

The Caspian Sea: Current Legal Problems

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1. Introduction

On September 20, 1994 Azerbaijan, one of the former constituent republics of the Soviet Union, signed an \$ 8 billion contract with an international consortium headed by "British Petroleum"¹ for the exploitation of certain oil fields in a part of the Caspian Sea claimed by Azerbaijan². This agreement provoked a strong reaction on the part of Russia, which denounced it as a unilateral attempt to change the legal status of the Caspian Sea and to achieve certain advantages at the expense of other coastal States. The Azerbaijan oil deal added new fuel to already existing tension between littoral States which at present have quite divergent views on how to use the Sea and its resources.

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¹ The thirty-year long project is expected to produce more than 500 million tons of oil and 55 billion cubic meters of petroleum gas. The consortium includes also the Azerbaijan State petroleum company, a number of American and other foreign corporations, and a Russian company "LUKoil". See: *Izvestia*, 21 September 1994; and "Oil Concerns Set \$ 8 Billion Accord with Azerbaijan", *International Herald Tribune*, 21 September 1994, at 1 and 6. In order to secure Iranian support of the deal Azerbaijan has offered a 5 percent share to Iran. However, the United States vigorously resisted its participation in the project and threatened to persuade American companies to leave the consortium if this happens. See: *Izvestia*, 26 January 1995. Eventually, Azerbaijan was compelled to exclude Iran from the consortium and to yield its share to Turkey, provoking strong Iranian opposition to the project. As the Minister of Foreign Affairs of Iran stated recently, "until the status of the Caspian Sea is defined, no State has a right to unilaterally exploit its resources". See: *Rossiyskaya Gazeta*, 26 April 1995.

² Some of these oil fields are located more than 100 kilometers from the coast of Azerbaijan.

The Caspian Sea is unique in many respects: environmental, economic, and geopolitical. It is the largest completely enclosed body of salt water in the world with a particularly fragile ecosystem, which has already suffered considerable damage due to extensive oil producing activities and pollution from land-based sources. A constant and significant increase in the sea level over the last several years poses an additional, and very serious, environmental problem.

The enormous oil and gas deposits contained in the Caspian Sea subsoil constitute a major, but not the only, reason for increased interest in the region. The Sea contains valuable fishery resources, including 90% of the world's stock of sturgeon. It also provides important transportation routes, connecting the European part of Russia, Transcaucasia and Central Asia.

Finally, the demise of the former Soviet Union dramatically changed the entire geopolitical situation in the region. Instead of two there are now five riparian States – Russia, Iran, Azerbaijan, Kazakhstan and Turkmenistan – sharing one of the richest natural resource areas of the world. In the past the USSR and Iran managed to avoid serious controversies while dealing with their common problems regarding the Caspian Sea. The recent emergence of a number of newly independent States has turned the Caspian Sea into a region of conflicting political and economic interests and influences.

The present legal regime of the Caspian Sea, which is based on the Soviet-Iranian agreements concluded more than 50 years ago, is no longer sufficient to deal with the host of complex political, economic and environmental problems which exist in the area. In light of this situation there is an urgent need to create a new legal regime for the Caspian Sea which would settle decisively the following important questions: What is or should be the legal status of the Caspian Sea from the point of view of international law? Which States are entitled, and to what extent, to use the Sea and its natural resources? What legal principles should govern States' activities involving uses and exploitation of the Sea?

2. Natural Characteristics

The Caspian Sea is often referred to as “the greatest salt lake in the world”. However, according to Encyclopaedia Britannica, “it is not absolutely correct, as scientific studies have shown that, until geologically quite recent times, it was linked, via the Sea of Azov, the Black Sea, and the Mediterranean, to the world ocean. This factor has molded strongly

all aspects of its physical geography”³. It seems to be more accurate to regard the Caspian as an “inland sea”⁴.

The Caspian Sea is located between the Caucasian mountains on the west and the Central Asian deserts on the east. It presently occupies an area of more than 143,000 square miles (370,000 square kilometers), although its dimensions have varied over the centuries, with its surface lying below ocean level. It stretches over nearly 750 miles (1,200 kilometers) from north to south and its average width is about 200 miles (320 kilometers). More than 80 percent of the shoreline fell in the past within Soviet territory and are shared now by Azerbaijan, Russia, Kazakhstan and Turkmenistan; the remainder (in the south) belongs to Iran.

