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Navigational Entitlements in the Vistula/Kaliningrad Lagoon in the Light of Comparative Cases

Case study.

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Abbreviations

EEZ – Exclusive Economic Zone

LOSC – 1982 The Law of the Sea Convention

EC – European Commission

Nm – Nautical miles

PCA – the Permanent Court Arbitration in the Hague

TFC - 1997 Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation

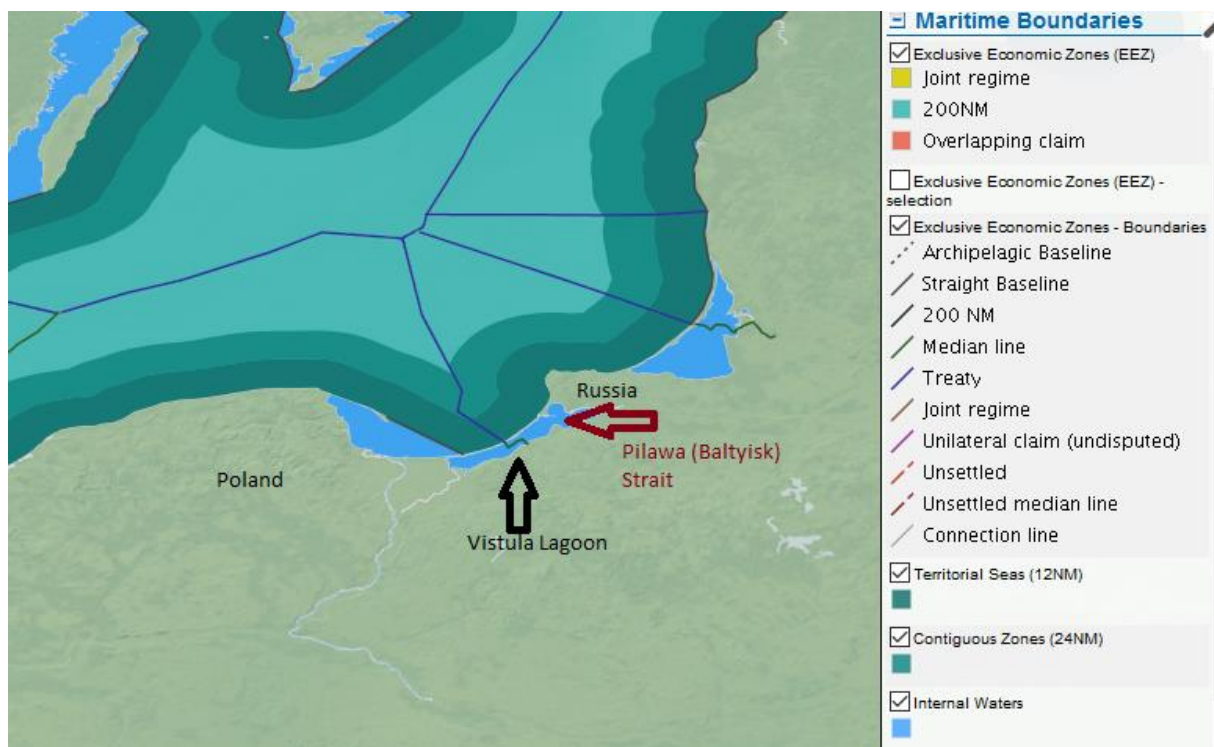
USSR – the Union of Soviet Socialist Republics

VCLT – 1969 Vienna Convention on the Law of Treaties

1 General information

1.1 Introduction

This thesis addresses the issue of the navigational entitlements in the Vistula/Kaliningrad Lagoon (thereafter the Lagoon). The Lagoon is divided among two states, namely the Republic of Poland and the Russian Federation. Its waters are categorised as internal. That means the entire Lagoon is under the sovereignty of mentioned states.



Map 1: Location of the Vistula Lagoon and the border between Poland and Russia. Source: www.marineregions.org.

The decision of choosing this subject were made in the light of recent events surrounding the Lagoon. Due to difficult accessibility, Polish Government initiated a long-expected programme of constructing a canal on the Vistula Spit. This ambitious project is a political decision to provide for an alternative navigational channel to surpass the Baltyisk Strait, which is currently the only way of access to the Lagoon – the Baltyisk Strait, and the Russian and Polish ports located there. The Baltyisk Strait starts at Russian border and leads to Russia's internal waters. Poland for a long time could not enjoy free passage through the strait and further free navigation trough the Russian internal waters. This constitutes a serious impediment for the local economy.

The programme brought lots of controversies since its beginning and has been delayed for around two decades. In autumn 2018 Polish government undertook first substantial measures to launch the construction works. That action met decisive objection of the Government of Russia, which argued in its disfavour. Russia relied mainly on environmental safety and supported its claim on the Espoo Convention, which is not a party to. Russia's objections effected in the reaction of the European Commission. The EC initiated a procedure to check the consistency of the construction of canal with the European law. In its decision issued in March 2019, the EC ordered suspension of the project until the final determination of the case. A month later, the Russian governor of the Kaliningrad indicated his concerns based on environmental protection.

The issue extends beyond the construction of the canal. It is rooted in the fundamental question of access of Polish and third-states commercial and navy vessels to the Polish ports and internal waters located in the Vistula Lagoon. There is a need to examine if Poland enjoys such an entitlement along with third states and what are the types of vessels which may pass and navigate through the strait and the Lagoon.

The Vistula Lagoon is in Central Europe. Its area is divided among Poland in its North-Eastern part and Kaliningrad Oblast, Russia in its western part. The Vistula Spit separates the Lagoon from the Baltic Sea. In the Lagoon are located two main urban areas. The biggest one is Russian city of Kaliningrad with population over 400 000¹. It is Russian second biggest harbour in the vicinity of the Baltic Sea² and most westwards located. The biggest urban area on the Polish side of the Lagoon is city of Elbląg, inhabited by over 100 000 men. Its port is of smaller

¹ Source: <https://en.wikipedia.org/wiki/Kaliningrad> accessed 06/07/2019.

² The first is St. Petersburg.

importance than Kaliningrad, as Poland has its biggest port in nearby city of Gdansk³ competing with neighbouring port of Gdynia. However, this port is of a key importance for regional development programmes and it has potential to increase its importance in the future.

The Russian coast of Kaliningrad generates the Exclusive Economic Zone, Contiguous Zone and Territorial Sea. Sole access to the waters of the Lagoon leads through the Baltiysk strait, called the Pilawa strait in Poland. Since the strait is a part of Russian coastline, vessels must sail down the Russian maritime zones. The strait connects Russian territorial waters with its Internal Waters. It is here where the issue brings sparks to the relation between the states. Russia claims full sovereignty over its Internal Waters of the Vistula Lagoon. However, it is necessary for vessels to cross through this area if their port of destination is located on Polish side of the Lagoon, especially those sailing to the port of Elblag. Russia successfully impede passage of such vessels by exercising its control over the strait and Internal Waters. Thus, Poland had decided to build a canal down the Vistula Spit to allow vessels unimpeded access to Polish ports in the Lagoon.

1.2 Methodology

The ordinary workshop for writing the thesis had been employed. Where applicable, it includes analyse of the highest-level sources of international law, which are the VLCT and the LOSC. It employs examination of relevant customary international law, especially in the explanation of potential entitlements in the Vistula Lagoon, the Kerch Strait and the Sea of Azov. It involves a study of relevant bilateral agreements, i.e. the 2009 Agreement on Sailing in the Vistula Lagoon between Poland and Russia or the 2003 Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait between Russia and Ukraine. In matter of state practice, in addition to analyse of relevant legal documents, it consists of interviews and examination of non-legal but official documents, which are necessary to properly understand the state practise in the particular case.

1.3 Research questions

The thesis will answer the following questions:

³ Source: <http://ceec-china-maritime.org/blog/the-port-of-gdansk-the-oldest-and-largest-polish-seaport/> accessed 06/07/2019.

What is the scope of the entitlement to navigate in the Vistula Lagoon and the Baltyisk Strait for the commercial and State-owned vessels flagged in Poland, as well as in other flag states?

Does Russia have a duty to facilitate navigation in the Vistula Lagoon and Baltyisk Strait, and what is the scope of this duty?

2 Introduction to the matter and the international regime of straits

2.1 Historical Background

Although the current borders of the Vistula Lagoon are well established since 1945, this was not always a case. The region was inhabited by various Slavic, Balt and Viking Tribes until the early middle-ages. When Poland was established as a political entity in X century, it occupied Northern-West part of the Lagoon by exercising its control over small part of the Vistula Spit and bank of the Lagoon⁴. The area was entirely claimed by Teutonic Order in XIII century during the partition time in Poland. It was reclaimed only in XVI century by the Polish-Lithuanian Commonwealth and was under Polish control or feud⁵. Due to internal problems of the Commonwealth in XVIII century, part of the Lagoon was regained by Prussia, and soon later it fully belonged to Prussia as a result of Partition of Poland in the same century. Afterwards, the Lagoon was claimed by German Empire because of political changes in Prussia, and later by Germany that succeeded the German Empire. Poland regained part of the Vistula Lagoon only in 1945 by virtue of the Potsdam Conference where the post-war borders were agreed to by The Big Three⁶.

In 1961 the Peoples Republic of Poland and the USSR concluded the Agreement on the Legal Relationship on the Polish-USSR border and Co-operation and Mutual Help in the Foreign Affairs. The Agreement in art. 14 provided for the entitlement to navigate on the Vistula Lagoon and the right of passage via the Baltyisk Strait of the commercial vessels. Art. 7 of the Protocol to the Agreement allows for the full or partial suspension of the navigation in the Lagoon and

⁴ Jasienica P. *Polska Piastow*, wyd. PWN, Warszawa 2007, p. 48, 49 and 52. See also: <https://encyklopedia.pwn.pl/haslo/Dagome-iudex;3890260.html> accessed 07/07/2019. <http://wlpaczpolske.pl/index.php?etap=10&i=1242&nomenu=1> accessed 07/07/2019.

⁵ Jasienica P. *Polska Jagiellonow*, wyd. PIW, Warszawa 1988, p. 83.

⁶ Source: <https://history.state.gov/milestones/1937-1945/potsdam-conf> accessed 07/07/19. See also: maps of Poland <http://wlpaczpolske.pl/index.php?etap=10&i=1242&nomenu=1> accessed 07/07/19.

the passage through the strait exclusively in case of a sanitary reasons. The Government of another party should be informed about the suspension without delay.

In 1989 Poland took a position of unvarying its boundaries. This attitude was reaffirmed by Poland in 1992 in the Treaty of Friendly and Neighbourly Cooperation between Poland and Russia⁷. The Teheran's set of Polish borders with Russia is legally binding and certain for now on. Since 2004 In 2009 states concerned concluded the Agreement Between the Republic of Poland and the Russian Federation Regarding Shipping on the Vistula Lagoon. The Agreement is the main tool that provides for legal framework and mechanisms of shipping between both states. Subsequently they were implemented into national regimes⁸.

2.2 Strait regime applicable in the Pilawa/Baltyisk Strait and the Vistula Lagoon

The current regime of straits in international law is included in customary international law and the Law of the Sea Convention (LOSC). This system has its roots in the *Corfu Chanel* Case regarding navigational rights enjoyed by British navy vessels in the territorial sea of Albania within the strait. The International Court of Justice (ICJ) established basic features which fulfilment grants the right of passage through straits. On one hand, the Court advocates geographical criteria and strait traffic's volume. On the other hand, it puts in front requirement that vessels involved should pass the straits innocently⁹. These terms, however, are vague and subject to interpretation. That renders necessary to examine straits nearly on a case-by-case basis in order to determine their status.

The LOSC prescribes straits regime in Part III. Art. 34.1 state that the regime of passage shall not affect the legal status of waters forming straits used for international navigation. It cannot affect jurisdiction rights or sovereignty of coastal states as well. In addition, art. 35(a) requires vessels to respect coastal states entitlement to internal waters within a strait. These provisions are vital for the topic and will be discussed further.

⁷ KASTORY A, *Problem Swobodnej Zeglugi Przez Ciesniny Pilawska i Zalew Wislany w Polsko-Radzieckich i Polski-Rosyjskich Negocjacjach*, *Studia Politologica Ucraino-Polonia*, 2016, p. 135.

⁸ PALMOWSKI T, *Selected Problems on Polish-Russian Cross-border Cooperation Based on the Example of the Vistula Lagoon*, *Europa XXI*, Polska Akademia Nauk, Warszawa 2010, p. 59-61.

⁹ ROTHWELL D, ELFERINK A, SCOTT K, STEPHENS T, *The Oxford Handbook of the Law of the Sea*, Oxford 2015, p. 116 and 117.

Part III regulates five categories of straits. These are namely 1) in art. 37 straits used for international navigation between one part of the high seas or EEZ and another part of the high seas or EEZ, 2) in art. 35(c) straits that are regulated wholly or partly by long-standing international conventions, 3) enshrined in art. 36 straits where there exists a route through the high seas or EEZ and it is similarly convenient, 4) described in art. 38(1) straits which exist between an island and the mainland, and there is a route of similar convenience seaward from the island, and 5) in art. 45 so-called “dead-end” straits, that is straits used in international navigation between one part of the high seas or EEZ and the territorial sea of a foreign state¹⁰.

