

Navigating Straits

Challenges for International Law

Edited by

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The Sea of Azov and the Kerch Straits

*Alexander Skaridov**

1 Introduction

What we call today the Sea of Azov, the Ancient Greeks called the Lake Maeotis (*Μαιώτις* in Ancient Greek).¹ This “lake-size” sea played a significant role in Russian history. The Russian Azov campaign, which happened in 1695, was a very symbolic event demonstrating the significance of having a naval fleet and marked the beginning of Russia’s turning into a maritime power.²

For the next 300 years this sea was probably among the quietest places in the world ocean,³ situated entirely within the southern part of the territory of Imperial Russia and later the Union of Soviet Socialist Republics (U.S.S.R.). From the international law perspective there were no “battles” among the differing views of scientists or claims on maritime spaces from other states. There were only some law publications of the XXth century that referred to the Sea of Azov among those gulfs “which may be regarded as part of the territorial sea”;⁴

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1 Adrian Room, *Placenames of the World* (2006), 42.

2 On October 20, 1696 the Boyar Duma (the highest Russian Tsar council, beginning in 1547) decreed the creation of the military fleet and this date is considered to be the birthday of the regular Russian Navy. Russia’s successful Azov campaign also strengthened its position during the Karlowitz Congress of 1698–1699 and the signing of the Treaty of Constantinople in 1700 between the Ottoman Empire and Russia, which gave Russia control over the Azov Sea.

3 Also taking into consideration the Sea of Azov battles during World War II.

4 United Nations Conference on the Law of the Sea Geneva, Switzerland 24 February to 27 April 1958 Document: A/CONF.13/1. *Historic Bays: Memorandum by the Secretariat of the United Nations, Extract from the Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents)*, 2009. Available at http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/4_A-CONF-13-1_PrepDocs_vol_I_e.pdf.

and others that expressed the opinion that it could be considered as internal waters.⁵

The Kerch Strait, which is located between the Kerchansky and Tamansky Peninsulas, is the only waterway connecting the Sea of Azov with the Black Sea. It is 40 kilometers in length and separates the Crimea in the west from the Taman peninsula in the east. Its northern end, opening into the Sea of Azov, the narrowest area in the Chuska landspit has a width ranging between 3.2–4.8 kilometers; and the southern end, opening into the Black Sea, which is 14 kilometers wide.

During the Soviet period the Sea of Azov and the Kerch Strait were part of the internal waters of the U.S.S.R. and by law the straight baseline was drawn between Cape Kyz-Aul—Cape Geleznyi Rog, making the Kerch Strait entrance internal waters.⁶ However, following the dissolution of the former U.S.S.R. in 1991 the status of the Sea of Azov and Kerch Strait changed.⁷ The Sea of Azov found itself with two coastal states, Ukraine and the Russian Federation, transforming it into an international waterway, each state claiming sovereignty ambitions over the Strait, the only water-way connecting the Sea of Azov with the Black Sea. This division created problems between the two States which continues today to be unresolved.

Two key issues will be addressed in this chapter regarding the Kerch Strait and Sea Azov: delimitation and navigational issues.

2 Legal Status of the Kerch Strait

Subsequent to the Act of the Russian Supreme Council N 4732-1, adopted on April 1, 1993 (Boundary Act),⁸ all administrative boundaries between the former Soviet Republics were granted “state” status. However, as no borders

5 P. C. Jessup stated that this contention “seems reasonable and any such Russian claim would not be contested” Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, (New York, 1927) 383; A. N. Nikolaev regards the Sea of Azov as part of the “internal waters of the U.S.S.R.”. A. N. Nikolaev, *Territorial Waters Problems in International Law*. (M., Goskomizdat, 1954); Gidel was of the opinion that certain maritime areas—of which the Sea of Azov is one—should not be treated as falling within the category of historic waters “because, pursuant to the rules of the ordinary international law of the sea, these areas are in any case internal waters”. Gilbert Gidel, *Le droit international public de la mer* (Paris, 1932). Nikolaev, *Territorial waters problems in international law*, 663.

6 U.S.S.R. Council of Ministers Regulation Feb. 7 1984.

7 The Agreement of the Commonwealth of Independent States, 8 December 1991.

8 “Law on the State boundary of Russian Federation,” 1993. N 17.

were established on paper or maps by this Act former neighbors started to create boundaries on their own—relying as much as possible on “local history” and “interpretation.” In 1999, by unilateral act, Ukraine drew the boundary line in the Kerch Strait to include the sandbank Tuzla (split) as part of Ukrainian territory. Russia announced that it would not recognize this boundary and actively disputed the status of the Tuzla split. In October 2003 Russia commenced construction of a causeway connecting the Taman peninsula with the Tuzla split; Ukraine protested the construction, which has since not been completed.⁹

This chapter will not repeat the legal (and some times not so very “legal”) grounds upon which both sides use for justification of their positions. This chapter will limit itself to examining some of the current agreements which were concluded and analyze international law provisions which should be recognized in this case by both countries.

