Barbara Janusz-Pawletta

The Legal Status of the Caspian Sea

Current Challenges and Prospects for Future Development

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Preface

The Caspian Sea is a great ecologic, economic and political but also a legal phenomenon worldwide. Its future evolution poses a challenge not only to its five bordering states—Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan—but also to the international community interested in its long term sustainable development. This ambitious intention may be met only by way of interstate cooperation in all dimensions of the development of the Caspian Sea, political, economic, ecological, but also of legal character. More than 20 years after the collapse of the Soviet Union and occurrence of the new geopolitical situation in the region, the balance between the development of mineral resources and environmental protection was not achieved in sufficient way. Ongoing affords of the riparian states and international community may, however, offer a reason to believe that the long-awaited consensus on the sustainable development of the Caspian Sea can still be found.

The presented book represents an attempt to identify comprehensive solution to the problem of the international legal status of the Caspian Sea. The unclear legal situation of the Caspian Sea and the consequent uncertainty of the coastal states about the issue of territorial demarcation, their uncertainty about the extent of their sovereign rights to the exploitation of natural resources and the uncertainty of the neighboring states with regard to shipping in the Caspian prevent continuous economic development of the region, destabilize political situation and result in a lack of security in the Caspian region. These issues are not merely of regional, but of a global importance. This is the way the research is being continued by scientist all over the world. This statement brings me to the sincere wish to express my deepest gratitude to international scholars, thanks to their profound knowledge and expertise in the Caspian issues, they inspired me and the led me through the sometimes difficult way of exploring and assessing the legal status of the Caspian Sea: Dr Friedemann Müller of German Institute for International and Security Affairs (SWP) Berlin, Prof. Dr. Philip Kunig of Free University Berlin,

Prof. dr hab. Leonard Łukaszuk of University of Warsaw, Prof. William E. Butler of Pennsylvania State University, Prof. Alexander N. Vylegzhanin of Moscow State Institute of International Relations (MGIMO), and late Prof. Anatoly L. Kolodkin.

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Abbreviations

AnnIDI	Institut De Droit International. Annuaire
ASEAN	Association of Southeast Asian Nations
BAT	Best Available Technology
BEP	Best Environmental Practice
BTC	Baku–Tbilisi–Ceyhan
CASPCOM	Coordinating Committee on Hydrometeorology and Pollution Monitoring of the Caspian Sea
CCWLF	Caspian Centre for Water Level Fluctuations
CEP	Caspian Environment Program
CIRM	Comité International Radio-Maritime
CIS	Commonwealth of Independent States
CNPC	China National Petroleum Corporation
CPC	Caspian Pipeline Consortium
CPUE	Catch-Per-Unit-Effort
CRTC	Integrated Transboundary Coastal Area Management Planning
EC	European Community
ECSC	European Coal and Steel Community
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EPIL	Encyclopaedia of Public International Law
EQO	Environmental Quality Objectives
EU	European Union
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization
GA Res.	General Assembly Resolution
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
IALA	International Association of Marine Aids to Navigation and Lighthouse Authorities

ICARCS	International Commission on Aquatic Resources of the Caspian Sea
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Report
ICLQ	International & Comparative Law Quarterly
IHO	International Hydrographic Organization
ILC	International Law Commission
ILEC	International Lake Environmental Committee
ILM	International Legal Materials
IMO	International Maritime Organizations
ISO	Standardisation
ITCAMP	Integrated Transboundary Coastal Area Management Planning
LBS Protocol	Land-based sources Protocol
LNTS	League of Nations Treaty Series
MEPC	Marine Environment Protection Committee
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NCAP	National Caspian Action Plan
NEAFC	North-East Atlantic Fisheries Commission
NIOC	National Iranian Oil Company
NJW	Neue Juristische Wochenschrift
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Union (since 1968), C series (Communications), L series (Laws)
RIAA	Reports of International Arbitral Awards
SAP	Strategic Action Program for the Caspian Sea from 2003
SC Res.	Security Council Resolution
TAC	Total allowable catch
TDA	Transboundary Diagnostic Analysis
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention ion the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UN Doc.	United Nations Documents
UNDP	United Nations Development Program
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNTS	United Nations Treaty Series
US	United States
USSR	Union of Soviet Socialist Republics
WB	World Bank
WCED	World Commission on Environment and Development
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

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Chapter 1
Introduction and Course of the Investigation

1.1 Situation in the Caspian Sea Since the Collapse of the Soviet Union

Is it possible for the Caspian Sea, which has become a bone of contention between the five bordering countries Russia, Kazakhstan, Turkmenistan, Azerbaijan and Iran after the collapse of the Soviet Union in 1991, to turn into an area of—literally speaking—fruitful cooperation in the legal sense? This question remains open for the time being, but we may have reason to hope, considering the recent state of the negotiations, that the long-awaited consensus can still be found.

More than 10 years after the collapse of the Soviet Union and the emergence of the newly independent republics of the Caspian Sea, a comprehensive solution to the problem of the international legal status of the Caspian Sea has still not been found. The unclear legal situation of the Caspian Sea and the consequent uncertainty of the coastal states about the issue of territorial demarcation, their uncertainty about the extent of their sovereign rights to the exploitation of natural resources and the uncertainty of the neighboring states with regard to shipping in the Caspian prevent continuous economic development of the region, destabilize political situation and result in a lack of security in the Caspian region.

The ineffective attempts to define the legal framework of the Caspian Sea should be explained by pointing to the existing deep differences between geopolitical and economic interests of the five littoral states. Along with the change of the geopolitical situation in the region after the collapse of the Soviet Union and the region's opening to international collaboration in the area of oil and gas resources, the Caspian Sea region has come to the center of attention even for China, the US and the EU, which has intensified the competition of powers existing in the region.

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1.2 New Phase of Caspian Negotiations Defines the Importance of Research

Only since the end of the 1990s, a new phase of development of the legal relationship between the Caspian littoral states has been emerging that could provide an answer to the pressing questions of the future status and regime of use of the Caspian Sea.

On the one hand, some progress in the multilateral negotiations on the Draft of the Convention on the future legal status of the Caspian Sea (further referred to as Draft Caspian status convention) has been observed in direct reference to the standards of international law. On the other hand, a not uncontroversial progress in bilateral legal relationships among the north Caspian littoral states has been reached regarding the division of the seabed of the Caspian Sea into sectors for exploitation of natural resources there (so called: North Caspian Agreements). The fact that those bilateral agreements regulate the legal relations in the parts of a region whose general status remains unclear raise legal doubts for Caspian littoral states not involved in these delimitation agreements. Then again, it seems that north Caspian countries have marked progress in clarifying the legal status of the Caspian Sea, which, indispensable as it is, is felt to be a generally positive phenomenon.

Another positive trend is reflected in the "step-by-step development" of new rules for the regimes of use of the Caspian Sea. This is evident in the regulation of the Caspian environmental regime. A positive example of this development, which may be mentioned here, is the Framework Convention for the Protection of the Marine Environment of the Caspian Sea signed in 2003 (further referred to as the Tehran Convention). Another example is the signing of Agreement on Security Cooperation in the Caspian Sea (further referred to as Caspian Security Agreement of 2010). This is dedicated, among other things, to fighting terrorism, drug trafficking, piracy, illegal migration and illegal exploitation of biological resources (poaching).

Although the development of bilateral relations between Caspian littoral states has delayed the process of multilateral negotiation to determine the overall status of the Caspian Sea, it has not prevented it. Even in the recent negotiations between all littoral states concerning the Draft Caspian status convention, new trends are visible. The Draft Caspian status convention is a result of legal negotiations between the coastal countries concerning the future status of the Caspian Sea, and thus it is not a binding legal agreement. However, it clearly demonstrates the will of the neighboring states to develop a legal status where international legal standards would be used as the basis. The analysis of its provisions shows that it comes down to creating a totally new legal framework for the Caspian Sea, which would refer to the provisions of the United Nations Convention on Law of the Sea of 1982 (further referred to as UNCLOS), but without applying the UNCLOS directly.

The current legal developments in the Caspian can be summarized as follows: first, there is progress in the multilateral negotiations on the Draft Caspian status convention, second, bilateral agreements are in progress and third, there is the

successful "step by step clarification" of individual regimes in the use of the Caspian Sea. All these suggest a new hope is rising for legal processes in the region. However, in relation to many aspects of the future legal status or legal regime, there is still no unified position of the coastal states. Nevertheless, regional development is visible, which confirms the importance of such an investigation into its details and shedding light on the current legal situation in the region.

1.3 Present State of Research into the Status and Regime of the Caspian Sea

The main part of the book will discuss recent legal developments around the legal issues concerning the Caspian Sea. It is argued here that the negotiating parties have moved far away from the legal-theoretical dilemma of whether the Caspian is a sea or a lake in a legal sense. This question seems to have lost its meaning in the light of the current evolution of the international relations between the countries bordering the Caspian Sea, as countries attempt to regulate all aspects of the legal use of the Caspian Sea independently in a Draft Caspian status convention. The provisions of the Draft Caspian status convention currently negotiated by the coastal countries are considered key sources revealing the current position of coastal states on the future of Caspian maritime transport, fisheries and other economic and military uses of the Caspian Sea, as well as its seabed and its subsoil. The analysis of this draft agreement represents the scientifically innovative part of this book.

To determine the current status of the negotiations between the neighboring states and the foreseeable developments of the legal conception of the future legal status and regime of the Caspian Sea, one shall also refer to relevant literature. One difficulty in this study is the lack of relevant and reliable literature that would represent and analyze the latest legal developments in a scientifically proven way. This does not mean, however, that there are no specialist publications on the legal status of the Caspian Sea. Quite the contrary, many professional publications by the representatives of both the local[1] and international law[2] doctrine, that deal with the topic have been published recently. However, most publications are limited exclusively to the discussion of contracts signed still in the 1920s and in 1941 between the USSR and Persia/Iran, and do not follow the latest legal developments that play a crucial role for the future of the region. One may often get the impression that many legal writers from the Caspian region strongly support political positions of their countries in the dispute over the Caspian Sea and thus contradict the principle of scientific impartiality.

[1] See: Barsegov (1998), Kolodkin (2002), Mamedov (2001a, b), Merzlyakov (1999), Ranjbar (2004), and Salimgerei (2003).

[2] See: Butler (1971), Chufrin (2001), Oude Elferink (1998a, b), Oxman (1996), Romano (2000), Uibopuu (1995), and Vinogradov and Wouters (1995).

The aforementioned lack of literature on the current developments in the process of defining the legal status and regime of the Caspian Sea is because of the practical difficulty of most legal documents that bear witness to it not being accessible to interested scientists. The existing documents are working drafts, for the most part only in a rough form and the negotiating states do not like to have them published so as not to predict the outcome of the negotiations. My access to many of these documents, often unpublished, was thanks to personal contacts with regional scientists who do research on the Caspian Sea.

The growing international interest in the exploitation of the natural resources of the Caspian Sea provides the justification and the reason for the continuation of research on the future of the legal status and regime of the Caspian Sea.

1.4 Structure of the Book

After a brief introduction to the geographical, political and economic conditions in the region presented in Chap. 1, an analysis of international legal obligations of the littoral states of the Caspian Sea will be carried out. In this context, it is particularly important to define and interpret the binding legal force of the agreements concluded between the USSR and Persia/Iran in light of the collapse of the USSR and continued existence of legal obligations arising out of the agreements concluded then for the newly created states (succession). Historical dispute over the qualification of the Caspian Sea as a sea, lake or condominium in legal terms, with analysis of legal consequences of such qualification as well were presented in a second chapter. Further, state practice of 1990s including the challenges for the regional cooperation after the dissolution of the Soviet Union, as well as peaceful ways of their resolution were presented: first: five-party negotiations on the convention on the legal status of the Caspian Sea, secondly: step-by-step conclusion of agreements on the use of natural resources, and thirdly: step-by-step multilateral regulations of the legal regimes in the Caspian Sea regarding protection of the marine environment of the Caspian Sea and security cooperation in the Caspian Sea were presented in Chap. 3. This book argues that the negotiating parties have left behind the legal-theoretical dilemma of whether the Caspian Sea is, in the legal sense, a sea or a lake, and the consequent legal implications. States seem to be exclusively concerned with the preparation of the draft, bilateral and multilateral negotiations and the above mentioned “step-by-step” approach focus.

Next chapters include legal analysis of particular aspects of the use of the Caspian Sea. Starting from Chap. 4, interrelations between territorial delimitations and the regime of the use of the Caspian Sea were presented, showing respectively non-legal aspects of settlement of the seaward boundaries in the Caspian Sea and following with elaboration on territorial delimitation and the state sovereignty in the Caspian Sea, state practice in delimitation of the Caspian Sea and prospects for the future division of the Caspian Sea. The ongoing debate of the coastal states to settle the delimitation issue takes two different forms: first, bi- and trilateral

agreements on sharing northern parts of the Caspian seabed for using resources located there, and second, multilateral negotiations on the future delimitation conducted in the framework of the Draft Caspian Status Convention. The latter shall define maritime zones in the Caspian Sea. However, there are still certain disagreements among the coastal states, especially regarding their sovereignty over maritime zones.

Chapter 5 reflects the regime for the use of non-living resources in the Caspian Sea—especially oil and gas—which significantly impact states' economic development's and bring coastal states to claim delimitation of maritime areas. This chapter defines existing reserves of non-living resources in the Caspian Sea and presenting existing international legal regulation of non-living resources. Further, it discusses the controversial claims on the rights to use non-living resources in the Caspian Sea and prospects of adopting new relevant legislation. Departing from the legal transformation from the Soviet-Iranian concept of *mare clausum* for the Caspian Sea it presents current developments including conclusion of bi- and trilateral agreements on using the northern parts of the Caspian seabed, and on the other hand, multilateral negotiations undertaken in the form of a convention on the Caspian legal status.

Chapter 6 on the legal regime of the living resources of the Caspian Sea starts from describing tensions between the protection of fish stocks and the oil industry in the Caspian Sea, and presenting of the existing regime of the living resources in international law. It discusses previous and existing regulations of fishing in the Caspian Sea as well as possible future regulations of the living resources in the Caspian Sea. Transition from the regime of common use during the soviet era up to the unclear stage of today resulted in extensive exploitation of the fish deposits and possible competing regulations offered by International Commission on Aquatic Resources of the Caspian Sea (ICARCS) and the Tehran Convention.

Seventh chapter on the legal regime of the pipelines in the Caspian Sea shows the existing status of pipelines in the Caspian Sea, which offer a sufficient way of Caspian oil and gas resources transportation to world markets. It refers to international law on pipelines as well as to future regulations on pipelines in the Caspian Sea. As the legal regime of Caspian maritime pipelines has never been subject to interstate agreements, but rather of a general practice of the Caspian states, it remains disputable whether and which parts of the Caspian Sea shall be covered by the coastal states' sovereignty, which would allow the coastal states to freely build transboundary Caspian pipelines.

Chapter 8 discusses the legal regime of maritime navigation on the Caspian Sea, being traditionally the most important regimes of the use of the Caspian Sea. It presents the legal regime of shipping in international law as well as the existing and possible solutions on Caspian navigation. Initial regime of freedom of shipping is valid until today, however the existing negotiations regarding differentiation in the scope of the shipping rights of third-party states typical for maritime zones existing in the law of the sea have not been settled yet.

Last chapter, ninth, elaborates over protection of the marine environment of the Caspian Sea. It begins with analysis of environmental principles applicable to the

Caspian Sea. Reflecting the structure of the most important act providing for the protection of the Caspian environment—the Tehran Convention and its ancillary Protocols—this chapter has been divided into parts regarding prevention, reduction and control of pollution in the Caspian Sea and protection, preservation and restoration of the marine environment. Further, it describes institutional framework for cooperation in the legal protection of Caspian environment and existing environmental procedures. With the adoption of the Tehran Convention, the states parties set specific environmental goals, but avoided taking on explicit commitments. The legally binding effect can only be achieved through the adoption of implementing protocols, something that takes place gradually.

This book does not present the national legislation of the Caspian Sea littoral states concerned, although it is locally referenced. The main reason for this arises from the subject of the research, which is restricted to international legal aspects of the regulation of the state and the regime of the Caspian Sea. Any provisions of national law can have no binding effect on the legal status of the third countries and thus cannot contain requirements for these third countries. Once the negotiations are finished and the Draft Caspian Status Convention will come in force, the national regulations concerning the law of the sea aspects of the Caspian Sea will have to be adapted directly to that Convention. This does not mean the significance of coastal States' national legislation on the use of the Caspian Sea and its resources, and its protection will be put into question. Quite the contrary: awareness of the importance of national legal solutions and their complexity, which cannot be fully analyzed within this book, encourages only local reference to the existing provisions, with the intention to avoid only cursory presentation of the complex national legal regulations.

Analysis on the legal status and regime of the Caspian Sea presented in this publication covers a period ending on 30 Mar 2014.

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Chapter 2
Geography, Politics and Economy in the Caspian Region

The following cursory description should present the geographical, economic, and political aspects of the development of the Caspian region as the question of the legal status and regime of the Caspian Sea is going to be explained against that background.

Until recently, neither Europe nor America nor China were interested in the huge Caspian Sea located in the barren steppes of Central Asia. Only its exceptional geographical size ensured continued interest of scientists. The Caspian Sea is the largest enclosed inland water area on earth.[1] It is bordered by Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan. While the large northern part of the Caspian is only about 6 m deep on average, its deepest point, located in the south, is 995 m below water level. The water masses of the Caspian Sea are fed by the rivers Volga, Ural and Kura. The Caspian Sea has no natural connection to the oceans today, but there is a navigable link to the Sea of Azov and thus the Black Sea, the Mediterranean and the Atlantic[2] through the Volga, the Volga–Don Canal and the Don River.

With the dissolution of the Soviet Union and the discovery of new oil and gas fields in the Caspian Sea, this region has become interesting to European countries as a potential source of raw materials. Also China and Japan have expressed their economic interests in the region. The interest of the USA is rather about expanding their sphere of influence in the post-Soviet space and pushing back Russia and Iran from the region. In this way, the entire Central Asia and the Caspian Sea have become a chessboard of world powers and thus got into the focus of international attention. In addition, the attack on the World Trade Center on 11 September 2001 moved north-western Central Asia, next to Afghanistan, into the public view. Thus,

[1] The Caspian Sea is longer than 1,200 km north to south and 300 km east to west on average (max 500 km). Its surface area is estimated at 436 km^2, but its water level is fluctuating. See: Brockhaus Enzyklopädie (2006), p. 650.

[2] See: Rabinowitz et al. (2004), pp. 19–40.

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the region of the Caspian Sea has become a geopolitically sensitive area, not only due to the issue of fighting terrorism but primarily because of access to the energy resources.

The current conflict around the Caspian resources has its origin in the so-called Contract of the Century of 1994, when the newly formed AIOC consortium of the Azerbaijani government signed—against opposition from the other coastal states—an agreement with western oil companies for 7.4 billion US dollars for the development of known oil fields. The income from the existing oil and gas resources represents the major part of the gross domestic product of the newly formed Caspian states and thus also forms an indispensable basis for independent political existence of those states, as for their further economic development. Therefore, Azerbaijan, Kazakhstan and Turkmenistan also call for final delimitation of the Caspian Sea and thus its legal division. Russia and Iran, however, want to keep control over the region as they have for centuries. Therefore, Russia is trying to avoid the loss of control over the oil and gas pipelines, which are the only way of exporting Caspian resources, and to prevent the construction of new pipelines.

In the geopolitical context the Caspian-Central Asian region has by no means the energy implications of the Persian Gulf and plays a smaller role in global energy security. The reasons for it are: firstly, by 2015 oil production in the littoral of the Caspian Sea could reach only 4–5 % of the world production. Other estimates of the Caspian reserves originating from the 1990s should be assessed as politically motivated exaggerations. Secondly, the transport of energy resources from the Caspian Sea to world markets is proving to be extremely difficult.[3] The development of additional oil and gas reserves in the Caspian region presupposes, however, that a large part of the energy is to be exported to international markets. For this, a strengthening of the existing infrastructure is needed. So far, exports have been handled over long overland routes, which might involve high costs (e.g. the railway transportation to Novorossiysk or to the Baltic ports). Some lines also pass via regions of long-standing political crisis (Chechnya). Due to the previous one-sided dependence on the Russian pipeline network there is interest in building alternative transit routes through Russia, but many of them are still in the planning phase. Besides economic reasons, pipelines are often determined also by political motives, such as with the attempt to control zones of influence in the region of the Caspian Sea. Central Asia is located as a connecting link in the heart of the Eurasian continent. The system of land transport in the region could again become a kind of silk route. Pipelines could play an important role in raising the logistic position of the region, and in this context the pipeline issue would be of paramount importance. There was a political motivation behind the US support for the idea of an "energy policy bridge" between Europe and the Caspian Sea, and thus the emergence of new pipelines from Baku through Georgia to Ceyhan, the Turkish coastal town. The project was concluded in May 2005 despite strong opposition from Russia. Since

[3] See: Seck (1998), pp. 169 et seq.

then, Caspian oil may reach the western energy markets bypassing Russia and Armenia.

Thirdly, the littoral states of the Caspian Sea are politically unstable. The clash of different interests and priorities of many countries has transformed the Caspian region in a politically sensitive area. For centuries the Caspian region has been characterized by the interaction of different ethnic, socio-cultural and religious traditions which make today's geopolitical situation even more complicated. The conflicts that exist today can be broken down into the following groups: geopolitical, geo-economic, ethno-territorial, military-strategic, environmental law and religious conflicts.[4] An additional factor of political instability in the region is the never excluded possibility that elites of the neighbouring states, west-oriented today, could be replaced overnight by ones that are hostile to the western powers. Finally, the miserable economic situation of the coastal countries blocks the way for needed foreign investment in the infrastructure in the Caspian region. So far, it has been possible to avoid military conflict, but there can be no certainty of a lasting political stability in the region.

So why is that remote region of such a great strategic importance? Why did the United States count the Caspian region among its strategic national interests in the 1990s? Obviously, there are other reasons than those previously mentioned, such as the main considerations of the international community when it comes to the importance of the Caspian Sea for global energy security. The decisive factor seems to be the new balance of power that has developed. The contemporary struggle for oil and gas resources is sometimes referred to as the new Great Game played in the nineteenth century by Russia and the United Kingdom. The Caspian region determines the future of US–Russian relations because, just like in Eastern Europe, the interests of the two former antagonists clash seriously in that region. The oil factor has become a driving force in Russian politics. The goal of the US seems to be to prevent Russia from restoring its former empire in the south of the Commonwealth of Independent States (further referred to as CIS).

In the 1990s, the European Union discovered its potential interests in the Caspian region. The EU's main motive for action was to ensure the diversification of its own energy supplies to avoid economic and political dependence. Another reason was also the commitment of both Europe and the US, motivated by the intention to support and to promote political stability in the Caspian region. On the one hand, the US and the EU tried to integrate the Caspian littoral states into military cooperation with NATO as part of the "Partnership for Peace" program and to move them closer to the Turkish sphere of cultural and economic influence. On the other hand, the EU provided financial support for the development of market economy in the post-Soviet republics of the Caspian region through programs such as "TACIS" or "TRACECA," with the aim to support the democratization process in the region.

[4] See: Zonn (2003), pp. 161 et seq.

Another geostrategic issue are the routes for transportation of resources.[5] While the oil companies, for financial and security reasons, prefer the route through Georgia and the Bosporus, Azerbaijan wishes to use a pipeline to Turkey. For the latter, a pipeline to the Mediterranean Sea is the main goal. Iran's position as a geo-economic center of the region depends on US attitude to Iran's involvement in the logistics of exporting raw materials from the Caspian. The role of the region will be significantly affected by the new actors, especially China and Japan. To them, the Caspian Sea is going to play a leading role in the future supply of strategic raw materials for Asia. For the new littoral states of the Caspian Sea, their countries' oil and gas resources are the only way of stopping economic decline. Oil has been a political weapon in the struggle for independence.

Due to various problems after the collapse of the Soviet Union and the correspondingly growing international economic as well as political interest in the region, the solution of the question of a viable legal status of the Caspian Sea seems to have become inevitable. The Caspian Sea may however need to wait a long time for the legal regulation of its problems. In any case, until its coastal states understand that legal clarity and stability is a key to a comprehensive development of the region.

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[5] See: Chufrin (2001).

Chapter 3
Legal History and the Present State of Use of the Caspian Resources

3.1 Introduction

The name of the "Caspian Sea" does not uncover its legal status of today. The name "Caspian" comes from one of the tribes of "Caspian" who once inhabited the west coast of the Caspian Sea. Previously, the Caspian Sea was alternately designated nearly 40 different names, which either had an ethnic origin (e.g. in the Russian zone: Hvalinsk Sea, in the Persian zone: Hazar Sea), or referred to by the name of coastal cities or states (Baku Sea, Girkan Sea, Abeskun Sea).[1] The term "sea" for the Caspian Sea does not have any legal reference. The ancient scientists and geographers such as Herodotus, Aristotle and Eratosthenes designated the Caspian Sea as a closed basin or an ocean bay. These traditional notions have clearly geopolitical, but without legal significance.[2] In the nineteenth century, thanks to the conclusion of Russian–Persian treaties, the first reference regarding the legal status of the Caspian Sea was made. The provisions introduced after the First World War, which remain in force until today, have many omissions or are partly obsolete. Consequently, based on the Soviet–Iranian agreements and regional customary law, the current legal principles governing the Caspian Sea neither give a clear understanding of the legal status of the Caspian Sea, nor longer appear sufficient to deal with the new complex of political, economic and environmental problems. This would suggest the need for a new set of provisions regarding the Caspian's legal status.

The concept of legal status has to define the scope of a particular state's sovereign power over the water area in question. It defines how much rights and obligations and to what extent a state may exercise over a relevant territory. It is

[1] See: Jiloe (1960), pp. 94–95.

[2] See: Gull (1960), pp. 90–91.

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important for proper comprehension of this analysis to draw a distinction between "legal status" and "legal regime."[3] In modern international law, both of these terms are applied in the legal regulation of international lakes and seas. Qualification of a pool of water to one of the two categories above—a sea or a lake—is of essential importance for determining both the status and the legal regime of the pool in accordance with, respectively the law of the sea (for water pools qualifying as seas) or international water law (for pools qualifying as international lakes). Therefore, the term "legal regime" is defined in contrast to the legal status as particular set of rights and obligations of the states with respect to the use of the relevant area. The Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention) is, for instance, classified as a regime issue.

3.2 Russian–Persian Treaties Concluded Until the Nineteenth Century

Until the end of the twentieth century the political arena of the Caspian region was alternately overwhelmed by Persia and Russia. The Persian reign in the Caspian region began in the eighth century with the Abbasid dynasty and was challenged only after almost a thousand years by tsarist Russia, and finally overthrown by Peter the Great in his first Persian campaign in 1722–1723.[4] At that time the first agreements between Russia and Persia were concluded, which shall be seen as the beginning of the formation of an international legal status of the Caspian Sea. These treaties, however, included no reference to the use of the Caspian Sea and its resources.

In the Treaty of St. Petersburg of 12 September 1723 Persia lost Derbent, Mazandaran, Astarabad and Baku to Russia and thus practically enforced Russia's exclusive navigation rights on the Caspian Sea.[5] The subsequent cooperation Treaty of Rasht of 1729 on the demarcation and cession of certain territories, which provided for freedom of commerce and navigation, transferred to Persia its coastal areas previously conquered by Russia and allowed Persia once again direct access to the Caspian Sea. Further limitation of the influence of Persia in the Caspian Sea after two wars lost by Persia against Russia was reflected in two treaties concluded with Russia, the Treaty of Golestan of 1813 and the subsequent Treaty of Turkomanchai of 1828. They provided Russia with the exclusive right to have a naval fleet in the Caspian Sea.[6] Persia received merely rights of navigation in the Caspian Sea and its commercial vessels were allowed to call at Russian port facilities. The treaties laid the legal regime of navigation in the Caspian Sea for the

[3] See: Kolodkin (2002a).

[4] Mamedov (2001a), pp. 109–114.

[5] Diplomatic Dictionary (1985), p. 483.

[6] Art. 5 of the Golestan Treaty of 1813 and Article 8 of the Turkomanchai Treaty of 1828.

first time. The use of natural resources, however, remained unregulated. The question of state borders between the coastal states was not clarified either, and thus the legal status of the Caspian Sea remained unresolved.

Both treaties remained in force until the period after the First World War. Attempts were made to indirectly replace the lack of explicit regulation of maritime borders within the Caspian Sea through the settlement and extension of land borders over the maritime areas. On 9 December 1881[7] and on 27 May 1893[8] two treaties were signed between Persia and Russia, which determined the land borders between the two states eastwards from the Caspian Sea. Article II of the first one said that the exact line of the inter-state border would be settled by special commissioners appointed by the parties. The treaty mentioned Astara and Hosseingholi as end-points of the boundary lines on the shores of the Caspian Sea. Although the line between Astara and Hosseingholi served exclusively as a land border, some authors developed the idea that the extension of this line should be seen as a maritime boundary in the Caspian Sea between the two states.[9] However, as this concept was not of a contractual nature it required a legal determination to reduce the potential of conflict between the coastal states. This happened only partially after the First World War, thanks to the conclusion of new agreements between the Soviet Union and Iran and respective interstate practice.

3.3 Legal Heritage of the Twentieth Century in the Caspian Region

The Treaty on Friendship and Cooperation between the Russian Soviet Federative Socialist Republic (RSFSR) and Persia adopted on 26 February 1921 (further referred to as 1921 Treaty) abolished their bilateral legal relations established in the nineteenth century. This agreement was the first one of a series of bilateral treaties completed between the USSR and Iran to regulate the use of the Caspian Sea. It remained one of the main sources of law in the Caspian region and basis for bilateral relations between the two states. The objective of the agreement of 1921 was the restoration of friendly relations between the two nations ("friendship and brotherhood" according to the original wording of the agreement). With the intention to abolish the hostile policy of the tsarist government against Persia, the treaty recognized existing borders and advocated for avoidance of interference in the internal affairs of each other (Article 2–4). Except for the restoration of Persia's equal rights of navigation it did not specifically address the issue of the legal regime

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[7] Article 1 of the Convention between Persia and Russia of 1881.

[8] Article III of the Convention between Russia and Persia for the Territorial Interchange of Faruze in Khorassan, belonging to Persia, and Hissar, within the confines of the Transcaspian Region, and Abbas Abad, on the right bank of the River Araxes, belonging to Russia.

[9] See: Polat (2002), p. 151.

of the Caspian. Natural resources were mentioned only in connection with the renewal of fisheries agreements. The treaty introduced equality of both parties regarding the navigation in the Caspian Sea (Article 11) recognising Persia's rights to keep war ships in the Caspian Sea. In addition, the Persian government recognized the great importance of the Caspian fisheries for food supply in Russia and respectively promised to conclude new fishery treaty with RSFSR (Article XIV). As a result of this commitment, a treaty regarding fishery on the southern Caspian coast was signed on 1 October 1927.[10] It stipulated that commercial fishing rights seawards of the coastal zone of 10 nautical miles would belong exclusively to a company 50 % of which would be owned by one of the parties (Article 5). This agreement was concluded for the period of 25 years and was not prolonged by Iran.

During the 1930s, increasing navigation and fishing in the Caspian Sea resulted in bilateral negotiations to develop the existing legal framework. When it goes for navigational issues, the 1935 Treaty of Establishment, Commerce and Navigation between Iran and the Union of Soviet Socialist Republics (further referred to as 1935 Treaty) first replaced the Convention of Establishment, Commerce and Navigation of 27 October 1931[11] (further referred to as 1931 Treaty), but in 1940 it was replaced by the Treaty of Commerce and Navigation between USSR and Iran[12] (further referred to as 1940 Treaty). The Treaty of 1940 was initially adopted with a validity of 3 years, but because no party terminated it, the treaty entered into force for an unlimited period and retains its validity until today.

In both the 1935 and 1940 treaties, states reserved navigation (military and merchant) as well as fishing for vessels flying their flags. They therefore excluded third states from the Caspian Sea and restricted the rights of innocent passage of ships of these other states. Nationals of third states were not even allowed to be crew members or port personnel (Article 139). Also, equal treatment of all vessels calling at, staying and leaving ports, as well as equal charges for services were guaranteed for ships flying the flag of a contracting party (Article 12). Both treaties provided for freedom to fish for both states in the entire Caspian Sea, except within a 10-mile zone along their respective coasts, where each state had exclusive fishery rights. Beyond the fishing zone both countries enjoyed unrestricted freedom of fishing for their residents.

Other activities, such as marine scientific research were not mentioned in the 1940 treaty. The coastal states did not resolve the issue of boundary lines in the Caspian Sea, thus the question of territory covered by the national sovereignty of the littoral states, including over the use of natural resources in the Caspian Sea

[10] Agreement regarding the Exploitation of the Fisheries on the Southern Shore of the Caspian Sea, with protocol, and Exchange of Notes.

[11] In Article 16–17 it bars from traffic and fishing in the Caspian Sea all ships that do not fly the flag of the USSR or Iran.

[12] The term Persia was in use for centuries and was originally dedicated to the Persis (Pars or Parsa also, as modern Fars) which is a well region in southern Iran. However, the Persians themselves called their country "Iran," meaning "a land of Aryans." The name Iran was officially adopted in 1935. See: "Persia." Encyclopædia Britannica (2005).

remained unresolved. Oil and gas exploration and drilling in the areas adjacent to the coast was mentioned in the Treaty in a highly unclear way. Iran agreed to grant to the USSR on its territory "the right to set up petrol pumps in Iran and to construct petroleum storage depots and other buildings necessary for dealing in petroleum and its products," in conformity with existing laws and regulations in Iran [Article 9 (8)]. The common principle of the Treaty is exclusivity of the rights of the coastal states regarding the use of the Caspian Sea, including its natural resources. This was based on the legal assumption that the Caspian Sea is a "Soviet–Iranian Sea" with exclusive rights to shipping and fishing, as well as other usage of the Caspian Sea. The non-littoral states in the Caspian region were refused any rights to the use of the Caspian Sea, which was repeatedly expressed in the official correspondence between the USSR and Persia/Iran.[13]

With the adoption of bilateral treaties between the USSR and Persia/Iran in 1921 and 1940, a final basis for the rights and obligations of coastal states was settled. As they were merely partially complete and regulated only the legal issues of shipping and fishing in the Caspian Sea, the lawful behavior of the littoral states was guided by local custom. After the collapse of the Soviet Union the ambiguities regarding the legal status of the Caspian Sea caused long term legal dispute by the coastal states regarding interpretation of these treaties as well as their binding status.

The long and fruitless legal debate of the 1990s over the framework of the legal status of the Caspian Sea regarded the main question, which was whether the Soviet–Iranian treaties provide for the status of the Caspian Sea as a lake or a sea in the legal sense, and thus which of the international set of principles—characteristic for an international lake or a sea—should be applicable for the future status of the Caspian Sea. This issue, however, was completely disregarded in the later practice of the coastal states, especially in light of the tendency to absorb the principles of applicable law of the sea and their inclusion into the Draft Caspian Sea Convention. Additionally, some states have concluded bilateral agreements concerning separate aspects of the use of the Caspian Sea, where the issue of a sea or a lake was not addressed.

New geopolitical situation in the region after the collapse of the Soviet Union created a new legal situation, which opened a long term dispute regarding the binding force of the Soviet–Iranian Treaties of 1921 and 1940 for the new littoral states of the Caspian Sea. Despite frequent denials of their legal binding force by the newly independent states, these agreements remain valid and shall be accepted as a basis for the interpretation of the legal status of the Caspian Sea, which will be shown in the following chapter.

[13] Exchange of Notes between the Persian Foreign Minister and the Soviet Ambassador, 27th October 1931, in: British and Foreign State Papers, volume 134, pp. 1045–1046; Exchange of Notes between the Soviet Ambassador at Tehran and the Iranian Minister for Foreign Affairs, 27th August 1935, in: Soviet Treaty Series (1950), vol. II, pp. 145–146; Exchange of Notes between the Soviet Ambassador at Tehran and the Iranian Minister for Foreign Affairs, 25th March 1940 in British and Foreign State Papers, vol. 144, p. 431.

3.4 State Succession and the Soviet–Iranian Agreements

With the creation of the Commonwealth of Independent States according to its founding agreement of 8 December 1991 and the Alma-Ata Protocol[14] of 21 December 1991 signed by 11 former republics, the Soviet Union ceased to exist. However, the questions regarding the succession of the newly independent states into the international treaties concluded by the USSR and their binding force for the successor states, remained disputable for many years. A background for the discrepancies comes out of the fact that the nature of the succession of the former Soviet Union is controversial to scientists and politicians.[15] It is put forward by the former Soviet republics around the Caspian Sea—Azerbaijan, Turkmenistan and Kazakhstan—that agreements concluded by the USSR, including the Soviet–-Iranian treaties of 1921 and 1940, lost their validity after the collapse of the Soviet Union. Therefore, the rights and obligations incorporated in these treaties were no longer binding for the newly established states. As a basis for this assertion it is particularly emphasized that under international law the USSR no longer exists as a contracting party.[16] The lack of their legal validity is also disputed because these treaties did not define boundaries between the former Soviet republics neither settled the legal status as a whole, referring merely to the issues of fishing and navigation.

Support for the above mentioned view would mean—something that one can hardly agree with—that since the collapse of the Soviet Union the Caspian Sea is in a legal vacuum and needs an entirely new regulatory system. The legal consequences of states' succession are regulated by the Vienna Convention on Succession of States in respect of Treaties promulgated in 1978.[17] Although this convention was not signed by any of the Caspian littoral states and neither is it recognized as part of customary international law by the scientific community, it still may constitute the main reference point for the solution of the question of the succession of states in the Caspian region.[18] The Vienna Convention on the Law of Treaties concluded in 1969,[19] which defines the conditions under which international agreements no longer apply, is not applicable to the dispute around the Caspian Sea. This agreement does not apply in cases of border treaties and therefore cannot be used for the assessment of validity of the Soviet–Iranian Treaties of 1921 and 1940. These treaties, although they did not refer directly to state borders in the

[14] ILM 31 (1992), Nr. 1, S. 147–154.

[15] As an example, the Baltic States may be mentioned, which are of the legal opinion they had been illegally occupied by the Soviet Union, but during the period of occupation they continued to exist *de jure* as subjects of international law. They could not be considered as successor states of the Soviet Union, see more detail: Schweisfurth (1992).

[16] Position of Kazakhstan on the legal status of the Caspian Sea, in: UN Doc. A/52/424, p. 3.

[17] ILM (1978), vol 17.

[18] Ipsen (2004).

[19] Art. 62 II a.

Caspian Sea, were aimed at delineating the spheres of influence of the neighboring states intentionally leaving the boundaries in the Caspian Sea open.

The Vienna Convention on Succession of States in respect of Treaties (Article 34 I a) states that "when a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist, any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed." This basic principle provides that the newly established states remain bound by the agreements of the predecessor. There are two exceptions to the general rule: first, when the states concerned agree otherwise (Article 34 II a) and second, when it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

For the newly independent Caspian littoral states of Azerbaijan, Kazakhstan and Turkmenistan questioning the validity of the Soviet–Iranian treaties this provision of the Vienna Convention on Succession of States in respect of Treaties means that they remain bound by the former agreement of its predecessor state. Additionally, the newly independent states have expressed public statements explicitly reaffirming their consent to the treaties adopted by the Soviet Union. The CIS Founding Agreement of 8 December 1991 in its Article 12 includes a clear commitment of the newly independent states to fulfil the obligations deriving from the treaties and agreements concluded by the former Soviet Union. This confession was repeated the same day regarding commitments towards the third countries in the Minsk Declaration[20] and in the Alma-Ata declaration. The latter guaranteed "the discharge of the international obligations deriving from treaties and agreements concluded by the former Union of Soviet Socialist Republics."

With the collapse of the Soviet Union there was some legal confusion whether this process shall have been assessed as secession—which implies that the predecessor state remains a subject of international law but experiences a changed territorial status—or a dismembratio—which implies a complete dissolution of the predecessor state and the creation of several new states on its territory. Russia claimed for itself not to be a successor state to the USSR but to be a "continuator state"[21] of USSR. Such a special status seemed to be confirmed by Russia overtaking USSR's seat on the United Nations Security Council. Unlike the other former Soviet republics, only Russia was not in need to receive recognition of third

[20] Europa-Archiv 1992, episode 8, p. D 302.

[21] e.g. Russian–British memorandum on consular missions of 30th January 1992, see Bulletin of International Treaties, 1993, no. 1, p. 33; Declaration on Russian–Japanese relations of 13th October 1993, see Bulletin of International Treaties, 1994, no. 2, p. 66. However, at the same time in other international legal writings it presents itself as a successor, see Unilateral acts of Russia: Government Decision of 11th March 1994, in: SAPP 1994, no. 12, pos. 983; International legal acts of Russia: The Protocol to the troop withdrawal agreement with Poland on 22nd May 1992, Bulletin of International Treaties, 1994, no. 2, p. 10.

countries.[22] Some authors refer also to the fact that Russia was the only Soviet republic which did not make any declaration of independence, which shall be understood that all republics split apart from the USSR, but not Russia, which continues the USSR.[23] This argument is contradicted by the finding that the declarations of independence at that time did not mean separation from the USSR. Russia was also one of the states-parties to the CIS founding agreement, which terminated USSR's founding Treaty of 1922.[24] However, Russia never claimed legal continuity of the Soviet Union for itself.[25] Therefore it is to say that the division of the USSR was a dismembratio and all CIS countries, including Russia, are successor states of the USSR. Thus, there is no subject identity between the former Soviet Union and today's Russian Federation.

The renunciation of the existing, though still incomplete, legal status of the Caspian Sea is linked to the question of the newly independent states' legal succession under the Vienna Convention on succession of States in Respect of Treaties. Thus in the Caspian Sea case, the rights and obligations of the predecessor state—i.e. the former Soviet Union—and its successors arising from international legal acts—incl. Treaty of 1921 and Treaty of 1940—are equally binding on both.

3.5 Legal Interpretation of the Soviet–Iranian Treaties

Recognition of the validity of the Soviet–Iranian treaties for the newly independent states of Azerbaijan, Kazakhstan, Russia and Turkmenistan, is an important but insufficient assumption for defining the current legal situation in the Caspian Sea. Incompleteness of the Treaty of 1921 as well as of the Treaty of 1940 caused their inconsistent interpretation by the newly established Caspian nation states. It led to the debate over the legality of the measures taken by States in the Caspian Sea.

In 1991, after the disintegration of the USSR, three newly independent Caspian states—Azerbaijan, Kazakhstan and Turkmenistan—challenged the legal validity of the Caspian treaties,[26] which had remained uncontested legally, either by the international community or by any of the signatory states, for several decades. The renunciation of the existing, though still incomplete, legal regime of the Caspian Sea was linked to the diverging negotiating positions adopted by the Caspian coastal states because of the historical-legal ambiguities of status of the Caspian Sea as a sea, lake or condominium.

The official adoption of an unequivocal interpretation of the legal character of this body of water by the negotiating states—as a sea, a lake or a condominium—would

[22] Ibid., pp. 175 et seq.

[23] See: Antonowicz (1991–1992), p. 824.

[24] See: Schweisfurth (1992), pp. 172–173.

[25] See: Schweisfurth (1996), p. 174.

[26] See: Vylegjanin (2000), p. 165.

have a serious impact on the scope of rights and obligations of the Caspian littoral states, also in respect to the Caspian resources. It would become basis of the legal interpretation of the existing Soviet–Iranian treaties of 1921 and 1940. The scope of rights and obligations recognized in such a way would remain valid until the Soviet–-Iranian treaties would be replaced by new rules. The monitoring of the development of the current debate suggests, however, that the Caspian does not appear to fall into either category. One could even argue that the question of legal classification of the Caspian Sea is no longer on the agenda of the Caspian intergovernmental negotiations over the future convention on the legal status of the Caspian Sea. The outdated character of this approach is visible through conclusion of treaties separately regulating single regimes of the use of the Caspian Sea. Nevertheless, a cursory overview of this legal debate of the 1990s appears to be required to present a full picture of the development of legal relations in the Caspian Sea.

3.5.1 Caspian Sea as "Sea"

The concept of the Caspian Sea as a sea in legal terms can be traced back to the state practice of the Soviet Union and Iran since the conclusion of the treaties of 1921 and 1940. In the jurisprudence of that time in both countries the Caspian Sea appeared as the so-called "closed sea." As Iran and the USSR were exclusive coastal countries, they saw the Caspian Sea as a Soviet–Iranian "closed sea." Accordingly, they took the position that the Caspian Sea was under the full sovereignty of the littoral states and remained closed for the access of other countries. However, the former littoral states differed among themselves in interpretation of the concept of a "closed sea."

The concept of the Caspian Sea as a closed sea founded on the Russian legal doctrine concerning the Caspian Sea was established in the nineteenth century[27] and was followed throughout the Soviet period.[28] Extensive Soviet[29] and foreign literature[30] from this period represented the legal assessment of the Caspian Sea as a closed sea. An identical legal understanding of a closed sea was applied by the USSR to the Black Sea.[31] A most significant feature of the Soviet legal doctrine of the closed sea was the recognition of exclusive sovereignty of the coastal states. According to this approach, the coastal countries are allowed to define by an international agreement the legal status and the regime of the closed sea. Thus, the contracting states were allowed to mutually determine the rights and obligations regarding the use of the sea. In case of absence of such an agreement, the states

[27] See: Mamedov (2001a), p. 126.