The second category embodied in art. 35(c) reflects straits regulated by long-standing international agreements where the regime of transit passage is not applicable. This provision includes many straits which use had been subject to international agreements during pre-LOSC time. These include, *inter alia*, Strait of Magellan, the Great Belts and Sund, the Aaland Strait¹¹. The question is whether straits governed by agreements and used for international navigation, which connect territorial sea with internal waters fall into this scope. The answer to that question seems to be negative since Part III is applicable with respect to rules of international law in accordance with art. 34.2. Following article treats sovereignty over the internal waters as being subject to Part III of the LOSC. It is then affirmative premise accepting the general provisions of the LOSC on this subject, with certain modifications provided by said Part. However, in terms of access to the strait, Bing Bing Jia said

“a strait used for international navigation may be one composed of internal waters, even without anything to do with the establishment of straight baselines. The Kerchensk Strait, linking the Sea of Azov and the Black Sea, is an example. It seems that this narrow strait has been part of the internal waters of formerly the USSR, and now Ukraine and Russia, in the same way that the Sea of Azov has been so. This evolvement has seldom attracted much interest from outside the two countries, but it seems to be an interesting case of an international strait composed of internal waters”¹².

¹⁰ ROTHWELL D, STEPHENS T, *The International Law of the Sea*, p. 329-330

¹¹ ROTHWELL D, ELFERINK A, (...), *The Oxford Handbook of the Law of the Sea*, p. 127 and 128.

¹² Jia B, “Article 35” in PROELSS A, [ed.], *United Nations Convention on the Law of the Sea: A Commentary* (Munich: Beck/Hart/Nomos, 2017), p. 277, nb. 72.

It gives an argument for accessibility to Baltyisk Strait for non-Russian-flagged vessels. It is a matter of customary international law. However, it is rather related to cases in which there are more than two states within a bay that does not consist of internal waters.

In addition, art. 35(a) expressly says that the scope of Part III does not affect any areas of internal waters within the straits, with the exception in cases where the straight baseline method described in art. 7 had been employed. Nevertheless, states are entitled to enter into other agreements pursuant to the Vienna Convention on the Law of Treaties (VCLT) and customary international law. This is the ground for entry into the Agreement on Sailing in Vistula Lagoon. Hence, in attempt to describe status of the Vistula Lagoon and passage through Pilawa (Baltyisk) Strait it is not enough to rely on the LOSC or customary international law. According to the LOSC, internal waters are waters on the landline side of the baseline (art. 8). They enjoy status of extensive coastal state's sovereignty over its land territory. There is no right of passage through such internal waters, unless one out of two exceptions occur – distress of a vessel or special agreement. K. BANGERT puts three problems considering the legal regime of internal waters into three categories. These include the general absence of right of innocent passage, the status of foreign vessels in internal waters and ports and, special right of access for foreign merchant vessels to commercial ports¹³.

However, there exists another scenario which could convert legal situation in the Lagoon. Possible application of art. 10 of the LOSC and drawing the bay closing line. That would convert the Lagoon into the bay and eventually, it would end-up with the shared bay regime, where different rules of navigation entitlement would be applicable. In order to do that, the bay must satisfy certain criteria. Its distance between the low-water marks of the natural entrance points cannot exceed 24 nm. However, in accordance with art. 10.1 it should also belong to a single state. Therefore, the Vistula Lagoon is excluded from the scope of art. 10 of the LOSC.

Despite its lack of regulation in this matter, the Vistula Lagoon is not the only example of such a situation. Many states involved in similar conflicts proposed change of art. 10. These proposals were, however, turned down. It may be argued that barring of other states from access

¹³ BANGERT K, *Internal Waters*, Max Planck Encyclopaedia of Public International Law, 2018, Nb. 15-17.

such waters may constitute a possible infringement of, *inter alia*, navigation and freedom of communication with the high seas¹⁴.

2.3 The Agreement on Sailing in Vistula Lagoon

The Agreement of 1st September 2009¹⁵ governs access of vessels into Vistula Lagoon via the Baltiysk Strait and shipping through waters of the Lagoon. It is a bilingual agreement in Polish and Russian languages. Both versions are of the same force. Art. 1 defines ships of the parties. This definition excludes warships of states and ships used only on government non-commercial service. That measure effectively puts both categories of vessels out of the scope of the Agreement. It brings another problem to the table. It renders impossible for Polish vessels excluded from the scope of the definition to access Vistula Lagoon on the Polish side since the only possible route of shipping is inaccessible to them by force of the Agreement. Art. 2(1) refers to the internal legislation of parties to the Agreement. It says that vessels excluded from the scope of art. 1 which intend to cross the border on the Lagoon or navigate through it further shall be subject to internal legislation of – respectively – Poland or Russia. On the contrary, vessels which fit into the scope of definition are entitled to cross the border or ship further through the Lagoon in accordance with the legislation of the other state-party to the Agreement, pursuant to art. 2(1). These legislation and principles and their eventual changes are subject to obligation of information. Based on art. 2(3), information shall be transferred via diplomatic measures.

Furthermore, vessels which intend to cross the Russian border need to meet the notification requirement while crossing the border on the Lagoon (art. 3.1). Vessels are executing this duty by notifying the appropriate border or port authority in accordance with laws and principles of a state demanding information. This requires certain procedural knowledge and practice within the state that requires information. It creates minor obstacle that should be relatively simple to obey. Additionally, art. 4 allows vessels of the parties to access only ports which the other party keeps open for international arrivals. This limitation extends only to the Lagoon. It aims at exclusion of small ports from the ambit of the Agreement and close the door on entry to them. It shall not be considered as an exception from the general principle that permits access to such

¹⁴ SYMMONS C, “Article 10,” in PROELSS A, [ed.], *United Nations Convention on the Law of the Sea: A Commentary* (Munich: Beck/Hart/Nomos, 2017), Nb. 27.

¹⁵ Umowa między Rządem Rzeczypospolitej Polski i Rządem Federacji Rosyjskiej o żegludze po Zalewie Wiślanym (Kaliningradskij zaliw), Monitor Polski Nr 78 poz. 975.

ports by ship in distress. Since 1st May 2004 commercial vessels of the EEA States also enjoy this right, because Poland became a member of the EU.

Poland and Russia agreed to cooperate in certain areas. Those relevant for shipping include mentioned in art. 5 obligation to favour and spur shipping in the Lagoon, prevent unnecessary detentions of vessels, and simplify the procedures and formalities related to border-crossing and accessing ports. Art. 6 requires states to safeguard and facilitate safe shipping of other party's vessels on its part of the Lagoon. The party is obliged to establish shipping lanes, provide for necessary technical equipment, maps and nautical publications. Art. 8 entails obligation to protect the environment with regard to shipping. It says that parties are expected to prevent any damage related to shipping of its vessels based on state own laws, principles and international obligations.

Dispute resolution procedure is encompassed in art. 11.1 and 2 of the Agreement. Art. 11.1 stipulates that the disputes arose from matters of application or interpretation of the Agreement shall be settled by the consultation. However, it is not specified how the consultation should take place. Following section advises the next step where the demand of section 1 has not been fulfilled. In such a case, the parties shall settle the dispute by diplomatic measures.

The Agreement has a temporary character, as follows from art. 12.2. It says that the Agreement is valid for a fixed-term of 5 years. It recognises the principle of a tacit agreement by allowing extension of the Agreement for another 5 years term where there is no objection of a party. However, the Agreement imposes limitation of such objections by setting up a deadline for termination and a form of termination. The first limitation allows the Agreement to be terminated by the party not later than at 6 months before the Agreement becomes automatically extended. Examination of this section brings to a conclusion that the Agreement expires after reaching its 5 years term, but it is not stated explicitly. The Agreement was not terminated yet and therefore it should be extended until at least 2024. The VCLT in art. 65 and 67 stands for validity of such conclusion. The second limitation expects the party to submit its termination in a written form. It is rather a form *ad solemnitatem*, since it is called for a written form in the Agreement explicitly. All these prerequisites must be fulfilled cumulatively to have an effect of termination of the Agreement.

Polish and EEA States flagged-military vessels are excluded from the right to navigate through the Vistula Lagoon and the Baltyisk Strait, which is granted to non-military vessels in art. 2.2.

of the Agreement on Sailing on the Vistula Lagoon. Pursuant to this provision, entitlement to navigate of those vessels is subject to the national laws of the Russian Federation and the Republic of Poland in their waters respectively. In practice it means that any access of warships to the Polish ports located in the Lagoon is to be determined by the Russian authorities. It significantly impedes the exercise of Polish sovereignty over its internal waters.

2.4 Summary

At the moment it is difficult to argue that Poland enjoys any rights through the Pilawa/Baltyisk Strait and Russian part of the Lagoon in form that would extend beyond the limited right granted by the Agreement. Poland lost its rights to do so by signing in to the Agreement. Despite diplomatic mistakes, the Agreement remains a valid and binding document of international law that has to be respected by the parties and non-parties to it. This means that the vessels are subject to Russian domestic regulations while shipping through the Strait and Russian part of the Lagoon. However, also Russian vessels that intend to cross the border on the Lagoon are subject to the domestic legal regime of Poland. Disbalance of relevance is undisputable, since Russia is the party that holds in its control the Strait and therefore the only possible route to access the Lagoon now¹⁶.

3 Application of the law in homogenous cases

It is not possible to answer research questions relying solely on the International Law, including the LOSC or the Customary International Law. High complication of the matter requires to analyse homogenous cases in the light of the Vistula Lagoon case. Cases analyse in this thesis are not the only cases homogenous to the case described in the Chapter II. However, they share certain features that are important in analyse of the entitlement. The Curonian Lagoon lies on the other bank of Kaliningrad. It may be called the twin Lagoon of the Vistula Lagoon. The Great Lakes are the unique body of water that because of some reason was categorised as the High Seas, and this feature is worth of examination. Also, the importance of the Great Lakes is embodied in the cross-border co-operation between Canada and the U.S. The Kerch Strait and the Sea of Azov resemble the conflict between Russia and Ukraine, which strongly relates to navigation through the internal waters. Thus, it is possible to find many similarities in relation to the Vistula Lagoon case.

¹⁶ Due to Polish project of building a canal on the Vistula Spit.

3.1 The Curonian Lagoon

Like Poland, Lithuania belonged to the former Soviet bloc. Its coastline mirrors Polish coastline of the Vistula Lagoon. There is the Curonian Lagoon, to which access goes through a strait in the immediate vicinity of the City of Klaipeda. Lithuania borders Russia on the southside of the Lagoon. The major geographical and political difference is that there are no main Russian towns across the Curonian Lagoon.

Location of the Curonian Lagoon and its geo-political situation resembles one of the Vistula Lagoon. There is only one accessible way to the Lagoon, via the Klaipeda Strait, located near the City of Klaipeda. The Port of Klaipeda is on the eastern bank of the strait. It is not possible to access the Lagoon without entering the port's waters¹⁷. Waters in the Lagoon have the status of internal waters, and they are shared between Lithuania and Russia. There is a state border on the Lagoon and border check-point on the Curonian Spit. The southern part of the Lagoon belongs to Russia. The territory is also called the Kaliningrad Oblast. The Russian banks of the Curonian Lagoon are parts of the northern side of the Kaliningrad Oblast, while the Russian banks of the Vistula Lagoon are parts of the southern side of the Kaliningrad Oblast. Thus, Kaliningrad Oblast is – figuratively – squeezed between the Vistula Lagoon and the Curonian Lagoon. However, Russia has only ports of smaller importance located in the Curonian Lagoon. Thus, it is a reversed-twin case with respect to the Vistula Lagoon, where Lithuania holds the major port in the area instead of Russia. In addition, there is only one entrance to the Lagoon, and it is located in the Lithuanian part of the Lagoon. In this case the location of Lithuania closely resembles situation of Russia in the Vistula Lagoon, while the location of Russia in the Curonian Lagoon mirrors the location of Poland in the Vistula Lagoon. Hence, the analysis of this case might help to determine the possible solution of the issue in the Vistula Lagoon.

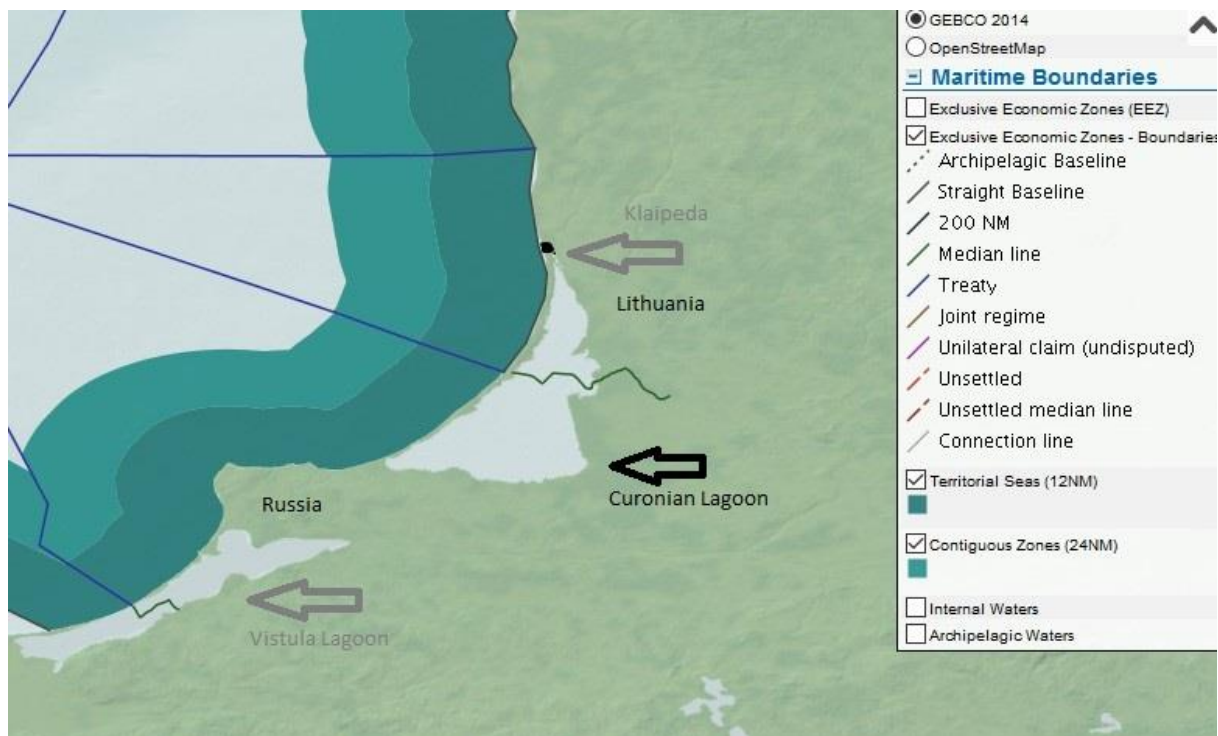
Lithuanian legislation concerning access to its territorial sea and internal waters is embodied in Law on the State Border of the Republic of Lithuania of 1992¹⁸. Lithuanian's approach relies on reciprocity. According to art. 10 of said legal act, Lithuania allows access of other states' vessels to its territorial waters and ports as a rule. However, it allows foreign warships right of peaceful navigation in its territorial sea without approval and notification requirement only if

¹⁷ See Annex I.