Based on the geomorphological and hydrological characteristics the Sea can be divided into the North, Middle, and South Caspian. The North Caspian is the most shallow part of the Sea, with average depths of 4 to 6 meters. The Middle Caspian is mostly a shelf area with depths up to 100–150 meters. The South Caspian consists mainly of a depression, which covers about one-third of the Sea and has a maximum depth of 1000 meters.

Three major rivers – the Volga and Terek (from Russia), and Ural (from Russia and Kazakhstan) – flow into the North Caspian, bringing with their waters a considerable amount of pollution. Almost 80% of the water which enters the Sea comes from the Volga river. The catchment area of the Caspian Sea comprises also the Araks river which has its out-spring in Turkey. The Araks then becomes the border first between Turkey and Armenia, then between Armenia and Iran, and finally between Iran and Azerbaijan before it joins the Kura river – which has its out-spring in Georgia – and runs into the Caspian Sea.

The coastal waters of the Caspian Sea are polluted with oil, phenols, ammonium and other substances. This pollution comes primarily from land-based sources and oil fields. Suffice it to mention that in Baku, the capital of Azerbaijan, which produces almost half of the waste water of the country, 82% is discharged without treatment⁵.

³ The New Encyclopaedia Britannica, 15th edition, 1990, Vol. 14, 256.

⁴ The New Encyclopaedia Britannica, Micropaedia, 15th edition, Vol.II, Caspian Sea, 612. The FAO's Systematic Index qualifies the Caspian sea as the “inland sea” (see Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin, Legislative Study No. 34, Vol. II, FAO, Rome 1984, 287).

⁵ Integrated Water Management and Protection Project for the Caspian Sea and its Catchment Area. Situation Analysis and Project Proposal. WHO, European Centre for Environment and Health, July 1993, 5.

Another major environmental problem of the Caspian region is the increase of the water level of the Sea. This process started at the end of 1970's and, according to scientific estimates, will continue at least until 2005. Since 1977 the water level raised by 2 meters (from -29 to -27 below the global mean sea level), resulting in a general inundation and erosion of the Caspian coasts. The water level of the Caspian Sea is expected to rise to minus 25 meters over the next decades. This will result in the inundation of more than one million hectares of land. Almost one hundred thousand people would have to be moved away from the regions in danger⁶.

3. Historical Background

For more than two centuries the regime of the Caspian Sea remained the subject of bilateral relations between Iran (Persia) and the Russian Empire, later the Soviet Union. However, agreements signed by two States – which constitute the core of the present legal regime of the Sea – focused mainly on the issues of navigation and, to a lesser extent, fishing – the areas of primary interest to the then two coastal States⁷.

The Golestan Treaty (October 12, 1813) and the Turkomanchai Treaty (February 28, 1828), which followed Persian defeats in its two wars against Russia, subjected the Sea to almost complete Russian control. Persia, although retaining its right of commercial navigation, was barred from having its warships in the Caspian Sea. According to both Treaties the right to have a naval fleet in the Caspian Sea belonged exclusively to the Russian government⁸.

This situation existed until the Bolshevik revolution in Russia in 1917 when the new Soviet government, motivated by its hostility to the “heritage of the Tsarist regime”, renounced some of Russia's rights and privileges with respect to its neighbors. The Treaty of Friendship between

⁶ Ibid., 9.

⁷ The Treaty of Resht (February 13, 1729) between Russia and Persia on the demarcation and cession of certain territories, provided for freedom of commerce and navigation (Art.8) in the Caspian Sea and the Araks and Kura rivers. C. Parry, *The Consolidated Treaty Series*, New York 1969 (1648–1919).

⁸ Article 5 of the 1813 Golestan Treaty and Article 8 of the 1828 Turkomanchai Treaty. See G.F. Martens, *Nouveau recueil de traités ... depuis 1808 jusqu'à présent*. Gottingue 1817–1842, vol. 7, 564. According to one commentary the Turkomanchai Treaty gives the impression that the sea was considered as a *mare nullius* reserved for the two adjacent States (see Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin, Legislative Study No. 15, FAO, Rome 1978, 34).