[28] See: Butler (1971), pp. 121–125.

[29] See: Belli (1940), p. 75; Kozhevnikov (1957), p. 222.

[30] See: Ngock Min Nguyen (1981), p. 36; Brown (1970), p. 97.

[31] See: Darby (1986), p. 685.

exercised their sovereignty within the territorial waters and the regime of the central parts of the water basin resembled the regime of the high sea. The Soviet closed sea concept was considered at the international level as restrictive for the commercial and military activities in certain maritime sectors for the representatives of the coastal states.[32] Thus, the introduction of this concept into the draft of the Geneva Convention on the high seas was prevented by the U.S., Britain and other countries.

Iran supported the closed sea doctrine, both in its national legislation and on an international level. In 1955 Article 2 of Iran's National Law on Exploration and Exploitation of the Continental Shelf of 1949 was supplemented by the provision that the international rules regarding the closed seas are applicable in the Caspian Sea.[33] Some authors claim that the only purpose of this controversial legal concept was to emphasize the difference between the regime of the Caspian Sea and other waters.[34] In 1974, Iran officially reaffirmed its previous assessment of the Caspian Sea as a closed sea, by pointing out that the notion of "closed sea" shall not be confused with the concept of the enclosed sea defined in UNCLOS (Article 122).[35] The difference between the concept of "enclosed sea" and "closed sea" was that the last one is not entirely closed.[36]

The Soviet–Iranian concept of a "closed sea" is a legal concept originally drafted by the former Caspian littoral states, which should not be confused with the "enclosed sea" within the meaning of the UNCLOS. According to the international law "closed sea" means a sea that has no connection to the world ocean and is surrounded by two or more states. The closed seas are excluded from the provisions of the Convention of 1982 and thus remain entirely under the exclusive control of the littoral states, which may exercise their sovereignty without any restriction either in the entire sea or its parts. This position was represented in intergovernmental negotiations by Kazakhstan right after the dissolution of the USSR. The basic difference of legal positions regarding the "sea related" status of the Caspian Sea represented by Kazakhstan and Russia–Iran's concepts was the classification proposed by Kazakhstan to define the Caspian Sea as an "enclosed sea" according to the understanding of UNCLOS. An official letter from the Permanent Representative of Kazakhstan from 1997 to the Secretary General of the United Nations[37] proposed to apply individual provisions of UNCLOS to the Caspian Sea, considering the specific characteristics of the Caspian Sea. The seabed of the Caspian Sea and its resources would be delimited by all coastal states along the middle line.

[32] See: Butler (1971), pp. 116–133.

[33] National legislation and treaties relating to the law of the sea, New York: UN, 1974. XXXIV, p. 151 Document Symbol: ST/LEG/SER.B/16 (Art. 2 note).

[34] See: Mehdiyoun (2000), pp. 178–189.

[35] For the purposes of the UNCLOS Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

[36] See: Nordquist (1985), p. 348.

[37] UN Doc. A/52/424, UN Doc. A/51/529.

Each coastal state would perform the exploration and exploitation in its economic zone independently. The exploitation of resources located within the economic zones of two different Caspian states should be the subject of a separate bilateral agreement. The Parties should agree on the width of coastal waters and the fishing zone remaining under national jurisdiction. The areas seawards of these zones should remain open for navigation of ships of the Caspian littoral states. Also the airspace over the Caspian Sea is open to all aircraft flying along the agreed routes. Fisheries and use of other biological resources would be carried out in fishing zones according to quota and a licensing system. Furthermore, Kazakhstan suggested that states surrounding the Caspian Sea should enjoy the right to use Russia's waterways to get access to other lakes and oceans, upon a separate agreement with the Russian Federation.

Today merely Iran, which calls for an equal division of the Caspian Sea among the five littoral states, seems to still support the concept of the "closed sea." Neither Kazakhstan nor Russia classifies the Caspian Sea according to the existing legal concepts. With the completion of the North Caspian agreements[38] at the end of the 1990s, and with the tough negotiations on the status of the Caspian Sea, the two neighboring states seem to be satisfied with the unclear status of the Caspian Sea and only the question of the Trans-Caspian pipelines remains inconsistent in their positions.

3.5.2 Caspian Sea as "Lake" in Legal Terms

One of the most determined advocates of the concept of the Caspian Sea as an international lake is Azerbaijan. Its legal position was presented to the other coastal states by the end of 1994 in the form of a draft Convention status.[39] The Caspian States were encouraged to bring about mutual understanding for the elaboration of a new legal status of the Caspian Sea. Due to its physical–geographical conditions the Caspian Sea was defined as a border lake, being an internal continental closed basin without natural connection with the ocean. Azerbaijan proposed to divide the Caspian Sea into national sectors. Sector should be understood as a part of the water area and of the seabed adjacent to the coastal State seawards of coastal waters being an integral part of the coastal state. Thus proposed sectors shall be covered by states' sovereignty. Their borders should be delimited according to the middle line principle on which each point is equidistant from the coast.

According to international law, the determination of the legal regime of a border lake is left exclusively to its neighboring states because there is no international convention that would regulate this issue in a universally binding way. Border lakes

[38] See Sect. 4.4.

[39] Draft of the convention in Records of the Foreign Office of the Azerbaijan Republic, in: Mamedov (2001b), p. 224.

are part of the internal waters of a country. The usage rights, environmental protection, water management and the shipping etc. are left to bilateral or multilateral agreements between the coastal states. The UNCLOS enjoys no direct application to a boarder lake; however, some of its legal principles may serve as guidance.

With only a few exceptions in the international practice, border lakes are divided among coastal states. In respective intergovernmental agreements states define borders of their national sectors, which are covered by their sovereignty. There are some standard methods of sector delimitation: "thalweg," "coastal line" and "middle line." The thalweg, a line of the lowest elevation within a watercourse, is a method often used for delimitation of international rivers and rarely for border lakes.[40] The principle of coastal line is usually applied in the practice of colonial countries and was later replaced by the principle of the middle line.[41] Other delimitation methods applicable to international lakes are: astronomical line,[42] straight line,[43] coastal line,[44] and historical boundaries.[45] In the international practice of border lakes the generally used method[46] is the geographical middle line,[47] and in the case of complex coastlines (with islands, peninsulas, etc.) the formal middle line.[48] However, there is no uniform practice in international law to delimit border lakes using the middle line.[49]

The Lake Constance (in German known as Bodensee) has a yet different legal status. There is, however, no consent of the three littoral states on how to define it. After the dissolution of the Holy Roman Empire of the German Nation in 1806 only the treaties on the use of Constance Lake were adopted, but the boundary lines were left undetermined.[50] The unclear and conflicting declarations of intent

[40] The US Supreme Court Minnesota v Wisconsin [1920] 252 US 273; Concerning Borgne See, in: The US Supreme Court Louisiana v Mississippi, 1906, 26 p. Ct. 408,571 and 202 US 1, 50, 58.

[41] In case of the Lake Malawi: Anglo-German Agreement of 1890 and Luso-British Agreement of 1891, Anglo-Portuguese Agreement of 1954; In case of the Caspian Sea: Treaty of Turkmenchay of 1828, Treaty of 1940.

[42] In case of the Lake Victoria (Uganda, Kenya, Tanzania): Anglo-German Agreement of 1890; partly in case of the Lake Chad (Chad, Cameroon, Niger, Nigeria): Anglo-French Conventions of 1898 & 1904 & 1906; In case of the Lake Prespa: Florence Protocol of 1926; In case of the Lake Tanganyika (Tanzania, Burundi, Congo): English–Belgian Protocol of 1924.

[43] In case of the Lake Ohrid: Florence Protocol of 1926; In case of the Lake Doyran: Border Treaty between Yugoslavia and Greece of 1959; Lake Khanka: Convention of Peking of 1860.

[44] In case of the Lake Ladoga: Moscow Peace Treaty of 1940.

[45] In case of the Neusiedler See: Treaty of Trianon of 1920.

[46] See: Verdross and Simma (1984), §1055.

[47] In case of the Lake Malawi (Nyasa): British–Portuguese Agreement of 1954; In case of the Lake Lugano: Switzerland–Italy Agreements.

[48] In case of the Lake Geneva: Convention between Switzerland and France on the Determination of the frontier in Lake Geneva of 1953; In case of the Lake Albert (Uganda and DRC): London Agreement of 1915.

[49] See: Pondaven (1972), pp. 59–108.

[50] See: Schweiger (1995), pp. 65 et seq.

expressed by the shore states do not allow determination either of a condominium regime or delimitation of the Lake Constance.[51]

The only example of a border lake, which is regulated by condominium status, is Lake Titicaca.[52] According to the Agreement for the boundary correction of 17 September 1909 between Peru and Bolivia (Tratado de Rectification de Frontieras) and its Additional Protocol of 2 June 1925, the lake was originally divided among the shore states.[53] This regulation was, however, afterwards amended by a treaty of 19 February 1957 (Convenio para el studio economico preliminar de aprovechamiento de las aguas del Lago Titicaca) regulating efficient use of waters. The Treaty introduced "indivisible and exclusive condominium over the waters of Lake Titicaca" between Peru and Bolivia "without amending the fundamental conditions of navigation, fisheries and water column" (Article 1).[54]

The considerations of the Caspian Sea when classified as an international lake can be summarized as follows: originally Azerbaijan defined the Caspian Sea as a border lake and called for its division into national sectors along the middle line. This request *de lege ferenda* was followed by an admission of primarily western oil companies to work in the claimed Azerbaijani sector of the Caspian Sea upon the so-called Contract of the Century. Nowadays, with the completion of the North Caspian treaties, Azerbaijan position regarding the final status of the Caspian Sea argues that regardless of any applicable legal concept the use of Caspian resources should not be hampered.

3.5.3 The Caspian Sea as "Condominium" in Legal Terms

According to the theory of condominium a border sea is under the joint political authority of all coastal states, which are equally sovereign in the sea. This view was represented by Russia[55] and Iran in the early 1990s. Also Turkmenistan occasionally supported the regime of the Condominium for the Caspian Sea,[56] but its position was often subject to change.[57] Russia and Iran claimed that the existing

[51] See: Frowein (1990), p. 216.

[52] See: Barsegov (1998), p. 8; In case of the Lake Titicaca (between Peru and Bolivia): Lapas Protocol of 1925 and of 1932; Originally also in case of the Lake Mirim (Treaty between Brazil and Uruguay Modifying their Frontiers on Lake Mirim and the River Yaguaron, and Establishing General Principles of Trade and Navigation in those Regions of 1909); In case of the Lake Skadar (between Yugoslavia and Albania): Florence Protocol of 1926.

[53] See: Garcia (1996), pp. 260–281.

[54] See: Pastor Mendoza (1958), pp. I et seq.

[55] See: Oude Elferink (1998), pp. 25–42.

[56] UN Doc. A/53/453 from 2nd October 1998.

[57] UN Doc. A/52/93 from 17th March 1997, in the letter to the UN Secretary General they reported the joint declaration of 27 February 1997, where they mutually recognized the right of exploitation of natural resources of the Caspian Sea. UN Doc. A/55/309 from 22nd August 2000, in the letter to

status of the Caspian Sea shall be defined based on the Soviet–Iranian treaties of 1921 and 1940, which do not provide for its division. On the contrary: the diplomatic notes exchanged upon the conclusion of these agreements refer to the Caspian Sea as "Soviet–Iranian Sea." In its note to the Secretary General of the United Nations on the legal status of the Caspian Sea Russia emphasized the need for its common management and use of its natural resources by all coastal countries, where no unilateral actions could be considered legal.[58] Furthermore, the note said that Russia would retain the right to take any appropriate and necessary measures to restore the proper regime of the Caspian Sea. Iran, in its letter to the UN Secretary General, also opposes the division of the Caspian Sea.[59] As, as claimed by Iran, the Soviet–Iranian agreements do not provide for any boundaries in the Caspian Sea, any attempt for its division would be illegal.

The concept of condominium is controversial in international law except in some historical cases.[60] In its decision on the Gulf of Fonseca the International Court of Justice held condominium regime appropriate in case of a dispute among the successor states.[61] However, it pointed out that this principle is applicable to an area which had previously been under the sovereignty of a single state. In another decision concerning Lac Lanoux regarding the territorial dispute between Spain and France, on whether this lake was a condominium, the International Court of Justice identified several basic conditions under which a lake could be described as a condominium.[62] First of all it emphasized that there must be a "clear and convincing" consent of the contracting parties on the existence of a condominium.[63] Both

the UN Secretary General Turkmenistan can also accept this principle (of sectorial division of the Caspian Sea), just as it accepted the earlier concept of a "common sea," p. 6.

[58] UN Doc. A/49/475.

[59] UN Doc. A/52/913.

[60] Convention of Gastein of 1865; Cromer–Ghali Agreement of 1899; Anglo-Egyptian Condominium of Sudan (1898–1955); Anglo-French Condominium of New Hebrides (1914–1980).

[61] ICJ Rep. 1992, pp. 350 ff. pp. 598 f. para 400.

[62] 24 ILM (1957), pp. 101–142.

[63] ICJ stated that "to admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two states, is to place an essential restriction on the sovereignty of a state, and such a restriction could only be admitted if there was clear and convincing evidence. International practice does reveal some special cases in which this hypothesis has become reality; thus, sometimes two States exercise conjointly jurisdiction over certain territories (joint-ownership, co-imperium, or condominium); likewise, in certain international arrangements, the representatives of States exercise conjointly a certain jurisdiction in the name of those States or in the name of organizations. However, these cases are exceptional, and international judicial decisions are slow to recognize their existence, especially when they impair the territorial sovereignty of a State." Furthermore, the Tribunal stated that "as between Spain and France, the existence of a rule requiring prior agreement for the development of the water resources of an international watercourses can therefore result only from a treaty Spanish thesis that the necessity for prior agreement would derive from all the circumstances in which the two Governments are led to reach agreement is in contradiction with the most general principles of international law." And, "as prohibited was seen a 'right of assent' a 'right of veto', which at the discretion of one state paralyses the exercise of the territorial jurisdiction of another."

ICJ decisions contain requirements which were never fulfilled in the legal practice of the Caspian states and therefore exclude their application for the Caspian dispute settlement.

3.5.4 Assessment of Possible Legal Solutions for the Caspian Status

The legal theories of the Caspian Sea as a sea, lake or condominium were confronted with each other in the legal debate for many years. The explicit acceptance of one of the concepts by the negotiating parties would inevitably lead to regulation of the Caspian Sea status according to its classification and the accompanying body of law. If the Caspian Sea is a "sea" in legal terms would be applicable.[64] If, on the other hand, the Caspian Sea is a "lake" or a "condominium" in legal terms, then customary international law concerning respectively border lakes[65] or condominiums would apply.[66]

The signature of the North Caspian Agreement by Azerbaijan, Kazakhstan and Russia, despite the disagreements expressed by the remaining coastal states, reflects their current position in the debate regarding the status of the Caspian Sea. Currently, Azerbaijan and Turkmenistan conduct bilateral negotiations about the status of resource fields lying between their coasts. The recently visible attitude of all these coastal states seems to become practice-oriented. It promotes effective use of Caspian resources, without dismissing ongoing multilateral negotiations of all coastal countries on the future status of the Caspian Sea. The question of whether the Caspian is a sea, a lake or a condominium in legal terms has disappeared from the ongoing negotiations on the future convention on the Caspian status.

3.6 Legal Confusions in State Practice Regarding the Use of Resources in the 1990s

The divergent interpretations of the existing Soviet–Iranian treaties being the legal basis for the status of the Caspian Sea and thus for the rights and duties of coastal states concerning the use of its natural resources effected in conflicting unilateral and multilateral actions of the Caspian littoral states. In September 1994, the so-called Contract of the Century between Azerbaijan International Oil Consortium and several international oil companies was signed for the exploitation of large offshore oil fields in the Caspian Sea (Guneshli, Chirag, Azeri, Kyapaz/Serdar)

[64] See: Bodenbach (2008).

[65] See: Romano (2000), pp. 145–161.

[66] Ibidem.

creating a joint venture AIOC (Azerbaijani International Oil Consortium). Azerbaijan's sovereignty claims regarding the use of the Caspian resources were introduced into its state constitution of 1995. Its Article 11 states that "for the territory of Azerbaijan entails internal waters and Azerbaijani sector of the Caspian Sea."

The conclusion of the Contract of the Century emphasized the lack of clarity of the existing legal status of the Caspian Sea and turned it into a burning challenge to the relations between the Caspian states. The unilateral action of Azerbaijan raised sharp criticism from other Caspian littoral states on the one hand, but at the same time it opened the way for similar actions of other coastal states. In reaction to the Contract of the Century the uninvolved coastal states expressed the opinion that any unilateral actions regarding the Caspian States might be legitimate only in case of a joint decision by all coastal countries.[67] At the same time they also reached for actions to use Caspian resources that were uncoordinated with other coastal states. Turkmenistan, already in 1993, enacted a law providing for the establishment of internal waters, a 12 nautical miles wide territorial sea and an exclusive economic zone. The new regulation covered also the Caspian Sea, which clearly referred to Turkmenistan's sovereignty claims in this area. Kazakhstan and Azerbaijan as well as Kazakhstan and Turkmenistan issued joint declarations mutually awarding each other right to exploit the natural resources of the Caspian Sea.[68] Kazakhstan and Azerbaijan expressed the sovereignty claims over the Caspian Sea also in a multilateral initiative of the so-called Ankara Declaration of 29 October 1998 regarding the exploitation of Caspian resources and their transportation.[69] The document signed by Azerbaijan, Georgia, Kazakhstan and Uzbekistan emphasized the great importance of the Caspian resources and their transportation for these countries. Special support was expressed for building of the Trans-Caspian gas and oil pipelines.

Russia's originally critical position towards any unilateral use of Caspian resources by coastal states changed with the adoption of the North Caspian Agreement on the use of Caspian resources, which were concluded despite opposition from Iran and Turkmenistan. Russia's change of mind about the legitimacy of allocation of rights of use of natural resources in the Caspian Sea has been justified by the fact that previous negotiations were ineffective and too long. Russia preferred to continue the multilateral efforts to settle the Caspian status,[70] but proposed that all coastal states should simultaneously carry out negotiations regarding the

[67] UN Doc. A/49/475, annex, October 5, 1994 (Russian Federation), UN Doc. A/51/59, annex, January 27, 1996 (joint statement of Iran and Russia October 30, 1995), UN Docs. A/51/73, annex, March 1, 1996 (joint statement by Russia and Turkmenistan August 12, 1995); A/51/138, Annex II, May 17, 1996 (joint statement of Kazakhstan and Russia April 27, 1996), UN Doc. A/52/324, Annex, 8 September 1997 (Iran).

[68] UN Doc. A/51/529 of 21 October 1996 (Azerbaijan–Kazakhstan); UN Doc. A/52/93 of 17 March 1997; UN Doc. A/52/324 of 8. September 1997 (Kazakhstan–Turkmenistan).

[69] UN Doc. A/C.2/53/9 of 3rd December 1998.

[70] See: Kolodkin (2002b).

separate legal regimes like navigation, resource's use, environmental protection etc. in the Caspian Sea.

Originally Iran held a clearly negative position towards the unilateral actions in the Caspian Sea,[71] A very serious situation, with the involvement of military threats, arose around Araz-Alov-Sharg oil field (known in Iran as Alborz). On 18 August 1998 Azerbaijan officially announced it had plans to carry out activities in this field, to be conducted in collaboration with some oil companies. Iran first pointed to Azerbaijan that it would need Iran's consent to lawfully carry out the planned activities.[72] A few days later on 23 July 2001 a BP-operated research vessel exploring this contested offshore field suspended its exploration activities under the pressure of Iranian military vessels and aircrafts.

Despite the originally expressed criticism Iran itself reached for unilateral actions in the Caspian Sea. In December 1998 the signing of a contract on the geological and geophysical exploration between Iran and Shell and Lasmo oil companies was announced. The respective area was regarded by Azerbaijan as part of its own sector of the Caspian Sea, thus it sent a protest letter to the UN Secretary General.[73] On 24 May 2000 Iran undertook another unilateral action by issuing a national legal act authorizing the National Iranian Oil Company (further referred to as NIOC) to explore and exploit oil and gas resources in the Caspian Sea.[74] The NIOC was permitted to conclude contracts with both local and foreign companies.

In the 1990s, the Caspian littoral states represented alternately contradictory positions and undertook clashing actions. On the one hand, they sharply criticized the neighboring countries, whose unilateral actions affected areas that they regarded as belonging to their national sectors of the Caspian Sea. At the same time, at the latest at the turn of the century, they all entered into agreements with regional and external partners regarding the use of resources within sectors of the Caspian Sea claimed by them as national. Simultaneously, at the level of political statements, the littoral states agreed to look towards a legal compromise and a possibly extensive cooperation. The expression of the political will to cooperate was a continuation of interstate negotiations on the convention on the legal status of the Caspian Sea, which have been carried out continuously since the mid-1990s until today. The multilateral approach was also expressed in aiming for the conclusion of agreements regarding separate legal regimes of intergovernmental cooperation in the Caspian Sea. This concept was enforced with the conclusion of the Tehran Convention of 2003 and the Caspian Security Agreement of 2010. There,

[71] Iran's rejecting reaction to the declaration of Kazakhstan and Turkmenistan (UN Doc. A/52/324 of 8th September 1997), to the announcement of extraction and exploitation of oil from the Cheragh reservoir by Azerbaijan (UN Doc. A/52/588 of 25th November 1997), "Ankara Declaration" condemning the trans-Caspian pipelines proposal (UN Doc. A/54/788 from 9th March 2000.)

[72] UN Doc. A/56/304 of 17th August 2001.

[73] UN Doc. A/53/741 of 14th December 1998.

[74] Official Gazette no. 16114, of 25th April 1379 of 25th June 2000. In: Ranjbar (2004), p. 88.

where the compromise among all littoral states appeared to be temporarily unreachable—as it was the case regarding the use of natural resource of the northern Caspian Sea—states undertook legal actions bilaterally regulating their relations in respective areas of the Caspian Sea, despite the opposition from remaining coastal states. At the same time, as expressed directly by all treaties related to territorial sectors or regimes of usage, none of them should prevent future comprehensive agreement on the legal status of the Caspian Sea, but they should rather be regarded as part of the final overall mutual agreement of all the five coastal states.

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Chapter 4
Cooperation Levels in Caspian States' Practice in the 1990s

4.1 Challenges for the Caspian Region After the Dissolution of the Soviet Union

The incompleteness of the Soviet–Iranian agreements and their conflicting interpretation raised doubt about the legality of the activities of Caspian littoral states in the 1990s. Actions taken by coastal states, often taken under the influence of mutually exclusive political and economic national interests of individual states, have an effect on all strategic areas of cooperation in the Caspian Sea, including the question of the setting of state borders, operating of ships and fisheries and degradation of natural resources and their transportation. This precarious situation alters already existing legal problems and creates new ones. Establishment of a uniform legally-binding document regulating the collaboration of states in the Caspian Sea basin is of tremendous importance for the political security of the entire region and its future economic development. Clarity and thus stability of the legal situation in the Caspian region is no less important for securing international investments in the extraction of Caspian resources, obtaining foreign loans as well as for the purchase of shares or exploitation rights to Caspian oil and gas fields. The introduction of legal standards and rules oriented towards peace and international legal standards would make an important contribution to the prevention of military solutions.

Among the large number of current questions related to international law in the post-Soviet space the one concerning uncertainty about the existence and development of state maritime borders of the five coastal states around the Caspian Sea is especially important. No clear statement on this issue was made in the treaties between Iran and the Soviet Union in the years 1921, 1935, and 1940. One can not explicitly determine whether the arrangements made by the coastal states in the past can be regarded as delimitation of the basin, or whether the Caspian Sea has been declared by the concerned States as an area which should be commonly used by all the States. This question is of fundamental importance for the successful solution of

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other problems of the Caspian Sea. Borders define the area of state sovereignty and thus narrow the scope of state jurisdiction. If the Caspian Sea became divided, issues such as the route of trans-Caspian pipelines, measures to protect the environment of the basin, transportation etc. would depend solely on individual and independent decisions of the individual coastal states. If, however, the Caspian Sea is subjected to joint administration regime, it will be in common use under which all decisions and actions must be agreed with the remaining coastal states. The existing unclear status contributes to legal uncertainty of the Caspian Sea and creates increasing instability in the region.

Sea transport is one of the most important means of developing intergovernmental economic ties in the Caspian Sea. In international law there is a general, broadly recognized principle of freedom of navigation on the seas for each state.[1] The principle of transit, freedom to enter a port facility and freedom to transport goods are also valid for navigation on international rivers and lakes.[2] Such principles are indeed part of the legal system. However, direct legal obligations derived from them can only be formed within narrow limits. To be directly applicable they need to be defined in other legal norms. Already the Soviet–Iranian treaties guaranteed the freedom of navigation on the whole Caspian Sea, however with the crucial limitation that this applies only to vessels flying a flag of one of the Caspian states. For the current trade needs the question of the international legal order of commercial and naval shipping on the Caspian Sea remains hardly regulated. Therefore, there is an urgent need for an intergovernmental regulation of commercial shipping on the Caspian Sea that would take as a basis currently applicable norms of the law of the sea.

The Caspian Sea has abundant fish stocks. The world famous Caspian sturgeon has become a basis of an independent branch of industry. In recent years the abundance of fish was strongly decreased by pollution and overfishing. Even the existence of the sturgeon is endangered. A comprehensive protection regulation is urgently needed. Under the auspices of the Commission on Aquatic Bioresources of the Caspian Sea a draft Agreement on Conservation of aquatic bioresources of the Caspian Sea and their management has been discussed since 2003. Simultaneously, the coastal states discussed the possible contents of a Protocol on Conservation of Biological Diversity ancillary to the Tehran Convention, which was adopted and signed at the Fifth Meeting of the Conference of the Parties in Ashgabat, Turkmenistan on 30 May 2014.

The existing and forthcoming large-scale oil and gas drilling threaten to deal another heavy blow to the ecosystem of the Caspian. The proposal to construct another oil pipeline on the floor of the Caspian Sea is not only politically highly controversial, but could also expose the Caspian ecosystem to another significant danger. The lack of clear intergovernmental provisions in this regard requires urgent regulation.

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[1] Article 90 UNCLOS.

[2] Article XIV Helsinki Rules (1966).

Increased cooperation among the Caspian littoral countries is an essential prerequisite for the successful implementation of all normative regulations of the Caspian states, with ten million inhabitants living in direct dependence from the Caspian Sea. To the same extent the necessity of close cooperation applies to the use of living and non-living natural resources of the Caspian Sea, the protection of the fragile Caspian environment and any action concerning the economic development of the region. The normative reform will completely change the political situation in the Caspian region. The cooperation in all subject areas is necessary for a successful reform, both on an international, national, regional and local level.

The intergovernmental cooperation in the area of law-making seems to be even more urgent as the existing problems become even more explosive because of the emergence of previously unknown threats. Drugs and illicit arms trafficking, illegal immigration, fish poaching and organized crime, classified as crimes under international law, have became so widely spread on the Caspian Sea that the community of the Caspian states has been greatly challenged. Not only the security and the sea traffic but also the environment of the Caspian Sea is threatened by the maritime terrorism and piracy. The new urgently needed regulations should be made to prevent these crimes in the Caspian Sea.

Some of the above-mentioned issues requiring new regulation arose because of the absence of rules or their inconsistent interpretation. Furthermore, they lead to inconsistent, even contradictory and mutually exclusive actions of neighboring states and thus they jeopardize the situation in the entire region. Being aware of the danger since the 1990s, the littoral states continue their search for the ways to a regional compromise. It will be achieved step by step at the bilateral and multilateral level, as well as it will be targeted at both the complex approach and regulation of the individual "subject areas."

4.2 Peaceful Settlement in International Law

The interstate conflict which has been observed in the Caspian Sea since the 1990s is subject to international legal regulations established for peaceful settlement of international disputes.[3] The existence of a dispute is of great importance for international dispute settlement procedures, although in international law there is no uniform definition of the term.[4] However, it is possible to define some aspects of an international dispute as follows:

"*An international dispute can take the following forms: disagreement over a fact or a legal or political issue, conflict between a number of parties or situation*

[3] On the concept of "international disputes" see: Caron and Shinkaretskaya (1995), p. 309.

[4] Art. 36(2) IJC Statute; Arts. 2003 et seq. of NAFTA Agreement.

when a demand or a claim of a party is denied or disputed by the other party or the other party submits a counterclaim."[5]

An international legal dispute is a disorder of intergovernmental relations. The distinction between legal and political aspects is very difficult but extremely important. Depending what aspects outweigh, different settlement procedures are performed. For example, the Article 65 of the ICJ Statute interprets that the ICJ can give its so-called advisory opinions only to a legal question. Therefore, the international legal doctrine tries to adequately separate the disputes in political issues from the vital interests or the honor of a state. Disputes over legal questions are related to the interpretation or application of the law. Whether a dispute must be regarded as justifiable depends more on the willingness of states to subject themselves to court jurisdiction, and less on the possible inadmissibility of dispute settlement proceedings before a court. In principle, any dispute can be decided under the rules of international law. However, not all disputes arising from these decisions are settled. For example, a supposed claim can be dismissed because of the lack of an international legal basis for a claim, and the dispute remains unresolved despite the fact that a decision was taken.[6] A hint about the legal customary law validity of the obligation to peacefully resolve disputes is provided by the successive resolutions of the UN, such as the Friendly Relations Declaration,[7] the Manila Declaration,[8] the Resolution 40/9, the Declaration on the Prevention and Removal of Disputes and Situations which May Threaten International Peace and Security, and the Role of the United Nations in this Field[9] and the United Nations Decade of International Law.[10] The norms of general international law with respect to dispute resolution are also enshrined in the Charter of the United Nations[11]:

"*All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*" *[Article 2(3)]*

These positive obligations of states to peacefully settle disputes imply that contending parties have the choice of means to settle a dispute. They can make use of the UN Charter provisions which provide for a diplomatic process as well as international arbitration and jurisdiction, and define other procedures. The individual processes are not ordered hierarchically, but their application in practice

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[5] See: Land (2000), p. 19.

[6] See: Kunz (1968), p. 684.

[7] Annex to GA Res. 2625 (XXV), 1970.

[8] Annex to GA Res. 37/10, 1982.

[9] GA Res. 41/92, 1986.

[10] GA 44/23, 1989.

[11] See: Kimminich (1997), p. 282.

depends on the circumstances of the dispute process. The parties to any dispute likely to endanger international peace and international security first seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional institutions or arrangements, or other peaceful means of their own choice.[12]

4.3 Five-Party Negotiations on the Convention on the Legal Status of the Caspian Sea

In the completely new geopolitical situation in the Caspian region there is an urgent need for new legal regulation in terms of both status and regime, and thus also of the rights and obligations of the state parties regarding the use of the Caspian Sea, including their waters above the seabed, the seabed, the subsoil, natural resources and the airspace above the sea. Adoption of a five-party document regulating the legal status of the Caspian Sea in a binding manner will be the basis for free undertaking of future legal obligations by the coastal states regarding associated issues. Legal clarity and, consequently, stability are also of enormous importance for ensuring international financial investment in the extraction of Caspian resources, foreign loans and the purchase of shares or exploitation rights to Caspian oil and gas fields. The introduction of a peace-oriented agreement respecting international legal standards will have an important contribution to preventing future military interventions.

The question of comprehensive regulation of all aspects of the status and regime of the Caspian Sea was raised for the first time by the delegation of Azerbaijan during the intergovernmental conference to resolve the emerging problems in the Caspian region (Tehran September/October 1992).[13] The first stage of the negotiations, which started between the Caspian countries during this conference, was characterized by multilateral and equal participation of all the neighboring countries. The draft agreement to establish a cooperation organization of the Caspian states, prepared by Iran and presented during that conference, aroused little interest of the other countries. Instead, they agreed on certain areas of cooperation, such as protection and sustainable use of natural resources and establishment of sea routes respecting interests of all the states.[14] As a result of the conference the so-called "Committee of Biological Resources" consisting of envoys from all the neighboring states started its normative tasks.

Cooperation at the level of the foreign ministries of all the five littoral states aiming at the conclusion of an agreement covering all issues both in terms of legal

[12] UN Charter, Article 33.

[13] See: Mamedov (2001), pp. 217–259.

[14] Joint Communiqué of the Caspian States Representatives of 4.12.1992, in: Records of the Foreign Office of the Azerbaijan Republic.

status and in terms of the regime was secured during the Almaty Conference in May 1995. At that time, the so-called Working Group composed of deputy ministers of foreign affairs of all the five littoral states was established as a mechanism for continuous negotiations concerning the legal status of the Caspian Sea.[15] At its meeting, the working group developed Draft Caspian Status Convention. This provides a basis for other multilateral agreements of the coastal states to regulate various issues relating to the Caspian Sea. The principle of consensus was announced as an exclusive way to the approval of all future agreements regarding the Caspian Sea as a result of the Foreign Ministers meeting in Ashgabat on 12 November 1996.

The future status agreement is part of public maritime law. The rules, which for the time being represent only a certain tendency in the legal development of the region, will turn into binding rules in future and thus they will find direct application in the regulation of the legal situation in the Caspian region. The Draft Caspian Status Convention has not been finally unanimously approved by the negotiating states yet, but it is still at the stage of negotiation. The Draft Caspian Status Convention is not a source of law as such for the regulation of the current legal situation in the Caspian region. This would also apply if the draft was not controversial. However, the unique and great importance of the Draft Caspian Status Agreement developing regional legal system should be emphasized. Never before had there been an attempt to codify an agreement and to develop many new rules of great importance in accordance with international maritime law standards. However, the uniqueness of the process and its importance for the future cannot hide the fact that there are still many fundamental issues which the parties can hardly reach an agreement over.

The provisions of the entire Draft Caspian Status Convention aim at the explanation of two different legal categories: the legal status and regime of the Caspian Sea. The Draft Caspian Status Convention proposes the following concept of the legal status of the Caspian Sea, defining the scope of authority of the individual states in the water area matter: "States Parties shall carry out their [sovereignty] and the sovereign rights in the Caspian Sea" [Article 2 I]. The recognition of states' sovereignty means acceptance of independent authority of a coastal state over a geographic area, in this case a particular zone of the Caspian Sea, which can be found in a power to rule and make binding laws, without the right of interference by other countries. Russia doesn't generally approve of this wording and proposes to remove the word "sovereignty." Russia rejects any division of the waters which would illustrate the sovereignty of coastal states over the offshore waters. The Draft Caspian Status Convention paraphrased the term "legal regime," as opposed to legal status, as follows: "*The law regime determines und rules the rights and obligations of state parties regarding the use of the Caspian Sea, including its waters above the seabed, the seabed, the subsoil, natural resources and airspace above the sea*" [Article 2 II]. And further: "*Parties use the Caspian Sea for the*

[15] See: Mamedov (2001), p. 232.

purpose of navigation, fisheries, use and protection of biological resources, the exploration and exploitation of the resources of the seabed and its subsoil, and for other purposes in accordance with this Convention, with the individual agreements to be settled among the Parties and with the national legislation of the States Parties" [Article 4].

The Draft Caspian Status Convention was drafted, according to its Preamble, "*starting from the fact that the Caspian Sea is of vital importance to the parties*." The Draft Caspian Status Convention includes the principle of respect for the sovereignty, territorial integrity, political independence, and sovereign equality of all the states, the prohibition of any threat or use of force. The following principle applies to the use of the Caspian Sea for peaceful purposes, its transformation into a zone of peace, good-neighborliness, friendship and cooperation, and the settlement of all problems related to the Caspian Sea by peaceful means. Accordingly it has been proposed—with Russia against—to introduce the principle of demilitarization of the Caspian Sea or classification of the Caspian Sea as a demilitarized zone, which is reserved exclusively for peaceful purposes. Furthermore, the draft includes principles that determine the use regime.[16]

The influence of the future Convention on already existing legal relations in the region will be tremendous. Therefore, a question should be posed here on the relationship between the content of the new regulation and the previously existing standards of the law of the sea. The provisions of UNCLOS, as a basic agreement in maritime law, cannot be applied to the Draft Caspian Status convention as the legal point of reference, because presently of all the coastal states only Russia is a party to the UNCLOS and there are no indications that other states will join the agreement. Nevertheless, despite it is apparent that some elements of UNCLOS have been taken over into the Draft Caspian Status Convention,[17] because of its current

[16] The principle of the prohibition of warships of non-Caspian states on the Caspian Sea, the principle of freedom and the warranty of merchant shipping safety for ships flying the flag of one of the contracting parties; the principle of denial of the right of passage to or within the Caspian Sea for ships flying the flag of a state other than a Contracting State; the principle of implementation of agreed standards and rules related to reproduction and regulation of the exploitation of bioresources; the principle of environmental protection of the Caspian Sea, preservation, restoration and sustainable use of its biological resources; the principle of responsibility of the states parties for having made harm to the ecological system of the Caspian Sea by causing pollution to its environment.

[17] The Draft Caspian Status Convention identifies identical water categories as UNCLOS (see Sect. 5.5), does however partially define them in a different manner and therefore does not describe the water categories using an identical wording. Furthermore, with the exception of Iran, all the coastal states agree that the seabed and its subsoil should be divided for the extraction of natural resources as well as other legitimate commercial and economic activities. This is similar to the UNCLOS provisions concerning the exclusive economic zone. In addition, in accordance with the provisions of UNCLOS, all Caspian littoral States except Russia agree that the sovereignty over the territorial sea will be applied in accordance with the Draft Caspian Status Convention and the rules of international law. Also, the concept of the width of the territorial sea in the draft corresponds to the regulation in the provisions of UNCLOS. As one of the basic standards for their action in the Caspian Sea, the littoral states have taken over the UNCLOS provision on the

status UNCLOS is to be recognized as a certain embodiment of the customary[18] law of the sea.[19] Some authors even speak of a possible universal validity of UNCLOS in the near future.[20] Customary legal validity of regulations contained in some international conventions also in relation to states that are not party to those agreements has been repeatedly confirmed in the judicature of the International Court of Justice,[21] as well as in legal literature.[22]

Without trying to diminish the regional significance of the so far reached state of preparations of the future status agreement, it cannot be disregarded that the negotiations between the coastal states have been carried out since the mid-1990s, yet they still have not been finalized. No perspective for short-term success of these negotiations made some coastal states seek bilateral solutions for the exploitation of the natural resources of the northern part of the Caspian Sea already at the end of the 1990s (the so called North Caspian treaties will be explained further). However, one could also propose a thesis that it is precisely because of the conclusion of the bilateral agreement that there is no longer urgency to search for a comprehensive legal solution of the future status and regime of the Caspian Sea, and that the multilateral conclusion process has not been definitively paralyzed. Whichever of the two theories is likely to be correct, it should be clearly noted that the multilateral negotiations on the future status and regime of the Caspian Sea are continued, however, there is no foreseeable end in sight.

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high seas that the Caspian Sea is reserved for peaceful purposes. Any issue relating to the Caspian Sea should be resolved by peaceful means, which is a principle enshrined in the UNCLOS. The provisions of the Draft Caspian Status convention regarding fishing in the Caspian Sea recognize the unlimited rights of the coastal states outside the exclusive fishing zones or outside the areas of national jurisdiction. These provisions build on the corresponding provision included in the UNCLOS regarding the high seas. As for shipping in the Caspian Sea, the Draft Caspian Status Convention contains an explicit reference to internationally binding sea law provisions, of which the most significant come from the UNCLOS. Azerbaijan, Kazakhstan and Turkmenistan agree that the coastal states in which mining sites are located on the seabed and the pipeline routes are allowed to be laid down, have the right to lay trans-Caspian pipelines. To clarify the pipeline route, agreements concluded among these states are applicable. The proposal corresponds to some extent to the provisions of UNCLOS related to the rights and obligations of states related to the laying of submarine cables and pipelines.

[18] The factors of time and certain behaviors are of crucial significance for the creation of international customary law. With the current developments of international law, customary law can arise very quickly. However, two conditions are necessary: as an objective element a general practice of states, to which the subjective element occurs as the *opinion iuris sive necessitatis*. See Bernhardt (1984), p. 215.

[19] See: Gornig and Despeux (2002), p. 6.

[20] See: Götz et al. (1998).

[21] North Sea Continental Shelf Judgement (1969), p. 41: "There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes one of the recognized methods by which new rules of customary international law may be formed."

[22] See: Sohn (1950), S. 1008.

4.4 Step-by-Step Conclusion of Agreements on the Use of Natural Resources

In the period from 1998 to 2004, three bilateral contracts and one trilateral agreement (so-called North Caspian Agreements) with additional protocols were concluded between Russia, Kazakhstan and Azerbaijan to regulate the delimitation between the relevant sectors as well as the regime of exploitation of natural resources in the northern part of the Caspian Sea between these countries.

On 6 July 1998 Russia and Kazakhstan signed the first agreement regarding division of the seabed of the relevant sectors of the Caspian Sea according (Agreement between the Russian Federation and the Republic of Kazakhstan on the Delimitation of the Seabed of the Northern Part of the Caspian Sea for the Purposes of Exercising Their Sovereign Rights to the Exploitation of its Subsoil, further referred to as Agreement between Kazakhstan and Russia 1998). As a method of delimitation, a modified median line was used. On 13 May 2002, Kazakhstan and Russia concluded an Additional Protocol to this treaty, which provided for the exact coordinates of the course of the delimitation of their sectors in the Caspian Sea and contained general exploitation provisions on three oil fields. According to this Additional Protocol, the water column remained in common use of both parties. All issues of freedom of navigation, overflight, laying and use of cables, pipelines, etc. should be regulated under separate bilateral or multilateral agreements to be concluded upon reaching by the states of a conclusion regarding the legal status of the Caspian Sea.

On 29 November 2001, Azerbaijan and Kazakhstan signed a delimitation agreement (further referred to as Agreement between Kazakhstan and Azerbaijan 2001). On 27 February 2003, both states concluded a supplementary protocol that delimited the seabed between the two countries along the median line. This treaty left the water column of the Caspian Sea disregarded.

On 23 September 2002, the last sector in the North Caspian region was delimited by the signature of a treaty between Azerbaijan and Russia on delimitation of adjacent areas on the Caspian seabed (further referred to as Agreement between Azerbaijan and Russia 2002). It provides for sovereign rights of contracting parties with respect to the non-living resources and other legitimate economic activities for the exploration and resource management in the sectors of its seabed and subsoil in the Caspian Sea.

The last of the North Caspian Treaties was an agreement signed between all the three parties—Azerbaijan, Kazakhstan and Russia—on the Convergence Point of the delimitation lines of the Adjacent Areas of the Caspian Seabed on 14 May 2003 (further referred to as Tri-Point-Border Agreement 2003).

The legitimacy of all North Caspian Treaties concluded between Russia, Kazakhstan and Azerbaijan was rejected by Iran[23] with reference to their

[23] UN Doc. A/52/913 of 21. Mai 1998, Attachment; UN Doc. A/56/850 of 1 March 2002; UN Doc. A/56/1017 of 31 July 2002.

contradiction of the existing Soviet–Iranian treaties of 1921 and 1940. Azerbaijan and Kazakhstan refused Iran's allegations.[24] In this context, it should be emphasized that neither Iran nor Turkmenistan are bound by the North Caspian Treaties. According to a generally accepted international law principle, which was codified in the Vienna Convention on the Law of Treaties of 1969, a treaty does not create either obligations or rights for a third state without its consent (Article 34). Thus, these treaties are binding neither for Iran nor for Turkmenistan. However, they remain binding for their state parties.

An attempt to guarantee recognition of the legality of the North Caspian Agreements was also made in the context of multilateral negotiations on the future status of the Caspian Sea. A regulation of the Draft Caspian Status Convention, which provides for principles of territorial delimitation in the Caspian Sea, upon agreement of all Caspian states except for Iran, prescribes the following:

> "*In case where parties have already signed a relevant agreement concerning the delimitation of the seabed and its subsoil, all questions relating to the delimitation to be decided in accordance with such agreements*" *[Iran against]* [Article 8(9)2]

This provision of the Draft Caspian Status Convention includes an indirect reference of the North Caspian states to their agreements, which divide non-living resources of the northern part of the Caspian Sea between the contracting states without considering the view of the remaining Caspian coastal states. This is an attempt to secure an overall recognition of the legality of these agreements.

In case of the absence of multilateral consent governing the legal status and regime of the use of the Caspian Sea, the strategy of concluding bilateral agreements on separate issues of the legal regimes in the Caspian Sea seems to be the only way to secure a lawful use of Caspian resources. This solution is regarded not without controversy, especially by Iran. The drive to use the natural resources of the Caspian Sea, which provide the bulk of states' incomes, especially of the newly independent Caspian states, cannot be hindered. There is need for securing their legality, even if only halfway, through the gradual conclusion of separate delimitation agreements. Nevertheless, it would be beneficial for the Caspian States to intensify their cooperation on the multilateral approach to the resolution of the legal status and regime of the Caspian Sea and to repeal the existing doubts regarding the legal acts regulating allocation and use of resources.

[24] UN Doc. A/56/927 of 18 April 2002.

4.5 Step-by-Step Multilateral Regulations of the Legal Regimes in the Caspian Sea

The strategy of providing mutually agreed solutions to existing ambiguities regarding legal regime issues in the Caspian region requires a gradual approach. For the solution of this extremely delicate and urgent problem, it is necessary to adopt one document based on consensus and adopted jointly by all the Caspian states. Today, this has proven successful only in the area of protecting environment and guaranteeing regional security. The first one to be adopted was the Tehran Convention of 2003, which entered into force in 2006 upon ratification by all Caspian littoral states. Another example of regional multilateral cooperation is the Caspian Security Agreement of 2010. The adoption of the above agreements indicates the possible direction of future actions aimed at seeking and reaching agreements by the coastal states in relation to the specific important aspects of their cooperation in the Caspian basin.