¹⁸ English version available at <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=tu0odnpaz&documentId=TAIS.21157&category=TAD> accessed 07/08/2019.

the flag state of such vessel grants peaceful navigation rights in its waters to Lithuanian warships respectively¹⁹.

Art. 4 employs a straight-baseline method which modification is open for the future international agreements. The exact coordinates are to be determined by the Lithuanian government. As shown in the Map 2 below, the actual baseline follows the Lithuanian coastline in a strict manner. Lithuania's legislation provides for 12 nm breadth of the Territorial Sea, exercising its maximum allowable breadth prescribed by the UNCLOS and accepted by the customary international law. Definition of internal waters is embodied in art. 5 and includes all the waters landward of the baseline. This definition expressly includes port waters that may be seaward of the baseline limited by the line connecting the furthest port structures at sea. These waters shall be considered as internal waters²⁰.



Map 2: Location of the Curonian Lagoon and the border between Lithuania and Russia.

Source: www.marineregions.org.

Lithuania is a member of the LOSC, hence the regime of innocent passage as prescribed in art. 19 of said Convention is applicable in the Territorial Sea of Lithuania. It is further reflected in

¹⁹ BUGAJSKI D, *Przejście okrętów przez morze terytorialne państwa obcego w prawie i praktyce państw bałtyckich oraz NATO*, Zeszyty Naukowe Akademii Marynarki Wojennej, Rok XLVII nr. 1, 2006 r., p. 27.

²⁰ Art. 5.2.

art. 10 of the Lithuanian law on the State Border. The term that is used in Lithuanian law is “peaceful navigation”. Art. 10 “prescribes peaceful navigation” as navigation without the intention, or with intention to enter or leave Lithuanian internal waters and ports. Like the LOSC, Lithuanian legislation allows vessels to stop or anchor during peaceful navigation if necessary for ordinary navigation, or “*for rendering assistance to persons, ships or aircrafts in distress*²¹”. The question arises if lack of the term “*force majeure*” should be classified as intentional and if on this ground Lithuania disallows vessels in situation that is classified as *force majeure* in its territorial sea. This matter should be analysed in the light of the LOSC as a superior document. Therefore, vessels in a situation that might be described as in the situation of *force majeure* shall be granted right to stop or anchor within the Lithuanian Territorial Sea. However, it has serious threat to bring up interpretational misunderstandings in application of the law by Lithuanian coastal authorities.

Established in art. 22 of the LOSC sea lines separation schemes are embodied in art. 10 of the Lithuanian Act. It simply states that the Government of Lithuania reserves the right to impose legally bounding sea lines. Those sea lines are obligatory for vessels carrying dangerous cargo, tankers and ships with nuclear engines. The material scope of this provision follows strictly the wording of art. 22.2 of the LOSC. Publicity requirement derived from art. 22.4 of the LOSC is to be fulfilled by authorised Lithuanian institutions.

Following art. 20 of the LOSC, submarines and “*other submarine transport*” as prescribed in art. 10 of the Lithuanian Act, must navigate on the surface with their flag shown. Lithuania imposes this obligation within its territorial sea and additionally while crossing the Lithuanian boundary. It means that submarines and other submarine transport are required to proceed with navigation in the prescribed manner also in Lithuania’s Internal Waters.

Access to Internal Waters and Ports of Lithuania is governed by art. 11 of the Lithuanian Act. In respect of ports, the law provides for the list of ports and roadsteads that foreign vessels are entitled to enter. Circumstances are shifting as it comes to internal waters. Entrance to them is to be prescribed by Lithuanian institutions in pursuance to art. 11.1. An exception from the rule of accessing ports is reflected in art. 11.5. It grants the right to enact rules of access to ports located in waters of frontier rivers, lakes and other bodies of water to Lithuanian institutions. Ports and internal waters are part of the Republic of Lithuania; thus, they are under Lithuanian

²¹ Art. 10.

sovereignty. On top of that, Lithuania banned vessels carrying nuclear weapons and weapons of mass destruction from crossing its boundary. The LOSC does not regulate matters related to access to such waters, leaving it to Lithuanian authorities.

The analysis of art. 10 of the Lithuanian Act brings to a conclusion that the meaning of “peaceful navigation” reflects major content of the term “innocent” used in art. 19 of the LOSC. Peculiar is the size of art. 10 that includes basic information of the rules located in several articles of the LOSC. However, since it is possible to invoke the LOSC in cases where application of the Lithuanian Act may be questionable in terms of its compatibility with the LOSC, such differences are of minor effect. The same conclusion has been reached by A. ELFERINK, who wrote that the diversity of terminology does not seem to have an outcome that sets up a substantially separate regime²².

To properly understand the Lithuanian legislation in relation to port and internal water access, it is necessary to examine the rules of access to its main port of Klaipeda. Klaipeda is located at the entrance to the Curonian Lagoon, on the eastern bank of Klaipeda Strait²³. This strait is the only navigable watercourse that allows access to the Curonian Lagoon. Its depth varies from 15 meters at the entrance to 15 m of the inner channel²⁴. However, there do not exist comparable ports down the Lagoon in terms of capacity. Hence, the main port of call is Klaipeda Port.

Port of Klaipeda is located 55⁰43’N and 021⁰07’E. It creates around 58 000 direct and indirect employment positions. It generated over 700 million Euros in 2017 with around 41 million tons of cargo handled. It is scheduled for development in an allegedly environmental-friendly manner, in order to increase its capacity and income²⁵. The Port’s territory area extends 557 ha and its water area equals 884,9 ha. Its storage capacity for bulk cargo is 933 700 t and capacity of liquid cargo tanks amounts to 749 000 m³. The Port’s total annual cargo capacity extends 65 million tons. It is an ice-free port for a whole year and has access to land and railway routes both to the East and West²⁶.

²² Law of the Republic Lithuania on the State Boundary of the Republic of Lithuania of 25 June 1992, [in:] „The International Journal of Marine and Coastal Law”, 1993, Vol. 8, No 2, p. 292.

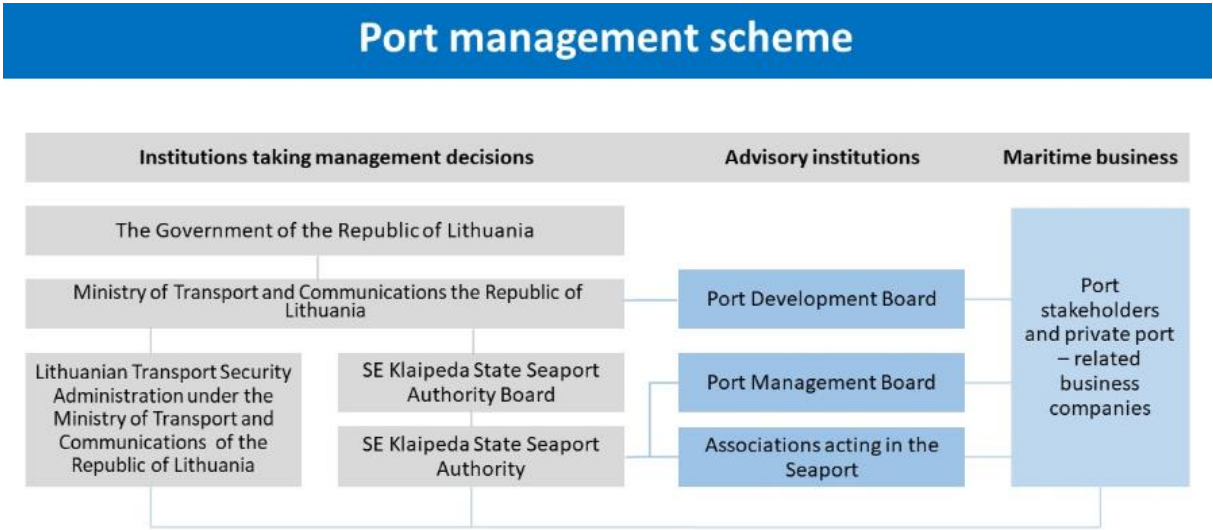
²³ See Appendix I.

²⁴ See the general information regarding Port of Klaipeda at <https://www.portofklaipeda.lt/the-port-of-klaipeda> accessed 10/08/2019.

²⁵ See: <https://www.youtube.com/watch?v=9haeHx9GD2g> 11/08/2019.

²⁶ See: <https://www.portofklaipeda.lt/capacities> 11/08/2019.

The Government of Lithuania is responsible for port management. It does it through the Ministry of Transport and Communication. The Ministry manages the Port in cooperation with several other entities with advisory competences or representing private interests. The advisory institution for the Ministry is Port Development Board. The Ministry manages the Port via Lithuanian Transport Security Administration together with Klaipeda State Seaport Authority. The latter is divided to Klaipeda State Seaport Authority Board and Klaipeda State Seaport Authority. It is a State Enterprise that has been founded in 1991. Its competences are prescribed in the Law on Klaipeda State Seaport of the Republic of Lithuania²⁷. There are 16 main functions of the Klaipeda State Seaport Authority and these are, *inter alia*, 1) coordination of the protection of the port territory affected by port users and to ensure safe navigation in the port, 2) to implement protective measures for protection of the port against pollution and to eliminate pollutions' effects, 3) organisation and execution plans of environmental protection, and 4) to construct, use and develop infrastructure of the port. The mission of the Klaipeda State Seaport Authority is proper functioning of the port and its development in such a way that will bring substantive benefits to the State. The Board performs supervisory functions over the Authority²⁸.



Scheme 1: Klaipeda Port management scheme²⁹.

²⁷ 19 May 1996 No I-1340. Available at <https://www.portofklaipeda.lt/regulations/level2/Uosto-istatymas/279> 13/08/2019.
²⁸ See: <https://www.portofklaipeda.lt/about-port-authority> 11/08/2019.
²⁹ Property of Klaipeda State Seaport Authority. Location: <https://www.portofklaipeda.lt/port-management> 11/08/2019.

Klaipeda State Seaport Authority does not stand alone. In its endeavours it is supported by Port Management Board and numerous associations acting in the Seaport. They have advisory competences. In addition, the Seaport Authority – like the Ministry – cooperates with maritime business, that is a category that includes port stakeholders and private companies. They have a common goal in rendering the port more investment-friendly and safe, including safe for navigation³⁰.

Lithuania has enacted a separated act concerning navigation by foreign-flagged warships on its waters. The act is known as the Resolution No 277 of the Government of the Republic of Lithuania on The Approval of Regulations on Entry and Stay of Warships and Government Ships of Foreign States in Klaipėda State Seaport, Regulations on Submission and Examination of Applications for Mooring of Lithuanian Navy Warships and Approval of the List of Berths Situated in the Non-Military Territory of the Port Reserved for Priority Mooring and Stay ff Lithuanian Navy Warships on Duty and for Warships of Foreign States³¹. The resolution provides for Regulations on Entry and Stay of the Foreign Warships and Government Ships in Klaipėda State Seaport.

The regulation provides for the general provisions and definitions in art.2, of which significant for the purposes of this work is the term “forced entry”. This term *de facto* addresses warship in distress under the LOSC. Art. 4 sets the condition to access the Port of Klaipeda. It is necessary to acquire a permit from the Ministry of the Foreign Affairs of the Republic of Lithuania beforehand. The permit allows the vessel to access the port. To receive the permit, the application to the Ministry of Foreign Affairs must be seek. The application shall be submitted by the competent institution of a third state via the diplomatic mission. The time limit is 30 working days before the expected date of ship’s arrival to the port. The exceptional treatment with regard to the visit of official guests sets up the requirement of submitting the application at least 7 working days prior to arrival to the port.

Another 2 exceptions are provided by art. 9 and 13. First relates to the permission to enter the port of foreign vessels for the purpose of military co-operation. It addresses for instance vessels arriving for the NATO exercises. Such an event must be hold on the Lithuanian territory. The permit issues the Commander of the Lithuanian Naval Forces of the Lithuanian Armed Forces.

