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# The Passage Regimes of the Kerch Strait—To Each Their Own?

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## ABSTRACT

This study explores the passage regimes of the Kerch Strait and its adjacent maritime areas in the context of current arbitration proceedings between Ukraine and the Russian Federation. It ascertains that conflicting sovereignty claims over Crimea might lead to strait states and user states alike retaining their different approaches to the passage regime of the Kerch Strait. Thus, the regimes of transit passage and authorization-based passage might simultaneously be applied to the Kerch Strait under the domestic laws of the strait states, law of the sea, and general international law, particularly the obligation of nonrecognition. The law of the sea allows the reconciliation of such conflicting approaches and ensures legal certainty in the shipping lanes of the Kerch Strait if the coastal states agree on and respect a *sui generis* passage regime.

## ARTICLE HISTORY

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Historic bay; Kerch Strait; legal regime of straits; sovereignty; transit passage

## Introduction

In times of increased tension between states, coastal states tend to use their security considerations as an argument—legitimate or not—to adopt measures that restrict navigational rights under the law of the sea. This may occur by restricting navigation through important chokepoints of maritime commerce by, for example, subjecting transiting ships or aircraft to the requirements of prior notification or authorization or even the use of force or coercion by the coastal state of the relevant strait (hereafter strait state). Such practices contradict the aims of the law of the sea to keep commercial trade routes open and to ensure the rule of law in the maritime domain.

Geopolitical developments in the Black Sea region in the past decade have exerted considerable pressure on the stability of passage regimes owing to a shift in the coastal states' security considerations, particularly in the light of the occupation of Crimea in February 2014 by the Russian Federation. This has triggered multiple arbitral proceedings between Ukraine and the Russian Federation, including the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* and the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, both before Annex VII Arbitral

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Tribunals.<sup>1</sup> They were preceded, in May 2019, by the prescription of provisional measures by the International Tribunal for the Law of the Sea (ITLOS) in response to the seizure of three Ukrainian naval vessels and detainment of their crew by the Russian Federation in the Kerch Strait on 25 November 2018 (hereafter the Kerch Strait incident).<sup>2</sup>

This study explores the passage regime(s) applicable to the Kerch Strait and its adjacent maritime areas. It asks how the law of the sea and general international law can contribute to ensuring the rule of law and legal certainty in the shipping routes in the Black Sea, the Sea of Azov, and the Kerch Strait that are affected by the conflicting sovereignty claims over Crimea. The Kerch Strait incident is used as a case study and as a basis for a critical analysis of the Ukrainian and Russian perspectives on navigational rights in the Kerch Strait while focusing on both the international legal framework and the domestic rules on navigation in the Kerch Strait. It also scrutinizes how Ukraine and the Russian Federation have interpreted the applicable law in their current arbitration proceedings and the implications of this for passage rights of ships and aircraft in the Kerch Strait. This article investigates the possibility that navigation through the Kerch Strait and its adjacent maritime areas might be subject to parallel legal regimes, pursuant to which, the regimes of transit passage and authorization-based passage may simultaneously apply to the Kerch Strait under the law of the sea and general international law.

## Characteristics of the Kerch Strait

The Kerch Strait (Russian: керченский пролив; Ukrainian: керченська протока) connects the Sea of Azov and the Black Sea. It lies between the Crimean Peninsula and the Taman Peninsula. The strait is 41 km long and, at its narrowest point, only 4 km wide.<sup>3</sup> The Russian Federation constructed a bridge over the Kerch Strait after its annexation of Crimea. The Crimean Bridge comprises a road bridge (used since 2018) and a railway bridge (used since 2019) that run in parallel from the Russian mainland coast to Crimea. On Ukraine's request, the Annex VII Arbitral Tribunal is expected to rule in the *Case Concerning Coastal State Rights* on the legality of the Crimean Bridge over the Kerch Strait.<sup>4</sup> Thus, the Arbitral Tribunal's award is expected to serve as the first judgment that addresses the compatibility of the construction of a bridge with the legal regime of straits.<sup>5</sup>

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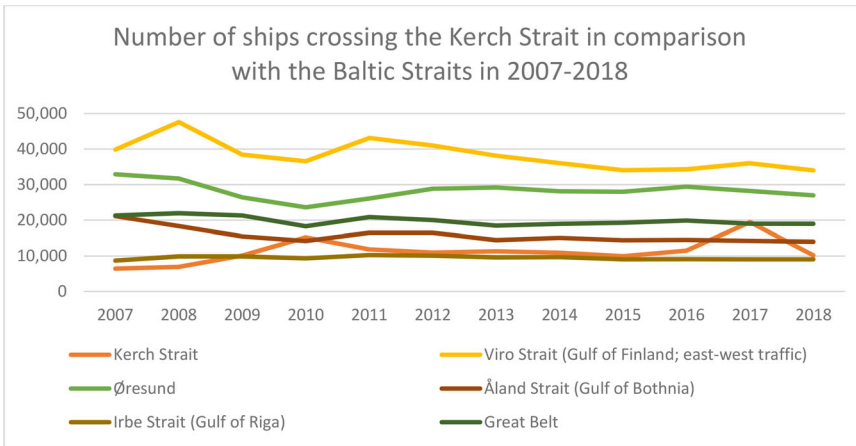
<sup>1</sup> See Annex VII Arbitral Tribunal, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Case No. 2017-06, available at <https://pca-cpa.org/en/cases/149/> (accessed 28 May 2020). Annex VII Arbitral Tribunal, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, Case No. 2019-28, available at <https://pca-cpa.org/en/cases/229/> (accessed 28 May 2020).

<sup>2</sup> International Tribunal for the Law of the Sea, *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, Case No. 26, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_26/C26\\_Order\\_25.05.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf) (accessed 4 July 2020).

<sup>3</sup> Internet Encyclopedia of Ukraine, "Kerch Strait", available at <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CK%5CE%5CKerchStrait.htm> (accessed 4 July 2020).

<sup>4</sup> Ukraine argues that the construction of the bridge and the laying of the submarine cables and pipelines in the Kerch Strait "are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility." Annex VII Arbitral Tribunal, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, [9, 492], available at <https://pcacases.com/web/view/149> (accessed 4 July 2020).

<sup>5</sup> Notably, the construction of a bridge over a strait has served as a source of dispute between the user state and strait state in the past, as demonstrated by the proceedings initiated by Finland in 1992 before the International Court of Justice. This case concerned a Danish bridge over the Great Belt, the construction of which was prejudicial to the



**Figure 1.** Number of annual ship crossings in straits based on the Baltic Marine Environment Protection Commission (HELCOM) automatic identification system data and the Russian Rosmorport statistics.

*Note:* Figure 1 is based on data collected via the maps and figures of HELCOM annual reports on shipping accidents in the Baltic Sea area from 2007 to 2014, available at <https://helcom.fi/baltic-sea-trends/maritime/accidents> (accessed 4 July 2020). The data in relation to period 2014 to 2017 are collected from the HELCOM Map and Data Service, available at: <http://maps.helcom.fi/website/mapservice> (accessed 4 July 2020). The data in relation to 2018 are collected from the Draft Annual HELCOM report on shipping accidents in the Baltic Sea area in 2018, HELCOM, Group of Experts on Safety of Navigation, Stockholm 19 September 2019, 5 -7, available at <https://portal.helcom.fi/meetings/SAFE%20NAV%2010-2019-639/MeetingDocuments/Forms/AllItems.aspx> (accessed 4 July 2020). HELCOM data do not cover 2019. The number of ships crossing the Kerch Strait decreased in 2019 to 9361. The data on the Kerch Strait are collected from Rosmorport website: see Azovo-Chernomorsky Basin Branch, VTS Services, “Statistics”, Rosmorport 2020, available at [http://www.rosmorport.com/filials/nvr\\_serv\\_nav](http://www.rosmorport.com/filials/nvr_serv_nav) (accessed 4 July 2020).

The Kerch Strait falls entirely within the limits of territorial sea and/or internal waters. It gives access to the Ukrainian ports of Berdyansk, Mariupol, and Henichesk, and to the Russian ports of Rostov-on-Don, Taganrog, Temryuk, and Yeysk on the coast of the Sea of Azov. The Sea of Azov, in turn, is connected with the Caspian Sea via the Don River, Volga-Don Canal, and Volga River. The Kerch Strait is the only maritime route from the major ports on the coast of the Sea of Azov to the Black Sea and beyond.

The Kerch Strait has relatively heavy traffic, reaching 15,229 crossings in 2010 and 19,451 in 2017.<sup>6</sup> As shown in Figure 1, these rates of crossings are comparable to those of, respectively, the Åland Strait (connecting the Gulf of Bothnia and the Baltic Sea) and the Great Belt (largest, but not busiest, among the Danish Straits) in the same years.<sup>7</sup> Nonetheless, the rate of crossings through the Kerch Strait mostly remains much lower—on average, close to 10,000 per year. For example, the strait had 10,978 crossings

Finnish navigation interests. However, Finland discontinued the case after reaching a settlement with Denmark pursuant to which Denmark paid Finland monetary compensation. See *Case Concerning Passage through the Great Belt (Finland v. Denmark)*, Order, of 29 July 1991, Provisional Measures, ICJ Reports 1992, p. 12. See also Martti Koskenniemi, “Case Concerning Passage Through the Great Belt” (1996) 27 *Ocean Development & International Law*, 255–289. Alex G. Oude Elferink, “The Regime of Passage Through the Danish Straits” (2000) 15 *International Journal of Marine and Coastal Law*, 555–566.

<sup>6</sup> See Figure 1.

<sup>7</sup> *Ibid.*

in 2012, 9969 crossings in 2015, and 9361 crossings in 2019.<sup>8</sup> This is comparable to the relatively stable rate of crossings through the Irbe Strait (leading to, e.g., the Port of Riga in the Baltic Sea), ranging from 9078 crossings in 2017 to 10,272 crossings in 2011.<sup>9</sup> By comparison, the traffic intensity in the Kerch Strait is many times smaller as compared with the busiest straits of the Baltic Sea, including the Viro Strait in the Gulf of Finland and Øresund between Sweden and Denmark.<sup>10</sup>

Therefore, the Kerch Strait meets the primary geographic and functional criteria of an international strait. Under the present author's interpretation of the 1982 United Nations Convention on the Law of the Sea<sup>11</sup> (UNCLOS or Convention), an international strait is a natural sea passage that is used for international navigation between two larger maritime areas and that is not more than 24NM wide<sup>12</sup> as measured from coast to coast or from baseline to baseline, and with respect to which, international vessel and/or air traffic is safeguarded under the Convention. In that regard, passage through the Kerch Strait is guaranteed under UNCLOS and the strait is used for international shipping, including often by ships registered in the European Union,<sup>13</sup> between two larger maritime areas and its width is less than 24NM.

