



Title

The Caspian Sea: Legal Challenges of Delimitation between Littoral States

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*Small Master's Thesis
Masters of Laws in Law of the Sea
University of Tromsø
Faculty of Law
Fall 2012*

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Introduction

It is hard to argue with the fact that the Caspian Sea is unique. It is the largest lake in the world with a vast water area with natural and biological resources. They include huge oil and gas deposits, sturgeon stocks. It is not surprising that five independent states have disputes on what status should they give to the Sea, how to share its seabed and water and at the same time it is important to save and protect fragile ecosystem of the region.

My paper is mainly focused on the problem of delimitation of the Caspian Sea between the littoral states. It is difficult legal, political and environmental issue that demands a lot of patience in the negotiations and proper legal approach for resolution. In the time of USSR's existence the status and the rights of the littoral States were more or less clear because of agreements signed between the USSR and Iran. The Soviet Union and Iran were successful in negotiation of the issues of commercial navigation and fishing. But there was no resolution of delimitation. Moreover after the Soviet Union's collapse it became harder to come to unanimous decision on how to delimit the Sea, as former Soviet republics Azerbaijan, Turkmenistan and Kazakhstan became independent States with the right to the part of the Caspian Sea.

The questions discussed in the work include the legal status of the Caspian Sea, applicable law in this dispute as it depends on the legal characteristics of the Sea. Firstly, states have to decide is it a lake or a sea. Depending on the status of the Caspian Sea, lake or sea, appropriate rules will apply. If it is a sea, then States should apply the 1982 Law of the Sea Convention and, the question is how to apply the LOSC, as not every state is a member of the Convention. It would also mean that each state would have territorial sea, exclusive economic zone. Taking into account that the average breadth of the Sea is not more than 200 nautical miles, States will have disputes over outer edge of the EEZ, because it would overlap with each other.

In case the Caspian Sea is an international lake what principle of delimitation will be applied? Geographically the Caspian Sea is a lake. It is the largest salt lake in the world. The Sea doesn't have direct outlet to the ocean, which is doubtful as it is connected with another seas through artificial canals. This fact also carries legal significance that will be discussed

later in the work. The Caspian Sea's waters are the boundary for the five states: Russia, Azerbaijan, Kazakhstan, Turkmenistan and Iran. In international law there is no multilateral agreement on international lakes, their status or delimitation principles like the UNCLOS that regulates a lot of issues concerning the navigation in the sea, its status in different maritime zones, marine research, etc. That is why international customary law might be applied in the case of the Caspian Sea. But there are several principles to delimit the lake. In *the North Sea Continental Shelf Case* Judge Ammoun said in the separate opinion that "delimitation of lakes sometimes referred to the median line of the middle of the water, sometimes to the thalweg, and sometimes followed the banks of the lake or did not purport to be based on any method".¹ Delimitation of the Caspian Sea as a lake, in case of any kind of delimitation, would raise questions about navigation of littoral states, the right to build pipelines through the states' sectors and fishing. This is the question that needs an answer in case of delimitation of the Caspian as a sea as well.

One more question that is considered in the thesis concerns Soviet-Iranian agreements of 1921 and 1940 and its consequences. Russia and Iran continue to insist on application of these agreements while other states recognized them but avoid their application. Although, they were concluded in the first part of the 20th century they are still in force. The treaties established the equity of rights of Russia and Iran. As opposed to previous agreements the *Treaty on Friendship and Cooperation* of 1921 gave Iran the right to fishing and navigation in the Sea. Vessels of only these two countries could navigate in the sea. According to the *Treaty on Trade and Navigation* of 1940, Russia and Iran established 10-mile fishing zone. Some authors suppose that 10-mile fishing zone didn't confirm that status of condominium (Rustam F. Mamedov, International legal status of Caspian Sea in its historical development). To understand what correspond to international law it is significant to define the scope of application of these treaties, how they were applied and what the consequences for all riparian states are at present.

This problem is not only legal, as different political and economic events have influence on it as well. The paper focuses mainly on the legal issues of the problem, but in order to reveal the importance of the issue it would be necessary to point out political decisions and their consequences.

¹ Separate opinion of judge Ammoun in the North Sea Continental Shelf Cases 1969, p, 149.

In the first chapter of my work I pay attention to the physical features of the Caspian Sea in order to demonstrate what the Caspian is from the geographical point of view. Then I think it is necessary to explain why the dispute around the Caspian Sea is so active and what the value of the Caspian Sea is. Its natural resources do not let the states to come to common decision because some deposits lie in the middle of Caspian where the boundaries of states meet. The second chapter contains the discussion of the Soviet-Iranian agreements of 1921 and 1940, its validity at present time and the regime that is created by these agreements. The third chapter of the work is devoted to legal discussion on what is the Caspian Sea according to legal theory. How the law of the sea would be applicable to this dispute if the Caspian is a sea or international customary law is to be applied to the dispute of the status and delimitation of the Caspian, because it is satisfies more the criteria of an international lake. To conclude this chapter there will be comparison of the law of the sea and international customary law.

My work will also be based on scientific data like quantity of natural resources in the Caspian Sea which will be obtained from reports and books and after will be analyzed in my research. My work will also be based on legal sources and official works and reports.

Chapter I. Background

1.1. Geographical features of the Caspian Sea.

The Caspian Sea is defined in the Encyclopædia Britannica as “world’s largest inland body of water, lying to the east of the Caucasus Mountains and to the west of the vast steppe of Central Asia. (...) The elongated sea sprawls for nearly 750 miles (1,200 km) from north to south, although its average width is only 200 miles (320 km). It covers an area of about 149,200 square miles (386,400 square km). (...) The Caspian is the largest salt lake in the world, but this has not always been true. Scientific studies have shown that until geologically quite recent times, approximately 11 million years ago, it was linked, via the Sea of Azov, the Black Sea, and the Mediterranean Sea, to the world ocean.”²

According to the Global International Waters Assessment drainage basin of the Caspian Sea is divided into three parts. The northern part, which is mainly shallow, occupies 27% of the Caspian Sea. The average depth is 5 meters. The middle part is deeper and occupies 38% of the surface of the Sea. On the south the Caspian Sea has the maximum depth of 1025 meters. The continuation of the Caucasus range separates the middle and southern part of the Caspian Sea.³

At present the only link with the open ocean is a series of artificial canals that connects the Caspian Sea with the Black Sea and the Baltic Sea through the Volga River, which is located within Russian territory. The Volga River is the most important source of inflow and contributes approximately 80% of the total inflow to the Caspian (GIWA of the Caspian Sea, UNEP, 2006). The Sea is a water boundary of five states. On the north of the Sea Russia has a border with Kazakhstan, on the west – with Azerbaijan. The latter one borders with Iran on the west south. Iran is contiguous with Turkmenistan on the east south. And Turkmenistan has

² A. N. Kosarev, O. K. Leontiev. *Caspian Sea*. 2008.
<http://www.britannica.com/EBchecked/topic/98044/Caspian-Sea/48064/Physical-features> (last visited on 05.08.2012)

³ UNEP, 2006. Stolberg, F., Borysova, O., Mitrofanov, I., Barannik, V. and Egtesadi, P. Caspian Sea, GIWA Regional assessment 23. University of Kalmar, Kalmar, Sweden. p. 14.

the common land and water border with Kazakhstan on the east.

1.2. Caspian resources and possibilities. Why it is important for the littoral and non-riparian states?

The resources of the Caspian Sea are the source of the endless negotiations and discussions between the riparian states. According to the BP Statistical review oil reserves of crude oil in the region are estimated at 277 thousand million barrels. Gas production is estimated at 3.0 trillion cubic feet per year.⁴

To understand the problem it is not enough only to know the numbers of valuable resources. The resources are the guarantee of political and economic independence of the majority of the countries in the Caspian region. For Azerbaijan, Turkmenistan and Kazakhstan oil and gas reserves are the opportunity to become the developed counties.

In 1994 Azerbaijan has signed an \$ 8 billion production sharing agreement with oil consortium headed by “British Petroleum” to exploit in the claimed by Azerbaijan oil fields of the Caspian Sea.⁵ The Azerbaijan’s President Heydar Aliev called this contract as “The contract of the century”. Energy resources contain 90 % of the total incomes of the country. Due to these resources Azerbaijan can afford to reconstruct the whole country after USSR’s collapse. The capital of the country is under modernization. Azerbaijan attracts more and more investors. The resources for this state are also the possibility to resolve the problem with Armenia about Nagorno-Karabakh place that lasts more than 20 years. Azerbaijan invests a lot of money into military service and training. It is well pointed out “any gain or loss in military strength by Azerbaijan in relation to the Karabakh issue could carry over to border issues on the Caspian”.⁶

Turkmenistan and Kazakhstan are more under the claim of Russia. Although Turkmenistan holds huge reserve of natural gas and Kazakhstan as well as Azerbaijan signed multimillion dollars agreement, they are still more dependent from Russia states than others.⁷ The example of this fact can be Russian threaten to Turkmenistan to withdraw Russian officers from the Turkmen army and Russian border guards patrolling Turkmen-Iranian

⁴ BP Statistical Review of World Energy, June 2012. www.bp.com/statisticalreview (last visited on 03 August 2012).