Next to those two positive developments, there remains a number of legal aspects of the use of the Caspian Sea, which require new settlement. Just to name the most urgent ones: navigation, fishing, resource extraction and laying of Trans-Caspian pipelines. In the best scenario, they should all be settled as part of an overall Caspian status convention, which does not seem to be possible or desired by the littoral states in the near future. The current practice of concluding separate, regime-related agreements adopted before the conclusion of the final status agreement seems not to be able to cover other fields, which urgently need a solution. Therefore, it might seem a good option to use temporary validity of such agreements, whose object is to regulate the individual legal aspects of cooperation in the Caspian basin. This would have to be agreed by negotiating states in separate treaties or via other means. The individual treaties would be applied provisionally pending its entry into force.[25] Respectively, the Caspian regime related agreement would enter into force only after the ratification of the Caspian status convention by all the five littoral states. Unless the treaty provides otherwise or the negotiating States have agreed otherwise, the provisional application of a treaty with respect to a state should be terminated if that state notifies the other states between which the treaty is being applied provisionally of its intention not to become a party to the treaty. Such a provisional treaty is binding on all parties that have applied the treaty because the legal nature of the obligations under such agreements is equivalent to the obligations deriving from treaties being in force. Any other understanding of the applicability of the preliminary treaty would lead to legal uncertainty and ambiguity.

[25] Vienna Convention on the Law of Treaties, Art. 25.

4.5.1 Protection of the Marine Environment of the Caspian Sea

Over-exploitation, habitat destruction and pollution threaten the natural resources of the Caspian Sea. There are also problems caused by water level change and greatly reduced fish stocks (especially sturgeon) in the Caspian. The introduction of alien fish species in the Volga-Don also poses a threat. In the face of a significant growth of concern regarding the poor condition of the environmental protection of the Caspian Sea it has been necessary to take all appropriate measures to prevent further deterioration of its ecosystem. The first legal step towards mutual protection of the Caspian environment was the adoption in 1994 of the Almaty Declaration on Cooperation of the Environmental Protection of the Caspian Sea Region.

Since the break-up of the Soviet Union there have been a lot divergent concepts of solving the current legal challenges to the Caspian Sea including environmental protection. Until today mutual negotiations among the coastal states have proved to be successful only regarding the issue of the protection of the Caspian environment. At the end of the conference in Tehran in November 2003 the Caspian littoral states signed a Final Act, of which the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention) constitutes Annex 2. The Tehran Convention entered into force on 12 August 2006 after being accepted by all Caspian littoral states. Until now three additional protocols: Aktau Protocol (2011), LBSA Protocol (2012), and Biodiversity Protocol (2014) and have been adopted, but have not entered into force yet. Aktau Protocol has been ratified by Azerbaijan, Iran, Russian Federation and Turkmenistan. LBSA Protocol has been ratified by Azerbaijan and Iran.

As the name suggests, the "Framework Convention for the Protection of the Marine Environment of the Caspian Sea" is aimed at environmental protection of the Caspian Sea. The Tehran Convention (Article 4) includes states' general obligations related to taking individually or jointly all appropriate measures to prevent pollution of the Caspian Sea and to protect the environment of the Caspian Sea. The Tehran Convention developed procedural regulations serving a better implementation of the states' general commitments. It includes environmental impact assessment, technological and scientific co-operation between the contracting parties, monitoring, exchange and access to information.[26] The Tehran Convention constitutes of internationally recognized principles, necessary to achieve the objectives of the Tehran Convention and to implement its provisions. Also, regulations concerning the prevention, reduction and control of pollution, as well as measures for the protection, preservation and restoration of the marine

[26] Tehran Convention, Articles 17–21; Barcelona Convention 1986, Articles 10, 11, and 20; Kuwait Convention 1978, Articles X–XII and XXIII; Abidjan Convention 1981, Articles 13, 14 and 22; Lima Convention 1981, Articles 7–10 and 14; Jeddah Convention 1982, Articles X–XII and XXII; Cartagena Convention 1983, Articles 12, 13 and 22; Nairobi Convention 1985, Articles 13, 14 and 23; Noumea Convention 1986, Articles 16–19.

environment are part of the Convention. All these provisions establish obligations aimed at the abatement of pollution from different sources: from land-based sources, seabed activities, from vessels and dumping.[27]

The "framework" feature of the Tehran Convention is supposed to establish a template for the ongoing diplomatic process to reduce the pollution arising from various sources in the Caspian Sea. In comparison with similar international Conventions and Agreements, the provisions of the Tehran Convention are formulated in a rather vague way. Its geographic boundaries are not clearly defined; timelines are almost entirely absent from this Convention. The Tehran Convention does not name specific threats to the environment of the Sea, not even oil being the most important source of pollution. There is no direct reference to protected zones existing in Caspian or to the threat of overfishing of sturgeon or other endemic species. There is no definition of the notion of "rare and endangered species," nor are the "adequate emergency preparedness measures, adequate equipment, and qualified personnel" to respond to environmental emergencies defined. The intention of the coastal states was to negotiate protocols on specific environmental issues of the Tehran Convention,[28] which would define the environmental protection of the Caspian Sea in more detail. Until today, significant work continues in the form of adopting additional protocols to the Tehran Convention—Protocol on Environment Impact Assessment in a Transboundary Context (further referred to as EIA Protocol)—which shall operationalize its work. A serious weakness of the process of environmental law setting is that civil society organizations are not involved in it, however three of the five state parties, being signatories to the Convention on Access to Information, Public participation in decision-making and Access to Justice in Environmental Matters (further referred to as Aarhus Convention), are obliged to involve public.

Taken as a whole, the Tehran Convention can be seen to mark a step forward in the coastal states' effort to preserve the particularly fragile maritime environment of the Caspian Sea. High complexity of the regulation in question resulted in a number of international partners becoming involved in the negotiation process preceding the adoption of the Tehran Convention, for instance the Caspian Environmental Programme, under the auspices of the United Nations Environment Programme, as well as the Global Environment Facility (GEF), a joint venture of the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP) and the World Bank. The features of the Tehran Convention are linked to the standard rules and norms of current international law, referring to

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[27] Tehran Convention, Articles 7–10; 1976 Barcelona Convention 1986, Articles 4–9; 1978 Kuwait Convention 1978, Articles II–IX; Abidjan Convention 1981, Articles 4–9 and 12; Lima Convention 1981, Articles 3–6; Jeddah Convention 1982, Articles III–IX; Cartagena Convention 1983, Articles 3–11; Nairobi Convention 1985, Articles 3–12; Noumea Convention 1986, Articles 4–9 and 15.

[28] Art. 6 (implementation); 7.2 (prevention, reduction and control of pollution); 8, 9, 10 (pollution); 14.2 (protection, preservation and restoration of marine biological resources); 18; 16 (sea level fluctuation); 17 (procedures of environmental impact assessment);

the agreements concluded both at the international as well as the regional level. It has already been demonstrated by the UNEP Regional Sea Project, and will be seen in the following analysis. The Tehran Convention can be classified as an example of regional regulations which include treaties under the UNEP Regional Seas Programme and ad hoc regional and sub-regional arrangements for Europe and the Antarctic. As mentioned before, the preparations for the Framework Convention took place under the auspices of UNEP, which has clearly exerted influence on the approach between parties. The UNEP Regional Seas Programme, launched after the 1972 Stockholm Conference and the creation of UNEP itself, was aimed to develop rules and norms at regional level,[29] and now extends to 13 regional areas.[30] The eight regional seas framework Conventions include substantive and procedural obligations, institutional arrangements and provisions regarding the adoption of protocols and annexes. The same structure is featured in the Tehran Convention for the Caspian Sea.

The Tehran Convention reflects a worldwide larger trend towards greater international regulation of environmental protection. Recognition and protection of the environment leads, on the one hand, to a considerable restriction of state sovereignty, and on the other, to the recognition of the values by which all states are bounded, namely the protection of the environment. However, the Tehran Convention explicitly reserves that none of its provisions "shall be interpreted as to prejudge the outcome of the negotiations on the final legal status of the Caspian Sea" (Article 37). Many references to the global and regional agreements which have built the legal basis for the Tehran Convention, including provisions typical for seas as well as for international watercourses, neither refer to the future status of the Caspian Sea nor disclose states' official position on the status.

Detailed examination of the significance of the Tehran Convention aimed at arguing that it has an important law-making role to play in the protection of the marine environment of the Caspian Sea has been presented in the separate chapter of this book. It presents a rather practical approach to the examining of the Tehran Convention, based mostly upon the analysis of and comparison with the related international treaties and agreements. The adequacy of the Tehran Convention was judged by its ability to protect the marine environment of the Caspian Sea.

4.5.2 Security Cooperation in the Caspian Sea

Poaching, illegal immigration and arm trafficking, drug trafficking and organized crime are classified as illegal acts under international law. In the present state these problems are intensified in the Caspian basin, representing a significant challenge for the coastal states. Not only the safety of maritime transport, but also the

[29] Mediterranean Action Plan (1975), p. 481.

[30] See: Sands (1995), pp. 296–302.

environment of the Caspian Sea can be threatened by maritime terrorism and piracy. Therefore, the states strengthen their cooperation to fight against these threats, also in working out and implementing relevant legal means. The duty to cooperate in the repression of illegal acts at sea remains primarily with coastal states.

Legal framework for combating security risks in the Caspian Sea was defined in the Agreement on Security Cooperation in the Caspian Sea (further referred to as Caspian Security Agreement). It was concluded in Baku on 18 November 2010 but is not in force yet. It reaffirms the commitment of the parties to contribute to regional security and stability, development and strengthening of cooperation in the use of the Caspian Sea exclusively for peaceful purposes. It states that security in the Caspian Sea is the prerogative of the littoral states. At the same time, nothing in this agreement is intended to prejudice the future shape of the legal status of the Caspian Sea, in respect of which international negotiations are still underway. The Caspian Security Agreement contains forms of cooperation of the competent authorities of the parties (Article 2)—procedures for the exchange of information and experience, meetings, consultation and concerted action to address fight against terrorism, organized crime, illegal arms dealing, trafficking drugs, money laundering, smuggling, piracy, human trafficking and illegal migration, illegal exploitation of biological resources (poaching) and ensuring the safety of navigation. To solve any security related problems, countries hold meetings and consultations as necessary, but not less frequently than once a year.

According to the UNCLOS, states are entitled—on the high seas or in any other place outside the jurisdiction of any state—to repress piracy (Article 100), suppress illegal dealing in drugs or psychotropic substances (Article 108), cooperate in the suppression of unauthorized broadcasting from the high seas (Article 109), etc. However, effective marine police is missing in the Caspian Sea. The Caspian Security Agreement does not provide for its establishment either. The Draft Caspian Status Convention prompts efforts in the fight against offences committed in the Caspian Sea stating that:

> "*The Parties shall cooperate for the purpose of prevention of international terrorism and its financing, the illegal arms and drug trafficking, poaching, for the prevention and suppression of illegal entry of immigrants at sea, and the prevention of other crimes in the Caspian Sea*" [Article 16 (14b)].

Conclusions

The dissolution of the Soviet Union sharpened the conflicting interests in the use of the Caspian Sea, especially of its natural resources of non-living (oil and gas) and living (sturgeon, etc.) character. The unclear legal status of the Caspian Sea, established based on the Soviet–Iranian Treaties as well as the

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long-term regional state practice, has pushed states to an active search for legal solutions. Approaches adopted by the states were multidimensional. First, there is the multilateral approach that involves all coastal states. It is the most sustainable way of resolving the existing conflicts around the Caspian Sea, but it still requires enhancement. The first form of multilateral cooperation of the coastal states was entering the multilateral negotiations for a comprehensive solution of the legal status, which took the form of preparing a draft convention on the legal status of the Caspian Sea. This document regulates all aspects of the legal status and regime of the Caspian Sea. Its complexity has prevented states from successfully finalising the negotiations, which have been conducted since the mid 1990s. Its added value is that this document, even though not in force, offers quite an exact picture of the legal positions of the negotiating states and therefore allows one to draw some conclusions regarding the future legal developments to be expected in the region. However, its limited effectiveness has pushed coastal states towards other solutions. Chronologically, the first were the bilateral actions by Russia, Kazakhstan and Azerbaijan aiming at the division of the North Caspian seabed and subsoil for the use of its natural resources. As these actions brought about great disagreement of the remaining states, the following acts concerning the Caspian Sea gained back a multilateral character. First was the adoption of the Tehran Convention, where coastal states agreed upon common protection of the Caspian environment. Secondly, states concluded an agreement guaranteeing regional security (Caspian Security Agreement).

Even though all states parties reassure that neither bilateral nor sectoral multilateral approach hampers prospects for the future resolution of the question of the status of the Caspian sea in total, the question remains whether these new developments will not be seen as the final solution—at least for the foreseeable period of time. It seems rather realistic, but one should consider to what extent multilateral sectoral regulations will be an effective mechanism capable of resolving the existing conflict around the Caspian Sea. Obviously, sectoral multilateral are better than bilateral agreements which exclude other coastal states. Their effectiveness can be guaranteed only if such multilateral sectoral agreements are concluded for all major areas of cooperation between the Caspian states. Nowadays, it is not the case, however, and there are no more multilateral sectoral negotiations ongoing, apart from those regarding bioresources, what however might change in the context of the recent adoption of the Biodiversity Protocol to the Tehran Convention. Still, the case of sectoral agreements does not offer a long-term solution to the question of legal delimitation of the Caspian Sea, or a clarification of the scope of states' sovereignty over the Caspian Sea. Therefore, in the future the sectoral multilateral approach may lead to revisionist claims to be posed by coastal states. For the time being it is, however, reasonable to conduct a search for

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sectoral multilateral negotiations to solve Caspian issues, which would guarantee a realistic approach to resolving the existing challenges for now, in the absence of readiness of coastal states to accept a final document regulating all issues associated with the legal status of the Caspian Seas.

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Chapter 5
Interrelations Between Territorial Delimitation and the Regime of the Use of the Caspian Sea

5.1 Non-legal Aspects of Settlement of the Seaward Boundaries in the Caspian Sea

Historically, states used to be more interested in the questions of usage regime than setting maritime borders. The newly observed praxis of dealing with seaward extension of state sovereignty because of the development of modern technologies of exploitation of natural resources. The scarcity of world resources has resulted in states competing to expand their zones of influence with no limits, and put forward claims concerning the delimitation of seaward boundaries. Unresolved border disputes often lead to poor management of resources and of ecology, and to disagreement and conflicts in inter-state relations, although the border issues play a limited role in the daily life of citizens. This has been the situation in the Caspian Sea region since the collapse of the Soviet Union.

Maritime delimitation requires regulation of the law of the sea that defines the legality of unilateral acts of states.[1] Mutually agreed intergovernmental boundary treaties are of great importance for the successful settlement of maritime disputes. Only the absence of relevant treaties authorizes direct reference to the norms of the law of the sea. However, it cannot be denied that the final lines of state maritime borders are determined not alone by the law, but to a great extent by non-legal factors like political, historical, security, economic, environmental, and geographical circumstances. States are often not willing to admit the influence of these factors on their border setting. Nevertheless, to successfully deal with the issues of border setting and relevantly the regime of resource usage—including in the case of the Caspian Sea—one needs to also refer to the non-legal conditions of delimitation.

The international law does not determine the actual boundary lines. These are left to the political will of the neighboring states and their non-normative

[1] ICJ Decision in case Gulf of Maine, In: ICJ Rep. 1984, § 112, p. 299.

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interactions, such as security, foreign policy objectives, etc. Decision-making processes in the delimitation cases show similar policy, economy, ecology, etc. related tendencies[2] worldwide. Political aspects of defining boundaries are regulated in intergovernmental negotiations, which begin from undertaking negotiations, defining negotiating positions, then joint acceptance of proposed demarcation lines, etc. This experience is also repeated in the process of boundary setting negotiations in the Caspian Sea, which have been carried on since the collapse of the Soviet Union.

Sometimes, to retain flexibility in their relations, states avoid a clear formulation of provisions of boundary agreements. This approach seems—after nearly 20 years of ongoing intergovernmental negotiations—to characterize the legal debate on the status of the Caspian Sea. How else could the little success in multilateral interstate negotiations on the agreement on the future status of the Caspian Sea be explained? The unclear legal heritage of the Soviet Union in relation to Caspian borders and the use of its resources have lasted despite the ongoing negotiations conducted since the early 1990s by the group of the Special Envoys of the Caspian states' presidents. The limited success of ongoing negotiations shall be referred to deep differences in geopolitical and economic interests of all the five littoral states that the states are not ready to give up. Application of the middle line principle for eventual division of the Caspian Sea, which is demanded by the newly independent Caspian states would cause that the traditional regional powers—Russia and Iran—would be awarded merely a small part of Caspian water and resources, which in turn brings up a politically and economically motivated conflict between both groups of states.

The majority of inter-state delimitation treaties worldwide have unilateral rather than multilateral character. Agreements regulating transboundary areas of cooperation, such as the conservation of highly migratory species, are an exception. The tendency for unilateral actions is present also in the Caspian Sea. Difficulties in the conduct of multilateral negotiations on the delimitation of the seabed of the entire Caspian basin bring coastal states to carrying out unilateral actions. The most prominent case is the division of the North Caspian Sea between Azerbaijan, Kazakhstan and Russia.

It can be observed in border negotiations worldwide that states carry out delimitation merely up to the starting point of a disputed territory, without hampering future delimitation of the remaining area.[3] Similar approach was taken for delimitation of the Northern Caspian sectors between Azerbaijan, Kazakhstan and Russia (North Caspian Agreement). It covered merely these sectors, which lay between the coasts of the states, and did not touch upon areas claimed by the remaining coastal states. It remains, however, controversial whether these treaties do not affect the interests of Turkmenistan and Iran regarding common use of the Caspian Sea. However, except protests originally raised by both countries through

[2] Oxman (1993), pp. 3 et seq.

[3] Charney and Alexander (eds) (2003), pp. 1057 et seq. No. 5–12.

diplomatic channels, they do not undertake any legal actions to secure their claims regarding the northern part of the Caspian Sea.

The coastal states' claims regarding fishing stocks, exploration and exploitation of energy resources or navigation reflect economic and security related aspects of a marine delimitation. Such boundaries described as "historical borders" in international practice play a major political and legal role.[4] It happens that such informal or *de facto* border lines turn into an official interstate border.[5] The natural resources already known or readily ascertainable in the areas under delimitation might well constitute relevant circumstances which would be reasonably considered during delimitation process.[6] Some solutions to disputes regarding the delimitation of marine boundaries were largely affected by traditional claims of coastal States to the use of fishing resources. A close relationship between the boundary line and the traditional fishing rights was pointed out by the International Court of Justice in the case of "Anglo-Norwegian Fisheries."[7]

In the unclear framework regarding the sharing of the Caspian Sea, the coastal states' policy regarding its delimitation is influenced by similar factors. Fish stocks were traditionally the subject of joint use of costal states in the Caspian region. The seabed oil and gas resources existing in the Caspian Sea, as they form an indispensable basis for independent economic and political existence of the coastal states, are claimed to be divided among the coastal states. Also, navigation is a worldwide recognized impact factor upon delimitation of boundaries.[8] It was, however, directly applied only in a few cases, where navigation was recognized as "special circumstances" and determined how a border line dispute was concluded.[9] Control or even exclusion of foreign vessels from the immediate vicinity of national coasts is regarded as a guarantee of strengthening national trade. This approach was present in all previously adopted regulations of the Caspian Sea, starting with the Soviet–Iranian treaties of the 1920s up to the present negotiations over the status of the Caspian Sea. Shipping in the Caspian is traditionally exercised on an equal footing by all coastal states, except free navigation for states from outside of the region.

Intergovernmental practice shows that the environmental factor, despite its relevance for sustainable development, plays a relatively minor role in the delimitation of borders. This was expressed in the case of "Gulf of Main" decision of the International Court of Justice, which stated that boundaries cannot be determined

[4] Convention on the Territorial Sea and the Contiguous Zone 1958, Article 12; Convention on the Continental Shelf 1958, Article 6; UNCLOS, Article 15.

[5] Charney and Alexander (eds) (2003), pp. 1475 et seq. No. 7–1.

[6] Libya/Malta 1985, ICJ 4, para. 50. Exception: Jan Mayen case, ibid., pp. 1755 et seq. No. 9–4.

[7] ICJ 1951, 133 and 142.

[8] Anglo-French Continental shelf case, in: ibid, pp. 1735 et seq. No. 9–3.

[9] Argentina–Chile, ibid., pp. 719 et seq. No. 3–1.

by environmental factors because they cannot be regarded as circumstances with catastrophic repercussions.[10] The awareness among the Caspian littoral states of the lack of clear regulations for the protection of the environment, and the resulting extensive damage to the fragile Caspian Environment persuaded the littoral states to adopt in 2003 the Tehran Convention on environmental protection of the Caspian Sea.

Also, the pressure from political powers from outside the region, who have their own economic and security interests in resource-rich regions worldwide, impacts the conduct of maritime delimitation there. This phenomenon can also be observed in the politics in the Caspian region. The main powers are actively involved in Caspian affairs, indirectly influencing regional delimitation. The first one to name is the US, active by signing the "Contract of the Century" and construction of the Baku–Ceyhan pipeline. Also, the European Union tries to secure Caspian resources to feed the Nabucco pipeline and China supporting pipelines from the Caspian Sea to China.

The future lines of the state maritime boundaries in the Caspian Sea are to be governed by international legal standards, but remain heavily dependent on non-legal factors like political interests of the coastal states and external powers, economic development in the area of living and non-living resources, as well as environmental conditions. In intergovernmental negotiations states try to weigh all the significant factors. The Caspian negotiations have already continued for almost twenty years, but their end is still not in sight. The conclusion of bilateral and trilateral delimitation agreements in northern Caspian Sea brought some legal stability to the region, but also defused the urgency of the overall solution hampering the process of multilateral negotiation over the demarcation of the entire Caspian Sea.

5.2 Territorial Delimitation and State Sovereignty in the Caspian Sea

With the collapse of the Soviet Union and the emergence of five independent states in the region of the Caspian Sea, which may claim full sovereignty or limited sovereignty rights (the so-called functional rights) in relevant sectors of the Caspian Sea, the question of delimitation of the Caspian Sea has become urgent. Lack of well establish national maritime zones often leads to poor resource and environmental management, as well as to discord, conflicts or even border disputes in interstate relations.

International practice in boundary setting can provide solutions and recommendations for the current negotiations in the Caspian Sea. First, the geographical area to be delimited shall be identified, and only then can the delimitation process be

[10] 1984 ICJ 341, para 233.

launched. The definition of the territorial scope contributes to the protection of rights of third countries. However, the definition of the so-called Caspian region poses difficulties.[11] In the case of the legal status of the Caspian, the subject of examination is limited to a geographically clearly fixed water area defined by the coasts of five states, namely Azerbaijan, Iran, Kazakhstan, Russia and Turkmenistan. The special delimitation of maritime zones remains closely linked to the amount of state's sovereignty in such zones, which can take form of full sovereignty of the littoral states or states' sovereign rights (the so-called functional rights). According to the law of the sea every coastal state may exercise rights with regard to the use of living or non-living resources located in its national maritime zone. The scope of coastal state's rights and extension of the zones should be clearly defined between coastal states. According to the law of the sea, interstate agreements on the delimitation of borders are based on global[12] or regional law of treaties and customs as well as courts' and arbitration decisions.

As the delimitation of maritime borders follows the rules of the law of the sea, it requires that the agreement between the Caspian Sea coastal states should match with these international standards. These shall be initially investigated to determine what conditions must be fulfilled for the Caspian agreement.

Delimitation is a legal act which aims at separating two sovereign or functional maritime areas. It should not be confused with demarcation, which is an act of technical character and intends to mark a line. A claim to conduct maritime delimitation is only justified if states meet certain conditions. Only state having a coast[13] and exercising sovereignty over the adjacent territory may lawfully claim its rights over maritime zones and enjoy a title to establish such zones.[14] State sovereignty thus provides a competence title regarding areas to be delimited.[15] It is part of the concept of the so-called natural prolongation that explains that a state's maritime boundaries should reflect the "natural prolongation" of where its land territory meets the coast.[16] When claiming relevant maritime zones state must be able to demonstrate the necessary legal title regarding the boundary. National maritime zones seaward from land boundaries, which do not exceed international maritime borders, can be claimed by states by unilateral acts. Other conditions of

[11] Zonn and Zhiltsov (2004), pp. 7 et seq.

[12] Convention on the Territorial Sea and the Contiguous Zone of 1958; Convention on the Continental Shelf of 1958; Convention on the High Seas 1958; Convention on Fishing and Conservation of Living Resources of the High Seas; UNCLOS.

[13] Judgement Gulf of Maine, In: ICJ Rep. 1984, p. 296 § 102; Judgement Tunisia vs. Libya, In: ICJ Rep. 1982, p. 61 § 73

[14] Gornig and Despeux (2002), pp. 28 et seq.

[15] On the departure from the principle of absolute sovereignty in international law, the judgment of the ICJ in "Trail Smelter case," in which the Court clarified the example damaged U.S. American Agriculture and Forestry caused by Canadian emissions, stating that in the event of a significant harm impairment of the principle of absolute sovereignty of a state could be abandoned and its sovereignty restricted. In: 162 LNTS 73, 3 RIAA 1907, 1938

[16] ICJ judgment in case North Sea Continental Shelf, ICJ Reports 1969, pp. 3–32.

maritime delimitation are that it has to be conducted in a zone where at least two legitimate titles overlap and with consideration of the existing and future rights of third states. The existence of these conditions in case of the Caspian Sea will be examined further.

For the case of future delimitation of the Caspian Sea there are three legal methods available. The first method of the so-called Tri-Points was applied in the regional legal practice for the peaceful settlement of the delimitation dispute in the North Caspian area, where the maritime areas of the three coastal countries converge and overlap. This method could furthermore be used for settling the Caspian disputes as the use of other methods of delimitation seems inappropriate.[17] The so-called principle of "*res inter alios acta*"[18] does not lead to effective solution as long as some coastal states (in case of the Caspian Sea—three of them) have already concluded bilateral agreements without paying attention to rights of third countries.[19] In such a case no state can claim right over the areas received thanks to such a delimitation treaty unless this deal does not harm the rights of third states. The North Caspian Agreements were concluded without taking into consideration the territorial claims of Iran and Turkmenistan, which asserted in official statements that Caspian Sea may be divided merely upon the consent of all the coastal states.

Application of another method of delimitation, which provides for recognition of third countries' rights',[20] would result in disproportionate claims of some countries in the Caspian Sea. Iran claims the need for equal delimitation of the Caspian Sea, where each coastal state receives a share of 20 %. As the Iranian coast is the shortest one, it does not seem possible that other states would recognize its claims to a share of 20 %. Application of the principle of recognizing third states' rights as a method of delimitation raises doubts whether it is right to expand the influence of third

[17] Gornig and Despeux (2002), pp. 79 et seq.

[18] The principle "*res inter alios acta*" means that a boundary between two States has no binding effect on a third country, and a modification of this principle is the principle "*res inter alios judicata aliis necnocere potest*" (see: Article 59 of the ICJ Statute: The decision of the Court has no binding force except between the parties and in respect to that particular case). This principle has the consequence that in the delimitation of an overlapping zones neither future nor existing claims of third countries are to be considered. This principle was applied by Courts of Arbitration in the cases against France, the United Kingdom (RSA, Vol XVIII, § 25, p. 154) and the US-American cases (Report on the New Jersey Delaware Maryland CEIP Delimitation Lines, pp. 23 and 27–28: Mississippi against Louisiana, Maryland against Delaware and Delaware against New Jersey).

[19] Such a situation was dealt with in the judgment of the ICJ regarding the delimitation of the North Sea continental shelf, where the States have concluded each new bilateral delimitation agreements without regard to previously existing contracts, See: ICJ Rep. 1969, § 4, pp. 13 et seq.

[20] In the case of Libya against Malta, the court has recognized the rights of third States to the extent that it has excluded from the zone of demarcation those parts to which a third-country raised claims, see: ICJ, Reports 1985, § 2, p. 16. Certain modifications with respect to this variant of the Tripoint model were expressed in the ICJ opinion Guinea against Guinea-Bissau. These regions were excluded from the demarcation, where other lines of delimitation were already established (ICJ, Reports 1985, § 93).

countries to such an extent that the assertion of claims to certain zones by coastal states depends entirely on the demands of third countries.[21]

The emergence of independent and sovereign states bordering the Caspian Sea has caused the need for the delimitation of maritime zones. Both the remains of the deadlocked regional Soviet practice, and the intergovernmental cooperation ongoing for the last 15 years, indicate the possible application of different boundary concepts in the Caspian Sea. Their brief assessment appears necessary to better portray the legal consequences of application of any of them for the use of Caspian resources

5.3 State Practice in Delimitation of the Caspian Sea

Since the beginning of the twentieth century there have been attempts to replace the lack of explicit regulation of maritime borders within the Caspian Sea with the extension of land borders between Astara and Hosseingholi over the maritime areas. In 1935 the Soviet government officially recognized, and reconfirmed in 1954, this line as a state border in the Caspian Sea.[22] The same line was specified as border line in the airspace between the two countries in the common air navigation agreement of 1964. In 1970, the Soviet oil ministry divided its part of the Caspian Sea between the four Soviet republics (Azerbaijan, Kazakhstan, Russia and Turkmenistan) with a middle line, where the Astara–Hosseingholi line was taken as the southern boundary of Azerbaijani and Turkmen sectors.

Under the regime of the Soviet–Iranian agreements of 1921 and 1940 the two countries, being the exclusive coastal states, regarded Caspian Sea as a closed sea standing fully under the sovereignty of the littoral states and remaining closed for access for other countries. However, after the collapse of the Soviet Union and emergence of new sovereign states the boundaries on the Caspian Sea became a subject of intergovernmental negotiations. As they were unsuccessful, it brought three countries bordering Russia, Kazakhstan and Azerbaijan to the decision to carry out a unilateral division of the northern part of the Caspian Sea. In the period from 1998 to 2004, three bilateral and one trilateral treaties, with additional protocols, were concluded that regulated the delimitation between the relevant national sectors of these countries as well as the regime of exploitation of natural resources in the northern part of the Caspian Sea.

According to the Agreement between Kazakhstan and Russia from 1998 Caspian seabed was divided into the relevant sectors and according to the Additional Protocol of 2002, the water column remained for common use of both parties. Article 1 of the Treaty saw a division of the northern part of the seabed and subsoil of the Caspian Sea between the parties in accordance with the equity principle and

[21] ICJ, Rep. 1985, dissenting opinion of Schwebel, pp. 176–177.

[22] Kembayev (2008), p. 1033.

with the relevant parties' agreement. The prescribed middle line shall be equidistant from the baseline, considering existing islands and other geological features. The line was to be drawn from the coast line by 27 m, measured according to tide-gauge in Kronstadt. However, this method causes problems for present delimitations. First, the tide-gauge in Kronstadt was introduced in the eighteenth century and thus it does not pay due regard to later changes of the sea level. Second, at the present time cycles of several years are being used for sea level measurement (for instance: a cycle of 19 years for the US), which are not used at all for the tide-gauge in Kronstadt.

The 2001 Agreement between Azerbaijan and Kazakhstan and its Additional Protocol of 2003 divided relevant Caspian seabed sectors between the two parties along the middle line. The treaty disregarded the water column of the Caspian Sea. Each point on the middle line is located the same distance away from the nearest points on the coastline, including islands. The line was to be drawn from the coast line by 28 m, measured according to the tide-gauge in Kronstadt. The line specified in the treaty began in the northwest of the Caspian Sea at the Tripoint with Russia and went towards the Tripoint with Turkmenistan in the southeast. Further details regarding boundary intersection points and the points on the base line were defined in the Additional Protocol.

The 2002 Agreement between Azerbaijan and Russia established two national sectors in the Caspian Sea, starting in the north-west on the mainland and continuing to the Azerbaijani–Kazakh–Russian Tripoint. Article 1 of the Treaty provides for national seabed and subsoil sectors in the northern part of the Caspian Sea to be delimited in accordance with generally recognized principles of international law in the form of a middle line that suits the Caspian states and requires their consent. In addition, the article includes exact coordinates of the middle line, including the coordinates of the Tripoint.

At last, an agreement between all three parties Azerbaijan, Kazakhstan and Russia was signed in 2003, establishing a Tripoint for the division of the northern part of the Caspian Sea among them.[23] According to Article 1 the point was located at the intersection of three Caspian seabed sectors at latitude 42°33′6″N and longitude 49°53′3″E. This so-called "Tripoint" is a point at which the boundaries of three countries meet and which is equidistant from the nearest points of the coasts of the parties and the relevant third countries. This Agreement was to settle the extension of the rights of the contracting states in the northern Caspian Sea zones regarding the use of resources, till it would be replaced by a future treaty on the legal status of the Caspian Sea.[24] To delimit the entire seabed of the Caspian Sea

[23] Kazakhstan on 4th December 2003, Azerbaijan on 9th December 2003.

[24] There are two different Tripoint methods, namely the so-called natural Tripoint, which is a an equidistant point between the states, which is located at the intersection of three equidistant lines; and an ad hoc Tripoint, located at any intersection located on the delimitation lines, see: Beazley (1993), pp. 256–259. This method was applied indirectly by the Permanent Court of Arbitration in 1999 in its judgment on the case of Yemen against Eritrea II (www.pca-cpa.org/ERYE2TOC.htm; Despeux 2000, pp. 459 et seq.). Without deciding on claims of third countries—especially of Saudi

two additional Tri-Points would be required: in the central part—between Azerbaijan, Kazakhstan and Turkmenistan and in the south—between Azerbaijan, Iran and Turkmenistan.

The delimitation process takes place in two stages. After the status of the seabed and its subsoil is settled first, the relevant provisions for the water column are to be specified. This approach was already applied in the North Caspian agreements, first between Azerbaijan and the Russia 2002 (Article 1) and then between Kazakhstan and Azerbaijan 2003 (Article 1). The question of the legal status of the water column in the northern part of the Caspian Sea was not addressed in two of three North Caspian agreements because of the potential territorial claim of Azerbaijan. Only in the Agreement between Kazakhstan and Russia of 1998 (Article 1), after defining the status of the seabed between their coasts, the water column was left for common use.

All the three North Caspian agreements reassure that they do not prevent a comprehensive multilateral agreement of all the coastal states on the legal status of the Caspian Sea.[25] Nevertheless, the legality of the North Caspian agreements was rejected by Iran with reference to its contradiction of the existing Soviet–Iranian agreements.[26] The North Caspian agreements are binding merely for their contracting parties and do not set any obligations for either Iran or Turkmenistan. According to international law provisions codified in the Vienna Convention on the Law of Treaties of 1969 (Article 34), a treaty does not create either obligations or rights for a third state without its consent. In practice, the North Caspian agreements present a unilateral answer to the urgent economic needs of the use of Caspian resources. Their conclusion slows down the multilateral negotiations on the final status of the Caspian Sea conducted among all Caspian states, but does not cancel them. Even if they remain legally controversial among the Caspian littoral states, they seem to pave the way for a new pattern in dealing with the challenging goal of settling the legal status of the Caspian Sea. Without belittling the importance of multilateral cooperation for finding mutually acceptable legal solution for the future status of the Caspian Sea, and in the light of pressing economic needs of the coastal

Arabia and Djibouti—the court set up the starting and the end points of the maritime delimitation between Yemen and Eritrea, which were equidistant from the coasts of these states and of third countries. Another method similar to Tripoint provides for delimitation, but for maritime zones to which third countries make a claim the delimitation has a temporary validity and thus it only has a potential character. In the case of Tunisia to Libya, in the area affected by the demands of third countries, the ICJ marked the direction of delimitation line using an arrow (ICJ, Rep. 1982, § 33 and 130, pp. 42 and 91). “The end point of the maritime boundary line which occurred in this way will match the future Tripoint between Tunisia, Libya, and Malta.” This method differs from the strict “*res inter alios acta*” method, because a court is not authorized to delimit disputed areas.

[25] Article 9 of the Agreement between Kazakhstan and Russia, 1998; Article 5 of the Agreement between Azerbaijan and Russia, 2002, Article 5 of the Agreement between Azerbaijan and Kazakhstan of 2003.

[26] UN Doc. A/52/913 from 21st May 1998, Attachment; UN Doc. A/56/850 from 1st March 2002; UN Doc. A/56/1017 of 31st July 2002.

states, the North Caspian agreements may be seen as a contribution to the promotion of legal stability in the region.

5.4 Prospects for the Future Division of the Caspian Sea

None of the existing practice of the division of the Caspian Sea—neither the prolongation of the land boundary line between Astara and Hosseingholi remaining from the Soviet period, nor the recently undertaken division of the northern part of the Caspian Sea—offer a mutual agreement between the coastal states regarding state borders in the Caspian Sea. The need for future clarification of its legal status based on the consent of all coastal states has never been denied by them. They are all of the opinion that the Caspian Sea plays an immense role for the existence and development of the coastal states and thus needs solid legal framework. In the ongoing negotiations parties need to balance their security concerns related to the scope of their impact upon the possibly extensive area of the Caspian Sea, and on the other hand their economic interests linked to the use of Caspian resources, which requires setting limited territorial sectors in the Caspian Sea. The pressing economic needs related to the use of living and non-living resources by coastal states support the implementation of the idea of delimitation of the Caspian Sea. The negotiating climate is unfortunately often characterized by mutual distrust, making it difficult to reach a sustained satisfactory outcome.

The transient nature of the current legal status is confirmed by the fact that intergovernmental negotiations initiated just after the collapse of the USSR with the objective to develop a new legal status of the Caspian Sea that would be acceptable to all the coastal states have been in progress until today. Its provisional result is a Draft Caspian Status Convention. The draft of this document elaborated so far offers some ideas relevant to the future legal status of the Caspian Sea. Its provisions may be regarded as a current negotiating position of the Caspian coastal states. The legal concepts and terms used in the Draft Caspian Status Convention were not created *ex nihilo* but took their origin from the law of the sea and mainly the United Nations Convention on the Law of the Sea, which finds merely indirect application for the Caspian Case.

Clear border setting reduces the risk of random extension of a state's rights to maritime zones. The possible introduction of maritime zones in the Caspian Sea, provided for under UNCLOS, was proposed by all Caspian coastal countries. If accepted, it would determine the scope of coastal states' sovereignty—full sovereignty or merely sovereign rights—and thus the extent of their rights to the use of natural resources. However, Caspian states differ extensively as to the nature of the proposed zones. It is also to be noted that it has not been finally determined yet whether according to its future legal status the Caspian Sea will be divided between the coastal states.

The disagreement between the coastal states regarding the way of the future delimitation of the Caspian Sea has been already well recognizable for the many years of ongoing negotiations on the status of the Caspian Sea. At the same time it is clear that states are determined to avoid unclear or tacit agreement regarding Caspian state borders. Coastal countries also refuse to introduce the so-called joint development or common management of cross-border zones. They neither affirm a system of the so-called revenue sharing, nor management cooperation, nor mutual restraint with respect to exercising their jurisdiction in relevant areas. In the given case it would be possible, and recommendable, in case of no mutual agreement to be concluded in foreseeable future, that the littoral states would conclude a preliminary agreement on the legal status of the Caspian Sea. It would need to include a clear statement that such an agreement would not be a hindrance to a subsequent final status agreement.

The legal consequences of relevant delimitation concepts contained in the Draft Caspian Status Convention will be analyzed below. The examination will be conducted following the provisions of the law of the sea. It will offer a possibility to gain insight into the state of current interstate negotiations and relevantly on the possible future delimitation of the Caspian Sea.

5.5 Future Maritime Zones in the Caspian Sea

The Draft Caspian Status Convention provides, following the model adopted by UNCLOS, for equivalently named categories of maritime zones. Their notions proposed in the Draft Caspian Status Convention differ from those accepted in the law of the sea, even though their wording has not been finally agreed by the negotiating parties yet. According to the UNCLOS all maritime zones are defined using the distance criterion: territorial sea of 12 nautical miles (Article 3), the contiguous zone of 24 nautical miles [Article 33 (2)], the exclusive economic zone of 200 nautical miles (Article 57) and the continental shelf of max. 350 nautical miles or 100 nautical miles from the 2500 m isobath [Article 76 (5) and (6)].

Article 5 of the Draft Caspian Status Convention, which will be explained below, provides for the following:

Paragraph 1:

- "*The water column of the Caspian Sea splits into territorial sea and fishery zone* [Azerbaijan's proposal] *or zones of national jurisdiction* [Russia proposal] *and the water area which remains under common use of contracting parties and where free merchant navigation and freedom of fishery* [Azerbaijan proposal] *or freedom of navigation and agreed fishery norms* [Russia's proposal] *and protection of environment are guaranteed*

- *The water column of the Caspian Sea splits into territorial sea, fishery zone and high sea* [Kazakhstan's and Turkmenistan's proposal]
- *The water column of the Caspian Sea consists of national zones, where freedom of navigation, agreed fishery norms and protection of environment are guaranteed* [Iran's proposal]

Paragraph 2:
The seabed and its subsoil are to be delimited for the purpose of exercising rights on exploiting of resources and other lawful economic activities related to exploiting resources of the seabed and its subsoil [rejected by Iran]

5.5.1 Base Lines

Before discussing possible future sea zones in the Caspian Sea it has to be stated that they are all measured from baselines determined in accordance with the provisions of the law of the sea. The baseline allows to mathematically estimate the course of a middle line (often used for delimitation of the territorial sea zone), every point of which is equidistant from the nearest points on the baseline. In general, this term means a normal baseline for measuring the breadth of the zones, which is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.[27] A baseline is also provided for islands,[28] reefs,[29] low-tide elevations,[30] and rocks.[31] The definition of coastal state rights can be also conducted by applying the principle of straight baselines, which nowadays seems to become a part of customary international law. The system of straight baselines is being adopted by most coastal states.[32] The International Court of Justice has already referred to it in the dispute over the Norwegian coastal waters.[33] The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.[34] The method of straight baselines joining appropriate points may be

[27] Article 5 UNCLOS.

[28] Article 10(2): 1958 Convention on the Territorial Sea and the Contiguous Zone 1958; Article 121(2) UNCLOS.

[29] Article 6 UNCLOS.

[30] Article 8: 1958 Convention on the Territorial Sea and the Contiguous Zone 1958; Article 13: UNCLOS.

[31] Article 121(3): UNCLOS.

[32] See: Bernhardt (1984), p. 218.

[33] ICJ Reports 1951, pp. 116 et seq.

[34] Article 7(3).

employed in, first, localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity,[35] second, mouths of rivers,[36] bays[37] and archipelagos.[38]

The Draft Caspian Status Convention provides [Article 7(8)][39] that each country sets the breadth of its territorial sea from a baseline. This provision does not indicate either the normal or the straight baseline as a method of measurement. The states were unable to agree even on a uniform definition of the baseline notion. As proposed by Azerbaijan:

> "*The Baseline is a line shown on charts agreed by states of a 1:200 000 scale issued in the same year [proposed by the Defence Ministry of Russia] or which are adequate to the list of geographical data issued by a coastal state*"

According to Kazakhstan's proposal:

> "*The Baseline is a line drawn according to a map agreed by state parties*"

Unity of the neighboring states prevails regarding the definition of the so-called "normal baseline." However, the fundamental problem of the recognition of the existence of territorial sea or the zone of national jurisdiction in the Caspian Sea remains unsolved.

> "*The normal baseline for measuring the breadth of the territorial sea or zone of national jurisdiction (and sectors/zones of the seabed) [proposed by Azerbaijan] is a low-water line of average level of the Caspian Sea measured at a height of minus 28.0 m. of the Baltic system of heights from 1977, based on the Kronstadt zero point, drawn on main land or islands area of the coastal state, as marked on large-scale charts officially recognized by the coastal State*".

> "*In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines may be employed in joining appropriate points drawing the baseline from which the breadth of the territorial sea or zone of national jurisdiction (and sectors/zones of the seabed) [proposed by Azerbaijan] is measured*".

The definitions enclosed in the Draft Caspian Status Convention are very similar to the provisions of UNCLOS related to the regulations of the base line, under

[35] Article 7 UNCLOS.

[36] Article 9 UNCLOS.

[37] Article 10 UNCLOS.

[38] Article 47, 50 UNCLOS.

[39] In favor: Azerbaijan, Kazakhstan and Turkmenistan; against: Russia.

which the low-water line is to be regarded as a starting point for determining the breadth of the territorial sea and the subsequent sea zones. However, the negotiating Caspian states have so far not reached any uniform binding agreement upon the baseline because they cannot agree in which zones the Caspian Sea should be divided or what breadth the zones shall have.

5.5.2 Internal Waters

The waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state.[40] In this area the coastal state exercises total and absolute sovereignty, equal to the sovereignty on land territory, air space over the internal waters as well as to its bed and subsoil.[41] The legal status of the territorial sea extends to the internal waters, thus the comprehensive and undisturbed exercise of the sovereign rights of the coastal state within internal waters is warranted.

