

**THE AZOV SEA AND THE KERCH STRAIT
IN THE LIGHT OF EXCEPTIONS UNDER ARTICLE 298(1)
UNCLOS REGARDING DISPUTES CONCERNING MARITIME
DELIMITATION AND HISTORICAL TITLES**

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INTRODUCTION

The Azov Sea/the Sea of Azov is located in south-eastern Europe, between the coastlines of Ukraine and the Russian Federation. It is connected to the Black Sea through the Kerch Strait¹. The Kerch Strait is situated between the southern coast of Crimea (the Kerch Peninsula), which belongs to Ukraine, and the northern coast of the Kuban Bay, which is part of the Russian Federation². The Kerch Strait, as a key geographical element that connects the Sea of Azov and the Black Sea, provides an important passageway for maritime transport and access to and from ports on the Sea of Azov. The Kerch Strait is valuable from different points of view³. The status of the Azov Sea and the Kerch Strait was a topic for discussion not only between its coastal states but also among international scholarship⁴.

¹ Sea of Azov. *Encyclopaedia Britannica*. <https://www.britannica.com/place/Sea-of-Azov> (accessed 12.06.2023).

² Kerch Strait. *Encyclopedia.com*. URL: <http://www.encyclopedia.com/reference/encyclopedias-almanacs-transcripts-and-maps/kerch-strait> (accessed 12.06.2023).

³ See in more details, Blank S. Why Is the Sea of Azov So Important? *Atlantic Council*, 2018. URL: <https://www.atlanticcouncil.org/blogs/ukrainealert/why-is-the-sea-of-azov-so-important/> (accessed 12.06.2023); Zahra A. 10 Kerch Strait Facts You Might Not Know. *Marine Insight*, 2022. URL: <https://www.marineinsight.com/know-more/10-kerch-strait-facts-you-might-not-know/> (accessed 12.06.2023); Urcosta R. B. Russia's Strategic Considerations on the Sea of Azov. *Warsaw Institute Special Report*, 2018. URL: <https://warsawinstitute.org/russias-strategic-considerations-sea-azov/> (accessed 12.06.2023).

⁴ See, Jessup P. C. *The Law of Territorial Waters and Maritime Jurisdiction* (1927). New York, 1970: p. 382-383; Gidel G. *Le droit international public de la mer / Gilbert Gidel. (1930-1934)*. Vol. III, p. 663; Symonides J. Freedom of Navigation in International Straits. *Polish Yearbook of International Law*. Vol. 17. 1988, p. 214; Чернявський А., Міжнародно-правові проблеми визначення статусу Азовського моря та Керченської протоки. *Правовий вісник Української академії банківської справи*. 2012. № 2. С: 89-92; Skaridov A. *The Sea of Azov and the Kerch Strait. Navigating Straits: Challenges for International Law / D. D. Caron, N. Oral*. Leiden. 2014. DOI: 10.1163/9789004266377_012: p. 220-221; Serbenko N. *On the Use*

During the USSR these waters were considered to be under its exclusive sovereignty. After its dissolution, Ukraine and the Russian Federation became coastal states in the Azov Sea and the Kerch Strait⁵. The legal status as well as applicable legal regime of these waters are still considered unsettled. After the dissolution of the USSR, Ukraine and the Russian Federation cooperated with each other with respect to navigation, management of fisheries and other natural resources, protection of the marine environment in the Sea of Azov and the Kerch Strait, etc.⁶

of the Kerch Strait, or Why the Russian-Ukrainian Agreement Violates International Law? *Independent Analytical Center For Geopolitical Studies Borysfen Intel*, 2015. URL: https://bintel.org.ua/en/nash_archiv/arxiv-osvita/kerch/ (accessed 12.06.2023); Кузнецов С.О., Аверочкина Т.В. Протоки, що використовуються для міжнародного судноплавства: деякі аспекти визначення правового статусу та режиму. *Lex Portus*. 2017. № 4. С. 31–47. URL: <http://dspace.onua.edu.ua/handle/11300/8798> (accessed 12.06.2023); Volterra R. G., Mandelli G. F., Nistal A. The Characterisation of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait. *The International Journal of Marine and Coastal Law*. Vol. 33(3). 2018: P. 614–622. DOI: 10.1163/15718085-12331098; Короткий Т. Р., Хендель Н. В. Міжнародно-правовий аналіз ситуації в Азовському морі та Керченській протоці. *Український часопис міжнародного права*. 2018. № 2. С. 42–55; Кузнецов, С. С. Азово-Керченська акваторія у концепції історичних вод. *Правова держава*. № 42. 2021. С. 108–114. DOI: 10.18524/2411-2054.2021.42.232425.

⁵ The scholar views in this regard are divided. The first view considered these waters as internal waters. The second view considered them as historical waters. For the view of internal waters see, Jessup P. C. *The Law of Territorial Waters and Maritime Jurisdiction* (1927). New York. 1970: p. 382–383; Gidel G. *Le droit international public de la mer* / Gilbert Gidel. (1930–1934). Vol. III, p. 663; Symonides J. *Freedom of Navigation in International Straits*. *Polish Yearbook of International Law*. Vol. 17. 1988, p. 214; etc. For the view of historical waters, see, Historic Bays: Memorandum by the Secretariat of the United Nations. Extract from the Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents). United Nations Conference on the Law of the Sea Geneva, Switzerland 24 February to 27 April 1958 Document: – A/CONF.13/1: p. 3, para 12. Also, it worth to mention that there were arguments that the Azov Sea is an example of the USSR’s “unjustifiably claimed” body of high seas. See, McDevitt J. B. *Law of the Sea*. *Texas International Law Forum*. Vol. 1. 1965, p. 62.