On December 24, 2003 Russia and Ukraine signed the Agreement on Cooperation on the use of the Sea of Azov and the Kerch Strait (Agreement on Cooperation).¹⁰ The Agreement, however, failed to provide for any delimitation agreement between the two States, but did recognize that the Sea of Azov and the waters of the Kerch Strait constituted internal waters of Russia and Ukraine. According to Article 1 of the Agreement on Cooperation, the delimitation of the Sea of Azov maritime boundaries and those related to the Kerch Strait were to be carried out by agreement between the two Parties. The Agreement further provided that foreign-flagged Russian and Ukrainian merchant vessels enjoyed the right of freedom of navigation (Art. 2(1)), but that third party merchant vessels could only pass through the Kerch Strait only if they were navigating to ports of Ukraine or Russia (Art. 2(2)); and foreign military and state vessels could proceed to the Sea of Azov only upon invitation or by permission (Art. 2(3)). However, the Agreement does not stipulate the authority responsible for granting such permission, its duration, or how many vessels and how long foreign military vessels would be allowed to remain in the Sea of Azov. These issues are important for Russia in light of Ukrainian aspirations for membership in NATO.¹¹

9 Small patch of land which called to-day Tuzla split or island was connected to the Taman Peninsula, but in 1925 local fishermen, to avoid passing around Tuzla, made a small fairway which later became wash ways, which actually created the “island” status for Tuzla.

10 In May 2010 Russia and Ukraine signed the Agreement on delimitation of the land border and which did not cover the maritime issues.

11 Even in the 2003 Agreement which consists of 5 articles it is difficult to find anything else which regulates the cooperation in using t sea spaces, including Article 3, where states

Another unsuccessful attempt to draw boundaries took place on November 2007 when both sides, instead of an “agreement,” signed a Protocol concerning their intentions to reach an agreement in the future. While it was hoped that on July 12, 2012 a delimitation agreement would be reached, the Russian and Ukrainian presidents, however, only ended up making a joint statement¹² that both sides contemplated future progress.¹³ On September 1, 2012, Russian Foreign Minister Sergei Lavrov, in his speech before students of the State University of Foreign Relations, mentioned that further progress had been reached on the question of delimitation of maritime boundaries in the Sea of Azov and Kerch Strait. His Ukrainian colleague—Mr. Mozik—Deputy minister of Foreign Relations was more optimistic and actually gave some details. He outlined that the first maritime boundary point should be somewhere near Taganrog and that this line should be connected with the point on the line between Ukrainian Cape Chroni and Russian Ahelleon; and that the last point in the entrance to the Kerch Strait should be on the line connecting the Ukrainian Cape Kyz-Aul and Russian Geleznyi Rog (former Soviet baseline along the Black Sea coast).

Many suggestions were made by both sides throughout the more than twenty rounds of negotiations on the delimitation of the Azov Sea, indeed too numerous to discuss in this chapter. However, the diagram reproduced below (Figure 10.1) reflects the different approaches and very closely follows many of the suggestions that were made by the Parties. The Russian approach draws a median line, where all points are to be equal distant from opposite shores. The Ukrainian position, basically connects the land boundary exit points and seems to be based on the proportionality of the coastal area. The median line is a compromise line between the two approaches. However, Ukraine and Russia have not established baselines or even base points along the coast line and for this reason the starting points for delimitation are not officially known, which makes questionable the kind of delimitation methodology being applied by both countries.

According to international law the Sea of Azov falls under the provisions of Part IX of UNCLOS¹⁴ on semi-enclosed and enclosed seas. Article 122 provides

indicated their willingness to follow existing and future agreements in shipping, navigation and hydrographic support, fishery and protection of the marine environment.

12 During negotiations thirteen other documents were written in different fields of activities. ITAR-TASS, July 12, 2012.