Yet passage of non-Russian ships through the Kerch Strait has been impeded, particularly as of 2014 when the Russian Federation gained control over both coasts of the strait. In 2018, the Russian Federation repeatedly obstructed the passage of ships operated for commercial as well as noncommercial purposes. The United States condemned, in August 2018, the Russian Federation's alleged harassment of international shipping, referring to Russia's practice in delaying hundreds of commercial vessels in the course of the previous 5 months.<sup>14</sup> Similarly, the European Parliament condemned, in its resolution of 25 October 2018, "the excessive stopping and inspection of commercial vessels, including both Ukrainian ships and those with flags of third-party states, including ships under flags of various EU Member States."<sup>15</sup> The European Parliament further condemned the infringement of navigational rights in Ukraine's territorial waters and pointed out that "Russia is bound by international maritime law and the bilateral cooperation agreement with Ukraine not to hamper or impede transit passage through the Kerch Strait and the Sea of Azov."<sup>16</sup>

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

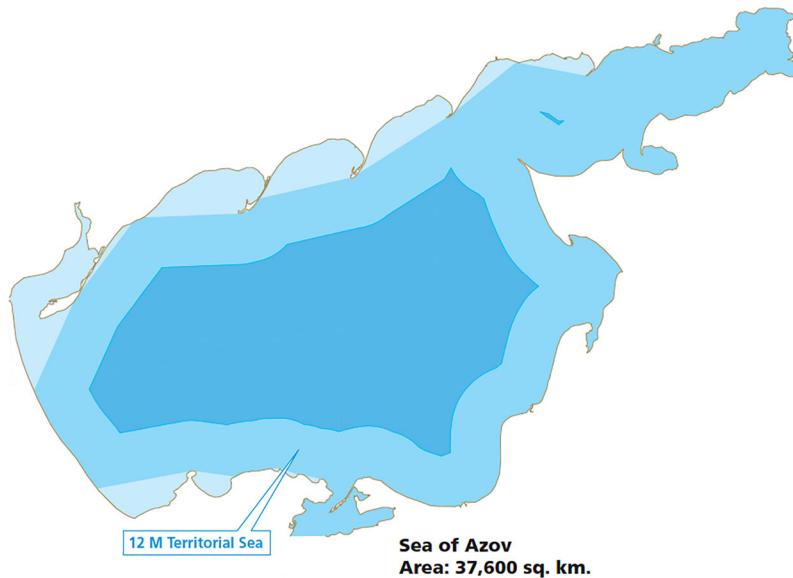
<sup>12</sup> See Art 35(b) of UNCLOS, according to which nothing in Part III of the Convention affects the legal status of the waters beyond the territorial seas of states bordering straits as EEZs or high seas. One may thus argue that international straits that fall under the category of Art 36 of UNCLOS should still meet the 24-NM limit. Hence, the exclusive economic zone (EEZ) or high seas corridor in the Art 36 type of international strait could be established by strait states by means of voluntarily limiting the width of the outer limits of their territorial sea. This method has been used by the Baltic strait states with respect to, inter alia, the Kadet and Femer straits, Bornholmssgat, and the Viro Strait.

<sup>13</sup> European Parliament resolution (EU) No. 2018/2870(RSP), of 25 October 2018, *On the Situation in the Sea of Azov*, point D.

<sup>14</sup> State Department's Press Statement, *Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov*, Washington DC, 30 August 2018, available at <https://www.state.gov/russias-harassment-of-international-shipment-transiting-the-kerch-strait-and-sea-of-azov> (accessed 4 July 2020).

<sup>15</sup> European Parliament's 2018 resolution on the situation in the Sea of Azov, note 13, [1].

<sup>16</sup> Ibid, [3]. Although the European Parliament made a reference to transit passage, the European Union (EU) has not otherwise claimed that the regime of transit passage is applicable to the Kerch Strait. Similarly, the United States has not submitted a protest for the applicability of the right of transit passage in the Kerch Strait.



**Map 1.** The Sea of Azov, including the internal waters, territorial sea, and EEZ of Ukraine and the Russian Federation.

*Source:* Dispute Concerning Coastal State Rights, Written Observations and Submissions of Ukraine on Jurisdiction, 27 November 2018, [Dispute Concerning Coastal State Rights, 2020 Award on Preliminary Objections, note 4, [212]].



**Map 2.** The Black Sea, including the internal waters, alleged territorial sea, and EEZ of Ukraine.

*Note:* Marineregions.org, “Overlapping claim Ukrainian Exclusive Economic Zone”, Flanders Marine Institute (VLIZ), 2020. The map has been modified by the author to include the names of, inter alia, the states, peninsulas, and ports mentioned in the article. Available at <http://www.marineregions.org/eezdetails.php?mrgid=5695> (accessed 4 July 2020).

The Russian Federation restricts navigation through the Kerch Strait via strict administrative practices as part of its vessel traffic service (VTS). These requirements include prior notification for and authorization of passage. It is stated in the Russian federal port authority’s Rosmorport instructions “Terms and conditions of navigation services in the VTS of the Kerch Strait” that

A regulatory approval system of vessel movement is effective in the VTS of the Kerch Strait coverage area. Vessels enter the VTS of the Kerch Strait coverage area and leave it,

approach toward to a pilot's reception position or start moving in the zone upon receipt of a VTS of the Kerch Strait operator's permit.<sup>17</sup>

It is explained in the instructions that the use of a permit-based system in the context of a 24-hour schedule is necessary for planning the movement of vessels, in particular, using a one-way movement of vessels in the fairway (the navigable part of the shallow Kerch Strait) and priority direction of vessel movement, in addition to establishing the speed and the interval of vessel movement.<sup>18</sup> In practice, the Kerch Strait VTS regulates vessel movement by "conveying [to] them binding instructions as follows: movement priority and the movement start time; the route, the interval and the speed of the movement; the procedure for passing fairways and crossing them; the ban on further movement; anchoring grounds and sheltered locations."<sup>19</sup>

These restrictions on the navigation of foreign ships in the Sea of Azov appear not to be founded on any relevant decisions of the International Maritime Organization (IMO). The Russian Federation appears to refer to IMO Resolution A.857(20)<sup>20</sup> as the legal basis of the VTS in the relevant maritime area, but that resolution only serves to describe the principles and general operational provisions for the operation of a VTS.<sup>21</sup> Notably, the resolution does refer to the possibility that a coastal state may exercise its discretionary right to establish and operate under a VTS a system of traffic clearances or VTS sailing plans or both in relation to priority of movements, allocation of space, mandatory reporting of movements in the VTS area, routes to be followed, speed limits to be observed, or other appropriate measures.<sup>22</sup> However, the resolution does not refer to such possibility in relation to straits used for international navigation. Such requirements hamper international navigation in a strait, and could only be lawful in an international strait if the measure was previously approved and adopted by the IMO (see, inter alia, Article 41(4) of UNCLOS).

The IALA's VTS Manual provides the coastal state's right to require traffic clearances explicitly only with respect to port VTS, while distinguishing it from a coastal VTS.<sup>23</sup> Clearance of ship movements is defined in the manual exclusively in relation to access to ports.<sup>24</sup> Clearances may also be required if ships seek to depart from a port. Port states often make use of this possibility, especially in ports with a heavy traffic, for example, in Europe's busiest passenger port, Helsinki.<sup>25</sup> With respect to coastal VTS, the IALA's VTS manual explains that the types of service provided depend on the legal

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<sup>17</sup> Rosmorport, VTS services, "General Information", "Terms and conditions of navigation services in the VTS of the Kerch Strait", available at [http://www.rosmorport.com/filials/nvr\\_serv\\_nav/#procedure\\_kerch](http://www.rosmorport.com/filials/nvr_serv_nav/#procedure_kerch) (accessed 4 July 2020). The current Kerch Strait VTS system was certified by the Russian Federation's Ministry of Transport on 23 August 2017 and the certification is valid until 23 August 2022. See "VTS certificate of the Kerch Strait, highest category", available at <https://www.rosmorport.com/about/sertificates/certification/#lic15> (accessed 1 September 2020).

<sup>18</sup> Rosmorport, note 17, "Terms and conditions of navigation services in the VTS of the Kerch Strait."

<sup>19</sup> *Ibid.*

<sup>20</sup> IMO Assembly Resolution A.857(20), Annex 1, of 27 November 1997, *Guidelines and Criteria for VTS*.

<sup>21</sup> Rosmorport, note 17, "Terms and conditions of navigation services in the VTS of the Kerch Strait."

<sup>22</sup> IMO Resolution A.857(20), Annex 1, note 20, [2.3.3].

<sup>23</sup> International Association of Marine Aids to Navigation and Lighthouse Authorities, *IALA VTS Manual* (Ed. 6, 2016), 27.

<sup>24</sup> *Ibid.*, 43.

<sup>25</sup> Traffic Management Finland, *Helsinki VTS Master's Guide*, 2020, 4–5, available at <https://tmfg.fi/sites/default/files/2020-02/Helsinki%20VTS%20Sector%201%20EN.pdf> (accessed 4 July 2020).

basis of the VTS and refers to its Guideline 1071 on the establishment of VTS in international straits.<sup>26</sup> The guideline does not mention the possibility of subjecting ships transiting an international strait to any unilateral prior authorization requirement imposed by the strait state.<sup>27</sup>

Generally, a VTS is established where a particular maritime area exhibits high traffic density.<sup>28</sup> Notably, such a VTS or authorization-based system has not been used with respect to Baltic straits that have a rate of annual crossings similar to that of the Kerch Strait, that is, the Irbe Strait between Estonia and Latvia leading to the Gulf of Riga and the Åland Strait between Finland and Sweden.<sup>29</sup> There appears to be no IMO resolution that would permit the establishment of a VTS specifically in the Kerch Strait, and therefore, the already-referred-to VTS requirements would be unlawful if the Kerch Strait constitutes an international strait.<sup>30</sup> Even though a port state can, by virtue of the principle of sovereignty, regulate access to its ports located on the coasts of the Sea of Azov, this would not entitle it to restrict access to the Ukrainian exclusive economic zone (EEZ) in the Sea of Azov (the existence of which is, however, contested by the Russian Federation), against the terms of the right of transit passage or to the ports of the other coastal state of the Sea of Azov against bilateral agreements between the coastal states on this matter, as argued in the following.

The Russian Federation restricts access to the Sea of Azov not only with respect to commercial ships sailing to the Sea of Azov. Tensions over the passage rights in the Kerch Strait peaked in November 2018 when the Russian Federation blocked the passage of three Ukrainian naval vessels, seized them, and detained the crew. This incident is discussed next in the context of the ongoing arbitration proceedings between Ukraine and the Russian Federation.

## **The Kerch Strait Incident and its implications for the passage regime in the Sea of Azov**

The roots of the Kerch Strait incident lie in the annexation of Crimea by the Russian Federation in 2014, as a result of which it now controls both the eastern and western coasts of the Kerch Strait. The overwhelming majority of states consider the occupation and annexation of Crimea as a manifest breach of international law, particularly the rules governing the use of force and territorial integrity. The UN General Assembly has stressed by a vote of 100 in favor, 11 against, with 58 abstentions, the importance of a policy of nonrecognition toward the Russian Federation's occupation and annexation of Crimea and the need to refrain from any action or dealing that might be interpreted as recognizing any such altered status.<sup>31</sup>

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<sup>26</sup> IALA VTS Manual, note 23, 27.

<sup>27</sup> International Association of Marine Aids to Navigation and Lighthouse Authorities, *IALA Guideline 1071—Establishment of a Vessel Traffic Service beyond Territorial Seas* (Ed. 1, 2009), 4ff.

<sup>28</sup> IMO Resolution A.857(20), Annex 1, note 20, [2.3.3].

<sup>29</sup> See also above Figure 1.

<sup>30</sup> See Regulation 12 of Chapter V, International Convention for the Safety of Life at Sea (SOLAS), adopted 1 November 1974, entered into force 25 May 1980, 1184 UNTS 278.

<sup>31</sup> General Assembly Resolution 68/262, UN Doc. A/RES/68/262, 2 (27 March 2014), available at [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/262](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262) (accessed 4 July 2020).



However, in the current *Dispute Concerning Coastal State Rights* before the Annex VII Arbitral Tribunal, the determination of Crimea's status under international law is not the object of the proceedings. The Arbitral Tribunal has clearly concluded, pursuant to Article 288(1) of UNCLOS, that "it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea."<sup>32</sup> Nevertheless, this does not preclude the Arbitral Tribunal from deciding on the legality of the Russian Federation's various activities in the Sea of Azov and the Kerch Strait,<sup>33</sup> including on the alleged harassment of Ukrainian vessels and impediments to their navigation through the Kerch Strait.<sup>34</sup> Notably, the rights of third states in the Sea of Azov and the Kerch Strait are also excluded from the scope of the dispute, although the Arbitral Tribunal's determination of the applicable passage regime inevitably affects the rights of third states, which may, in principle, submit another claim against Ukraine or the Russian Federation (or both) in the future.