³⁰ See: <https://www.portofklaipeda.lt/about-port-authority> 11/08/2019.

³¹ Official translation available at: <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=-2y4hh4hfa&documentId=TAIS.277275&category=TAD> 30/08/2019.

The permit should be issued within 10 working days since the day when submission was received. Not later than one day after the permit was issued, the relevant information should be transferred to the Klaipeda State Seaport Authority and the Coast Guard. The same deadline applies to the applicant. The Lithuanian Naval Forces is the body responsible for the delivery.

Art. 13 foresees another exemption from the general regime. It describes the obligations of the ship that entered the port based on the forced entry (ship in distress). If this is the case, the commander or master of the ship is obliged to deliver a report message to the Lithuanian Maritime Safety Administration, the Klaipeda State Seaport Authority and the Commander of the Lithuanian Naval Forces. The report message must include specific information regarding the reasons for the forced entry and the required assistance if this is needed. Beforehand, an authorisation procedure should take place. The authorisation is issued by the Lithuanian Maritime Safety Administration and is subject to approval of the Commander of the Lithuanian Naval Forces. The Commander should present his conclusions on the authorisation of the forced entry immediately. In case of positive decision, it should be transmitted to the Klaipeda State Seaport Authority. Then the Authority proceeds with mooring location and set a stay duration. Usually it does not exceed 5 working days. This period might be extended if the master of the vessel will apply for such an extension.

In art. 7 the legislator prescribed the guideline for the evaluation of the application for the entry into the port. According to the guideline, the Lithuanian institutions should conduct the evaluation of the purpose of the entry to the port, the interests of the Lithuanian foreign policy, the security of Lithuania and “other national interests”. There is no definition of the “other national interests”. It is a general clause, that encompasses many institutions which does not need to be legal in nature. It often refers to the French phrase “raison d’état” and prescribes the goals of the state. The provision serves as an escape cock for the state that uses it. It allows for a flexible application of the law. In this case, the state might invoke volume of reasons based on that provision if the arrival of a foreign-flagged military vessels is uncomfortable for some reasons. Art. 15 determines the conditions of stay and leave from the port of said vessels. Following the provision, the duration of the stay cannot exceed 5 working days. Exceptionally it may exceed, if the information of it is included in the permit. Before leaving, the commander of the ship is obliged to notify about the planned departure to the Lithuanian Maritime Safety Administration, the Port Authority and the Commander of the Lithuanian Naval Forces.

Last but not least, Lithuania participates in regional cooperation with neighbouring states, *inter alia* Lithuania – Russia Cross-Border Cooperation Programme 2014-2020. This endeavour is highly formalised and financed by the European Union. Parties recognised importance of shipping and cooperation in establishment of water border crossing points. They decided to act in a manner targeted on promotion of shipping³². Parties are intended to cooperate, among others, in the areas of economy, infrastructure and environment³³. This is a prove that reasonable diplomacy and will to cooperate can be effective. Both states are willing to begin sharing their parts of the Lagoon reciprocally. This may be a vital lesson for Polish Government to learn.

One of many benefits of this co-operation is the approved project of the first call for proposals, titled “*Adaptation of maritime heritage for promotion of culture, cultural networking with the purpose of tourism development*”³⁴. The main beneficiary is the Museum of the World Ocean, while institutions enlisted as the “other beneficiary” are Lithuanian Sea Museum, Public Institution Klaipeda Maritime City Symbol Meridianas Sailboat. Another project is titled the “*Common Heritage of Curonian Lagoon: from Extraordinary to Familiar*”³⁵, with the Immanuel Kant Baltic Federal University, Klaipeda University and Museum of the World Ocean as other beneficiaries to the project.

The report of effects of these programmes is not yet available. However, the second call for proposals had taken place. That means the participants are interested in participation in the programme and the enhancement of the co-operation between their states. The official language of the programme is English.

3.2 The Great Lakes

One of the arguments invoked by Polish researchers in disputes having as a subject matter access to the Vistula Lagoon is the legal status of the Great Lakes of North America. These lakes can enjoy the status of high seas in the exact meaning as prescribed in the LOSC. Certain Polish publicists rely on this status in constructing their arguments in favour of unimpeded access to the Vistula Lagoon. Therefore, the worthiness of these claim will be subject to the examination of this subsection.

³² Lithuania – Russia CBD Programme 2014-2020, p. 37.

³³ *Ibidem*, p. 21-23.

³⁴ Application No LT-RU-1-022.

³⁵ Application No LT-RU-1-038.

This case may be relevant for the analysis of the Vistula Lagoon because of the example of the cooperation between the United States and Canada. It is one of many examples that may be brought to the table. However, it has certain features that distinguished it from others. The precedents that used the terminology “high seas” in relation to the Great Lakes had been issued in the age, where the United States was still in the stage of formation. Even though all the states surrounding the Great Lakes were part of the Union since 1858, it must bear in mind that the understanding of “Union” and other political events in the States had influence on the final determination of the status of the Great Lakes. Additionally, their vastness had been also included in favour of calling them the “high seas”. However, the cooperation in use of them is of higher importance. This includes cooperation in sharing them first among states and mostly relevant cooperation between the United States and Canada. This cooperation is especially important in relation to shared watercourses. The St. Lawrence River connects the Great Lakes with the St. Lawrence Gulf and from there with the Atlantic Ocean.

The Great Lakes have a significant place in the regional ecosystem. According to the United States Environment Protection Agency³⁶ the Great Lakes are a source of 84% North America’s fresh water supply, which is convertible to 21% of total fresh water supply worldwide. The Great Lake basin holds approximately 25% of Canadian agriculture and 7% of the U.S. farming industry. The population of the basin amounts to 30 million people³⁷.

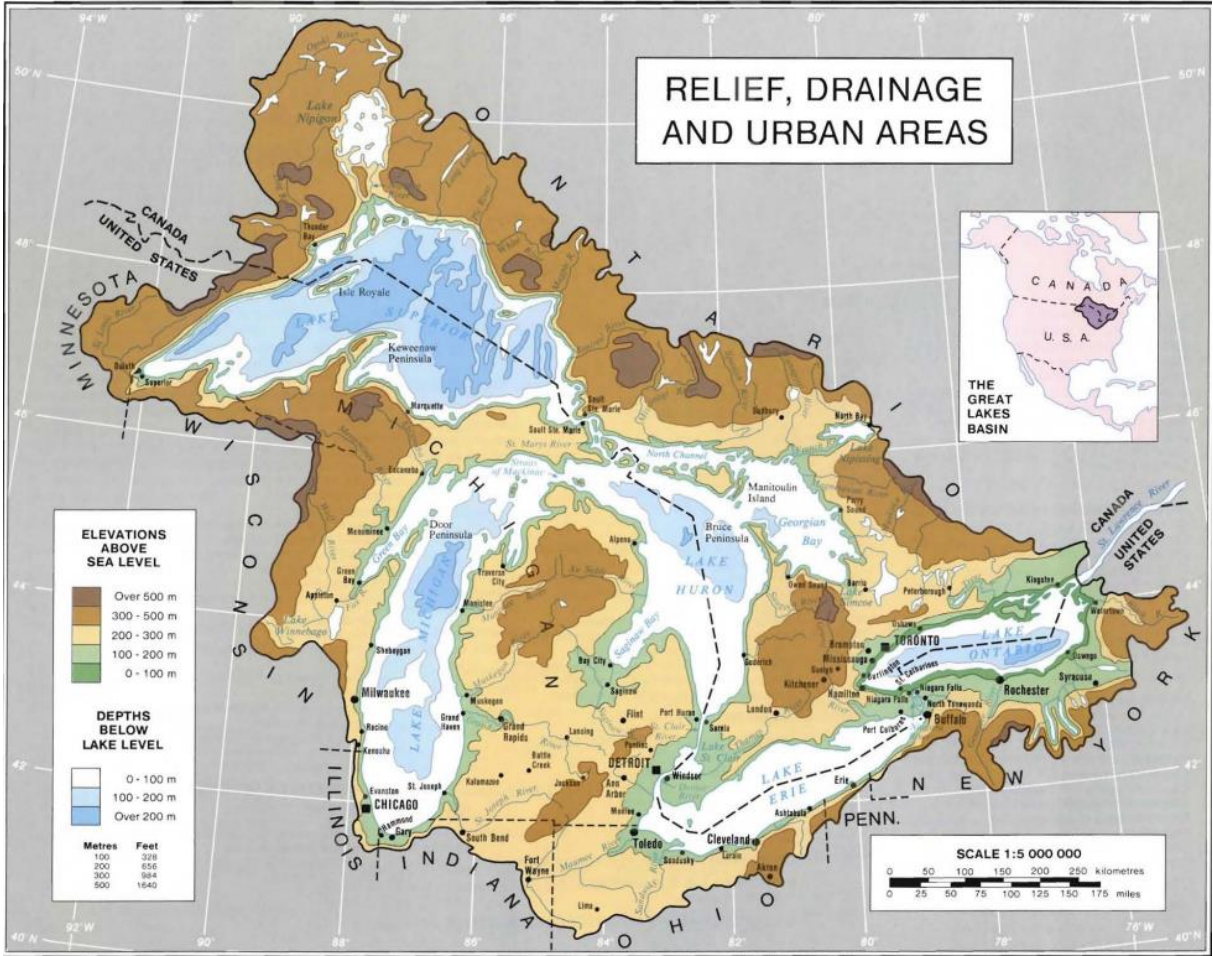
The Great Lakes is a term that refers to 5 interconnected lakes located in the Eastern part of Northern America. The United States of America and Canada share their sovereignty over the Lakes. These lakes should be *prima facie* considered internal waters as stated in art. 8 of the LOSC as they are “(...) waters on the landward side of the baseline of the territorial sea (...)”. However, it happened that the U.S. federal courts issued decisions in which they regarded the Great Lakes as “high seas” in the meaning adopted by the LOSC. Puzzling status had been granted for the purposes of criminal jurisdiction, federal admiralty and maritime jurisdiction³⁸. The legal status of the Great Lakes had been evolving since the beginning of the United States.

³⁶ It is a regulatory agency. EPA has competence to adopt regulations which explain technical, operational and legal matters being *sine qua non* to implement laws. This competence is authorised by the U.S. Congress. Legal basis for its operation is laid down in the U.S. Code of Federal Regulations, Title 40: Protection of Environment. See: <https://www.govinfo.gov/app/collection/cfr/2018/title40>.

³⁷ Source: The United States Environment Protection Agency. See: <https://www.epa.gov/greatlakes/facts-and-figures-about-great-lakes> 12/08/2019.

³⁸ Source: https://www.gc.noaa.gov/gcil_greatlakes.html 12/08/2019.

Its development had been shaped by changes within the law of the sea itself. Hence the current status of the Great Lakes as high seas must be examined in the light of those conversions.



Map 3: Physical map of the Great Lakes of North America³⁹.

Soon after the declaration of independence and adoption of the Constitution by the United States of America, the law of this state, that was mainly derived from the English common law, stated that admiralty has no jurisdiction unless the act was committed at the high seas⁴⁰. In *Eagle v. Fraser* the Court admitted general jurisdiction over bodies of water to the admiralty but based on the Judiciary Act of 1789. *Hine v. Trevor* – admiralty enjoys jurisdiction on the Great Lakes based on the Act enacted by Congress in 1845. Congress extended the U.S. criminal jurisdiction over the Great Lakes in 1890. In 1892 Mr. Justice Field found a precedent that departed from the majority of the judicial decisions at a time. He decided that the Great

³⁹ United States Environmental Protection Agency and the Government of Canada, *The Great Lakes. An Environmental Atlas and Resource Book*, 3rd edition, Toronto 1995.
⁴⁰ HUNT H, *How the Great Lakes Became "High Seas" and Their Status Viewed from the Standpoint of International Law*, *The American Journal of International Law*, Vol. 4, No. 2 (Apr., 1910), p. 291-294.

Lakes have “(...) *all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas (...)*, and that there are other high seas than those of the ocean⁴¹. He based his determination of the matter on comparison the English admiralty law, which was the main marine power at a time, able to impose and enforce its domestic laws on seas. This law stayed in contradiction to his conclusions, but he relied on geographical factors of the United States, which require a different application of the law. In England, the jurisdiction of admiralty has been bound and limited to the ebb and flow of the tide, that is “public navigable waters” of the era as a formal premise. Nonetheless Mr. Justice Field puts the Great Lakes’ regional characteristics upfront, arguing that this is sufficient factor to administer a distinct application of the law in this case⁴².

Furthermore, Mr. Field argued in addition to the regional features, that the Great Lakes should be classified as high seas because any type of commercial vessels at a time of adjudication was able to navigate through them. In defining them as high seas, he mainly relied on their immensity. The Justice argued that their character as high seas is essential and shall not be disregarded by lack of tides and freshness of their waters, as “[m]any seas are tideless, and the waters of some are saline only in a very slight degree”⁴³. Mr. Field could allow himself for such statements by cause of lack of one agreed definition of the high seas. He disagreed with a limited view on the definition of the high seas, that is limited in its special scope only to oceans. He decided to rely on roman scholars who distinguished between ports, heavens and open waters, attributing status of high seas to the latest⁴⁴. He further argued, that

“[t]o hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago, when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain⁴⁵”.

⁴¹ United States Supreme Court Illinois Cent. R. Co. v. State of Illinois (1892) No. 419. See the judgment here: <https://caselaw.findlaw.com/us-supreme-court/146/387.html> 13/08/2019.