⁶ It is proven by number of different agreements in this matter: Договір про дружбу, співробітництво і партнерство між Україною і Російською Федерацією від 31 травня 1997 р. База даних «Законодавство України». URL: https://zakon.rada.gov.ua/laws/show/643_006#Text (accessed 12.06.2023); Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24 грудня 2003 р. База даних «Законодавство України». URL: https://zakon.rada.gov.ua/laws/show/643_205#Text (accessed 12.06.2023); Угода між Урядом України та Урядом Російської Федерації про співробітництво в галузі рибного господарства від 24 вересня 1992 р. База

However, from 2014, the level of cooperation was significantly reduced due to the illegal annexation and occupation of Crimea by the Russian Federation⁷. It was later followed by three Ukrainian submissions of disputes with the Russian Federation to ad hoc tribunals under Annex VII of the United Nations Convention on the Law of the Sea (further, UNCLOS)⁸ and International Tribunal for the Law of the Sea⁹. In particular, the *Dispute*

даних «Законодавство України». URL: https://zakon.rada.gov.ua/laws/show/643_024#Text (accessed 12.06.2023), etc. However, it should be noted that Agreement on Cooperation in the Azov Sea and the Kerch Strait was concluded after the beginning of Russian unilateral construction of a dam from the Russian shore of the Kerch Strait to the Ukrainian island Tuzla. See, 24 вересня 2003 року Російська Федерація розпочала будівництво дамби з російського берега Керченської протоки до українського острова Коса Тузла. ВМС ЗС України, 24 вересня 2018. URL: https://www.facebook.com/navy.mil.gov.ua/posts/1022162254653711?__tn__=-R (accessed 12.06.2023). Also, it should be noted, that all mentioned Agreements are denounced by Ukraine at the moment. See, Про припинення дії Договору про дружбу, співробітництво і партнерство між Україною і Російською Федерацією: Закон України від 06 грудня 2018 р. № 2643-VIII/ Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/2643-19#Text> (accessed 12.06.2023); Про припинення дії Договору між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки : Закон України від 24 лютого 2023 р. № 2948-IX. *Верховна Рада України*. URL: <https://zakon.rada.gov.ua/laws/show/2948-20#Text> (accessed 12.06.2023); Про денонсацію Угоди між Урядом України та Урядом Російської Федерації про співробітництво в галузі рибного господарства : Постанова Кабінету Міністрів України від 29 квітня 2022 р. № 500. База даних «Законодавство України». URL: <https://zakon.rada.gov.ua/laws/show/500-2022-%D0%BF#Text> (accessed 12.06.2023).

⁷ The author of this article is guided by General Assembly Resolution 68/262 on ‘Territorial integrity of Ukraine’, 27 March 2014. URL: <https://undocs.org/A/RES/68/262> (accessed 12.06.2023) as evidence that there are not any legal grounds “for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol.” By this, even despite the Russian Federation claims over territory of Crimea, Crimea remains as a territory of Ukraine.

⁸ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994). 1833 UNTS 3 (UNCLOS).

⁹ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation). Permanent Court of Arbitration, PCA Case Repository. URL: <https://pca-cpa.org/en/cases/149/> (accessed 12.06.2023); *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* (Ukraine v. the Russian Federation). Permanent Court of Arbitration, PCA Case Repository. URL: <https://pca-cpa.org/en/cases/229/> (accessed 12.06.2023); *Detention of three Ukrainian naval vessels* (Ukraine v. Russian Federation). Provisional Measures. Order on 25 May 2019. ITLOS Reports 2018-2019, p. 283; International Legal Materials, vol. 58, pp. 1147–1166.

Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (further, *Coastal State Rights Dispute*) brings to light the legal uncertainty regarding the interpretation and application of Article 298 para 1 of UNCLOS. One of many Russian Federation objections focuses on the claims concerning activities in the Sea of Azov and in the Kerch Strait while another one addresses the parties' declarations under para 1 Article 298 of UNCLOS¹⁰.

The purpose of the article is to contribute to the understanding of the scope of interpretation and application of Article 298 para 1 of UNCLOS in disputes related to the Sea of Azov and the Kerch Strait. In particular, the article proposes constructive approaches and recommendations of interpretation and application of the optional exceptions regarding the dispute concerning the interpretation or application of Articles 74 and 83 of UNCLOS relating to sea boundary delimitations, and those involving historic bays or titles in the context of the Sea of Azov and the Kerch Strait.

Research methods include the analysis of academic writings, international treaties, and norms of international law. The research is based on the study of documents of international organizations, such as UN, ILC, etc., decisions of international courts and tribunals in the law of the sea cases, as well as report and recommendations of the compulsory conciliation commission. In addition, the article takes into account the applicability of the possible scenario of interpretation and application of Article 298 para 1 of UNCLOS with regard to approaches and practice of resolving disputes related to maritime delimitation and historical title.

Due to this, the structure of the article consists of introduction, three chapters and conclusions. The first chapter will provide a general overview of Article 298(1) of the UNCLOS in relation to the Azov Sea and the Kerch Strait. The second chapter will answer on the question whether or not a declaration under Article 298 excluding disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations may exclude obligations of restraint and cooperation under Articles 74(3) and 83(3) of UNCLOS. The third chapter will address the criteria which the Arbitral Tribunal will evaluate to decide whether the legal regime of the Azov Sea and the Kerch Strait consists (of a) historical title or not.

¹⁰ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020: chapters V and VI.

1. Review of Article 298(1) of the UN Convention on the Law of the Sea in relation to the Azov Sea and the Kerch Strait

When UNCLOS was negotiated, it was clear that it must have compulsory dispute settlement procedures for solving disputes concerning the interpretation or application of provisions of UNCLOS. Otherwise, it would not be successful in its implementation¹¹. Therefore, Section 2, Compulsory Procedures Entailing Binding Decisions, was included. Section 2 sets out the procedures that allow the parties to resolve disputes related to the interpretation or application of the provisions of UNCLOS and obtain binding decisions. Under UNCLOS, unless the parties have reached an agreement through peaceful negotiations, any dispute relating to the interpretation or application of the Convention may be referred to a court or tribunal having jurisdiction over the matter¹².

State Parties have the right to choose one or more procedures for the resolution of disputes, such as the International Tribunal for the Law of the Sea, the International Court of Justice or ad hoc arbitral tribunals¹³. The decision made by the court or tribunal is binding on the parties to the dispute, and they are obliged to comply with it¹⁴.