By contrast, the Annex VII Arbitral Tribunal has not yet decided on its jurisdiction in another case brought before it by Ukraine in the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, which addresses the legality of the Russian Federation's activities in the Kerch Strait on 25 November 2018.<sup>35</sup> In this case, Ukraine submitted its memorial to the Arbitral Tribunal on 22 May 2020, in response to which the Russian Federation raised preliminary objections and contended that the Arbitral Tribunal does not have jurisdiction because, inter alia, Ukraine's claims relate to a dispute concerning military activities (the Russian Federation made the same preliminary objection earlier in the *Dispute Concerning Coastal State Rights*, as explained in the following). The Arbitral Tribunal decided in October 2020 that the Russian Federation's preliminary objections will be addressed in a preliminary phase and suspended proceedings on the merits.<sup>36</sup>

The Kerch Strait incident involved three Ukrainian naval vessels that were on their journey halfway around Crimea and intended to transit the Kerch Strait in order to enter the Sea of Azov. The *Berdyansk* and the *Nikopol*—two artillery boats—and the *Yani Kapu* (a naval tugboat) were heading from the Ukrainian Black Sea coastal city of Odesa to a Ukrainian port<sup>37</sup> in the Sea of Azov. The Ukrainian ships carried on board 24 naval personnel.

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<sup>32</sup> Annex VII Arbitral Tribunal, *Dispute Concerning Coastal State Rights*, Award 21 February 2020, [197].

<sup>33</sup> *Ibid.*, [297].

<sup>34</sup> *Ibid.*, [338–339].

<sup>35</sup> *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Procedural Order No. 1, PCA Case No. 2019-28, Annex VII Arbitral Tribunal, of 22 November 2019, 1–4. See also Comment by the Information and Press Department on Ukraine filing an arbitration memorandum regarding the Kerch Strait incident, 26 May 2020, available at [https://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/ckNonkJE02Bw/content/id/4138495](https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/ckNonkJE02Bw/content/id/4138495) (accessed 4 July 2020).

<sup>36</sup> *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Procedural Order No. 2, PCA Case No. 2019-28, Annex VII Arbitral Tribunal, of 27 October 2020, 1–5.

<sup>37</sup> The ITLOS provisional order refers to the port of Berdyansk, whereas Ukraine's diplomatic notes to the UN claim that the ships were heading to Mariupol Port. See *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Order of 25 May 2019, [31]. See also Annex to the letter dated 27 November 2018 from the Permanent Representative of Ukraine to the United Nations, UN Doc. A/73/605-S/2018/1053 (30 November 2018), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm> (accessed 4 July 2020).

The Russian Federation, which claims sovereignty over Crimea and its adjacent territorial sea,<sup>38</sup> is required, under Articles 17 and Article 24(1) of UNCLOS and in conformity with the 1989 Jackson Hole statement,<sup>39</sup> to respect the innocent passage of Ukrainian ships in the Black Sea. While the Russian Federation was required to respect the Ukrainian ships' right of innocent passage off the western and southern coast of Crimea, the applicable navigation regime changed in time as the Ukrainian ships reached the maritime area leading to the Kerch Strait (southeast of Crimea). Passage through the Kerch Strait is regulated under Article 2 of the Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (2003 Kerch Treaty).<sup>40</sup> Article 2(1) of the 2003 Kerch Treaty stipulates that Ukrainian and Russian warships enjoy freedom of navigation in the Sea of Azov and the Kerch Strait. Thus, Ukraine's ships ought to have enjoyed the freedom of navigation in the entrance to the Kerch Strait since the freedom of navigation in the Kerch Strait, as stipulated in Article 2 of the 2003 Kerch Treaty, would be devoid of any practical effect if it did not apply in the waters leading to the Kerch Strait.

The transit of the Ukrainian vessels in the entrance to the Kerch Strait was obstructed by Russian Coast Guard vessels, which commenced a pursuit after the three Ukrainian ships had turned around and headed to the Black Sea proper.<sup>41</sup> On the same day, Ukraine alleged before the UN that "Ships of the Russian Federation, in violation of freedom of navigation, unlawfully used force against the ships of the Ukrainian Naval Forces."<sup>42</sup> During the pursuit, the Russian ships fired at *Berdyansk*, wounding three members of the Ukrainian crew, after which the Ukrainian ships were seized and the crew was detained by the Russian Federation.<sup>43</sup> Ukraine claimed that the seizure of its ships and detention of the crew not only violated UNCLOS, which grants immunity to warships and members of their crews, but also the Third Geneva Convention relative to the Treatment of Prisoners of War (1949).<sup>44</sup> Ukraine explicitly referred to the crew as prisoners of war.<sup>45</sup>

<sup>38</sup> See *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [211].

<sup>39</sup> Joint Statement by the United States of America and the Union of Soviet Socialist Republics: Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989 Jackson Hole, 4, available at [http://www.un.org/depts/los/doalos\\_publications/LOSBulletins/bulletinpdf/bule14.pdf](http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bule14.pdf) (accessed 4 July 2020). See also, e.g., Kari Hakapää and Erik J. Molenaar, "Innocent Passage—Past and Present", (1999) 23 *Marine Policy*, 143.

<sup>40</sup> Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, adopted 24 December 2003, entered into force 5 May 2004. Accessible in Ukrainian at [https://zakon.rada.gov.ua/laws/show/643\\_205?lang=en#Text](https://zakon.rada.gov.ua/laws/show/643_205?lang=en#Text) (accessed 4 July 2020). For an unofficial English version of the treaty, see <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/proelss/dateien-valentin/agreement-sea-of-azov> (accessed 4 July 2020).

<sup>41</sup> ITLOS 25 May 2019 Order on Provisional Measures, note 37, [31].

<sup>42</sup> Annex to the letter dated 25 November 2018 from the Permanent Representative of Ukraine to the United Nations, UN Doc. A/73/601–S/2018/1052 (28 November 2018), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm> (accessed 4 July 2020).

<sup>43</sup> ITLOS 25 May 2019 Order on Provisional Measures, note 37, [31–32]. According to the memorandum submitted by the Russian Federation to ITLOS, the Ukrainian Navy servicemen were apprehended under Art 91 of the Code of Criminal Procedure of the Russian Federation as persons suspected of having committed a crime of aggravated illegal crossing of the state border and were placed in detention.

<sup>44</sup> Annex to the letter dated 18 April 2019 from the Permanent Representative of Ukraine to the United Nations, UN Doc. A/73/844–S/2019/334 (23 April 2019), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm> (accessed 4 July 2020).

<sup>45</sup> Annex to the letter dated 10 December 2018 from the Permanent Representative of Ukraine to the United Nations, UN Doc. A/73/659–S/2018/1112 (14 December 2018), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm> (accessed 4 July 2020).

On 29 November 2018, Ukraine alerted the Annex VII Arbitral Tribunal of the Kerch Strait incident, noting that “Russia’s latest actions, including firing and seizure of Ukrainian naval vessels, mark a serious escalation of a months’-long pattern, in which vessels flagged both to Ukraine and to third states have repeatedly faced obstacles to navigation.”<sup>46</sup> In that context, it is possible to approach the Kerch Strait incident from the perspective of *jus in bello*. James Kraska has argued that the legal framework of humanitarian law applies to the Kerch Strait incident, rather than UNCLOS, since Ukraine and the Russian Federation are engaged in an international armed conflict.<sup>47</sup> In a letter to the UN, Ukraine, indeed, claimed that the Russian Federation’s actions in the Kerch Strait incident “constitute an act of armed aggression ... undermining the peaceful settlement of the Ukrainian-Russian armed conflict.”<sup>48</sup>

Yet, notably, in the arbitration proceedings in *the Coastal State Rights Case*, neither Ukraine nor the Russian Federation has referred to the Kerch Strait incident as being governed by the rules of naval warfare. They debate whether the occupation of the Crimean Peninsula in 2014 constitutes use of force.<sup>49</sup> The Kerch Strait incident of 2018 has not been brought to the attention of the Arbitral Tribunal by Ukraine as a clear example of an alleged use of force, but rather is based on the impediments imposed by the Russian Federation on the passage of ships in the Kerch Strait and the Sea of Azov.<sup>50</sup> It was also the view of the Arbitral Tribunal in response to the Russian Federation’s preliminary objections that “the fact that some of the Ukrainian vessels whose navigation was impeded belonged to Ukraine’s navy does not cause the dispute to concern military activities.”<sup>51</sup> However, this decision does not necessarily preclude the Arbitral Tribunal from reaching a different conclusion in *the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, the object of which is specifically the Kerch Strait incident of 25 November 2018.

In response to Ukraine’s request for provisional measures, the ITLOS Order of 25 May 2019 required the Russian Federation to release the Ukrainian vessels and servicemen and to allow them to return to Ukraine.<sup>52</sup> The ITLOS considered that the continuing detention of the Ukrainian servicemen and naval ships would irreparably prejudice their

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<sup>46</sup> Annex to the letter dated 29 November 2018 from the Permanent Representative of Ukraine to the United Nations, UN Doc. A/73/619–S/2018/1079 (5 December 2018), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm> (accessed 4 July 2020).

<sup>47</sup> James Kraska, “The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?” 3 December 2018, *EJIL: Talk!* at <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/comment-page-1> (accessed 4 July 2020).

<sup>48</sup> Annex to the letter of 10 December 2018 from Ukraine to the UN, note 45. As a reaction to the Kerch Strait incident, the United States carried out a freedom of navigation operation in the Peter the Great Gulf in the Russian maritime area of the Sea of Japan and, in support of Ukraine, sent a US warship to the Black Sea. See Jesse Johnson, “U.S. warship conducts Sea of Japan operation in challenge to Russia’s ‘excessive maritime claims,’” 6 December 2018, *The Japan Times*, at <https://www.japantimes.co.jp/news/2018/12/06/national/u-s-warship-conducts-freedom-navigation-operation-challenge-russias-excessive-maritime-claims> (accessed 4 July 2020). Hannah L. Smith, “US sends warship into Ukraine’s Black Sea crisis”, 6 December 2018, *The Times*, at <https://www.thetimes.co.uk/edition/world/us-warship-heading-for-black-sea-after-ukraine-sailors-crisis-7flmj8h> (accessed 4 July 2020).

<sup>49</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [6, 49, 79, 305, 310, 328].

<sup>50</sup> *Ibid.*, [250, 311].

<sup>51</sup> *Ibid.*, [338].

<sup>52</sup> ITLOS 25.05.2019 Order on Provisional Measures, note 37, [8, 118]. The Russian Federation did not participate in the ITLOS hearing on provisional measures as it considered that the dispute concerned its military activities, which are exempted from ITLOS jurisdiction. It also did not immediately respond to the ITLOS order. Nonetheless, the Russian Federation freed the servicemen under a prisoner exchange deal in September 2019. The seized navy ships were returned to Ukraine in November 2019.

immunity.<sup>53</sup> The seized Ukrainian navy ships and their crew have since been returned to Ukraine. The ITLOS found in its Order that “at the core of the dispute was the Parties’ differing interpretation of the regime of passage through the Kerch Strait”<sup>54</sup> and concluded that “what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation.”<sup>55</sup> The Annex VII Arbitral Tribunal will likely clarify in the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* whether the Kerch Strait incident of 25 November 2018 concerned a law enforcement (rather than a military) operation against Ukrainian sovereign immune vessels. The incident also raises questions about the extent of navigational freedoms that Ukraine and the Russian Federation enjoy in the Kerch Strait and the Sea of Azov.

### Freedom of navigation of Ukrainian and Russian ships in the Kerch Strait

Article 2 of the 2003 Kerch Treaty stipulates the passage rights of Ukrainian, Russian, and foreign ships in the Sea of Azov and the Kerch Strait. Article 2(1) of the 2003 Kerch Treaty provides that merchant ships and warships, as well as other state vessels flying the flag of the Russian Federation or Ukraine, operated for noncommercial purposes, enjoy freedom of navigation in the Sea of Azov and the Kerch Strait. By contrast, warships and other state vessels of third states operated for noncommercial purposes may enter the Sea of Azov and pass through the Kerch Strait if they are visiting a port in Ukraine or the Russian Federation with the permission of both parties (Article 2(3) of the 2003 Kerch Treaty). The right of passage of commercial ships of third states is more liberal, since under Article 2(2) of the Treaty such vessels “may enter the Sea of Azov and pass through the Kerch Strait if they go to or return from a Russian or Ukrainian port.” Yet the 2003 Kerch Treaty does not stipulate the conditions under which foreign commercial ships may enter the Sea of Azov. This might be explained by the fact that under the 2003 Kerch Treaty, foreign commercial ships’ access to the Sea of Azov is dependent on their visiting a Ukrainian or Russian port. Thus, under the terms of the 2003 Kerch Treaty, their right of navigation through the Kerch Strait is presumably intertwined with the conditions for entering ports.