⁵ Sergei Vinogradov and Patricia Wouters, “*The Caspian Sea: Current Legal Problems*”, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, (1995) p. 604.

⁶ Shannon O’Lear “*Resources and Conflict in the Caspian sea*”. Geopolitics, Vol. 9. No, 1. 2004. p. 179.

⁷ *Ibid.* p. 168-169.

border.⁸ In case of Kazakhstan, many of pipelines go through the Russian territory.⁹

Concerning Russia and Iran, there are other reasons for claiming sectors in the Caspian Sea. Both Russia and Iran have oil and gas deposits outside the Caspian Sea. Russia has huge oil and gas fields in Siberia, on Sakhalin, in the Arctic. Iran is extracting oil in the Persian Gulf. What is important here is the political situation and confrontation with the West. Iran and Russia are in the one boat, they have to be in alliance to prevent the entry of the USA and NATO in the region.

One more reason for the clear regulation of the Caspian Sea is pollution of the marine environment and environmental protection. Pollution of the Sea comes from industrial sewage, transportation of oil and gas, during the extraction, different kinds of toxic emissions and pollution from rivers of the littoral states. Taking into account that the Caspian Sea is the inland body of water it is worse for recovering of its waters. As I. Zonn writes "... the struggles over rights to ownership of the energy potential and the right to determine the future routs for the transport of hydrocarbons to the world market have contributed to the neglect of environmental issues. This makes it very difficult and at times even impossible to formulate a coordinated regional policy in the field of nature conservation and rational management of the resources of the sea".¹⁰

The Caspian Sea contains huge resources of herring, sturgeon and salmon. It is famous for production of black caviar but its reserves are decreasing.¹¹ After collapse of the USSR the regulation of the marine resources changed because of the absence of unanimous policy between five states in regard of reservation and protection of marine resources. Development of hydrocarbon resources became the main goal of the littoral states and environmental issues are overshadowed by industrial projects. The unclear legal status of the Caspian Sea gives an opportunity for the poaching and IUU fishing. While there are no official borders in the Caspian Sea poachers divided the Sea between themselves what is unfavorable for both the people living on the coasts of the Caspian Sea and for States who are interested in legal catching.¹²

⁸ R. Menon, "*Treacherous Terrain: The Political and Security Dimensions of Energy Development in the Caspian Sea Zone*", The National Bureau of Asian Research Analysis, Vol. 9, No. 1. (1998), p. 16.

⁹ Shannon O'Lear "*Resources and Conflict in the Caspian sea*". Geopolitics, Vol. 9, No. 1, 2004. p.169.

¹⁰ Igor Zonn, "*The Caspian Sea: threats to its biological resources and environmental security*", <http://books.sipri.org/files/books/SIPRI01Chufrin/SIPRI01Chufrin04.pdf> (last visited on 3 August 2012).

¹¹ Y. Zeinolabedin, M.S. Yahyapour and Z. Shirzad, "*Geopolitics and Environmental Issues in the Caspian Sea*", Caspian Journal of Environmental Sciences, 2009, Vol. 7 No.2, p. 119.

¹² Ivanov V.P., "*Biologicheskiye Resursy Kaspiyskogo Morya*" [Biological resources of the Caspian Sea] Caspian Fishery Research Institute: Astrakhan, 2000, p.20.

All environmental problems are directly or indirectly connected with the delimitation of the Caspian Sea issue. While legal status of the Caspian Sea and water borders stays unclear, it would be a complicated task for the littoral States to cope with the pollution and biological decline. This is an issue that demands the common approach to be resolved.

Interest of non-riparian states

Among other actors with high interest in this region there are the USA, the European Union, Turkey. The USSR and Iran never considered the Caspian Sea as an open for all states sea. It was always a matter of these two states' jurisdiction.

The abovementioned states don't have any legal access to the resources of the Caspian and they use economic key factor to influence on the situation. They are interested in exploitation of the hydrocarbons fields, constructing pipelines to transport the oil and gas. For the EU it is better to transport the oil and gas from Turkmenistan through the Caspian Sea to Azerbaijan bypassing Russia. In autumn of 2011 European Union gave a mandate to European Commission to negotiate with Azerbaijan and Turkmenistan on building pipeline on the seabed across the Sea. Moscow and Tehran disagree with the construction of the pipeline referring to difficulties to lay pipelines because of the seismic activity and the relief of the seabed, which is also not delimited. It is better for Europe to bypass Russia in delivery of oil and gas from Turkmenistan and Azerbaijan.

For USA it is also a political question. They support Azerbaijan in national sectors approach, as littoral states will gain sovereignty over their sectors, what diminishes the influence of Russia on these states. Because of the interference of the other states in this issue, it becomes more and more difficult to settle this dispute. In 1994 when Azerbaijan signed a multibillion dollars contract on the exploitation of its fields, Iran was offered a 5 % share. As the United States resisted to this deal, under its pressure Azerbaijan cancelled a deal with Iran and offered participation to Turkey.¹³

¹³ Sergei Vinogradov and Patricia Wouters, "The Caspian Sea: Current Legal Problems", Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, (1995) p. 604.

Chapter II. Soviet-Iranian agreements of the 20th century.

This chapter is devoted to the issues of content of the agreements concluded between the Soviet Union and Iran in 1921 and 1940, how the Caspian Sea was treated according to these treaties and how these treaties influenced on the legal status of the Caspian Sea.

From the 19th century the Russian Empire (later the Soviet Union) and Persia (Iran) regulated the Caspian Sea. One of the earliest agreements between the Russian Empire and Persia were the Treaty of Golestan of 1813 and Turkmenchay Treaty of 1828 that replaced the Treaty of 1813 putting an end to the war. According to these treaties the Russian Empire was the only one which had a right to keep military forces on the Caspian.

Later, by the Russian-Persian Treaty of 1921¹⁴ the USSR declared all previous treaties signed by them, which put Persia in unfair and unequal conditions in comparison with the USSR's position, null and void (Article 1).¹⁵ The Treaty dealt with the navigation issues as it proclaimed the equal right of parties to navigate freely on the Caspian Sea (Article 11).¹⁶ The Article 7 of the treaty established a rule that there must not be any foreign crew in Persian fleet that has a hostile aims in regard to the USSR; in such a case the USSR had a right to demand to remove such crew from the Persian fleet.¹⁷ The Treaty also provided the equal right to fishing in the Caspian Sea (Article 14).¹⁸ However, the Article says nothing about the

¹⁴ “Договор между Российской Социалистической Федеративной Советской Республикой и Персией” (26.02.1921, Москва), Сборник действующих договоров, соглашений и конвенций, заключенных СССР с иностранными государствами, Изд. третье.- М., 1935. С. 36-45. (Collection of current treaties, agreements and conventions, concluded by the USSR with foreign states Third edition, Moscow, 1935, p. 36-45.)

¹⁵ Статья I. Российское Советское Правительство объявляет все трактаты, договоры, конвенции и соглашения, заключенные бывшим Царским Правительством с Персией и приводившие к умалению прав персидского народа, отмененными и потерявшими всяческую силу.

¹⁶ Статья XI. Обе Высокие Договаривающиеся Стороны согласны, что с момента подписания настоящего Договора они будут в равной степени пользоваться правом свободного плавания по Каспийскому морю под своим флагом.

¹⁷ Статья VII. Обе Высокие Договаривающиеся Стороны согласны в том, чтобы в случае, если в составе экипажа судов персидского флота окажутся граждане третьих держав, использующие свое пребывание в персидском флоте в недружелюбных по отношению к России целях, Российское Советское Правительство будет иметь право потребовать от Правительства Персии устранения указанных вредных элементов.

¹⁸ Статья XIV. Признавая все значение рыбных промыслов южного побережья Каспийского моря для нормального снабжения России предметами продовольствия, Правительство Персии, по утрате законной силы договорными обязательствами, имеющимися у него ныне в отношении этих промыслов, согласно

borders or sectors where either Russian or Persian ships could freely fishing, it allows to come to conclusion that they could fishing over the whole Caspian Sea.

In regard to delimitation of the Caspian Sea, the Article 3 of the Treaty says that both parties agreed to respect the borders established by the Commission of Delimitation, 1881.¹⁹ But it established only land borders and dealt nothing with the Caspian Sea border.

The Treaty on Trade and Navigation of 1940 between the USSR and Iran²⁰ stressed that only these parties use the Caspian Sea. The Article 12 of the Treaty provides that their trade ships would be treated in ports on the same conditions as the national trade ships.²¹ The new provision of the Treaty was the establishment of 10-mile fishing zone measured from the coasts.²² Mamedov believes that the 10-mile fishing zone that undermines the position of those who think that the Caspian Sea was the area of common interests, i.e. the condominium.²³

As well as the Treaty of 1921 the Treaty of 1940 did not established any borders on the Caspian Sea between the USSR and Iran. There is also nothing said about the seabed delimitation and about the order how the parties were going to exploit the natural resources. It is more likely that states were not intended to give the Caspian Sea the status of the sea or lake, their practice shows that they were creating special regime for the Caspian Sea, which is available only to littoral states.