⁴² HUNT H, *How the Great Lakes (...)* p. 296.

⁴³ United States v. Rodgers, 150 U. S. 249. 1893, p. 256.

⁴⁴ *Ibidem*, p. 254.

⁴⁵ *Ibidem*, p. 255.

In the same judgment Justices Mr. Gray and Mr. Brown had dissented opinion in this subject matter. They had argued that the Great Lakes could not be regarded as high seas since they are inland seas which are under the exclusive control of states and full power of state law. They understood high seas as areas free of state sovereignty and jurisdiction, which resembles the legal understanding of high seas nowadays. They deny any attempt of historical justification arguing that the Great Lakes were never free to navigate but subject to permission and laws of Great Britain and the United States afterwards⁴⁶. H. HUNT supports this view and argues broadly on its favour in his book. Ultimately this view prevailed. Today, high seas are defined in art. 86 of the LOSC as parts of the sea free of the sovereignty of states excluded from maritime zones of states.

Current navigational rights on the Great Lakes are determined by the Canadian and U.S. state law respectively within jurisdictions of said states. In addition to that both states agreed on joint-cooperation regarding *inter alia* navigation rights of vessels, fishing activities or environmental protection. This cooperation flourishes in the adoption of the Boundary Waters Treaty of 1909⁴⁷.

Art. I of the Treaty is the legal ground for free navigation of vessels of contracting parties on the Great Lakes. This freedom, similarly to the one in the LOSC, is not unlimited. It is subject to state national laws which are consistent with the freedom to navigate on the Lakes. Those national laws must be applied equally and in a non-discriminatory manner. The scope of entities encompassed by the Treaty includes Canadian and U.S. inhabitants, ships, vessels, and boats. This obligation of equal treatment is applicable only in relation to the entities of contracting parties. It does not extend to third-states entities⁴⁸.

To enhance cooperation between states, they concluded art. III. It has engendered the International Joint Commission. It is an institution competent to manage shared water resources. This is a suitable platform for common actions for both states with respect to environmental protection and freshwater resources (art. IV), hence its indirect influence on navigation and shipping on the Great Lakes. It may limit free navigation via technical regulations, for example by deciding on the projects that may influence water level or

⁴⁶ Ibidem, p. 283 and 284.

⁴⁷ Treaty Between the United States and Great Britain Relating to Boundary Waters and Questions Arising Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548

⁴⁸ See: https://www.gc.noaa.gov/gcil_greatlakes.html 14/08/2019.

watercourse for navigation. An instance of such activity is undertaken in 1952 Regulation Plan for Lake Ontario and St. Lawrence River. It was an extensive hydro-electric power project on the St. Lawrence River. It had been approved by the International Joint Commission. It controls the Lake Ontario's outflow. The flows set up limits flooding to shoreline communities, produces electricity and enhances commercial shipping. Nevertheless, the Commission's primary field is focused on water resources management and environmental protection rather than shipping⁴⁹.

According to art. VII the Commission consists of 6 commissioners, 3 on the part of the U.S. and 3 on the part of Canada. Art. VIII provides for jurisdiction of the Commission. It encompasses "*all cases involving the use or obstruction or diversion of the waters with respect to which under Article III or IV of this treaty the approval of this Commission is required*". The commissioners may subject their approval to a fulfilment of a condition. This may take place in cases where it is necessary to protect and indemnity against losses or injuries on the waters of both states. In particular, the commissioners might require a remedy or protection in order to compensate such losses or injuries.

According to the United States Environmental Protection Agency, the U.S. and Canada have one of the world's most effective environmental partnerships in cross-border dimension. They especially highlight the Boundary Waters Treaty and the International Joint Commission as the foundation of this system⁵⁰.

The Great Lakes of North America were considered as high seas for a certain period. This status was not assigned to them as a result of concrete ground for such. It has to be bear in mind that at a time of adjudication, the law of the sea was not developed yet to unequivocally establish status of the Great Lakes. Since the law of the sea developed, granting such status is nowadays inaccurate. This is a significant feature considering the U.S. common law judiciary system. One may attempt to argue in favour of judgment of Mr. Justice Field. However, it must be balanced against modern characteristics of the term "high seas" included in the LOSC and customary international law. In addition, since then the legal treaty has been established to govern navigation and shipping matters on the Lakes, giving navigational freedom only to the contracting states. Canada and the U.S. excluded third-states from navigational freedom based

⁴⁹ WALKER G, *The Boundary Water Treaty 1909 – A Peace Treaty?* 39 Can.-U.S. L.J. 170, 2015 p. 183. Available at: <https://scholarlycommons.law.case.edu/cuslj/vol39/iss/14> 13/08/2019.

⁵⁰ U.S. Environmental Protection Agency, *EPA Collaboration with Canada*, 2016

on the LOSC and customary international law, as the U.S. is not a party to the LOSC, but relevant provisions are considered already a part of customary international law, in this case art. 8. Under customary international law there is no ground for foreign-flagged vessels to access other states internal waters. Any navigation or shipping of such vessels through the Great Lakes must be accepted respectively by the Canadian or U.S. authorities in the ambit of their jurisdiction.

3.3 The Kerch Strait and the Sea of Azov

The Kerch Strait connects the Sea of Azov to the North with the Black Sea to the South of the strait. It separates the Russian mainland to the East from Crimea located to the West. The strait's breadth varies from 3,1 kilometres to 15 kilometres. It is up to 18 metres deep and around 35 kilometres long⁵¹. Waters within the strait bear status of territorial waters. At the moment the Strait is controlled by Russia. It drew international attention due to "Kerch Strait Incident" on 25 November 2018, where Russia conducted detention of 3 vessels that belong to Ukrainian Navy.

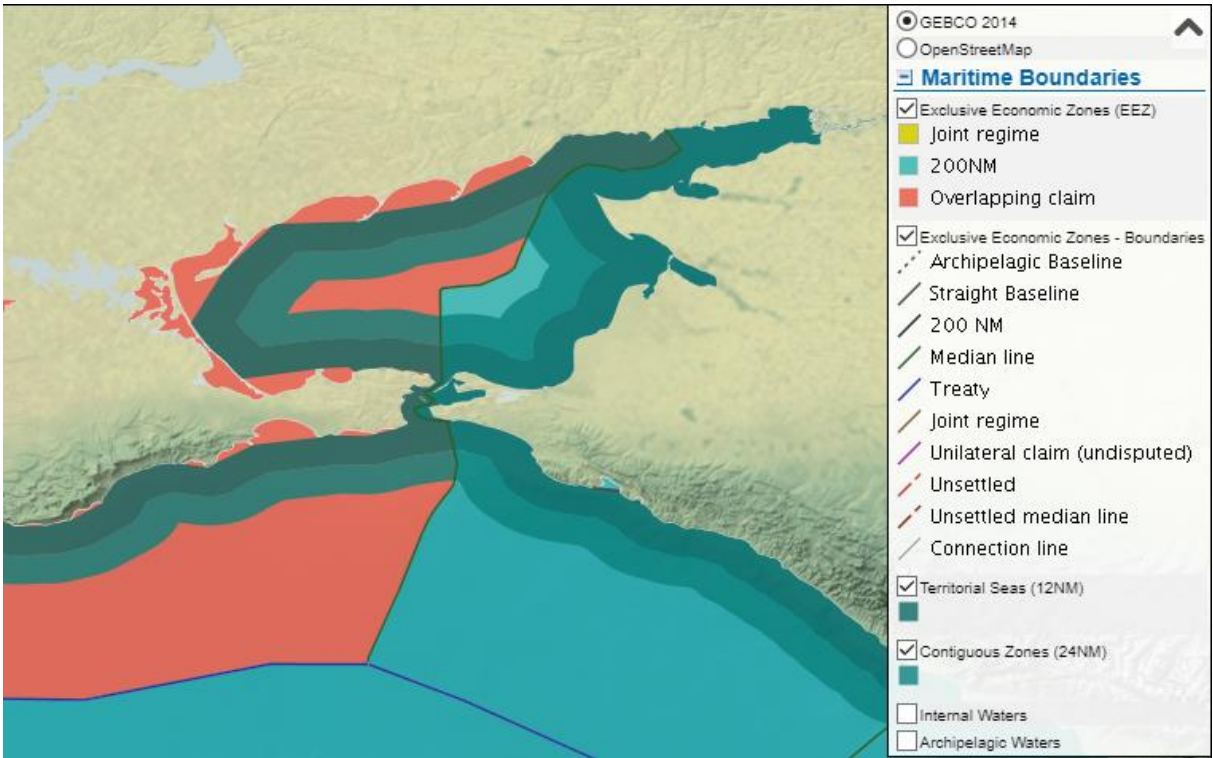
The Kerch Strait is relevant because of its features, which in a high extent reflect the situation in the Vistula Lagoon. The Sea of Azov is shared by Russia with another state. Also, Russia is in sole control over the strait that is the only possible way to access the Sea of Azov. Status of the waters is unclear, but it was eventually confirmed that according to the bilateral agreement, the Sea of Azov consists of internal waters shared between Ukraine and Russia. However, the waters have not been delimited. The matter of overlapping claims of internal waters is not dealt by the LOSC. Then, theoretically, both states can use the Sea in full extent as their internal waters, with respect to principles of the International Law.

The situation is more complicated because of the on-going conflict between both states over sovereignty of Crimea. It has certain implication for the legal status of the waters of the Sea of Azov. If the territory remains under the Russian sovereignty, Ukrainian coast will be in the minority and very dependable on the Russian interpretation of the ambit of rights that are granted to Ukrainian vessels, assuming that said waters will remain internal and undelimited. Delimitation of this waters by an agreement will rather not be possible since it would put Ukraine in very unfavourable position. However, theoretical delimitation together with conversion of the internal waters into the sea waters seems to be more appropriate. Then, Russia

⁵¹ Source: https://en.wikipedia.org/wiki/Kerch_Strait 14/08/2019.

would take majority of maritime zones in the Sea of Azov, leaving only small part of the Sea to Ukraine, which would be surrounded by the Russian waters and still without any direct access to the Strait.

Ukrainian vessels were seeking to navigate through the strait. Their destination was allegedly the port of Mariupol and Berdyansk located on the Sea of Azov. Vessels were intercepted by the Federal Security Service of the Russian Federation in cooperation with the coastguard and the air force⁵². As a result, Russia detained said naval vessels and 23 sailors. Six Ukrainian sailors were injured during the incident⁵³. Ambassador of the Russian Federation to Ireland, Yury FILATOV, said in the interview for the Irish Times that actions undertaken by the Ukrainian vessels were intentional and provocative.



Map 4: The Kerch Strait and suggested maritime zones on the Azov and Black Sea surrounding the Strait. Source: www.marineregions.org.

⁵² Минобороны РФ подтвердило участие военных в инциденте в Керченском проливе, accessible at: <https://www.interfax.ru/russia/640169> 14/08/2019 - Russian Ministry of Defence Confirms Military Participation in Incident in Kerch Strait.

⁵³ The Kerch Strait Incident, 2018, source: <https://www.iiss.org/publications/strategic-comments/2018/the-kerch-strait-incident> 14/08/2019.

Russia controls the Kerch Strait since 2015 as an effect of the annexation of Crimea by the Russian Federation in 2014⁵⁴. The Strait's waters belong to Russian territorial sea as an outcome of annexation. Hence Russia controls passage through the strait. To access and leave the strait vessels must navigate through Russian territorial sea both on the Black Sea and the Sea of Azov. Ukraine has its maritime zones on the latter, together with overlapping Russian claim on EEZ.

Since the political situation in the region had changed, the question regarding Russia's competence to regulate passage through the strait arose. Situation sparkled when Russia initiated construction of a bridge connecting two peninsulas over the Strait. The bridge began to serve as the justification for the impediment of navigation through the strait. Russian authorities started to ban and suspend navigation due to construction work and for now on they ban it for safety reasons⁵⁵. On the other hand, the architecture of the bridge allegedly prevents certain types of vessels access to Ukrainian ports located on the Sea of Azov⁵⁶.

Crucial to resolving the dispute is determination of the legal status of the Kerch Strait. It does not seem to be classified by Part III of the LOSC, because it does not fulfil the spatial requirement. It connects merely territorial seas of the same state. In order to determine its status, the examination of historical documents should be conducted.

Ukraine was part of the USSR until it reached independence in 1991. The Sea of Azov at a time, was considered as Russia's internal waters. It has been possible on the ground of art. 7 of the Convention on the Territorial Sea and the Contiguous Zone of 1958, incorporated in art. 10 of the LOSC. At the strait's entrance, Russia drew a bay closing line. This had to change since 1991 when Ukraine became an independent state and from this moment the Sea of Azov had two sovereign states on its banks. Like in similar situations, between Russia and Ukraine arose an issue regarding delimitation of the Sea among both states. The issue has not been resolved in the initial 2003 Treaty Between Ukraine and the Russian Federation on the Ukrainian-Russian State Border⁵⁷. Certain matters regarding maritime cooperation were settled in the

⁵⁴ PIFER S, *Five Years After Crimea's Illegal Annexation, The Issue Is No Closer to Resolution*, Order From Chaos, 2019, available <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/> 15/08/2019.

⁵⁵ FILATOV Y, *Russian perspective on Kerch Strait incident*, The Irish Times 2018, available: <https://www.irishtimes.com/opinion/letters/russian-perspective-on-kerch-strait-incident-1.3714950> 15/08/2019.