The freedom of navigation granted by Article 2(1) of the 2003 Kerch Treaty is applicable in the Kerch Strait only to the ships of coastal states of the Sea of Azov, that is, Ukraine and the Russian Federation, and not to the ships of third states.<sup>56</sup> The freedom of navigation is a high seas freedom guaranteed under Article 87(1)(a) of UNCLOS and is also applicable to all ships in an EEZ (Article 58(1) of the Convention). It is not clear whether the entire regime of freedom of navigation as laid down in UNCLOS is applicable to ships registered in Ukraine and the Russian Federation in the Sea of Azov and the Kerch Strait.<sup>57</sup> In general, however, there seems

<sup>53</sup> Ibid, [111]. This follows from the fact that warships and other government ships operated for noncommercial purposes are entitled to sovereign immunity in a foreign territorial sea and EEZ under Arts 32 and 95–96 in combination with Art 58 of UNCLOS.

<sup>54</sup> Ibid, [72].

<sup>55</sup> Ibid, [74].

<sup>56</sup> Notably, Art 2(1) of the 2003 Kerch Treaty grants only the freedom of navigation and does not explicitly provide for the freedom of overflight.

<sup>57</sup> Valentin J. Schatz and Dmytro Koval, “Russia’s Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective” (2019) 50 *Ocean Development & International Law*, 285.

to be no good reason why states should not enjoy a broad navigational freedom in waters under their sovereignty.

It is not unprecedented for the freedom of navigation to made applicable by an agreement among the strait states with respect to a territorial sea. Under Article 5(2) of the 1979 Peace Treaty between Egypt and Israel, the two parties agreed that they “consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight.”<sup>58</sup> If the coastal states of the Strait of Tiran had not agreed on the applicability of such a liberal transit regime, then passage through the Strait of Tiran would be subject to the regime of nonsuspendable innocent passage under Article 45(1)(b) of UNCLOS. Although navigation through the Strait of Tiran would therefore be safeguarded under international law, the passage regime would be more restrictive for flag states in comparison to freedom of navigation and would not include the freedom of overflight.<sup>59</sup>

By contrast, the passage regime stipulated in the 2003 Kerch Treaty is based on the premise that the Sea of Azov and the Kerch Strait comprise internal waters of Ukraine and the Russian Federation. Article 1 of the 2003 Kerch Treaty stipulates that the Sea of Azov and the Kerch Strait have historically been internal waters of the Russian Federation and Ukraine. This allowed the coastal states of the Sea of Azov to agree that only their ships enjoy the freedom of navigation, whereas the ships of third states need to request prior authorization to enter the Sea of Azov via the Kerch Strait.<sup>60</sup>

Nonetheless, while the Russian Federation maintains that “it has been exercising exclusive sovereignty over the waters of the Kerch Strait since it has been exercising its sovereignty on both sides of the strait,”<sup>61</sup> it claims that the Kerch Strait is still open for transit for Ukrainian ships and commercial ships of other states entering Russian or Ukrainian ports in the Sea of Azov. The Russian Federation argues that, pursuant to the 2003 Kerch Treaty, Ukrainian ships enjoy freedom of navigation and foreign nonmilitary vessels sailing to and from Ukrainian ports are entitled to “free passage” in the Kerch Strait.<sup>62</sup>

It is not clear what the reference to “free passage” means. It holds connotations with legal concepts such as the freedom of navigation or transit passage. Yet, as analyzed in the preceding, all ships, including Russian-flagged as well as foreign ships, need to apply for a prior permit from the Russian authorities to transit the Kerch Strait according to the terms of the Kerch Strait VTS. It is thus questionable whether, in practice, foreign commercial ships have “free passage” to enter the Sea of Azov.

Notably, the 2003 Kerch Treaty does not refer to “free passage.” Instead, it uses, in Article 2(2), more general terms: “Commercial vessels flying the flags of third states may enter the Sea of Azov and pass through the Kerch Strait if they go to or return from a Russian or Ukrainian port.” Therefore, foreign commercial ships that intend to cross the

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<sup>58</sup> Peace Treaty between Israel and Egypt, adopted 26 March 1979, entered into force 25 April 1979, 1138 UNTS 59. This is reiterated in Art 14(3) of the Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, adopted 26 October 1994, entered into force 10 November 1994, 2042 UNTS 351.

<sup>59</sup> See further, e.g., Erik J. Molenaar, *Coastal State Jurisdiction over Vessel-source Pollution* (Kluwer Law, 1998), 319.

<sup>60</sup> Notably, the 2003 Kerch Treaty does not grant the freedom of overflight to Ukraine or the Russian Federation, nor to any other state.

<sup>61</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [211].

<sup>62</sup> *Ibid.*

Kerch Strait, not for the purpose of visiting Ukrainian or Russian ports, are, in any case, not entitled to enter the Sea of Azov under Article 2 of the 2003 Kerch Treaty.

Article 2(2) of the 2003 Kerch Treaty does not exclude the possibility that strait states may exercise considerable control over the passage of ships of third states in the Kerch Strait. In principle, this provision appears to allow for an authorization-based passage regime with respect to commercial vessels flying the flags of third states. Moreover, this provision explicitly makes foreign commercial ships' access to the Sea of Azov dependent on whether they are seeking access to either Ukrainian or Russian ports. Under international law, coastal states have considerable discretion to regulate a foreign ship's access to ports (see Articles 25(2), 38(3), and 211(3) of UNCLOS). A general right of foreign ships to enter ports is absent from UNCLOS and states have retained their freedom to close ports,<sup>63</sup> subject to the exception relating to instances requiring humanitarian assistance, as well as to conditions of proportionality and the prohibition of discrimination. The ICJ has concluded, with regard to the contemporary state practice, that it is "*by virtue of its sovereignty that the coastal State may regulate access to its ports.*"<sup>64</sup> Therefore, the coastal state has a wide discretion in deciding whether to allow foreign ships to enter its ports.<sup>65</sup> Hence, the Russian Federation may arguably exercise its permit system in relation to foreign commercial ships that seek access to the Sea of Azov for the purpose of entering its ports under Article 2(2) of the 2003 Kerch Treaty.

With respect to ships that seek to enter the Sea of Azov not for the purpose of visiting ports, the Russian Federation's permit-based passage regime could be lawful if it meets the conditions of Art 311(2) of UNCLOS, which provides that "This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention." These conditions could be satisfied if the maritime area of the Kerch Strait and the Sea of Azov constitutes a historic bay, owing to which no passage rights would apply therein, as discussed further in the following.

The Russian Federation's authorization-based Kerch VTS rules clearly hinder the transit of those commercial ships that seek access to Ukrainian ports in the Sea of Azov. Therefore, the Russian Federation's claim in the judicial proceedings about the applicability of "free passage" in the Kerch Strait to foreign nonmilitary vessels sailing to and from Ukrainian ports appears to contradict both the Russian Federation's previous practice and its domestic rules. The Russian Federation presumably cannot apply the permit requirement in relation to commercial ships that seek access to Ukrainian ports in the Sea of Azov under Article 2(2) of the 2003 Kerch Treaty. Furthermore, Ukraine contests *in toto* the legality of the Russian Federation's permit-based passage regime on the grounds that, instead, the regime of transit passage is applicable to the Kerch Strait, as discussed in the following.

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<sup>63</sup> Narrowly, Art 255 of UNCLOS stipulates an obligation of means according to which states shall endeavor to facilitate, subject to the provisions of their laws and regulations, only research vessels' access to their harbors.

<sup>64</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, p. 111 [213].

<sup>65</sup> Molenaar, note 59, 101. Robin R. Churchill and Vaughan Lowe, *The Law of the Sea* (Manchester University Press, 1999), 52.

## A critical analysis of Ukraine's arguments about the applicability of transit passage to ships and aircraft in/over the Sea of Azov and the Kerch Strait

Ukraine maintained in the *Coastal State Rights Case* that “[T]he Sea of Azov and the Kerch Strait are not internal waters; rather, the Sea of Azov is an enclosed or semi-enclosed sea within the meaning of the Convention, containing a territorial sea and exclusive economic zone, and the Kerch Strait is a strait used for international navigation.”<sup>66</sup> Ukraine also stated that: “[T]he Kerch Strait is an international strait [...] connecting “one part of [...] an exclusive economic zone” in the Sea of Azov to “an exclusive economic zone” in the Black Sea.”<sup>67</sup> On this interpretation, the regime of transit passage would apply in the Kerch Strait (see Maps 1 and 2). The regime of transit passage would grant *grosso modo* the freedom of navigation but also the freedom of overflight to all ships and aircraft of all states in the Kerch Strait, thereby rendering the 2003 Kerch Treaty incompatible with UNCLOS by virtue of Art 311(2) of the Convention.

Thus, the passage regime under Article 2 of the 2003 Kerch Treaty could not restrict the passage rights of ships and aircraft by virtue of the Treaty if, instead, the regime of transit passage is applicable to the Kerch Strait under UNCLOS. This position finds support from the legal literature.

López Martín considers that the regime of internal waters as declared in the 2003 Kerch Treaty is not consistent with international law and argues that

[I]t does not seem that there are any of the parameters required for the proclamation of historic waters, therefore, such a declaration, subjecting the passage of foreign military vessels to the consent of the coastal States, is a clear infringement of the right of passage in transit which should be in force in the Kerch Strait in accordance with the provisions in Art 37 of the Convention of 1982, which both States are parties to.<sup>68</sup>

Alexander Skaridov shares López Martín's critique in connection with the legal implications of the reference to “internal waters” in the 2003 Kerch Treaty and finds that this reference does not have much legal significance, but rather has more general and historic implications.<sup>69</sup> Skaridov opined in 2014 that the regime of transit passage should be applicable to the Kerch Strait in order to preserve the freedom of navigation of merchant vessels.<sup>70</sup>

Similarly, Ukraine has downplayed the legal value of the reference to internal waters in Article 1 of the 2003 Kerch Treaty and Article 5 of the Agreement between the Russian Federation and Ukraine on the Russian–Ukrainian State Border<sup>71</sup> (State Border Treaty), which provides: “Questions pertaining to contiguous maritime waters shall be settled by agreement

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<sup>66</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [200].

<sup>67</sup> *Ibid.*, [215].

<sup>68</sup> Ana G. López Martín, *International Straits: Concept, Classification and Rules of Passage* (Springer, 2010), 71.

<sup>69</sup> Alexander Skaridov, “The Sea of Azov and the Kerch Straits”, in David D. Caron and Nilufer Oral (eds), *Navigating Straits: Challenges for International Law* (Martinus Nijhoff, 2014), 234–235.

<sup>70</sup> *Ibid.*, 237.