Azerbaijan bases its arguments on the decree of the USSR's Ministry for the Oil and Gas industry of the 1970 that divided the northern Caspian between the USSR's republics on sectors with the median line. Former Soviet republics mutually recognized this delimitation as

заклучить соглашение с подлежащим продовольственным органом Российской Социалистической Федеративной Советской Республики об эксплуатации сих промыслов на особых, имеющих быть выработанными к тому времени, условиях.

¹⁹ Статья III. Обе Высокие Договаривающиеся Стороны согласны признавать и соблюдать границу между Персией и Россией в том виде и начертании, как она была установлена Разграничительной комиссией 1881 года.

²⁰ Сборник торговых договоров и соглашений по торгово-экономическому сотрудничеству СССР с иностранными государствами (на 1 января 1977 года). Т. 1.- М.: Экономика, 1977. С. 301-313. (Collection of trade treaties and agreements on economic and trade cooperation between the USSR and foreign states (as of 1st of January 1977), Vol.1, Ekonomika, Moscow, 1977, p. 301-313.)

²¹ Статья 12. Торговые суда, плавающие под флагом одной из Договаривающихся Сторон в Каспийском море, будут трактоваться в портах другой Стороны при входе, во время пребывания в них и при выходе из них на основаниях, равных во всех отношениях с национальными судами.

²² Часть 4 статьи 12. Каждая из Договаривающихся Сторон сохраняет за судами своего флага ловлю рыбы в водах, омывающих ее берега, до пределов 10 морских миль.

²³ Rustam Mamedov, "International Legal Status of the Caspian Sea in its Historical Development", Turkish Yearbook, Vol. XXX, 2000, p. 125.

states' water borders.²⁴ On this basis Azerbaijan claims that the sovereign rights of the states extend to their sectors established “as a result of the traditional activities of the littoral states”. As there is no any treaty restricting their jurisdiction “the de facto tradition of the use of the Caspian Sea within national sectors on the basis of international customary law remains in effect”. Azerbaijan states that Treaties of 1921 and 1940 regulate only navigation and fishing on the Caspian, the rules over mineral resources remain outside the scope of the Treaties.²⁵

2.1. Application of Soviet-Iranian agreements.

Previously Russia stated that Treaties of 1921 and 1940 with Iran determine the legal regime of the Caspian. According to the Russia's position it is necessary to update the Treaties taking into account the appearance of new states. There was also stated that Russia would not agree with the unilateral exploitation of natural resources because it concerns all littoral states and such actions would be considered as unlawful. Iran expressed its position in the letter to the UN Secretary-General in 1997. It is similar to the Russian position. Iran declared that the littoral states “bear a common responsibility regarding its proper utilization, the development of its natural resources and the preservation of the environment”. Treaties of 1921 and 1940 are binding for all states, which provide common use of the Sea except 10-miles exclusive fishery zone from the coast. And there is unacceptable any unilateral actions.²⁶ Iran clearly confirmed its position when it violated Azerbaijan's airspace using navy air force to assert its claim over Araz-Alov-Sharg oil field in 2001.²⁷

To understand the current legal status of the Caspian Sea it is necessary to research how the Caspian was treated by the USSR and Iran before the appearance of new states and its claims. Exchanges of notes to the agreement of 1940 between the states declared that the parties consider the Caspian Sea as Soviet and Iranian sea.²⁸ The USSR and Iran, defending the concept of closed sea, were motivated by not only legal and geographical features of the

²⁴ Farid Rauf oglu Shafiev, “*The legal regime of the Caspian Sea: views of the littoral states*”, Prism, Vol. 7, Issue 6.
http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=28012&tx_ttnews%5BbackPid%5D=223 (last visited on 21 August 2012)

²⁵ Statement by the Ministry of Foreign Affairs of the Azerbaijani Republic (A/53/741 December 10, 1998).

²⁶ Position of the Islamic Republic of Iran concerning the legal regime of the Caspian Sea, A/52/324, 3 September 1997

²⁷ Ariel Cohen, “Iran's Claim Over Caspian Sea Resources Threaten Energy Security”, The Heritage Foundation Backgrounder, Executive Summary, No. 1582, September (2002), p. 1.

²⁸ Mehmet Ögütçü, “*Caspian energy and legal disputes: prospect for settlement*”, Institut français des relations internationales (2003) p. 37.

Caspian but mainly by military power in order not to allow other states to get access to significant areas.²⁹

Iran was interested in exclusive rights over the natural resources of the Caspian Sea. Iran asserted national jurisdiction over the natural resources of the continental shelf of the Persian Gulf and the Gulf of Oman. The same provisions cover the status of the Caspian Sea according to Iranian national legislation.³⁰

In 1927 the USSR and Iran concluded Fisheries Agreement that established joint Soviet-Iranian company in order to exploit biological resources of the Caspian Sea for 25 years. According to the Agreement the USSR recognized Persian territorial sovereignty to the southern Caspian Sea with the line from Astara on the southwest to the Hassanqoli on the east. This line might be considered as a line delimiting the Caspian Sea in legal and geographical aspect and shows what area was under Persian sovereignty and what was under Soviet. Moreover, Soviet Union issued internal secret order to draw the same Astara-Hassanqoli delimitation line in order to provide better guarding waters of the Caspian Sea.³¹ The Parties agreed not to include in their activity third states. The agreement allowed the USSR of exploiting biological resources south from the Astara-Hassanqoli line. However, this Agreement was in force only 25 years and Persia was not willing to prolongate the Agreement, and the company was disintegrated.³² After agreement expired parties have exploited their fisheries resources independently without notification and consultation with each other. They also did not cross the Astara-Hassanqoli line. Iranian boat did not go to the north of this line as it was under control of the Soviet Union. Such treatment shows that both the Soviet Union and Iran did not consider the Caspian Sea as a common area.³³

Iran is preparing its “Doctrine of the Caspian Sea”, which covers legal, economic, ecological and security issues. I will mention legal issues, as it is the most important for this work. According to the doctrine the Caspian Sea is a special case and it not subject to the rules of international law. States should create a special regime for the Sea on the basis of “equity”. Years before Third Baku Summit of the Caspian States (18 November 2010) Iran

²⁹ Rustam Mamedov, “*International Legal Status of the Caspian Sea in its Historical Development*”, Turkish Yearbook, Vol. XXX, (2000) p. 128.

³⁰ Kamyar Mehdiyoun, “*International Law and the Dispute over Ownership of Oil and Gas Resources in the Caspian Sea*”, The American Journal of International Law, Vol. 94, No. 1, (2000) p. 182.

³¹ Order by NKVD №3 09.01.1935.

³² *A Diplomatic history of the Caspian Sea: treaties, diaries, and other stories*, Guive Mirfendereski; foreword by H.R. Chehabi, New York (PALGRAVE) 2001 p.127.

³³ Mariangela Gramola, “*State Succession and the Delimitation of the Caspian Sea*”, The Italian Yearbook of International Law, Martinus Nijhoff Publishers, Vol. XIV, The Netherlands (2004) p. 245.

claimed 20 % of the Caspian Sea, as it would be equal to have 20 % for every littoral state. On the Summit Iran stated that it is going to claim more than 20 %. It allows assume that Iran's claim is at least 20 % of the Caspian Sea.³⁴ While taking any decisions on the Caspian issues, states should follow the consensus principle. Iran opposes any agreements on legal regime that were concluded without Iran. Iran does not accept the modified median line principle, which was used in the agreements between Russia and Kazakhstan and Russia and Azerbaijan. Applying the modified median line, Iran gets only 13 % of the Caspian Sea. Iran also proposed a 25-miles exclusive zone for littoral states. As states are not obliged by the UNCLOS, which provide up to 200 miles for the EEZ. Therefore making a special regime for the Caspian Sea states can apply 12-miles zone of territorial sea and a 12 or 13 miles of exclusive fishery zone. Iran also pointed out that on the basis of the Treaties of 1921 and 1940 there is no need for interference of the third states.³⁵ This leads to the conclusion that Iran as well is considering the Caspian Sea more as a lake than a sea. During the USSR's existence both the USSR and Iran treated the Caspian Sea as an enclosed body of water not giving much attention to its legal status and not allowing third states to navigate in waters of the Caspian.

It is obvious that neither the USSR nor Iran ever consider the Caspian as an open sea even after the UNCLOS appeared. Their practice should be taken into account while determining the legal status of the Caspian Sea. The Caspian Sea is a big lake that in fact does not have natural connection with the ocean. The practice of the USSR and Iran confirm it by refusing to allow any foreign presence there. The Caspian Sea was always under joint control of the USSR and Iran.

2.2. Validity of the Treaties after the break up of the Soviet Union.

Each littoral state seeks to get full sovereignty over as far as possible bigger part of the Caspian Sea. However, after the break up of the Soviet Union the question of succession of Soviet treaties arose. According to Russian official position the Caspian States confirmed in Alma Ata Declaration that they continue to fulfil the international obligations from the

³⁴ Bahman Aghai Diba, "Baku Summit and New Policy of Iran in the Caspian Sea", 21 November 2010, www.payvand.com/news/10/nov/1211.html (last visited on 3 August 2012).