13 http://президент.рф/ref_notes/1259

14 United Nations Law of the Sea Treaty, (Montego Bay), 10 Dec. 1982, 1833 U.N.T.S. 3 (hereinafter “UNCLOS”).

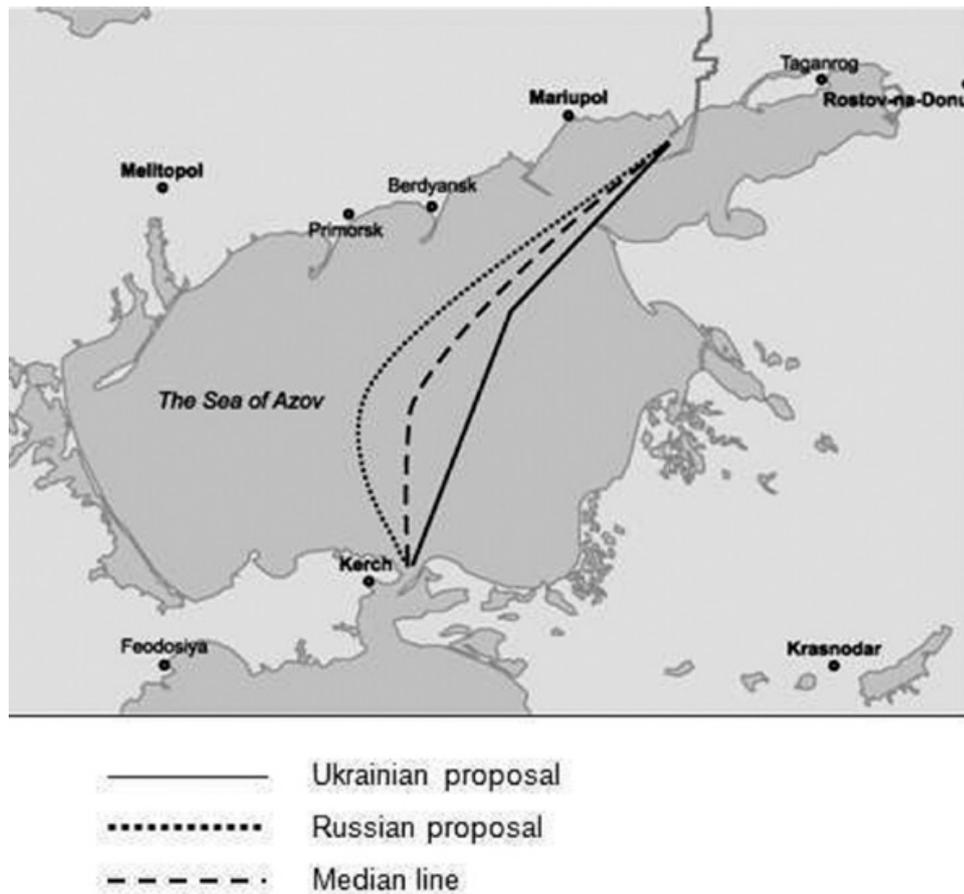


FIGURE 10.1 *Proposed delimitation lines*

that enclosed or semi-enclosed sea means a gulf, basin or sea surrounded by two or more states and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states.¹⁵ Does this provision apply to the Azov Sea case even if the status of its waters is “internal”? UNCLOS does not provide for the delimitation of internal waters. Article 8(1) defines “internal waters” as waters on the landward (not seaward) side of the baseline. In regard to “delimitation” of the territorial sea between states with opposite or adjacent coasts under Article 15, “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

¹⁵ Ukraine ratified UNCLOS on 26 July 1999; Russia on March 12, 1997.

of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Unfortunately, other provisions of Part IX are not very helpful in determining the status of the Sea of Azov or help with its delimitation. What appears most evident is that in the delimitation of the territorial sea both States should adopt base lines (straight or normal) according to the provisions of the UNCLOS (Art. 7, Art. 14). As no further information is officially available from the Parties on this matter the only source available is that provided by mass media sources.

While there is no boundary delimitation practice that is close to the situation in the Sea of Azov, some scholars have suggested for this purpose the Lake Erie case,¹⁶ which does not, however, seem appropriate as it is dealing with an inland water space. Whereas, the Sea of Azov is a maritime space where the parties are to delimit what is in actuality a bay¹⁷ with a single narrow sea waterway opening to another space of the world ocean. Following the dissolution of the Soviet Union this maritime area no longer belongs to a single political entity but instead has two coastal states. For this reason the case of the Gulf of Bothnia delimitation has much more in common with the Sea of Azov and Kerch Strait.

The external limits of Finland's territorial sea in the Gulf of Bothnia and in the Åland Sea are determined by maritime boundary treaties concluded with Sweden in 1811, 1972 and 1994.¹⁸ According to the 1994 Treaty the Parties agreed

16 See, for example: Alec McEwen. RUSSIA—Ukraine boundary in the Sea of Azov and Kerch Strait (Powerpoint). Available at <http://people.ucalgary.ca/~amcewen/Azov-Kerch.pdf>.

17 Can be referred to as a liman or bay.

18 Act on the Delimitation of the Territorial Waters of Finland (as amended by Act No 144/1965, Act No 332/1966 and Act No 981/1995) adopted in Helsinki on 18 August 1956. Section 1 (Act No 144/1965). Delimitation of the Sea Territories and the Continental Shelf . . . in the archipelago of Tornio in the northern part of the Gulf of Bothnia, by the state boundary between Finland and Sweden as provided in the Agreement between Finland and Sweden on the Delimitation of the Continental Shelf in the Southern and Northern Parts of the Gulf of Bothnia, in the Åland Sea and in the northernmost part of the Baltic Sea, concluded on 29 September 1972 and in the boundary lines review (rajantarkistus) of 1981, in accordance with the Topographic Description of Boundaries (rajanselityt) signed in Tornio on 19 January 1811 after the Peace of Hamina. In the Åland Sea, to the south and to the north of the islet of Märket, the boundary between Finland and Sweden was established in the aforementioned Description of Boundaries of 1811, as provided in the aforementioned Agreement of 1972, in the boundary lines review of 1981 and in the Agreement between Finland and Sweden on the Delimitation of the Boundary between Finland's Continental Shelf and Fishing Zone and Sweden's Exclusive Economic Zone in the Åland

that the territorial waters consisted of internal waters and external waters or the territorial sea.¹⁹ The internal waters included that part of the territorial waters the landward limits of which consist of the mean water line along the coast and, at river mouths, of a straight line across the mouth between the limit points situated on the mean water line of the banks; and the seaward outer limits of which consist of straight baselines, the points of which are located on the outermost landmarks, either on the mainland or on islands, rocks or low-water elevations.²⁰