<sup>71</sup> Agreement between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, adopted 28 January 2003, entered into force 23 April 2004, available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54132/Part/I-54132-08000002803fe18a.pdf> (accessed 4 July 2020).

between the Contracting Parties in accordance with international law. Nothing in this Treaty shall prejudice the positions of Ukraine and the Russian Federation regarding the status of the Sea of Azov or the Kerch Strait as internal waters.”<sup>72</sup> In the *Coastal State Rights Case*, Ukraine contends that after the dissolution of the Soviet Union, the Sea of Azov and the Kerch Strait “no longer qualify as internal waters,”<sup>73</sup> as only bays, the coasts of which belong to a single state under the terms of Article 10 of UNCLOS, can be potentially categorized as internal waters.<sup>74</sup> Yet, as pointed out by the Russian Federation, this position ignores the opposite conclusion reached by the International Court of Justice (ICJ) in the *Gulf of Fonseca case* and Arbitral Tribunal in the arbitration between Slovenia and Croatia.<sup>75</sup>

Ukraine claims that the Sea of Azov comprises the following maritime zones as provided for in UNCLOS: internal waters, territorial sea, EEZ, and continental shelf. It follows from this that Ukraine’s contiguous zone, which was established by the Contiguous Zone of Ukraine Act in December 2018,<sup>76</sup> also exists in the Sea of Azov and extends up to 24 NM as measured from the baselines in conformity with Art 33(2) of UNCLOS. The Act does not, however, explicitly include or exclude the Sea of Azov from its application. In this context, the Russian Federation has maintained that

With regard to the adoption of the Contiguous Zone of Ukraine Act, it is the understanding of the Russian Federation that the geographical area to which this Act applies is the part of the Black Sea that is contiguous to the coast of Ukraine. The Sea of Azov, we recall, is part of the internal waters of Russia and Ukraine. Therefore, the provisions on contiguous zones of the United Nations Convention on the Law of the Sea of 1982 do not apply to it, nor, consequently, does the Act establishing the contiguous zone of Ukraine under the Convention.<sup>77</sup>

If the Sea of Azov is included in Ukraine’s normal maritime zones as provided in UNCLOS, then the Kerch Strait satisfies the criteria of Art 37 of UNCLOS for the applicability of the transit passage regime, as shown in Map 2.

Ukraine also asserts that, in practice, it has invoked the right of transit passage in the Sea of Azov.<sup>78</sup> In support of this claim, in the *Dispute Concerning Coastal State Rights*, Ukraine referred to the 2001 *note verbale* of its Ministry of Foreign Affairs that explicitly refers, in the context of the passage regime in the Kerch Strait, to the provision of UNCLOS that regulates the designation of sea lanes and traffic separation schemes (TSS) in international straits.<sup>79</sup> Yet the instances referred to by Ukraine, in the

<sup>72</sup> *Ibid*, Art 5.

<sup>73</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [212].

<sup>74</sup> *Ibid*, [214].

<sup>75</sup> Final Award of 29 June 2017 pursuant to the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, [883–885]. *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Judgment, ICJ Reports 1992, p. 351 [399].

<sup>76</sup> Law about adjacent zone of Ukraine of December 6, 2018 No. 2641-VIII, signed by the President of Ukraine on 29.12.2018, available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/2641-VIII> (4 July 2020). Available in English at <https://cis-legislation.com/document.fwx?rgn=112881> (accessed 4 July 2020).

<sup>77</sup> Annex to the letter dated 7 March 2019 from the Permanent Representative of the Russian Federation to the United Nations, Position of the Russian Federation in connection with the adoption of the Contiguous Zone of Ukraine Act, UN Doc. A/73/802, (20 March 2019), available at <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm> (accessed 4 July 2020).

<sup>78</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [242].

<sup>79</sup> Ukraine has alleged that the Russian Federation breached Art 41(4)–(5) of UNCLOS, which provides that before designating or substituting sea lanes or TSS, strait states are required to draft these proposals in close consultation with each other and the IMO as the competent organization, before referring them to the IMO with a view to their adoption. The strait states may designate, prescribe, or substitute the sea lanes or TSS if the IMO has first approved them. Only then may such sea lanes or TSS in a strait where the regime of transit passage applies be considered as



arbitration proceedings, in support of the claim that it previously invoked the transit passage regime in the Kerch Strait occurred in 2001 and 2002, and thus preceded the conclusion of the 2003 bilateral treaties. Ukraine also referred to a 1992 treaty with the Russian Federation on cooperation in the fisheries sector in the Black Sea and Sea of Azov, and claimed that the treaty makes no reference to the Sea of Azov having any status other than a semi-enclosed sea comprising normal maritime zones.<sup>80</sup> In addition, Ukraine points to its “List of geographical coordinates of points defining the baselines for measuring the breadth of the territorial sea, exclusive economic zone and the continental shelf in the Sea of Azov,”<sup>81</sup> which it deposited with the United Nations in 1992.<sup>82</sup>

In conclusion, the state practice invoked by Ukraine in support of its claim that the regime of transit passage applies to the Kerch Strait precedes the conclusion of the 2003 bilateral treaties, which stipulate that the Sea of Azov and the Kerch Strait are internal waters of the Russian Federation and Ukraine, and establish a restrictive passage regime in the Kerch Strait that is clearly incompatible with the right of transit passage. In a similar vein, the 2002 draft law on internal waters, the territorial sea, and the contiguous zone of Ukraine, which provided for a Ukrainian territorial sea in the Sea of Azov,<sup>83</sup> was never adopted, and instead was followed by the conclusion of the 2003 bilateral treaties, which expressly applied the internal waters regime to the Sea of Azov. Therefore, neither treaty law nor Ukraine’s state practice prior to the arbitral proceedings necessarily supports Ukraine’s claim that the Kerch Strait is subject to the transit passage regime.

## The significance of 2003 bilateral treaties for the passage regime of the Kerch Strait

Ukraine’s position that the regime of transit passage applies to the Kerch Strait is somewhat ambiguous, particularly due to the fact that it explicitly agreed in Article 5 of the 2003 State Border Treaty that the Sea of Azov and the Kerch Strait constitute internal waters within Ukraine and the Russian Federation. Likewise, Article 1 of the 2003

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“generally accepted international regulations” that ships in transit passage are required to respect (Art 39(2)(a) of UNCLOS). By contrast, in international straits where innocent passage applies, sea lanes and TSS can be adopted by the strait state(s) by only taking into account the recommendations of the IMO (Art 22(3)(a) of UNCLOS). Despite the Ukrainian petitions and claims that the new rules are dangerous for mariners, the Russian Federation established the new navigation conditions between the fairways in the allegedly Ukrainian part of the internal waters of the Kerch Strait. Soon after, on 5 September 2002, the Russian-flagged oil tanker *Lidiya* collided with another ship in the Kerch Strait. It was found during the investigation that the accident was partly caused by the new Russian navigation rules between fairways Nos. 50 and 52, which, the Ukrainian Ministry of Foreign Affairs believed, “could have resulted in human fatalities and an oil spill from the tanker *Lidiya*.” Ukraine reiterated the importance of Art 41(4)–(5) of UNCLOS and called for the revocation of the new navigation rules that were established unilaterally by the Russian agencies with respect to the Kerch Strait’s area between fairways Nos. 50 to 52. UA-516, Ministry of Foreign Affairs of Ukraine, No. 72/22-446-2110, 3–4, at <https://files.pca-cpa.org/pcadocs/ua-ru/04.%20UA%20Rejoinder%20Memorial/01.%20Exhibits/> (accessed 4 July 2020). UA-515, Ministry of Foreign Affairs of Ukraine, No. 21/20-410-747, 4, at <https://files.pca-cpa.org/pcadocs/ua-ru/04.%20UA%20Rejoinder%20Memorial/01.%20Exhibits/> (accessed 4 July 2020).

<sup>80</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [237].

<sup>81</sup> *Ibid.* See also Ukraine—Legislation. United Nations Division for Ocean Affairs and the Law of the Sea at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm> (accessed 4 July 2020).

<sup>82</sup> See UNDOALAS, *Law of the Sea Bulletin*, No. 36 (UN, 1998).

<sup>83</sup> See ВЕРХОВНА РАДА УКРАЇНИ, Проект Закону про внутрішні води, територіальне море та прилеглу зону України, No. 2605, від 30.12.2002 року, available in Ukrainian at [https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?id=&pf3516=2605&skl=5](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=2605&skl=5) (accessed 4 September 2020).

Kerch Treaty stipulates that the Sea of Azov and the Kerch Strait “have historically been internal waters of the Russian Federation and Ukraine.” Moreover, under Article 2 of the Kerch Treaty, Ukraine consented to apply a restrictive passage regime to the Kerch Strait, which is clearly incompatible with the rights of transit passage and of innocent passage. This passage regime restricts the access of foreign merchant vessels to the Sea of Azov and prohibits the entrance of foreign warships to the Sea of Azov unless both Ukraine and the Russian Federation explicitly give their prior permission. Furthermore, the 2003 Kerch Treaty does not guarantee the right of foreign aircraft to fly over the Kerch Strait, a right that would be applicable under the transit passage regime for the purpose of entering the EEZ in the Sea of Azov.

Therefore, it is doubtful that the regime of transit passage was applicable to ships and aircraft in the Kerch Strait after Ukraine became a party to the 2003 Kerch Treaty. However, Ukraine could argue that the Sea of Azov and the Kerch Strait were internal waters, as agreed in the 2003 bilateral treaties, but that the legal regime changed as a result of the Russian Federation’s occupation and annexation of Crimea. The Russian Federation’s aggression against Ukraine would have provided, arguably, sufficient grounds for suspending or terminating the 2003 bilateral treaties to the extent that they set out the internal waters regime and regulate passage rights in the Sea of Azov and the Kerch Strait. Notably, pursuant to Art 3 of the ILC Draft Articles on the Effects of Armed Conflicts on Treaties, the 2003 bilateral treaties should not be considered as *ipso facto* terminated or suspended owing to the outbreak of hostilities between Ukraine and the Russian Federation in 2014, even assuming that this dispute constitutes an armed conflict.<sup>84</sup> The 2003 Kerch Treaty has not been suspended or terminated by its states parties.

Nonetheless, Ukraine could invoke the Kerch Strait incident of 25 November 2018 as a material breach of the freedom of navigation within the terms of Article 2(1) of the 2003 Kerch Treaty. The transit of Ukrainian ships through the strait was blocked by the Russian Federation by means of placing a tanker under the Crimean Bridge and using force, which resulted in casualties among the Ukrainian crew members, who were subsequently charged with the crime of aggravated illegal crossing of a border and detained in breach of sovereign immunity of warships and government ships under Article 92 of UNCLOS. Thus, the Kerch Strait incident potentially constitutes a material breach of the 2003 Kerch Treaty within the meaning of Article 60(1) of the Vienna Convention on the Law of Treaties<sup>85</sup> (VCLT), which would entitle Ukraine to terminate the treaty or suspend its operation in whole or in part. The Russian Federation’s unilateral imposition of restrictions on the passage of ships in the Kerch Strait have arguably precluded the enjoyment of freedom of navigation by the Ukrainian ships. It can be argued that these freedoms are essential to the accomplishment of the object or purpose of the 2003 Kerch Treaty in terms of Article 60(3) of the VCLT.

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<sup>84</sup> General Assembly Resolution 66/99, 9 December 2011, 2, available at <https://undocs.org/en/%20A/RES/66/99> (accessed 7 September 2020). Pursuant to its Art 18, the Draft Articles on the Effects of Armed Conflicts on Treaties are in any case without prejudice to the termination, withdrawal, or suspension of treaties as a consequence of a fundamental change of circumstances.

<sup>85</sup> Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.

In this context, it is also possible for Ukraine to invoke the *rebus sic stantibus* clause under Article 62 of the VCLT to terminate or suspend the operation of the 2003 Kerch Treaty on the grounds that the Russian Federation's annexation of Crimea and other actions that have hampered the freedom of navigation of Ukrainian ships for the purpose of accessing the Sea of Azov have fundamentally changed the circumstances based on which Ukraine initially consented to be bound by the treaty.<sup>86</sup> The 2003 Kerch Treaty does not regulate the procedure for withdrawing from it. Thus, pursuant to Articles 65(1) and 67 of the VCLT, Ukraine would have to notify the Russian Federation in writing of its claim and indicate the measure proposed to be taken with respect to the treaty and the reasons thereof.