However, in a balance to the compulsory dispute settlement procedures over the disputes concerning the interpretation or application of UNCLOS in Section 2, the State Parties agreed on limitations and exceptions to the applicability of such sections in Section 3. Thus, Article 298 provides optional exceptions to the compulsory procedures entailing binding decisions. Para 1 of this Article, reads as follows:

“1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles [...]”.

According to this Article, States have the right to make a declaration to exclude the application of certain provisions of UNCLOS. Namely, disputes concerning the interpretation or application of articles 15, 74 and 83 relating

¹¹ Beckman R., Sim C. Maritime Boundary Disputes and Compulsory Dispute Settlement: Recent Developments and Unresolved Issues. *Legal Order in the World's Oceans* / M. H. Nordquist, J. N. Moore, R. Long. Leiden, 2018. P. 228–250. DOI: 10.1163/9789004352544_013: p. 229.

¹² Article 286 UNCLOS.

¹³ Article 287 UNCLOS.

¹⁴ Article 296 UNCLOS.

to sea boundary delimitations and those involving historic bays or titles. These exceptions play a significant role in the context of the disputes involving the Sea of Azov and the Kerch Strait.

Both countries, Ukraine and the Russian Federation, made declarations that excluded disputes relating to sea boundary delimitations and disputes involving historic bays or titles¹⁵. By this, no dispute involving the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations and/or those involving historic bays or titles can be a subject of the compulsory dispute settlement procedure.

The complexities of the disputes involving the Azov Sea and the Kerch Strait are due to a lack of delimitation between its coastal states, uncertainty in the legal status and legal regime of these waters, occupation of part of the coastal territory of one state by another, the full-scale military invasion of Ukraine by the Russian Federation, etc.¹⁶

¹⁵ Declarations or Statements upon UNCLOS Ratification. URL: https://www.un.org/depts/los/convention_agreements/convention_declarations.htm (accessed 12.06.2023). The text of these declarations can be found via URL: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en#EndDec (accessed 12.06.2023).

¹⁶ About the lack of delimitation between Ukraine and the Russian Federation, see, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020; para. 364. In particular, the phrase “the delimitation of the territorial sea, the EEZ, and the continental shelf between the Parties, has not been effected by agreement in accordance with the Article 15, 74, 83 of UNCLOS”. For earlier reference, see, Elferink O. A. G. *The Law and Politics of the Maritime Boundary Delimitations of the Russian Federation: Part 1. The International Journal of Marine and Coastal Law*. Vol. 11(4). 1996. P. 533–569. DOI: 10.1163/157180896X00294; p. 563. About uncertainty in the legal status and legal regime of the Azov Sea and the Kerch Strait, see Skaridov A. *The Sea of Azov and the Kerch Strait. Navigating Straits: Challenges for International Law / D. D. Caron, N. Oral*. Leiden. 2014. DOI: 10.1163/9789004266377_012: 221-229; Lott A. *The Passage Regimes of the Kerch Strait—To Each Their Own? Ocean Development & International Law*. Vol. 52(1). 2021. DOI: 10.1080/00908320.2020.1869445: p. 82–87, etc. About the occupation of part of the coastal territory of Ukraine by the Russian Federation, see: General Assembly Resolution 68/262 on ‘Territorial integrity of Ukraine’, 27 March 2014. URL: <https://undocs.org/A/RES/68/262> (accessed 12.06.2023); Statement on “Russia’s on-Going Aggression against Ukraine and Illegal Occupation of Crimea”. Ministry of Foreign Affairs of Ukraine. URL: <https://mfa.gov.ua/en/news/55831-zajava-delegaciji-ukrajini-shhodo-trivajuchoji-rosijsykoji-agresiji-proti-ukrajini-ta-nezakonnoji-okupaciji-krimu-movoju-originalu> (accessed 12.06.2023), etc. About the full-scale military invasion of Ukraine by the Russian Federation see Statement of the Ministry of Foreign Affairs of Ukraine on the New Wave of Aggression of the Russian Federation against Ukraine. Ministry

This article does not include any analysis of such complexities due to its limited scope. Thus, the focus is on the scope of interpretation and application of Article 298 in respect of sea boundary delimitation and disputes involving historic bays or titles in the case of the Azov Sea and the Kerch Strait. Due to it, the next two sections will elaborate on the applicability of optional exceptions to disputes between Ukraine and the Russian Federation as coastal states bordering the Sea of Azov and the Kerch Strait.

2. Disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations and the Azov Sea and the Kerch Strait

Maritime delimitation disputes may have different forms and situations¹⁷. There is a controversy on how Article 298 of UNCLOS has to be interpreted or applied¹⁸. Namely, whether a declaration under Article 298 excluding disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations may also exclude obligations of restraint and cooperation under Articles 74(3) and 83(3) of UNCLOS or not¹⁹.

of Foreign Affairs of Ukraine. URL: <https://mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-new-wave-aggression-russian-federation-against-ukraine> (accessed 12.06.2023) Statement on a Year since the Start of Russia's Full-Scale Military Invasion of Ukraine. 'Ministry of Foreign Affairs of Ukraine. URL: <https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-do-roku-z-pochatku-povnomasshtabnogo-vijskovogo-vtorgnennya-rosiyi-v-ukrayinu> (accessed 12.06.2023); General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops. UN Press. URL: <https://press.un.org/en/2022/ga12407.doc.htm> (accessed 12.06.2023).

¹⁷ Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives). Preliminary Objections. Judgment on 28 January 2021. ITLOS Reports 2020–2021 (forthcoming), para. 333.

¹⁸ Sim C. Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options. *Asia-Pacific Journal of Ocean Law and Policy*. Vol. 3(2). 2018. DOI: 10.1163/24519391-00302005: p. 234.