Keeping in mind the unstable coast line (which is the same for the sandy coast of the Sea of Azov) another provision defines that the base points "... shall be selected from among points located above the mean water level at a certain point, designated on the basis of long-term water level measurements. Even points below the said level may be used as base points, provided that they are at least periodically within sight and a lighthouse or other installation permanently above the sea level, has been built on them. The base points and the location of the landward limits of the internal waters ... shall be reviewed every thirty years."²¹

On the issue of the applicable regime of navigation and transit passage under Part III of UNCLOS to the strait between Finland (Åland Islands) and Sweden that leads to the Gulf of Bothnia (Åhvenanrauma Strait), which is also very similar to the Kerch Strait situation, the Parties agreed that the Åhvenanrauma Strait was not an international strait to which the transit passage regime would be applicable. The Finnish declaration, made upon signature to the 1982 UNCLOS, stated that:

... the exception from the transit passage regime in straits provided for in Article 35 (c)) of the Convention is applicable to the strait between Finland (the Åland Islands) and Sweden. Since in that strait the passage is regulated in part by a long-standing international Convention in force,

Sea and in the northern part of the Baltic Sea concluded on 2 June 1994 (Act No 983/1995). In June 1994 Finland and Sweden agreed on a single continental shelf/EEZ-fishery jurisdiction boundary and settled the controversy about the effect of the Bogskir Islands on the delimitation. The agreement entered into force on 30 July 1995.

19 Ibid., Section 3, Act No 981/1995.

20 Ibid., Section 4, Act No 981/1995.

21 Ibid., Section 5, Act No 981/1995.

the present legal regime in that strait will remain unchanged after the entry into force of the Convention.²²

If the legal status of the Kerch Strait is taken as a separate issue, the Gulf of Maine²³ case may be also an example for the Sea of Azov delimitation. Without going into its details, but to recall that after many years of negotiations the United States and Canada were unable to resolve the maritime boundary issue mostly because of the Georges Bank issue. Even after the decision made by

22 Martti Koskenniemi and Marja Lehto, "Finland and the Law of the Sea", in Tullio Treves and Laura Pineschi eds., *The Law of the Sea: The European Union and Its Member States* (1997), 127–150, 132–33. See also website for the United Nations Division for Oceans Affairs and Law of the Sea, Declarations made upon signature/ratification/accession/succession for Finland.

23 The Gulf of Maine is located off the northeast coast of the United States and surrounded by the states of Maine, New Hampshire, and Massachusetts, and the Canadian provinces of New Brunswick and Nova Scotia. It became the offshore battle in the 1960s and early 1970s because of varying continental shelf claims. In 1964 Canada issued oil and gas exploration permits on Georges Bank, the thumb-shaped underwater plateau rich in fisheries resources. Relying on the 1958 Geneva Convention on the Continental Shelf, Canada considered the equidistant line as the proper ocean boundary. While the United States also began to issue geophysical exploration permits on Georges Bank in 1964. In November 1969 the U.S.A. requested a moratorium until the exact continental shelf boundary could be agreed upon. On December 1, 1969, Canada refused to accept a moratorium, and during subsequent negotiations in 1970, the United States first made its boundary position clear. All of Georges Bank was claimed, with the deep Northeast Channel, off the tip of the Bank, viewed as a natural dividing line. With Canada's fisheries zone becoming effective on January 1, 1977, and the United States' fisheries zone coming into force on March 1, 1977, overlapping fisheries zones occurred. Canada at first claimed an equidistant line, but on November 3, 1977 it enlarged its claim. The claim changed due to the special circumstances of Cape Cod, Nantucket Island, and Martha's Vineyard, which, Canada argued, should not be considered part of the United States coastline due to their distorting effect. The United States claimed all the fisheries of Georges Bank. With Canada's fisheries zone becoming effective on January 1, 1977, and the United States' fisheries zone coming into force on March 1, 1977, overlapping fisheries zones occurred. Canada at first claimed an equidistant line, but on November 3, 1977 it enlarged its claim. The claim changed due to the special circumstances of Cape Cod, Nantucket Island, and Martha's Vineyard, which, Canada argued, should not be considered part of the United States coastline due to their distorting effect. The United States claimed all the fisheries of Georges Bank. The case was turned to the International Court of Justice. On October 12, 1984 a Chamber of the ICJ drew a single maritime boundary for the Gulf of Maine/Georges Bank region. *Delimitation of the Maritime Boundary of the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246. See David L. Vander Zwaag, "The Gulf of Maine Boundary Dispute and Management," 15 *Ocean & Coastal Law Journal* 2010: 241, 243–44.

International Court of Justice (ICJ),²⁴ over a decade of management disputes and negotiations, politicians, bureaucrats, and lawyers found themselves stalemated. With so many socioeconomic interests at stake, including those of the United States fishing industry, who saw the Georges Bank as “belonging to America,”²⁵ both countries saw the need for an authoritative decision by a prestigious institution to which local constituencies would listen.