The Draft Caspian Status Convention defines internal waters as "waters on the landward side of the baseline" [Article 1(14)]. However, because there is no uniform coastal states' standing on the recognition of the territorial sea zone in the Caspian Sea, there are no exact provisions on the internal waters. If the concept of the territorial sea was accepted, in the wording remaining in accordance with the provisions of UNCLOS, one would expect that the parties would meet a similar arrangement regarding the internal waters, corresponding with the law of the sea regulations.

5.5.3 Coastal Sea

According to the international law the sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.[42] This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.[43]

The recognition of the territorial sea concept in the Caspian Sea is a major point of contention during the debate over its future status as the status of this maritime zone enjoys an eminently practical significance for the use of sea. In the territorial sea coastal states exercise full and unrestricted sovereignty over all activities, such as fishing, mining, environmental protection, custom, etc. The rights of the coastal

[40] Art. 8 UNCLOS.

[41] ICJ Case: Nicaragua, ICJ Report 1986, 111.

[42] Article 17–32 UNCLOS.

[43] Article 2 UNCLOS.

state in the territorial sea are obtained only with respect to shipping. Ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. In the coastal areas, where most shipping routes are located, the coastal state rights are limited by the principle of innocent passage,[44] which is already firmly established in states' practice worldwide.[45] The question of seaward extension of the territorial sea has always been particularly controversial in the history of the law of the sea. It is regarded as one of the great achievements of UNCLOS that it included for the first time ever a firm contractual setting of the outer limit of the territorial sea.[46] The UNCLOS states that every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines.[47]

The Draft Caspian Status Convention shows that the concept of the territorial sea remains controversial among the coastal states because of the ensuing legal consequences foreseeing almost unlimited competence of a coastal state in the territorial sea zone. The introduction of the territorial sea zone in the Caspian Sea would effect in the loss of any possibility of interference into internal affairs of the coastal state in its territorial sea by other coastal states. It would be equal to recognizing state boundaries in the Caspian Sea, which were historically never finally settled. States such as Azerbaijan, Kazakhstan and Turkmenistan, who claim the introduction of the territorial sea zone, claim official recognition of state borders in the Caspian Sea.

In case of introduction of the territorial sea zone in the Caspian Sea the regime of innocent passage of ships in the territorial sea would be similar to the model prescribed in the UNCLOS. However, a special regulation is to be expected with respect to the innocent passage of warships, where the Draft Caspian Status Convention provides for its still not unified definition:

> "*Passage in waters of relevant sectors/zones of the Caspian Sea for warships and other government ships operated for non-commercial purposes requires consent*" [*Article 3.6*].

[44] Passage related to Article 18 UNCLOS means navigation through the territorial sea for: traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for rendering assistance to persons, ships or aircraft in danger or distress. The passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State (Article 19 UNCLOS).

[45] Wolfrum (1990), pp. 20–23.

[46] See: Wolfrum (1990), pp. 20–23.

[47] Article 3 UNCLOS.

This formulation goes back to an initiative of Azerbaijan, but has run into opposition of Russia. Kazakhstan and Turkmenistan gave their approval for the concept, conditional upon the final method of division of the Caspian Sea.

5.5.4 Fishery Zone

Although in the UNCLOS there is no direct reference to the exclusive fishing zone, its existence and rights and obligations effecting from its application have been widely recognized. According to the law of the sea, the coastal state exercises functionally limited rights with respect only to the living resources in the fishing zone. The Draft Caspian Status Convention provides for the recognition of fishing zone, which will be discussed accordingly in the following chapter regarding living resources.

5.5.5 Zone of National Jurisdiction

According to the law of the sea, a zone of national jurisdiction means a maritime area which consists of internal waters and the territorial sea.[48] Thus, within such a zone coastal state exercises unrestricted sovereignty. One can see the Exclusive Economic Zone as part of such a zone, in which the coastal state exercises economic sovereignty. However, definition of the Zone of National Jurisdiction proposed by Russia is different:

> "*a water body adjacent to the coast and extending no more than 15 sea miles from the baseline, where freedom of navigation and agreed fishery norms as well as environmental protection are secured*" [Article 5(6). 1]

Russia's concept of the zone of national jurisdiction rejects any portion of the sovereignty of coastal states there, explaining that:

> "*within zones of national jurisdiction coastal states exercise the control necessary to prevent infringement of its customs, fiscal, health and veterinary laws as well as enjoy exclusive fishery rights*" [Art. 7(8)]

The Russian definition of the Zone of national jurisdiction refers directly to UNCLOS provisions on the so called contiguous zone and exclusive fishing zone. In neither of the two zones the coastal state exercises a full territorial sovereignty, but only the so-called sovereign rights limited to some police matters. According to

[48] See: Dupuy and Vignes (1991), p. 291.

UNCLOS the contiguous zone may not extend beyond 24 nautical miles from the baselines, where the coastal state may exercise the control necessary to avoid and punish infringement of its customs, fiscal, immigration or sanitary laws committed within its territory or territorial sea.[49] However, the nature and territorial scope of coastal state's control within the contiguous zone remain unclear.[50]

5.5.6 High Sea

According to UNCLOS the high sea covers all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state.[51] A legal basis for these provisions offers the principle of freedom of the high seas, which prevails in international law since relatively recent time.[52] The concept of marine freedoms involves basic marine freedoms to be exercised by all states with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under UNCLOS with respect to activities in the Area.[53] The freedom of the high seas comprises: freedom of navigation and overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations permitted, freedom of fishing, as well as freedom of scientific research.

Beyond the limits of national jurisdiction there is the so-called Area, which, together with its resources, is common heritage of humanity. The special rights granted by UNCLOS to the Area shall affect the legal status of waters superjacent to the Area or that of the air space above those waters.[54] The general conduct of states in relation to the Area must be in the interest of maintaining peace and security and promoting international cooperation, mutual understanding and the provisions of UNCLOS relating to the area of principles enshrined in the Charter of the United Nations and other rules comply with international law.[55]

There are following differing proposals among the Caspian coastal states regarding the status of the waters outside the fishing zone or Zone of national jurisdiction:

> "*. . .waters being subject to joint use by the states where free merchant shipping and freedom of fishing [proposed by Azerbaijan], or in which the freedom of*

[49] Article 33(2, 3).

[50] See: Wooldridge (1992), pp. 781 et seq.

[51] Article 86: UNCLOS.

[52] See: Ipsen (2004), p. 289.

[53] Article 87: UNCLOS.

[54] Article 135: UNCLOS.

[55] Article 138: UNCLOS.

navigation and coordinated fisheries standards [proposed by Russia] and the environment are protected."

"…the high seas [proposed by Kazakhstan and Turkmenistan], which belong neither to territorial sea (National zone), nor to exclusive fishery zone nor to internal waters [proposed by Turkmenistan]

"…national zones, with ensured freedom of navigation, the agreed fisheries standards, and the protection of environment" [proposed by Iran]

The Draft Caspian Status Convention does not provide for and special regime for the maritime territories outside of the fishing zone or Zone of national jurisdiction. It rather refers to the status of the high seas known from the law of the sea based on the freedom of the high seas, which remains free from any territorial claims of states.

An implicit assumption, though probably accepted by the contracting parties in the Draft Caspian Status Convention, which is well established in the law of the sea, provides that the states' rights in the Area do not affect the legal status of the waters superjacent to the Area or that of the air space above those waters.[56]

The concept guaranteeing freedoms of navigation and fishing proposed by Azerbaijan reflects international law's rules on the high seas, although it does not provide for other recognized freedoms. The proposal regarding the high sea zone in the Caspian Sea made by Kazakhstan and Turkmenistan does not fully reflect the relevant law of the sea standards. All coastal countries agreed that according to previously binding rules navigation on the Caspian Sea shall remain free and unrestricted to all the neighboring countries. The principle of freedom of navigation and ensuring safety covers merchant ships flying the flag of Caspian coastal states but excludes any foreign ships from the principle as it used to be practiced before the dissolution of the Soviet Union.[57] Introduction of such an understanding of the freedom of navigation outside of the fishing zone or the zone of national jurisdiction into the Draft Caspian Status Convention would mean a significant limitation of traditional rights on fishery.

5.5.7 Methods of the Future Maritime Delimitation in the Caspian Sea

Having presented the necessary conditions for the possibility of conducting maritime delimitation it is now time to discuss the existing methods of delimitation, which affect, among other things, the utilization of Caspian resources. One of the rules mainly used in the international law is the so-called principle of equidistance.

[56] Article 135: UNCLOS.

[57] Article XIV, XV of 1935 Agreement; Article 12, 13 of 1940 Agreement.

Application of this principle points out to the method of median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured.[58] The following variants of the equidistant line are known in the states' practice: simplified,[59] adapted,[60] and strict.[61] The legal sources for the delimitation law and thus the equidistant principle are the Geneva Conventions of 1958 and the UNCLOS, as well as the international case law. Geneva Conventions provide for free choice of delimitation methods and do not prescribe equidistance as a compulsory method. Only if there is no other agreement between them the equidistance method, considering reasons of "special circumstances," is preferred. While conducting delimitation of the continental shelf or exclusive economic zone an equitable solution must reached,[62] which is not to be understood as the *ex aequo et bono* principle.[63] The equidistance method shall not be seen as a norm of customary law because the necessary "*opinio juris sine necessitatis*" is failing; however, this method has found indisputable roots in international legal practice of states.[64]

The equidistance principle has been provided for in the Draft Caspian status convention. Regarding the method of delimitation of the future Caspian zones the Draft provides that:

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[58] Article 12, § 1 and Article 24 § 3 of the Convention on the Territorial Sea and the Contiguous Zone 1958; Article 6, § 1 and 2 of 1958 Convention on the Continental Shelf; Article 15: UNCLOS.

[59] Denmark/United Kingdom, see Oude Elferink (1999), p. 548.

[60] For example Denmark/Iceland, see Oude Elferink (1998), pp. 607 et seq.

[61] United Kingdom/United States of America, In: IJMCL, vol. 9, No. 2, 1994, pp. 258–259.

[62] See ICJ judgement in the case of the North Sea continental shelf of 1969 (ICJ, Reports 1969, pp. 3 et seq.). The principle of equity has come to apply for the first time in the North Sea Continental Shelf case, where the ICJ concluded that in addition to consideration of the relevant circumstances in the region, the application of the "equity principles" is a binding rule of customary law in case of delimitation between states, who are not party to contractual law (ICJ, Reports 1969, § 101 c 1, p. 54). With this decision, the ICJ has caused a long-term disagreement of the states with respect to the nature of the application of the equidistance method for the delimitation of maritime zones beyond the territorial sea. This conflict of contractual and judicial law has not been repealed by the provisions of UNCLOS. The UNCLOS requires an equitable solution in the continental shelf or EEZ delimitation in the absence of agreement among the involved states, which can be achieved in the application both of equidistance and equity methods (Article 74, 83 UNCLOS). The final set of rules that explain the current legal application of the equity principle have been established by the judgment of Qatar against Bahrain. This confirmed that application of the equidistant principle is the first and the application of the equity principle is the second stage of each delimitation case.

[63] ICJ, 1969, § 88, 49.

[64] Gornig and Despeux (2002), pp. 184 et seq. A certain degree of inconsistency is shown in ICJ judgments in the cases Libya against Malta from 1985 (Libya/Malta, ICJ, Reports 1985, pp. 12 ff. and Denmark against Norway from 1993 (ICJ, Reports 1993, pp. 37 et seq.). The ICJ has used the equidistance method as basis, which must be examined in the second phase based on special or relevant circumstances and the principle of equity. This unification was first referred only to opposite states (ICJ 1993, § 50, p. 60) and then also to adjacent countries (Qatar/Bahrain, ICJ 2001, in conjunction with § 170 & 224).

"*The delimitation of the seabed and its subsoil in sectors/Zones of national jurisdiction should be based on the median line [Iran against] and with the consent of all states whose coasts are opposite or adjacent to each other, with due regard to the norms of international law, states practice established in the Caspian Sea [Turkmenistan against], and according to equitability [Azerbaijan against] [Article 8 (9).1]*

Kazakhstan agrees with such formulation but suggests adding an additional proposal:

"*The delimitation of the Caspian seabed and its subsoil shall be conducted upon an agreement of states whose coasts are opposite or adjacent to each other*" *[Azerbaijan against].*

Russia agrees with both versions of Article 8(9).1 proposing to add a provision directly referring to the North Caspian Agreements:

"*In case where parties have already signed a relevant agreement concerning the delimitation of the seabed and its subsoil, all questions relating to the delimitation to be decided in accordance with such agreements*" *[Iran against] [Article 8 (9).2]*

The Draft Caspian Status Convention sets some special conditions for the application of the equidistance principle to the delimitation of the Caspian Sea, including: previous signing of a relevant agreement, compliance with norms of international law,[65] taking into account previous state practice in the Caspian Sea, principle of equity,[66] and validity of previous relevant delimitation agreements.[67]

[65] The procedure laid down in the draft is similar to the UNCLOS provisions regarding delimitation upon the equidistance method. However, the draft remains inconsistent with other provisions of UNCLOS and thus it provides a serious ambiguity. For example, according to UNCLOS a coastal sea remains under territorial sovereignty. However, the Caspian littoral states are far from unanimous acceptance for such territorial sea concept and whether this concept is at all applicable to the Caspian Sea. In the draft, the principle of the median line is mentioned in relation to the delimitation of the sectors of seabed and its subsoil, and not, as is the case in the UNCLOS, in relation to the entire territorial sea. The existing conceptual differences between the draft and the globally accepted understanding of the territorial sea concept may result in serious errors in the future status of the Caspian Sea.

[66] The Azerbaijan's disagreement with the application of the equity principle in the implementation of the median line is rooted in its fear of reviving Iranian demands of division of the Caspian Sea into five equal parts. This would, however, show a false understanding of this principle by Azerbaijan.

[67] In the negotiations leading up to the Draft Caspian Status Convention Azerbaijan, Kazakhstan, and Russia call for acceptance of the existence and recognition of the binding force of the previously signed agreements on delimitation of the northern part of the Caspian Sea for exercising sovereign rights enabling parties to use the natural resources of its seabed. Parties to the North Caspian agreements agreed that these treaties will not prevent the achievement of overall

In the Draft Caspian Status Agreement parties define merely the principles of delimitation of the Caspian seabed and its subsoil on sectors/zones, without clarifying the future status of the water column. Such an approach roots in the provisions of UNCLOS concerning the delimitation of the exclusive economic zone. Its peculiarity is that in contrast with the delimitation of the continental shelf, the exclusive economic zone is composed of the water column and the seabed and therefore its delimitation may be conducted in separate processes for the water column and for the sea bed. The course of delimitation of the water column may initially vary from the course of delimitation of the seabed.[68] The appropriateness of this distinction was confirmed by ICJ which pointed out to the need to consider the peculiarities of living and non-living resources.[69] A similar regulation was introduced in the 1958 Geneva Convention on the continental shelf, where waters above the continental shelf are to be seen as high seas.[70] A similar process of delimitation conducted in two separate stages was applied in the North Caspian Agreements between Azerbaijan and the Russia in 2002 (Article 1) and between Azerbaijan and Kazakhstan 2003 (Article 1).

Conclusions

The setting of state maritime borders is crucial for sustainable development of a country, and for its peaceful and fruitful cooperation with neighboring states. Delimitation of the state borders requires a clear international legal framework based on political consent of all states sharing a common water pool. Border lines define the scope of state sovereignty settling each state's rights to use natural resources of the water area, pipeline regime, shipping, etc. According to customary law of the sea every coastal state has the right to a national maritime zone and relevant rights to use it, which shall be delimited according to common international standards.

Until today there is no clear legal framework of state borders in the Caspian Sea. Neither agreements nor legal praxis between the Soviet Union and Iran have managed to define the legal status of the Caspian Sea in a way that would be recognized as binding by the currently existing coastal states. It resulted in a long term dispute around the status of the Caspian Sea. In the early 1990s, the legal debate was fixed on accepting the concept of a sea, lake

(continued)

agreement among the Caspian littoral states regarding the legal status of the Caspian Sea. However, in the Draft Caspian Status Convention Azerbaijan, Kazakhstan, and Russia request that all arising questions shall be decided in accordance with existing contracts related to Caspian delimitation, which included a preliminary solution of some aspect of the status. This proposal met with the opposition of Iran, and Turkmenistan abstained.

[68] See: Ipsen (2004), p. 869.

[69] ICJ, Rep. 1984, p. 246.

[70] See: Oda (1995), p. 306.

or condominium for the Caspian Sea in defining its status. The ongoing struggle of the coastal states to settle the delimitation issue takes two different forms: first, bi- and trilateral agreements on sharing northern parts of the Caspian seabed for using resources located there, and second, multilateral negotiations on the future delimitation conducted in the framework of the Draft Caspian Status Convention. The latter shall define maritime zones in the Caspian Sea. However, there are still certain disagreements among the coastal states. The greatest challenge is related especially to the introduction of a concept of a coastal sea zone, which would recognize states' sovereignty over such a zone and excludes most rights of other states in this area. This debate is also linked to the question of introducing a zone excluded from coastal states' sovereignty, guaranteeing states' maritime freedoms.

The application of the middle line and straight baselines for the delimitation of the Caspian Sea, as proposed in the draft of the status convention, would result in the establishment of national sectors, regardless whether the Caspian Sea is to be recognized as a transboundary lake or sea in legal terms. As the Caspian Sea is 200 nm wide on average, the application of the proposed delimitation method would result in establishing national sectors of ca. 20.6 % for Azerbaijan, 14.6 % for Iran, 30 % for Kazakhstan, 15.6 % for Russia and 19.2 % for Turkmenistan. No space would be left any longer for the exercise of the traditional freedom of shipping on the Caspian Sea, which is guaranteed also in the customary maritime law. Such an effect contradicts the position of Caspian countries expressed in the Draft Caspian Status Convention regarding navigation in the Caspian Sea. It provides in Article 10(1) that merchant ships of the coastal states enjoy freedom of navigation in the entire area of the Caspian Sea. It contradicts the concept of the median line, proposed in the Draft Caspian Status Convention for delimitation of maritime zones, which provides for a zone excluded from freedom of navigation apart of the relevant coastal state exercising rights over the coastal zone (territorial sea). Both concepts must be therefore adjusted so as not to lead to unclear interpretations of the Draft Caspian Status Convention.

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Chapter 6
The Regime for the Use of Non-living Resources in the Caspian Sea

6.1 Reserves of Non-living Resources in the Caspian Sea

Considering the overall resource potential of the Caspian region, it remains undisputed that the secured oil reserves of the Caspian region are considerably smaller than the energy potential of the Middle East. Caspian oil production accounts for 3.29 % and gas production for 3.6 % of world reserves (BP 2009). However, the region is much less explored than the Gulf, so that new data are quite conceivable.[1] The Caspian oil and gas industry is developing most in Azerbaijan (the Balahani–Sabunchi–Ramani site, the offshore Shah Deniz field, and the Azeri–Chirag–Guneshli field), Kazakhstan (Tengiz, Karachaganak, and Kashagan) and Turkmenistan (South Yoloten–Osmman field).

6.2 International Legal Regulation of Non-living Resources

The legal regime of the non-living resources, according to the law of the sea, differs in respective categories of marine waters: first, in internal waters and territorial seas where the coastal State exercises full and unrestricted sovereignty over non-living resources above the seabed and in the subsoil of the submarine areas; secondly in the economic zone and the continental shelf where the coastal State exercises "sovereign rights" with respect to non-living resources; and thirdly in the so-called Area, seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, where non-living resources are excluded from the sovereignty of individual coastal states and considered the shared heritage of humankind. This law of the sea division of maritime waters became the basis of the intergovernmental negotiations on the regime of non-living resources in the Caspian Sea, but

[1] See: Müller and Halbach (2001).

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for the time being it has not come into legally binding force. The consequences of the possible application of the law of the sea zones for the Caspian Sea will be analyzed in the next part, where the prospects for a future legal regime of the non-living resources are elaborated.

There are some special international legal models related to the use of transboundary non-living resources, which can be used in the resource-related agreements. First are the "resource deposit clauses," which are used rather rare because of high legal risks. It requires states' cooperation in the case when at least one resource crosses the existing state boarder lines and at least one share of the resource field could be exploitable.[2] The second model of cooperation on shared resources is the so-called "resource unitization." This requires cooperation between the license or concession carrier in the case when resources reach areas being uses overlap. Other existing legal models of the jurisdiction over the transboundary non-living resources are as follow: "common management zones," "revenue sharing," "management cooperation," and "mutual restraint."

Last but not least is the model agreement of the "joint development" system, which is another intergovernmental model agreement, one that is usually applied to oil and gas fields and could be suitable for the regulation of the Caspian Sea. It regulates exploration and exploitation of non-living resources that have a transboundary character or are located in an overlapping zone.[3] However, one case is famous where the "joint development model" was used for a resource field which was located next to the coast of merely one of the contracting states without interfering into the adjacent area of the other contracting state.[4] The goal of the "joint development model" is to identify the differing states' interests that might arise from the demarcation and allocation of resources. Therefore this model might be applied even before the final settling of a border agreement to enable early exploration and exploitation of natural resources.[5] It is possible then that a subsequent delimitation can be performed respectively, one that takes in mind the situation achieved after the "joint development system" has been applied.[6] This may result in a final demarcation in zigzag form to avoid touching upon existing fields and saving the integrity of the already granted concessions.[7]

Despite the littoral states' disagreement over the course of future Caspian delimitation of the Caspian resources, their continuing multilateral negotiations on the future status agreement on the future demarcation prove that these states are determined not to conclude a tacit agreement on a preliminary settling of the maritime boundaries. The North Caspian agreements also guaranteed that their conclusion does not prevent a comprehensive agreement over the legal status of

[2] UK–Norway, Charney and Alexander (2003), pp. 1879 et seq. No. 9-15.

[3] Japan–South Korea 1974, ibid, pp. 1057 et seq. No. 5-12.

[4] Bahrain–Saudi Arabia, ibid, pp. 1489 et seq. No. 7-3.

[5] Canada–USA (Gulf of Maine): ibid, pp. 401 et seq. No. 1-3.

[6] Bahrain–Saudi Arabia: ibid, pp. 1489 et seq. No. 7-3.

[7] Trinidad–Tobago–Venezuela: ibid, pp. 675 et seq. No. 2-13(3).

the Caspian Sea by all five littoral states. These treaties shall not predetermine the final border demarcation in the northern part of the Caspian Sea, but they reflect the state' claims on delimitation of the Caspian Sea for the use of the Caspian non-living resources.

6.3 Controversial Claims on the Rights to Use Non-living Resources in the Caspian Sea

Agreements reaching back to the nineteenth century reflected a lack of regulation of maritime borders in the Caspian Sea, which was continued in the Soviet–Iranian legal practice from 1921 to 1940, and thus contributed to the lack of clarity regarding the currently existing rights of the riparian states on the use of natural resources. From the Soviet–Iranian theory of closed sea, which used to be applied to the Caspian Sea by the former littoral states, one can conclude that all Caspian resources were fully covered by the sovereignty of both riparian states. Another significant feature of the Soviet–Iranian legal doctrine of the closed sea was the assumption that in the case of the absence of another agreement the littoral states exercise their sovereignty within the territorial waters and the regime of the central parts of the basin equals the regime of the high sea.[8] The treatment of the Caspian Sea as a closed sea was expressly confirmed in 1955 in Article 2 of Iran's National Law on Exploration and Exploitation of the Continental Shelf from 1949.[9] According to this article, one can conclude that the use of Caspian non-living resources within the territorial waters of the Soviet Union and Iran was limited to the respective coastal states, but in the central part of the Caspian Sea, the exploitation of the resources was open to both. In 1970, the oil industry Ministry of the USSR divided the use of the Soviet part of the Caspian Sea among four Soviet republics—Azerbaijan, Kazakhstan, Russia, and Turkmenistan.[10] The internal zones of use created in the Soviet part of the Caspian Sea were determined according to the principle of the center line.

The lack of clarity with regard to the scope of the individual rights of riparian states on non-living resources of the Caspian Sea grew in importance after the dissolution of the Soviet Union, which triggered unilateral attempts at regulation. In a communique of April 1996 between Kazakhstan and Russia, the latter recognized the rights of all Caspian riparian states to conduct all possible activities in the field of mineral and biological resources. Also, in a joint statement from October 1996, Kazakhstan and Azerbaijan guaranteed each other the right to exploit the natural resources of the Caspian Sea.[11] Both states recognized the need to define the states'

[8] See: Butler (1971), pp. 116–133.

[9] National legislation and treaties relating to the law of the sea (1974), XXXIV, p. 151.

[10] See Sect. 5.3.

[11] UN Doc. A/51/529 from October 21, 1996 (Azerbaijan–Kazakhstan).

sovereign rights in respective sectors in the Caspian Sea, and this was expressed also in the bilateral Statement of Kazakhstan and Turkmenistan in February 2007.[12] During the November 1996 meeting of the foreign ministers of five Caspian states in Ashkhabad three of them (Russia, Iran, and Turkmenistan), signed a Memorandum on the joint use of the Caspian's natural resources.[13] According to this Memorandum, a tripartite company for the investigation and development of hydrocarbon resources was to be established—however, this did not come to pass. Azerbaijan and Kazakhstan refused to join this declaration. Russia's original concept of introducing a joint development area over the Caspian seabed beyond a 45-mile economic zone was rejected by the other riparian States. Therefore Russia's recognition of unilateral actions regarding the Caspian Sea was finally expressed only with the signature of the North Caspian agreements, providing for gradual progress towards a consensus-based solution to the Caspian status problem with the settlement, first and foremost, of the issues of exploitation of mineral resources, the environment, fishing, and navigation.[14]

In the period from 1998 to 2004 Russia, Kazakhstan, and Azerbaijan signed the so-called North Caspian agreements, where in addition to the sector's delimitation, the regime of exploitation of natural resources in the northern part of the Caspian Sea between these countries was settled. The treaties clear certain provisions on the use of non-living resources in the northern Caspian Sea, although neither Iran nor Turkmenistan is a party to them. The Agreement of 1998 between Kazakhstan and Russia (Article 2) provides for states' sovereign rights over the seabed and subsoil of the northern part of the Caspian Sea to explore and exploit resources within the sectors' limits. States agreed on exclusively common rights to explore and exploit resources that extend across the median line set by the treaty. Detailed regulations on the potential joint exploitation works provide the Additional Protocol to the treaty. It covers two geological structures: Kurmangazy (Kulalinskaya) and Central Well, as well as a field called Kwalunskoye. Kazakhstan exercises sovereign rights over the Kurmangazy structure (Art. 2), but Russia is entitled to take part in the exploitation in the form of joint development (Article 3). Respectively, Russia exercises sovereign rights over the Central Well-structure and Kwalunskoye field (Art. 4 and 5), however Kazakhstan remains entitled to participate in the resources exploitation (Article 4). The protocol provides also that in the case of the discovery of new transboundary geological structures maritime, the state parties shall re-assign a new contract that would determine the economic activities in such an area.

In 2001 a similar agreement on the Northern part of the Caspian Sea bottom was signed between Azerbaijan and Kazakhstan. It provided (Article 3) for parties'

[12] UN Doc. A/52/93 from March 17, 1997.

[13] See: Mamedov (2001), p. 237.

[14] UN Doc. A/58/719–S/2004/137 vol. February 23, 2004 (Letter dated February 19, 2004 from the Permanent Representative of Azerbaijan and the Russian Federation to the United Nations addressed to the Secretary General).

sovereign rights over the seabed and subsoil of the Caspian Sea for exploring and exploiting the resources within the limits of the two settled national sectors. According to the Additional Protocol of 2003 to this treaty, in the case of identifying new fields extending across the median line between both national sectors, state parties should conclude a separate agreement.

The third of the Northern Caspian Agreements was concluded between Azerbaijan and Russia in 2002. It provides (Article 2, paragraph 1) that the state parties shall exercise their sovereign rights over non-living resources and other legitimate economic activities related to exploration and exploitation of the resources within the treaty's defined sectors of the Caspian seabed and subsoil. The exploration and exploitation of the resources extending beyond the median line between both national sectors are to be performed by an organization authorized by state parties' governments according to the respective international legal practice (Article 2, paragraph 2).

The industrialization of the Caspian Sea is particularly evident in the growing number of artificial islands and other installations for the extraction of non-living resources. The first of many facilities designed for resource extraction was the artificial island built east of the Kashagan oil field by Agrippa KKO Company.

The coastal states' conflicting territorial claims, which results in an overlapping of zones, speaks for the delimitation of the Caspian Sea. It shall however be considered that the requested territorial rights might injure the rights—also on the use of resources—assented to by states not involved in the delimitation process of the maritime zones in question.[15] This becomes particularly acute in the case of maritime areas, where the distance between the opposite shores is less than 400 nm, as is the case for the Caspian Sea. The clashing legal claims of several states over the same maritime areas was regulated—even if only partially—in the northern part of the Caspian Sea through the set of Agreements between Azerbaijan, Kazakhstan, and Russia. Clashing legal claims are also present in other parts of the Caspian Sea. Since the end of the 1990s, a conflict has continued between Azerbaijan and Iran regarding the Araz–Alov–SARQ fields in the south of the Caspian Sea. In July 2001, military threats were made by Iranian ships towards British Petroleum, which was working on behalf of Azerbaijan seismic surveys at Araz–Alov–Sarq fields. Another disputed area is the oil field Serdar/Kyapaz located within the overlapping zone between Azerbaijan and Turkmenistan. Turkmenistan also denies the right of Azerbaijan to exploit the oil fields of Chirag, Azeri, and Kyapaz/Serdar. Although both states are in agreement that the delimitation of the Caspian Sea bed should be conducted according to the principle of the median line, there is no agreement on where exactly the line shall run. Hence, the opposing claims of these two states.

[15] Aegean Sea, ICJ Rep. 1978, § 85, p. 35; Tunisia vs. Libya, ICJ Rep. 1982, § 75, pp. 61 and 62; Gulf of Maine, ICJ Rep. 1984, §195, p. 327.

6.4 Prospects of Adopting Relevant Legislation on the Use of Non-living Resources in the Caspian Sea

The littoral states' legal positions regarding the legal status of the Caspian Sea envisaged in the draft of the future Caspian Status Convention put an evidence of the existence of immense differences in their views with respect to the scope of each state's rights on the use of non-living resources of the Caspian Sea. Particularly controversial seems to be the questions on the recognition of the area of the territorial sea, including its seaward extension, division of its seabed and subsoil, and the method of delimitation. The reason for this is that in the area of the territorial sea, similar as in the state's internal waters, a coastal state possesses sovereignty entitling it to extensive rights over the resources of this area. As every zone of the territorial sea may be subject to the sovereignty of merely one coastal state, their delimitation contributes to great controversies and tensions between the riparian states. The provisions of the draft Caspian status agreement regarding the spatial order of the Caspian Sea reveal two irreconcilable concepts regarding its future legal status and regarding the existence of the sovereign rights with respect to the resources of the Caspian basin. Recognition of the sovereign rights of States in the Caspian Sea is embodied in the concept of the territorial sea. In this way they support the idea of recognition of complete sovereignty of all Caspian littoral states in respective coastal seas and the national sovereignty over the resources. This position is rejected, however, by some coastal states advocating the introduction of zones known from law of the sea with a status similar to contiguous zone. This implies the rejection of coastal states' sovereignty over any area of the Caspian Sea, also regarding the rights to natural resources.

According to the draft agreement on the Caspian Status all coastal states, except Russia, agree that coastal states shall exercise the sovereignty over respective Caspian areas, differing however in the understanding of the legal status of the zones covered by sovereignty. According to [Art. 6(7) Abs. 2] Azerbaijan, Kazakhstan, and Turkmenistan: "*sovereignty should extend to the air space over the territorial sea as well as the seabed and subsoil of the territorial sea*." Iran claims that "*sovereignty [should] be extended only to the waters superjacent to the seabed of the sector*." The difference in the Iranians' position derives from limiting the coastal states' rights within the so-called "national sectors" merely to the development and use of marine resources and implementation of other economic activities at the seabed and subsoil of the Caspian Sea. Such a position equals rather Iran's rejection of the sovereignty concept to be applicable over the national sectors in the Caspian Sea.

Regarding the installations and structures in the Caspian Sea, the states agreed in the Draft Caspian Status Agreement that: *State Parties shall exercise their sovereignty [Russia proposes to remove this term and replace it with the term "jurisdiction"] over their nationals, ships in their ownership and over installations and structures in the Caspian Sea according to the norms of international law* [Art. 12 (11)]. Such a norm shall be interpreted that the states' rights concerning

installations and structures receiving Caspian resources shall be exercised according to the status of both, the territorial sea, which is with the absolute and unlimited sovereignty of each riparian state, and the status of the exclusive economic zone implying the coastal states' sovereign rights over the extraction of the resources.

The future status of the seabed and the subsoil of the Caspian Sea seaward of the territorial sea and the fishing zone or the zone of national jurisdiction—whichever name it will finally receive—will not correspond with the legal regime of the deep seabed known from the law of the sea. The Draft Caspian Status Agreement provides [Iran refuses] that: "*The seabed and its subsoil are to be separated for the purpose of exercising the rights for the extraction of mineral resources as well as other legitimate socio-economic activities concerning the development of the resources of the soil and subsoil.*" *[Art 5 (6) 2]*. No special legal regime for the Caspian areas seaward of the areas covered with exclusive coastal states' rights shall be understood as equipping seabed and subsoil maritime sectors of the Caspian Sea with equal status. This differs from the UNCLOS regulations provided for the "Area" located beyond the limits of national jurisdiction, which is considered a shared heritage of humankind, and where no sovereign rights may be acquired or exercised.[16]

Conclusions

Rights on use of non-living natural resources in maritime space offer an important added value to states' economic development's and may oft be seen as a reason for countries claim on conduct of delimitation of maritime areas. International law of the sea defines the scope of states' rights on exploration and exploitation of non-living natural resources in maritime zones. Defining the states' rights is particularly challenging in case of resources covered by overlapping claims of the coastal states, but also here some legal methods of delimitation are available in the international praxis.

Due to the presence of reach non-living resources in the Caspian Sea, especially oil and gas fields, the legal debate over their delimitation is difficult to resolve. In the time of Soviet–Iranian control over the Caspian Sea the use of natural resources was conducted according to the concept of *mare clausum*. In these states' praxis the Caspian space was informally divided into two separate zones exclusively used by each state. Since the dissolution of the Soviet Union, the initial debate over delimitation of the states' rights on Caspian non-living resources was conducted according to the concepts of a sea, lake or condominium for the Caspian Sea status. The current

(continued)

[16] Art. 1, §. 1 UNCLOS, Arts. 135 and following. Many of UNCLOS's provisions regarding the "Area" were amended by Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

developments take two different forms: first, conclusion of bi- and trilateral agreements on using the northern parts of the Caspian seabed, and second, multilateral negotiations undertaken in the form of a future convention on the legal status of the Caspian Sea. The first is contested by the remaining costal states; however they undertake other unilateral measures themselves. The latter shall define future maritime zones in the Caspian Sea and respectively the scope of states' right within these zones. However there are still sufficient disagreements among negotiating countries regarding the states' sovereign rights over the resources and their use.

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Chapter 7
The Legal Regime of the Living Resources of the Caspian Sea

7.1 Tensions Between the Protection of Fish Stocks and the Oil Industry in the Caspian Sea

Extensive commercial fishing and the rapidly growing number of oil-related off-shore activities, along with the rapid development of new technologies, contributes to increasingly unwanted intrusion into the traditional areas of the use of the Caspian Sea, such as fishing. There is a biological limit to the exploitation of fish reserves, which is determined by the "Maximum Sustainable Yield," i.e., the largest catch to be taken from the stocks without destroying them.[1] The establishment of protection zones, the construction of substantial anchoring systems, as well as an abundance of mining equipment in the areas with the best fish stocks cause serious problems for fishing. An important legal task at the intergovernmental level as well as within individual countries' legislation is development of a legal system reconciling the needs of all traditionally versatile usages of the Caspian Sea—non-living resources, fishing and shipping.

In the Caspian region, the problems of living resources remain unresolved for now. A fundamental concern is the Caspian fish stocks, which are characterized by large quantity and variety. The Caspian Sea is inhabited by 123 species of fish, of which about 30 species are of high economic value.[2] According to the Caspian Environmental Programme up to 500–600 thousand tons of fish is caught in the Caspian Sea annually, with the majority being Beluga (Husohuso), starlet (Acipens erruthenus) and migratory marine species of herring, Pike perch (Stizostedion), carp (Cyprinus carpio), bream (Abramis), catfish (Silurus glanis), and the Caspian roach (Rutilus). Of these species the largest commercial value is that of sturgeons (five species) and the roach (three species).[3]

[1] See: Anderson (1975), pp. 159 et seq.

[2] See: Zonn and Zhiltsov (2004), p. 43.

[3] Art. VIII CITES.

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Until 1991 two Caspian coastal states—the Soviet Union and Iran—used to control the entire caviar market and were responsible for the conservation of fish stocks. With the disintegration of the USSR, however, state protection was limited and the exploitation of resources was furthered by poaching. In 1997 the Conference of the Parties of the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which Caspian littoral states except Turkmenistan are parties to, included all sturgeon species into Appendix II, listing the species threatened with extinction. Thus, since 1997 the exporter states of these endangered species have the duty to abide by the strict regulations of CITES, including the necessary approval and special designation systems. This implicated the Caspian states' obligation to enforce the CITES provisions regarding the introduction of systems of catch approval and special designation protecting species. States are obliged to prohibit trade with endangered species.[4] As caviar is a popular local delicacy, countries must also make efforts to control domestic trade in sturgeon.

According to the Secretariat of CITES, the Caspian Sea provides approximately 90 % of world caviar stocks. The official annual catch has fallen from 30,000 tons in the late 1970s to less than 10,000 tons at the end of the 1990s.[5] So far, the states have not been successful in stopping poaching and are far from responsible fisheries management. The required bans on fishing in areas with overfishing, however, are difficult to enforce over extended periods. The poaching of valuable fish stocks, particularly of sturgeon, is very common. Selective fishing methods that avoid the undesirable by catch as well as the catch of immature fish are expensive for the common use.

7.2 Regime of the Living Resources in International Law

Living resources are not a coherent biological species category, but can be divided into numerous marine products, such as conventional and unconventional products (e.g., deep-sea fish), or sea creatures used for medicinal purposes. Hence the law of the sea regulation of the living maritime resources contains many different norms.[6] The basic rules of the legal regime of living resources is provided by UNCLOS[7] and certain instruments adopted after its entry into force, i.e.: the Agreement on Implementation of the Provisions of the United Nations Convention of 10.12.1982 on the Conservation and Management of Straddling Fish Stocks and Highly migratory Fish Stocks; the Food and Agriculture Organization's Code of

http://www.cites.org/eng/news/pr/2002/020306_caviar_resumption.shtm. Accessed 1 July 2014.

[4] Art. VIII CITES.

[5] http://www.cites.org/eng/news/pr/2002/020306_caviar_resumption.shtml. Accessed 1 July 2014.

[6] See: Kindt (1984), p. 9.

[7] See: Hyvarinen et al. (1998), pp. 323–338.

Conduct for Responsible Fisheries; the complementary FAO Agreement to promote compliance with International Conservation and Management Measures by Fishing Vessels on the high Seas[8]; and the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities.[9]

According to the current law of the sea the territorial sovereignty of a coastal state over its territorial sea enables the coastal state to reserve to their nationals all fishery rights in the area covering this space. On the other hand, the high seas are open to all states, whether coastal or land-locked. Freedom of the high seas comprises, *inter alia*, freedom of fishing.[10] The right to engage in fishing on the high seas is, however, restricted by treaty obligations, the rights and duties occurring from UNCLOS, as well as the interests of coastal states. The main such is the duty to take, or to cooperate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas (Art. 117 UNCLOS). Between the areas covered by the state's full sovereignty over the living resources in its territorial sea and the area of freedom of fishing on the high seas there was a need to create an additional zone recognizing states' fishing rights, but simultaneously guaranteeing stocks protection. Its initial form was the fishery zone, which was gradually replaced in state practice with the concept of exclusive economic zone.

The principle of freedom of fishing was originally established as a result of the principle of freedom on the high seas.[11] Nevertheless, states have tried to reserve certain exclusive rights outside of their territorial seas, particularly with regard to fishing and mining, what has also finally found recognition in international case law.[12] Already in the 1940s some of the Latin American states raised claims regarding the establishment of special fishing zones (extended up to 200 nautical miles measured from the baselines). Their rationale was the need to guarantee food security for the population through natural resources.[13] As a result, merely sovereign rights on fishing were recognized.

The introduction of the concept of exclusive economic zones and respective restrictions over the freedom of fishing on the high seas led to the escalation of conflicts among coastal states' fishing interests. This opened the high seas to the fishing states operating worldwide. The additional tightening of fishing rights on the high seas, followed by the growing dissatisfactions of fishery states, was introduced

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[8] Code of Conduct for Responsible Fisheries (1995).

[9] UN Doc. A/51/116 (1996).

[10] Art. 87 and 116 UNCLOS.

[11] Art. 2 §. 3 No. 2 of Convention on the High Seas of 1958, Art. 1, Section 1 of the Convention on Fishing and conservation of the living resources of the high seas; Art. 87, § 1 lit. e i.V.m., Art. 116 of UNCLOS.

[12] ICJ Rep. 1973, pp. 44 f. over support Latin American claims regarding 200 miles economic zones, also ICJ Rep. 1974, p. 192 in the Fisheries Jurisdiction Cases (Germany/Great Britain). The recognition of states' rights on fish stocks located out of the territorial sea was so reflected in the ICJ decision in the case of so-called "Icelandic fisheries dispute."

[13] See: Garcia-Amador (1974), pp. 33 et seq.

because of the steady downward trend of existing fish stocks. The states' far-reaching obligations to protect the living resources were adopted, among others bases, on the Convention on Fishing and Conservation of the Living Resources of the High Seas of 1958, Agreement concerning Co-operation in Marine Fishing of 1962; the Fisheries Convention of 1964; and the Convention On Conduct Of Fishing Operations In The North Atlantic of 1967.

The establishment of the exclusive economic zone (further referred to as EEZ) was the greatest achievement of the Third Law of the Sea Conference (1973–1982), but it was recognized first as a part of customary international law,[14] which initially met with great difficulties.[15] Its adoption contributed to substantial restriction of the principle of freedom of fishing on the high seas. Its maximal breadth shall be not more than 200 nautical miles measured from the baseline. The delimitation of the exclusive economic zone can be conducted between states with opposite or adjacent coasts based on an agreement guaranteeing an equitable and appropriate solution. Within EEZ the coastal states' sovereign rights for the exploring and exploiting, conserving and managing the living and non-living natural resources of the waters superjacent to the seabed, the seabed and its subsoil are guaranteed.[16] The coastal states thus have no sovereignty in their own economic zone, but merely sovereign rights with respect to living and non-living resources. The regulation of fishing and fish stocks is subordinated to the coastal state's sovereignty.[17] Every coastal state shall ensure the application of appropriate conservation and management measures in order not to jeopardize the existence of the living resources in the exclusive economic zone by over-exploitation and to preserve or bring back the populations of harvested species to levels securing the maximum sustainable yield.[18] In its authority regarding the exploitation of living resources, the coastal state shall promote the objective of optimum utilization of the living resources in the exclusive economic zone.[19] For this purpose, it shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal state does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch.[20] There are also special rules for stocks occurring within the exclusive economic zones of two or more coastal states or both within the exclusive economic zone and in areas beyond and adjacent to it (highly migratory species, marine mammals, anadromous stocks, catadromous species, sedentary species).[21]

[14] Case Concerning the Continental Shelf, ICJ Rep. 1982, 74.

[15] See: Hafner (1987), p. 185.

[16] Art. 56, §. 1 a) UNCLOS.

[17] Art. 61, §. 1 UNCLOS.

[18] Art. 61, §. 2, 3 UNCLOS.

[19] Art. 62, §. 1 UNCLOS.

[20] Art. 62, §. 2 UNCLOS.

[21] Corresponding: Art. 63–68 UNCLOS.

Historically, the fishery zones were the predecessor of exclusive economic zones, and were gradually replaced by them. However, still, many coastal states worldwide establish fishing zones among their maritime areas instead of an exclusive economic zone, though UNCLOS does not include any direct reference to it. Originally, the fishing zone concept was understood as covering merely up to a maximum breadth of 12 nautical miles measured from the baseline.[22] It recognized preferential but non-exclusive fishing rights of the coastal state of those countries that are dependent on coastal fisheries in a particular way.[23] State practice of the 1970s confirmed the success of the fishing zone regimes. The exclusive fishing zone is a part of the exclusive economic zone. With regard to the fishery zone all relevant provisions of UNCLOS on exclusive economic zones can be applied by analogy. In the fishery zone the rights and jurisdiction of the coastal state are limited exclusively to living resources. The fundamental difference to the exclusive economic zone is that in a fishing zone the exercising of individual coastal states' sovereign rights is limited merely for the exploring, exploiting, conserving, and managing the living resources.[24]

Rights on the use of natural resources may be assigned regarding resources' utilization, profit-sharing, and legal management, etc. The concept of territorial sovereignty is the only such in international law which regulates the equitable distribution of states' rights to the use of resources.[25] There is no exclusive, universally binding legal model for the use of natural resources. Some standards for assigning fishery usage rights can be found in the individual interstate arrangements on fishing quota allocation, as they define the allocation of rights between particular states and private companies.[26] A suitable example could be the rules on the fishery management outside the 200-mile zones adopted by the regional fisheries organization, the North-East Atlantic Fisheries Commission (further referred to as NEAFC).