In recent years, the possible termination of the 2003 Kerch Treaty has been extensively debated in the Ukrainian parliament and by the government. In July 2015, a draft law for the denunciation of the 2003 Kerch Treaty was submitted to the Ukrainian parliament by its future chairman (2016–2019) Andriy Parubiy, but the representatives of the Ministry of Foreign Affairs, the Ministry of Defense, the Ministry of Justice, the Ministry of Infrastructure, and the Security Service decided in a special meeting that the current national interests of Ukraine did not necessitate its denunciation.<sup>87</sup> Subsequently, Ukrainian parliamentarians have made petitions for the denunciation of the 2003 Kerch Treaty to the President of Ukraine and the Minister of Defense in which they argue for the establishment of an EEZ in the Sea of Azov, as they claim that this would, inter alia, allow the entrance of NATO warships to the Sea of Azov.<sup>88</sup> Currently, such visits require the consent of the Russian Federation under Article 2(3) of the Kerch Treaty.

Furthermore, shortly after the Kerch Strait incident of 25 November 2018, the Ukrainian Minister of Foreign Affairs claimed on television that “with its actions, the Russian Federation has confirmed that bilateral agreements on the Kerch Strait and the Sea of Azov are null and void. We understand that Russia has never had any intention to follow them.”<sup>89</sup> Nonetheless, this declaration has apparently not been supplemented with any actual steps for terminating or suspending, either in whole or in part, the 2003 bilateral treaties. Ukraine has not initiated the procedure set forth in section 4, Part V of the VCLT for terminating or suspending the operation of the 2003 bilateral treaties.

Owing to domestic political considerations, Ukraine might be tempted to terminate or suspend the 2003 bilateral treaties if the Annex VII Arbitral Tribunal supports the position of the Russian Federation that the Sea of Azov comprises internal waters based on the concept of historic bay and Ukraine's alleged acceptance of that regime in the light of the 2003 bilateral treaties. The Kerch Strait would then connect unambiguously a Ukrainian EEZ in the Sea of Azov with EEZs in the Black Sea. This would imply the applicability of the right of transit passage to the Kerch Strait, which would conflict with the Russian

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<sup>86</sup> Notably, Art 62(2) of the VCLT does not exclude the possibility of invoking the *rebus sic stantibus* clause, as the 2003 Kerch Treaty does not establish a boundary.

<sup>87</sup> Ridvan Bari Urcosta, “Russia’s Strategic Considerations on the Sea of Azov”, 3 December 2018, *Warsaw Institute*, 34. See also ВЕРХОВНА РАДА УКРАЇНИ, ГОЛОВА КОМІТЕТУ, до реєстр. No. 0051, від 16.07.2015 року, available in Ukrainian at <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=56077&pf35401=364420> (accessed 4 July 2020).

<sup>88</sup> Urcosta, note 87, 34–35.

<sup>89</sup> “Ukraine-Russia Sea Clash: Who Controls the Territorial Waters Around Crimea?”, 27 November 2018, *BBC News* at <https://www.bbc.com/news/world-46345317> (accessed 4 July 2020).

Federation's potential claim that the Kerch Strait would still constitute a strait falling under the category of Art 35(a) of the UNCLOS, as discussed in the following.

Rather than terminating the 2003 bilateral treaties, Ukraine maintains, as argued in the *Coastal State Rights Case*, that, notwithstanding the conclusion of the 2003 bilateral treaties, it has not reached a final agreement with the Russian Federation regarding the status of the Sea of Azov, as any final agreement would be contingent on maritime boundary delimitation.<sup>90</sup> Notably, Ukraine has not fixed a maritime boundary with the Russian Federation in the Sea of Azov. Yet this claim ignores the fact that a maritime boundary is not a prerequisite for the existence of an internal waters regime in a historic bay. As discussed in the following, the ICJ made it clear in the *Gulf of Fonseca case* that sovereignty over internal waters of a historic bay may be exercised jointly by its coastal states.

### **The Sea of Azov as a potential historic bay and its implications for the regime of passage in the Kerch Strait under Art 35(a) of UNCLOS**

As examined in the preceding, Ukraine clearly rejects the Russian Federation's argument that the Sea of Azov and the Kerch Strait comprised solely internal waters throughout the 1990s. For that reason, Ukraine has requested the Annex VII Arbitral Tribunal to declare that the Sea of Azov comprises its EEZ, as a result of which, the regime of transit passage would apply to ships and aircraft crossing the Kerch Strait (Art 37 of UNCLOS). Even if the Arbitral Tribunal accedes to this request, the scope of applicability of the regime of transit passage in the Kerch Strait could still, irrespective of the Arbitral Tribunal's findings, remain unclear and subject to debate. One may expect the Russian Federation to continue to deny the applicability of the right of transit passage in the Kerch Strait, as discussed next.

For those states interested in retaining the passage regime of the Kerch Strait that is stipulated in the 2003 Kerch Treaty, it is important that the Arbitral Tribunal supports the claim that the Sea of Azov constitutes a historic bay. The Kerch Strait would then potentially fall under the exception stipulated in Art 35(a) of UNCLOS: "Nothing in this Part affects: (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such." This implies that the legal regime of straits used for international navigation does not affect any areas of internal waters within a strait if such maritime areas had been considered as internal waters prior to the first establishment of the relevant straight baselines (hereafter referred to as *long-standing internal waters*).<sup>91</sup> However, in the existing case law, the question of whether a strait that meets the geographic and functional criteria of a strait can be classified as internal waters, including by reason of historic title, has not yet received a clear answer.<sup>92</sup> Thus, the Annex VII Arbitral

<sup>90</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [239–240].

<sup>91</sup> See Satya N. Nandan and David H. Anderson, "Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982" (1989) 60 *The British Yearbook of International Law* 173. Hugo Caminos and Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge University Press, 2014), 66–67.

<sup>92</sup> Clive R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Martinus Nijhoff, 2008), 33.

**Table 1.** Potential classification of the Kerch Strait as a non-international strait and the perceived positions of the Russian Federation and Ukraine

Kerch Strait's classification as a non-international strait	The Russian Federation's perceived position	Ukraine's perceived position
Long-standing internal waters exception (Art 35(a))	Potentially affirmative based on the restrictive reading of Art 35(a): entitled to enclose the strait with its straight baselines; stressing that the Kerch Strait has previously comprised entirely internal waters based on the 2003 bilateral treaties that have been respected also by third states.	Rejective based on the liberal reading of Art 35(a), which merely clarifies that Part III of UNCLOS affects areas of internal waters in an international strait to the effect that the otherwise applicable passage regime of innocent passage would be replaced with that of transit passage if the strait meets the conditions of Art 37.
Not used for international navigation	Not applicable: the strait is frequently used by foreign ships.	Not applicable: the strait is frequently used by foreign ships.

Tribunal has the potential to clarify this question in the current proceedings between Ukraine and the Russian Federation.

The states that are interested in the application of the regime of transit passage to the Kerch Strait may espouse a different reading of Art 35(a) of UNCLOS. Pursuant to an interpretation supporting this position, Art 35(a) of UNCLOS merely clarifies that Part III of the Convention affects areas of internal waters within an international strait to the extent that the otherwise applicable innocent passage regime would be replaced with that of transit passage if the strait meets the conditions of Art 37 of the Convention.<sup>93</sup>

Clearly, the latter interpretation of Art 35(a) of the Convention would support the position of Ukraine in the determination of the passage regime applicable to the Kerch Strait. The Russian Federation could adopt the opposing reading of the same provision by claiming that the passage rights of foreign ships are not safeguarded under international law in the Art 35(a) category of straits, where the area constitutes long-standing internal waters. For example, in the Baltic Sea, this exception has particular relevance in connection with the Sea of Straits in Estonia, Kalmarsund in Sweden, and the multiple straits in the Åland region of Finland. All these areas constituted the internal waters of the relevant coastal state, probably since 1938 under the Nordic neutrality rules,<sup>94</sup> and well before Estonia, Finland, and Sweden first established their system of straight baselines.<sup>95</sup> This exception could also have significance for the passage regime of some straits in the Northern Sea Route.<sup>96</sup>

<sup>93</sup> Hugo Caminos, "The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea", in *Recueil des cours de l'Académie de droit international de la Haye 1987* (Martinus Nijhoff, 1989), 130.

<sup>94</sup> Declaration between Denmark, Finland, Iceland, Norway and Sweden for the Purpose of Establishing Similar Rules of Neutrality, Stockholm 27.05.1938, at: [http://www.histdoc.net/history/nordic1938\\_en.html](http://www.histdoc.net/history/nordic1938_en.html) (accessed 4 July 2020). See also "Denmark-Finland-Iceland-Norway-Sweden: Declaration Regarding Similar Rules of Neutrality" (1938) 32 *American Journal of International Law*, 141–163. The northern countries Denmark, Finland, Iceland, Sweden, Norway, and the Baltic States adopted analogous domestic legal acts on neutrality on the basis of the already-mentioned 1938 declaration.

<sup>95</sup> See further Alexander Lott, *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage*, (Brill, 2018), 25, 213–221.

<sup>96</sup> See further on the Russian Federation's claims in, e.g., Jan J. Solski, "Russia", in Robert C. Beckman, Tore Henriksen, Kristine Dalaker Kraabel, et al. (eds), *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (Brill, 2017), 192–197.

A restrictive interpretation of Art 35(a) of UNCLOS is functionally equivalent to the exception provided for in Article 8(2) of UNCLOS but it addresses, specifically, navigational rights in straits, whereas Article 8(2) is more generally applicable to internal waters.<sup>97</sup> Such a reading of Art 35(a) of UNCLOS serves as a potential legal basis for establishing a passage regime that may entail a permit-based system in a strait even if the strait would otherwise be subject to the regime of transit passage. This is significant, particularly if the Annex VII Arbitral Tribunal finds in support of the Russian Federation that the Sea of Azov is a historic bay and constitutes internal waters and that Ukraine has accepted that regime in light of the 2003 bilateral treaties. If such a finding were made, Ukraine might be tempted to terminate the 2003 bilateral treaties altogether, consequently triggering the applicability of the transit passage regime in the Kerch Strait, as discussed in the preceding. The scope of Art 35(a) arguably covers the Sea of Azov, which it is argued is a historic bay and for which the straight baseline segment at the entrance of the Kerch Strait was established in 1985.<sup>98</sup> Pursuant to a teleological interpretation of Art 35(a) in combination with customary international law, the exception is potentially also applicable in cases where the coastal state has not (yet) established a system of straight baselines but its relevant maritime area has been recognized as constituting a historic bay.

In the case of the Sea of Azov and the Kerch Strait, the legitimacy of the Russian Federation's claim to long-standing internal waters rests on the recognition of this maritime area as a historic bay. UNCLOS does not directly regulate historic bays (Article 10(6) of the Convention),<sup>99</sup> as their status is instead governed by customary international law. Should the Annex VII Arbitral Tribunal conclude that the Sea of Azov and the Kerch Strait do not (any longer) comprise long-standing internal waters that meet the criteria of Articles 8(2) and 35(a) of UNCLOS, then there appears to be no other legal basis for the restrictive passage regime that currently applies in the Kerch Strait and Sea of Azov under Article 2 of the 2003 Kerch Treaty. General international law cannot provide a legal basis for other historic passage regimes that are incompatible with UNCLOS. This conclusion follows from the

Annex VII Arbitral Tribunal's South China Sea award, where it was emphasized that

[T]he prohibition on reservations is informative of the Convention's approach to historic rights. It is simply inconceivable that the drafters of the Convention could have gone to such lengths to forge a consensus text and to prohibit any but a few express reservations while, at the same time, anticipating that the resulting Convention would be subordinate to broad claims of historic rights.<sup>100</sup>

For the Sea of Azov to be recognized as a historic bay, the claim needs to be accepted by other states and based on a long and consistent assertion of dominion over the bay, which includes the coastal state's right to exclude foreign vessels entering the bay without its permission.<sup>101</sup>

<sup>97</sup> On the interpretation of Art 35(a), see further Lott, note 95, 21–27.

<sup>98</sup> The Decree no. 4450 of the Council of Ministers of the Soviet Union on the Confirmation of a List of Geographic Coordinates Determining the Position of the Baseline in the Arctic Ocean, the Baltic Sea and Black Sea from which the Width of the Territorial Waters, Economic Zone and Continental Shelf of the U.S.S.R. is Measured, 15 January 1985.