Delimitation of maritime spaces according to state practice and the ICJ practice can be summarized into four main steps:

- identifying the relevant coasts and baselines;
- ascertaining whether there is any pre-existing agreement relating to the delimitation of the maritime areas;
- delimiting the territorial sea (where requested) by applying the equidistance-special circumstances rule;
- delimiting the continental shelf/EEZ applying the equitable principle-relevant circumstances rule.

Applying the above-mentioned provisions to the Azov Sea-Kerch Strait case we have to acknowledge that there are no known baselines adopted along the Azov sea coast; there is no pre-existing delimitation agreement,²⁶ and because coastal states already decided that the Sea of Azov is their internal waters—there are no EEZ or continental shelf spaces. Even so, the relevant coasts to be taken into account in the delimitation needs to be determined. Once Ukraine and Russia have established the relevant coast, baselines need to be identified

24 Canada received jurisdiction over approximately one-sixth of Georges Bank, and some commentators have described the decision as essentially “splitting the difference” between the Canadian and United States claims.

25 For example, a United States’ representative expressed concern over how the U.S. systems would have reacted if a Soviet judge had some bearing on determining the fate of New England fisher persons. See Alexander, *The Gulf of Maine Case: An International Discussion*, 17–18.

26 The question of whether a maritime boundary was settled by prior formal agreement has been of considerable importance in a number of cases. For example, in the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening, Judgment, I.C.J. Reports 2002)*, Nigeria disputed the validity of a number of treaties and agreements that would otherwise have affected the delimitation. Another example is the *Greenland and Jan Mayen* case, where the question of whether a 1958 maritime delimitation treaty applied to the area in question was disputed (*I.C.J. Reports 1993*, pp. 50–51). The Court was called upon to interpret the treaties in question and reach a decision as to their applicability.

as the basis for any other calculations because baselines are the starting point from which each maritime zone is to be determined and mapped.

This chapter will not go into the technical methodological details of a possible delimitation of the Sea of Azov but stress the interdependence of delimitation with resolving the legal status of the Kerch Strait.

3 Commercial Navigation in the Azov-Black Sea

For centuries, the Sea of Azov has been an important waterway for the transport of goods and passengers.²⁷ The first modern ironworks in Imperial Russia were located upstream on the Kalmius River at Donetsk (formerly known as Yuzovka). It was also important for the transportation of iron ores from the mines of the Kerch peninsula to the processing plant of Azovstal in Mariupol (formerly Zhdanov).²⁸

Navigation dramatically increased after the construction in 1952 of the Volga-Don Canal which connected the Sea of Azov with the Volga River²⁹ For example, the Azovo-Donskoe Parohodstvo (shipping company) in the year 2011 shipped about 6 million tonnes of cargo, which was 13% more than in 2010. In 2012 this increased by 40% in comparison with the year 2011.³⁰ Russia also plans to complete the “Eurasia project” (new inland waterway between Caspian sea and Sea of Azov) as well as to develop the “North-South” inland route. If these projects are completed the flow of cargo (including Caspian oil)

27 Azov Sea started to become important for Russia in the XIXth century because of the abundance of the fish and also the ever-increasing trade across the sea. The average annual number of ships entering the harbor of the Azov Sea in the years 1866–1871 were 2,662 with a total tonnage of 362,951 tons. At present time, the Russian merchant fleet (Reka-More type), using the Sea of Azov consists of about 1210 vessels with a total tonnage 40,658. (see <http://giduss.info/economy.html>). Another traditional activity in the sea is fishing. The Sea of Azov used to be the most productive fishing area in the Soviet Union: typical annual fish catches of 300,000 tonnes converted to 80 kg per hectare of surface. The catch has decreased in the 21st century, with more emphasis now on fish farming, especially of sturgeon. The 2010 catch decreased to 11,4 thousand tons which is about three times lower than in 2000. RIA NOVOSTI, 18/08/2013.

28 Ukraine; this activity stopped after the closure of the mines in the 1990s.

29 River Volga is the most important riverine transport route in the central Russia—thus connecting major cities such as Moscow, Volgograd and Astrakhan. Currently, the major ports in the Sea of Azov are Taganrog, Mariupol, Yeysk and Berdyansk.

30 http://www.korabel.ru/news/comments/azovo-donskoe_parohodstvo_podvelo_itogi_raboti_v_2011_godu.html (in Russian).

will dramatically increase the volume of international shipping and general commercial use of the Azov-Mediterranean merchant route.

The Sea of Azov is the shallowest sea in the world with an average depth of 7 meters and maximum depth of 14 meters; and in the bays, where silt has built up, the average depth is about one meter. The sea bottom is also relatively flat with the depth gradually increasing from the coast to the center. The Sea of Azov is connected to the Black Sea by the Kerch Strait, which is 41 kilometers long and at its narrowest has a width of 4 kilometers and a maximum depth of 15 meters. The Kerch Strait is bordered to the west by the Kerch peninsula of the Crimea, belonging to Ukraine, and to the east by the Russian Taman peninsula in Krasnodar Krai. Many rivers flowing into the Sea of Azov form bays, lagoons and limans. The sand, silt and shells they bring are deposited in the areas of reduced flow, that is the sides of the bays, forming narrow sandbanks called spits. Typical maximum depth in the bays and limans is a few meters.