³⁵ Bahman Aghai Diba, "Iranian Doctrine of the Caspian Sea", 27 December 2010, www.payvand.com/news/10/dec/1260.html (last visited on 3 August 2012).

Treaties of the former USSR and therefore they are obliged to follow the treaties.³⁶ The Parliament of Azerbaijan at first refused to ratify the Alma Ata Declaration.³⁷ The Parliament took a position that the situation in the Caspian region significantly changed, Azerbaijan is an independent state and it has a right to access to the sea and its resources. Azerbaijan affirmed “it was not a successor state to the Soviet Union but newly independent country born from the decolonization process.”³⁸

According to Vienna Convention on Succession of States with respect to Treaties the definition of “newly independent state” is “a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible”. The question is whether Azerbaijan and all other former Soviet Republics were dependent on the Soviet Union territories. The last 1977 Constitution of the USSR³⁹ declared that all republics have a right of withdrawal from the Soviet Union (Article 77). Soviet Republic was considered as sovereign soviet socialist state with its own constitution and power within its territory (Article 76). Moreover the Constitution of 1977 provided to the Soviet Republics the right to have international relations, to sign international treaties and to exchange the diplomatic and consular representative offices with other states (Article 80). In my opinion the provision of such rights does not satisfy the definition of “dependent territory for the international relations” and they should not be considered as states appeared as a result of decolonisation process after the break up of the Soviet Union.

Even if to consider that Azerbaijan, Turkmenistan and Kazakhstan are newly independent states in terms of the Vienna Convention, the Convention states that if successor state consent to obligations or rights shall devolve upon the successor State (Article 8) and these states agreed to fulfil the obligations of the Soviet Union according to the Alma-Ata Declaration.

The another position is that the Russian Federation is a continuing of the Soviet Union state and thus it is responsible for international obligations and other former Soviet Republics are free to choose to fulfil the obligation of the USSR or not. Neither states nor international

³⁶ Alma Ata Declaration, Alma Ata, December 21, 1991.

³⁷ Alma-Ata Declaration was ratified by Azerbaijan in 1993.

³⁸ Witt Raczka “*A sea or a lake? The Caspian’s long odyssey*”, Central Asian Survey, (2000) p. 206-207.

³⁹ Code of Laws of the USSR, Vol. 3, 1990, p. 14.

organization objected to the status of Russia as a continuing of the USSR state.⁴⁰ Even in such a case new states chose to fulfil the obligations of the Soviet Union signing the Alma Ata Declaration.

“In reality, the legal value of these agreements was reduced” and “it is sufficient to realize that new States have often negotiated and signed agreements without any real intention of respecting them, but rather with the diplomatic purpose of avoiding disputes and keeping dialogue with other contracting States open”.⁴¹ States’ behaviour showed that they are not willing to apply the Treaties although there is no any document denouncing them. Indeed, even Russia and Iran insisting immediately after the dissolution of the Soviet Union on the validity of the Treaties, began to hold a position incompatible with the application of the Treaties. Russia concluded bilateral agreements with Kazakhstan and Azerbaijan delimiting their national sectors on the basis of the median line. Iran is claiming at least 20 % sector of the Caspian.

In Minsk Agreement parties declared that they respect territorial integrity of former Soviet Republics and existing borders (Article 5, 1991 Minsk Agreement). It confirms the *uti possidetis* principle, which keeps the administrative borders as they existed within predecessor state. The principle could be applied to international lakes as well, as the ICJ in maritime delimitation dispute between Guinea-Bissau and Senegal confirmed it.⁴²

2.3. The concept of “condominium”

There is also one more theory exist that the Soviet-Iranian Treaties of 1921 and 1940 created a regime of condominium between parties. However in Soviet times this concept was not widely spread in the USSR. It became popular after the collapse of the Soviet Union, as both Russia and Iran needed solid grounds to leave the Caspian Sea mainly under their control.

But it was not easy as their practice showed that they never considered the Caspian Sea as a common area. It is worth to mention that despite the Treaties of 1921 and 1940 that establish the equal right to navigate and have navy forces in the sea, the Caspian was mainly

⁴⁰ Mariangela Gramola, “*State Succession and the Delimitation of the Caspian Sea*”, The Italian Yearbook of International Law, Martinus Nijhoff Publishers, Vol. XIV, The Netherlands (2004) p. 249.

⁴¹ Ibid. p. 250.

⁴² Mariangela Gramola, “*State Succession and the Delimitation of the Caspian Sea*”, The Italian Yearbook of International Law, Martinus Nijhoff Publishers, Vol. XIV, The Netherlands (2004) p. 261.

used by the Soviet Union with the control over the oil platforms and military forces.⁴³ The Soviet Union began to exploit the oil in the coastal region of Azerbaijan. There was no consultation with Iran or proposal to join the activity. However Iran never protested these activities notwithstanding that it was a breach of the Treaty of 1940.⁴⁴ In 1997 Iran expressed its position and stated that unilateral actions are not acceptable and the Treaties of 1921 and 1940 are valid and have to be exercised by all littoral states. Why did not Iran stated this when the USSR began the unilateral actions? It seems that Iran may not longer assert such claims with respect to Russia according to article 45 of Vienna Convention on Law of Treaties of 1969.

Barbara Janusz writes that the essential condition for the condominium regime was established by arbitration decision over the dispute between Spain and France in regard to Lake Lanoux. The Court states “restriction on the sovereignty of a state could only be admitted if there was clear and convincing evidence. International practice reveals some ceases such as joint-ownership or condominium.”⁴⁵ Therefore there shall be an agreement that clearly states that the lake is under joint jurisdiction of the parties. Moreover, after establishing a 10-mile exclusive fishing zone it may hardly be considered as a common zone.

The Gulf of Fanseca is rare case where the Court established the condominium regime. The Gulf is located in the Pacific Ocean and surrounded by Nicaragua, El Salvador and Honduras. Before 1821 all three states were part of Spain. The ICJ ruled that the Gulf is to be under joint jurisdiction except 3 miles zone from their coast which is under control of coastal state.⁴⁶ However, the difference of that case from the Caspian Sea is that Gulf was previously under jurisdiction of only Spanish Empire before its collapse. The Gulf of Fanseca was utilized by all states co-jointly for a long period of time.⁴⁷

The Treaties between the USSR and Iran related only to question of commercial navigation. They did not concern the issues of hydrocarbon extraction or marine research. What is also important is that these Treaties did not establish the delimitation line between parties. That is why from the legal point of view these Treaties do not meet the requirements

⁴³ Gulnar Nugman, “*The Legal Status of Caspian Sea*”, Eurasian Studies, No. 13, (1998) p. 80.

⁴⁴ Kamyar Mehdiyoun, “*International Law and the Dispute over Ownership of Oil and Gas Resources in the Caspian Sea*”, The American Journal of International Law, Vol. 94, No. 1, (2000) p. 183.

⁴⁵ Barbara Janusz, Stiftung Wissenschaft und Politik, “*The Caspian Sea Legal Status and Regime Problems*”, Briefing Paper, The Royal Institute of International Affairs, (2005) p. 5.

⁴⁶ Land, Island and Maritime Frontier Dispute (EL SALVADOR/HONDURAS: NICARAGUA INTERVENING), ICJ Reports, 1992, p. 351.

⁴⁷ Kamyar Mehdiyoun, “*International Law and the Dispute over Ownership of Oil and Gas Resources in the Caspian Sea*”, The American Journal of International Law, Vol. 94, No. 1, (2000), p. 188.

of reality when states need a precise legal status of the Caspian Sea including their national sectors under their sovereignty with clear delimitation borders, status of ships navigating the Caspian Sea and division of natural resources.

Chapter III. Legal status and legal regime of the Caspian Sea.

3.1. Is the Caspian Sea international lake or sea?

Question of legal status of the Caspian Sea is directly connected with the legal features of the region. Hundreds of works are devoted to this question. Absence of clear identification and legal status of the Sea leads to disability of littoral states to make a consensus on distribution of natural resources fields, maritime sectors of the Sea, navigation, construction of pipelines on the seabed, fishing. Lack of cooperation of states increases possibilities of pollution and illegal fishing in the Sea. As a result multimillion-dollar projects on extraction of oil or gas are stopped and not fulfilled in time or at all.

Azerbaijani expert K.K. Gul pointed, “Caspian Sea is the greatest lake in the world. Thanks to the [its] size and water salinity degree it had been named as sea in the ancient periods”.⁴⁸ But the size and water salinity might be not enough to treat the Caspian as a sea. According to article 122 of the Law of the Sea 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 (...). The Caspian Sea has the only connection with the ocean through the Volga River and artificial system of canals that join it with the Black Sea and the Baltic Sea. The Convention says nothing about what type of “narrow outlet” it has to be, natural or artificial. Moreover the Volga River is under the Russia’s control and only Russia has a right to permit the way through the river. So at first glance the Caspian Sea does not have any international outlet to the ocean.