¹⁹ See, Sim C. Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options. *Asia-Pacific Journal of Ocean Law and Policy*. Vol. 3(2). 2018. DOI: 10.1163/24519391-00302005: p. 234–254. And for another view, see, Liao X. The Road Not Taken: Submission of Disputes Concerning Activities in Undelimited Maritime Areas to UNCLOS Compulsory Procedures. *Ocean Development & International Law*. Vol. 52(3). 2021. DOI: 10.1080/00908320.2021.1959772: 297–324.

The wording of para 3 of Article 74 and para 3 of Article 83 of UNCLOS is the same²⁰. The relevant paras introduce obligations “to enter into provisional arrangements of a practical nature” and an “obligation not to jeopardise or hamper the reaching of a definitive boundary agreement”²¹. And the question is, whether such obligations are a part of a dispute concerning the interpretation or application of articles 15, 74 and 83 *relating to sea boundary delimitations*, or if they constitute a separate dispute.

Maritime delimitation in the Sea of Azov and the Kerch Strait has not been done²². Thus, even if there is a dispute in this regard, it will reach neither a court nor a tribunal with a possibility of a binding decision due to the declarations made by Ukraine and the Russian Federation.

²⁰ The wording is the following: “3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”

²¹ See Barrett J., Burke N. Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas. *British Institute of International and Comparative Law*, 2016. URL: <https://www.biiicl.org/publications/report-on-the-obligations-of-states-under-articles-743-and-833-of-unclos-in-respect-of-undelimited-maritime-areas> (accessed 12.06.2023); Churchill R. International Law Obligations of States in Undelimited Maritime Frontier Areas. *Frontiers in International Environmental Law: Oceans and Climate Challenges* / R. Churchill. Leiden, 2021. P. 141–170. DOI: 10.1163/9789004372887_006. Also see interpretation in UNCLOS commentaries of the Articles 74 and 83: Tanaka Y. Article 74. *United Nations Convention on the Law of the Sea: A Commentary* / A. Proelss. Beck Hart Nomos. 2017. P. 564–584; Tanaka Y. Article 83. *United Nations Convention on the Law of the Sea: A Commentary* / A. Proelss. Beck Hart Nomos. 2017. P. 651–667; Article 74 – Delimitation of the Exclusive Economic Zone between States with opposite or Adjacent Coasts (II). *United Nations Convention on the Law of the Sea* / M. H. Nordquist, S. Nandan, S. Rosenne. Center for Oceans Law and Policy, University of Virginia. Leiden, 2014. P. 796–816; Article 83 – Delimitation of the Continental Shelf between States with opposite or Adjacent Coasts (II). *United Nations Convention on the Law of the Sea* / M. H. Nordquist, S. Nandan, S. Rosenne. Center for Oceans Law and Policy, University of Virginia. Leiden, 2014. P. 948–985.

²² It is worth mentioning that there were several attempts to delimit maritime boundaries in the Azov Sea. In this regard, Ukraine submitted its proposed baselines for delimitation in the Azov Sea: List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Sea of Azov, notified by note verbale dated 11 November 1992. *UN Law of the Sea Bulletin* 36, 1998, 51–52. URL: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_1992_CoordinatesAzovSea.pdf (accessed 12.06.2023).

In the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* Ukraine does not ask to delimit the maritime areas between Ukraine and Russia and does not involve the interpretation or application of articles 15, 74 and 83 in any part of its submission²³. Instead, the Russian Federation invokes Article 298 para 1 in regard to maritime boundary delimitations as a reason to exclude the arbitral tribunal's jurisdiction over "any dispute having a bearing on the delimitation of the territorial sea, exclusive economic zone, and continental shelf". The Russian Federation claims that the phrase "relating to sea boundary delimitations" covers "not only disputes involving the determination of sea boundaries but all matters connected with the entire delimitation process, including issues of overlapping entitlements"²⁴. As "overlapping entitlements" meant the determination of such entitlements of either Party within the maritime areas around Crimea, the tribunal rules that it has a lack of jurisdiction to make such determinations because it involves a decision on the sovereignty over Crimea between two states²⁵.

By this, none of the parties invokes paras 3 of Article 74 or 83 of UNCLOS. However, it provides the view that "the determination of the existence and extent of maritime entitlements is *one of the first matters* to be addressed in the delimitation of a maritime boundary." It also recalls the statement of ITLOS in the Bay of Bengal judgment, where it states that "the first step in any delimitation is to determine whether there are entitlements and whether they overlap"²⁶. Thus if the delimitation starts from determining of the overlapping entitlements, then the obligations "to enter into provisional arrangements of a practical nature" and an "obligation not to jeopardise or hamper the reaching of a definitive boundary agreement" stated in para 3 of Article 74 and 83 of UNCLOS are not part of the delimitation dispute.

Some support for this idea can be found in the *South China Sea Arbitration*. The Arbitral Tribunal states that "a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap"²⁷. Namely, the Arbitral Tribunal found that a dispute over an issue which may be considered in the course of boundary delimitation did

²³ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020, para 377.

²⁴ *Ibid.*, para 360.

²⁵ *Ibid.*, para 376–383.

²⁶ *Ibid.*, para 379–380.

²⁷ *South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China). Award on 16 July 2016, para 156.

not necessarily constitute a dispute over maritime boundary delimitation itself²⁸. It brings attention to the fact that even by being very close to the delimitation procedure issues, it can still be outside of the exception under Article 298 concerning the disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations.

According to the view of Youri van Logchem, the provisions of paras 3 of Article 74 and Article 83 of UNCLOS consist of “two obligations for claimant States that apply prior to EEZ or continental shelf delimitation”²⁹. Meanwhile, van Logchem also states that these paragraphs are “a constituent part of the delimitation provisions of Articles 74 and 83 LOSC”³⁰. And by this, it is possible to assume that the optional exception applies to the relevant Articles as a whole. However, the Tribunal in the *South China Sea Arbitration* specified that “maritime boundary delimitation is an integral and systemic process. In particular, the Tribunal notes that the concepts of an “equitable solution”, of “special circumstances” in respect of the territorial sea, and of “relevant circumstances” in respect of the exclusive economic zone and continental shelf may entail consideration of a *wide variety of potential issues arising between the parties to a delimitation. It does not follow, however, that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself*”³¹.