Soviet Russia and Iran (February 26, 1921) declared null and void all treaties, agreements, and concessions, which diminished the rights of the Persian people, concluded by the former Tsarist government with Persia⁹. The principle of equality of rights was established by the Treaty as the basis for bilateral relations between the two States.

Except for the restoration of Iran's equal right of navigation (Article 11), the 1921 Treaty did not specifically address the issue of the legal regime of the Caspian Sea, as both countries were preoccupied mostly with political stability in the post-World War I period. It was only in the 1930's that increased navigation and fishing in the Caspian Sea led to bilateral negotiations to develop, though not in detail, the legal framework for such activities through a number of accords, including the Treaty of Establishment, Commerce and Navigation between the USSR and Iran (August 27, 1935)¹⁰. Later this agreement was replaced by a similar one, the Treaty of Commerce and Navigation (March 25, 1940)¹¹.

The underlying principle of both documents, which determined all aspects of the utilization of the Sea and its resources, was the exclusivity of rights of coastal States. The Caspian Sea was "closed" to all third States and their nationals. The right of navigation in the Caspian Sea, both naval and commercial, was reserved exclusively for ships belonging to the USSR and Iran, or to their nationals and commercial and transport companies bearing the flag of either State. The notion of exclusivity went as far as, for example, not to allow nationals of third States to be included in the ship crews or personnel of ports¹².

⁹ Documenty vneshney politiki SSSR (Documents of the Foreign Policy of the USSR), Moscow 1959, 536.

¹⁰ 176 LNTS, 299. The Treaty replaced the Convention of Establishment, Commerce and Navigation (October 27, 1931) between the USSR and Iran. Convention reserved navigation and fishing rights in the Caspian Sea to vessels flying the Soviet or Iranian flag (Articles 16–17). See Documenty vneshney politiki SSSR (Documents of the Foreign Policy of the USSR), Moscow 1968, 603–604; British and Foreign State Papers, Foreign Office, London, vol. 134, 1026 (hereinafter BFSP).

¹¹ Sbornik deistvuyuschikh dogovorov, soglasheniy i konventsiy, zaklyuchyonnikh SSSR s inostrannymi gosudarstvami (Collection of treaties, agreements and conventions, concluded by the USSR with foreign States), vol. X, Moscow 1955, 56.

¹² According to Article 14 of the 1935 Treaty only nationals of the two Parties could be crew members on ships in the Caspian Sea. In an exchange of notes (October 1, 1927) Iran, "taking into consideration a mutual interest that the Caspian Sea remained exclusively Soviet-Persian", conceded to Russia's request that non-nationals of Iran shall not be hired (as officers, workers and contractors) at the Port Pahlavi (Iran) for a 25-year period (emphasis added). See Documenty vneshney politiki SSSR (Documents of the Foreign Policy of the USSR), Moscow 1965, 428–434. The same reference to the Caspian Sea as "Per-

Both States enjoyed the freedom to fish in all parts of the Caspian Sea, except within a 10-mile zone along the coast of their neighbor, which was reserved exclusively for that State's own fishing vessels. For a time, however, fishing in the southern part of the Sea beyond the 10-mile zone was carried out on the terms of a concession granted to a joint Soviet-Iranian company, which was established in 1927¹³. It acquired official status under a Soviet-Iranian agreement dated October 31, 1931, which confirmed its monopoly with respect to certain species of fish. The concession remained in force for 25 years and was terminated by Iran in 1953.

For historical and political reasons other activities in the Sea, including marine scientific research, oil and gas exploration, and drilling in the areas adjacent to their coasts, remained beyond the scope of bilateral regulations. The coastal States have never resolved the issue of delimitation of the Caspian Sea. The Russian-Persian land border was defined by the 1881 Border Commission¹⁴. It was confirmed, with minor changes relating to certain islands and settlements which were returned to Persia, by the 1921 Treaty. However, the boundary line in the Caspian Sea was never established by any bilateral arrangement but rather remained subject to unilateral assertions¹⁵ and theoretical debate¹⁶.

sian and Soviet" is contained also in The Notes of October 27, 1931 which accompany the 1931 Convention (see note 10, 612-613).