Some authors have another opinion regarding this issue. According to Henn-Juri Uibopuu the Volga river system should be treated as international waterway. His arguments are the following. First, the river Akhtuba, which flows into the Caspian Sea through the Kazakhstan’s territory, is connected with the Volga River what makes it as a single waterway. Uibopuu supposes that the same should be applied to the Volga-Baltic waterway and

⁴⁸ K.K. Gul, ”From the historical geographical researches of Caspian Sea”, *Izvestiya Akademii Nauk Azerbajjanskoy SSR, Series of Geog.-Geology. Sciences*, Baku, 1960, No. 2, pp. 90-91.

Kazakhstan may claim to the Volga –Baltic Sea Canal System.⁴⁹ He also refers to the Versailles Peace Treaty of 1919 which, according to his opinion, states that international river system include “...lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the same river”.⁵⁰ But as provided by the Treaty article 331 relates to the specified international rivers: the Elbe, the Oder, the Niemen and the Danube. The Versailles Treaty might be applied in the case with the Caspian Sea with care as at the time of the drawing of the Treaty the Volga-Baltic waterway was not considered and there was no intention to give it the title of international river as the whole system was on the territory of the USSR. Moreover Russia will hardly recognize that the Volga-Baltic waterway is international, as it would mean a free access of other littoral states to navigate there.

Resolving the issue of legal status of the Caspian would not make a final resolution of the problem as the concept of legal status does not include rights and obligations of the littoral states. Legal status determines under which state’s sovereignty the territory is located and whether this territory or area according to its legal features lake or sea or enclosed sea etc.⁵¹ Legal regime means that states have rights and obligations in respect of the object, they are entitled to change legal relationship not modifying its legal status. States also have a right to prescribe legal rights and obligations on the third states in respect to the geographical area.⁵² In case of the Caspian Sea it is important both to establish the legal status of the sea, and to determine its legal regime, as states have a dispute over what rights they have and how they can exploit the natural resources, what are their boundaries in the Caspian.

Bernard H. Oxman precisely stressed that “Attempting to determine the rights and duties of the states concerned by a process of deductive reasoning based on the status of the Caspian Sea as a sea or a lake is largely, if not entirely, a pointless endeavor”.⁵³ Determining the Caspian as a sea or as a lake would not settle a dispute. Even if the states would agree on the Caspian is a sea and the LOSC is applicable to it, they still would have a disputes over equidistance line and the LOSC does not give a rationale to it, it provides with only general principles. In case states would come to conclusion that the Caspian Sea is a lake, there are no

⁴⁹ Henn-Juri Uibopuu, *The Caspian Sea: A Tangle of Legal Problems*, *The World Today*, Vol.51, No.6 (Jun., 1995), pp.120.

⁵⁰ The Versailles Peace Treaty of 1919 Art. 331, para. 1.

⁵¹ Barbara Janusz, *Stiftung Wissenschaft und Politik*, “*The Caspian Sea Legal Status and Regime Problems*”, Briefing Paper, The Royal Institute of International Affairs, 2005, p. 2.

⁵² Ilias Bantekas, “*Bilateral Delimitation of the Caspian Sea and the Exclusion of Third Parties*”, *The International Journal of Marine and Coastal Law*, 26 (2011), p. 48.

⁵³ Bernard H. Oxman, “*Caspian Sea or Lake: What Difference Does It Make?*” *Caspian Crossroads*, No. 4 (1996), p. 12.

binding universal agreements that would establish the borders and rights and obligations referring to the lake. It would be the littoral states' obligation to resolve these questions. As legal regime of the lakes is based on the specific agreements therefore littoral states would have to make this regime.⁵⁴

Moreover from that some littoral states have already begun to create a legal regime of the Caspian Sea by signing the bilateral agreements and exploiting the oilfields, especially in the northern part of the Caspian where Russia, Azerbaijan and Kazakhstan signed a tri-point agreement,⁵⁵ despite the absence of the established and recognized legal status of the Sea (Annex I).⁵⁶ As a consequence it might be concluded that these three states (Russia, Azerbaijan and Kazakhstan) consider and treat the Caspian as an international lake, notwithstanding that Kazakhstan, for examples, had a position that the Caspian Sea should be treated as a sea. In 1994 Kazakhstan proposed a draft convention on the Caspian Sea. It is based on the UNCLOS concept of the enclosed sea. According to this draft of the convention the Caspian should be divided between littoral states with the median line and each state should have sovereign rights to the seabed and its resources. According to Kazakhstan the division of the Caspian means that each state has territorial sea, the EEZ; fishing and exploitation of resources should be exercised inside the relevant offshore zone.⁵⁷ This approach was confirmed by the official position addressed to the UN, where Kazakhstan also stated that each landlocked Caspian state should have an access to the high sea through Russian waterways on the basis of separate agreement.⁵⁸

3.2. Application of the Law of the Sea Convention of 1982 to the Caspian Sea.

The Law of the Sea Convention is a unique document as it covers huge number of aspects of the sea law. The convention was a solution to many states with problems of delimitation, fisheries, navigation, safety of resources, etc. The question remains can the LOSC be applied to the Caspian Sea case, as it is necessary to determine its status and delimitation between littoral states.

⁵⁴ Yusin Lee, "Toward a New International Regime for the Caspian Sea", Problems of Post-Communism, Vol. 52, No. 3 (2005), p. 39.

⁵⁵ *International Maritime Boundaries*. Jonathan I.Charney, David A.Colson, Lewis M.Alexander, Robert W. Smith, Volume 5, The Netherlands, 2005. p. 3539.

⁵⁶ Ibid, p. 3549.

⁵⁷ Mehmet Ögütçü, "Caspian energy and legal disputes: prospect for settlement", Institut français des relations internationales, 2003, p. 44.

⁵⁸ The Position of Kazakhstan on the legal status of the Caspian Sea, 3 October 1997, A/52/424.

With regard to the Caspian Sea there is variety of scientific views whether or not the LOSC is possible to apply, what rights states will have in that case, how the Sea will be delimited.

If the Caspian Sea is treated as a sea then the following provisions of the LOSC will be applied. According to the LOSC the Caspian Sea is an enclosed or semi-enclosed sea and Volga River is international waterway. The LOSC does not divide these two terms. According to Vinogradov and Wouters the definition of the enclosed or semi-enclosed sea in the LOSC “can be construed as including even those marine areas, which, from strictly geographical point of view, are not enclosed or semi-enclosed seas – i.e. not containing narrow outlet. According to the UNCLOS this definition is wider than that identified through geographic criteria”.⁵⁹ According to article 123 of the LOSC States have to cooperate in order to perform their duties to organize management, conservation, exploitation and exploration in the Caspian Sea and to coordinate their activities to protect and preserve environment.

Baselines and internal waters. First of all in case of application of the LOSC littoral states have to establish baselines from which the territorial sea and other zones will be measured. Internal waters refers to “the waters found within coastal areas enclosed by straight baselines such as bays, bights, gulfs, sounds, ports and harbors, (...) river mouths, estuaries, canals (...).⁶⁰ It is unlikely that this provision of the Convention would raise any objection between littoral states. The dispute could arise in respect of drawing baselines like the dispute between Azerbaijan and Turkmenistan which is considered later in this chapter.

Territorial sea. If states will apply the LOSC then all littoral states have a right to territorial sea with the sovereign jurisdiction over 12 nm maritime area from the baselines with the right of innocent passage for third states through the territorial sea of the coastal state (Art. 17, LOSC). That would mean also that all littoral states as well as other states would have the right of innocent passage provided by the LOSC through the Volga River (Art. 125, LOSC). Uibopuu supposes that it can be realized due to necessity of Caspian landlocked states in access to the high seas.⁶¹

Contiguous zone. As well as states have a right for the territorial sea, states are free to establish the contiguous zone, where they are entitled to exercise control in order “to prevent

⁵⁹ Sergei Vinogradov and Patricia Wouters, “*The Caspian Sea: Current Legal Problems*”, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, (1995) p. 612.

⁶⁰ *The International Law of the Sea*. Donald R. Rothwell, Tim Stephens. Oxford and Portland, (Hart Publishing) 2010, p. 54.

⁶¹ Henn-Juri Uibopuu, “*The Caspian Sea: A Tangle of Legal Problems*”, *The World Today*, Vol.51, No.6 (1995), p.121.

infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; punish infringement of the above laws and regulations committed within its territory or territorial sea” within 24 nm from the baselines (Art. 33, LOSC).

The exclusive economic zone. Each state would have an EEZ up to 200 nm. In the case with the EEZ states will have to negotiate about the equitable solution for every state (Art. 74, LOSC), because the width of the Caspian Sea is not more than 200 nm. According to the article 15 of the LOSC states shall delimit the overlapping zones with the median line equidistant from the nearest points on the baselines from which the territorial sea is measured. This provision has exclusion in case of existence of historic title or other circumstances.