Because of shallow waters and abundant rivers only vessels with the specific characteristics can operate in the Sea of Azov. These vessels are required to be constructed in accordance with the class rules set down in the register of inland navigation vessels (e.g. the Russian river register), although there are also a number of models of river-sea vessels which have been built to classes of the Russian maritime register and those of other classification societies. From both economic and practical viewpoints, river-sea vessels built to the class of the Russian river register are best suited for the Sea of Azov routes. The regulations for the classification and construction of combined navigation vessels, set out in the Russian river register, stipulate that the codes (in Russian) “M-SP”,³¹ “M-pr”³² and “O-pr”³³ are the main symbols designating the class of combined navigation vessel, indicating its construction type and navigation area and conditions.

Existing and new types of river-sea vessels, operating along coastal routes, could be exempted from a number of stringent requirements of the International Convention on Safety of Life at Sea (SOLAS),³⁴ which are not always justified,

31 “Class ‘M-SP’ vessels are permitted to navigate in sea areas with a maximum wave height of 3.5 metres at a 3 per cent frequency of occurrence. 46 CFR—Code of Federal Regulations—Title 46: Shipping (296.11—Vessel requirements). Revised, October 10, 2010.

32 “Vessels of ‘M-pr’ class are permitted to navigate in sea areas with a maximum wave height of 2.5 metres at a 3 per cent frequency of occurrence. Ibid.

33 Vessels of ‘O-pr’ class are permitted to navigate in sea areas with a maximum wave height of 2.0 metres at a 3 per cent frequency of occurrence. Ibid.

34 International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 [hereinafter SOLAS]; Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, 1974, Feb. 17, 1978, 32 U.S.T. 5577, 1226 U.N.T.S. 237.

since river-sea vessels are already subject to a number of restrictions relating to navigational areas, wave height, etc.³⁵ The SOLAS Convention already makes provision for the recommendation by the Administration that there should be exemptions for vessels whose safety features and route conditions are such that the requirements under certain of the Convention's chapters are either pointless or superfluous and which, when under way, do not sail further than 20 miles from the nearest shore.

In the light of the above, where the route in question, i.e., Don River-Sea of Azov-Black Sea-Dnieper-Danube, is concerned, this is clearly open to navigation by vessels in the classes "M-SP", "M-pr" and "O-pr"³⁶ during the specified periods of the year, bearing in mind that the restrictions applicable to the Black Sea are more rigorous.³⁷

To unify ship document requirements, in June 2002, the Russian and Ukrainian ministries of transport signed the Protocol on conditions governing the entry of Russian and Ukrainian combined river-sea navigation vessels into Russian and Ukrainian ports on the Azov and Black Seas. The Parties to the Protocol agreed that Russian and Ukrainian vessels carrying documents of the Russian maritime register or the Russian river register and the Ukrainian navigation register would be sufficient for passage in the corresponding navigational area and would be permitted to enter Russian and Ukrainian ports on the Azov and Black seas for the performance of cargo operations or to shelter from bad weather.³⁸

35 The International Convention on Load Lines also provides for the granting of exemptions to the requirements, in particular when regional agreements exist between the countries where the ports of entry are situated.

36 Of the vessels currently operated by the Russian river fleet, cargo vessels of the types "Sibirsky", "Volgo-Balt", "Amur", "STK", "Omsky", "Volgoneft" and "Lenaneft" belong to classes "M-SP" and "M-pr" of the Russian river register. Some vessels with Russian maritime register classes are also operated in combined river-sea navigation, namely, those of the types "Sormovsky", "Baltisky", "Morskoy", "Volga", "Ladoga" and "Volgo-Don".

37 Class "M-SP": 20-mile coastal zone throughout the year; Class "M-pr": 10-mile coastal zone around the Crimean peninsula from the Kerch strait to 45°N; 20-mile coastal zone in the north-eastern area of the Black Sea north of 45°N (March–November); Class "O-pr": 5-mile coastal zone from the port of Odessa to the Danube breach (Prorva arm) (March–October); and 5-mile coastal zone from the port of Odessa to the port of Skadovsk (March–November). Vessels in navigation class II-SP of the Russian maritime register are less restricted and are able to proceed up to 100 miles from shelter points, and vessels in class III-SP—up to 50 miles.

38 Economic and Social Council. Exchange of information on measures aimed at promoting transport by inland waterways. TRANS/SC.3/2003/3, 19 June 2003.

To lessen the risk of collision in busy shipping lanes at the approaches to the Kerch Strait and the Berdyansk and Taganrog Bays, traffic separation systems were established together with recommended sea lanes and fairways. Vessels navigating in accordance with the traffic separation systems and proceeding along or near recommended sea lanes and fairways are required to comply with the 1972 International Regulations for preventing Collisions at Sea (COLREG),³⁹ as well as the rules set out in the compendium of shipping rules for the Black Sea and the Sea of Azov adopted by both Ukraine and Russia.⁴⁰

4 Regime of Passage in the Kerch Strait

The Kerch Strait is a shallow water route and for navigational purposes the Kerch-Yeni-Kale channel.⁴¹ The Kerch-Yeni-Kale channel (KEC) consists of four bends and is approximately 30 kilometers long, 120 meters wide, and the shallowest area is 8 meters.⁴² At present there are two navigable waterways through the Kerch Strait: a deep water way through the Kerch-Yeni-Kale Channel (KEC), which is almost in Ukrainian waters;⁴³ and through the waterways # 50 and #52 (seaward to the Russian side) which can be used only by vessels with a draught of not more than 3 meters (see Figure 10.2).