As a result of the introduction of the exclusive economic zones a new category of states' rights with respect to transboundary fish resources has emerged. Whether it is possible to reconcile the diverging states' interests by virtue of the adoption of cooperation agreements depends on numerous legal[27] and non-legal (biological, technological, economic, social, and political) factors.[28] The distinction between the legal regime of fish stocks management is to be performed respectively to their

[22] Fisheries Jurisdiction Case, ICJ Rep. 1974, p. 192. Critics: Churchill (1975), p. 82.

[23] ICJ Rep., 1974, p. 196.

[24] Handbook on the Delimitation of Maritime Boundaries (2000), p. 9.

[25] Exceptions for restricted multilateral treaties example respect of the High Sea, Spitzbergen, Antarctica.

[26] See: Hafner (1987), pp. 119 et seq.

[27] See: Case Law: Lac Lanoux Arbitration (1957). In: 24 International Law Reports 1957, p. 101; North Continental Shelf Cases (1969) in: ICJ Rep. 1969; Case Concerning the Delimitation in the Gulf of Maine Area (1984) in: ICJ Rep. 1984; Fisheries Jurisdiction Cases (1974) in: ICJ Rep. 1974. UNCLOS: Art 2, 56, § (1)(a), 77, § 77(1), 116, 117, 63, § (1), 63(2), 65–67.

[28] Hey (1987), pp. 15 et seq.

location: first—stocks occurring within the exclusive economic zones of two or more coastal states or both within the exclusive economic zone and in an area beyond and adjacent to it. The second applies to fish stocks occurring within the areas of the overlapping claims of two or more coastal states (exclusive economic or fishery zones), which thereby hampers the delimitation of the zones.[29]

An additional problem regarding the fishery regime arises from the partially contentious relationship between respective provisions for the regime of the exclusive economic zone and the continental shelf in customary international law. The question is whether the states' sovereign rights on fishing within the exclusive economic zone underlie the special regime of the fishery safety zones of certain oil or gas exploration fields. Such a conclusion seems to be legitimate in the light of current state practice. Respectively, fishing in such safety zones is subjected to the legal regime of the continental shelf and not to the regime of the exclusive economic zone.[30]

7.3 Previous and Existing Regulations of Fishing in the Caspian Sea

The original rights of Caspian coastal states on the exploitation of fishery resources were settled in the Friendship and Cooperation Treaty between the Russian Soviet Socialist Republic (RSSR) and Persia of 26 February 1921, wherein Persia explicitly recognized the great importance of the Caspian fisheries for Russia's food supply [Art XIV]. In October 1927 the Agreement regarding the exploitation of the fisheries on the southern shore of the Caspian Sea, with protocol was signed. It stipulated that commercial fishing outside coastal zones 10-nautical mile-wide was restricted exclusively to a common Russian–Persian Company 50 % owned by each coastal state [Art 5]. This agreement was originally concluded for a period of 25 years and not prolonged by Iran. The regulation of the Caspian states fishing rights was extended in the Trade and Navigation Treaty concluded between the USSR and Iran on 25 March 1940. It determined a 10-nautical-mile coastal zone, within which each party enjoyed exclusive rights on fishing. Seawards of the fishing zone both coastal states possessed unrestricted freedom of fishing.

The principle of exclusivity and commonality of the costal states' rights on leaving resources located outside the 10-nautical-mile exclusive fishing zones remained in force until the collapse of the Soviet Union. It was upheld also after the dissolution of the USSR in the legal positions represented by new coastal states. At the conference of October 4, 1992 the parties agreed upon a determination of the spheres of joint actions and organized six specialized committees, however only the committee on biological resources undertook its works. The International

[29] See: Lagoni (1992).

[30] See: Ulfstein (1998), pp. 237 et seq.

Commission on Aquatic Resources of the Caspian Sea (further referred to as ICARCS) was created by four littoral states and joined by Iran not until 2003. Its goal was to regulate Caspian fisheries by defining the Total Allowable Catch (TAC) and distributing between the coastal states the catch quota regarding major commercial fish species (sturgeon, kilka, seals). The states quota system is based on a methodology of the Caspian Fishery Research Institute (КаспНИРХ) and depends on their contribution to species reproduction (volume of freshwater inflow, number of fingerlings from natural spawning grounds, number of released fingerlings from hatcheries, habitat feeding grounds and resources). The Commission actively works in the area of conservation and the use of Caspian bioresources, scientific cooperation, and data exchange to calculate distribution quotas between countries.[31]

The Commission, while meeting twice a year under a 2-year rotating chairmanship of each country, prepared in 1993 a project for a convention on the use and protection of biological resources, which still remains under the states' consideration. Already at the Meeting in Ashkhabad held between 30 January and 2 February 1995, the issue of the extension of exclusive jurisdiction zones of the coastal states over fisheries remained unresolved. A consensus was achieved from the proposed 15 miles (Russia), 25 miles (Kazakhstan), 30 miles (Iran) and 40 miles (Turkmenistan and Azerbaijan) by the coastal states, except Azerbaijan, of a 20-mile national fishing zone.[32] The importance of this regulation is its close thematic relation to the Tehran Convention's adoption of the Protocol on the Biodiversity, which covers bioresources. In the case of the final adoption of the Commission's proposed Convention on Bioresources, to avoid repetitions, this matter would have to be excluded from the Tehran Convention's Biodiversity Protocol.

Another point of dispute in the Commission's ongoing negotiations is agreement on preliminary national allowances for caviar production. The authorization by the CITES is based on the Conservation Action Plan for the Caspian Sea Sturgeon Fisheries (the Paris Agreement) concluded by the riparian states during the 45th CITES Standing Committee Meeting in 2001. It extended CITES's authority over Caspian domestic trade and markets obliging states to issue 12-month Action Plans and providing for their commitment, starting from 2001, to present to the CITES detailed caviar production data. As caviar stocks continued to decline through the 1990s, the Parties to CITES decided to place all sturgeon species—including the rapidly declining beluga—under CITES Appendix II, which restricts their trade on a scientific basis, but does not ban it entirely; trade is illegal only for species listed under Appendix I of CITES.[33] Respectively, all exports of caviar and other sturgeon products have had to comply with strict CITES provisions. The amount of sturgeon that can be harvested (TAC) is derived by the Caspian coastal states according to the two not entirely compatible stock and catch assessment methods: sample trawling used by the former Soviet republics and catch-per-unit-effort (further

[31] CAS State of Environment (2010).

[32] See: Mamedov (2001), p. 237.

[33] See: Beluga Caviar Exports to Resume Following Spat over Quotas (2010).

referred to as CPUE) use by Iran.[34] The Caspian Bioresources Commission is the CITES regional body responsible for allocation of TAC among Caspian states.

Caspian states, using different TAC methods, still cannot compensate illegal fishing. Because of caviar, CITES introduced a temporary ban on export for caviar and other sturgeon products in 2001. It forced the coastal states to improve the regional situation and the CITES Secretariat was unable to publish quotas of annual export quotas for 2002–2005. However, in later years (2006, 2009, 2012) the Caspian coastal States did not provide sufficient information about the sustainability of their sturgeon catch and were not given a quota for commercial sturgeon fishing. In August 2013 Russia, supported by some other riparian states, suggested to introduce a 5-year moratorium on sturgeon catching in the Caspian Sea, which could help restore the sturgeon population to a commercially sufficient level.[35]

Riparian states still support the idea of the community approach to the use of Caspian living resources. This was reflected also in the bilateral agreements on the delimitation of the northern part of the Caspian Sea. In the Agreement between Azerbaijan and the Russia of 2002 (Art. 1) and in the Agreement between the Republic of Azerbaijan and the Republic of Kazakhstan 2003 (Art. 1) regulating the legal regime of water column was deliberately left unregulated because of the claims of Azerbaijan in this regard. The agreement between Kazakhstan and the Russia 1998 (Art. 1) expressly provides that water column remains in common use, even when the seabed and see soil of the northern part of the Caspian Sea was delimited between the parties to this agreement for the use of other resources.

The greatest achievement in strengthening of the existing legal regime on living resources was the conclusion of the Tehran Convention in 2003. It provides in Article 14 for the states' particular regard to protection, preservation, restoration, and rational use of marine living resources. Caspian states shall take all appropriate measures based on the best scientific evidence available to: first, develop and increase the potential of living resources for conservation, restoration, and rational use of environmental equilibrium in the course of satisfying human needs in nutrition and meeting social and economic objectives; and second, maintain or restore populations of marine species at levels that can produce the maximum sustainable yield as qualified by relevant environmental and economic factors and taking into consideration relationships among species; third, ensure that marine species are not endangered by over-exploitation; fourth, promote the development and use of selective fishing gear and practices that minimize waste in the catch of target species and that minimize by-catch of non-target species; fifth, protect, preserve and restore endemic, rare and endangered marine species; sixth, conserve biodiversity, habitats of rare and endangered species, as well as vulnerable ecosystems.

The final provision regarding the regime of the Caspian living resources must be defined in the framework of multilateral state negotiations over the future status of

[34] See: Total allowable catch (tac) estimation for Sturgeon species in the Caspian sea (2014).

[35] See: Russia suggests moratorium on catching sturgeons in Caspian Sea (2013).

the Caspian Sea, which remains under the states' consideration and their provisions, and it will be elaborated hereafter.

7.4 Future Regulation of the Living Resources in the Caspian Sea

The countries bordering the Caspian Sea take an interest in establishing a zone of exclusive fishing rights seawards of the territorial sea or the zone of national jurisdiction. In addition some of them claim territorial sovereignty over these marine zones and some of them require sovereign rights in the fishing. The settling of the fishery zone shall enable states to use the fish stocks as well as to protect them from overfishing. However, the long-standing disputes over the extent of coastal state jurisdiction over the fish stocks, as well as territorial extension of such a zone, remain unresolved. The provisions of the Draft Caspian Status Convention define fishery zones as follows:

> "*Fishing zones are determined in accordance with this Convention and shall not extend further then* [proposed 25–30 nautical miles, but not defined yet] *nautical miles seawards from the baseline*" *[*Proposed by Azerbaijan, Iran, and Turkmenistan] "*or from the border line of the territorial sea or the National jurisdiction zone*" [Proposed by Kazakhstan] [Art. 9(10) Abs.1]
>
> "*In its own fishing zone or in the zone of national jurisdiction* [Proposed by Russia]*, each State Party exercises exclusive right on conduct of the fishing industry and the usage of other living resources in accordance with relevant national legislation.*" [Art. 9(10) Abs.2]

The proposed concept of a fishery zone refers a similar principle included in the law of the sea; however its current interpretation by Caspian coastal states leaves a lot of ambiguity. The indicated extension of the Caspian fishing zone (25–30 nautical miles) seems justified given the small total width of the Caspian Sea. The definition does not however clarify either the nature or the extent of the rights of coastal states with respect to the living resources of the Caspian Sea in the fishing zone. Supported by some coastal states, the regulations of the law of the sea extend the provisions of the Exclusive Economic Zone also to fishing zones, recognizing coastal states' sovereign rights to the living natural resources. Therefore Russia objects to such an understanding of the concept of fishing zones in the Caspian Sea. It rejects any legal forms that would ensure any sovereign rights in the Caspian Sea, and supports the introduction of a zone of national jurisdiction within which riparian states would possess merely certain non-resource related rights. It contributes to legal uncertainty regarding the status of the area, where the coastal states might, as proposed in the Draft Caspian Status Convention, exercise exclusive rights over the conduct of the fishing industry and

the usage of other living resources. The contentious point is the amount of sovereignty which the coastal countries can exercise within the fishery zone. The answer to this could be given only upon the states' agreement on the territorial division of the Caspian Sea, which will finally define the respective states' rights in Caspian Sea zones.

A serious weakness of the Status Convention comes from the fact that the legality of the valuable fish industry in respect to prevention of living resources' degradation shall be assessed according to both national legislation and international standards, to which not all coastal states are parties. The law of the sea guarantees costal states' sovereign rights to living resources within the EEZ but limited by the participation rights of third states.[36] The coastal state shall use the living resources[37] according to the obligation to optimize the use of the resources.[38] There are no special UNCLOS preconditions for assessing the living resources, but states shall consider certain factors[39] which serve both conservation as well as the economic needs of the coastal state.[40] The access conditions to the living resources are left to coastal state's national law regulations.[41] However, UNCLOS (Art. 70) promotes particularly the rights of landlocked and geographically disadvantaged states.

The Draft Caspian Status Convention foresees third-state participation in access to TAC but limits its number to Caspian coastal states. It also calls for norms of access to TAC surplus based upon strict intergovernmental agreements depriving coastal states of the freedom to define the access conditions to the surplus of TAC. The Draft Caspian Status Convention recognizes the fishing rights of coastal states' natural and juridical persons, but limits them with the exclusion of sturgeon and seals. These limits are set also for the usage rights on stocks located seawards of the exclusive fishing zone or national jurisdiction zone. Ensuring the states' exclusive control over sturgeon and seal stocks is reasonable because of their economic importance and the need for special protection. Setting quotas limiting the use of natural resources in the EEZ is common in the law of the sea. However, the usage rights used to be guaranteed exclusively to the respective coastal state or also certain private companies.[42]

> "*According to the present Convention and international mechanisms, the Parties shall jointly define the total allowable catch of the valuable species of the Caspian living resource*" [Art. 9(10) Abs. 3].

[36] Art. 62, 69, 70 UNCLOS.

[37] Art. 61, § 1 and 62 UNCLOS.

[38] See: Hafner (1987), p. 272.

[39] Annotated Directory of inter-governmental organizations concerned with ocean affairs (A/CONF 62/L 14 from 10 Aug 1976).

[40] See: Hafner (1987), pp. 267 et seq.

[41] Also: Art. 297. § 3 (a) UNCLOS.

[42] See: Hafner (1987), p. 119.

"*The sturgeon industry is prohibited, except within the mutually agreed by the Parties limited quotas of sturgeon catches in the Caspian Sea for the purpose of marine scientific research. The sturgeon industry close to Iran's coast is traditionally regulated by Iran, after consultation regarding its separate quotas*" [Proposed by Russia][Art. 9(10) Abs.3]

"*The Parties determine the capacity to harvest the living resources in their exclusive fishing zones or zone of national jurisdiction* [proposed by Russia]. *If one of the Parties has no capacity to harvest the total allowable catch, it may grant other States based on agreements or other arrangements and pursuant to the national legislation and regulations, access to the surplus of the total allowable catch*" [Art. 9(10) Abs.4].

"*The Parties shall jointly define the norms and rules in accordance with this Convention in particular related to: permits for fishing industry; catch quotas, fishing seasons and areas of fishing industry, the types, size and number of fishing gear; age and size of fish which may be caught; norms and rules*" [Art. 9(10) Abs.5].

"*Natural and juridical persons of the Contracting States may, except the sturgeon and seals stocks, fish seawards of the exclusive fishing zones or the zones of national jurisdiction [proposed by Russia], according to the conditions laid down by the Contracting Parties in accordance with norms and rules of para 5 of this Article*." [Art. 9(10) Abs.5]

Conclusions

Extensive exploitation of the fish deposits of the Caspian Sea, conducted within both legal and illegal activities, as well as industrialization of the whole Caspian region, negatively contribute to the situation of the whole spectrum of living resources of the Caspian Sea. Protection guaranteed under the auspices of the CITES convention could not stabilize the resource development, which would not exceed the maximum sustainable yield. The framework offered by the international maritime law, defining states' rights of use of living resources, as well as their obligation to protect, did not find comprehensive application in the Caspian Sea because of the unclear legal status of the Caspian Sea. In the Soviet–Iranian period fishery was under the regime of common use, excluding coastal fishery zones devoted to national use. Since the dissolution of the bilateral system of control over the Caspian Sea the regime of living resources has been regulated under auspices of the International Commission on Aquatic Resources of the Caspian Sea (ICARCS), which is a regional and multilateral platform for Caspian states' negotiations. However, it does not pose formal competence to adopt binding legal acts; it is however active in working out legal framework for use and

(continued)

protection of Caspian biological resources. Strengthening of the existing legal regime on living resources was offered by conclusion of the Tehran Convention for the Protection of the Maritime Environment of the Caspian Sea. Recent adoption of an ancillary Protocol on Biological Diversity will strengthen the applicability of the Tehran Convention and the regime of protection of the Caspian living resources. It shall however be well coordinated with the legislative activities undertaken under auspices of ICARCS.

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Chapter 8
The Legal Regime of the Pipelines in the Caspian Sea

8.1 Pipelines in the Caspian Sea

The oil and gas resources of the landlocked Caspian region are thousands of miles away from open sea ports, from where tankers could deliver them to markets in Europe, Asia, or America. This was one reason why a number of pipelines for the transport of liquids and gases (petroleum and natural gas from the Caspian fields) was built—namely, to transport resources overland for distances of several thousand kilometers. As some large oil and gas deposits are located seaward of the Caspian coast, there are plans to construct offshore pipelines on the seabed of the Caspian Sea.

Whereas oil and gas production in the Caspian Sea has been increasing from year to year, the expansion of export capacity has been slow. Many regional and global actors want to gain control of the Caspian's energy reserves and their transport routes to strengthen either own political presence in the region, to reduce their dependence on energy supplies from the Gulf region, or (as in the case of the new independent states of the Caspian states) to secure their economic development. This complex geopolitical situation in the region impedes policy with respect to laying pipelines in the Caspian region.[1]

The two oil pipelines Baku–Novorossiysk (the northern route from 1997 and the second route from 2000), as well as the pipeline Baku–Supsa transport oil from the fields of Azerbaijan to the west. The oil from Kazakhstan also flows through two lines: Atyrau to Samara in Russia, where it connects with the Russian main line, and since 2001 also through the pipeline of the Caspian Pipeline Consortium (further referred to as CPC) from the oil field Tengiz to the Russian ports of Novorossiysk and Tuapse on the Black Sea. The required expansion of the loading capacity of the two ports, however, hampers further oil transport through the Black Sea to the Mediterranean area. An alternative to the CPC is offered by the oil pipeline Baku–

[1] See: Freitag-Wirminghaus (1998), pp. 23 et seq.

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Tbilisi–Ceyhan (further referred to as BTC), which is designed for the transport of oil mainly from Azerbaijan to the world market. The idea remains very controversial of building a trans-Caspian line to deliver oil from the Kazakh Aktau field into the BTC.[2] The completion of other planned pipelines that could to carry Caspian resources both to the west and to the south and east, in the near future is not foreseeable for political reasons.[3] The Kazakhstan–China oil pipeline is China's first direct oil import pipeline from Central Asia. It runs from Kazakhstan's Caspian shore to Xinjiang in China. The pipeline is owned by the China National Petroleum Corporation (further referred to as CNPC) and the Kazakh oil company KazMunayGas. The construction of the pipeline was agreed between China and Kazakhstan in 1997. The first section of pipeline from the Aktobe region's oil fields to Atyrau was completed in 2003. Currently capacity is approx. 14 million tons per year. The pipeline is expected to reach a nominal capacity of 20 million tons per year in 2014.[4] The strategic importance of the Caspian deposits consists not in their actual size, but in their role in diversifying sources of energy for countries seeking resources outside the Arab region. The transportation of Caspian resources via both the existing and the planned routes, requires the adoption of relevant provisions on their construction and operation.

Given the geographical location of the Caspian Sea as landlocked waters, the legal regime of the resource transport routes is subject to disputes between the coastal states. Much greater importance concerns the possible elaboration of legal norms defining the regime of pipelines on the seabed and underground. The final set of rules determining the oil and gas pipeline regime shall reflect international legal standards.

8.2 International Law on Pipelines

International law provides detailed regulation of the regime for laying submarine pipelines. Pipelines located overland and at the bottom of the sea are defined as a means of transporting petroleum and natural gas. The overland pipelines enjoy no special regime under international law. Submarine pipelines are regulated according to the law of the sea. The existing international rules concerning freedom of transport may apply to pipelines and gas lines when they are used for traffic in transit if agreed upon by the contracting states concerned.[5] There are merely a few

[2] See: Buonanno (2003).

[3] Iran Oil Swap (Neka, Tehran); Central Asia Oil (Turkmenistan, Afghanistan, Gwadar, Pakistan); Iran Azerbaijan (Baku–Tehran); Kazakhstan—China (Aktobe, Xinjiang); Kazakhstan, Turkmenistan, Iran (Kazakhstan, Turkmenistan to Kharg Island in Iran); Ksashuri–Batumi (Dubendi in Azerbaijan to Batumi in Georgia).

[4] See: Kazakhstan–China Pipeline LLP at www.kcp.kz/en/projects. Accessed 1 July 2014.

[5] Art. 1 of the Convention on Transit of Land-Locked States; Art. 124 para. 2 UNCLOS.

treaties regulating this matter. A number of related issues (like property, licensing, safety standards, and the environment) are regulated by the national law of the individual states.

Most transboundary overland pipelines consist of separate parts located on areas covered by the given state's sovereignty and their regime is therefore regulated by national laws. However, it is becoming increasingly common that the transboundary pipelines are regulated by multilateral agreements.[6] They provide for the parties' general obligations regarding pipeline construction, non-discrimination in usage, etc.,[7] or even exact data regarding the delineation of the course for the laying of such pipelines.[8] The pipelines to be laid on the territory of another state for defense reasons require the permission of the state concerned.[9]

Initially, a state's freedom to lay submarine cables was recognized in the nineteenth century. This was regulated for the first time in the Convention for the Protection of Submarine Cables from 1884,[10] and recognized as one of the freedoms of the high seas in 1927 by the Institute de Droit International.[11] The legal regime for laying and protecting submarine pipelines was set in the Convention on the High Seas of 1958 [Art. 2 (3)] and in the UNCLOS [Art. 87 para. 1 (c)]. The coastal state shall have the right to set conditions for pipelines entering its territory or territorial sea, or to establish its jurisdiction over pipelines that are from other states under its jurisdiction (Art. 79, 1–4 UNCLOS). Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal state may not impede the laying or maintenance of such cables or pipelines. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal state. The coastal state retains the right to establish conditions for pipelines entering its territory or territorial sea, and its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf, along with exploitation of its resources and the operations of artificial islands, installations and structures under its jurisdiction.

Outside the territorial sea, states are free to lay submarine pipelines.[12] When laying submarine cables or pipelines, states shall have due regard to pipelines already in place.[13] In particular, the possibility to repair existing cables or pipelines

[6] See: Lagoni (1997), p. 1034.

[7] Brazil–Bolivia 1938, UNTS, vol. 51, p. 256; Brazil–Bolivia–Argentina–Paraguay–Uruguay, 1941 In: (Hudson and Sohn 1949/1950), vol. 8, p. 623.

[8] US–Canada, Northern Gas Pipeline Agreement, 1977.

[9] Haines–Fairbanks Oil Pipeline Agreement of 1955.

[10] See: Martens (1817–1842), vol. 11, p. 281.

[11] Ann IDI, vol. 3 (1927), p. 339.

[12] Art. 2 (3), Art. 26, para. 1, 1958 Convention on the High Seas; Art. 87 para. 1 c), Art. 112 para. 1 UNCLOS.

[13] Art. 26 para. 3 1958 Convention on the High Seas, Art. 79 para. 5, Art. 112 para. 2 UNCLOS.

shall not be prejudiced. In case of interruption or damage to a submarine pipeline by the owner of another submarine pipeline the repair costs incurred by the pipeline owners must be carried by him.[14] The freedom to lay submarine pipelines—including the laying of new pipelines as well as repairing the old—as well as to enjoy other freedoms of the high seas shall be exercised by states with due regard to the interests of other states enjoying similar freedoms on the high seas and to those states' rights with respect to activities in the Area.[15]

A state's right to lay pipelines on the continental shelf and respectively on the sea bed of the exclusive economic zone is limited by the following rights of the coastal state: to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources, and the prevention, reduction, and control of pollution from pipelines[16] and the coastal state's consent for the delineation of the course for the laying of such pipelines on the continental shelf (Art. 79 Abs. 3 UNCLOS). In the areas where the Exclusive Economic Zone was established above the continental shelf the legal regime of continental shelf prevails. This applies except when the Exclusive Economic Zone exceeds the seaward limits of the continental shelf, as in such a territory the regime of the high seas is applicable (Art. 58. Abs. 1, 2 UNCLOS).

The right of the coastal state to take reasonable measures for the prevention, reduction, and control of pollution from pipelines[17] includes its right to conduct an inspection and the imposition of safety standards.[18] The pipes require pumping stations for their proper functioning. A safety zone will therefore be created around them.[19]

The maritime pipeline regime for the land-locked countries is a special case. Land-locked states are those countries which have no access to the sea coast. Their geographic location hampers their participation in world trade because they need to trade at a great distance from the sea, thus causing relatively high costs. Securing free and unfettered access to the high seas is of great significance for the landlocked countries, which in turn is connected with the transit issue. Both persons and property, which originate from a land-locked state or shall arrive at its territory, must cross the territory of another state, which matter can cause numerous legal, political, and administrative difficulties.[20]

[14] Art. 4 Convention for the Protection of Submarine Cables; Art. 28 1958 Convention on the High Seas, 1958; Art. 114 UNCLOS.

[15] Art. 2 1958 Convention on the High Seas, 1958; Art. 87 para. 2, Art. 150, 153 UNCLOS.

[16] Art. 4 Convention on the Continental Shelf 1958 Art. 26 para. 1, 2 1958 Convention on the High Seas, Art. 79 Abs. 2 UNCLOS.

[17] Art. 4 Convention on the Continental Shelf; Art. 26 Abs. 1, 2 1958 Convention on the High Seas; Art. 79 Abs. 1, 2 UNCLOS.

[18] Art. 27–29 1958 Convention on the High Seas; Art. 113–115 UNCLOS.

[19] Art. 5 Convention on the Continental Shelf; Art. 60, Art. 80 Abs. 4–7 UNCLOS.

[20] See: Uprety (1995).

Not all international agreements that guarantee the freedom of transit extend to the rights of landlocked countries to lay pipelines, securing the contractually preferential treatment of landlocked countries. The Barcelona Convention and the Barcelona Statute on freedom of transit, the first which has provided for freedom of transit, does not apply to laying of pipelines. The Barcelona Convention and the Statute has a more general scope of application in comparison to the New York Convention on Transit Trade of Landlocked States of 1965 (further referred to as New York Convention of 1965). The latest, alongside traditional means of transport, includes rules for "other" means of transport, including oil and gas pipelines, which shall be established by common agreement among the contracting states concerned, with due regard to the multilateral international conventions to which these States are parties.[21] UNCLOS, while defining the means of transport, states that landlocked states and transit states may, by agreement between them, include as means of transport pipelines and gas lines (Art. 124 para. 2). Also, the GATT-agreement secures the transit right of the landlocked states (Art. V), which may be exercised by state, and not private enterprises (Art. XVII). None of these provisions allowing the transit freedom for pipelines may be applicable to the Caspian Sea pipeline, because neither the Soviet Union itself, nor its successor states, have ever become parties to these conventions. Therefore a particularly important role for the expansion of pipeline transit rights of the Caspian's landlocked countries is played by Energy Charter, which was signed in Lisbon on 17 December 1994 by all the states of the former Soviet Union. Its weakness lies in the fact that Russia has not ratified the Charter.[22]

The Energy Charter defines (Art. 1 Abs. 4, 5) oil transportation as one of the priority areas for regulation. Its provisions are applicable to all economic activity in the energy sector, including the transportation of primary energy sources (oil and gas) and energy products. It obliges parties to take necessary measures to facilitate the transit of energy materials and products consistent with the principle of freedom of transit and without distinction as to the origin, destination, or ownership of such energy materials and products or discrimination as to pricing based on such distinctions, and without imposing any unreasonable delays, restrictions, or charges (Art. 7. 1). Contracting Parties shall encourage relevant entities to co-operate in: first, modernizing energy transport facilities necessary to the transit of energy materials and products; second, developing and operating energy transport facilities serving the Areas of more than one contracting party; third, applying measures to mitigate the effects of interruptions in the supply of energy materials and products; and fourth, facilitating the interconnection of energy transport facilities (Art. 7 Abs. 2). The next, very important provision states that in the event that transit of energy materials and products cannot be achieved on commercial terms by means of

[21] Art. 2 para. 1 New York Convention of 1965.

[22] After signed the Energy Charter Treaty in 1994 Russia accepted its provisional application (agreeing to apply its provisions as far as they are with its national law), which was terminated by Russia in 2009.

energy transport facilities, the contracting parties shall not place obstacles in the way of new capacity being established, except as may otherwise be provided in applicable legislation regarding environmental protection, land use, safety, or technical standards. In the event that transit of energy materials and products cannot be achieved on commercial terms by means of energy transport facilities the contracting parties shall not place obstacles in the way of new capacity being established (Art. 7. 4). However, a party through whose territory primary energy sources and energy products can be routed in transit, is not obliged to permit the construction or modification of energy transport facilities or a new or additional transit through existing energy transport facilities in case when it would endanger the security or efficiency of its energy systems, including the security of supply (Art. 7 Abs. 5). A special system of dispute settlement described in the Charter may be applicable only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties involved in the dispute (Art. 7 Abs. 7).

8.3 Future Regulations on Pipelines in the Caspian Sea

The pipeline regime in the Caspian Sea has never been subject to separate interstate regulation. It is the draft of the status convention, which for the first time will regulate this regime. The Draft Caspian status convention is—albeit indirectly—following law of the sea provisions.

> "*Contracting states may lay submarine cables and pipelines on the bottom of the Caspian Sea. [proposed by Azerbaijan, Kazakhstan and Turkmenistan] in accordance with this Convention, international legal standards and agreed economic standards*" *[Art 13 (2), Section 1] [proposed by Iran]*
>
> "*The delineation of the course for the laying of such pipelines is subject to the consent of the state party, if the submarine pipe is to be laid through the mining site of the coastal state.*" *[Art 13 (2), paragraph 2] [proposed by Azerbaijan, Kazakhstan and Turkmenistan]*
>
> "*Nothing affects the right of the state parties to establish conditions for laying pipelines entering their mining sites on the seabed*" *[Art. 13(2) Abs. 3][*proposed by Azerbaijan, Kazakhstan, Iran and Turkmenistan*]*

Regarding the laying of a trans-Caspian pipeline the state parties differ seriously in their positions. Provisions proposed by Iran together with Russia are not compatible with existing international law norms regarding the laying of submarine pipelines.

> "*Contracting states may lay submarine cables and pipelines on the bottom of the Caspian Sea*" [Art. 13(2) Abs. 1] [proposed by Russia and Iran]

"*States Parties establish conditions for the laying of technological pipelines in their own sectors or their zones at the seabed of the Caspian Sea*" [Art. 13 (2) Abs. 2][proposed by Russia and Iran]

"*The Contracting states may lay submarine main pipelines on the floor of the Caspian Sea, under the condition that an ecological expertise of these projects will be approved by all the coastal countries. The state laying the pipeline shall bear material responsibility for damages caused to the other Parties and to the marine environment occurring due to break up of the pipeline*" [Art. 13(2) Abs. 3] [proposed by Russia and Iran]

Iran and Russia rule out the possibility of a unilateral decision with regard to the laying of a trans-Caspian pipeline. Russia's position on the division of the Caspian Sea into Zones of National Jurisdiction, where coastal states' rights have not sovereign character, excludes coastal states' privileges recognized by UNCLOS regarding rights on laying the pipelines. Azerbaijan, Kazakhstan, and Turkmenistan represent the position that each of the coastal states exercises the right to lay submarine trans-Caspian pipeline. Such a right shall be based on an agreement concluded exclusively between states whose seabed mining site is crossed by the routes of pipelines. This proposal complies with the provisions of UNCLOS relating to the rights and obligations of states on the laying of submarine pipelines. It requires the consent of the respective coastal state (Art. 79 Abs. 3) because nothing must affect the right of the coastal state to establish conditions for pipelines entering its territory, or its jurisdiction pipelines constructed.

The Draft Caspian Status Convention states that the regime of the pipelines in the Caspian Sea shall be designed according to the requirements of both: standards of the law of the sea and rules reflected in the Draft of the future convention. This provision does not allow deriving the final standards for pipelines as long as the coastal states represent entirely diverging views with respect to the legal division of the Caspian Sea into maritime zones which define the coastal states' fundamental right regarding the laying of pipelines.

Conclusions

Although the oil and gas resources of the Caspian Sea are sufficient, their transportation to world markets requires enhancement. The most suitable form for doing so is to ship the resources over a waterway, which is limited in the case of the Caspian region, or to use pipelines. The existing network of pipelines from the Caspian Sea shall be extended, and this requires application of international legal standards. In the case of land pipelines there are different legal frameworks available, such as the Energy Charter of 1994, where also the newly independent riparian states are party to. In the case of the maritime pipelines which are to pass through the Caspian Sea, the law of the sea would be respectively applicable. It would be recommendable to place

(continued)

the future legal regime for the Caspian Sea together with the fundamental rules of the law of the sea.

The legal regime of Caspian maritime pipelines has never been subject to interstate agreements. It was subordinated only to the general practice of the Caspian states in regulating the use of the Caspian Sea. Nowadays, it is only a Draft Caspian Status Convention which shall define the future legal framework for the maritime pipeline regime. The challenge related to the settlement of this issue is, as in the case of other legal regimes for use of the Caspian Sea, related to the undefined status of the Caspian Sea. There is still no agreement between the coastal states whether and which parts of the Caspian Sea shall be covered by the coastal states' sovereignty or respective sovereign rights, as would allow the coastal states to freely build transboundary Caspian pipelines.

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Chapter 9
The Legal Regime of Maritime Navigation on the Caspian Sea

9.1 Ship Navigation on the Caspian Sea

Shipping has always been one of the most important means for developing international trade and economic relations between Caspian countries. The growing interest of states in shipping requires establishing a new legal regime for the Caspian Sea which would ensure the application of internationally binding legal norms to Caspian shipping.

The Caspian Sea covers an area of about $371{,}000^2$ km and has no natural connection with the oceans. However, via the Volga river, the Volga–Don Canal, and across the Don, there is a navigable linkage to the Sea of Azov and thus to the Black Sea, the Mediterranean, and the Atlantic. The Volga waterway can facilitate maritime traffic from the Caspian Sea through the Volga–Baltic Canal to the Baltic Sea. The main ports on the Caspian Sea are: Astrakhan, Olya, Makhachkala (Russia), Baku (Azerbaijan), Aktau (Kazakhstan), Bandar-e Anzali (Iran), and Turkmenbashi, formerly Krasnovodsk (Turkmenistan).

At the time of Tsar Peter the Great, Russia sought to establish itself as the main maritime power in the Caspian Sea. Thanks to his success in the Russian–Persian war, Russia became the ruling power in the whole region. From the October Revolution to the beginning of 1990, because of the isolation policy of the Soviet Union, the route through the Caspian Sea and the Volga was closed for international transportation.[1] Based on agreements between the USSR and Iran, all ships not flying the flag of the USSR or Iran were excluded from operating in the Caspian Sea. After the collapse of the Soviet Union, the Caspian Sea gained major geopolitical and economic importance and now facilitates international trade between Asia and Europe.

The most important trade routes were established as early as the beginning of the eighteenth century. Russian ships sailed regularly from Astrakhan, on the eastern

[1] See: Arsenov (2003), p. 8.

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coast of the Caspian Sea, for Kabak harbor and Karagan. There were also trade routes between Astrakhan and Baku, Derbent and Nisabad.[2] Shipping transport was revived when in 2000 an agreement was signed between the Russian Federation, India, and Iran on the creation of the International transport corridor "North–south." This corridor was designed to bring goods from India, Pakistan, and the Persian Gulf through the territory of Iran and its harbors on the Caspian Sea, and then further on through Russia's ports to the countries of Central and Eastern Europe and Scandinavia. The Astrakhan and Olya traffic nodes, two of the key elements of this traffic corridor, have recently gained in significance. Since 2002, there has also been a ferry route—namely, the "Caspian Traker Line"—for shipping goods between this port and two other Caspian ports (Anzali in Iran and Aktau in Kazakhstan). Another important element of this route is the Russian harbor of Makhachkala. Iran competes with Russia through large international free trade zones established in the city of Anzali. The "North–south" Transport Corridor is also of great importance for Kazakhstan, which ships its oil resources via Aktau harbor. In Soviet times, there was only one ferry line that crossed the Caspian Sea from Baku to Krasnovodsk (now Turkmenbashi). It was established in 1929 and operates regularly to this day alongside the ferry line of Makhachkala–Turkmenbashi and Aktau–Baku. Today, there are four ferry terminals: in Baku, Makhachkala, Turkmenbashi, and Aktau.

9.2 The Legal Regime of Shipping in International Law

There is no binding, overarching international legal definition of what is meant by the notion of ship or shipping. Maritime shipping differs from inland navigation especially in terms of the spatial area of shipping operations. Maritime vessels operate mainly in areas outside of national jurisdiction.

The development of international shipping is stimulated by economic needs. The local circumstances, traditions, experience, and developmental stage of countries' shipping, as well as their politics and economics, are usually very diverse. For setting up a successful shipping regime two conditions are to be met: first, the guarantee of freedom of trade and services and, secondly, the existence of an efficient information system that facilitates and enables trade.[3]

The international agreements that deal with maritime shipping are of a different legal nature. The first group regulates the duties and rights among states and the other regulates the relations between subjects to private law.[4] The law of the sea sets out legal standards such as the right of passage through international channels, waterways, and straits, as well as the legal status of ships in harbors, and the rights

[2] See: Tuschin (1978).

[3] See: Goss (1985), pp. 391 et seq.

[4] See: Farthing (1993), p. 33.

of landlocked states. Maritime law was usually adopted at the initiative of actors of private law, which negotiated with states via Comité Maritime International (CMI). This practice ended, however, when it was replaced by the International Maritime Organization (IMO), until 1982 known as the Inter-Governmental Maritime Consultative Organization (IMCO).

The public-sector involvement in defining the technical standards of shipping, its safety and stability, routes, social problems of the crew, pollution control, etc., has increased significantly in recent years. Not only will new binding standards be introduced, but so will penalties for law violations. This development is determined by the constant changes in the political relations among states, which brings significant instability to worldwide shipping. An example is the rejection of shipping rules by the Soviet Union after the Cuban Missile Crisis of 1962, which remained out of use despite diplomatic affords during conferences in Moscow and Hamburg at the beginning of the 1980th. Such a deplorable state of affairs was created by the years of distrust that prevailed from the late 1970s to the early 1980s between the US, European countries, and the Consultative Shipping Group. A positive development was visible merely in the international shipping industry of the Western European countries, which gradually integrated maritime trade laws enhancing free shipping zones.[5] An important normative contribution to the development of international shipping was also provided by international organizations. For example, the Organization for Economic Cooperation and Development (further referred to as OECD) adopted in the 1980s 13 basic principles of maritime transport policy. Also, the United Nations Conference on Trade and Development (further referred to as UNCTAD) and its Shipping Committee drew up the "UNCTAD Liner Code."[6] This Code includes basic principles of standard commercial practice and aims to become a "universally acceptable code for liner conferences." The Code came never into force, but did become the basis for subsequent legislative codifications in this field.[7]

An important area of legal regulation is safety at sea. By "safety at sea" we are to understand the safety of shipping and the safety of life and goods, as well as the safety of the maritime environment.[8] The issue of the vessel's safety refers to the construction of the vessel and its classification, equipment, as well as to the nature and operation of its load. In the case of passenger ships, additional attention is paid to the measures for safeguarding life, and they are to be guaranteed by special equipment. A maritime safety system is to be defined as certain standards and conditions including: a system of legal standards regarding safety at sea,[9] a system

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[5] First was the Regulation 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.

[6] Convention on a Code of Conduct for Liner Conferences 1974.

[7] EC Regulation 954/79; United Nations Convention on conditions for registration of ships 1986.

[8] See: Łukaszuk (1997), p. 104.

[9] UNCLOS; Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG); SOLAS Convention, 1974; SAR Convention, 1979; MARPOL.

of institutions responsible for setting legal standards for maritime safety,[10] a system of institutions enforcing the norms of safety at sea,[11] and a system of institutions responsible for updating and spreading information on shipping.[12] The high importance of the issue of shipping safety exceeds the issue of cargo and passengers and also covers all other human activities at sea, such as fishing, marine scientific research, exploration and exploitation of the seabed, and environmental protection.

The international safety standards are of a diverse character. A distinction is made between: firstly, technical standards that shall reduce the risk of accidents or the possible consequences of an accident; secondly, protection standards for the environmentally friendly use of ships with the exception of accident situations; thirdly, construction standards for ships and port construction; fourthly, qualification standards for the crew of the ships.[13]

The current shipping standards, recognized worldwide, are mainly included in the International Convention of 1974 for the Safety of Life at Sea (SOLAS) and other international agreements.[14] One of the most important steps contributing to enhancement of safety at sea initiatives was the establishment of the Society of Lloyd's Register in 1834, which contains detailed information on all vessels.

One of the most important features of navigation is its freedom to pass without any obstacles both on the high seas, and also in the territorial waters of other countries and straits. Unlimited freedom of navigation is, however, due to the need to prevent collisions at sea, no longer possible or requested. This task of ensuring the safety of ships is carried out by the International Maritime Organization, originally known as Inter-Governmental Maritime Consultative Organization. All respective standards relating to maritime safety were defined in the International Regulations for Preventing Collisions at Sea, 1972 (Colregs) and related agreements.

The sustained regulation of shipping requires the drawing up of certain rules related to environmental protection of the sea. The first International Convention for the prevention of pollution of the sea by oil was adopted in 1954. A significant adjustment of the international protection standards come only after 1967, when the huge Torrey Canyon oil tanker sunk. In the wake of this disaster the International Convention for the Prevention of Marine Pollution from Ships (MARPOL) was adopted, along with some additional agreements.

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[10] International Maritime Organisation (IMO); International Hydrographic Organization (IHO); International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA); Standardisation (ISO); Comité International Radio-Maritime (CIRM); World Meteorological Organization (WMO).

[11] Sea chambers, Civil and Criminal Courts, Administrative authority of coastal state, Insurance company.

[12] Global Maritime Distress and Safety System (GMDSS); Maritime Safety Broadcasts (Navtex); Organisation on Maritime Search and Rescue (SAR).

[13] See: Łukaszuk (1997), p. 116.

[14] 1966 Load Line Convention; MARPOL; International Bulk Chemical Code, International Bulk Chemical Code; International Carrier Code.

9.3 Existing Rules on Navigation in the Caspian Sea

The international legal standards for navigation are not directly reflected in the existing agreements regulating navigation in the Caspian Sea. Until the end of the twentieth century, the rights on navigation in the Caspian Sea were exercised exclusively by Iran and Russia. Russia received access to the Caspian Sea not until the eighteenth century. That is when the first agreements between Russia and Persia were concluded, which are to be considered the beginning of the formulation of the international legal status of the Caspian Sea, as they were devoted to regulation of navigation. In the Treaty of St. Petersburg of 12 September 1723 Persia recognized Russia's exclusive navigation rights in the Caspian Sea for a period of 10 years. After losing the wars during the nineteenth century, Persia's navigational rights in the Caspian Sea were further limited by the Treaty of Golestan of 1813 and the Treaty of Turkmenchay of 1828. Neither their merchant ships received rights to shipping in the Caspian Sea: only Russia's trade vessels were eligible for navigation there. This was lifted not until the conclusion of the Treaty of Friendship between the USSR and Persia in 1921. This agreement, which remains in force until today, confirmed the unlimited freedom of navigation in the entire Caspian Sea for ships flying the flag of one of the coastal states.[15] This freedom for navigation in the Caspian region, which was confirmed by subsequent treaties concluded between the USSR and Iran in 1931, 1935, and finally in the Trade and Navigation Treaty of 1940, was restricted to the Caspian coastal states. The last one provided for equal treatment of all vessels operating under the flag of the contracting parties, both entering and calling at port facility [Art. 12]. In addition the parties agreed that no extra fees may be charged on any ship of another contracting party: they can be charged only with fees that are paid by one's own ships.

The bilateral agreements between the USSR and Persia/Iran concluded in 1921 and 1940 became the final legal basis regulating the rights and obligations of coastal states regarding shipping in the Caspian Sea. After the collapse of the Soviet Union, despite frequent denials of the legally binding nature of these Soviet–Iranian treaties by the newly independent states, their core regulation on freedom of navigation was also retained and treated as a starting point for negotiations on the future legal status of the Caspian Sea.

9.4 Future Provisions on Navigation in the Caspian Sea

Due to the enormous importance of navigation on the Caspian Sea as a carrier of trade and economic development of the riparian states, those states drafted special regional regulations on navigation. The proposed regime remains far from the

[15] Art. XIV Treaty of Friendship 1921.

general provisions of the law of the sea. This is explained by the denial of the maritime character of the Caspian Sea and respective rejection of the necessity to apply international legal standards to the Caspian navigation.