In 1970 the USSR delimited the Caspian within its zone into sectors between the Russian, Azeri, Kazakh and Turkmen SSRs on the basis of equidistant line,⁶² Azerbaijan claims its sector on the basis of the USSR’s ordinance and exploits Azeri and Kyapaz oilfields within this sector from the Soviet times, it can be considered as historic title. At the same time Turkmenistan disputes on the influence of the Absheron peninsula and Azeri island on the delimitation with the median line, as they move the line significantly on the east if they are taken as base-points. Turkmenistan suggested to avoid using them and proposed a delimitation “based on the intersection of half-way points on lines of certain parallels of latitudes and not using all coastal points”,⁶³ which would move the Azeri and Kyapaz oilfield and part of the Chirag field under Turkmen sector. Azerbaijan refused to accept this suggestion and continued to insist on the applicability of the USSR's Ordinance. Moreover Turkmen protests over the Azerbaijan's activity in regard to the Azeri, Kyapaz and Chirag field arose three years later after they were started exploiting in 1994. According to article 45 of the Vienna Convention on International Treaties a state may not protest over the treaty if its conduct showed that the state acquiesced with it.

Turkmenistan never had continual position in regard to the Caspian Sea. It changed several times from 1991. According to the national “Law on the State Border” Turkmenistan spread its sovereignty over internal waters, territorial sea and the EEZ, what allows to think that at first Turkmenistan had a point that regime established by the Law of the Sea Convention should be applicable to the Caspian Sea.

In 1996 Turkmenistan and Russia addressed to the UN a Joint Statement, where states

⁶² *The Caspian Sea: A Quest for Environmental Security*. William Ascher, Natalia Mirovitskaya, North Atlantic Treaty Organization. Scientific Affairs Division, Vol. 67, 1999. p. 147.

⁶³ *International Maritime Boundaries*. Jonathan I.Charney, David A.Colson, Lewis M.Alexander, Robert W. Smith, Volume 5, The Netherlands, 2005. p. 354.

indicated that “(...) the sides believe that all rights with regard to the Caspian Sea appertain to the States of the Caspian region and that they alone may define rules governing activities in the Caspian as well as conditions for involving physical persons and legal entities of third countries.” States affirmed that all questions related to the natural resources must be regulated with the participation of all states of the region.⁶⁴ This statement has nothing in common with the UNCLOS, as states believe that only Caspian states may establish rules regulating the activities in the Caspian Sea. In 1997 Turkmenistan protested the exploitation of the Azei oil field, claiming that it is located within Turkmen sector. According to Azerbaijan it was implicit support to the approach that the Caspian should be divided into national sectors.⁶⁵ Indeed the same year Turkmenistan and Kazakhstan made a Joint Statement, declaring that the Caspian Sea should be divided with the median line.⁶⁶

One-year later Turkmenistan switched to Iran’s side, claiming in the Joint Statement that “the Treaties of 1921 and 1940 are sole international documents governing legal issues relating to the Caspian Sea”, supporting the view that a condominium approach is applicable to the Caspian Sea with the sectoral coastal belt and equal share of the natural resources between the littoral states.⁶⁷

In 2000 Turkmenistan returned to the sectoral approach, announcing in the letter to the UN that this approach is acceptable to Ashgabat if interests of all littoral states are taken into account.⁶⁸

Returning to the application of the EEZ, it is important to mention what rights and obligation would littoral states have in regard to the Caspian Sea. First of all littoral states would have sovereign rights over exploration and exploitation, management and conservation of natural resources in the seabed and subsoil and waters superjacent to it (Art. 56, LOSC). It is essential for all states as they will not lose control over the oilfield which they are exploiting at present.

The problem of the application of the LOS Convention is that only Russia and Iran have signed it and Iran does not ratify the LOSC. The same situation is with the Convention on the Territorial Sea and the Contiguous Zone of 1958. If other littoral states do not accept the

⁶⁴ Joint Statement by the Russian Federation and Turkmenistan on the results of talks concerning the problems affecting the Caspian Sea, 1 March 1996, A/51/50.

⁶⁵ Witt Raczka (2000): A sea or a lake? The Caspian’s long odyssey, *Central Asian Survey*, 19:2, p. 210.

⁶⁶ Joint Statement on the questions related to the Caspian Sea between Turkmenistan and Kazakhstan, 27 February 1997, A/52/93.

⁶⁷ Joint Statement signed by the Presidents of Iran and Turkmenistan, 8 July 1998, A/53/453.

⁶⁸ Letter dated 18 August 2000 from the Permanent Representative of Turkmenistan to the United Nations addressed to the Secretary-General, A/55/309.

LOSC, all littoral states would reach a consensus only on that provisions which have a force of a custom. But not all provisions of the UNCLOS are customary norms. A lot of actions would need a regulation within bilateral or multilateral agreements such as conditions of entry into ports as it is not a customary rule, use of Russian waterways, marine research, etc. The application of the Conventions became more complicated because Russia, the only state that ratified the Convention, does not consider the Caspian as a Sea and therefore would not apply the Convention.

Moreover the Caspian Sea was excluded from the scope of discussion of the Third Conference, as it did not consider it as a high sea, as well as USSR and Iran did not.

3.3. International customary law applicable to the Caspian Sea.

Rules of international customary law are applicable to the Caspian Sea if it is considered as an international lake. These rules would apply to the delimitation principles, rights, obligations and jurisdiction of the littoral states and the third states.

As in the case of the Caspian Sea there is no multilateral agreement that would establish the boundaries between all five states, then significant questions are concerning the delimitation of the lake, sovereignty and jurisdiction of the littoral states, whether the lake navigable for the third states or not.

Lake is international in a case if it is a water border for more than one state. There are a lot of cases when such lakes are not delimited by riparian states because of the absence of multilaterally accepted rules in general international law and states insist on different principles of delimitation. For example, the dispute around the Lake Constance which is surrounded by Germany, Austria and Switzerland is not completely resolved because states propose different principles to partition the lake, such as median line or application of regime of condominium.⁶⁹ Rules that regulate lakes' delimitation were mainly created by state practice and treatment to the lakes and by judicial cases. The main principle that states and international courts perfectly know and that is often applied is a principle of equidistance line. Delimitation of any body of water must be just and equitable. In the *St. Pierre and Miquelon* case the Court of Arbitration indicated that the delimitation should "be effected in accordance

⁶⁹ Jochen A. Frowein, "Lake Constance", Max Planck Encyclopedia of Public International Law, 2009. http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1310&recno=5&author=Frowein%20%20Jochen%20A (Visited 21 August 2012).

with equitable principles, or equitable criteria, taking account of all the relevant circumstances, in order to achieve an equitable result. The underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method.”⁷⁰

Professor Yoshifumi Tanaka well indicated that “the equitable principles as customary law are at the heart of the law of maritime delimitation.”⁷¹ This rule with no doubt should be applied in the dispute of the Caspian Sea. Even the Caspian Sea is not recognized as an enclosed or semi-enclosed sea and rules of the LOSC would not be applied to it, still the article 15 of the LOSC might be applied to this case. In the *Qatar/Bahrain* dispute over delimitation of the territorial sea Bahrain was a party of the LOSC and Qatar has signed it. But parties agreed that “most of the provisions of the LOSC reflect the customary law”.⁷²

At present there is a trend that the Caspian is delimited as a lake with the median line. Russia, Kazakhstan and Azerbaijan have already concluded agreements on the delimitation of the northern Caspian by modified median line.⁷³

To apply median line to the rest part of the Caspian Azerbaijan and Turkmenistan need to agree on how the median line should be put. As it is stated earlier these two states agree that their sectors should be delimited with the median line. But they have different views on the method of line’s application. Azerbaijan wants island to be taken into account when Turkmenistan proposes to measure baselines from the mainland’s coastline.⁷⁴ It moves the median line closer to the Turkmenistan’s land border. The status of the island is interesting because it can be taken into account if the Caspian Sea is regarded as a sea, and rules of Article 121 of the LOSC could be applied. There is no common approach that islands have to be taken into account in delimitation process in obligatory way. In some cases courts give full entitlement to the island to influence on the delimitation boundary, like in dispute between *Barbados v. Trinidad and Tobago*⁷⁵. Nevertheless in arbitration between Eritrea and Yemen no effect was given to some islands as a full entitlement of the island would cause inequitable result.⁷⁶ It is not customary rule that islands may influence on the delimitation boundary.

⁷⁰ Canada v. France. The *St. Pierre and Miquelon* case. The International Court of Justice. The Hague (1992), 1163, para. 38.

⁷¹ Yoshifumi Tanaka “*Reflections on Maritime Delimitation in the Nicaragua/Honduras Case*”, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, (2008) p. 913.

⁷² ICJ Reports 2001, 91, para. 167.

⁷³ Yusin Lee, “*Toward a New International Regime for the Caspian Sea*”, Problems of Post-Communism, Vol. 52, No. 3, (2005) p. 44.

⁷⁴ Witt Raczka “*A sea or a lake? The Caspian’s long odyssey*”, Central Asian Survey, (2000) p. 215.

⁷⁵ Barbados v. Trinidad and Tobago. Permanent Court of Arbitration. The Hague (2006).

⁷⁶ Eritrea v. Yemen. Permanent Court of Arbitration. The Hague (1999), para. 138-157.

In case with the Caspian Sea it is more likely that states have to negotiate on the effect of the Cilov Island. Whether to give any effect to the island or not, Azerbaijan and Turkmenistan could take as a starting point requirements of the UNCLOS, which states that “Rocks which cannot sustain human habitation or economic life of their own”, may not be entitled to give any effect on the delimitation process (Art. 121, LOSC). Azeri island Cilov is only 6 square km and sustains habitation of less than thousand people.⁷⁷ The main activity of the island is extraction of oil. Industrial activity on the island has begun in 1952.⁷⁸ Therefore, it seems that island could be taken into account in delimitation process between Azerbaijan and Turkmenistan.