¹³ Agreement regarding the Exploitation of the Fisheries on the Southern Shore of the Caspian Sea, with Protocol, and Exchange of Notes (October 1, 1927), 112 LNTS, 297.

¹⁴ The Commission was established under a Convention on the Regulation of the Boundary to the East of the Caspian Sea (December 9, 1881) between Russia and Persia. See G.F. Martens, *Recueil de traités... depuis 1761 jusqu'à présent*, 2 édition revue et augmentée, Gottingue 1817-1835, vol.3, 332.

¹⁵ The delimitation line on the Caspian Sea as a continuation of the terrestrial border between Astara and Hoseinqoli was established unilaterally by the Order No 3 of the NKVD (Soviet Ministry of Internal Affairs) in 1935 but has never been recognized by Iran as the Soviet-Iranian border.

¹⁶ According to one Iranian author "in 'amateurish' interpretation of the Caspian Sea issues, some have tended to link the two land borders from Astara to Husseinqli in the east, calling it the imaginary border of the two countries, while no border line has been demarcated for the two countries in the Caspian Sea", M.-R. Dabiri, "A New Approach to the Legal Regime of the Caspian Sea as a Basis for Peace and Development", *The Iranian Journal of International Affairs*, Spring 1994, 32. Another Iranian author, comparing the Caspian Sea with Lake Major, asserts that: "la démarcation la plus rationnelle, pour cette mer, nous paraît comme pour la lac Majeur, être la ligne médiane sur laquelle seront menées des perpendiculaires des frontières côtières 145/0 et 144/0, la portion sud appartenants à l'Iran et l'autre partie à l'URSS", A. Dowlatchahi, *La mer Caspienne, sa situation au regard du droit international*, Paris 1961, 49.

Existing international instruments do not provide an exact definition of the Caspian Sea's legal status. Some authors find an indication of the coastal States' approach to this issue in the Exchange of Notes between the USSR and Iran at the time of the conclusion of the 1931, 1935 and 1940 Treaties. In these documents the Caspian Sea was repeatedly referred to as "the Soviet and Persian (Iranian) Sea". While this wording can be regarded as merely a political declaration reflecting the special interests of the coastal States, some authors consider it as sufficient basis to maintain a particular legal status of the Sea¹⁷.

It is clear that the Caspian Sea and its resources have remained the exclusive domain of its coastal States. This situation was accepted by other States and acknowledged by international legal doctrine¹⁸. However, in the absence of a definitive conventional determination of the legal regime of the Caspian Sea its legal status will continue to be the subject of scientific speculations. For the sake of theoretical clarity it is necessary to consider the Caspian Sea through the prism of the existing relevant international legal regimes: enclosed seas and international lakes.

*4. Theoretical Background: Enclosed Seas and International Lakes*¹⁹

The threshold question in this type of situation is whether the particular body of water is a lake, or enclosed or semi-enclosed sea. The identification of the type of water resource will determine what area of law it is to be regulated by. For example, enclosed (and semi-enclosed) seas are regulated by the international law of the sea. By contrast, the utilization of the waters of international lakes (and rivers) is governed, in large part, by the international law relating to the non-navigational uses of interna-

¹⁷ M.-R. Dabiri, noting that "the Caspian Sea has always had a *sui generis* legal status", practically equates it to a *condominium*: "the letter and spirit of agreements reached between Iran and the former Soviet Union legally specify the Caspian Sea as condominium", Dabiri (note 16), 32-37.

¹⁸ See, e.g., Ph. Pondaven, *Les lacs-frontière*, Paris 1972. W. Butler acknowledges this fact: "Soviet jurists regard the Caspian as a large lake which historically has been called a sea. General norms of international law relative to the high seas, to vessels and their crews sailing on the high seas do not extend to the Caspian, whose regime is governed by Soviet-Iranian treaties and agreements", W.E. Butler, "The Soviet Union and the Continental Shelf", Notes and comments, 63 *American Journal of International Law* 1969, 106.