Thus, the matter that is within the scope of maritime delimitation cannot be automatically considered as a dispute related to maritime boundary delimitation itself. Although the tribunal does not directly mention relevant paras of Articles 74 and 83 of UNCLOS, it is still possible to draw the conclusion that the obligations of claimant States that apply prior to the maritime border delimitation can be decided by the tribunal, even with the application of optional exceptions provided by Article 298 UNCLOS.

The Conciliation Commission in *Timor Sea Conciliation* (Timor-Leste v. Australia) finds that Arts 74 and 83 “address not only the actual delimitation of the sea boundary between States with opposite or adjacent coasts, but also the question of the transitional period pending a final

²⁸ Beckman R., Sim C. *Maritime Boundary Disputes and Compulsory Dispute Settlement: Recent Developments and Unresolved Issues*. Legal Order in the World’s Oceans / M. H. Nordquist, J. N. Moore, R. Long. Leiden, 2018. P. 228–250. DOI: 10.1163/9789004352544_013: p. 239–240.

²⁹ Logchem, Y. *The Rights and Obligations of States in Disputed Maritime Areas*. Cambridge. 2021. 333 p. DOI: 10.1017/9781108909051: p. 118.

³⁰ *Ibid.* P. 164–165.

³¹ Emphasis was made by the author, *South China Sea Arbitration* (The Republic of Philippines v. The People’s Republic of China). Award on 16 July 2016, para 155.

delimitation and the provisional arrangements of a practical nature that the Parties are called on to apply pending delimitation”³². That could be interpreted as not including the interpretation and application of the UNCLOS provisions Articles 73 and 83 as a part of a dispute concerning maritime delimitation. The reason for this is the interpretation of paras 3 of these Articles as a different matter of a sea boundary delimitation dispute. Namely, separating the actual maritime delimitation with the transitional period before the final delimitation as well as the provisional arrangements of a practical nature before such delimitation is completed.

The wording of Article 298 para 1 is “(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations”. Applying the literal interpretation, the dispute that should be excluded from compulsory dispute resolution under Part XV UNCLOS is a dispute related to sea boundary delimitations. It also involves the interpretation or application of Articles 15, 74 and 83, but it still has to be about sea boundary delimitation. Yet, there is no clear answer in the UNCLOS jurisprudence on whether or not the obligations “to enter into provisional arrangements of a practical nature” and an “obligation not to jeopardise or hamper the reaching of a definitive boundary agreement”, stated in para 3 of Article 74 and 83 of UNCLOS, are part of a dispute related to sea boundary delimitations that constitutes an optional exception under Article 298 UNCLOS. Due to this, the view of this article that these paras of Articles 74 and 83 of UNCLOS seem to be a different dispute than the one concerning sea boundary delimitation. Thus, an optional exception of “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations” can only be applicable in combination when the dispute is not only about the interpretation of the mentioned Articles, but also includes matters of sea boundary delimitations itself.

However, only “[a] future court or tribunal, as anticipated by the wording of paragraph (1) of Articles 74 and 83 referring to “international law, as referred to in article 38 of the Statute of the International Court of Justice”, would have the mandate to interpret the scope of an Article 298 declaration

³² *Timor Sea Conciliation* (Timor-Leste v. Australia). Decision on Australia’s Objections to Competence on 19 September 2016, para. 97. For the detailed analyses of the case, see Liao X. The Timor Sea Conciliation under Article 298 and Annex V of UNCLOS: A Critique. *Chinese Journal of International Law*. Vol. 18(2). 2019: P. 281–325. DOI: 10.1093/chinesejil/jmz020; Conciliation between Timor-Leste and Australia. Max Planck Encyclopedias of International Law [MPIL]. Oxford Public International Law, 2019. URL: <https://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e2216> (accessed 25.03.2023).

by considering paragraphs (1), (2) and (3) of Articles 74 and 83 independently”³³.

Theoretically, the interpretation or application of Article 298 of UNCLOS in regard of paras 3 of Articles 74 and 83 can be found within the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*. Christine Sim refers to the Agreement on Cooperation in the Use of the Sea of Azov and the Straits of Kerch (24 December 2003) between the Russian Federation and Ukraine as a joint development agreement for their disputed maritime areas. She is also of the view that the Article 298 declaration should not be capable of excluding obligations of restraint and cooperation from the dispute settlement³⁴.

Neither Ukraine nor the Russian Federation involved these matters into their submissions or objections. That is why the Award in the *Coastal State Rights Dispute* of the Arbitral Tribunal only states on the co-relation between the existence of overlapping maritime entitlements, the question of delimitation, and delimitation exception³⁵. Because the Arbitral Tribunal asked Ukraine to resubmit its Memorial according to the adopted Award, there is still a possibility that the resubmitted submission will focus on obligations “to enter into provisional arrangements of a practical nature” and an “obligation not to jeopardise or hamper the reaching of a definitive boundary agreement”.

However, while this issue remains uncertain and it is only possible to recommend to Ukraine to include these issues into its submissions, there is no doubt that the Arbitral Tribunal will have a closer look on another optional exception to the jurisdiction in the merits: an optional exception involving disputes regarding historic bays or titles. Thus, the next sub-chapter will address the historic title argument presented by the Russian Federation as an objection to the Arbitral Tribunal in respect of the status of the waters of the Azov Sea and the Kerch Strait.

3. Disputes involving historic bays or titles and the Azov Sea and the Kerch Strait

In the context of disputes arising between countries bordering the Sea of Azov and the Kerch Strait, the existence or non-existence of historical title over the waters in question plays a crucial role not only in determining the

³³ Sim C. Maritime Boundary Disputes and Article 298 of UNCLOS: A Safety Net of Peaceful Dispute Settlement Options. *Asia-Pacific Journal of Ocean Law and Policy*. Vol. 3(2). 2018. P. 234–254. DOI: 10.1163/24519391-00302005: p. 250.

³⁴ *Ibid.*, p. 238–240.