⁵⁶ KOVAL D, SCHATZ V *UKRAINE v. Russia: Passage through Kerch Strait and the Sea of Azov. Part II: Ukraine's Rights of Passage through Kerch Strait*. Voelker Rechtsblog 2018. Available: <https://voelkerrechtsblog.org> 15/08/2019.

⁵⁷ Available: <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54132/Part/I-54132-0800002803fe18a.pdf> 15/08/2019.

Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait⁵⁸. However, this Agreement left delimitation problem to be resolved in the future, special agreement. Such an agreement has never been concluded⁵⁹.

In the same year, states concluded the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait⁶⁰. Certain interpretation difficulties regarding art. 1 arose. It says that the Sea of Azov and Kerch Strait have the status of internal waters. However, this matter was addressed in Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch of 24 December 2003. They reaffirm art. 1 of the 2003 Cooperation Agreement. This regime is confusing, and many charts apply an “ordinary” or “proposed” division of maritime zones in the Sea of Azov in accordance with provisions of the LOSC.

Since the annexation of Crimea, the situation of the strait and the Sea of Azov reflects the one in the Vistula Lagoon and Baltyisk Strait. Both straits are fully controlled by Russia and lead to a body of water that has the status of internal waters. In contrast to political factors, the only legal difference is that the internal waters are not formally delimited between states. The LOSC does not provide for delimitation of internal waters, thus leaving this matter to resolve by interested states. Due to current relations between states, chairman’s chance any delimitation agreement will be adopted in the near future.

The geographic features of the Sea of Azov allow its determination as the enclosed sea. This renders applicable art. 123 of the LOSC, which impose on the states bordering such a body of water an obligation to cooperate, in particular in the exercise of their rights and duties. Letters (a) to (d) of this article refer to specific duties that should be undertaken by such states. They do not mention categories of rights or obligations that grant the navigational rights. However, the context of the sentence one of art. 123, which says

“[s]tates bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention”

⁵⁸ Available: <https://www.ecolex.org/details/treaty/agreement-between-the-russian-federation-and-the-ukraine-on-cooperation-in-the-use-of-the-sea-of-azov-and-the-strait-of-kerch-tre-149547/> 15/08/2019.

⁵⁹ KOVAL D, SCHATZ V, *UKRAINE v. Russia: Passage through Kerch Strait and the Sea of Azov. Part I: The Legal Status of Kerch Strait and the Sea of Azov*, Voelker Rechtsblog 2018. Available <https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/> 15/08/2019.

⁶⁰ Available <http://kremlin.ru/supplement/1795> 19/08/2019.

allows for the conclusion that the scope of such cooperation extends well beyond matters touched in said letters, thus including the navigational rights and obligations established in the LOSC.

The navigational regime in the Kerch Strait and the Sea of Azov varies from applicable international law and the customary international law to national Ukrainian and Russian law. To avoid headache, in 2002 states signed the Protocol on Conditions Governing the Entry of Russian and Ukrainian Combined River-Sea Navigation Vessels into Russian and Ukrainian Ports on The Azov and Black Seas. The Protocol was designed to unify laws of both states regarding principles and rules of shipping in areas of their jurisdictions. In effect, Russian and Ukrainian flagged vessels could navigate through corresponding waters if they were in possession of one of the respective documents: the Russian maritime register, the Russian river register or the Ukrainian navigation register. The scope of said protocol allowed such vessels to enter compatible ports for cargo operations and to shelter from bad weather conditions at sea. To keep up navigational safety in the Kerch Strait, the traffic separation systems were established. In addition to that, navigating vessels are required to follow 1972 International Regulations for Preventing Collisions at Sea and the rules gathered in the collection of shipping rules adopted by both states, which is known as the 2002 Protocol on Conditions of Entrance of Russian and Ukrainian Vessels of Joint Shipping Zone into the Ukrainian Ports of Azov Sea and Black Sea⁶¹.

Navigation rights through the Kerch Strait cannot be dealt with based on Part III of the LOSC. It is the case because Part III deals with five categories of straits⁶², neither one of which connects territorial sea with internal waters or internal waters which are governed by the shared bay regime. The applicable regime may be sought under customary international law. Some scholars argue that customary international law applies to straits that connect high seas or EEZ with internal waters or straits that consist of internal waters. It should also apply to straits which lead to bays bordered by several states, but it is uncertain⁶³. In its judgment in case *Land, Island and Maritime Frontier Dispute*⁶⁴, the ICJ said

⁶¹ SKARIDOV A, *The Sea of Azov and the Kerch Strait*, in: DAVID D. CARON AND NILUFER ORAL (eds.), *Navigating Straits*, Brill 2014, p. 230-232.

⁶² See: Section 2 of hereby paper, "What is the straits regime in the International Law of the Sea that is applicable to the Pilawa/Baltyisk Strait?"

⁶³ SCHATZ V. & KOVAL D, *Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective*, *Ocean Development & International Law* 50:2-3, 2019, p. 289.

⁶⁴ Available: <https://www.icj-cij.org/en/case/75/judgments> 30/08/2019.

“[since the states accept the single sovereignty of the states involved in the dispute, but] with mutual rights of innocent passage, there must also be rights of passage through the remaining waters of the Gulf, not only for historical reasons but because of the practical necessities of a situation where those narrow Gulf waters comprise the channels used by vessels seeking access to any one of the three coastal States. Accordingly, these rights of passage must be available to vessels of third States seeking access to a port in any one of the three coastal States; such rights of passage being essential in a three-State bay with entrance channels that must be common to all three States. The Gulf waters are therefore, if indeed internal waters, internal waters subject to a special and particular régime, not only of joint sovereignty but of rights of passage”⁶⁵.

The ICJ supported the view that straits which lead to bays by few states belong to type of straits where the right of passage is recognised by the Customary International Law. In this case the ICJ found that the states bordering the bay do enjoy the right of innocent passage. This right is anchored in the historical reasons and the practical necessities. The latest is more relevant for the Kerch Strait and similar problems, like the one described in the Vistula Lagoon. In these three cases, the waters primarily belonged to a one state and then became shared. They have only one accessible water route, however the existence the delimitation line differs. The term “practical necessities” means that the internal waters should be accessible for passage or navigation in such cases, in order to avoid inconvenient solutions. This approach has its roots in the doctrine of access to the seas for everyone, that ultimately has prevailed. In addition to that, one enjoys the right of connection with the high seas. Different adjudication in those cases would impede exercise of this right. The reasoning of the ICJ should be also applicable to the Kerch Strait and the Sea of Azov dispute.

Navigation and passage rights were determined by Ukraine until the annexation of Crimea. In addition, Ukraine was entitled to gain certain benefits related to passage through the strait. This includes toll duties enacted by Ukrainian Kerchensky Commercial Sea Port Authority, which were allegedly discriminatory towards Russians, according to SKARIDOV⁶⁶. The situation had flipped over with annexation. Since 2015 Russia has been subjecting Ukrainian vessels to authorisation requirement for passage through the strait.

⁶⁵ The ICJ Judgment in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening, 1992, Nb. 412, p. 258.

⁶⁶ Ibidem, p. 233.

Russia imposed several restrictions on passage through the strait. At first, it provided for the suspension of passage due to the construction of Kerch Bridge. Further, Russia adopted restrictions due to the existence of the bridge, regarding mainly the dimensions of vessels. However, as the Kerch Strait Incident proved, there is a ban of Ukrainian vessels free passage through the strait due to the safety reasons, justified by rising tensions between the states and other para-military incidents in considerable vicinity of the bridge⁶⁷.

Currently, Ukrainian vessels which intend to pass through the strait are subject to inspections and detentions by Russian authorities. These restrictions were passed in the law of May 2018 on border control for the Kerch Strait. Russian restriction on a passage, together with construction of the Crimean Bridge were condemned and initiated sanctions by the United States of America⁶⁸. In its press release, the U.S. Department of State Spokesperson indicated that

“[t]he bridge represents not only an attempt by Russia to solidify its unlawful seizure and its occupation of Crimea, but also impedes navigation by limiting the size of ships that can transit the Kerch Strait, the only path to reach Ukraine’s territorial waters in the Sea of Azov. We call on Russia not to impede this shipping”.

This statement wraps out the approach of the U.S. to the matter. It is a call for political action and most importantly reaffirms the existence of a legal conflict. Due to the new regime, Ukrainian economy suffers considerable losses, including 15% decrease in freight turnover for the summer of 2018, more than 100 ships detained by Russian authorities. On top of that, Russian authorities engaged in a control of Ukrainian vessels navigating in the Sea of Azov within the cabotage. Russia declares that all the measures taken were conducted in non-discriminatory way⁶⁹.

In relation to the annexation of Crimea, Estonia and Poland denied access to their ports for the Russian sailing vessel “Siedov” since on its board were sailor students from Crimea. Russia called it as a non-friendly act⁷⁰.

⁶⁷ FILATOV, *Russian perspective on Kerch Strait incident (...)*.

⁶⁸ U.S. Department of State, *The Opening of the Kerch Bridge in Crimea*, 15 May 2018, <https://www.state.gov/the-opening-of-the-kerch-bridge-in-crimea/> 19/08/2019.

⁶⁹ SCHATZ V. & KOVAL D, *Russia’s Annexation of Crimea (...)* p. 283.

⁷⁰ TVN24, *Rosyjski żaglowiec nie wpłynie na polskie wody. MSZ: decyzja premiera*, available <https://www.tvn24.pl/wiadomosci-ze-swiata,2/rosyjski-zaglowiec-siedow-nie-zostanie-wpuszczony-do-portu-w-gdyni,926884.html> 31/08/2019.

The fact that Russia had built the Crimean Bridge did not occur out of the blue. Russia was seeking the possibility of connecting the Crimean Peninsula with the Russian mainland for a long time. In fact, in 2010 the presidents of both states signed the agreement on the construction of the bridge⁷¹. After all, the Crimean Bridge is 35 m. height, with its clearance zone of 33 meters. It is 11 meters lower than the height of vessels which allegedly visit the Ukrainian Port of Mariupol. In relation to Ukrainian claim that the bridge closes the Sea of Azov it is necessary to underline, that Russia also has ports located there and will use the same watercourse in order to access them. In the Great Belt case, where Judge Tarassov gave an opinion that low-height bridges are “a serious threat to the continued, unimpeded passage” for international shipping in international straits. However, the Great Belt Bridge had been constructed with 18 m. clearance zone, which is nearly half lower than the clearance zone of the Crimean Bridge. The restriction on vessels able to pass under the bridge is equal. The Russian military vessels are the only type of vessels allowed to navigate in the area in periods of suspension of the passage.

Ukraine lost its favourable position in the area since the Crimea’s annexation. It lost its rights as a coastal state in Russia’s favour, because these maritime zones are emitted by Crimean Peninsula. Ukraine cannot enjoy the status of a coastal state in relation to its territories adjacent to the Sea of Azov, particularly because of its status of internal waters. Ukrainian claim in this matter shall be determined by the Permanent Court of Arbitration in the Hague⁷² the Netherlands, under Annex VII of the LOSC. Until then, Ukraine does not enjoy coastal state rights on the Black Sea and cannot claim maritime zones generated by the annexed region for themselves. Relevant for this issue is a decision in respect of annexation of Crimea, as this land generate maritime zones in question. Hopefully, the PCA will address this matter in its decision.

There are other grounds on which Ukrainian vessels may rely its right of passage through the strait and further navigate through the Sea of Azov to access Ukrainian ports. The Agreement signed in 2003 by Ukraine and Russia on cooperation in the correspondent area is still in force – neither state terminated it. It grants the same “free” navigational rights to both states. Navigation should be free in a sense as a right, entitlement. It does not constitute the freedom and its meaning is different than used in the LOSC in relation to high seas. This understanding is supported by long-standing tradition of providing such meaningful words in cooperation and

⁷¹ Kyiv Post, *Azarov creates group for bridging the Kerch Strait*, access <https://www.kyivpost.com/article/content/ukraine-politics/azarov-creates-group-for-bridging-the-kerch-strait-77597.html> 23/08/2019.

⁷² Available: <https://pca-cpa.org/en/cases/149/> 20/08/2019.

friendship treaties or agreements⁷³ and the fact that Ukraine had imposed tolls and duties on Russian flagged vessels passing through the strait. Hence relevant is the matter of access, entitlement to passage itself rather than payments. Foreign flagged commercial vessels were permitted to pass through the strait if they were voyaging to either Russian or Ukrainian ports located in the Sea of Azov, however, foreign-flagged navy or governmental vessels were allowed to pass through the strait and the Sea of Azov only upon invitation or permission of one of the states together with acceptance of the other state. I.e. if Ukraine invited British warship, Russia would have to agree on passage of such a unit through the said route.

Application of said agreement by its parties is problematic. Driven by their interests, they respect provisions of the agreement very subjectively, or disregard certain behaviours whenever it suits them⁷⁴. Russia acts very confidently, employing provisions which are on their advantage, in particular by changing the Agreement's scope of application. Russia sees the Agreement in the Sea of Azov, where it needs to secure Russian flagged vessels navigation rights. On the other hand, it indicates that since the annexation of Crimea, the Agreement is no longer applicable in entirely Russian Kerch Strait. Russia instead enacts its own law and favour own legal regime. It allows passage of other vessels, particularly Ukrainian flagged vessels, to use the strait with defined limitations and at Russian discretion⁷⁵. J. KRASKA argues that the Russian approach to 2003 Agreement violates its provisions in relation to international law, especially obligation to cooperate expressed in many provisions of the LOSC⁷⁶ and obligation set in art. 26 of the VCLT to act with *bona fide* in relation to treaties which are binding between states.