<sup>99</sup> Except for the possibility for a state to declare, pursuant to Art 298(1)(a)(i), that it does not accept compulsory procedures entailing binding decisions with respect to disputes concerning the interpretation or application of Arts 15, 74, and 83 involving historic bays or titles.

<sup>100</sup> *South China Sea Arbitration (the Philippines v. China)*, Award of the UNCLOS Annex VII Tribunal, 12 July 2016, [254].

<sup>101</sup> Churchill and Lowe, note 65, 44. Caminos and Cogliati-Bantz, note 91, 60–61.

**Table 2.** Potential classification of the Kerch Strait as an international strait: the asserted positions of the Russian Federation and Ukraine

Kerch Strait's classification as an international strait	The Russian Federation's perceived position	Ukraine's perceived position
Strait links two parts of an EEZ or the high seas (Art 37)	Rejective: transit passage is not applicable in the Kerch Strait; the Sea of Azov forms a historic bay.	Affirmative: transit passage applies in the Kerch Strait; the Sea of Azov is no longer a historic bay.
Strait connects an EEZ or the high seas with the territorial sea of a foreign state (Art 45(1)(b))	Rejective: foreign warships cannot enjoy the right of nonsuspendable innocent passage.	Rejective: the Kerch Strait connects two EEZs (Art 37); Ukraine is a strait state, not a foreign state; Ukraine rejects nonsuspendable innocent passage.
Strait includes an EEZ or high seas corridor (Art 36)*	Rejective: freedom of navigation and overflight are not applicable in the Kerch Strait; the Sea of Azov forms a historic bay.	Potentially affirmative: freedom of navigation and overflight could be applicable in the Kerch Strait; the Sea of Azov is no longer a historic bay.
<i>Sui generis</i> strait (Art 311(2))	Affirmative: the Kerch Strait is regulated by the 2003 Kerch Treaty, which is compatible with UNCLOS.	Potentially affirmative: Ukraine has not terminated the 2003 Kerch Treaty, which stipulates the passage regime.

\*Technically, it is possible for the Russian Federation to stipulate under its domestic legal acts that there are no/only marginal belts of territorial sea or internal waters in the Kerch Strait (which has a minimal width of approx. 3 NM), thereby creating a narrow EEZ/high seas corridor in the strait.

The Russian Federation asserts that the Sea of Azov and the Kerch Strait were historically internal waters of the Russian Empire, and, later, the Soviet Union, and, since 1991, the common internal waters of Ukraine and the Russian Federation, the status of which has not been protested by other states.<sup>102</sup> Notably, although there appear to be no explicit protests by states against the internal waters status of the Sea of Azov prior to the change in the Ukrainian Government's position on this matter after the annexation of Crimea, the United States, in its announcements and official documents, has consistently refrained from using the term "juridical bay" for the waters of the Sea of Azov that were enclosed by the straight baseline pursuant to the Decree no. 4450 of the Council of Ministers of the Soviet Union in 1985.

It can possibly be argued that characterizing the Sea of Azov as a historic bay is per se contrary to customary international law. The Sea of Azov includes an extensive maritime area that falls outside the 12-NM limit of territorial sea as measured from the baselines. The maritime area that spans the Sea of Azov outside the 12-NM limit is relatively large, as it has a maximum length of over 60 NM and maximum width of over 90 NM. Consequently, it may be argued that the Sea of Azov does not lie in the immediate vicinity of Ukrainian and Russian coasts and thus cannot be considered as a historic bay under customary international law. This claim, however, is somewhat weakened by the fact that state practice includes examples of much larger historic bays, for example, Hudson Bay,<sup>103</sup> as compared to the maritime area of the Sea of Azov.

The Russian Federation refers to the 1992 judgment of the ICJ in the *Gulf of Fonseca case*, according to which "A State succession is one of the ways in which territorial sovereignty passes from one State to another; and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided

<sup>102</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [199, 202].

<sup>103</sup> Bing B. Jia, *The Regime of Straits in International Law* (Clarendon Press, 1998), 76.

maritime area passes to two or more new States.”<sup>104</sup> A similar question was recently addressed in the arbitration between Slovenia and Croatia where the Arbitral Tribunal found, referring to the *Gulf of Fonseca case*, that the UNCLOS framework on bays under Article 10 does not exclude “the existence of bays with the character of internal waters, the coasts of which belong to more than one State.”<sup>105</sup> Thus, the current case law accepts the possibility that a historic bay falls under the joint sovereignty of its coastal states.

The Russian Federation claims that it exercises sovereignty over the Sea of Azov jointly with Ukraine. It argues that the historic bay status of the Sea of Azov dates back to the Soviet era and imperial Russia,<sup>106</sup> and that “any waiver or renunciation of a State’s rights must either be express or unequivocally implied by the conduct of the State.”<sup>107</sup> According to the Russian Federation, the internal waters status of the Sea of Azov and the Kerch Strait has remained unchanged and this is confirmed in Article 1 of the 2003 Kerch Treaty and Article 5 of the 2003 State Border Treaty.<sup>108</sup>

In this respect, Ukraine’s state practice is relevant to an assessment of the legality under customary international law of the regime of internal waters as stipulated in the 2003 bilateral treaties. Pursuant to the findings of the ICJ in the *Gulf of Fonseca case*, both Ukraine and the Russian Federation need to recognize the continuous historical status of the bay.<sup>109</sup> In that regard, Ukraine argues that after its restoration of independence, it “made clear its position that the Sea of Azov was subject to the normal rules of the international law of the sea.”<sup>110</sup> Ukraine seems to imply that the historic bay regime was disrupted after Ukraine deposited its “List of geographical coordinates of points defining the baselines for measuring the breadth of the territorial sea, exclusive economic zone and the continental shelf in the Sea of Azov” with the United Nations in 1992. If the Annex VII Arbitral Tribunal finds that the historic bay regime of the Sea of Azov was interrupted in the 1990s, then this could undermine the legality of the legal regime of the Sea of Azov as stipulated in the 2003 bilateral treaties *in toto*. Thus, a broad interpretation of Ukraine’s arguments in the *Coastal State Rights Case* is that it rejects the position that it has continuously recognized the Sea of Azov as a historic bay.

If Ukraine had unequivocally made it clear that it did not accept the joint dominion over the Sea of Azov as a historic bay in the 1990s, then one could argue that the exercise of the coastal states’ dominion over the Sea of Azov has not been continuous, as it was interrupted during the 1990s and prior to the conclusion of the 2003 treaties. If this was the case, then Ukraine would have vetoed the Russian Federation’s endeavors to continue to apply the historic bay regime to the Sea of Azov. Similarly, Estonia rejected, in the 1990s, the Gulf of Riga as a historic bay as proposed by Latvia on the basis of the centuries-long practice of the Russian Empire and the Soviet Union.<sup>111</sup> Yet

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<sup>104</sup> *Land, Island and Maritime Frontier Dispute*, Judgment, note 75, [399].

<sup>105</sup> *Slovenia v. Croatia Arbitration*, 2017 Award, note 75, [883–885].

<sup>106</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [205].

<sup>107</sup> *Ibid.*, [206].

<sup>108</sup> *Ibid.*

<sup>109</sup> *Land, Island and Maritime Frontier Dispute*, Judgment, note 75, [394].

<sup>110</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [237].

<sup>111</sup> On the comparisons with between the Gulf of Riga and the Sea of Azov in the context of the historic bay see also *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [224, 233, 252].



Ukraine's position toward the Sea of Azov as a historic bay has been ambiguous. On the one hand, Ukraine has claimed in the arbitral proceedings that the Sea of Azov includes its EEZ; on the other hand, however, it has not terminated or suspended, in whole or in part, the 2003 bilateral treaties, which both declare that the Sea of Azov constitutes the internal waters of Ukraine and the Russian Federation. This reluctance may be explained by the recognition of freedom of navigation of Ukrainian ships in the Kerch Strait and the Sea of Azov under Article 2 of the 2003 Kerch Treaty.

### **The importance of the obligation of nonrecognition for the passage regime of the Kerch Strait**

Even if the Arbitral Tribunal finds that the Sea of Azov does not (any longer) constitute entirely internal waters and, instead, comprises other maritime zones, including an EEZ, then the Russian Federation might, in response, connect Crimea with its system of straight baselines from the Taman Peninsula. This would have the effect of maintaining the maritime area in and adjacent to the Kerch Strait as internal waters from the perspective of those states that recognize the Russian Federation's sovereignty over Crimea. In support of this, the Russian Federation could cite Article 1 of the 2003 Kerch Treaty and Article 5 of the State Border Treaty, which stipulate that the status of the Kerch Strait is internal waters, and refer to the fact that these treaties have remained in force and that the passage regime stipulated therein has been, so far, largely respected by other states.

Continuing this hypothetical scenario, after the potential establishment of a system of straight baselines around Crimea, the Russian Federation might potentially claim that the Kerch Strait still constitutes an Art 35(a) category of non-international strait,<sup>112</sup> as it comprises internal waters that were considered as such prior to the establishment of the system of straight baselines around Crimea (see Articles 7 and 8(2) of UNCLOS). It is not impossible that the Russian Federation would thereby strive to exclude the applicability of the regime of transit passage to the Kerch Strait. The Russian interpretation of the applicable law would be based on its sovereignty claim over Crimea. Deciding on the legality of the Russian Federation's potential internal waters claim with respect to the Kerch Strait is unlikely, as it would require the Arbitral Tribunal to decide on the legality of the Russian Federation's alleged sovereignty over Crimea. The Arbitral Tribunal has already expressly excluded questions of sovereignty over land territories from the scope of its final award and will not address any claims of Ukraine on the premise of Ukraine being sovereign over Crimea.<sup>113</sup>

Hence, should the Arbitral Tribunal support the position of Ukraine that the Kerch Strait is an international strait that is subject to the regime of transit passage, then this ruling would not be able to take into account the Russian Federation's claim to sovereignty over the whole maritime area of the Kerch Strait, which, from the Russian Federation's perspective, would possibly entitle it to categorize the Kerch Strait as a non-international strait under Art 35(a) of UNCLOS.

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<sup>112</sup> For an explanation on the use of the term "non-international strait," see Lott, note 95, 7–8.

<sup>113</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [197].

If, by the time the Arbitral Tribunal delivers its award, the passage regime stipulated in Article 2 of the 2003 Kerch Treaty should hypothetically be devoid of any legal effect, then the Russian Federation would likely consider Ukrainian ships as foreign ships that need to comply with its restrictive passage regime in the Kerch Strait. This would cause further tension and serve as a potential basis for the escalation of the conflict in the Sea of Azov region. In the light of this sophisticated legal and geopolitical perspective, Ukraine's restraint toward the potential termination or suspension of the 2003 bilateral treaties, as examined in the preceding, may be considered a balanced approach. One may even wonder whether the passage regime as stipulated in the 2003 Kerch Treaty could, in principle, still serve as a compromise between the parties' otherwise conflicting approaches to the passage regime of the Kerch Strait. Had the Russian Federation not hampered the passage of merchant vessels to and from Ukrainian ports in the Sea of Azov and had it respected the freedom of navigation of Ukrainian naval vessels navigating through the Kerch Strait, then the parties to the current dispute might still potentially regard the legal regime of the 2003 Kerch Treaty as a pragmatic solution that effectively accommodates the parties' main interests.

Nonetheless, the compatibility of the Russian Federation's potential claim with the Convention is doubtful. Pursuant to a restrictive interpretation of Art 35(a) of UNCLOS,<sup>114</sup> the legal regime of straits used for international navigation does not affect any areas of internal waters within a strait if such maritime areas were considered internal waters prior to the establishment of straight baselines. The notion of "not previously been considered as such" in Art 35(a) of the Convention does not grant the coastal state an unlimited discretionary right to restrict passage rights in straits under its domestic legal acts. The coastal state's internal waters also need to have been "considered as such" by other states. Thus, the main criterion under Art 35(a) of UNCLOS that the coastal state needs to satisfy if it seeks to declare a particular strait as its non-international strait is recognition by other states of such a passage regime and the relevant domestic legal acts, which, for example, establish the relevant straight baselines or declare the area as the coastal state's historic bay. In that regard, the majority of states that follow the policy of nonrecognition with respect to the annexation and occupation of Crimea do not recognize the Russian Federation's sovereignty over the internal waters in the western part of the Kerch Strait.