³⁵ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020, para 381.

legal status of these water areas, but also for the jurisdiction of the Tribunal in the compulsory dispute settlement under UNCLOS.

The definition for historic waters is generally considered as the following: ‘waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community States’³⁶. “The most recent definition for explaining the meaning of historic bays or titles is provided in *South China Sea Arbitration* as: “Historic title’ ... is used specifically to refer to historic sovereignty to land or maritime areas. ‘Historic waters’ is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea, although “general international law ... does not provide for a single ‘régime’ for ‘historic waters’ or ‘historic bays’, but only for a particular régime for each of the concrete, recognised cases of ‘historic waters’ or ‘historic bays’. [...] Finally, a ‘historic bay’ is simply a bay in which a State claims historic waters”³⁷.

A term that is related to the historic waters but not to be confused with it, is the term ‘historic rights’. In the *South China Sea Arbitration* the arbitral tribunal finds that considering ‘the effect of any historic rights claimed by China to maritime entitlements in the South China Sea and the interaction of such rights with the provisions of the Convention’ as well as ‘the legal validity of any claim by China to historic rights in the South China Sea’ are disputes concerning the interpretation and application of UNCLOS. In this regard, the jurisdiction of the arbitral tribunal depends on ‘the nature of any such historic rights and whether they are covered by the exclusion from jurisdiction over “historic bays or titles” in Article 298’³⁸. The tribunal concluded: “China’s claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the ‘nine-dash line’ are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits

³⁶ Cited Bouchez, L.J., *The Regime of Bays in International Law*, 1964 from Symmons, C. R. *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal*. Leiden, 2019. DOI: 10.1163/9789004377028, p. 6.

³⁷ *South China Sea Arbitration* (The Republic of Philippines v. The People’s Republic of China). Award on 16 July 2016, para 223.

³⁸ *South China Sea Arbitration* (The Republic of Philippines v. The People’s Republic of China). Award on Jurisdiction and Admissibility on 29 October 2015, para 398-399. Also see, Symmons, C. R. *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal*. Leiden, 2019. DOI: 10.1163/9789004377028: p. 44–61.

of China's maritime entitlements under the Convention. The Tribunal concludes that the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein".

This finding is based on the evaluation of the nature of China's claimed rights in the South China Sea and the scope of the exception in article 298(1)(a)(i) of UNCLOS as well as defining the relation of UNCLOS to prior claims to historic rights and jurisdiction, China's claim to historic rights in the South China Sea, and whether China has established exceptional rights or jurisdiction since the adoption of UNCLOS.

The arbitral tribunal clearly and accurately dismissed the concept, introduced to it as the 'nine-dash line', that a State party to UNCLOS can have historic rights to fish or to seabed resources within another State's 200 nm zone³⁹. By this, the exception under Article 298 of UNCLOS was not applicable because the case has a claim for historic rights within another State's 200 nm zone but not within the historic title determination.

As it is possible to see, states can refer to historical bays, titles, rights to support their territorial and other claims as well as try to trigger the optional exception to compulsory jurisdiction concerning disputes involving historical bays or titles.

Determining the historical bay or historical title requires a detailed analysis of various factors. In 1962 the Secretariat of the United Nations prepared a study related to the juridical regime of historic waters including historic bays⁴⁰. This study establishes the elements of a legal 'historic waters' claim: 'there seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States'⁴¹.

³⁹ McDorman T. L. *The South China Sea Arbitration: Selected Legal Notes. Asian Yearbook of International Law*. Vol. 21. 2015. P. 3–15. DOI: 10.1163/9789004344556_002: p. 15.

⁴⁰ Juridical Regime of Historic Waters, including Historic Bays – Study prepared by the Secretariat. Document A/CN.4/143. *United Nations Yearbook of the International Law Commission*, Vol. 2, 1962. P. 1–26. URL: https://legal.un.org/ilc/documentation/english/a_cn4_143.pdf (accessed 25.03.2023).

⁴¹ Ibid.: p. 13, para 80. It was also cited in *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*. Award on 16 July 2016, para 222.

However, it is also necessary to mention the fourth factor. It is a question of whether the claim of historic title “can be justified on the basis of economic necessity, national security, vital interest or a similar ground”⁴².

Following this approach, it would be a reasonable expectation to see that the Arbitral Tribunal in the *Coastal State Rights Dispute* will evaluate such factors regarding the waters of the Azov Sea and the Kerch Strait. Nevertheless, the wording of the Award on Preliminary Objection does not precisely follow the determination elements mentioned above. The arbitral tribunal states that “the legal regime governing the Sea of Azov and the Kerch Strait depends, to a large extent, on how the Parties have treated them in the period following the independence of Ukraine”. The elements of the provided evaluation can be divided into the following three categories:

- 1) agreements between Ukraine and the Russian Federation related to the Azov Sea and the Kerch Strait;
- 2) actual practice in the Azov Sea and the Kerch Strait;
- 3) conduct of Parties to each other and/or to third States in the Azov Sea and the Kerch Strait concerning:
 - a) navigation;
 - b) exploitation of natural resources;
 - c) protection of the marine environment⁴³.

It is possible to call this approach as an “updated” and more precise list of elements to determine not only the existence of historical title, but also to establish the legal regime over the disputed water status. By implying such an approach, the exercise of authority as well as the attitude of foreign States are analysed in detail. However, there is nothing said about the continuity of the exercise of authority over the area by the State claiming the historic right. It is not clear from this how the continuity of the exercise of authority over the Azov Sea and the Kerch Strait will be evaluated and what time frame is considered to be enough to be able to claim a historical title.

It is important to note that the Arbitral Tribunal has jurisdiction to determine whether the waters in question have a historical title or not. And if the arbitral tribunal finds that the waters within the Azov Sea and the Kerch Strait possess a historical title, then the exception provided by Article 298 of UNCLOS will apply to the tribunal’s jurisdiction. However, the determination of the historical title is closely related to the determination

⁴² Juridical Regime of Historic Waters, including Historic Bays – Study prepared by the Secretariat. Document A/CN.4/143. *United Nations Yearbook of the International Law Commission*, Vol. 2, 1962. P. 1–26. URL: https://legal.un.org/ilc/documentation/english/a_cn4_143.pdf (accessed 25.03.2023): p. 13, para 81.