Navigation is to be seen as one of the areas where the norms of international law are to enjoy a definite primacy over the regional regulations.[16] The national legislation of coastal states may not violate internationally accepted standards applicable in specific cases. With regard to the regulation of navigation in the Caspian Sea, the indirect applicability of UNCLOS shall be considered. The draft of the future convention on the legal status of the Caspian Sea regulates navigation as follows:

> "Merchant ships flying the flag of a contracting state enjoy the freedom of navigation on the entire Caspian Sea. The freedom of commercial navigation on the Caspian Sea is exercised according to the provisions of this Agreement and other agreements of contracting parties, which remain in accordance with this treaty". [Art. 10 (10) Abs. 1]

This regulation of the freedom of navigation on the Caspian Sea reflects the UNCLOS's provisions regarding the high seas, albeit in a largely modified form. According to UNCLOS the freedom of navigation[17] constitutes one of the main "maritime freedoms" and it serves as a basis for the principle of freedom of the high seas. Thus within the freedom of each state, whether coastal or landlocked, is the right to sail ships flying its flag on the high seas.[18] The Draft Caspian Status Convention grants unrestricted rights to navigate on the entirety of the Caspian Sea, without considering the existence of any special maritime zones. The discussions over the future delimitation of the Caspian Sea have not yet arrived at whether, and if so to what extent, the coastal states will exercise sovereign rights in future maritime zones in the Caspian Sea. However, regardless of the outcome of this dispute, the legal status of respective zones will not impact the coastal states' freedom of navigation in the entire Caspian basin. The Draft Caspian Status Convention does not follow the traditional distinction included in UNCLOS between the regime of navigation within internal waters, territorial seas, and the exclusive economic zone. The UNCLOS provides no mandatory right to either entering or calling at national port facilities, which is an imminent part of national state territory, to the foreign merchant ships or warships, except in cases of emergency, or according to international agreements.[19] In the contiguous zone, the coastal state has no special right to navigation, but may only exercise the control

[16] See: Vukas (2004), p. 133.

[17] Freedom and Safety of Navigation out of coastal sea area is regulated by UNCLOS (Part XII, Section 7) and other conventions like Convention on the International Regulations for Preventing Collisions at Sea and other rules set by International Maritime Organisation, which role is to impartially monitor navigational routs.

[18] Art. 90 et seq. UNCLOS.

[19] In case of Nicaragua v. United States, ICJ Rep. 1986, 111.

necessary to prevent or punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. In the exclusive economic zone (also in the fishing zone) all states, whether coastal or landlocked, enjoy freedom of navigation as prescribed for the high sea (Art. 58 UNCLOS). The only restriction for the freedom of navigation reflects the coastal states' sovereign right to the protection and preservation of the marine environment (Art. 56 b) iii) UNCLOS), especially their legislative powers against pollution caused by ships (Art. 210, 211, 216, 220 UNCLOS).

The Draft Caspian Status Convention Sea provides for national treatment of all vessels as follows:

> "*Each State Party shall guaranty merchant ships of other contracting parties the same treatment as to the national merchant ships. This includes unrestricted calling in at national ports in the Caspian Sea for the purpose of loading and unloading of the cargo, the embarkation and disembarkation of passengers, payment of shipping and other port charges, as well as the use of the ordinary for shipping and carrying out of particular services to commercial activities*"*[Art 10 (10), paragraph 2].*

The benefits provided here were limited by following rule:

> "*The regime shown in paragraph 2 of this Article shall be applicable to the ports of the Caspian Sea, which are open to the vessels flying the flag of States Parties*" *[Art 10(10) Paragraph 3]*

The above principle of national treatment means a ban on discrimination against national ships. It confirms that all benefits granted to a merchant ship flying the flag of a contracting state must be granted also to a merchant ship flying flags of all other states parties. This clause is included in numerous international agreements where parties wish to ensure that their nationals, goods, ships, etc. are treated equally by the other contracting states.[20] Thus, foreign goods and services and their providers must not be treated less favorably than domestic ones. In international legal practice, the national treatment, whose origin lies in the principle of freedom of transit,[21] is very common, as for instance with respect to landlocked countries[22] or in the General Agreement on Tariffs and Trade (GATT).[23] The principle of equal treatment is deeply rooted in the navigation tradition of the Caspian Sea's littoral states. The agreement concluded by the Soviet Union and Iran established the equal treatment of all vessels flying the flag of the state parties.[24] The equal treatment

[20] See: Fox (1992), p. 296.

[21] Art. 2 Convention on Freedom of Transit of 1921; Art. 5 GATT.

[22] See: Uprety (1995); Art. 3 Abs. 1 Convention on the High Seas of 1958; Art. 15 Convention on Transit of Land-Locked States, 1965.

[23] Art. 3, 17 GATT Convention.

[24] Art. XV 1935 Treaty; Art. 12, 1940 Treaty.

referred to rights and duties regarding calling in, anchoring, and leaving national ports in the Caspian Sea. The national treatment was limited to the following goods: passengers' luggage, fuel, and goods necessary for operating the vessel, and the cargo of others ships which was loaded or unloaded from the vessel. The national treatment clause set by Soviet–Iranian treaties remains in line with the Draft Caspian Status Convention, and the future Convention's principles concerning the equality clause.

The following rules regarding the transit rights on inland waterways for the Caspian states are included into the Draft Caspian Status Convention:

> "*Conditions and Procedure of the transit from the ocean through the internal waters of Russia for vessels flying the flag of Azerbaijan, Iran, Kazakhstan or Turkmenistan are to be set in an agreement between any of these countries and the transit state*" *[Art 10 (10) Abs. 4–5, proposed by Russia, Iran, Turkmenistan]*

or

> "*The Republic of Azerbaijan, the Republics of Kazakhstan and Turkmenistan as landlocked states have the right to free access to other seas and the ocean. For this purpose they exercise the freedom of transit with all means of transport through the territory of the Islamic Republic of Iran and the Russian Federation*" *[Art. 10 (10) Abs. 4–5, proposed by Azerbaijan and Kazakhstan]*

or

> "*The Contracting Parties, which are landlocked, have the right of access to other seas and to the ocean. For this purpose they exercise the freedom of transit with all means of transport through the territory of transit countries. Conditions and Procedure of exercising the freedom of transit are to be set in bilateral, sub-regional or regional agreements between any of these countries and the transit state*". *[Art 10 (10) Abs. 4–5, proposed by Kazakhstan, supported by Azerbaijan]*

The only conceivable waterway which could be used as a transit route from the Caspian landlocked States, leads across the Volga River, the Volga–Don Canal and the Don. They constitute a navigable link to the Azov Sea and respectively to the Black Sea and the Mediterranean and the Atlantic. The Volga could be used for navigation from the Caspian Sea through the Volga–Baltic Canal to the Baltic Sea. All of these waterways are internal waters of Russia, granting Russia status of the "transit state," through whose territory the transit of persons, baggage, goods and means of transport passes by means of railway rolling stock, sea, lake, and river craft and road vehicles is to be carried out (Art. 124 UNCLOS).

There is no agreement among the Caspian littoral states regarding the conditions of access of Azerbaijan, Kazakhstan, and Turkmenistan to the other seas and the ocean depending on whether the negotiating state is a landlocked country itself or not. The international legal regulations of such a problem would depend on the

assumption of whether the Caspian Sea represents, in the legal sense, a sea (enclosed or semi-enclosed sea), or a lake. As was already mentioned, this question is no longer a point on the agenda concerning the future legal status of the Caspian Sea. In the early 1990s Kazakhstan, in representing the first option, used to call upon the states bordering the Caspian Sea, according to Part IX of UNCLOS, to cooperate with each other in the exercise of their rights and in the performance of their duties (Art. 123). This approach, without referring directly to UNCLOS, is still represented by the Caspian's three landlocked countries. In contrast, Russia, backed by Iran and Turkmenistan, represents the view that the future standards regulating the freedom of transit for the landlocked Caspian countries shall be settled in a special agreement between the landlocked state and the transit state. However, Russia often wavers in its opinion on the matter.

With regard to the right of passage for non-merchant vessels in the Caspian Sea, the draft of the future Caspian status convention provides the following:

> "*Warships and other government ships operated for non-commercial purposes enjoy the right of transit through the zones of national jurisdiction of other states Parties. The passage must be continuous and expeditious. However, passage includes stopping and anchoring as long as a tentative agreement exist or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.*"*[Art 11 (10) proposed by Russia]*

Here the proposed rule on the right of innocent passage favors warships and other government ships operated for non-commercial purposes of the contracting states. It follows only partly on the provisions of UNCLOS related to the right of innocent passage through the territorial sea for ships of all states (Art. 17 et seq.). The law of the sea provides for the right of innocent passage for merchant ships and the rules governing the passage of warships and other government ships operated for non-commercial purposes are not clear enough. The Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 and the UNCLOS can be interpreted as approval of innocent passage for warships. However, a number of states expressed serious reservations about the fact that the states retain the right to control or approval of peaceful passage of warships.[25] The requirement for earlier approval by the coastal state or at least the duty of announcing the passage was not accepted during the Third Law of the Sea Conference.[26] This condition did not become a part of the common law, either.[27] Another difference between Russia's proposal and UNCLOS provisions is that Russia requests peaceful passage within the Zones National jurisdiction, not the territorial sea. Russia views free passage as reserved exclusively for certain contracting states, rather than recognizing this right

[25] See: Kasoulides (1992), p. 146.
[26] Art. 21 UN Document A/AC. 138/SC. II/L.18.
[27] See: Vukas (2004), p. 141.

as belonging to all states, as UNCLOS does it. Stopping shall be allowed merely in emergencies for persons, ships, or aircraft.

The Draft Caspian Status Convention provides for states' jurisdiction over their nationals:

> "*State Parties shall exercise their sovereignty [Russia proposed removal of this notion] and their jurisdiction in the Caspian Sea over their nationals, their ships, installations and structures according to the norms of international law*" *[Art 12 (11), Section 1]*

Ships shall sail under the flag of one state only and shall be subject to its exclusive jurisdiction on the high seas (Art. 92 et seq. UNCLOS), which covers administrative, technical, and social matters of ships. The rights of the coastal states over their nationals, vessels, and installations and structures in the Caspian Sea reflect the legal principles for the territorial sea and the exclusive economic zone.

Although a coastal state has full territorial sovereignty in the territorial sea, the criminal and civil jurisdiction of the coastal state can be exercised on board a foreign ship passing through the territorial sea merely in limited cases (Art. 27, 28 UNCLOS). The general principle of international law is that nationals of a state are exclusively subject to its jurisdiction. Neither a warship which encounters on the high seas nor foreign ship, other than a ship entitled to complete immunity, is justified in boarding it unless there are reasonable grounds for suspecting that the ship is engaged in piracy, in the slave trade, etc. (Art. 110 UNCLOS). The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state (Art. 111 UNCLOS).

Finally, the Draft Caspian Status Convention provides for safety zones in the Caspian Sea:

> "*Geographical coordinates of the structures and contours of the safety zones shall be communicated to all contracting states.*" [Art 12 (11), Section 2]

The above proposal remains in accordance with the standards of international management of safety zones. Such regulations contains UNCLOS, which regulates Exclusive Economic Zone, where due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained (Art. 60 Abs. 3). In the case of the necessity to protect artificial islands, installations, or structures the coastal state may establish an adequate safety zone. Within such zones the state may take appropriate measures to ensure the safety of navigation and of artificial islands, installations, and structures. The breadth of the safety zone is determined by the coastal state, by considering applicable international standards. These zones must be designed so that they take into consideration the nature and function of artificial islands, installations, or structures. They shall not extend over a distance of 500 m around the safety zones, measured from each point of the outer edge of the artificial islands, installations, or structures.

Conclusions
Shipping is traditionally one of the most important regimes of the use of the Caspian Sea. It was once used for transporting all kind of goods, but nowadays it is used especially for shipping natural resources. The regulation of shipping was a subject of the earliest establishment of interstate law. The initial agreements concluded by the Soviet Union and Iran provided for freedom of shipping in the entire Caspian Sea for all ships exclusively of the coastal states. This regime is valid to this day. Although voices are frequently heard that the former Soviet–Iranian treaties have lost their legal force with the dissolution of the Soviet Union, nobody rejects the binding force of the freedom of shipping in the Caspian Sea. This approach reflects also the Draft Caspian Status Convention, which recognizes the shipping-related provisions of the law of the sea characteristic for the high sea zones. It extends such a regime over the whole space of the Caspian Sea, without foreseeing any differentiation in the scope of the shipping rights of third-party states typical for other maritime zones. An opposite interpretation of the recognition of the coastal states freedom in the Caspian Sea could derive from the draft regulation proposed to divide the Caspian Sea according to the middle line principle, which were also proposed in the Draft Caspian Status Convention. It could however end up entirely delimiting the Caspian Sea without leaving any space for free shipping.[28] Such an interpretation of the proposed introduction of the middle line seems not have been intended by the negotiating countries.

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[28] See Sect. 5.5.7.

Chapter 10
Protection of the Marine Environment of the Caspian Sea

10.1 Introduction

The purpose of this chapter is to examine the significance of the existing regulations on the protection of the fragile Caspian maritime environment. The adequacy of the existing rules will be judged by their ability to protect the marine environment of the Caspian Sea. This analysis presents a rather practical approach to examining existing legal acts in the Caspian Sea, and is based on the analysis of and comparison with the related international treaties and agreements.

Reflecting the structure of the most important act providing for the protection of the Caspian environment—the Tehran Convention—this chapter has been divided into parts presenting the main obligations of coastal states towards the Caspian Sea environment. It begins with elaboration of the general environmental principles applicable to the Caspian Sea. The next part reflects the responsibility of states towards prevention, reduction, and control of pollution from various sources, such as land-based, seabed activities, dumping, shipping, introduction of alien species, and other human activities and environmental emergencies which might cause pollution to the Caspian Sea environment. The subsequent part discusses the obligations of states parties to protect, preserve, and restore the marine environment of the Caspian Sea, including its biodiversity and the management of the coastal zone, as well as the effect of the fluctuation of Caspian Sea's level. Further, institutional arrangements and a number of special procedural instruments of maritime protection are discussed, such as: Exchange of Information, Environmental Impact Assessment (EIA), state cooperation, monitoring, research and science, consultations, and access to information for the public. Finally, the issue of implementation of the Convention and compliance with its provisions, via liability and compensation provisions as well as mechanisms of dispute settlement, are discussed.

The elaboration presented here on the states' obligations towards the Caspian Sea environment is based mainly on the provisions of the Tehran Convention and is

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expanded to include the contents of its ancillary Protocols. The provisions of the Tehran Convention regulate a complexity of environmental phenomena in the Caspian region which are caused by a variety of factors influencing the ecosystem of the region. Coping with them requires holistic cooperation and understanding among all coastal states, which in the Caspian case is often undermined by the lack of political will to limit one's own sovereign powers and to offer sufficient financial means to cover environmental needs. As the awaited environmental solution for the Caspian Sea seems most likely to be reached in a gradual process, the coastal states have decided to reach the objective of protecting all spheres of the marine environment of the Caspian Sea by a number of instruments to be concluded one by one. A similar trend can be observed in the present international practice of responding to global environmental challenges. The Tehran Convention alone could hardly develop a practical effect, except that it obliges its state parties to undertake certain further actions. With the adoption of the Tehran Convention, the states parties set specific environmental goals, but avoided taking on explicit commitments. The legally binding effect can only be achieved through the adoption of implementing protocols, something that takes place gradually. Until now, two additional protocols to the Tehran Convention—the Aktau Protocol (2011), LBSA Protocol (2012), and Biodiversity Protocol (2014)—have been signed by the Caspian countries. However, they have not yet entered into force. Additional work is underway to prepare protocol the Protocol on Environment Impact Assessment in a Transboundary Context (EIA Protocol).

Apart from the Tehran Convention, two more environmental documents which add to the general understanding of the framework of protection of the Caspian Sea environment are under Caspian states' consideration. The first one was prepared under the auspices of the Commission on Aquatic Bioresources of the Caspian Sea as a draft Agreement on Conservation of Aquatic Bioresources of the Caspian Sea and their management. It includes the main principles and criteria of management of the aquatic bioresources stock of Caspian Sea, which have been discussed among the states since 2003. If this document were finally adopted by all Caspian states and entered into force, there would be no need for an extensive regulation of this issue within the Protocol on Conservation of Biological Diversity ancillary to the Tehran Convention, which has however recently been adopted in May 2014. Secondly, the Agreement on the cooperation among Caspian States in the area of Hydrometeorology of the Caspian Sea has been proposed by the Coordinating Committee on Hydrometeorology and Pollution Monitoring of the Caspian Sea (further referred to as CASPCOM) during its 17th session in October 2012,[1] but has not been agreed yet. Both documents are still under the states' consideration and have yet to reach final legal form.

[1] http://www.caspcom.com/index.php?razd=sess&lang=1&sess=17&podsess=52 (Accessed 1 July 2014).

10.2 Protocols for Enforcing the Tehran Convention

The creation of a tailor-made, mutually beneficial regime for all the sensitive issues of the marine environment of the Caspian Sea was a difficult undertaking, as the states have very heterogeneous interests resulting from their economic needs. To facilitate the negotiation process on the Tehran Convention for the Protection of the marine environment of the Caspian Sea, the coastal states decided to tackle the existing problems gradually and design a framework agreement to be fulfilled by additional detailed protocols.

As the adoption of the auxiliary protocols to the Tehran Convention is both a legal obligation enclosed in the convention itself and a necessary condition for successful implementation of the Tehran Convention, it seems important to elaborate on this requirement.

> "*Any Contracting Party may propose protocols to this Convention. Such protocols shall be adopted by unanimous decision of the Parties at a meeting of the Conference of the Parties. Protocols shall enter into force after their ratification or approval by all the Contracting Parties in accordance with their constitutional procedures, unless the protocol does not envisage a different procedure for adoption. Protocols shall form an integral part of this Convention.*" [Article 24(1)]
>
> "*The annexes to this Convention or to any protocol shall form an integral part of the Convention or of such protocol, as the case may be, and, unless expressly provided otherwise, a reference to this Convention or its protocols constitutes at the same time a reference to any annexes thereto. Such annexes shall be restricted to procedural, scientific, technical and administrative matters.*" [Article 25(1)]

The working version of the Tehran Convention and the drafts of all additional protocols were prepared on behalf of the governments of the Caspian littoral states by the United Nations Environmental Programme. The UNEP has repeatedly demonstrated its competence in the area of initiating environmental legislation by supporting numerous processes of negotiating multilateral environmental agreements.[2] The Caspian Environmental Programme (further referred to as CEP) took over the organizational tasks and mediation between UNEP and the negotiating Caspian governments.

The approach of complementing an international treaty by a series of additional instruments aims at both facilitating difficult negotiations and reducing the number of any future amendments to the text of the Tehran Convention itself. In the case of any amendment to the Tehran Convention, the procedures are rigorous. The Tehran

[2] UNEP Regional Seas Programme; Washington Global Programme of Action for Protecting the Marine Environment from Land-Based Activities 1995; Rotterdam Convention 1998.

Convention prohibits reservations [Article 32] which are a unilateral statement made by a state, whereby such state purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.[3]

The Tehran Convention appoints no fixed time frame to the Conference of the Parties for the adoption of implementing protocols. It determines neither the precise objectives to be achieved with these protocols, nor the order of their adoption. However, it seems that the protocols must be accurate enough so as not to miss the target of completing the provisions of the Tehran Convention. As of today, two of the Protocols have already been adopted but have not entered into force. Initially the Protocol Concerning Regional Preparedness, Response and Co-operation in Combating Oil Pollution Incidents ("the Aktau Protocol") was adopted on August 12, 2011, and ratified by merely three of the state parties: Azerbaijan, Iran, and Turkmenistan. Secondly, the Protocol for the Protection of the Caspian Sea against Pollution from Land-Based Sources and Activities ("the LBSA Protocol") was adopted on December 12, 2012, but has not been ratified yet. The Protocol for the Conservation of Biological Diversity ("Ashgabat Protocol") was only adopted in Ashgabat, Turkmenistan on 30 May 2014. The remaining Protocols on Environmental Impact Assessment in a Transboundary Context are still under coastal states' consideration.

10.3 Environmental Principles Applicable to the Caspian Sea

The provisions of the Tehran Convention are rooted in the well-established principles of international environmental law. The Tehran Convention explicitly refers to the fundamental principles of precaution, cooperation, sustainability, responsibility and liability, etc. Some of them enjoy binding legal force and some others need to be complemented by other norms.

10.3.1 Principle of Sustainable Development

According to the Tehran Convention (Article 2), the objective of the treaty is to use the resources in a rational way. This goal reflects the legal principle of sustainable development, which is to be regarded as one of the basic rules of modern international environmental law, has been named also in the LBSA Protocol (Preamble). The emphasis on the principle of sustainable development by the Caspian littoral states confirms their commitment to the right of the human community to live in

[3] Definition of reservations according to Article 2(1)d of the Vienna Convention on the Law of Treaties.

uninjured environmental conditions reflecting eco-friendly awareness of the countries of the Caspian region, which will be beneficial for the further development of environmental cooperation in the region. The recognition of the interaction between environment and development derives from the Stockholm Declaration,[4] and in particular from the Final Declaration of the United Nations Conference on Environment and Development in 1992 in Rio de Janeiro.[5] It is arguable whether the principle of sustainable development has already become part of the customary international law. However, certainly the number of international agreements recognizing this principle is increasing. As not one generally accepted definition of sustainability exists, some treaties refer to it by using other notions like "rational,"[6] "proper,"[7] or "wise."[8]

Sustainable use of natural resources focuses on reaching an agreement on the environmentally and socially acceptable extension of the use and exploitation of the resources. The application of this principle in environmental legal praxis requires in-depth knowledge in the field of the natural sciences to create an appropriate legal regime for the exploitation of natural resources.[9] Sustainable development of natural resources means, to simplify it a bit, the reduction of resource consumption to a level that does not exceed the regenerative capacity of this resource's potential. Here, the three dimensions of ecology, economy and social affairs of the usage of resources must be linked. An important aspect of sustainable development of natural resources is to ensure the respect for needs of the present generation regarding the resources without compromising the ability and quality of life of future generations.

[4] Text in: ILM 11 (1972), 1416.

[5] Text in: ILM 31 T.

[6] Stockholm Declaration 1972, Principle 13 and 14; Antarctic Marine living Resources Convention 1980, Article II(1) and (2); Jeddah Convention 1982, Article 1(1) define "conservation" objectives as including "rational use," regarding migratory birds: Western Hemisphere Convention 1940, Article VII]; regarding fisheries: Danube Fishing Convention 1958, Preamble and VIII; 1959 North- East Fisheries Convention, Preamble and Article V(1)(b); Black Sea Fishing Convention 1959, Preamble and Article 1 and 7; South Atlantic Fisheries Convention 1969, Preamble; Baltic Fishing Convention 1973, Article I and X(h); Northwest Atlantic Fisheries Convention 1978, Article II(1), regarding salmon: North Atlantic Salmon Convention 1982, Preamble, regarding all natural resources: 1968 African Conservation Convention, Article II, Amazonian Treaty 1978, Articles I and VII, regarding seals: Antarctic Seals Convention 1972, Article 3(1); Convention on Conservation of North Pacific Fur Seals 1976, Article II(2)(g), regarding hydro resources Amazonian Treaty 1978, Article V;

[7] Regarding fisheries: General fisheries Council for Mediterranean 1949, Preamble and Article IV (a); regarding forests: American Forest Institute 1959, Article III(1)(a).

[8] Regarding flora and fauna 1968 African conservation Convention, Article VII(1); Stockholm Declaration 1972, Principle 4, South Pacific Nature Conservation 1976, Article V(1); regarding wetlands: Ramsar Wetlands Convention 1971, Articles 2(6) and 6(2)(d); regarding natural resources generally: Bonn Convention 1979, Preamble.

[9] See: Robinson (1998), 2 et seq.

Under the umbrella of the sustainability principle various principles have also emerged and are commonly used in international environmental practice, which should guide also the Caspian contracting parties. The Tehran Convention explicitly requires the use of the principles of intergenerational equity, "precautionary," "the polluter pays" and public participation to successfully achieve the objectives of the Tehran Convention and to implement its provisions (Article 5).

10.3.2 "Future Generations" Principle

As the Preamble of the Tehran Convention puts it, the contracting party resolved firmly "to preserve living resources of the Caspian Sea for present and future generations." The LBSA Protocol expresses states' desire to meet their needs through protection and conservation of the Caspian environment. The idea of safeguarding natural resources in the interest of future generations and not leaving them resource-scarce and with pollution problems, as an aspect of the sustainable development concept, is reflected in a great number of environmental treaties concerning such issues.[10] Also in international declarations there are references to the benefit of future generations.[11] The practical legal consequence of provisions concerning this matter is not clear. They may support the position of individuals in enforcing rights and obligations following on from environmental treaties.[12]

In terms of natural resources, it is important to emphasize that natural resources may be developed and managed only to the extent that their long-term usability and availability is provided also for future generations. The exhaustion of natural resources by the present generation will seriously impact the existence of future generations.[13] Such discrimination against future generations is to be condemned from both an ethical but also from a legal perspective.[14] A possible elimination of the generation conflict is provided by an economic method, the so-called "exponential discounting," which converts a future benefit into an equivalent corresponding with today's values.[15]

[10] South Pacific Nature Convention 1976, Preamble; 1992 Helsinki Convention, Article 2(5)(c); 1985 ASEAN Convention, Preamble; Kuwait Convention 1978, Preamble; 1983 Cartagena de Indias Protocol, Preamble; Jeddah Convention 1982, Article 1 (1); Biodiversity Convention 1992, Preamble; Climate Change Convention 1992, Article 3(1); Nairobi Convention 1985, Preamble; CITES 1973, Preamble; ENMOD Convention 1977, Preamble; Bonn Convention 1979, Preamble.

[11] UN General Assembly Resolution 35/8 of 1980 Historical Responsibility of States for the Preservation of Nature for Present and Future Generations; Rio Declaration 1992, Principle 3.

[12] United Nations General Assembly Resolution 2749 (XXV) of 17 December 1970.

[13] See: Thompson (2004).

[14] See: Davidson (2003).

[15] See: Farber (2003), S. 1.

10.3.3 The Precautionary Principle

The precautionary principle is based on the *prevention principle* in German law.[16] The most important feature of this principle is that positive action to protect the environment may be required before scientific proof of harm has been provided. However, to this day there is still no unity in the understanding of the meaning of this term among states. On the one hand, it can be defined as showing caution of approach towards activities which could have adverse impact on the environment. On the other hand, there could be strict regulation and prohibition of activities and substances potentially harmful to the environment, even without convincing evidence of their likely harmful effect. The precautionary principle is applicable to risk prevention in situations which can be defined as "not-on-risk-yet."[17] The consideration and preparedness for a possible future danger corresponds to the long-term environmental perspective which focuses not only on immediate threats. Strengthening of the precautionary approach is reflected in the so-called "cradle to grave" principle known from American environmental law. It provides for the control of certain environmental problems throughout the process of production, use and disposal. This approach was applied for the first time in the "Beveridge Report."[18]

There is no doubt that the precautionary principle reflects a principle of customary law, and its application will depend on the circumstances of each case. Since the mid-1980s, one can observe a growing support for precautionary actions within binding agreements[19] in the case of the threat of "serious or irreversible" damage to environment.[20]

The provisions of the Tehran Convention and the LBSA Protocol concerning the precautionary principle constitute a repetition of the Principle 15 of the Rio Declaration, which is widely considered as the first and full reflection of the precautionary principle. Both those documents contain almost verbatim the same provision, saying that "where there is a threat of serious or irreversible damage" to the Caspian Sea environment, "lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent" such damage.

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[16] Twelfth Report, Royal Commission on Environmental Pollution (1988), 57.

[17] See: Fleury (1995), S. 45.

[18] See: O'Connell and Oldfather (1993).

[19] Vienna Convention 1985, Preamble; Montreal Protocol 1987, Preamble; The Ministerial Declaration of the Second North Sea Conference 1987; The Third North Sea Conference 1990.

[20] Bamako Convention 1991, Article 4(3)(f); Helsinki Convention 1992, Article 2(5)(a); Biodiversity Convention 1992, Preamble; Climate Change Convention 1992, Article 3(3); OSPAR Convention 1992, Article 2(2)(a); 1992 Baltic sea Convention Article 3(2); Rio Declaration 1992, Principle 15.

10.3.4 "The Polluter Pays" Principle

The international environmental law principle known as "polluter pays" principle is reflected in the Tehran Convention.

> "*In their actions to achieve the objective of this Convention and to implement its provisions, the Contracting Parties shall be guided by, inter alia "the polluter pays" principle, by virtue of which the polluter bears the costs of pollution including its prevention, control and reduction.*" [Article 5(b)]

It is doubtful whether the "polluter pays" principle may be considered as part of internationally binding customary law. It raises no doubts only in relation to state members of the OECD,[21] and the EU.[22]

The "polluter pays" principle takes its origins from the Principle 16 of the Rio Declaration of 1992. It means the polluter should, in principle, bear the cost of pollution. This principle means the costs of removal of the damage caused are attributed to the polluter, and the polluter bears the responsibility for protecting the environment and avoiding causing damage to it. So far, however, neither is the burden of proof clearly defined in international environmental law, nor have the limits of applicability of the "polluter pays" principle been fixed, although this principle is incorporated into numerous international agreements[23] and non-binding declarations.[24]

The recognition of this principle and of the obligations which result from it in the Tehran Convention, and in the LBSA Protocol, is especially remarkable. However, the contracting parties did not positively lose an old subject of contention, whether the polluter, besides paying for the prevention, control and reduction costs, should also pay for the decontamination, clean-up and restoration of the environment.

On the one hand, the Rio Declaration promotes compliance with the "polluter pays" principle at the international level (principle 16), but on the other hand it provides for the concept of "common but differentiated responsibility," which

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[21] OECD Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies C(72)128(1972), 14 I.L.M. (1975), 236; 1989 OECD Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution, C(89) 88(Final)(1989), 28 I.L.M. 1320.

[22] 1973 Programme of Action on the Environment, OJ C 112, 20.12.1973, p. 1; Council Recommendation 75/436/EURATOM, ECSC, EEC of 3 March 1975, Annex, paragraph 2, OJ 1 169, 29.6.1987, p. 1.

[23] 1985 ASEAN Convention, Article 10(d); 1991 Alpine Convention, Article 2(1); 1992 Helsinki Convention, Article 2(5)(b), OSPAR Convention 1992, Article 2(2)(b); 1992 Baltic Sea Convention, Article 3(4); 1990 Oil Pollution Preparedness Convention, Preamble; Industrial Accidents Convention 1992, Preamble.

[24] Recommendation on the implementation of the Polluter-Pays Principle, C(74)223 (1974); Recommendation on the Application of the polluter-pays principle to Accidental Pollution, C (88)89 (Final)(1989) 28 ILM 1320.

acknowledges that in view of the different contributions to global environmental degradation, a state's responsibility for the environmental damage depending on its size (Principle 7). Although the Tehran Convention does not directly refer to the common but differentiated responsibility principle, it leaves open the catalogue of environmental principles. The imposition of legal duties deduced from the "polluter pays" principle needs respective national law setting actions that cannot be replaced by reference to this principle on the level of an international legal act.

10.4 Prevention, Reduction and Control of Pollution in the Caspian Sea

The sources of maritime pollution are, in particular, pollutants from land, ships and the air as well as from oil tankers, activities on the seabed for the exploitation of natural resources, and the disposal of waste of all kinds at sea.

One of the main objectives of the Tehran Convention is prevention, reduction and control of pollution, which constitutes a general obligation of the Caspian Sea littoral states. In the LBSA Protocol this obligation was extended by elimination of pollution to the maximum extent possible. Acts of pollution of the marine environment are contrary to generally recognized principles of the international law of the sea (freedom of the seas, the principle of the protection and rational use of the living resources, and likewise to the principle of the protection of the environment, etc.). All international agreements that require the prevention of pollution to the marine environment from any sources in fact consolidate and develop the principle of the protection of the marine environment. Nowadays, maritime protection against pollution is covered in both general multilateral[25] and regional[26] conventions. The provisions of the Tehran Convention, as presented below, refer to a number of such conventions and their provisions, especially to the 1982 United Nations Convention on the Law of the Sea, which reflects the rules of customary international law, as well as the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

The Tehran Convention defines pollution, almost literally repeating the UNCLOS provisions, as "the introduction by man, directly or indirectly, of substances or energy into the environment resulting or likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health and hindrance to legitimate uses of the Caspian Sea."[27] Existing international environmental law defines the states' duties and rights within the field of environmental protection and provides for the most comprehensive general framework covering all forms and

[25] International Convention for the prevention of pollution of the sea by oil of 1954, Convention on the High Seas of 1958 (Article 24, 25): UNCLOS; London Convention 1972, MARPOL.

[26] UNEP Regional Seas Programme; OSPAR Convention 1992; Baltic Convention (1992).

[27] Tehran Convention Article 1; UNCLOS, Article 1(4).

sources of pollution. Similarly, regulation of a variety of sources of pollution is included in the Tehran Convention, regulating pollution from land-based sources, seabed activities, vessels, other human activities, and pollution by dumping.

10.4.1 Land-Based Pollution

The prevention and elimination of pollutants and any adverse impact of human activities upon the maritime environment is mostly related to the land-based sources of pollution such as waste, wastewater from households, industry and agriculture, caused deliberately by specific activities. The pollutants enter maritime environment by dumping or incineration of waste or other items on land.

One of the considerable sources of land-based pollution is agricultural production. Agricultural pollution involves the loss of soil and use of chemicals which contaminate groundwater and rivers, and, finally, the seas. Pollution emerges also from industry and advanced technology. Pollution from land-based sources includes groundwater and river pollution, which eventually enters the marine environment, as well as airborne pollution, which, through the atmosphere, reaches the ocean.

The Caspian Sea is a closed drainage system so entering pollutants can hardly be removed. The main sources of pollution, inflowing via rivers Volga, Ural and Kura, are agriculture, industry and urbanization.[28] Agricultural pollutants (environmentally harmful pesticides) come mainly from small-scale farms along the Caspian coastline. Newly established farms are dependent on large-scale use of pesticides, as well as irrigation, to ensure adequate production. Industrial discharges originate mainly from wastewater treatment plants. Oil pollution affects especially the Absheron Peninsula in Azerbaijan, the waters outside Hazar in Turkmenistan, and Atyrau in Kazakhstan.

Land-based pollution is defined by the Tehran Convention as follows: "... pollution of the sea from all kinds of point and non-point sources based on land reaching the marine environment whether water-borne, air-borne or directly from coast, or as a result of any disposal of pollutants from land to sea by way of tunnel, pipeline or other means" (Article 1). This wording is an almost literal repetition of the analogous provisions of the 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources. Following Article 207 of UNCLOS, the Tehran Convention requires Contracting Parties to "take all appropriate measures

[28] Caspian Sea state of environment 2011, Report by the interim Secretariat of the Tehran Convention for the Protection of the Marine Environment of the Caspian Sea and the Project Coordination Management Unit of the "CaspEco" project, pp. 28–32, See: http://www.grida.no/publications/caspian-sea/, Accessed 1 July 2014. Section on land-based pollutants was based on the first and the second Transboundary Diagnostic Analyses, Rapid Assessment of Pollution Sources studies performed by all littoral states (2007), the Baseline Inventory Report: Land-based point and non-point pollution sources in the Caspian Coastal Zone (2008) and the Regional Pollution Action Plan (2009).

to prevent, reduce and control pollution of the Caspian Sea from land-based sources" (Article 7.1).

Similarly to the provisions of some of the UNEP Regional Seas Protocols,[29] the Tehran Convention requires state co-operation where watercourses flow through the territories of two or more countries. In the case of discharge likely to cause pollution of the Caspian Sea, states "shall co-operate in taking all appropriate measures . . . including, where appropriate, the establishment of joint bodies responsible for identifying and resolving potential pollution problems" (Article 7.3). Further, the Tehran Convention sets emission standards, which are additional measures of prevention, reduction and control of the pollution of the Caspian Sea, using the best available environmentally sound technology, best environmental practice, and low- and non-waste technology.[30]

The LBSA Protocol, which, however, is not yet in force, is to be seen as a means of implementation of the Tehran Convention's (Article 7) requirement to prevent, reduce and control pollution from Land-Based Sources, in particular pollution of the sea from all kinds of point and diffuse sources based on land, reaching the marine environment, whether water-borne, air-borne or directly from the coast. The LBSA protocol applies in the first place to emissions of polluting substances originating from land-based points and to diffuse sources that have or may have an adverse effect on the marine environment and/or coastal areas of the Caspian Sea; secondly it applies to inputs of polluting substances transported through the atmosphere into the marine environment of the Caspian Sea from land-based sources under the conditions defined in Annex III, and thirdly to pollution resulting from activities that affect the marine environment and/or coastal areas of the Caspian Sea.

In implementing of the LBSA Protocol contracting parties should (Article 5) firstly: adopt regional and/or national programs or plans of actions based on pollution source control and containing measures and, where appropriate, timetables for their completion; secondly: address 12 different activities (agriculture and animal husbandry, industry, water, waste management, tourism, etc.)[31] and 15 substances[32] through the

[29] Athens LBS Protocol 1980; Quito LBS Protocol 1983; Kuwait LBS Protocol 1990.

[30] Tehran Convention, Article 7.2; see also Montreal Guidelines and OSPAR Convention 1992.

[31] 1. Agriculture and animal husbandry; 2. Industry (Aquaculture; Electronic; Energy production; Fertilizer production; Food processing; Forestry; Nuclear; Metal industry; Mining; Oil and gas related activities; Paper and pulp; Pharmaceutical; Production of construction materials; Production and formulation of biocides; Recycling;· Shipbuilding and repairing; Tanning; Textile; Waste management: Hazardous and toxic waste; Industrial Wastewaters; Municipal solid waste and wastewaters; Radioactive waste; Sewage sludge disposal; Waste incineration and management of its residues; Rocket fuel; 4. Tourism; 5. Transport; 6. Construction and management of artificial islands; 7. Construction of motorways and highways; 8. Liquidation of chemical weapons and ammunition; 9. Dredging; 10. Construction of harbours and harbour operations; 11. Alteration of the natural physical state of the coastline; 12. Installations out of exploitation which are affected by sea-level fluctuations.

[32] 1. Bioaccumulation and biomagnification. 2. Cumulative effects of substances. 3. Distribution patterns of substances (i.e. quantities involved, use patterns and probability of reaching the marine

- progressive development, adoption and implementation of emission controls, including emission limit values for relevant substances, environmental quality standards and environmental quality objectives, as well as management practices based on the factors defined in Annex I; and
- including timetables for achieving the limits, management practices and measures agreed by the states;

States should also utilize or promote Best Available Technologies (further referred to as BAT) and Best Environmental Practices (further referred to as BEP) and transfer of environmentally sound technology (Annex V). Further, Caspian states should (Article 6) progressively formulate and adopt common guidelines as well as regional programs and plans of action, dealing in particular with, first: the length, depth and position of pipelines for coastal outfalls, by considering, in particular, the methods used for treatment of emissions; second: special requirements for emissions requiring separate treatment; third the quality of sea-water that is necessary for the protection of human health, living resources and ecosystems when used for specific purposes; fourth, the control and, where necessary, progressive replacement of products, installations and industrial and other processes causing significant pollution of the marine environment and coastal areas; and fifth, specific requirements concerning the quantities of the substances discharged, listed in Annex I to the Protocol, their concentration in emissions and methods of discharging them.

The Caspian states should ensure (Articles 7–9) that the emission controls of the point sources of pollution and the methods of control of diffuse sources of pollution, especially from agricultural activities, as well as other activities not mentioned in Annex I, which may have adverse effect on the maritime environment or coastal areas, are based on BAT and BEP. States are required to take all appropriate measures, incl. national action plans and states' limitations on point sources, to reduce inputs of pollutants.

Regional measures for preparedness, response and co-operation for protection of the Caspian Sea from oil pollution from land based sources are regulated in the Aktau Protocol Concerning Regional Preparedness, Response and Co-Operation in Combating Oil Pollution Incidents to the Tehran Convention on the Protection of the Marine Environment of the Caspian Sea adopted in 2011, but not effective yet.

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environment). 4. Effects on the organoleptic characteristics of marine products intended for human consumption. 5. Effects on the smell, colour, transparency, temperature or other characteristics of seawater. 6. Health effects and risks. 7. Negative impacts on marine life and the sustainable use of living resources or another legitimate uses of the sea. 8. Persistence of substances. 9. Potential for causing eutrophication. 10. Radioactivity. 11. Ratio between observed concentrations and no observed effect concentrations (NOEC). 12. Risk of undesirable changes in the marine ecosystem and irreversibility or durability of effects. 13. Toxicity or other noxious properties (e.g. carcinogenicity, mutagenicity, teratogenicity). 14. Capability of long-distance transport.

10.4.2 Pollution from the Seabed Activities

The main reason for pollution from the seabed activities is the escape of harmful substances emerging from exploitation, exploration and processing of raw materials on the seabed, primarily through oil and gas drilling. Leaked oil forms a film spreading on water surface, which interrupts the interaction between water and the atmosphere, fouls the feathers of sea birds and pollutes flora and fauna. Even soil gets strongly saturated.

The extraction of non-living resources in the Caspian Sea is significant even on a worldwide scale. Caspian oil and gas industry is developing especially in Azerbaijan, Kazakhstan and Turkmenistan. As a result, ecological degradation reaches a significant level. Offshore oil production, faulty pipes, unavoidable accidents and effluents from refineries and petrochemical industry in the Caspian cause extensive environmental damage.

The Tehran Convention gives the littoral states of the Caspian Sea the mandate "to prevent, control and reduce pollution of the Caspian Sea resulting from seabed activities" (Article 8). Caspian states' commitment merely to take all appropriate measures to reach the set goal is weaker than in the UNCLOS (Article 208) and some regional agreements,[33] which require parties to adopt laws and regulations as well as other measures to prevent, reduce and control pollution. The Tehran Convention merely encourages parties to co-operate in the development of protocols to that Convention to prevent, control and reduce pollution of the Caspian Sea caused by seabed activities.

Regional measures for preparedness, response and co-operation for the protection of the Caspian Sea from oil pollution caused by seabed activities, but also regarding oil pollution from vessels and land-based sources are regulated by the Aktau Protocol to the Tehran Convention. It has been signed in addition to the Tehran Convention by all Caspian states on 12 August 2011, but has not entered into force yet. The Protocol requires states (Article 4) to jointly develop and establish guidelines for the practical, operational and technical aspects of joint action, as well as a regional mechanism. Its operational implementation should be based on a Caspian Sea Plan concerning Regional Co-operation in Combating Oil Pollution in Cases of Emergency, which was originally drafted during 2001–2003 consultation of the Caspian littoral states, working in close cooperation with the Caspian Environment Programme and the International Maritime Organization. Further the Protocol requires states to establish National Systems and Contingency Plans for Combating Oil Pollution Incidents (Article 5) and Pollution Reporting Procedures (Article 7) enabling them to take Operational Measures in case of oil spill. States should take the necessary measures to ensure that ships flying their flag carry on board a shipboard oil pollution emergency plan. A Contracting Party

[33] OSPAR Convention 1992, Article 5 and Annex III; UNEP Guidelines on offshore Mining and Drilling 1982, Baltic Sea Convention (1992), Article 12(1).

requiring assistance to deal with an oil pollution incident, or the threat of such an incident, may request assistance, upon Reimbursement of Costs of Assistance, from the other Contracting Parties (Article 10).

10.4.3 Pollution from Other Human Activities

The variety of human-induced negative impact on the marine environment cannot be limited to the problem of pollution only, although pollution is classified as the largest, most common and therefore the most dangerous factor. Numerous other factors of anthropogenic impact on the marine environment include changes in temperature and radioactivity, the introduction of waste water and the influx of nutrients, irretrievable water use and the destruction of aquatic organisms by seismic surveys, the cultivation of arable species, the destruction of coast, construction of oil platforms, etc. Many of the purely land-based activities, such as dam construction, installation of irrigation constructions, deforestation, or atmospheric fumes can exercise a negative impact even a hundred kilometers away from the coast. The coastal population is growing and their increased activity in the coastal zone essentially changes the local environment. Clearing, land reclamation, drainage for flood protection, construction of roads and ports etc. often accelerate coastal erosion and destroy the habitat.

In Article 11 the Tehran Convention requires states "to take all appropriate measures to prevent, reduce and control pollution of the Caspian Sea resulting from other human activities . . . including land reclamation and associated coastal dredging and the construction of dams." Their consequences for the Caspian environment and economy (especially fishing industry) are harmful.[34]

The ecosystem of the Caspian Sea is highly negatively impacted by the extending land reclamation. This human interference caused the spreading of steppe and desert species in recent years, which are typical of zonal communities that are poor in species and are characterized by low productivity. This causes the disappearance of rare and endemic species. A historical example supporting this thesis in the Caspian region is the disappearance of almost the entire population of the Caspian Tiger in the early twentieth century. Here, as elsewhere, socio-economic necessity collides with ecological. It is visible in the case of a development program for the Kazakh sector of the Caspian Sea. This program aims to increase offshore oil production by 2015 and thus enforces the development of the necessary infrastructure in the country—and thus land reclamation.

Additional untreated sewage and pollutants are discharged into the Caspian Sea from the catchment area of the Volga, more than 1 million km^2, and from the Kura, as well as the rivers of Ural. Another environmentally harmful human activity is dredging, which on the one hand contributes significantly to coastal erosion, but on

[34] See: Barannik et al. (2004), pp. 45 et seq.

the other hand it responds to economic necessity. As in the case of deepening of the Volga–Don waterway, where, because of a deficient road system in the Caspian region, water transport is the essential means of transporting goods in an environmentally friendly way. As the number of tankers in operation is not sufficient, there is a need to use larger vessels in the Volga–Don Canal to transport oil to the Azov Sea and the Black Sea. It requires, however, dredging of the Volga–Don Canal, which is filled with a lot of silt.