In addition to the 2003 Agreement, Ukraine can rely its navigation rights under the 1997 Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation. Art 17 of this Treaty states

[parties] shall ensure the freedom of transit [...] across each other's territory in accord with generally recognized norms of international law. The conveyance of freight and passengers by [...] sea [...] between the two Parties, and by transit across their territories, including

⁷³ SCHATZ V. & KOVAL D, *Russia's Annexation of Crimea (...)* p. 285.

⁷⁴ See: Kyiv Post: *Foreign Ministry: Ukraine won't break Azov Sea treaty with Russia*, 2018; SOCOR V, *Azov Sea, Kerch Strait: Evolution of Their Purported Legal Status*, Eurasia Daily Monitor Volume: 15 Issues: 169, 171 and 173, 2018.

⁷⁵ SOCOR V, *Azov Sea, Kerch Strait: Evolution (...)*.

⁷⁶ KRASKA J, *The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?* EJIL: Talk! 2018, available <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/> 20/08/2019.

*operations through sea [...] are effected in the manner and according to the conditions provided by separate agreements*⁷⁷”.

This provision provides for the freedom of transit through territories of the parties to the TFC. However, the meaning of the term “freedom of transit” is used rather in the same way as the “freedom of navigation” in the 2003 Agreement, that is without giving intention to provide for the freedom of transit, but rather as a political move. This view is mirrored by the further part of the provision, which indicates that this “freedom” will be subject to limitations provided for by the other agreements.

Furthermore, art. 29 of the TFC obligates Ukraine and Russia to cooperate in the fields of navigation, in particular its development, and operation of the structures. The question arises of the relation between art. 29 and 17 of the TFC. Following art. 31 of the VCLT, the provision of art. 29 should be treated as *lex specialis* to art. 17. It refers to navigation in general, not only passage. This opinion is also shared by DE STOOP, who wrote that the right of transit passage is broader than the innocent passage. However, the freedom of navigation on the high seas is the broadest of those three rights⁷⁸. But it does not seem that Ukraine and Russia mean the term “navigation” in art. 27 in the same broad manner, as it is described in the LOSC. It is rather the navigation within its limited scope, dictated by treaties and practice of these states. The same apply to the word “transit” used in art. 17. It seems to be appropriate to leave them in the same order, since both terms are deprived of their initial meaning dictated by the International Law in a manner that justifies such an outcome.

Based on the case documentation submitted to the PCA, one may observe that Ukraine constantly claims Russia’s inconsistency with the International Law and the bilateral agreements concluded by the states, whereas Russia justifies all its actions and claims its accordance with said laws. It is necessary to examine these claims in detail.

The Crimean Peninsula is under disputable sovereignty of Russia. The area was formally annexed, and until this situation will be clarified by the independent, international tribunal or court, it remains under Russia’s sovereignty. Hence, Ukraine had lost its coastal state’s rights over the maritime zones generated by the Crimean Peninsula and internal waters in the Kerch Strait. Internal waters in the Sea of Azov remain shared, thus the difference will only influence

⁷⁷ Translation provided by SCHATZ V. & KOVAL D, [in:] *Russia’s Annexation of Crimea (...)* p. 285.

⁷⁸ DE STOOP D, *An Outline of International Law*, ASPG 2019, p. 291.

theoretical delimitation line, if the delimitation procedure would be launched. At the moment all the former Ukrainian waters have been claimed by Russia. Until the decision of said tribunal or court will be made and enter into the force, there is no legal ground for objection to it or a different interpretation of the Law.

Ukraine argues that Russia imposed the complete blockade of the transit passage or the innocent passage through the Kerch Strait. Russia counterclaims by justifying the necessity to apply certain solutions, that *de facto* impede the transit in non-discriminatory and non-arbitrary manner. The LOSC gives carte blanche to states in relation to territories under their full sovereignty. This is applicable in the Kerch Strait, since it currently consists of the Russian internal waters. The argument based on art. 45(1)(b) of the LOSC describing the dead-end straits is missed, as explained above. The status of the waters in the Sea of Azov also allows Russian vessels to impede the navigation of foreign-flagged vessels. These are shared internal waters which are formally undelimited yet. Thus, both states enjoy their shared sovereignty in relation to the whole area of the Sea of Azov. However, in the light of cooperation treaties between states, actions that impede the navigation of their respective vessels in said waters should be reasonable and do not exceed over what's necessary. Also, any impediment for the navigation should be applied in good faith and in the spirit of cooperation and good willingness. If Russia obeys these rules, there is no argument *de iure* that may disallow Russia to continue such activity.

However, since there is an on-going dispute over the passage and navigation entitlement, it indicates that Russia may be deemed not to apply the cooperation agreements appropriately. Apparently, the requirement to cooperate by the states failed to the extent that was enough to engender the conflict. In the light of the obligation to act with the good faith and to cooperate with Ukraine, Russia is expected to act in a different way than only to secure its position and disregard every Ukrainian appeal. Even if the obligation to cooperate has considerable tangible and unsolid character that is subject to interpretation, it is the letter of the hard law. In this case there is certainly room for improvement of the cooperation between the states depending on mutual will to respect the law and the concluded agreements at least at the internationally recognised standard.

When it comes to third states-flagged vessels, their scope of rights is prescribed in art. 2.2. of the 2003 Cooperation Agreement. The provision says

“[m]erchant ships under the flags of third states may enter the Sea of Azov and pass through the Kerch Strait if they are sent to or returned from a Russian or Ukrainian port”.

Hence, the third states’ merchant vessels do not enjoy the same rights as Russian or Ukrainian vessels. In order to lawfully access the Sea of Azov and the Kerch Strait, these vessels must fulfil three alternative requirements. Either they need to be navigating to Russian or Ukrainian port and being invited by the respective state, or they need to be in return from such a port. However, as mentioned above, this category of vessels is now navigating through Russia’s internal waters. Based on this, Russia may suspend its traffic through the internal waters, with due regard to the performance of the 2003 Cooperation Agreement.

Navigation of warships and non-commercial vessels owned by states is encompassed in art. 2.3 of the 2003 Cooperation Agreement. According to this paragraph, warships and non-commercial vessels owned by states

“may enter the Sea of Azov and pass through the Kerch Strait if they are sent on a visit or business call to the port of one of the Parties at its invitation or permit, agreed with the other Party”.

The navigation of this category of vessels is thus much more complicated than the commercial vessels. Ukraine and Russia set up a system of requirements to fulfil beforehand. To be granted the right to navigate, the warship or the non-commercial vessel belonging to the state must be sent on an official visit or business call. This visit or business call must be conducted in either Russian or Ukrainian port. Further, vessel needs to acquire a document that certifies such a purpose of the voyage. This may be stated i.e. in an invitation or permission issued by the inviting state. Ultimately, success of this endeavour is subject to the agreement of the other state. Either Russia or Ukraine must agree on navigation of said vessel beforehand. Nothing in art. 2.3 prohibits the state to withdraw this agreement at any moment. However, since the annexation of Crimea, it would be unreasonable to expect that Russia would ask for permission of Ukraine to host vessels in the Russian Port of Kerch. In relation to this area, it is rather the case that this provision expired due to unforeseen circumstances brought with the annexation and the fact that the Kerch Strait is now a part of Russian internal waters.

To summarise it, situation is to be determined by the judgment of the independent international court (the PCA). Until then, claims of both states remain contradictory. This situation has emerged, *inter alia*, due to 1) lack of delimitation of the Sea of Azov and 2) the annexation of

the Crimean Peninsula and claim over its maritime zones. However, so long as the peninsula is under Russian sovereignty, Ukraine must recognise its competence to determine passage through the Strait. On the other hand, Russia must act with regard to the international obligations, especially the cooperation requirement provided for in art. 44 and 123 of the LOSC. Additionally, it should take into consideration said judgment of the ICJ in the case *Land, Island and Maritime Frontier Dispute*, which implicitly established requirement to cooperate in similar situation and where it is demanded by the “practical necessities”. Nevertheless, Russia can enjoy its entitlement to regulate and suspend the navigation through the Kerch Strait, because the strait is a part of the Russia’s internal waters.

When it comes to the Sea of Azov, these waters have not been delimited yet and it is doubtful that either Russia or Ukraine will proceed with such delimitation in the near future. Thus, based on the 2003 Cooperation Agreement Russia and Ukraine can treat the Sea of Azov as their internal waters. Based on this status, they have entitlement to exercise their rights and duties in joint co-ownership of the waters, that is over all the sea and in respect of the rights of another co-owner. Therefore, both states are entitled to conduct inspections everywhere on the sea. In the case of control over Russian or Ukrainian vessels, it should be exercised with respect to the agreements and treaties concluded by the parties. In general terms it means that these controls should be reasonable and necessary to guarantee safety on the sea and structures located thereon. Such controls should not exceed the reasonable volume.

4 State practice and summary

4.1 Perspective on compliance with the Vistula Sailing Agreement⁷⁹

Polish flagged vessels exercise its passage right through the Baltyisk Strait on an everyday basis. This fact is supported by Polish Maritime Office⁸⁰, Marine Department of Border Guard⁸¹ and Custom Office. These administrative bodies’ tasks are to safeguard compliance with the Sailing Agreement, especially by teaching and providing necessary information to entities interested in crossing the border on the Lagoon and further sail to the Baltic Sea through the

⁷⁹ Based on phone interview with the Polish Border Guard on 20/08/2019, additional sources: <http://www.zalewwislany.pl/zalew-kaliningradzki/nawigacja-prowadzenie-rejsu>; Yacht Club Elblag (website address below).

⁸⁰ Website: https://www.umgdy.gov.pl/?page_id=650 21/08/2019.

⁸¹ Website: <https://www.morski.strazgraniczna.pl/mor/komenda/struktura-i-zasieg/1637,Struktura-i-zasieg.html> 21/08/2019.

Baltyisk Strait. They fulfil their duties by conducting trainings and coaching with entities' personnel, but primarily by giving access to information via their offices.

In the City of Elblag there exist a considerable number of associations in maritime industry. Their scope varies from fishing and commercial to sport, leisure and touristic associations. Their significance is that they are focus on conducting businesses with activities on the Lagoon or the Baltic Sea. For these associations and in particular represented by them entities, it is a matter of high importance to have possibly unimpeded passage through the strait and the Lagoon, and access to Elblag's Port. This is the reason why they eagerly cooperate with Polish state authorities. The cooperation is mutual – Polish authorities provide them for necessary legal knowledge, make procedures simpler and more familiar, chiefly by sharing information on practical side of the passage through Russian waters. In advance, they ask for share of information regarding application and compliance of the Agreement by Russian border authorities on a border check point. In addition, their often provide such entities with unofficial information circumscribing control which is important for regular people, reduces stress and minimalises surprise caused by unforeseen requests. Such information frequently includes behaviour of Russian authorities and up-to-date attitude towards Polish crews.

A significant complication is the lack of guarantee of procedure and this practical side by Russian border control authorities. Procedure has been established and shared with Polish Border Guard, however as they claim, its application is dependable on the ultimate decision of the Russian Border Guard, and their decisions are frequently inconsistent. This fact brings some extent of uncertainty to the table. The crew of vessels may not be secured by fulfilling requested duties beforehand, because they are at risk of not getting access granted nonetheless. Many sailors complain about losing their documents during control, even if they had several copies of those. This complain remain unresolved or discontinued, if formal procedure were initiated, due to lack of proves.

The Polish Border Guard issued non-legal document, which might be classified as the check-list for entities interested in the navigation from the Port of Elblag to the Baltic Sea via Russian waters⁸². The importance of the document lies in the fact that Polish sailors are required to communicate with the Russian Boarder Guard in Russian only. This requirement extends on the entire control procedure. Moreover, the forms are available only in Russian language, and

⁸² See Appendix II.

the submissions of the applications should be also done in Russian. This approach is not cooperative, because in Poland a minority of population is fluent in, or speak Russian.

One of the interested entities is the Yacht Club Elblag⁸³ which on its own initiative organised coaching for its members on the occasion of regatta organised by the Club. The representative of the Border Guard asked for comment on compliance of Russian border authority with the Sailing Agreement. Further, Polish Border Guard were to prepare a report based on these comments, in order to submit it to the Ministry of Foreign Affairs. Further actions to be undertaken by the Ministry are not open for public.

The Governor of Kaliningrad Oblast, Anton Alikhanov, recognises that the Polish project of digging the canal through the Vistula Spit brings a risk regarding the ecology of the Vistula Lagoon and constitutes a threat to existence of the spit. He explained that Russians are concerned about migration of the local stocks of fishes and the salinity of the lagoon. In terms of fulfilling its cooperation obligations, Alikhanov ensured that the passage via the Baltyisk Strait is possible and that no one denied such right to entitled vessels. He says there are no problems with the passage. He doubts in Polish arguments and in the safe construction of the canal. He argues it is the unnecessary solution⁸⁴.

4.2 Conclusions

4.2.1 Research question one: the scope of the entitlement to navigate in the Vistula Lagoon and the Baltyisk Strait

The entitlement to navigate in the Vistula Lagoon occurred to be a complex matter. The examination of the cases in section 3 of the present thesis supports this view. The matter could be resolved by relying solely on the 2009 Sailing Agreement. This approach would allow to close the question with the conclusion that Polish vessels need to adjust to the Agreement. However, the shadow of a doubt was brought with the political choice to build the canal through the Vistula Spit. On the one hand, Poland keeps the agreement. It does not terminate it nor undertakes endeavour to change it. On the other hand, it conducts activities to surpass Russia's position in the strait and the Lagoon.

