure protection of sovereignty, national interests and territorial integrity of Ukraine. Such line should be established until the common decision on delimitation will be reached.

Keywords: the Sea of Azov, UNCLOS, the delimitation of internal waters, the historical waters, the median line.

SUMMARY

After the collapse of the USSR the issue of status of the Sea of Azov has become quite important. Ukraine and the Russian Federation are the only coastal States which have to define the regime of exercising of jurisdiction. In 2003 the Agreement on Cooperation on the use of the Sea of Azov and the Kerch Strait was concluded. It was agreed that the Azov Sea and the Kerch Strait are the internal waters of Ukraine and the Russian Federation on historical basis.

Concerning the delimitation it was established that the Azov Sea is delimited by a line of state border in accordance with the special agreement between the Parties. There were nearly 30 rounds of negotiations on delimitation which have failed. The States have not agreed upon a maritime boundary between them. 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 relations became tense after the Crimea annexation in 2014 and other violations of international law. The violations from the Russian side gave the ground for Ukraine's submissions in the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation) at the Permanent Court of Arbitration under the provisions of UNCLOS. Also, there are the statements of politics concerning the intent to terminate the Agreement on Cooperation on the use of the Sea of Azov and the Kerch Strait. It was found, that it is possible to terminate the Agreement according to the Vienna Convention on the Law of Treaties. But it does not change the status of the Sea of Azov. The termination will lead to the complete absence of legal ground for Ukraine to exercise its jurisdiction in the Azov-Kerch area.

Delimitation remains the only way to define the nature and extent of jurisdiction of both coastal States. Thus, Ukraine and the Russian Federation should continue to cooperate and resolve the dispute between them. In question of delimitation parties should apply the customary law, the case law and such method as proportionality.

Moreover, despite the fact that the customary law suggests that maritime delimitation between States with opposite or adjacent coasts may be effected only unilaterally, the current circumstances give the ground to establish the median line by Ukrainian Government unilaterally to secure the territorial integrity and to protect the national sovereignty against Russian aggression until the common decision on delimitation will be reached.

HONESTY DECLARATION

17/05/2019

Vilnius

I, Olena Sokolova, student of
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Mykolas Romeris University (hereinafter referred to University),

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confirm that the Master thesis titled

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1. Is carried out independently and honestly;
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