Currently, the legal regime for navigation in the Kerch Strait is navigation based on the Ukrainian law and Rules for the KEC. According to the Mandatory Regulations issued for the Kerch Merchant Sea Port,⁴⁴ when proceeding to the Port of the Kerch Strait, information about the ship's approach must be given 48 hours prior to the estimated time of arrival (ETA) and again 24 hours before arrival. Clearance for ship departure and arrival is performed on board the ship. Port charges are regulated by the Ukrainian Government.⁴⁵

39 International Regulations for Preventing Collision at Sea 1972, as amended ("COLREGS"), 20 Oct. 1972, 1050 U.N.T.S. 17 (1972).

40 Protocol On conditions of entrance of Russian and Ukrainian vessels of joint shipping zone into the Ukrainian ports on Azov sea and Black sea, signed in June 1, 2002. <http://embrus.org.ua/ru/juridicalbase>.

41 Another name—Kerch-Yenikalskiy channel.

42 Kerch Merchant Sea port is in charge of the Kerch-Yenikalskiy Channel.

43 Allowed ship draught for the passing vessels is up to 8 meters.

44 Mandatory Regulations issued for the Kerch Merchant Sea Port. 2008. http://imodocs.com/txt/data_www/texts/Op_Kerchqo8.php3.

45 Kerch "Port-charges" set up by the Cabinet Council of Ukraine decrees of 12th October 2000 № 1544 (Official Bulletin of Ukraine, 2000, № 42, Art. 1784; 2001, № 48, Art. 2142; 2002,

The KEC is accessible for ships of up to 215 meters in length and up to 8 meters in draft. The Harbor Master may permit larger vessels to enter the channel on a case-by-case basis (Article 2.1.2). Ships over 160 meters in length and over 6 meters draft are required to navigate the channel during daytime hours only. (Article 2.1.3). It is prohibited to enter KEC if there is fog, snowfall, mist, heavy rain, and if the wind speed is over 14 meters per second. (Article 2.1.4) The services of the Vessel Traffic Control Center (VTC) are compulsory for vessels bound for ports in the Kerch Strait and passing in transit through the KEC. The maximum speed for vessels with a draft greater than 5 meters is 10 knots for the vessels and 12 knots for smaller vessels (Art. 2.1.12 (a)).

Pilotage is compulsory for all foreign flagged vessels navigating through the KEC (Art. 2.2.21 (a)); for CIS⁴⁶ flagged ships with a draught greater than 4.5 meters or length over 120 meters; for damaged ships; oil tankers and ships carrying dangerous goods; for nuclear-powered vessels; and vessels that the Harbor Master otherwise requires to take pilotage (Art. 2.2.21 (b-d)).

Bunkering service is offered 24 hours a day, unlimited quantity, to all ships passing through the Kerch Strait. Bunkering operations are held on the outer roadstead without the vessel's clearance. The order should be submitted at least 24 hours before approaching the anchorage place, with preliminary agreement.⁴⁷

The Kerchensky Commercial Sea Port Authorities (Ukraine) have unilaterally implemented different types of passage duties (e.g. pilot, navigational). For some Russian shipping companies the amount is quite substantial and higher than duties imposed on similar Ukrainian ships and can be approximately twice as much as the cost of passage through the shallow fairways #50 and #52 (see above).

On the other hand, most vessels passing the Kerch Strait are Russian flagged vessels, no less that 9000 annually. Media sources estimate the Ukrainian annual revenue of from shipping in the Kerch Strait to be about 80–100 millions U.S. dollars.⁴⁸ So, from a commercial point of view- more ship journeys—more earnings for the Kerch port authorities.

№ 14, Art. 721; 2003, № 29, Art. 1465; 2004., № 52, Art. 3452) and amended by Decree of 20th August 2008 № 769.

46 Commonwealth of Independent States.

47 24 hours a day the Kerch port takes oil, sewage, bilge water and garbage from the ships passing through the Kerch Strait.

48 Azov sea transportation analyses. (St. Petersburg, GAM, 2012).



FIGURE 10.2 *Kerch-Yeni-Kale Channel waterways*

In regard to the legal regime of passage applied in the Kerch Strait according to Article 5 of the Russian-Ukraine Agreement of Jan. 28, 2003, mentioned above, both States considered the Azov Sea and Kerch Strait to be “internal waters.” In September 2003, however, because of the Tuzla controversy, both countries were pushed to negotiate this issue again. Article 1 of the Russian-Ukraine Agreement on Cooperation in using the Sea of Azov and Kerch Strait (signed in December 24, 2003) stated that...historically the Azov Sea and Kerch Strait appears to be internal waters of Russian Federation and Ukraine. In the author’s view, “appears to be...” cannot be interpreted as legal definition, moreover no further explanations were provided in the following provisions of the Agreement. This provision is more declarative than legal, otherwise the Parties should have stated that they consider the Azov Sea waters to be internal waters within the meaning of international law or UNCLOS. That is why “internal” may be explained as inland waters from a geographical, economical, historical or any other perspectives, but not legal.