¹⁹ Part 3 of this paper is based mainly on the unpublished report by S. Vinogradov and P. Wouters, "The Legal Regime of Enclosed Seas and International Lakes", Geneva 1994.

tional watercourses. The rules relating to delimitation and navigational rights are equally determined by the classification of the water resource. Thus the first question to be addressed relates to classification.

The qualification of a body of water as an enclosed or semi-enclosed sea or lake depends primarily on the following geographical criteria: (i) whether the particular water resource has a direct outlet connecting it with a sea or an ocean; (ii) whether the body of water is at an altitude different from that of sea level.

a) Enclosed seas: legal regime

The concept of enclosed and semi-enclosed seas is not new in the doctrine of international law. While this notion emerged long before the Third United Nations Conference on the Law of the Sea, it has undergone serious changes since its inception. The 1982 UN Convention on the Law of the Sea, as well as recent developments in State practice, have given new meaning to these maritime areas. Legally and politically they now form the main geo-political basis for regional cooperation of coastal States in such fields as economic development, marine environment protection, fishery resources management, and so forth. The number of enclosed or semi-enclosed seas is considerable enough, including such strategically and economically important maritime areas as the Barents, Baltic, Black, Red, Mediterranean, and South China Seas, as well as the Persian Gulf.

Originally, legal scholars differentiated between these two categories of water bodies based primarily on geographical criterion²⁰. According to geographers "an 'enclosed' sea has no outlet through which to drain, witness the Caspian and the Aral Seas"²¹. Ph. Pondaven followed this same approach in distinguishing between enclosed and semi-enclosed seas²².

²⁰ A. Gervais and G. Fouilloux defined them as follows: "Les mers fermées sont entièrement situées à l'intérieur des terres, sans communications avec une autre mer", "les mers semi-fermées sont des mers à la fois isolées d'autres mers et reliées à celles-ci par des détroits de faible largeur" (Repertoire de droit international, Paris, t.69, 333, article "Mer").

²¹ L.M. Alexander, "The Management of Enclosed and Semi-enclosed Seas", in: E. Fabbri (ed.), *Ocean Management and Global Change*, London 1992, 539-49.

²² Pondaven concludes that "il convient d'abandonner la distinction entre lac et mer fermée pour assimiler... les mers fermées bordées par plusieurs riverains à des lacs-frontière, celles-ci se rangent naturellement dans la catégorie des lacs-frontière ne communiquant pas avec la mer libre" (note 18), 12-13.

However, the 1982 UNCLOS changed completely the historically prevailing legal meaning of the term “enclosed sea”. The UNCLOS does not distinguish between enclosed and semi-enclosed seas, but instead places them both into one general category. Article 122 of Part IX of the UNCLOS provides that “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”²³.

Thus, from a legal point of view there is no distinction between enclosed and semi-enclosed seas. Two criteria (geographic and legal) must be met to qualify a body of water for coverage by the provisions of Part IX: (i) it has to be connected to another sea or the ocean by a narrow outlet, and/or (ii) consist entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States. This can be construed as including even those marine areas, which, from a strictly geographical point of view, are not enclosed or semi-enclosed seas – i.e. not containing a narrow outlet. “*Apertis verbis* according to UNCLOS the category embracing both enclosed and semi-enclosed seas is potentially much wider than that identified through geographic criteria”²⁴.

The definition of Article 122 (UNCLOS) is “so worded as to arguably include relatively open water areas, such as the Coral or Barents Seas, which are covered primarily by their coastal States’ exclusive economic zones”²⁵. It can thus be maintained that both legally and politically all of these marine areas can be absorbed into a single legal category.

On the other hand, a distinction must be made between enclosed seas defined by Article 122 (UNCLOS) and the so-called “enclosed” seas or “quasi-seas” (such as the Caspian and the Aral Seas) which, despite some

²³ UNCLOS, The Law of the Sea: United Nations Convention on the Law of the Sea, United Nations, New York 1983.

²⁴ A. Vallega, “The Regional Scale of Ocean Management and Marine Region Building”, 24 *Ocean and Coastal Management* 1994, 23.