Therefore, the obligation of nonrecognition could serve as the key factor in determining whether or not the right of transit passage applies in the Kerch Strait. The obligation of nonrecognition is stipulated in Article 41 of the ILC Articles on State Responsibility,<sup>115</sup> according to which no state shall recognize as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation. From Ukraine's perspective, Crimea's status as an integral part of Ukraine is "settled" and the Russian Federation's claim to Crimea is devoid of any legal effect.<sup>116</sup> In the event that the Annex VII Arbitral Tribunal reaches the conclusion that the Sea of Azov

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<sup>114</sup> A liberal interpretation of Art 35(a) of the UNCLOS would not entitle the Russian Federation to restrict passage through the Kerch Strait in any case; see the preceding discussion.

<sup>115</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, A/56/10, Art 41.

<sup>116</sup> *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, note 4, [99, 144].

does not comprise internal waters based on the historic bay concept, then flag states should presumably avoid consenting to the current restrictive passage regime in the Kerch Strait and instead claim the right of transit passage. This follows from the rationale that the Russian Federation will continue to claim sovereignty over both coasts of the Kerch Strait. If they recognize the Russian Federation's restrictive passage regime in the Kerch Strait in such circumstances, then this might, arguably, constitute an implicit recognition of the Russian Federation's sovereignty over Crimea. In practice, access of foreign merchant vessels to the Sea of Azov would likely be hampered even more as compared to the situation so far, leading to further complications for international shipping and the development of the coastal regions of the Sea of Azov.

The significance of geopolitical considerations, particularly the policy of nonrecognition, to the passage regime in the Kerch Strait somewhat resembles the situation in the Sea of Straits in the Estonian Western Archipelago.<sup>117</sup> Under its domestic legislation, Estonia does not recognize the right of transit passage (nor, fully, the right of innocent passage) to the Sea of Straits, notwithstanding that the Sea of Straits connects the EEZs between the Gulf of Finland and the Baltic Sea proper with the Latvian EEZ in the Gulf of Riga. Third states, including neighboring states Finland and Latvia, recognize the Estonian restrictive passage regime in the Sea of Straits. Similar to the legal framework applicable to the Kerch Strait, the legal basis for such state practice can be found in Art 35(a) of UNCLOS, since the Sea of Straits can be considered among such internal waters recognized prior to the establishment of straight baselines by Estonia after its restoration of independence in 1991. Yet the Art 35(a) exception is applicable to the Sea of Straits only if one recognizes Estonia as a continuous state. This is because Estonia established its internal waters in accordance with the 1938 Nordic Rules of Neutrality under Section 2(3) of its 1938 Neutrality Act, pursuant to which the whole maritime area of the Sea of Straits was considered as internal waters.<sup>118</sup> A state that does not recognize Estonia's state continuity could, in principle, claim that it is not bound with the exception stipulated in Art 35(a) of UNCLOS and thus retains its right of transit passage for crossing the Sea of Straits.<sup>119</sup>

Similarly, should the Arbitral Tribunal find that the current *sui generis* passage regime no longer applies to the Kerch Strait and it is replaced instead with the regime of transit passage, then the Russian Federation's approach to the applicable passage regime in the Kerch Strait could potentially be diametrically opposed to the approach of those states and entities that pursue a policy of nonrecognition toward the occupation and annexation of Crimea, including Ukraine, the European Union, and the United States. The Russian Federation could consider the strait as a non-international strait subject to the exception of Art 35(a) of UNCLOS, whereas the policy of nonrecognition implies that most states would rather consider the Kerch Strait as an international strait subject to the right of transit passage.

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<sup>117</sup> The obligation of nonrecognition was used by, inter alia, the United States and numerous European states in response to the unlawful occupation and annexation of the Baltic States by the Soviet Union. Strict nonrecognition policy was consistently used, e.g., by Belgium, Spain, Germany, Portugal, Ireland, and Vatican. See Stefan Talmon, *Recognition of Governments in International Law* (Clarendon Press, 1998), 103.

<sup>118</sup> See Lott, note 95, 207–223.

<sup>119</sup> In such a hypothetical case, the right of transit passage would nonetheless be inapplicable as it would be replaced, pursuant to the Messina exception, with the regime of nonsuspendable innocent passage, as provided in Arts 38(1) and 45(1)(a) in combination with Art 45(2) of the UNCLOS. This right could be considered applicable to the ships of other protesting states, including the United Kingdom and Germany, as they submitted protests against some of the sections of the Estonian Waterways Act and the Neutrality Act of 1938, just as they did with other Nordic states that adopted the uniform neutrality acts of 1938. See further Lott, note 95, 223–228.

From the perspective of the majority of states, the maritime area in the Kerch Strait is generally not considered as comprising entirely the Russian Federation's internal waters. Instead, the policy of nonrecognition entails that most states regard the western part of the Kerch Strait as comprising Ukrainian internal waters. Therefore, if the Arbitral Tribunal respects Ukraine's request and finds that the Sea of Azov and the Kerch Strait include Ukraine's normal maritime zones, then any unilateral declaration of the Kerch Strait as a non-international strait by the Russian Federation after the establishment of a system of straight baselines around the Crimean and Taman peninsulas would fail to meet the conditions of Art 35(a) of UNCLOS, primarily owing to the lack of recognition by the international community.

Based on a systemic interpretation of the UNCLOS, the potential for the categorization of the Kerch Strait as a non-international strait is summarized in [Table 1](#). The table also debates the perceived positions of the Russian Federation and Ukraine in relation to the legal categorization of the Kerch Strait as a non-international strait.

## Conclusion

The legal regime of the Kerch Strait continues to be determined by such factors as the outer limits of maritime zones of the Russian Federation and Ukraine, their bilateral treaties, and their domestic law on internal waters and baselines. In addition, the key determinant lies in geopolitical factors, particularly the obligation of nonrecognition.

These primary determinants enable states to approach the legal regime applicable to the Kerch Strait from diametrically opposing perspectives, possibly even after the final award of the Annex VII Arbitral Tribunal. In the *Coastal State Rights Case*, Ukraine has alleged that the regime of transit passage is applicable to the Kerch Strait, whereas the Russian Federation rejects this claim and, instead, finds that the passage regime is governed by the 2003 Kerch Treaty. Should the Annex VII Arbitral Tribunal decide that the Sea of Azov constitutes a historic bay, which comprises internal waters as stipulated in the 2003 bilateral treaties concluded between Ukraine and the Russian Federation, then one option for Ukraine would be to terminate the 2003 bilateral treaties and establishing normal maritime zones in the Sea of Azov. The transit passage regime would then be applicable to the Kerch Strait as it would connect the Ukrainian EEZ in the Sea of Azov with EEZs in the Black Sea.

To counter this or in a situation where the Annex VII Arbitral Tribunal favors Ukraine's claim on the applicability of the regime of transit passage to the Kerch Strait, the Russian Federation could enclose the Kerch Strait with its system of straight baselines and declare that the Kerch Strait is a non-international strait. Consequently, the maritime area of the Kerch Strait would form internal waters that had been previously considered as such, based on the historic bay concept, provided that the Russian Federation substantiates this claim with a solid legal basis pursuant to Art 35(a) of UNCLOS. For example, the Russian Federation could cite Article 1 of the 2003 Kerch Treaty and Article 5 of the State Border Treaty, which stipulate that the status of the Kerch Strait is internal waters, and refer to the fact that these treaties have remained in force and the passage regime stipulated therein has been, thus far, largely respected by other states. Hence, the Russian Federation would potentially be able to exclude the right of transit passage in the Kerch Strait in accordance with a restrictive interpretation of Articles 35(a) and 8(2) of UNCLOS.

This would certainly conflict with Ukraine's approach to the applicable law and that of states that do not recognize the Russian Federation's alleged sovereignty over Crimea. They could adopt a diametrically opposing interpretation of Art 35(a) of UNCLOS, arguing that it serves merely to clarify that Part III of UNCLOS affects areas of internal waters in the Kerch Strait to the extent that the otherwise applicable passage regime in internal waters is replaced with that of transit passage. States that follow the obligation of nonrecognition with respect to the annexation and occupation of Crimea could also claim that even if one adopts the restrictive reading of Art 35(a) of UNCLOS, then its conditions are not met in relation to the Kerch Strait, as most states do not recognize the Russian Federation's sovereignty over the internal waters of the western part of the Kerch Strait.

Therefore, the previously mentioned determinants of the legal regime of the Kerch Strait create further instability regarding the Kerch Strait's passage regime, exacerbated by the possible exercise of coastal state unilateral discretion even after the arbitral proceedings. In this context, navigation through the Kerch Strait and its adjoining maritime areas might potentially be subject to parallel passage regimes. Based on the previous analysis, [Table 2](#) debates the asserted positions of the Russian Federation and Ukraine in relation to the legal categorization of the Kerch Strait as an international strait.

Nonetheless, the determinants of the legal regime of the Kerch Strait also provide a broad set of means for Ukraine and the Russian Federation to reach a compromise on the applicable passage regime. In particular, the 2003 Kerch Treaty establishes a passage regime that is compatible with UNCLOS in terms of Art 311(2) of the Convention if the Annex VII Arbitral Tribunal upholds the Russian Federation's claim that the Sea of Azov constitutes a historic bay. In this situation, the 2003 Kerch Treaty stipulates a more liberal passage regime as compared to the one that would otherwise be applicable to the Kerch Strait under UNCLOS. Under Articles 8(2) and 35(a) of UNCLOS, foreign commercial ships would not be entitled to enter the waters forming the historic bay without the coastal state's prior permission, whereas Article 2(2) of the 2003 Kerch Treaty stipulates that commercial ships flying the flags of third states may enter the Sea of Azov and pass through the Kerch Strait if they are going to or returning from a Russian or Ukrainian port (notably, for entering the port, ships may eventually still be required to seek a clearance). Thus, the Kerch Strait currently can be categorized as a *sui generis* strait in terms of Art 311(2) of UNCLOS.

This shows potential for reaching a compromise between the otherwise conflicting claims of the Sea of Azov coastal states over the legal classification of the Kerch Strait. The *sui generis* regime could allow, similarly to the passage regime under the 2003 Kerch Treaty, unimpeded passage of all commercial ships, and freedom of navigation for all Ukrainian and Russian ships, but significant restrictions on the passage of foreign warships and other noncommercial ships in the Sea of Azov and the Kerch Strait. This *sui generis* legal regime has not raised any objections prior to the measures taken in recent years by the Russian Federation, which hampered the passage of commercial ships and Ukrainian naval vessels through the Kerch Strait. Moreover, Ukraine has not terminated or suspended, in whole or in part, the 2003 Kerch Treaty.

Should the parties to the dispute not reach a compromise, then a final award of the Annex VII Arbitral Tribunal that upholds either Ukraine's or the Russian Federation's

claims could potentially lead to the application of parallel legal regimes of transit passage and permit-based passage to the Kerch Strait, causing increased legal uncertainty for international shipping. Such instability regarding the applicable passage regime could also constitute a fruitful ground for any potential future conflict between Ukraine and the Russian Federation and likely hinder the economic development of the Sea of Azov region.

Reaching a compromise solution on the applicable passage regime in the Kerch Strait would not necessarily require new treaty negotiations between the parties to the dispute. It follows, from the preceding discussion, that the law of the sea and general international law are already clearly able to reconcile the conflicting interests of the coastal states and to ensure the rule of law and legal certainty in the shipping routes of the Sea of Azov. Therefore, it is rather a matter of *pacta sunt servanda* that the rights and freedoms stipulated in the 2003 Kerch Treaty are guaranteed by its states parties toward each other and third states.

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