⁴³ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020, p. 85, para 291.

of the status of the Azov Sea. Thus, the Arbitral Tribunal left such analyses to the merits⁴⁴.

To avoid an attempt to forecast such a decision, as well as due to the lack of publicity of proceedings during the exchange of Memorials between parties in the *Coastal State Rights Dispute*, only the main points of influence will be analysed, starting with the case where a certain area of water is considered with a historic title.

In the *Land, Island and Maritime Frontier Dispute* the ICJ's Chamber acknowledged that the waters of the Gulf of Fonseca, excluding the three-mile maritime belt, have a historical status and are subject to shared sovereignty among the three coastal states: El Salvador, Honduras and Nicaragua⁴⁵.

Despite the certain similarity between the Azov Sea and the Gulf of Fonseca (both water areas used to be governed by one state and then found themselves bordered by more than one state) the decision is not relevant in finding the applicability of optional exception provided in para 1 Article 298 of UNCLOS. There are a few reasons for this. Firstly, the *Land, Island and Maritime Frontier Dispute* was decided before UNCLOS entered into force. Therefore, no UNCLOS provisions were used. Secondly, the jurisdiction for the Chamber of ICJ was granted by the Special Agreement between El Salvador and Honduras to Submit to the Decision of the International Court of Justice the Land, Island and Maritime Boundary Dispute Existing Between the Two States⁴⁶. Therefore, the jurisdiction of the ICJ was decided and agreed between the parties. Thirdly, the 1917 Judgement of the Central American Court of Justice where it was faced with the question: "What [...] was the legal status of the Gulf waters after the succession to Spain of the three new coastal States, in 1821?"⁴⁷. The Central American Court of Justice found that the Gulf of Fonseca is a historic bay with the characteristics of a closed sea⁴⁸. Thus, the Chamber evaluated the decision and concluded that there are no disagreements about the status of the Gulf of Fonseca between

⁴⁴ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020, p. 112, paras. 388–389.

⁴⁵ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening). Judgement on 11 September 1992, p. 616–617, para 432.

⁴⁶ Special Agreement between El Salvador and Honduras to Submit to the Decision of the International Court of Justice the Land, Island and Maritime Boundary Dispute Existing Between the Two States, Signed in the City of Esquipulas, Republic of Guatemala, on 24 May 1986. URL: <https://www.icj-cij.org/sites/default/files/case-related/75/6541.pdf> (accessed 12.06.2023).

⁴⁷ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening). Judgement on 11 September 1992, para 386–387, 389–390.

⁴⁸ *Ibid.*, para 390.

El Salvador, Honduras and Nicaragua. All three countries bordering the Gulf maintain their position⁴⁹. Thus, the *Coastal State Rights Dispute* does not have any previous binding decision over the status of the Azov Sea or/and the Kerch Strait and by this, their status has yet to be decided.

The determination of the legal regime of the Azov Sea and the Kerch Strait from the dissolution of the USSR will help to see the factual regime of governance of these waters. The substantial factors that are available at the moment have been very controversial. For example, Ukraine provided the list of the geographical coordinates of the points defining the position of the baselines for measuring these waters to the UN in 1992⁵⁰. In 2003 however, Ukraine and the Russian Federation signed the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait⁵¹. Ukraine states that by participating in this Agreement Ukraine has thus never agreed on “internal waters status without a border; and that delimitation was a condition for the treatment of the Sea of Azov and the Kerch Strait as internal waters”⁵². The Russian Federation claims the opposite. That this Agreement brought the determination of the waters of the Sea of Azov as internal waters⁵³.

According to the Russian Federation, the waters of the Azov Sea and the Kerch Strait were “historically internal waters of the Russian Empire, and later the USSR, and, since 1991, the common internal waters of Ukraine

⁴⁹ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening). Judgement on 11 September 1992, para. 394.

⁵⁰ List of the geographical coordinates of the points defining the position of the baselines for measuring the width of the territorial waters, economic zone and continental shelf of the Sea of Azov, notified by note verbale dated 11 November 1992. *UN Law of the Sea Bulletin* 36, 1998, 51–52. URL: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_1992_CoordinatesAzoVSea.pdf (accessed 12.06.2023).

⁵¹ Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24 грудня 2003 р. База даних «Законодавство України». URL: https://zakon.rada.gov.ua/laws/show/643_205#Text (accessed 12.06.2023). Also, see, Про припинення дії Договору між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки: Закон України від 24 лютого 2023 р. № 2948-IX. *Верховна Рада України*. URL: <https://zakon.rada.gov.ua/laws/show/2948-20#Text> (accessed 12.06.2023).

⁵² Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020, para 238–242.

⁵³ *Ibid*, para 227–230.

and the Russian Federation”⁵⁴. Both parties agree that the Azov Sea and the Kerch Strait were internal waters of the USSR⁵⁵.

However, the Russian Federation also uses the concept of historical title to exclude the application of UNCLOS to the waters of the Azov Sea and the Kerch Strait⁵⁶. According to the view of the Russian Federation “the claim of historically internal waters should be also interpreted as claims that the rights exercised in the Sea of Azov and the Kerch Strait are based on historic title”.

From this, it is possible to assume that three points of historical title must be taken into account:

1) whether the historical title existed or not before the dissolution of the USSR;

2) if the historical title did exist during the USSR, then whether it is continued to be or not after the dissolution;

3) if the historical title did not exist before the dissolution of the USSR, then whether it started to exist after the dissolution.

This is where the continuity of the exercise of authority over the area can be checked. Another issue that could possibly arise is that due to the full-scale military invasion of Ukraine by the Russian Federation, Ukraine terminated the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait on 24.02.2023 with reference to Article 62 of the Vienna Convention on the Law of Treaties. By this, the reason for termination of such an Agreement was the fundamental change of circumstances⁵⁷.