One more problem that is described in the work of Raczka is that level of sea is often changing. As a consequence the shoreline is changing as well and it is difficult to establish points which would form baselines for measuring equidistant line between opposite states.⁷⁹ In case when such geographical circumstances is influencing on establishing of clear baselines and consequently affects on the equidistant line, principle of bisector line could be applied.⁸⁰ “The use of a bisector – the line formed by bisecting the angle created by the linear approximations of coastlines – has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate. (...) In instances where, as in the present case, any base points that could be determined by the Court are inherently unstable, the bisector method may be seen as an approximation of the equidistance method.”⁸¹

Mentioned above principles of delimitation were applied to the seas and mainly and provisions of the UNCLOS were widely used. But there is a tendency that states are close to apply internationally recognized methods and principles to delimit the Caspian as a lake.

Rights and obligations of littoral states under customary law.

The practice of governing the lakes shows that usually they are under full sovereignty of the littoral states. Littoral states have exclusive right to exploit and explore the natural resources of the seabed and subsoil as well as biological resources within its sector.⁸²

⁷⁷ “Chilov”, Wikipedia, the free encyclopedia, English version: www.en.wikipedia.org/wiki/Chilov (last visited on 21 August 2012).

⁷⁸ “Chilov”, Wikipedia, the free encyclopedia, (Russian: Основная отрасль промышленности — добыча нефти. Промышленная разработка месторождения ведется с 1952 года) Russian version: www.ru.wikipedia.org/wiki/Чилов (last visited on 21 August 2012).

⁷⁹ Witt Raczka “A sea or a lake? The Caspian’s long odyssey”, Central Asian Survey, (2000) p. 216.

⁸⁰ *International law*, 6th edition, Malcolm M. Shaw, Cambridge (Cambridge University Press) 2008 p. 591.

⁸¹ *Nicaragua v. Honduras* case, International Court of Justice, The Hague (2007), para. 287.

⁸² Barbara Janusz, Stiftung Wissenschaft und Politik, “The Caspian Sea Legal Status and Regime Problems”, Briefing Paper, The Royal Institute of International Affairs, 2005, p. 4.

Russia and Kazakhstan signed a bilateral agreement, where parties agreed to delimit with the median line the seabed of their sectors in the north of the Caspian Sea, leaving the water surface for common use.⁸³ Russia and Kazakhstan defined in their Agreement of 1998 their rights and jurisdiction over their sectors:

“The seabed of the northern part of the Caspian Sea and the subsoil thereof, without prejudice to the continued common use of the water’s surface, including protection of the freedom of navigation, agreed fishing quotas and environmental protection, shall be delimited between the Parties along a median line adjusted on the basis of the principle of justice and the agreement of the Parties. The adjusted median line includes sectors that are not the same distance from the baselines and are determined by taking account of islands and geological features, as well as other circumstances and geological expenditure incurred.”⁸⁴

The parties agreed on sovereign rights for the exploitation of the resources of the seabed in their sectors (Article 2 of the Agreement). Article 5 deals with the freedom of navigation and overflight. This freedom is available only to Russia and Kazakhstan, as parties clearly established in the agreement that questions related to navigation shall be regulated by separate bilateral agreement. Other littoral states can also navigate in the sectors of Kazakhstan and Russia in case of signing relevant agreement (Article 5 of the Agreement).

In 2001, Russia signed the similar agreement with Azerbaijan. On the same principle the Caspian Sea is divided between Russia and Azerbaijan, Kazakhstan and Azerbaijan. On the northern part the Caspian states have sovereign rights to explore the resources of the Caspian.

Neither Iran nor Turkmenistan has established official water borders in the Caspian Sea with other littoral states. Although they exploit the natural resources in their sectors, they just did not officially delineated and demarcated their zones. Both Iran and Turkmenistan have disputes with Azerbaijan over oilfields that are located between them. Whose sovereignty would be over these oilfields depend on how the equidistant line would lie. While the Caspian Sea is not delimited between Azerbaijan and Turkmenistan both states agreed not to held any

⁸³ The Agreement 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 signed by the President of Russia and Kazakhstan, July 6, 1998.

⁸⁴ The 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, Moscow 6 July 1998.

works over the disputed oilfield Kyapaz (Turkmen Serdar). Iran pretending to 20 % share of the Caspian has overlapping claims with Azerbaijan over oilfield Sardar.

The practice of littoral states in regard to the Caspian Sea shows that they do not will to open the Caspian for the third states, except Kazakhstan which claims a right to access to the ports of the Baltic Sea.⁸⁵ Although the Caspian is open for the riparian states, non-riparian states don't have an access to the Sea. For instance, Lake Chad is also open only for four littoral states, which have sovereign rights over the Lake⁸⁶. The right to decide whether to open a lake to the third states or not is derived from the sovereign rights of the states. The only connection with the open sea the Caspian Sea has through the Volga River which is under Russian sovereign control. Therefore if some of the littoral states want an access to the open sea, it is necessary to convince Russia to conclude relevant agreements on giving an access to the Volga River. On the other hand, even if the littoral States would convince Russia to open the Volga River for them to have an access to the high seas, it would not necessarily mean that third states have an access to the Caspian Sea. Russia could give an access to the Volga River to the Caspian states on the basis of Article 69 of the LOS Convention which is ratified by Russia. But as Russia is not recognizing the Caspian Sea as a sea, there is no binding obligation for Russia to open the Caspian Sea for the third states. Russia has official view on the issues regarding the Caspian Sea addressed to the Secretary-General of the UN. In 1994 Russia stated: "The Caspian Sea lacks a natural link to the world's ocean and seas and is thus a land-locked body of water. The norms of international maritime law, particularly those pertaining to a territorial sea, exclusive economic zone and continental shelf, are not applicable to it. There is thus no basis for unilateral claims relating to the establishment of zones of this type in the Caspian or for the introduction of elements of their regime".⁸⁷ Later, in 1996 Russia changed its position suggesting to divide the Caspian into national sectors with 45-miles zone from the coast with exclusive jurisdiction of littoral state, 10-miles zone for fishing and leaving the middle of the Sea for joint utilization and development.⁸⁸ Russia sticks the position that the Caspian Sea is a lake. It is more convenient to regulate it, as there are no any international treaty rules that states have to follow in this case. Obviously Russia is not willing to consider the Caspian as a "sea". The "sea" approach is disadvantageous for

⁸⁵ The Position of Kazakhstan on the legal status of the Caspian Sea, 3 October 1997, A/52/424.

⁸⁶ The Convention relating to the Development of the Lake Chad Basin, N'Djamena, 22 May 1964, Article 3.

⁸⁷ The Position of the Russian Federation regarding the legal regime of the Caspian Sea (No. A/49/475, October 5, 1994).

⁸⁸ Syed Adnan Ali Shah, "GEOPOLITICS OF THE CASPIAN SEA REGION: A RUSSIAN PERSPECTIVE", 2002, http://www.issi.org.pk/old-site/ss_Detail.php?dataId=192 (last visited on 3 August 2012).

Russian government. Recognizing the Caspian as a sea, Russia would have to open the Caspian Sea for the third states and the Volga River would be an international navigational waterway. For the political and security reasons Russia hardly will accept this concept.

Azerbaijan is the only state, which from the beginning of its independent international activity was against any common usage of the Caspian Sea. It has strong position that the Caspian should be divided into national sectors with the median lines. In the Azerbaijan's draft convention on the Caspian Sea it is indicated that "the Caspian is a "border lake" that is to be divided into national sectors applying the regime of internal water basins, like in cases of several African and North-American border lakes".⁸⁹ Azerbaijan proclaimed in Art. 11 of its Constitution of 1995: "The Azerbaijan Republic territory shall include (...) the Caspian Sea (Lake) sector relating to the Azerbaijan Republic, (...)".

Azerbaijan keeps the position that the Caspian Sea is a lake without the outlet to the ocean, which shall be divided with an equidistant line; all littoral states have sovereign right to water, seabed and its resources. Azerbaijan develops numerous oilfields, which are situated near its coast and far from it. In fact it is also can apply the concept of the Caspian Sea as a "sea". Even if the Caspian Sea was divided into sections with the territorial sea and the exclusive economic zone by equidistant line, states would have the same shapes of the sectors. The difference would concern only rights and obligations of the coastal and third states in regard to navigation, use of the natural resources of the seabed, protection and preservation of marine biodiversity.

Customary law does not have a solution to all legal questions arising around the Caspian Sea, which states could apply in the dispute with the Caspian Sea. International law can give just directions how to resolve the dispute and states have a task to negotiate in good faith in order to reach equitable result. As there are rules of the customary law covering regulation of international lakes and there are the LOSC does not provide with regulations in connection to legal regime of lakes states should cooperate when dealing with international lakes. Notwithstanding that there is no agreement between the littoral states over the final delimitation on the Caspian Sea; it does not mean that they can not held activities in the part of the Sea under their jurisdiction.⁹⁰

⁸⁹ Ibid. p. 207.