Another environmental problem indicated by the Tehran Convention is the pollution originating from the construction of dams. The land and the water are ecologically intertwined. Any interruption of this connection, as is the case when a dam is constructed, causes extensive changes to the river system and its hydrology and natural flow. A cascade of reservoirs built on the Volga improves water supply and inland water transport, but at the same time the increased demand for water from the industry and settlements, as well as the evaporation of artificial reservoirs leads to larger water losses and thus to the increase of salinity of water. The dams and locks on the Volga raise the water level in the river, thus reducing the flow rate, so that the self-cleaning ability of the Volga gets limited. Polluted waters cannot be purified in a natural way, as the respective biological species are covered by sediments, which do not get flushed out because of low water flow rate. The most serious example of damage to the environment of the Caspian Sea is the Kara–Bogaz–Gol bay separated from the Caspian Sea by a dam. The dam existed from 1980 to 1992 and was built to prevent water runoff from the Caspian Sea and the falling of water level. Instead, it had disastrous ecological consequences. The sturgeon was separated from its spawning areas, the bay turned into a salty lagoon, salt storms ravaged the coast, coast desertification was accelerated etc.

10.4.4 Pollution by Dumping

In the 1970s of the twentieth century, the scope of the environmental law was extended from referring merely to prevention of pollution of the marine environment with oil, and for the first time it addressed the problem of pollution from other sources[35] and from dumping. Pollution by dumping refers to pollution that is created on land and subsequently transported for disposal at sea. The pollution of the sea by solid waste of all kinds that either deliberately or accidentally enters the oceans each year is caused by waste, but also by washed out agricultural soil, pesticides, other chemicals and effluents that are washed into the water cycle. The chemical industry sinks huge amounts of waste in the sea, of which the dumping of heavy metals contaminated dredged material is particularly problematic. The dumping of radioactive waste is particularly dangerous and forbidden under

[35] Intervention Protocol of 1973.

international law. Many pollutants get into the groundwater and eventually also into the oceans.

Many media sources state that Caspian Sea suffers from dumping from different sources. Naval ships regularly dump their ballast water in the Caspian Sea. Untreated industrial wastewater, including nuclear, is dumped into the Caspian annually. Another point of concern is the pollution of the Caspian Sea originating from onshore and offshore oil. Already at the time of the Soviets it was a few times higher than the maximum permissible concentration.[36] Also nowadays oil waste is damped from platforms in the Caspian Sea. The most endangered areas are Baku Bay, Absheron Archipelago, Turkmenbashi, Cheleken, Mangishlag, Tengiz, etc. Offshore drilling products and wastewater from cleaning facilities are often dumped into the Caspian Sea. Oil wells flooded due to rise of the sea level pose increasing environmental danger. Alone in the Kazakh sector of the Caspian Sea there are 19 oilfields with 1485 oil wells in the coastal zone. Constructed many years ago, the structure of offshore oil wells, fields and pipelines corrodes, polluting the sea.

A broad set of international principles established for combating pollution caused by dumping are included in UNCLOS (Article 210) and the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (further referred to as London Dumping Convention). The London Dumping Convention, for instance, includes measures, procedures and standards aimed at the prevention, reduction and pollution control from vessels' dumping. This approach, visible in the number of international agreements, among others the UNEP Regional Seas Protocols,[37] reflects the current state of international standards relating to the prevention of pollution, marine pollution by dumping. These principles are confirmed in contemporary case law.[38]

As it includes merely a general reference to existing sources of International law, the Tehran convention does not expressly reflect the obligation to refer to dumping protection mechanisms existing in law. Following the London Dumping Convention, the Tehran Convention characterizes dumping as "any pollution to the Sea from any deliberate disposal into the marine environment of waste or other matter from vessels, aircraft, platforms, or other man-made structures in the Caspian Sea or any deliberate disposal of vessels, aircraft, platforms, or other man-made structures in the Caspian Sea" (Article 1). Also, the general requirements regarding prevention, reduction and pollution control are common for both the treaties on the global level and for the Caspian region.[39]

[36] Hegimoklu (1999).

[37] Barcelona Dumping Protocol 1976, Article 2; Noumea Dumping Protocol 1986, Article 2; Paipa Dumping Protocol 1989, Article 1.

[38] Case concerning Trail Smelter Arbitration (USA v. Canada), 3. UNRIAA 1905 (1941); Corfu Chanel Case (1949) ICJ 4; Lake Lanoux Arbitration (Spain v. France), 12 UNRIAA 281 (1963).

[39] UNCLOS, Article 1.1(5), 210.1; Tehran Convention, Article 10.1.

However the Tehran Convention's provisions on dumping are more general. It doesn't mention any particular types of pollutants, as is the case in the 1972 London Dumping Convention, which established three categories of waste, clearly prohibiting dumping only in the case of highly hazardous waste substances listed in Annex I, except in emergency cases.[40]

Dumping of other substances requires a "special" or "general" permit, applied for in advance, which could also be applicable in the Caspian Sea case.[41] The Tehran Convention does not prejudge the question of the threshold at which pollution from dumping becomes impermissible. According to the London Dumping Convention, national authorities should keep detailed records of all relevant matters (the characteristic and composition of the matter and of the dumping site and methods of deposit, and other general considerations and conditions including possible effects on marine life and other uses of the sea, the practical availability of alternative methods of treatments, disposal or delimitation).[42]

Compared to the provisions of the London Dumping Convention, the Tehran Convention limits the jurisdiction of the state parties to the ships and air vehicles that are registered in their territory or fly its flag. Regardless of the substance involved, the only exception to the rules of the Tehran Convention for preventing, hindering, reducing and controlling dumping in the Caspian Sea is allowed in emergency situations. Such an emergency case applies only to situations where human or marine life is threatened or aircraft or vessels are in danger of "complete destruction or total loss" and must be reported to the Contracting Parties. The unacceptable risk and dumping needs regarded as "the only way of averting the threat, and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur. Such dumping should be conducted as to minimize the likelihood of damage to human or marine life or hindrance to legitimate uses of the sea in accordance with the applicable international and regional legal instruments" (Article 10.3).

10.4.5 Pollution from Vessels

Vessel-source pollution is generated by marine transportation, which includes international operational and accidental discharges resulting from shipping operations. Vessel-source pollution includes all types of pollution originating from vessels, such as oil, chemicals, natural gas and other hazardous materials, which result both from accidents at sea, reballasting and tank cleaning. An example of a

[40] London Dumping Convention, Article V; Interim Procedures and Criteria for Determining Emergency Situations, LDC V/12, Annex 5.

[41] London Dumping Convention, Article IV(1)(b) and (c).

[42] London Dumping Convention, Article VI(3) and Annex III, as mentioned in 1989, Res LDC 32 (11), Amendments to the Guidelines for the Application of Annex III (LDC 11/14, Annex IV).

significant increase in the pollution of the Caspian Sea associated with oil transportation by tankers was the increase in the amount of oil transported from terminals in Turkmenbashi via the Caspian Sea to Baku, which was then used to fill the Baku–Tbilisi–Ceyhan pipeline built in 2005.[43]

Serious pollution accidents in the 1960s involving sunken oil tankers such as the Torrey Canyon supertanker Amaco Cadiz, the Exxon Valdez or the Mega Borg, revealed the immense danger of ship operations for the marine environment and thus led to increased legislative activity of the global society. To reduce the pollution of marine environment originating from ships many international agreements were adopted. Regional standards for the prevention, reduction and control of pollution of marine environment by ships can be found in numerous international agreements.[44] International legal instruments in which the most important provisions against the pollution from vessels are contained include UNCLOS and MARPOL. UNCLOS merely empowers states to regulate pollution from vessels and limits their jurisdiction to the application of generally accepted international rules and standards contained in the relevant multilateral agreements. The most important is the MARPOL Convention, which regulates the obligation of states to prevent marine pollution. The substantive norms arising from six additional protocols to MARPOL regulate the prevention of pollution of the marine environment by oil, by the Noxious Liquid Substances in Bulk, Harmful Substances Carried by Sea in Packaged Form, Sewage from Ships, Garbage from Ships as well as Prevention of Air Pollution from Ships.

Mindful of this important source of pollution to which the Caspian Sea may be exposed, the parties to the Tehran Convention agreed to take all appropriate measures “to prevent, reduce and control pollution of the Caspian Sea from vessels” (Article 9). These provisions contain the basic elements found in other international instruments. Only in a general way does the Tehran Convention require co-operation of states in the development of protocols and agreements prescribing agreed measures, procedures and standards, and binds them with the relevant international rules.

Regional measures for preparedness, response and co-operation for the protection of the Caspian Sea from oil pollution caused by vessels are provided for under the Aktau Protocol to the Tehran Convention adopted in 2011 but not effective yet.

[43] Geospatial Technologies and Human Rights Project—Satellite Imagery Analysis for Environmental Monitoring: Turkmenbashi, Turkmenistan May 2013, prepared by American Association for the Advancement of Science (assessment of two towns located near Turkmenbashi on the Caspian Sea: Avaza and Tarta). For full report: http://www.aaas.org/news/releases/2013/media/AAAS_Turkmenistan_Oil_2013.pdf. Accessed 1 July 2014.

[44] Copenhagen Agreement 1971; Helsinki Convention 1992, Article 7, Annex IV; 1976 Barcelona Convention, Article 6; Kuwait Convention 1978, Article IV; Abidjan Convention 1981, Article 5; Lima Convention 1981, Article 4 (b); Lima Convention 1981; Jeddah Convention 1982: Cartagena Convention 1983, Article 5; Bonn Agreement 1983; Nairobi Convention 1985, Article 5; Noumea Convention 1986, Article 6.

10.4.6 Environmental Emergencies

Situations that lead to a catastrophic pollution of marine environment are often caused by unexpected and unforeseen events at sea. Therefore, there has been a need for increased contractual activities to counteract the causes of such pollution for a long time. The international agreements providing for the prevention of pollution of the sea, which were concluded until the 1990s of the twentieth century, were unsatisfying because they did not require states to take preventive measures. In 1990, the first International Convention on Oil Pollution Preparedness, Response, and Co-operation was adopted, giving necessary impetus for subsequent international legal instruments. The agreement contains a general obligation of states parties to take all appropriate measures to prepare for oil pollution incidents and to fight them.

The oil disaster caused by a blowout on a BP rig in the Caspian Sea, off the coast of Baku, in September 2008, was the most serious example of oil pollution on the Caspian.[45] There were also other examples of unpredictable pollution to Caspian marine environment caused by humans or by nature because the Caspian Sea is one of the main transport routes in the region. Recognizing that it is desirable to protect the fragile environment of the Caspian Sea from environmental emergencies, the Tehran Convention devotes a separate article to this problem.

Defining the environmental emergency, the Tehran Convention refers to the basic elements of the provisions regarding international watercourses,[46] saying that an environmental emergency is "a situation that causes damage or poses an imminent threat of pollution or other harm to the marine environment of the Caspian Sea and that results from natural or man-made disasters" (Article 2). Further, states are required to take all appropriate measures and co-operate to protect human beings and the marine environment, using preventive, preparedness and response measures against the harm caused by natural or man-made emergencies (Article 13). This provision refers to the obligations contained in the OPRC Convention, followed by the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, in 2000. Both are aimed at providing a global framework for international co-operation in combating major incidents or threats of marine pollution.

Following the OPRC Convention principles, which provide for national and regional systems for preparedness and response (Article 6), the Tehran Convention requires states to "take all appropriate measures to establish and maintain adequate emergency preparedness measures, including measures to ensure that adequate equipment and qualified personnel are readily available to respond to environmental emergencies" (Article 13.4). The Tehran Convention, like the OPRC Convention (Articles 5 and 7), promotes international co-operation in industrial accidents and environmental emergencies. It commits states to set up an early warning system

[45] http://ecowatch.com/2012/04/19/bpcoverup. Accessed 1 July 2014.

[46] UN Water Convention, Article 28.

and prescribe the actions necessary in the event of an environmental emergency or imminent threat thereof. "The Contracting Party of origin should ensure that the Contracting Parties likely to be affected, are, without delay, notified at appropriate levels" (Article 13.3). For the co-ordination of the means of communication and also for the promotion of co-operation, it provides a number of legal instruments concluded under auspices of UNEP.[47] According to the above-mentioned states' obligation to undertake preventive measures and set up preparedness measures, every State should first identify hazardous activities within its jurisdiction, which are likely to cause environmental emergencies. The Caspian littoral states are not expressly committed to develop specific national and regional systems and contingency plans for prevention and combat of pollution accidents, as is the case according to OPRC Convention (Article 6). The only aspect which was taken from the OPRC Convention is the obligation to design a competent national authority, which is responsible for the prevention and combating of oil pollution [Article 13(4)]. After that, the Tehran Convention requires member states to ensure that other Contracting Parties are notified of any such proposed or existing activities. "The contracting parties shall agree to carry out environmental impact assessment of hazardous activities and to implement risk-reducing measures" (Article 13.2). It will be referred to in detail in the following chapter.

10.5 Protection, Preservation and Restoration of the Marine Environment

The marine environment of the Caspian Sea—including its water and the adjacent coastal areas—represents a self-contained unit being an indispensable component of a life supporting system, which requires sustainable development. The Tehran Convention includes the general obligation of states to individually or jointly take all appropriate measures to protect, preserve and restore the environment of the Caspian Sea (Article 4.b). The provision is included in the international instruments regarding both seas[48] and international watercourses,[49] as well as others.[50] The term "environment" is to be interpreted quite broadly, to be applied to areas "surrounding" the Caspian Sea, which have a minimal influence on the protection and preservation of the Caspian Sea itself. It is derived from the provisions committing states to take necessary measures to develop and implement national

[47] Mediterranean Emergency Protocol (1976), Article 1; Kuwait Emergency Protocol 1978, Article II; Jeddah Pollution Emergency Protocol 1982, Article II.

[48] UNCLOS, Article 192.1.

[49] UN Water Convention, Article 20.

[50] African Convention on the Conservation of Nature and Natural Resources 1968, Article II; ASEAN Agreement 1985, Article 1.

strategies and plans for the planning and management of land affected by its proximity to the sea (Article 15). The duty to protect the environment requires states to shield it from damage or harm, as well as from significant threat of harm, which reflects the general application of the principle of precautionary action. The protection, as well as preservation, should ensure their continued viability as life-support systems, providing bases for sustainable development. The requirement that states should act individually or jointly is to be understood that appropriate action is to be taken where necessary and on an equitable basis.

In view of the general nature of the obligation contained in the above-mentioned article, it is preceded by other more specific articles in Part IV. The Tehran Convention requires particular regard from the Contracting Parties for the protection, preservation, restoration and rational use of marine living resources (Article 14). The ocean resources are usually categorized as non-living and living resources, where the latter include fish stocks and marine mammals. The goals of international law for fisheries conservation are: promoting international co-operation; managing and conserving fisheries and marine living resources, and supporting international research, scientific co-operation and international regulation.

Citing the need to apply the best scientific evidence available, the Tehran Convention contains provisions requiring parties to the Convention to take all appropriate measures required to protect, preserve and restore the marine environment. In doing so, the convention mostly repeats objectives included in the United Nations Conference on Environment and Development (further referred to as UNCED) Agenda 21.[51] The requirement of the Tehran Convention (Article 14.1) and UNCED [Article 17.46(a)] refers to the development of living resources' potential for conservation, restoration and rational use of environmental equilibrium to satisfy human needs in nutrition, as well as meeting social and economic objectives. The provisions of the conservation and management of fisheries may be considered as reflecting customary international law, which is the reason that the Tehran Convention almost literally repeats the obligation imposed on states as contained in UNCLOS [Article 61(3)]. It requires the Caspian Sea littoral states to ensure the maintenance and restoration of the populations of marine species at a level that can produce the maximum sustainable yield, i.e. the largest average catch that can be taken continually (in a sustainable fashion) from a stock under conditions of relevant environmental and economic factors and relationships among species (Article 14.1b). The already-mentioned requirement is in addition to the other obligations of states, also to be found among UNCLOS provisions, which is to ensure that marine species are not endangered by overexploitation, i.e. the catches exceed the maximum sustainable limit recognized by the Food and Agriculture Organization.[52] Like the UNCED, the Tehran Convention in Article 14(1) (d) provides for the promotion of the "development and use of selective fishing

[51] Paragraph 17.46, A/CONF.151/26 (Vol. II) (1992).

[52] Tehran Convention, Article 14.1c; UNCLOS, Article 61(1) and (2).

gear and practices that minimize waste in the catch of target species and that minimize by-catch of non-target species." According to UNCLOS, both of these legal instruments require states to "protect, preserve and restore endemic, rare and endangered marine species" (Article 194.5).

10.5.1 Protection of Biodiversity

Caspian Sea's biological diversity is characterized by a high level of endemic fauna species, present in the mid-Caspian Sea region, and their great diversity, especially in the north Caspian. The total count of species in the Caspian Sea Region is estimated at up to 2,000 groups of plants and animals.[53] There are many algae species and more than 100 other native species, but only one marine mammal—the Caspian seal. As many as 19 fish species are listed in the IUCN and some National Red Data Books. There are more than 300 species of birds.

Caspian states' commitment regarding the protection, preservation and restoration and rational use of the marine living resources in the Caspian Sea within the Tehran Convention refers to the main objective of the 1992 Convention on Biological Diversity, i.e. conservation of biodiversity. In Article 14(1)(f) the Tehran Convention requires states to pay particular attention to the "habitats of rare and endangered species, as well as vulnerable ecosystems." The Tehran Convention also requires states to protect, preserve and restore biological resources (Article 14.2), which demands regulation or management of biological resources important for the conservation of biological diversity, whether within or outside protected areas, with a view to ensuring their conservation and sustainable use.[54] The Tehran Convention does not include the direct definition of the biological resources. Instead, the Biodiversity Convention defines them as "genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity" (Article 2). Competing with the incentive for co-operation between governmental authorities and the private sector in developing methods for sustainable use of biological resources contained in the Biodiversity Convention (Article 10e), the Tehran Convention requires states to "co-operate in the development of protocols in order to undertake the necessary measures for protection, preservation and restoration of marine biological resources" (Article 14.2).

In the Tehran Convention the Caspian states assigned priority to the development of an ancillary Biodiversity Protocol, which was adopted in Mai 2014.

[53] Caspian State of Environment, pp. 54–62.

[54] Convention on Biological Diversity of 1992, Article 8b.

10.5.2 Invasive Alien Species

Invasive alien species are animals and plants that are introduced, accidently or deliberately, into a natural environment where they are not normally found, causing serious negative consequences for the original species, communities or habitats. The enormous dissemination of invasive alien species especially in recent years results from increased international traffic and trade. Some of the new species were deliberately introduced into the Caspian Sea, e.g. to increase the productivity of the species living there. However, it has not always achieved the desired effect, such as in the case of Azolla pinnata, which caused anoxia in lagoons of Iran.

Invasive alien species are considered one of the greatest threats to biodiversity. They are in competition with native species and threaten to displace them or cause introgression of their genes into native species. Invasive species can alter site conditions and thus ecological cycles. Even very small populations, by causing damage to native species, can cause economic losses, e.g. depriving people of their livelihood and thus causing poverty or increase in poaching etc. Recognition of these dangers contributed recently to the need to combat these species.[55]

But it was not until the 1970s that the scientific community began reviewing this problem in detail.[56] Numerous global[57] and regional[58] agreements were signed to prevent the negative impact of the invasive alien species on native plant and animal species. The development of international legal instruments relating to this issue has been continuing until the adoption of the International Convention for the Control and Management of Ships' Ballast Water and Sediments, adopted on 13 February 2004. Decision VI/23 of Conference of the Parties to the Convention on Biological Diversity is a catalogue of measures for the development of national strategies for the implementation of international legal provisions on the combat of alien species. It provides the definition of the term "alien species" as "species, subspecies or lower taxon, introduced outside its natural past or present distribution; includes any part, gametes, seeds, eggs, or propagates of such species that might survive and subsequently reproduce."[59]

The definition of pollution contained in the Tehran Convention does not include biological alterations. The problem of alien species received special attention in the

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[55] Global Invasive Species Programmes, European Plant Conservation Strategy.

[56] MEPC Res (1991) 50(31); Convention on Biological Diversity of 1992, Objectives, Article 8h; Conference of the Parties to the Convention on Biological Diversity in 1998, Decision IV/5; in 2002, Decision VI/23; 2002 World Summit on Sustainable Development, Plan of Implementation, paragraph 34(b); IMO, Res A.774(18) in 1993 and A.868(20) in 1997.

[57] 1991 MEPC Resolution 50(31); 1992 Convention on Biological Diversity, Objectives, Article 8h; Conference of the Parties to the Convention on Biological Diversity in: 1998-Decision IV/5, in 2002 Decision VI/23; 2002 World Summit on Sustainable Development, Plan of Implementation, paragraph 34(b); IMO, Resolution A.774 (18) in 1993 and A.868 (20) in 1997.

[58] Convention on the Conservation of European Wildlife and Natural Habitats 1979.

[59] Conference of the Parties to the Convention on Biological Diversity (2002). http://www.biodiv.org/decisions/?lg=0&dec=VI/23 (Accessed 1 July 2014).

Tehran Convention. It was regulated in a separate article, confirming the current approach that alien species are not to be defined as pollution per se.[60] Alien species were defined in the Tehran Convention as follows:

> "*An alien species whose establishment and spread may cause economic or environmental damage to the ecosystems or biological resources of the Caspian Sea*." [Article 1]

Unlike the UN Water Convention (Article 22), which refers to the new species that are genetically altered or produced through biological engineering, the Tehran Convention refers to alien species, i.e. those that are non-native to the Caspian basin and whose establishment and spread may cause economic or environmental damage to the ecosystem or biological resources of the Caspian Sea. The Tehran Convention addresses the prevention of the introduction, control and combating of invasive alien species in a separate article because their introduction into the ecosystem is not generally regarded as pollution per se.[61] It is clear that alien or new species of flora and fauna can have an adverse influence on the marine environment of a particular water basin. They can destroy the ecological balance and result in serious problems, including the clogging of intakes and machinery, the spoiling of recreation, the acceleration of eutrophication, the disruption of food webs, the elimination of other, often valuable species, and the transmission of diseases. The Tehran Convention requires littoral states to "take all appropriate measures to prevent the introduction into the Caspian Sea and to control and combat invasive alien species, which threaten ecosystems, habitats or species" (Article 12). This formulation contains basic elements of the UNCLOS provisions regarding the preservation, reduction and control of introduction of alien and new species, which may cause significant and harmful changes thereto (Article 196). While any introduction of alien species should be under strict observation, the Tehran Convention does not indicate any precautionary action regarding the alien species, unlike the UN Water Convention, which requires measures against species, which "may" have a detrimental effect to the ecosystem (Article 22).

The Tehran Convention does not refer to any particular alien species by name. It also hardly provides for concrete means of combat which should be taken by states. Alien species have been introduced into the Caspian Sea both accidentally and intentionally, for economic purposes.[62] Some of them have caused considerable ecological disruption, such as algae Rhyzosolenis becoming a dominant phytoplankton, Rhithropanopeus harrisii causing a complete change in the benthic area,

[60] Report of the International Law Commission on the work of its 46th session, and next International Legal Committee, Commentary, 1994, Yearbook of the International Law Commission, vol. 2 pt. 2, p. 122.

[61] Report of the International Law Commission on the work of its 46th session, and next International Legal Committee, Commentary, ILCYB (1994), Vol. 2, Part 2, 122, 124.

[62] Caspian State of Environment, pp. 62–63.

Acartia tonsa dominating zooplankton. The Comb jelly (mnemiopsos deidyi), which invaded in the late 1990s competes for food with tulka fisheries and eats its larvae, which in turn adds to declining of the stock of Caspian seals, in whose diet tulka is a key element.

10.5.3 Coastal Zone Management

The most important problems of coastal regions is coastal erosion, exacerbated by infrastructure, construction or development of natural gas, as well as destruction of habitats as a result of poorly planned development, land reclamation or marine management. Problems for the sustainable management of coastal zones are also caused by the decline in biodiversity, including fish stocks, as well as the pollution of water and soil. In the case of the Caspian Sea an additional immense threat to water management is posed by the fluctuation of water level. In many cases, the above-mentioned environmental problems can cause social problems for people living there, such as unemployment, migration, competition among users, loss of development opportunities, etc.

The need for coastal zone management was highlighted for the first time in the resolution of the United Nations conference in Rio de Janeiro in 1992. In Agenda 21 of this Conference objectives for sustainable development of the seas and coasts were set out.[63] Many problems in the coastal zones are cross-border and cannot be solved by individual countries. Thus, there is a need for a supra-regional states' community ready to undertake appropriate cooperative policies and investment strategies. The importance of these problems is reflected by the great number of international instruments, some of them of worldwide character,[64] providing for the development of national plans for coastal zone management.[65]

The Tehran Convention requires states to "take necessary measures to develop and implement national strategies and plans for planning and management of the land affected by proximity to the sea" (Article 15). This provision follows the 1996 Common Recommendations for Spatial Planning of the Coastal Zone in the Baltic Sea Region, recognizing coastal zone management as a broad social, economic and ecological approach aimed at improvement activities which "influence significantly the quality of the environment, economic and social opportunities and the cultural heritage in the coastal zone."[66] Also, other international legal instruments refer to

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[63] Chapter 17 Agenda 21.

[64] Land-Ocean Interactions in the Coastal Zone, UNEP-ICAM: Integrated Coastal Area and River Basin Management, EUCC-The Coastal Union, HELCOM HABITAT Group.

[65] UNCED resolutions, Rio de Janeiro 1992, Chapter 17 of Agenda 21, statements from "The World Coast 1993" conference; Washington Declaration on the Protection of the Marine Environment from Land-Based Activities, Preamble, 23 October to 3 November 1995.

[66] Common Recommendations for Spatial Planning of the Coastal Zone in the Baltic Sea Region, Preamble (1969), Article 2b.

the urgent need for coastal states to develop integrated coastal zone management plans.[67]

Despite the recognition of the need for a successful coastal management, only a few initiatives have been undertaken in the Caspian region so far to remove existing obstacles. A positive exception was the preparation of a cross-border "Integrated Coastal Area Management Planning."[68] It was started under the Caspian Environmental Programme but is outdated now. The entire work should have been done by the Regional Center for Integrated Transboundary Coastal Area Management Planning (CRTC-ITCAMP) established in the Islamic Republic of Iran. It coordinated the preparation of a series of National Coastal Profiles of all Caspian littoral states, which, however, were last updated in 2003. On this basis a "Caspian Regional Coastal Profile" for the entire region was supposed to be developed, comprising identification of regional issues, institutional strengths and weaknesses, capabilities, training needs and training opportunities for the Caspian Region.

Reference to an integrated approach to coastal area development, based inter alia on coastal area planning, includes also the LBSA Protocol to the Teheran Convention (Article 10). It requires states to adopt and implement mitigation measures to reduce negative impacts of natural hazards such as long-term sea-level fluctuation, storm-surges, storms, earthquakes and coastal erosion on the population and infrastructure of the coastal areas. Special attention was devoted to deforestation and land degradation, where appropriate national plans of action should contribute to combat land based pollution of Caspian maritime environment. It was finalized electronically in the form of Home-based—communicate of the Integrated Transboundary Coastal Area Management Planning (ITCAMP) Theme of the Caspian Environment Programme (CEP).[69]

10.5.4 Fluctuation of the Caspian Sea Level

The Tehran Convention pays special attention to human activities intended to counteract the fluctuations of the sea level. The water level in the Caspian Sea has been rising since 1978, which has serious consequences for the entire region. The rising water level accelerates changes in the water regime, the hydro-chemical regime of estuaries and of the structures and productivity of biological communities living there, as well as the chemical composition of groundwater etc. The earthen walls which were built to isolate oil-polluted water from clean sea water

[67] UNCED Resolutions, Rio de Janeiro (1992), Chapter 17 of Agenda 21, statements from "The World Coast 1993" Conference; Washington Declaration on the Protection of the Marine Environment from Land-Based Activities, Preamble (23 October–3 November 1995).

[68] http://www.coastalguide.org/icm/caspian/index.html. Accessed 1 July 2014.

[69] Ibidem.

(e.g. Tengiz oil field), are vulnerable to flooding. Also, large parts of the oil infrastructure are threatened by the water fluctuation. Residential areas in the coastal zone have been severely affected by the rising water level so that resettlement of the population was needed (for example, the city of Dervish in Turkmenistan).

Environmental policy, in its pursuit of sustainable development in the areas adjacent to the Caspian Sea, depends on four major factors, among them the hydro-meteorological regime of the Sea and its basin, including the fluctuations of its water level. To mitigate the economic and ecological negative consequences of the sea level fluctuations, it is necessary to use sea level forecasting and undertake measures that decrease sea level variation. The ILEC Survey of the state of the World's Lakes concludes that climatic changes are the most probable cause of the fluctuations of the Caspian sea level.[70]

The Tehran Convention deals with the issue of Caspian Sea level fluctuation providing for states' co-operation in the development of protocols to the Convention and committing them to carry out scientific research and jointly develop measures and procedures, in so far as is practicable, to decrease the consequences of the Caspian Sea level fluctuations.

> "*to co-operate in the development of protocols to the Convention prescribing to undertake the necessary scientific research and, insofar as is practicable, the agreed measures and procedures to alleviate implications of the sea level fluctuations of the Caspian Sea*." [Article 16]

The measures taken to mitigate the negative consequences of Caspian Sea fluctuation include the establishment in 1998 of the so-called Caspian Centre for Water Level Fluctuations (CCWLF). It was created as part of the TACIS program of the European Union to support the first phase of the work of the Caspian Environmental Programme. Since 2003, the research of CCWLF has been partially, but not sufficiently, continued as part of other separate projects.

10.6 Institutional Framework for Cooperation in the Legal Protection of Caspian Environment

The success of a treaty compliance regime, which constitutes formalized monitoring of the fulfillment of the contractual obligations of states by a collective body, depends largely on how the institutional questions of competences of supervisory organs are defined in the treaty itself. Another crucial factor is that the supervisory organ should have certain instruments that would allow sufficient verification of the

[70] Golubev (1997), p. 67, http://www.ilec.or.jp/en/wp/wp-content/uploads/2013/04/Vol.8_World_Lakes_in_Crisis.pdf in p. 67 (Accessed 1 July 2014).

accuracy of information requested by the contracting states (reports and declarations). The Tehran Convention provides for two supervisory bodies—the Party Conference and the Secretariat.

10.6.1 Conference of the Parties

The main supervisory body is the Conference of the Parties, regulated under Article 22 of the Tehran Convention. The Conference of the Parties must be appointed not later than 12 months after the entry into force of the Tehran Convention. Thereafter, the Conference of the Parties shall hold ordinary meetings at regular intervals. Extraordinary meetings of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference of the Parties, or at the written request of any Party provided that it is supported by at least two other Contracting Parties. The Conference of the Parties is composed of representatives of each state party, each of which has one vote. All decisions are to be taken unanimously. The Chairmanship of the Conference of the Parties shall be held in turn by each Contracting Party. The functions of the Conference of the Parties shall be, among others (Article 22, Section 10), to keep under review the implementation and content of this Convention, its protocols and the Action Plan as well as reports prepared by the Secretariat and to consider and adopt any additional protocols or any amendments. The Conference of the Parties receives and considers reports submitted by the Contracting Parties and reviews and evaluates the state of the marine environment and, in particular, the state of pollution and its effects, based on reports provided by the Contracting Parties and by any competent international or regional organization.

The Tehran Convention does not provide for "non-compliance" procedures for defaulting states. Neither does it provide for a procedure determining that a state party fails to obey it. The only aspect which the Conference of the Parties has authority to review and evaluate is the state of pollution of the Caspian Sea. However, the treaty does not specifically define the controlling procedures of compliance with the Tehran Convention and its Protocols. Neither does the Tehran Convention give the Conference of the Parties the competence to ask questions to the reportable state. It significantly hinders its *de facto* control over states and the legal evaluation of the implementation of the Tehran Convention. The following provision, which regulates the sources of information available to the Conference, limits them to competent international or regional organizations. Respectively, it limits the range of potential sources of information necessary for the effectiveness of the compliance control. In terms of reporting, the parties are merely obliged to submit to the Secretariat reports on measures adopted for the implementation of the provisions of this Convention and its protocols [Article 27]. The Conference of the Parties has the right merely to consider these reports.

It is to be noted that the parties deliberately left the issue of compliance control procedures of the Tehran Convention for subsequent regulation because of

insufficient protection of the rights of the involved states. Aware of the need to strengthen the control mechanisms, the states agreed to cooperate in their development. It is necessary to define the means allowed to be taken following identification of problems with compliance. Shall the supervisory body be empowered merely to make recommendations,[71] or also to penalize[72] such states' behavior? If needed, the Conference of the Parties may seek technical and financial services of relevant international bodies and scientific institutions [Paragraph 10f] or establish such subsidiary bodies as may be deemed necessary [Paragraph 10g] for the implementation of this Convention and its protocols, also regarding the control over their fulfillment.

10.6.2 Secretariat

The Secretariat is a collective treaty body which consists of an Executive Secretary, who is appointed by the Conference of the Parties (Article 22, Section 10h) as the chief administrative officer of the Secretariat (Article 23, Section 3), as well as necessary staff. The Secretariat shall provide formalized and institutionalized monitoring by determining whether the Parties carry out their contractual obligations. Its supervisory functions are reflected in Article 23 of the Tehran Convention. The Secretariat has to create certain compliance incentives and ensure respective assistance. It shall prepare and transmit to the Contracting Parties notifications, reports and other information received. This task should not be limited to the mere receipt and forwarding of the reports, but shall include processing of reports for other organs. The Secretariat shall prepare and transmit reports on matters relating to the implementation of this Convention and its protocols as well as consult states on matters relating to the implementation of this Convention and its protocols.

The Secretariat shall assist states in complying with the Convention and its protocols, aimed at tackling the root causes of poor or non-fulfillment of specified obligations, which often originates from the vagueness of material obligations in the Convention or shortcomings in the infrastructure for the performance in line with the Convention. The compliance assistance, explicitly mentioned by the Tehran Convention, includes considering enquiries and information from the Contracting Parties and consulting them on matters relating to the implementation (Article 23, Paragraph 4c), as well as arranging, upon request from any Contracting Party, for the provision of technical assistance and advice for effective implementation (Article 23, Paragraph 4f). The assistance with capacity building for environmental purposes, providing among other things legislative support, is nowadays

[71] CITES, Article XIII.

[72] Attachment IV Montreal Protocol 1987.

a common practice.[73] Also the transfer of technology, understood as supporting scientific and technological development, is related to capacity building and globally recognized as necessary.[74]

The function of the Secretariat established under the Tehran Convention is provisionally executed by UNEP based in Geneva. This task was overtaken by UNEP in July 2004 in accordance with a request made by parties to the Tehran Conference.

10.7 Procedures

The Tehran Convention sets it as contracting parties' duty to "co-operate on a multilateral and bilateral basis in the development of protocols to the Tehran Convention" (Article 6), which reflects the basic principle of environmental law. The practical importance of this principle has been already emphasized in a number of general political commitments[75] and binding international instruments,[76] as well as agreements of regional[77] and global application.[78] The general obligation of co-operation among the Caspian states is related to the matter of implementation of the Tehran Convention, providing that the protocols developed in a co-operative way should prescribe "additional measures, procedures and standards for the implementation" of the Tehran Convention (Article 6). However, more specific commitments have been provided for: environmental impact assessment, rules concerning information exchange, consultation and notification. Research programs require specific, not general issues of concern.[79]

The same requirement for states' cooperation—directly, through Secretariat of the Teheran Convention and with international organizations—regarding the land-

[73] Article 4 (2) Vienna Convention for the Protection of the Ozone Layer; Chapter 33, 34 Agenda 21.

[74] Article 202, 203, 266, 267 UNCLOS; Article 4, 5 Climate Change Convention.

[75] Stockholm Declaration 1972, Principle 24; Rio Declaration 1992, Principle 27.

[76] Industrial Accident Convention 1992, Preamble.

[77] London Convention 1933, Article 12(2); Western Hemisphere Convention 1940, Article VI; Alpine Convention 1991, Article 2(1).

[78] Vienna Convention 1985, Article 2(2), Biodiversity Convention 1992, Article 5.

[79] Article 20 research programs should be aimed, inter alia, at: a) developing methods for the assessment of the toxicity of harmful substances and investigations of its affecting process on the environment of the Caspian Sea; b) developing and applying environmentally sound or safe technologies; c) the phasing out and/or substitution of substances likely to cause pollution; d) developing environmentally sound or safe methods for the disposal of hazardous substances; e) developing environmentally sound or safe techniques for water- construction works and water-regulation; f) assessing the physical and financial damage resulting from pollution; g) improvement of knowledge about the hydrological regime and ecosystem dynamics of the Caspian Sea including sea level fluctuations and the effects of such fluctuations on the Sea and coastal ecosystems; h) studying the levels of radiation and radioactivity in the Caspian Sea.

based sources of pollution, is expressed in the LBSA Protocol (Article 16). Scientific and technical cooperation is important, and is should be encouraged by states. They should endeavor to cooperate upon requests for assistance in developing scientific, technical, educational and public awareness programs, and training scientific, technical and administrative personnel as well as providing technical advice, information and other assistance.

10.7.1 Exchange of Information

The availability of, and access to, environmental information is a condition to successful and sustainable use, protection, restoration and co-operation within states as well as among them. A general obligation to exchange information is present in every international environmental treaty. With time, the environmental information has become, step by step, the central issue of international environmental law.[80] There are already a lot of noteworthy international instruments regarding the issue of information.[81] To improve the flow of information and compliance with the more general objective to exchange information, a number of conventions have developed more strict procedures, such as the establishment of a documentation service,[82] an information service,[83] or a permanent committee of information.[84] The right of access to information on the environment, whether for the large public or particular groups, is a recent achievement of international environmental law, which includes a citizen's right of access to information.

The principle of accessibility of information on the pollution of the marine environment of the Caspian Sea is mentioned as one of the basic and fundamental rules of the Tehran Convention. Accordingly, the contracting parties provide each other with as much relevant information as possible.

> "*The principle of accessibility of information on the pollution of the marine environment of the Caspian Sea according to which the Contracting Parties provide each other with relevant information in the maximum possible amount*." [Article 5 Abs. c]

[80] Stockholm Declaration 1972, Principle 2; 1982 World Charter for Nature, Paragraphs 15, 18, 19, 23.

[81] IAEA Notification Convention 1986; Basel Convention 1989; EC Directive on Environmental Information 1991; Industrial Accidents Convention 1992, Rio Declaration 1992; Agenda 21, Chapter 40.

[82] European Plant Protection Convention 1951, Article V(9).

[83] South-West Asia Locust Agreement 1963, Article II(1).

[84] African Phyto-Sanitary Convention 1954, Article 9.

The determination of the Caspian littoral states to comply with the obligation to inform and grant access to information about pollution of the marine environment of the Caspian Sea reflects a significant progress comparing to the often reserved attitude of the Caspian littoral states regarding the internationally recognized obligation of providing information on environmental damage. A requirement for states to continuously collect and exchange environmental data is provided for in the Tehran Convention:

> "*The Contracting Parties shall directly or through the Secretariat exchange information, on regular basis, in accordance with the provisions of this Convention.*" [Article 21 Abs. 1]

This explicit term "exchange of information" heads Article 21 of the Tehran Convention. However, this article requires that the contracting parties should exchange information "on a regular basis," which in international environmental law used to be interpreted as an obligation to report, to provide regular or periodic information on specified matters to a specified body. That is why "reporting" may be distinguished from the usual meaning of the term "information exchange."

General information for the special purposes of another state should be provided, especially technical and scientific information. This legal obligation shapes Article 20 of the Tehran Convention requiring co-operation among the contracting parties "in the conduct of research and development of effective techniques" concerning all issues of pollution of the Caspian Sea and "to endeavor to initiate or intensify specific research programs." The required co-operation includes the obligation to provide general information on one or more matters to another state on an ad hoc basis, especially regarding issues of research and development, even if this article does not explicitly mention it.

The LBSA protocol required Caspian states (Article 14) to exchange available data and information on the state of the marine environment and coastal areas regarding the pollution from land based sources on a regular basis, directly or through the Secretariat. The Contracting Parties should also develop systems and networks for the exchange of information.

10.7.2 Environmental Impact Assessment

A project that could potentially cause significant transboundary environmental pollution and adversely affect the environment of another state is to be subjected to an environmental impact assessment. The function of the environmental impact assessment is to provide the concerned parties with information on the environmental effects of their decisions, to require decisions to be in accord with its provisions and to ensure the participation of all potentially interested actors in the decision-making process. Since the 1970s, environmental impact has been progressively adopted into global and many national legal systems as a response by the

international community to the request to devise strategies to hold and limit the effects of environmental degradation.[85] There are some binding international acts explicitly requiring the application of the environmental impact assessment, which were preceded by other agreements providing for explicit or implied general obligations on environmental impact assessment.[86] The obligation of states to warn each other in a timely manner in case of a transboundary environmental accident is gradually becoming part of customary law.[87] The countries of Europe and America have created their own criteria of transboundary environmental impact assessment in their national legislation. These criteria, however, are often not only limited in scope but also do not cover all transboundary actions that could potentially have an adverse effect, and neither do they provide for detailed procedural mechanisms of the EIA. The EIA is to contribute to an effective environmental protection through identification, description and assessment of impact of policies on the environment. Within an IEA procedure various methods of analysis, forecasting, evaluation, participation and cooperation can be used. The test should be carried out systematically according to the certain pattern. The effects of an intervention are to be evaluated gradually according to each analytical criterion.

For the success of the IEA the full involvement of the public is of indisputable importance. Complex consultations and public debates improve the decisions taken, as they provide several alternatives. Despite that, involving the public in national and regional legislation is going slowly.[88]

In the "Almaty Declaration on Cooperation in the field of Environmental Protection of the Caspian Sea Region" (1994) the Caspian coastal states decided to take coordinated measures to prevent the growing harmful transboundary impact

[85] 1972 National Environmental Protection Act; Rio Declaration 1992, Principle 16; Stockholm Declaration 1972, Principle 14 and 15; OECD Council Recommendation C(74) 216, Analysis of the Environmental Consequences of Significant Public and Private Projects, 14 Nov. 1974; OECD Council Recommendation C(79)116, Assessment of Projects with Significant Impact on the Environment, 8 May 1979; FAO Comparative Legal Strategy on Environmental Impact Assessment and Agricultural Development, 1982 FAO Environmental Paper; OECD Council Recommendation C(85) 104 on Environmental Assessment of Development Assistance Projects and programs, 20 June 1985; 1986 World Commission on Environment and Development, Environmental Protection and Sustainable Development: Legal Principles and Recommendations, 58 to 62; Goals and Principles of Environmental Impact Assessment, UNEP/GC/DEC/14/25 (1987); 1992 Agenda 21, Paragraphs 7.41(b); 8.4; 8.5(b); 10.8(b); 9.12(b); 11.24(a); 13.17(a), 15.5(k), 16.45(c); 17.5(d); 18.22(c); 19.21(d); 21.31(a); 22.4(d); 23.2.

[86] 1985 adopted EC Directive on Environmental Impact Assessment; ESPOO Convention; Antarctic-Environmental Protocol 1991 to the Antarctic Treaty of 1959.

[87] See: Pulp Mills on the River Uruguay (Arg. v. Uru.), 178–180 (Judgment of April 20, 2010), *available at* http://www.icj-cij.org/docket/files/135/15877.pdf. Accessed 1 July 2014. The Court observed that the practice of environmental impact assessment (EIA) "has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource," 204.

[88] See: Tilleman (1995).

on the Caspian marine environment.[89] International organizations were involved into these actions. For example, the objective of preventing risks associated with the exploitation of the energy resources of the Caspian Sea can be achieved with the help of the EIA. The legal model for this regulation of the Tehran Convention was drawn from the Espoo Convention that might be used as a standard for development of regional EIA provisions. A detailed elaboration of the coordination measures for information exchange and cooperation of states in this respect contains a number of UNEP supported regional environmental agreements, which could also serve as a benchmark for the case of the Caspian Sea.[90] The Espoo Convention finds direct application merely for Azerbaijan and Kazakhstan if considering all Caspian littoral states.[91]

The EIA was recognized also by the Tehran Convention. According to the general duty of notification, the states should develop common standards which can ensure that transboundary environmental impact is prevented as far as possible. Without this procedural safeguard the set objectives of the prevention, reduction and control of pollution of the marine environment, as well as the protection, prevention and restoration of the marine environment of the Caspian Sea would stay ineffective [Article 4 (a), (b)]. The Convention provides that "each contracting party shall take all appropriate measures to introduce and apply procedures of environmental impact assessment of any planned activity, that are likely to cause significant adverse effect on the marine environment of the Caspian Sea" [Article 17(1)]. "The contracting parties are required to disseminate the results of environmental impact assessment and co-operate in the development of protocols that determine procedures regarding this issue" [Article 17(2)].

For taking preventive and combating measures against pollution incidents, the Tehran Convention calls upon the contracting party of origin to identify hazardous activities within its jurisdiction that can potentially cause environmental emergencies. This party should ensure that other contracting parties are notified of any such proposed or existing activities. The contracting parties agreed to implement risk-reducing measures [Article 13, Section 2]. This provision refers in part to the regulation of the UN Convention on the Law of Non-Navigational Uses of International Watercourses of 1997. Its Article 12 states that before a watercourse state implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse states, it should provide those states with timely notification thereof. In contrast, the Tehran Convention speaks merely of already existing cross-border harmful actions.