⁵⁴ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020, para 199.

⁵⁵ Ibid, para 290.

⁵⁶ Ibid, para 292.

⁵⁷ Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24 грудня 2003 р. База даних «Законодавство України». URL: https://zakon.rada.gov.ua/laws/show/643_205#Text (accessed 12.06.2023); Про припинення дії Договору між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки: Закон України від 24 лютого 2023 р. № 2948-IX / Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/2948-20#Text> (accessed 12.06.2023); Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980). United Nations, Treaty Series, Vol. 1155. P. 331. It should be noted that there was also reference Article 24 of Law of Ukraine On International Agreements of Ukraine. The relevant Article provides the procedure how the termination has to be done and do not give reasons for such denunciation. Про міжнародні договори України : Закон України від 29 червня 2004 р. № 1906-IV / Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/1906-15#n217> (accessed 12.06.2023).

It is not clear whether this will have any effect or not on determining the historical title.

The Arbitral Tribunal in its Award mentioned its future analyses only concerning “whether historic title to the waters in question existed, whether such title continued after 1991, and, if so, what the contents of the regime applicable to such waters has been”⁵⁸. Thus, it is possible to interpret this in a way that if the historical title did not exist before the dissolution of the USSR, then it did not start to exist after the dissolution. However, if it did exist, then whether it could be terminated due to the fundamental change of circumstances between the coastal states.

While writing about the future determination of the legal status of the Azov Sea and the Kerch Strait, the Arbitral Tribunal does not refer directly to the requirement established in the “Juridical Regime of Historic Waters, including Historic Bays”. By adopting an updated approach, the Arbitral Tribunal is answering the needs of the ongoing case, involving the requirement already established, but giving them a much more detailed overview and evaluation.

From the perspective that holds that if the Arbitral Tribunal finds historical title within these waters then all submissions related to the waters in question are out of the jurisdiction of the Arbitral Tribunal, it would mean that an optional exception under Article 298 UNCLOS would inevitably be triggered. And by this, there would be no possibility to obtain a legally binding decision by Annex VII Arbitral Tribunal in compulsory dispute settlement under UNCLOS.

From the other perspective, if the Arbitral Tribunal finds historical rights within these waters but not a historical title, then by this it would overpass the exception to jurisdiction in para 1 Article 298 of UNCLOS. It will be further able to decide over Ukrainian submissions related to the activities within the Azov Sea and the Kerch Strait.

CONCLUSIONS

Interpretation and application of exceptions under para 1 Article 298 UNCLOS regarding disputes concerning maritime delimitation and historical titles play a crucial role in the *Coastal State Rights Dispute*. This is because both parties to the dispute made declarations to exclude such matter from the jurisdiction of a court or a tribunal under UNCLOS.

A declaration under Article 298 excluding disputes concerning the interpretation or application of Articles 15, 74, and 83 relating to sea boundary delimitations may not include obligations of restraint and

⁵⁸ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation). Award on Preliminary Objections on 21 February 2020, para 292. Also, in para 388.

cooperation under paras 3 of Articles 74 and 83 of UNCLOS. Due to the ongoing controversy on how Article 298 of UNCLOS has to be interpreted or applied, it is possible to assume that a dispute over an issue that may be considered in the course of a maritime boundary delimitation may not constitute a dispute over maritime boundary delimitation itself. It is recommended to Ukraine to claim in its revised submissions the violation of the Russian Federation of para 3 of Article 74 UNCLOS in respect of obligations “to enter into provisional arrangements of a practical nature”, and an “obligation not to jeopardise or hamper the reaching of a definitive boundary agreement”.

The Arbitral Tribunal determination of the status of the Azov Sea and the Kerch Strait plays a significant role in its jurisdiction over the activities within such waters. The main criteria to determine the legal regime of the Azov Sea and the Kerch Strait consists of agreements between its coastal states, their activities and conduct to each other, and/or to third States in such waters. The Arbitral Tribunal will also establish whether the historical title existed, and if so, then whether it continues to exist. If the historical title did not exist before the dissolution of the USSR, then it did not start to exist after the dissolution. However, if it did exist, it is not clear whether it could be terminated due to the fundamental change of circumstances between the coastal states. Thus, this aspect is also recommended to be taken into consideration for the Ukrainian revised submission. Because, if the Arbitral Tribunal finds historical title within these waters an optional exception under Article 298 UNCLOS it would inevitably be triggered, and all submissions related to the Azov Sea and the Kerch Strait are out of the jurisdiction of the Arbitral Tribunal.

SUMMARY

This article examines exceptions provided for in para 1 of Article 298 of UNCLOS to jurisdiction of the Arbitral Tribunal in Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait with respect to the Sea of Azov and the Kerch Strait. In particular, the scope of interpretation and application of a dispute concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitation, and those involving historic title. The results of the study reveal certain aspects provided by para 1 Article 298 of UNCLOS that may and may not affect the jurisdiction of Arbitral Tribunal in resolving disputes related to the Sea of Azov and the Kerch Strait between Ukraine and the Russian Federation. This article proposes approaches and recommendations of interpretation and application of the optional exceptions in question. Thus, due to uncertainty on how Article 298 of UNCLOS has to be interpreted or applied, it provides an answer that a dispute over an issue that may

be considered in the course of a maritime boundary delimitation may not constitute a dispute over maritime boundary delimitation itself. The obligations “to enter into provisional arrangements of a practical nature” and an “obligation not to jeopardise or hamper the reaching of a definitive boundary agreement” under paras 2 of Articles 74 and 83 of UNCLOS may not be considered as interpretation of an optional exception. The article analyses the legal aspects of the Sea of Azov and the Kerch Strait in the context of criteria for discovering whether or not historical title over these areas of water are in place. It also provides a possible scenario where the historical title did not exist before the dissolution of the USSR, or if it did exist with a particular focus, whether it could be terminated due to the fundamental change of circumstances between the coastal states. This study can be useful for academic researchers, lawyers and international debaters interested in issues of public international law and the law of the sea.

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