²⁵ Alexander (note 21). According to Alexander, “the water body may be over 90 per cent enclosed, as in the case of the Black and Mediterranean Seas, in which situation the flushing action will be extremely slow. Conversely, a semi-enclosed sea may have a broad connection with a larger water body. In the case of the Bay of Bengal, for example, there is a 700-mile opening into the Indian Ocean, between Sri Lanka and Thailand”. Alexander argues that marine bodies “in which 95 per cent or more of the periphery is occupied by land” can be considered as an enclosed sea. He also proposes that “in order to qualify as a semi-enclosed sea approximately 50 per cent of the periphery should be occupied by land” (ibid.).

of their natural characteristics (i.e., dimensions and salinity) do not fall within the former category. They have no connection with the ocean and sometimes are regarded as lakes. However, due to specific geographical, political and historical circumstances, their legal regimes differ from that of most other international lakes and thus deserve special consideration.

As the legal regime of enclosed and semi-enclosed seas is part of the international law of the sea, all activities within these maritime areas (such as navigation, marine scientific research, exploration and exploitation of marine natural resources, etc.) are governed primarily by the principles and rules contained in the 1982 UNCLOS, as well as other relevant international instruments. Article 123 (UNCLOS), however, acknowledges the particular character of this category of maritime areas and urges coastal States to cooperate with each other in the management, conservation, marine environmental protection, scientific research, exploration and exploitation of living resources thereof. Importantly, the UNCLOS does not go beyond mere recommendations in this regard and thus imposes no substantive obligations upon coastal States.

Most of the current legal issues concerning enclosed and semi-enclosed seas arise from economic development and pollution problems. These have become the focus of extensive international cooperation, especially within the context of the marine regions concept²⁶. Management of the oceans and their natural resources on a regional level is based legally on the relevant provisions of the UNCLOS (Articles 63, 66, 118, 122, 123, 197, 276, 277, and 282).

Delimitation remains one of the most complicated problems and has a great potential for leading to future international controversies and conflicts²⁷. This is particularly the case where unresolved delimitation questions are aggravated by overlapping unilaterally-asserted territorial claims

²⁶ See, e.g., J. Morgan, "The Marine Region", 24 *Ocean & Coastal Management* 1994, 51-70; Vallega (note 24).

²⁷ See, e.g., S. Sharma, *Delimitation of Land and Sea Boundaries Between Neighboring States*, New Delhi 1989; B. Oxman, "Drawing Lines in the Sea", 18 *Yale Journal of International Law* 1993, 663-74; J. Gilas, "Equitable Principles of the Delimitation of the Continental Shelf", XIX *Polish Yearbook of International Law* 1991-1992, 61-69; H. Chiu, "The Problem of Delimiting the Maritime Boundary between the Exclusive Economic Zone and the Continental Shelf of Opposite States", in: *Essays in Honour of Wang Tieya*, 1994.

with respect to the areas rich in marine living and mineral resources (as in the situation with the Aegean Sea²⁸ and the South China Sea²⁹).

Currently there exist significant treaty and judicial practice, as well as the substantive provisions of the UNCLOS (Article 74 – regarding the EEZ, and Article 83(1) – regarding the Continental Shelf), which govern delimitation of maritime areas, including those in enclosed and semi-enclosed seas³⁰. However, there exists no single and generally recognized method of delimitation. The 1982 UNCLOS formula that delimitation shall be effected by agreement in accordance with equitable principles has gained general acceptance as a basic rule³¹.

b) International lakes: legal regime³²

The legal regime of international lakes differs from that of enclosed seas and is closely linked to the notion of the sovereignty of coastal States. Unlike the law of the sea there exist no conventional legal rules, nor uniform State practice, which govern all aspects of activities with respect to international lakes and their resources. The legal regimes of international lakes vary significantly and are based primarily on specific international agreements.

The most important legal issues relating to international lakes are: (i) the delimitation of their boundaries; (ii) if the lakes are navigable, the rules governing navigation; and (iii) the rules governing the non-navigational uses of their waters.

²⁸ See N. Poulantzas, "The New International Law of the Sea and the Legal Status of the Aegean Sea", 44 *Revue hellénique de droit international* 1991, 251–72.