In the Tehran Convention the development of the ancillary Protocol on Environment Impact Assessment in a Transboundary Context (further referred to as EIA

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[89] UNDP; WB; UNEP.

[90] Mediterranean Emergency Protocol 1976, Article 1; Kuwait Emergency Protocol 1978, Article II; Jeddah Pollution Emergency Protocol 1982, Article II; etc.

[91] Azerbaijan (25.03.1999 accession), Kazakhstan (11.01.2001 accession), Russia (6.06.1991 signature).

Protocol) has been assigned priority by the Caspian states, however its draft remains still under states' consideration.

Provisions related to transboundary impacts were included into the LBSA protocol to the Tehran Convention (Articles 11–12). In case of pollution from land-based sources and activities originating from the territory of the contracting party likely to have adverse effect for other contracting states the protocol required countries to share information and enter into consultation. Additionally, states are required to adopt regional and national guidance concerning assessment of the potential environmental impact of land-based activities on its territory. Application of EIA procedures to planned land-based activities likely to cause adverse effect to Caspian environment should ensure that implementation of such activities will be conducted having fully considered the outcomes of EIA procedure and with prior written authorization by the country.

10.7.3 Reporting

The objective of states' obligations to report is to facilitate implementation of an act in the particular contracting state. The Tehran Convention on the Protection of the Marine Environment of the Caspian Sea, in line with numerous international environmental agreements, provides for the reporting obligation of all parties regarding the implementation of the Convention and its protocols, and regulates the scope of actions agreed upon by the Conference of the Parties.

> "*Each National Authority shall submit to the Secretariat reports on measures adopted for the implementation of the provisions of this Convention and its protocols in format and at intervals to be determined by the Conference of the Parties. The Secretariat shall circulate the received reports to all Contracting Parties*." [Article 27]

According to international law, reporting is aimed at the implementation of a legal act. It differs significantly from the obligation to exchange information, which is aimed at exchanging scientific and technical data. The reporting obligation set in the Tehran Convention is of a more general nature and it does not call upon states to provide detailed data. It requires neither ensuring of a comprehensive review of national legislation nor administrative regulations, procedures or practices, nor strategies for implementation of the legal acts, nor the monitoring of the actual situation with regard to the implementation obligation, nor facilitation of exchange of information between the states parties with regard to achieving the objectives and rights and obligations set out in the Convention. There is no single model of how the reports specified in the Tehran Convention should be prepared, to ensure the consistency and comparability of the data. Data management was entrusted to competent national authorities. However, these often come across the problem that they do not themselves possess required data, and need to request them from

national information systems. The Treaty Conference is mandated to receive reports and to evaluate and determine the state of the environment on their basis.

There are a few types of reports among international environmental agreements, which are also found in the Tehran Convention. First of all, some environmental agreements provide for institutional organs to provide reports to the parties, to inform them about activities taking place under the treaty.[92] The Tehran Convention requires the Secretariat of the Convention to prepare and transmit to the contracting parties reports and other information received [Article 23.4(b)], as well as to "circulate the received report to all Parties" (Article 27). Format and intervals of reports will be decided by the Conference of the Parties. However there is no indication as to a particular time or how often the reports should be submitted. Therefore, there is the provision requiring reports to relate to the implementation of the provisions of this Convention and its protocols [Article 23.4(d)].

Another reporting obligation to be fulfilled is to provide a report to the institutions established under the treaty. In the Tehran Convention there are clear provisions regarding this issue. Each national authority is required to submit to the Secretariat reports on measures adopted for the implementation of the provisions of the Tehran Convention and its protocols (Article 27). The Conference of the Parties receives reports submitted by the contracting party [Article 22.10(d)]. Inter alia the Conference is due to review and evaluate the state of the maritime environment and, in particular, the state of pollution and its effects, which can be used to evaluate the information the parties are obligated to provide.

To define further details of the mandatory contents of the reports one must refer to the basic duties of the parties to the agreement to submit reports to national authorities, as well as their obligation of cooperation to prevent, reduce and control the pollution of the Caspian Sea, and by considering the requirements commonly used in international practice, we can extract the other details regarding the content of the party's reports from the provisions of other international environmental treaties. These include reporting requirements, which increasingly require detailed and regular information, and are used to provide information on the implementation of treaty commitments. Parties are required to provide reports on the establishment of any natural reserves,[93] authorization to issue licenses,[94] implementation measures and their effectiveness,[95] other environment and development issues they find relevant,[96] new and additional finance resources, access to environmentally sound technologies and know-how, etc.[97]

[92] Tropical Tuna Commission Convention 1949, Article 1(2); African Phyto-Sanitary Convention 1954; Article 3(b); Agreement establishing the EBRD 1990, Article 35.

[93] London Convention 1933, Article 5(1) and 8(6).

[94] International Whaling Convention 1946, Article VIII(1).

[95] Plant Protection Agreement 1956, Article II(1)(b); Basel Convention 1989, Article 3(1); Biodiversity Convention 1992, Article 26; Climate Change Convention 1992, Article 12; OSPAR Convention 1992, Article 22.

[96] UNGA Res. 47/191 (1992), para. 3(b).

[97] Climate Change Convention 1992, Articles. 12(3), and 4(3), (4) and (5).

The other type of reporting is to allow or require non-governmental actors to report on environmental emergencies.[98] A similar commitment is included in the Tehran Convention, which insists that the Conference of the Parties should state the extent of pollution and its effects based on reports provided by both the contracting parties and by any competent international or regional organization [Article 22.10 (d)].

Based on the party's obligation to act in accordance with standards commonly used in international practice by formulating, elaborating and harmonizing rules to prevent, reduce and control pollution, contracting parties are also required to provide reports of an event other than an emergency situation, which may entail a significant environmental risk. The need for such an obligation has been widely recognized in international environmental law since the mid-1970s.[99]

According to the LBSA Protocol (Article 17) states are obliged to submit a report on the implementation of the protocol provisions regarding land-based pollution to the Secretariat of the Teheran Convention, which is to prepare respective regional reports.

10.7.4 Consultations

The Tehran Convention for the protection of the marine environment of the Caspian Sea does not refer expressly to the obligation of consultation. However, the Caspian littoral states are obliged to consult, according to the general international practice of states, so that the pollution of the Caspian Sea remains below the threshold of significance.

The obligation to consult may occur for different reasons, which can all arise on the Caspian Sea. Consultation may be required on the implementation of a treaty[100]; second, when the proceeding of one state may cause considerable disruption to the environment or to the rights of another state[101]; third, concerning the use of shared natural resources[102]; fourth, in time of emergency.[103] The obligation to consult is connected with the principle of "prior informed consent," which is currently

[98] Agenda 21 UNGA res 47/191 (1992), para. 3(h).

[99] Stockholm Declaration 1972; UNEP draft Principle of Conduct 1978, Principle 6; Rio Declaration 1992, Principle 19; 1980 Agreement between Spain and Portugal on Co-operation in Matters Affecting the Safety of Nuclear Installation, Article 2.

[100] ASEAN Agreement 1985, Article 18(2)(e).

[101] Quito LBS Protocol 1983, Article XII and Athens LBS Protocol 1980, Article 12(1); 1974 Nordic Environmental protection Convention, Article 11 and Espoo Convention 1991, Article 5 and Industrial Accidents Convention 1992, Article 4; 1979 LRTAP Convention, Article 5.

[102] 1968 African Nature Convention, Article V(2); Ramsar Convention 1971, Article 5; 1982 UNCLOS, 142(2); 1982 Geneva SPA Protocol, Article 6(1).

[103] 1981 Abidian Emergency Protocol, Article 10 (1)(b); London Convention 1972, Article V(2); 1986 I.E. Notification Convention, Article 6; ILO Radiation Convention 1960, Article 1.

adopted and widely recognized by a number of international legal instruments.[104] As a result of an accident like the Chernobyl disaster, a number of treaties,[105] non-binding instruments[106] and practice of states[107] now include commitments of states to provide emergency notification of incidents, which are likely to have a significant effect on the environment. A consequence of the Chernobyl accident was the widely spread opinion that the obligation to notify in case of emergency situations was a rule of international law. It does not apply to military nuclear accidents. It has already been recognized by international courts and tribunals[108] and in a number of instruments of international environmental law.[109] Also notification of an emergency situation is required.

Some treaties provide not only for the requirement that states consult with each other and with non-governmental actors, but require that a Consultative Committee should be appointed.[110] In the Caspian Sea case its implementation would be possible by a decision of the Conference of the Parties to "establish such subsidiary bodies as may be deemed necessary for the implementation of the Convention and its protocols."[111]

10.7.5 Monitoring

The enforcement authorities use the following as a source of information on implementation of environmental legislation: information provided by other contracting parties, data from non-governmental organizations, on-site investigations, and finally monitoring.[112]

Monitoring entails a frequent obligation of the parties to international environmental agreements to collect information relevant to specific or general environmental commitments.[113] The monitoring serves a number of purposes, of which the

[104] 1985 FAO Pesticides Guidelines; 1989 UNEP London Guidelines; Basel Convention 1989; 1989 Lomé Convention.

[105] 1982 UNCLOS, Article 198; 199 Biodiversity Convention, Article 14(1)(d); 1992 Rio Declaration 1992, Principle 18.

[106] 1974 OECD Recommendation, para. 9; 1978 UNEP draft Principles of Conduct, Principle 9.

[107] 1982 Montreal ILA Rules, Article 7; 1987 IDI Resolution, Article 9(1)(a).

[108] Lac Lanoux Arbitration, 24 I.L.R. 101 (1957); Fisheries Jurisdiction Cases (United Kingdom v. Iceland) (Merits), 1974 ICJ Rep. 3, Special Agreement between Hungary and the Slovak Republic for Submission to the ICJ of the Differences between them, 32 I.L.M. 1294 (1993).

[109] 1978 UNEP Draft Principles, Principle 7; 1986 WCED Legal Principles, Article 17; Rio Declaration 1992, Principle 19, etc.

[110] Treaty of Rarotonga 1985, Article 10 and Annex 3.

[111] Article 22.10(g) of Tehran Convention.

[112] See: Beyerlin (2000), p. 244.

[113] Antarctic Convention 1959, Article VII; London Convention 1972, Article VI(1)(d); Rhine Chemical Pollution Convention 1976, Article 10(1); Paris LBS Convention 1974, Article 11; 1976 Barcelona Convention, Article 101982 UNCLOS, Article 204(1) and (2) and Article 226 (1);

most common is to support research and to investigate trends which reflect the state of the environment.[114] The monitoring serves the procurement of data of technical and scientific nature. These data support future legislation rather than present the implementation which has already taken place. Accordingly, appropriate databases are created that prepare, store and make available to the public the collected information on the prevention of cross-border environmental damage.

The Tehran Convention also calls for repeated measurement of the quality of the environment on the Caspian Sea, providing for regular individual or joint assessment of the environmental conditions of the Caspian Sea, and the effectiveness of measures taken for the prevention, control and reduction of pollution of its marine environment. To achieve this aim parties should make appropriate effort to "harmonise rules for the setting up and operation of monitoring programmes, measurement systems, analytical techniques, data processing and evaluation procedures for data quality" (Articles 19.3 and 19.4). The obligation to "harmonise rules" does not include monitoring to ensure compliance with the objectives of the agreement, to avoid the involvement of another state in the compliance process.

The Tehran Convention does not directly provide for the involvement of international organizations in information gathering, which is now a widespread international practice.[115] However, the possibility to bridge this gap may be limited again by a party's obligation to act in accordance with standards commonly used in international practice regarding the pollution issues.

The Tehran Convention provides that the contracting parties develop a centralized database and information management system, which would serve as a repository for all important data and information, for decision-making, education, administration and general public knowledge (Article 19.5). Therewith, this provision will also fulfill another international obligation requiring states to improve public education and awareness on environmental matters.[116] The Secretariat of the Convention is committed to establishing and maintaining the database of national and international laws relevant to the protection of the Caspian Sea [Article 23.4 (e)]. The obligation to collect, compile and evaluate to identify sources that are likely to cause pollution of the Caspian Sea is in the context of the general obligation to co-operate to prevent, reduce and control pollution and protect, preserve and restore the marine environment of the Caspian Sea [Article 18.3(a)].

> "*The Contracting Parties shall co-operate in the formulation of an Action Plan for the Protection of the marine environment of the Caspian Sea in order to prevent, reduce and control pollution and to protect, preserve and restore the marine environment of the Caspian Sea*." [Article 18(2)].

OSPAR Convention 1992, Article 6 and Annex IV; Helsinki Convention 1992, Article 11; Biodiversity Convention 1992, Article 7(b) and (c); Agenda 21, Chapter 40.

[114] OSPAR Convention 1992, Annex IV, Article 1.

[115] Earthwatch, Global Environmental Monitoring System (GEMS), International Environmental Information System (INFOTERRA), The European Environment Agency.

[116] Rio Declaration 1992, Principle 10; Agenda 21, Chapter 36.

The “National Caspian Action Plan” (NCAPs) is elaborated by the Caspian littoral states, considering the assessment of the most vulnerable environmental areas that match with priority areas identified in the Transboundary Diagnostic Analysis for the Caspian Sea (TDA) of 2002. The purpose of conducting a TDA is to scale the relative importance of sources and causes, both immediate and root, of transboundary water problems and to identify potential preventive and remedial actions. In NCAPs each state developed goals and presented certain actions, as well as made available resources and strategies to achieve the planned objectives. The NCAPs were prepared before May 2002 and together with the TDA became basis of the so-called “Strategic Action Program (SAP) for the Caspian Sea,” which was prepared in November 2003.[117] The SAP sets the agenda for enhanced regional environmental cooperation among the littoral states over the next 10 years, approximately 2007–2017, in two distinct 5-year periods. To improve environmental stewardship and protect the ecosystems of the Caspian, the SAP outlines five regional Environmental Quality Objectives (EQOs) to be addressed, and identifies environmental interventions taken to meet those EQOs at the national and regional level. The SAP builds upon and complements the NCAPs. SAP is the result of the regional consultation process involving both the Caspian littoral states as well as international partner organizations. In 2006 the need to update the TDA, SAP and NCAP was acknowledged, which was based on the consistency of the four priority regional concern areas identified in the first SAP of 2003: first, unsustainable use of bioresources; second, threats to biodiversity, including those from invasive species; third, marine and coastal pollution; and fourth, unsustainable coastal area development. The SAP defines the financial and institutional structures required for the implementation of the priority actions approximately till 2017.[118]

According to the LBSA Protocol (Article 13) Contracting Parties, to the extent possible, should collect data and information and prepare and maintain a national database on the conditions of the marine environment and coastal areas of the Caspian Sea and on inputs of substances listed in Annex I of this Protocol from land-based sources. They should also undertake regional assessment on a regular basis (at least once in 5 years) of the state of the marine environment and coastal areas of the Caspian Sea and collaborate in establishing elements of the regional monitoring program as well as compatible national monitoring programs.

[117] Strategic Action Program for the Caspian Sea, prepared by Caspian Environmental Programme, in: Programme Coordination Unit, 2003.

[118] See http://iwlearn.net/iw-projects/1618/reports/caspiansea_sap_2003.pdf/view, p. 4. Accessed 1 July 2014.

10.7.6 Public Access to Information

The norms of the Tehran Convention for the protection of the marine environment of the Caspian Sea with regard to the obligation to provide information does not restrict the right to environmental information only to the states, but are aimed at informing the citizens and the general public.

> "*The Contracting Parties shall endeavour to ensure public access to environmental conditions of the Caspian Sea, measures taken or planned to be taken to prevent, control and reduce pollution of the Caspian Sea in accordance with their national legislation and taking into account provisions of existing international agreements concerning public access to environmental information.*" [Article 21(2)]

In this regard the Tehran Convention builds upon the international standards as a benchmark for the regional rules on information access. Citizens' right of access to environmental information can be found in numerous international agreements.[119] The European law extends this right and awards citizens the following rights: access to information, public participation in decision-making and access to justice in environmental matters explicitly settled in the so-called "Aarhus Convention" of The United Nations Economic Commission for Europe (further referred to as UNECE).[120]

According to the Aarhus Convention (Article 2, Section 3) "environmental information" means any information in written, visual, aural, electronic or any other material form on the following: first, state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; second, factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the elements of the environment and cost-benefit and other economic analyzes and assumptions used in environmental decision-making; third, the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to above.

Three Caspian littoral states, the former Soviet republics of Azerbaijan, Kazakhstan and Turkmenistan, are parties to the Aarhus Convention and are obliged to

[119] EC Environmental Information Directive 90/313/EEC, OJ L 158, 23. Juni, 56; OSPAR Convention 1992, Article 9; Lugano Convention 1993, Article 13–16; Rio Declaration 1992, Principle 10; Agenda 21, para. 23.3; Occupational Health Services Convention 1985, Article 13; Asbestos Convention 1986, Article 20.

[120] Aarhus Convention of 1998.

apply all its provisions. However, the scope of the assurance of access to information, public participation in decision-making and access to justice in environmental matters is more limited in its scope. The Tehran Convention emphasizes the party's obligation to ensure public access to environmental conditions of the Caspian Sea and to take appropriate measures to prevent, control and reduce pollution of the Caspian Sea (Article 21.2). These endeavors should take place in accordance with the party's national legislation and should consider provisions for existing international treaties regarding public access to environmental information. Tehran Conventions requires parties merely to "endeavour to ensure public access to environmental conditions of the Caspian Sea." In contrast, in Article 1 the Aarhus Convention states that "each party shall guarantee" all three forms of access to environmental information. Parties to the Tehran Convention merely agreed to "consider" the international standards of public participation, among others the Aarhus Convention. In fulfilling this obligation, the Caspian littoral states are subordinated to their own national law and shall act in accordance with it. As for Azerbaijan, Kazakhstan and Turkmenistan which are parties to the Aarhus Convention, they are obliged to intensify the public participation in environmental matters and to strengthen the environmental awareness of the population also with respect to the affairs of the Caspian Sea. The three pillars of the Aarhus Convention, access to information, public participation in decision-making and access to justice in environmental matters should find implementation in the case of the Caspian Sea.[121]

The implementation and compliance with other international environmental rules such as eco-labeling (the labeling of environmental aspects of goods and services)[122] and eco-accounting (to assess if the environmental costs are properly accounted for by both individual firms and states, and that information about it is easily accessible)[123] and auditing (the technique of allowing firms or states to conduct the eco-accounting).[124]

The internationally recognized problem of the limited effectiveness of these obligations is partly caused by the unwillingness of states to share information of potential commercial value or which could violate intellectual property rights.[125]

According to the LBSA Protocol (Article 15) it promotes the participation of local authorities and the public in measures that are necessary for the protection of the marine environment and coastal areas of the Caspian Sea against pollution from land-based sources and activities. States should also facilitate public access to the information concerning conditions of the marine environment and coastal areas of

[121] See: McAllister (1998).

[122] Council Regulation 92/880/EEC, OJ L 99, 11 April 1992, Article 1.

[123] Report of the Secretary General: Accounting for Environmental Protection measures; UN doc. E/C.10/1991/5, 11 February 1991.

[124] Council Regulation 93/1836/EEC, OJ L 168, 10 July 1993, 1; Article 1(1) and (2).

[125] Biodiversity Convention, Article 16.

the Caspian Sea, measures taken or planned to be taken to prevent, control and reduce pollution by considering the provisions of existing international agreements concerning public access to environmental information.

10.8 Implementation of the Tehran Convention and Compliance

10.8.1 Compliance

In the Teheran Convention (Article 28) the Caspian countries agreed to co-operate in the development of procedures to ensure compliance with the provisions of this Convention or its protocols. More detailed compliance with the regulations regarding the land-based sources of pollution includes the LBSA Protocol (Article 18). It prescribes that the Conference of the Parties will review and evaluate Parties' compliance with the Protocol and the decisions and recommendations adopted thereunder based on the received reports and any other information submitted by the Contracting Parties and, where appropriate, decide upon and call for steps to bring about compliance with the Protocol and decisions adopted thereunder and promote the implementation of recommendations, including measures to assist a Contracting Party to carry out its obligations.

10.8.2 Liability and Compensation

The rules regarding states' liability for environmental damage need to be considered in relation to international treaties, customary law and general law principles. The customary law creates an obligation to avert damage to the environment. The first problem is defining environmental damage. There are no common international norms regarding this issue, however, some treaties make a certain contribution towards this aim defining "pollution"[126] or "adverse effects"[127] as being of marginal value to cause liability for environmental damage. The International Court of Justice in the Trail Smelter Case required "serious consequence" to justify the claim.[128] Environmental damage does not include damage to persons or to property.[129] However, establishment of a threshold of tolerable environmental damage may vary according to local terms. In this way states will set their own environmental standards with diverging consequences. Some guidelines in this respect for

[126] UNCLOS 1982, Article 1(4)

[127] Vienna Convention 1985, Article 1(2); Climate Change Convention, Article 1(1).

[128] Trail Smelter Case, 16 APRIL 1938, 11 March 1941;3 R.I.A.A 1907 (1941).

[129] ILC Draft Articles on International Liability, Article 24.

associated countries have been prepared for instance by the European Commission,[130] and the World Health Organization (further referred to as WHO).[131]

The issue of definition of the international standard of care applicable to the obligation of preventing environmental damage, fault,[132] strict liability,[133] and also whether absolute liability exists[134] also remains unresolved.

The obligation to make amends for the consequences of an illegal act is well established.[135] The reparation for abuse of an international environmental obligation could be a formal apology,[136] a declaration by an international tribunal recognizing the legal position of the other party,[137] or punishment of guilty persons.

Another problem concerns the basis for assessing the extent of environmental damage, the cost of reinstatement or a theoretical model for calculation. This aspect of international law is not developed, however the Trail Smelter Case and limited state praxis have established a precedent.

Some international treaties provide for state liability for environmental damage.[138] International Law Commission (further referred to as ILC) has prepared draft liability Articles trying to establish basic principles concerning this issue.[139]

States' liability for environmental damage is considered as being not well developed and requiring further building up. The reference made by the Tehran Convention to the principles and norms of international law on the issue of liability and compensation for environmental damage seems to be regarded as giving assistance in the long term perspective, but not immediately.

Under provisions relating to "liability and compensation for damage to the environment of the Caspian Sea resulting from violations of the provisions of this Convention and its protocols," the Tehran Convention refers to principles and norms of international law (Article 28). It provides for the fact that on this basis contracting parties should undertake to develop appropriate rules and procedures. However, although the general principles of international law concerning states' liability are relatively well developed, a lot needs to be done with regard to the environmental damage caused by states.[140]

[130] Radiological Protection Criteria for Controlling Doses to the Public in the Event of Accidental Releases of Radioactive Material, A Guide on Emergency Reference Levels of Dose from the Group of Experts Convened under Article 41 of the EURATOM Treaty (1982).

[131] Nuclear Power: Principles of Public Health Actions for Accidental Releases (1984).

[132] CRAMRA 1988, Article 8.

[133] ILC Draft Liability, Article 24, 26, 28.

[134] Space Liability Convention 1972, Article II.

[135] Chorzow Factory Case (1927) PCIJ ser. A, No. 17, at 47.

[136] Rainbow Warrior Case, 82 I.L.R (1990) 500, 575–577.

[137] Corfu Channel Case ICJ Rep. 1949, 4, 35.

[138] UNCLOS 1982, Article 139, 235.

[139] See: Barboza (1990), p. 39.

[140] Stockholm Declaration 1972, Principle 22: Rio Declaration 1992, Principle 13.

10.8.3 Settlement of Disputes

There is a remarkably constant increase in the frequency of dispute settlement clauses among the international legal instruments. The dispute settlement provisions are often contained in multilateral environmental treaties; however, they can also derive from other general agreements regarding the peaceful settlement of international disputes, when the States involved in a dispute concerning implementation or interpretation of environmental treaties among them are also parties to that general agreement.[141] Most of the multilateral treaties regarding environmental issues, which include dispute settlement clauses, reflect basic methods for peaceful settlement of disputes deriving from Article 33(1) of the United Nations Charter. The most comprehensive and complex dispute settlement provision is included in UNCLOS; however, there is no certainty that UNCLOS is applicable to the Caspian Sea.

According to international legal rules, the Tehran Convention requires the littoral States to settle disputes regarding its application or interpretation by consultation, negotiation or by any other peaceful means of their choice (Article 30). As observers had anticipated, the Tehran Convention has been prepared and concluded under the auspices of UNEP, and its dispute settlement clauses are almost a literal replication of the provisions regarding dispute settlement contained in UNEP Regional Treaties.[142] States are required to take advantage, first, of diplomatic means and, second, of legal means of settlement, though, recently, there has been a remarkable increase of non-contentious mechanisms. By resorting to diplomatic means, parties to a dispute finally decide to accept or reject a proposed solution. The primary and non-binding instrument is negotiation between involved states, to identify the conflict to reach a common acceptable outcome.

The practice of "good offices" is applied when diplomatic relations between states have been broken, and it is aimed at bringing the parties to negotiations. However, its usefulness in environmental disputes seems to be rather insubstantial. Mediation involves an intervention by a third party to settle the dispute, while advancing non-binding proposals made by this third party. The objective of the next settlement instruments inquiry is to clarify disputed issues, which is found in Article 9 of the Hague Convention on the Pacific Settlement of International Disputes. The last of the diplomatic means of settlement is conciliation, which includes attributes of both inquiry and mediation.[143]

The legal means of dispute settlement result in legally binding decisions for the parties to the dispute and include arbitration and judicial settlement. International

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[141] Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations, New York, 2 April 1949, 71 UNTS, 102–127.

[142] Barcelona Convention, Article 28.1; Abidjan Convention 1981, Article 24.1; Cartagena Convention 1983, Article 23.1; Nairobi Convention 1985, Article 24.1; Noumea Convention 1986, Article 26.1.

[143] Revised General Act for the Pacific Settlement of International Disputes (1949), Article 15.1.

arbitration is aimed at the settlement of state disputes by judges chosen by them.[144] International environmental disputes may also be taken to an international court competent to give a legally binding decision.[145]

Conclusions

The rules for the protection of the marine environment, which include prevention, reduction and control of pollution, as well as protection, preservation and restoration of the marine environment, belong to the most highly developed principles in the field of environmental law. As this paper demonstrates, the Tehran Convention contains a set of regulatory methods approaching pollution from different sources, with pollution from land-based sources, seabed activities, from vessels, pollution caused by dumping, pollution from other human activities and pollution caused by the introduction of invasive alien species, as well as from environmental emergencies. Addressing a number of pollution sources, the Tehran Convention refers to many internationally recognized rules, often of considerable specificity, pertaining to different bodies of water.

An important goal of this paper has been also to give evidence that the Tehran Convention meets all of the main internationally recognized standards relating to environmental protection. This paper has questioned and demonstrated, point by point, that the legal and institutional structures of the Tehran Convention for the Protection of the Marine Environment of the Caspian Sea meet the objective of protecting the fragile marine environment of the Caspian Sea.

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Chapter 11
Concluding Remarks

The political opening of the Caspian region after the collapse of the Soviet Union brought the use of the rich oil and gas resources of the Caspian Sea to the fore of regional and global politics. As a result of the dissolution of the USSR, five instead of two coastal countries emerged in the Caspian region. Moreover, their state borders were not settled. The revenue prospects from the use of the natural resources of the Caspian Sea supported the economic recovery of the riparian states. On the other hand, it hardened the states' negotiating positions and their lack of willingness to compromise regarding demarcating borders, as well as defining the legal regime in the Caspian Sea. The potential for conflict that arises from the growing demand of coastal states for fossil fuels, sharpened by the uncertainty of the legal situation in the Caspian region, met with the divergent interests of global players such as the US, the EU, and China, which tried to gain access to Caspian resources. There is plain danger in the fact that the slow progress in multilateral negotiations on access to transboundary energy fields could replace the search for legal compromise with expanded armament of the Caspian's littoral states. This in turn could lead to a paralysis of regional cooperation and economic development—as well as to a weakening of regional security.

The legal investigation carried out as part of this research refers on the one hand to a number of unresolved legal issues in the Caspian Sea, ones which were mainly caused by the coastal states' lack of political will to compromise. At the same time it presents the progress in clarifying the legal relationships in the region and thus the raising of hope for the peaceful and mutually satisfying settlement of the legal conflict in the region. It is worth stating that since the late 1990s, certain steps have been achieved in the multilateral negotiations on the draft multilateral agreement on the legal status of the Caspian Sea. In addition, some Caspian Sea countries have completed bilateral contracts clarifying the regime for usage of the energy sources in other parts the Caspian Sea. New legal frameworks are still coming into being, and thus to achieve success, the negotiating parties need to increase their flexibility, be willing to compromise, and to abandon preconditions.

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In the perspective of global energy security, the natural resources of the Caspian Sea play a rather minor role, but for the newly independent states of Azerbaijan, Kazakhstan, and Turkmenistan they are the only reliable guarantee of economic recovery and development. At the same time the availability of natural resources ensures a basis for the independent political development of these countries and their regional position. Thus, the Caspian's resources have an influence not only on the regional economy, as they also have a strong impact on political stability in the region. Conversely, a political crisis in the Caspian region, ethnic, religious, ecological, or territorial—may cause a high degree of regional destabilization as well as affect regional energy security. The question of security requires solving the problem of the protection of the regional environment and respect for human rights. All these require the establishment of a new supranational legal framework in the region.

The existing regional conflicts result mainly from the undefined legal status of the Caspian Sea and from the lack of unity among the coastal countries concerning the allocation of Caspian resources. Since the collapse of the Soviet Union, the problem of the international legal status and regime of the Caspian Sea has remained unresolved. Despite ongoing negotiations between the riparian countries, a certain status quo was established that does not allow accelerating settlement. The Soviet–Iranian treaties of 1921 and 1940 remaining in force are incomplete, because except for fishing and navigation they do not regulate any other regime of the use of the Caspian Sea. The interpretation of the existing status (if the Caspian Sea is a sea or a lake or a condominium in the legal sense) does not allow drawing respective legal conclusions regarding the use of Caspian resources. Instead of continuing this longstanding, fruitless discussion of whether the Caspian is a sea or a lake in a legal sense, the emphasis of the current discourse over the status of the Caspian Sea is restricted of three groups of normative acts: The first, most recent group is that of bilateral treaties concluded between Russia, Kazakhstan, and Azerbaijan, delimiting sectors of the seabed and subsoil in the northern part of the Caspian Sea for exploiting natural resources. In spite of the denial of their legal power by Iran and Turkmenistan, the treaties contribute to the clarification of the current regime of the use of Caspian natural resources without prejudicing the future shape of the Caspian Sea's legal status.

The second notable milestone in the current international legal development in the Caspian region is the signing in 2003 of the Tehran Convention on environmental protection in the Caspian Sea. The adoption of this treaty, being the only document signed after the collapse of the Soviet Union by all littoral states, reflects the states' awareness of the need to strengthen the protection of the fragile Caspian environment. Its full operation will be achieved, however, with the signature of two of the four remaining additional protocols.

The conclusion of the Tehran Convention as well as the signing of the North Caspian agreements between Russia, Kazakhstan, and Azerbaijan reflects new intrastate legal developments. Despite the statement that these agreements do not undermine the importance of multilateral negotiations on the legal status of the Caspian Sea, their practical impact upon negotiations is plain. All these agreements,

of subject restricted contents, reflect a new approach to solving Caspian legal unclarities by gradually adopting separate regimes regulations instead of awaiting the final settlement of the entire convention on the Caspian Sea's legal status. It is still argued, but not any more practically followed, that any regulation of Caspian affairs must be taken by the consent of all coastal states. Obviously, the final status of the Caspian Sea requires its settlement in the unanimous decision of all the coastal states in the form of a Convention on legal status of the Caspian Sea, including comprehensive regulation of all legal issues. In the meantime, it seems to have become acceptable that decisions on certain legal regimes are taken separately and incrementally.

The multilateral negotiations of the riparian states over the future convention on the legal status of the Caspian Sea are the last but not least of the three aspects of the current discourse over the future status of the Caspian Sea. Founded in 1995, the working group of deputy foreign ministers of all five littoral states was a mechanism for continuous negotiations concerning the legal status of the Caspian Sea. In the process of its work the group developed a Draft Caspian Status Convention. The draft refers to all aspects of the legal regime and the status of the Caspian Sea—including demarcating borders, the regulation of fishing, navigation, and the use of natural resources, etc.—and thus in comparison to sectoral agreements this represents an exhaustive legal regulation. Due to its preliminary status the draft convention has no binding force upon the coastal states, but its provisions reflect a clearly positive legal development in the Caspian region mainly governed by international legal standards. Upon reaching the consent of all coastal states the draft convention will be binding upon the coastal states and will become part of the public law of the sea. Its provisions, which nowadays represent merely a certain tendency in the legal development of the Caspian region in the future, will turn into binding rules and thus following their development is of practical importance today as well to enable representatives of the law practice to prepare for the upcoming changes.

The existing clash of energy interests among the Caspian coastal states, sharpened by the permanent interference of international actors, hampers prognosis of the future developments in the geopolitical situation in the Caspian region. The situation is further complicated by the prevailing lack of clarity concerning the legal situation in the region, where more than 20 years after the collapse of the Soviet Union the international legal status of the Caspian Sea is still undefined. The uncertainty of the maritime delimitation between the riparian states, and thus the undefined scope of their sovereign rights on natural resource exploitation, destabilize the economic and political situation in the Caspian region.

The ongoing legal debate on the existing status of the Caspian Sea, both by regional lawyers, as well as lawyers, in Western countries, is limited to analysis of relevant agreements between the Soviet Union and Persia/Iran and to the related question whether the Caspian is a sea or a lake. However, there is a need to extend this discussion to include the latest legal developments—such as the conclusion of the Northern Caspian agreements and Tehran convention—and to try to analyze their impact on the existing legal framework in the region. The investigation of the draft Convention on the future status of the Caspian Sea allows insight into the

possible future legal developments—and thus more comprehensive legal analysis of the existing situation. Both analyses are *sine qua non* if the legal security in the Caspian Sea is to increase, and if closer cooperation of its littoral states is to be secured.

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List of International Treaties

- Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998)
- Abidjan Emergency Protocol of 1981 (Abidjan Protocol Concerning Co-operation in Combating Pollution in Cases of Emergency of 1981)
- African Convention on the Conservation of Nature and Natural Resources of 1968
- African Phyto-Sanitary Convention *of 1954 (Phyto-sanitary Convention* for *Africa* South of the Sahara of 1954)
- Agreement establishing the EBRD *of 1990 (Agreement Establishing the European Bank* for Reconstruction and Development of 1990)
- Agreement for the Establishment of a General Fisheries Council for the Mediterranean of 1949
- Agreement on Implementation of the Provisions of the United Nations Convention of 10.12.1982 on the Conservation and Management of Straddling Fish Stocks and Highly migratory Fish Stocks
- Agreement concerning Co-operation in Marine Fishing of 1962
- Alpine Convention of 1991
- Amazonian Treaty 1978 *(Amazon* Cooperation *Treaty* of 1978)
- Anglo-French Conventions of 1898 & 1904 & 1906 concerning the Lake Chad (Chad, Cameroon, Niger, Nigeria)
- Anglo-German Agreement of 1890
- Anglo-German Agreement of 1890 (concerning the Lake Victoria, Uganda, Kenya, Tanzania)
- Anglo-Portuguese Agreement of 1954 concerning the Lake Malawi
- Antarctic Marine living Resources Convention 1980 (Convention on the Conservation of Antarctic Marine Living Resources of 1980)
- Antarctic Seals Convention 1972 *(Convention* for the Conservation of *Antarctic Seals* (CCAS) of 1972)
- Antarctic Treaty of 1959

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- Antarctic-Environmental Protocol (Protocol on Environmental Protection to the Antarctic Treaty of 1991)
- Asbestos Convention of 1986
- ASEAN Convention of 1985 (ASEAN Agreement on the Conservation of Nature and Natural Resources of 1985)
- Athens LBS Protocol (Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (LBS Protocol) of 1980)
- Baltic Fishing Convention 1973 (Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts of 1973)
- Bamako Convention of 1991 (Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 1991)
- Barcelona Convention of 1976 (Barcelona Convention for Protection against Pollution in the Mediterranean Sea of 1976)
- Barcelona Dumping Protocol (Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft of 1976)
- Basel Convention *of 1989 (Basel Convention* on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989)
- Biodiversity Convention (Convention on Biological Diversity of 1992)
- Black Sea Fishing Convention 1959 *(Convention* concerning *Fishing* in the *Black Sea* of 1959)
- Bonn Agreement of 1983 (Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances of 1983)
- Bonn Convention (Convention on the Conservation of Migratory Species of Wild Animals of 1979)
- Border Treaty between Yugoslavia and Greece of 21 May 1959 (concerning Lake Doyran)
- Cartagena Convention (Protocol to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region Concerning Co-operation in Combating Oil-Spills in the Wider Caribbean Region of 1983 also known as Oil Spill Protocol)
- Cartagena Convention of 1983 (Cartagena Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region)
- CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora, also known as the Washington Convention of 1973)
- COLREG (Convention on the International Regulations for Preventing Collisions at Sea of 1972)
- Convention between Persia and Russia of 1881: Convention between Persia and Russia of 9 December 1881
- Convention between Russia and Persia of 27 May 1893 for the Territorial Interchange of Faruze in Khorassan
- Convention between Switzerland and France on the Determination of the frontier in Lake Geneva of 25th February 1953
- Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris Convention on land-based sources of marine pollution of 1974).

- Convention for the Protection of Submarine Cables of 1884
- Convention of Peking of 1860 (concerning the Lake Khanka)
- Convention on Conservation of North Pacific Fur Seals of 1976
- Convention on Fishing and Conservation of Living Resources of the High Seas of 1958 (Geneva)
- Convention on Freedom of Transit of 1921
- Convention on the Conservation of European Wildlife and Natural Habitats of 1979
- Convention on the Continental Shelf of 1958 (Geneva)
- Convention on the High Seas of 1958 (Geneva)
- Convention on the Territorial Sea and the Contiguous Zone of 1958 (Geneva)
- Convention on Transit of Land-Locked States, 1965
- Convention on Conduct of Fishing Operations in the North Atlantic of 1967
- Copenhagen Agreement of 1971
- CRAMRA 1988 (Convention on the Regulation of Antarctic Mineral Resource Activities of 1988)
- Cromer–Ghali Agreement of 1899 (Condominium of Sudan)
- Danube Fishing Convention 1958 (Convention concerning Fishing in the Waters of Danube of 1958)
- English–Belgian Protocol of 1924 (English–Belgian Protocol of 5th August 1924 concerning Lake Tanganyika) (Tanzania, Burundi, Congo)
- ENMOD Convention (Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977, also known as Environmental Modification Convention)
- Espoo Convention (Espoo Convention on Environmental Impact Assessment in a Transboundary Context of 1991)
- EURATOM Treaty of 1982 (Treaty establishing the European Atomic Energy Community of 1982)
- European Plant Protection Convention of 1951 (Convention for the Establishment of the European and Mediterranean Plant Protection Organization of 1951)
- Florence Protocol of 1926 (concerning the Lake Ohrid between Yugoslavia and Albania)
- Florence Protocol of 1926 (concerning the Lake Prespa between Yugoslavia and Greece)
- Florence Protocol of 1926 (concerning the Lake Skadar between Yugoslavia and Albania)
- Gastein Convention of 1865
- GATT Convention (General Agreement on Tariffs and Trade) of 1994
- Global Programme of Action for Protecting the Marine Environment from Land-Based Activities of 1995
- Haines-Fairbanks Oil Pipeline Agreement of 1955
- Helsinki Convention (Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992)
- Helsinki Convention of 1992 (Convention on the Protection of the Marine Environment of the Baltic Sea Area of 1992)

- IAEA Notification Convention *of 1986 (Convention* on Early *Notification* of a Nuclear Accident of 1986)
- ILO Radiation Convention of 1960 (ILO Radiation Protection Convention of 1960)
- Industrial Accidents Convention of 1992 (*Convention* on the Transboundary Effects of *Industrial Accidents* of 1992)
- International Convention for the prevention of pollution of the sea by oil of 1954
- International Whaling Convention of 1946 (The *International Convention* for the Regulation of *Whaling* of 1946)
- Jeddah Convention 1982 (Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment of 1982)
- Jeddah Pollution Emergency Protocol of 1982 (Jeddah Protocol Concerning Regional Co-Operation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency of 1982)
- Kuwait Convention of 1978 (Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution of 1978)
- Kuwait Emergency Protocol of 1978 (Kuwait Protocol Concerning Co-operation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency of 1978)
- Kuwait LBS Protocol (Protocol for the Protection of the Marine Environment Against Pollution from Land-Based Sources of 1990)
- Lapas Protocol (on Lake Titicaca between Peru and Bolivia) from 2nd June 1925 and 13th February 1932
- Lima Convention of 1981 (Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific of 1981)
- Load Line Convention of 1966
- London Agreement of 1915 (concerning Lake Albert) of 3rd February 1915 between Belgium and Great Britain
- London Convention of 1933 (Convention Relative to the Preservation of Fauna and Flora in the Natural State)
- London Dumping Convention (Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972)
- Lugano Convention (Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 1993)
- Luso-British Agreement of 1891
- MARPOL (International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978)
- Mediterranean Emergency Protocol of 1976 (Protocol Concerning Cooperation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency of 1976)
- Montreal Protocol of 1987 (Montreal Protocol on Substances that Deplete the Ozone Layer of 1987)
- Moscow Peace Treaty of 1940 (concerning the Lake Ladoga)
- NAFTA Agreement (North American Free Trade Agreement) of 1994

- Nairobi Convention of 1985 (Nairobi Convention of the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region of 1985)
- New York Convention of 1965 (New York Convention on Transit Trade of Landlocked States of 1965)
- North Atlantic Salmon Convention 1982 (Convention for the Conservation of Salmon in the North Atlantic Ocean of 1982)
- *North-East* Atlantic *Fisheries Convention* of 1959
- Northern Gas Pipeline Agreement, 1977
- Northwest Atlantic Fisheries Convention 1978 (Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries of 1978)
- Noumea Convention of 1986 (Noumea Convention for the Protection of Natural Resources and Environment of the South Pacific Region of 1986)
- Noumea Dumping Protocol (Protocol for the Prevention of Pollution of the South Pacific Region by Dumping of 1986)
- Occupational Health Services Convention of 1985
- OPRC (Oil Pollution Preparedness Convention) (International Convention on Oil Pollution Preparedness, Response and Co-operation of 1990)
- Oslo Convention (Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft of 1972)
- OSPAR Convention (Convention for the Protection of the Marine Environment of the North-East Atlantic of 1992)
- Pacific Settlement of International Disputes 1907 (Hague Convention for the Pacific Settlement of International Disputes of 1907)
- Paipa Dumping Protocol (Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South-East Pacific of 1989)
- Plant Protection Agreement of 1956 (Plant Protection Agreement for the Asia and Pacific Region of 1956)
- Intervention Protocol of 1973 (Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil of 1973)
- Quito LBS Protocol (Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources of 1983)
- Ramsar Wetlands Convention 1971 (Convention on Wetlands of International Importance, especially as Waterfowl Habitat of 1971)
- Rhine Chemical Pollution Convention (Convention For The Protection Of The Rhine Against Chemical Pollution of 1976)
- Rotterdam Convention 1998 (Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade of 1998 also known as Prior Informed Consent)
- Rotterdam Convention of 1998 (also known as Prior Informed Consent).
- SAR Convention (International Convention on Maritime Search and Rescue, 1979)
- SOLAS (International Convention for the Safety of Life at Sea of 1974)
- South Atlantic Fisheries Convention 1969 (Convention on the Conservation of the Living Resources of the Southeast Atlantic of 1969)

- South Pacific Nature Convention of 1976 (Convention on Conservation of Nature in the South Pacific of 1976)
- South-West Asia Locust Agreement of 1963 (Agreement for the Establishment of a Commission for Controlling the Desert Locust in the Eastern Region of its Distribution Area in South-West Asia of 1963)
- Space Liability Convention of 1972 (Convention on International Liability for Damage Caused by Space Objects of 1972)
- Switzerland–Italy Agreements concerning the boundary in Lake Lugano
- Treaty between Brazil and Uruguay Modifying their Frontiers on Lake Mirim and the River Yaguaron, and Establishing General Principles of Trade and Navigation in those Regions of 1909
- Treaty of Rarotonga (South Pacific Nuclear-Free Zone Treaty of 1985)
- Treaty of Trianon (Treaty of Peace Between The Allied and Associated Powers and Hungary And Protocol and Declaration of 1920), concerning the boundary of Neusiedler See
- Tropical Tuna Commission Convention of 1949 (Convention for the Establishment of an Inter-American Tropical Tuna Commission of 1949)
- UNCLOS (United Nations Convention on the Law of the Sea of 1982)
- UNFCCC (United Nations Framework *Convention* on *Climate Change of 1992*)
- United Nations Charter of 1945
- United Nations Convention on a Code of Conduct for Liner Conferences of 1974
- United Nations Convention on Conditions for Registration of Ships of 1986
- Vienna Convention of 1985 (Vienna Convention for the Protection of the Ozone Layer of 1985)
- Vienna Convention on Succession of States in respect of Treaties, 1978
- Vienna Convention on the Law of Treaties 1969
- UN Water Convention (Convention on the Law of the Non-navigational Uses of International Watercourses of 1997.
- Western Hemisphere Convention *of 1940 (Convention* on Nature Protection and Wild Life Preservation in the *Western Hemisphere of 1940)*