⁸³ The Club's website: <http://www.jachtklub.elblag.pl> 20/08/2019.

⁸⁴ TVP Info, *Gubernator obwodu kaliningradzkiego obawia się przekopu Mierzei Wiślanej: Ryby mają tam tarło*, April 2019, available <https://www.tvp.info/42222546/gubernator-obwodu-kaliningradzkiego-obawia-sie-przekopu-mierzei-wislanej-ryby-maja-tam-tarlo> 31/08/2019.

According to the 2009 Sailing Agreement Russia has a total control over the passage through its part of the Vistula Lagoon and the Baltyisk Strait. It should grant this right to commercial and non-governmental Polish-flagged vessels, and the EEA-flagged vessels based on the membership of Poland in the EU. Nevertheless, the vessels might be subject to the control in the Russian port of Baltyisk and even rejected the right to navigate through Russian internal waters or the right of passage via the Baltyisk Strait. Hence the entitlement is not obstructed of the obstacles, neither free, in the meaning used in the Ukrainian-Russian navigation treaties in the Kerch Strait and the Sea of Azov. Based on art. 3.3, of the 2009 Agreement, both sides might limit the navigation in the Vistula Lagoon. It is a definitive failure of the Polish diplomacy, since the protocol to the 1961 Agreement between Poland and the USSR provided for suspension of the navigation and the passage exclusively in the case of sanitary reasons.

The navigational entitlement does not extend to the vessels flagged in the states outside the EEA. If they wish to reach Polish side of the Vistula Lagoon, they must comply with the Russia's national legislation. Yet, there is no invitation procedure like in case of military or non-governmental vessels of third states intending to reach Russian or Ukrainian port(s) in the Sea of Azov, based on the invitation issued by one of these states.

The difference of the situation in the Curonian Lagoon is anchored in its characteristics. Lithuania is interested in increasing number of arrivals to the Port of Klaipeda. Also, Lithuania has stronger geopolitical position in the lagoon, because of the location of the Klaipeda Strait. On the other hand, Russia has only minor ports on their side of the lagoon. Nevertheless, states are on a good way to abolish formalities on the boundary. They support the smooth navigation through the lagoon and the passage through the strait.

Poland recognised the status of internal waters of the Vistula Lagoon by adhering to the 2009 Agreement. It recognises Russia's straight baseline which encloses the entrance to the strait. In effect, the Vistula Lagoon could not be regarded as the dead-end strait, pursuant to art. 45 of the LOSC. However, Poland invoke – as Ukraine did - the judgment of the ICJ in the case *Land, Island and Maritime Frontier Dispute*. The judgment is in favour of states in similar location as Poland, for which the connection to the high seas is a matter of the “practical necessity”. The lack of this argument lowers Polish chances to negotiate favourable conditions, to acquire the unsuspended right of the navigation and the passage through the Russian internal waters for the Polish-flagged commercial and non-commercial vessels and third-states-flagged commercial and non-commercial vessels.

The ICJ judgment was delivered in relation to the bay that was not delimited at the time. Poland accepted its borders in 1992 and confirmed the status of the lagoon's waters in the Agreement of 2009. Situation is additionally complicated by the Polish-Russian relations. Poland put herself in this difficult position, despite all the tools that could have been used. However, Poland should be still entitled to seek the right of the passage via the Kerch Strait and the Russian part of the Vistula Lagoon for commercial and non-commercial vessels which intend to arrive at one of the Polish ports located in the Lagoon, based on the customary international law. Russia should be able to impose reasonable limitations for it, where necessary, but should not be able to obstruct others from this entitlement completely.

4.2.2 Research question two: the duty to facilitate navigation in the Vistula Lagoon and Baltyisk Strait

Russia is a party to the LOSC. It is subject to the duties described there. One of these is the duty to co-operate. Embodied in previously invoked art. 44 and 123 of the LOSC, it obliges Russia to co-operate with Poland and other states. Many provisions of the LOSC reflect the customary international law, that includes the duty to co-operate. Hence, Russia's duty is not limited to the parties to the LOSC solely. Further, since Poland and other states should be entitled to the passage via the Kerch Strait and the Russian part of the Vistula Lagoon for commercial and non-commercial vessels which intend to arrive at one of the Polish ports located in the Lagoon, Russia should be in duty to facilitate the navigation of said vessels.

However, Russia acts on the contrary. It raises number of obstacles, which may be questionable even on the ground of the 2009 Polish-Russian Agreement. Examination of the other cases lets to observe that the fruitful co-operation with Russia or other states is possible. But it is not the case, when Russia does not intend to do so, like in the dispute with Ukraine.

The case of the Curonian Lagoon is an example of a fruitful co-operation in the comparable circumstances to these in the Vistula Lagoon. The official language of the co-operation programme is English, even though officially the second language in Lithuania remains Russian⁸⁵. To my best knowledge, it would be appropriate to assume that the conduct of conversations with Russian or Lithuanian boarder guards is in Russian, since 70% of the Lithuanian population speaks it. Nevertheless, the official documents are in English, which is

⁸⁵ *Languages in Lithuania*, available <http://www.truelithuania.com/topics/culture-of-lithuania/languages-in-lithuania-01/09/2019>. The reason behind this is rather that the programme is financed by the EU, and Russian is not an official language of the EU. Also, it renders the programme more transparent.

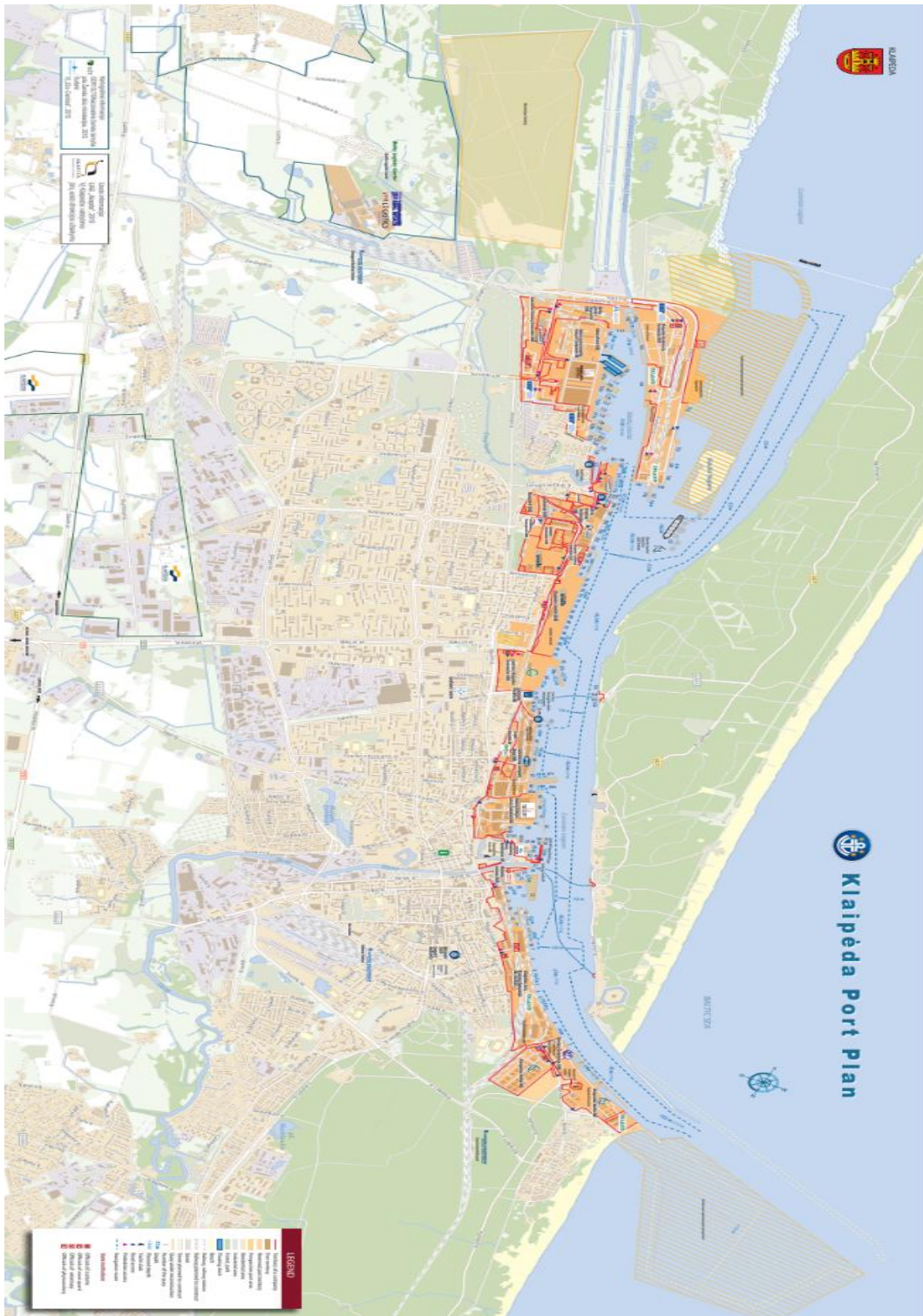
not the case in the Polish-Russian relations. The second language in Poland is English, thus it is difficult to ignore the fact that controls are conducted in Russian. It renders a serious obstacle for the marine traffic.

This could not be the case in the Great Lakes. Both states have the same official language. They are the example of a desired co-operation between states bordering a body of water. They share watercourses in a fully non-discriminatory way, that allows the vessels of flagged in both states to use them nearly freely. This co-operation system is one of the best functioning in the world, hence it serves as a primary example of the proper co-operation and facilitation of the navigation, where an endeavour for such a result is undertaken together by the two states.

The situation in the Sea of Azov and the Kerch Strait proves that where a state is obstructed of its necessary rights, it encourages a conflict. In order to mitigate this scenario, it is important to share one's state waters to a reasonable extent. It does not mean that foreign states are entitled to dictate the regulations which should be adopted for their comfortable navigation. Because of its complicity, the duty to co-operate and to facilitate the navigation should be examined on the case by case basis.

Appendix I

The Plan of the Port of⁸⁶Klaipeda



⁸⁶ Available at:

https://www.portofklaipeda.lt/uploads/Uosto%20planas/Klaipedos_uostas_2019_%20EN_zemelapis_galutinis.pdf 13/08/2019.

Appendix II

The official Note Provided by The Polish Border Guard on the occasion of regatta in the City of Elblag – With Own Translation

WŻNE INFORMACJE ŻĘGLARSKIE

Przekroczenie granicy państwa na morzu Bałtyckim z Polski do Rosji z zamiarem przepłynięcia tranzytem Cieśniną Pilawską, Zalewem Wiślanym do portów na terenie Polski, oraz w kierunku odwrotnym.

Żeglarze zamierzający odbyć w/w rejs jednostką sportowo żeglarską powinni zgłosić ten fakt władzom morskim w Kaliningradzie (według Rosjan) do godz. 18.00 dnia poprzedzającego wypłynięcie na adres

e-mail: portstat@mapkld.ru.

fax nr +7 4012579481,

+7 4012579448

wnioski do wypełnienia na powyższy Ares znajdują się na stronie WWW.mapkld.ru (w języku rosyjskim)

Na zgłoszeniu powinno znajdować się nazwa jachtu , bandera , dane techniczne jachtu długość , szerokość, wysokość, nr burtowy, dane załogi imię , nazwisko , paszport i nr, zajmowane stanowisko (rola) na jachcie, miejsce i data urodzenia , narodowość oraz adres zamieszkania. Termin przekroczenia granicy celem tranzytu i szacunkowa godzina wplynięcia na wody Federacji Rosyjskiej oraz szacunkowy czas i termin przybycia do portu w Bałtiju (Przybycie morza).

Dodatkowo załoga jachtu ma obowiązek zgłosić się podczas rejsu do Rosyjskich Służb Morskich drogą radiową na kanale UKF 74 lub 16 wywołując (w języku rosyjskim) „Wyszka Bałtyjskaja kosa lub Wyszka port Bałtisk”. Dodatkowo Rosjanie podali nr telefonu w/w służby dyżurnej prowadzącej nasłuch i korespondencję radiową to jest 8 4014 52 23 94.

IMPORTANT INFORMATION REGARDING SAILING

Crossing the Polish-Russian border on the Baltic Sea with intention to exercise the transit passage through the Pilawska Strait, the Vistula Lagoon to ports on the Polish territory and back.

Sailors who wish to navigate a sport vessel should register the journey with the Russian marine authorities in Kaliningrad until 6 p.m. a day before the journey, on the following address:

e-mail, fax and phone No.

Registration should consist of an application available at the website www.mapkid.ru (only in Russian).

Registration should consist of the name of the yacht, the flag, the technical data: length, breadth, height, the side number, the crew's data: name, surname, passport with number, position on the yacht, place and date of birth, nationality and the living address. The expected time of the border-crossing and arrival at the Russian waters, and the expected time of entering the Port of Baltyisk.

Additionally, the crew is obliged to register themselves during the passage to Russian Marine Authority via the radio route on the channel UKF 74 or !6 and call out (in Russian) "Wyshka Baltyiska kosa or Wyshka port Baltisk". In addition, Russians provided for the prefect phone number conducting the radio interception and correspondence, that is 8 4014 52 23 94.

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Useful Links

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The general information regarding Port of Klaipeda at <https://www.portofklaipeda.lt/the-port-of-klaipeda>

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