A recent incident that took place in July 2013, when a Russian Coast Guard cutter intercepted a Ukrainian fishery boat⁴⁹ evidently indicated that based on the current agreements the two States are not able to solve even a simple jurisdiction problem. Following the mentioned incident the Ukrainian side started to discuss the necessity of reconsideration of the Russian-Ukrainian agreements. This or that reason hopefully will push both States to adopt a new legal regime based on UNCLOS and on the basis that that this semi-enclosed sea should consist entirely or primarily of the territorial seas and exclusive economic zones of the two coastal States.

As to the question of the nature of passage through the Kerch Strait the regime of innocent passage does not apply as the Kerch Strait does not come within one of the exceptions to the transit passage regime under UNCLOS where non-suspendable innocent passage would apply.⁵⁰

So, in the author's view, as there are no factors indicating that the Azov Sea is "internal" from a legal point and no agreement has been signed regarding the passage regime, the legal question of passage remains an open one. Keeping in mind the relationship between the two coastal States it would seem that the best decision would be application of the regime of transit passage (if the countries agree to draw base lines and finalize delimitation of their respective territorial sea, EEZ etc.)⁵¹ by the creation of joint Kerch-Enicalskiy

49 On July 17, 2013 in the point 46 degrees 41,2 minutes N and 37 degrees 51,7 minutes E Russian Coast guard cutter stopped the Ukrainian fisherman boat for the illegal activity. The Ukrainian boat was destroyed after and 4 people died, one sailor was put in Russian prison with criminal charges for illegal fishery. Ukrainian side stated that all happens not on Russian territory and no criminal charges could be enforce. INTERFAKS-UKRAINA, August 9, 2013.

50 Under UNCLOS non-suspendable innocent passage applies to the following straits used in international navigation: (1) *Straits formed by an island of a State bordering the strait and its mainland, if there exists seaward of the islands a route through the high seas or an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics* (Art. 38(1)); (2) *Straits between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State* (Art. 45(b)); (3) *Straits which include a route through the high seas or an exclusive economic zone, if this route is of similar convenience with respect to navigational and hydrographical characteristics* (Art. 36); and (4) *Straits which include a route through the high seas or an exclusive economic zone, if this route is not of similar convenience with respect to navigational and hydrographical characteristics* (Art. 36).

51 UNCLOS, Article 37 applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

administration with passage regulations that could be based on port regulations that could be adopted as administrative rules by the Joint Administration instead of creating a strait regime which would require a more complex process of negotiating an official agreement between the States.

6 Final Comments

The delimitation of the Sea of Azov has been progressing slowly with numerous rounds of negotiations. One of the difficulties is that neither side has made public their delimitation methodology. Probably the more practical approach will be delimitation of the Sea of Azov on the basis of establishing baselines, territorial sea followed by the delimitation of the States' respective EEZs.

For more than twenty years both coastal States—Ukraine and Russia have tirelessly argued the legality of their positions and made hundreds of attempts to solve the delimitation of the Sea of Azov and the status of the Kerch Strait. However, to date no agreement has been reached for the Sea or for Kerch Strait shipping.

The Russian position is quite understandable—Sevastopol,⁵² Azov, Kerch and Crimea, as a whole, are landmarks of Russian history and it has been difficult to accept that all this changed as a result of political decisions taken by a few persons.⁵³ For Ukraine, on the other hand, the Sea of Azov and Kerch Strait claims reflect the reality of its current state sovereignty.⁵⁴ Over the years the relationship between Ukraine and Russia has been so poor that even economic losses resulting from political and legal impasse have not been able to bring change or final agreement.

Russia does not have any legal reasons to insist that the Kerch Strait should be partly under Russian jurisdiction. Likewise, Ukraine has fewer grounds to claim the Tuzla split as being part of its state territory. If Russia were to recognize Ukrainian territorial claims on Tuzla split Russia would be fully dependent on the willingness of Ukraine to regulate navigation in the Strait. Dubious

52 Russian Black Sea fleet is based at Sevastopol under treaty until 2017.

53 Crimea was transferred to Ukraine by a decree of the Presidium of the Supreme Soviet of the U.S.S.R. issued 19 February 1954. It could be not recognised from legal point of view as the decree which change the status of the state territory; the only what was changed—the administrative management. Among the Crimea population approximately 60% is ethnic Russian.

54 Ukraine became an independent state on 24 August 1991.

terms such as “Master of the key to the Strait” employed by Ukraine, do not exist in UNCLOS and are not known to customary international law.

The Kerch Strait is the only connection between the Sea of Azov to the Black Sea and to the Mediterranean Sea. Over the years international shipping has increased. The unilateral actions of Ukraine continue to create problems with Russia. The Kerch Strait, while not geographically falling within the definition of a strait to which transit passage applies, nevertheless, in the interest of preserving freedom of navigation for merchant vessels, in this authors opinion should be the applicable regime.