⁹⁰ *Lac Lanoux Arbitration* (Spain v. France), Judgement of 16 November 1957, UN Reports of International Arbitral Awards, Vol.12, p.281.

3.4. Comparison of the law of the sea and international customary law in relation to applicability to the Caspian Sea.

In this part of the thesis I am going to compare the customary law and law of the sea in relation to the status of the Caspian Sea, littoral states' rights and obligations, transportation and navigation. I would like to discuss what the customary law and law of the sea have in common in these issues, and what their differences are.

Both the law of the sea and the customary law contains rule of equidistant line, which is applied in delimitation process. It is obvious that each case of delimitation dispute is unique and demands individual approach. The northern Caspian states have begun to delimit the Sea with the median line giving full effect to the islands. Applying this method on the basis of either customary law or the law of the sea, states should attend during delimitation to factors that could influence on the location of the equidistant line, such as geographical factors which include presence of islands or peninsulas in order to reach just result. But it is not always taking into consideration islands and peninsulas could lead to the just result. For instance aforementioned dispute between Azerbaijan and Turkmenistan could result in unfair consequences. The point is that if parties would apply equidistant line taking into account the Azeri island, two (Chirag and Azeri) of the three disputed oilfields would be under Azerbaijani sovereignty, when they are located on the distance of 82 miles, 73 miles and 65 miles from Turkmenistan and on the distance of 92 miles, 100 miles and 115 miles from the coast of the Azerbaijan respectively.⁹¹ The most distant from Azerbaijan oilfield Kyapaz would be on the boundary of parties' sectors.

The difference of application of either law of the sea or customary law may be expressed in rights and obligation of littoral states, their sovereignty over the Caspian Sea, access of third states to the Sea.

Rights and obligations of the littoral states in regard to transportation and navigation depend on what legal status the Caspian Sea has. Both the Law of the Sea Convention and customary international law has different approaches to the questions of transportation and navigation. The main difference is that littoral states have sovereignty over the whole national sectors, which have outer limits till median line if general international law is to be applied. The LOSC has different regimes for internal waters, territorial sea and the EEZ.

⁹¹ *A Diplomatic history of the Caspian Sea: treaties, diaries, and other stories*, Guive Mirfendereski; foreword by H.R. Chehabi, New York (PALGRAVE) 2001 p. 188.

If the Caspian is a sea, then states will apply the LOSC, which provides right of all states to lay submarine cables and pipelines in the EEZ. This right is conditional as the LOSC established that it must be compatible with the provisions of Part V of the Convention. Anyway third states shall comply with the laws and regulations of the coastal state (Art. 58, LOSC). The navigation issue is settled by the LOS Convention, which provides freedom of navigation for all states (Art. 90, LOSC), which opens the Caspian Sea for all states through Volga River.

If the Caspian is an international lake, littoral states will have absolute sovereignty over its national sectors. Any state that wants to lay pipeline will be bound to request a permission of littoral states, depending on under which national sectors will be laid a pipeline. The same is a situation with navigation. Only littoral states have a right to navigate in the Caspian Sea while it is considered as a lake. One of the main features of such rights is that littoral states usually navigate over the whole lake, not only within their national sectors. This practice stays unchanged because the USSR and Iran never granted to third state a right to navigate in the Caspian.

I discussed above that if states would apply the LOSC, they would have a right to claim internal waters, territorial sea and the EEZ. In this case they would have different jurisdiction that is applied to these zones according to the LOSC. In the internal waters states would have the same rights, obligations and jurisdiction as if they would apply the national sectors approach dividing a lake according to the customary law, i.e. they have absolute sovereignty in both cases. In the territorial sea states would have to provide the right of innocent passage for third states, while the customary law applying to the lakes does not have such a requirement because of the full sovereignty of the littoral states over the lake.

The main difference here is that the LOSC have necessary regulations regarding to the relationship between coastal states and third states, while in case of applying the customary law states would have to arrange all questions relating to criminal and civil jurisdiction in their national sectors in bilateral and multilateral agreements, as well as questions relating to navigation of military and government ships because it is necessary to define in what way the jurisdiction will be fulfilled in regard to other littoral states. There would be no third states except riparian states; therefore they need special regime applicable to all five states in the Caspian.

Conclusion

The main difficulty in the dispute over the Caspian Sea is that states failed to find a common approach to delimit the natural and biological resources that would satisfy the interests and rights of all states in equitable and just manner. During the first years after the break up of the Soviet Union littoral states expressed opposite views on how the Caspian Sea shall be delimited. As at present there are five states instead of two, it is necessary to show their conflicting views regarding the status of the Caspian and its delimitation.

Because of the high level of political influence of the dispute it is not easy to predict how states would negotiate. But a positive point is that the process over delimitation of the Caspian Sea has begun without military tensions in the northern part of the Caspian between littoral states: Russia, Kazakhstan and Azerbaijan. States managed to agree on essential provisions of utilizing the Caspian Sea. They delimited the seabed, dividing the natural resources and establishing its sovereign rights, what is preventing the disputes over hydrocarbon fields.

In the first chapter of the thesis the issues of Caspian Sea geographical features were revealed. For the better understanding of the dispute the question why the Caspian Sea region attracts the attention and interest of the littoral states is also investigated in this part. In 1994 Azerbaijan signed “the contract of the century” with the western company and from this moment the race for the natural resources of the Caspian Sea began. That was not the only problem because of the absence of the clear status of the Caspian Sea. Rushing for the riches of the Caspian Sea the littoral states paid less attention to the environment of the Sea. Sharp beginning of the industrial activity and bad control over the catches of the fish increased the environmental pollution of the Sea.

The second chapter is related to the Soviet-Iranian agreements of 1921 and 1940, where states declared all previous treaties of 1813 and 1828 null and void. The Treaty of 1921 regulated the issues of commercial navigation and trade. The USSR and Iran opened their ports for each other in the Caspian Sea. The Treaty of 1940 established the 10 mile fishing zone from their coasts. However, these treaties did not provide the border between parties in

the Caspian Sea, which as a result lead to discussions between Russia, Azerbaijan, Kazakhstan, Turkmenistan and Iran that they should not apply the treaties in the dispute over the status of the Caspian Sea. The USSR and Iran treated the Caspian Sea as a lake; never allowed third states navigate in there. However, they made activities in the Caspian independently from each other; therefore they did not treat it like a common area. As a consequence the claims of Russia and Iran that the treaties established a condominium regime in the Caspian Sea are groundless. Moreover, Russia changed its policy and concluded agreements with Kazakhstan and Azerbaijan on median line delimiting the northern part of the Caspian.

The questions of the legal status, principles of delimitation according to the law of the sea or general international law are discussed in the third chapter of the thesis. The legal status and legal regime are differentiated as legal status refers to questions of delimitation, establishing rights of the states on the particular parts of the Caspian. Legal status could not be changed as legal regime of the Sea. Legal regime provides rights and obligations in relation to the Sea and it can be changed if littoral states wish to do so.

The Law of the Sea Convention is considered in the way if littoral states would apply the regime provided by the Convention to the Caspian Sea if it was a sea. What rights states have over the zones of internal waters, territorial sea, the exclusive economic zone and how the regime EEZ would be settled as the Caspian Sea is not wider than 200 nm. The attention also was given to the Volga River system because if the Caspian Sea is a sea, the Volga River would become an international waterway.

The international customary law is considered in the chapter in case the Caspian Sea is a lake. Even the Caspian Sea is a lake the principle of median line should be applied as state practice and judicial cases show that this principle is widely extended. Some cases concerning the delimitation are mentioned in order to understand how the principle of equidistant line would be applied to the Caspian Sea. The process of delimitation according to modified median line has begun as Russia, Kazakhstan and Azerbaijan have already divided the northern part of the Caspian Sea signing bilateral and multilateral agreements.

To conclude the chapter the status according to the Law of the Sea Convention and international customary law are compared. The principle of delimitation would be the same in both cases if the LOSC or the customary law were applied, as both sources contains the principle of equidistance as starting point for delimitation in such disputes. The difference between the LOSC and the customary law is in the rights and obligation of the littoral states

and the availability of the Caspian Sea to the third states. In case the Caspian Sea is a sea, their rights, obligations and jurisdiction over the natural resources are regulated by the LOSC, and the third states have an access to the Caspian Sea and its resources. As opposite to the LOSC, under the customary law the sectors of the Caspian Sea and its natural and biological resources would be under the exclusive sovereignty of the littoral states. In this case the third states do not have an access to the Caspian.

The problems remained unresolved are concerning the dispute between Azerbaijan and Turkmenistan on the median line between their sectors. Notwithstanding the fact the states are not intending to consider the Caspian Sea as a sea, they should take as a starting point the relevant provisions of the LOSC in order to decide to draw the median line, in particular in question whether they should take into account the Azeri island Chilov or not. In case some oilfields remains in between the states they should establish joint activity and control over middle fields. This is the only obstacle that prevents Azerbaijan and Turkmenistan to conclude an agreement delimiting their sectors with the median line. In order to resolve the dispute on the Caspian Sea states have to rely on their practice and judicial practice in this field.

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Annex I