²⁹ Z. Gao, "The South China Sea: From Conflict to Cooperation", 25 *Ocean Development & International Law* 1994, 345–59; Y. Hui, "Joint Development of Mineral Resources – An Asian Solution?", 2 *Asian Yearbook of International Law* 1991, 87–112.

³⁰ For a comprehensive analysis of existing State practice in the area of maritime delimitation see the most fundamental recent legal treatise on this issue *International Maritime Boundaries*, (J.I. Charney & L. M. Alexander eds.), Vols. I & II, Dordrecht 1993.

³¹ G. Jaenicke, "North Sea Continental Shelf Case", in R. Bernhardt (ed.), *Encyclopedia of Public International Law (EPIL)*, Instalment 2, 205–208, at 208.

³² Among the most important international lakes: Lake Albert (Uganda-Zaire); Lake Chad (Cameroon-Chad-Niger-Nigeria); Lake Constance (Austria-Germany-Switzerland); Lake Geneva (France-Switzerland); the Great Lakes (comprising 5 individual but connected lakes shared between Canada-United States); Lake Lugano (Italy-Switzerland); Lake Malawi (Malawi-Mozambique-Tanzania); Lake Tanganyika (Burundi-Ruanda-Tanzania-Zaire-Zambia); Lake Titicaca (Bolivia-Peru); Lake Victoria (Kenya-Uganda-Tanzania). See the important study by Pondaven (note 18), 432–438, which contains a list of some 65 international lakes.

The rules governing the delimitation (and demarcation) of the boundaries of an international lake are not universally accepted. Although State practice has varied on this issue, the prevailing view is that all States bordering an international lake are entitled to a share of it. Where the lake is successive, the boundary generally follows the terrestrial border. In the case of contiguous lakes, the respective parts are generally determined through the use of a median line³³, but there have been significant exceptions to this rule. For example, Lake Constance, which is bordered by Austria, Germany and Switzerland has yet to be fully delimited. Only Germany and Switzerland have agreed to a boundary line – but this relates solely to the *Untersee*, one of the three parts of the Lake. As to the largest part of the Lake, the *Obersee*, the parties have been unable to come to the agreement on which principles should govern its delimitation. Austria maintains that this part of the Lake should be shared by all three riparians as a *condominium*; Switzerland contends that the median line should be used for the delimitation; and Germany has not taken any official position³⁴.

Methods other than the median line which have been used to delimit international lakes include the use of astronomical straight lines (in the case of Lake Victoria), and a combination of astronomical and geographical reference points (Lake Chad)³⁵.

In summary, the delimitation of international lakes is not at present governed by an established set of rules, nor are there universally accepted customary norms based on uniform State practice. Thus it remains an area in which potential controversies may arise³⁶.

³³ The actual determination of the median line varies with practice. Calculations for median lines may be based on measurements commencing from the banks of the lake, or on transversals traced in circles drawn along the course of the lake. See L. Caflisch, "Règles générales du droit des cours d'eau internationaux", 219 *Recueil des cours de l'Académie de droit international* 1989-VII, 113–225, 95–99. See also G. Marston, "Boundary Waters", in R. Bernhardt (ed.), *EPIL*, Instalment 10, 29.

³⁴ J. A. Frowein, "Lake Constance", in R. Bernhardt (ed.), *EPIL*, Instalment 12, 216–219, at 216.

³⁵ See P.H. Sand, "Development of International Water Law in the Lake Chad Basin", 34 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1974, 52–82, at 70. See additional examples in Caflisch (note 33), 98–99.

³⁶ Where States enjoy friendly relations, the international lake may indeed remain undelimited. This is the case of Lake Constance where most matters, except international boundary, have been regulated by treaty. However, some issues may arise even between friendly States. Clearly, different situations may occur where riparian States are unfriendly. In such cases border controversies could well pose a threat to international peace.

Navigation on international lakes is another area of law which is not entirely settled³⁷. While freedom of navigation was promoted by the League of Nations 1921 Barcelona Convention³⁸, not all States have adopted this notion. At a minimum one can say that State practice supports the view that the States bordering a navigable lake are entitled to freely navigate on the entire lake – recognition of the principle of the “community of interests” that riparians have³⁹.

An issue arises where non-riparian States want to navigate the waterway; despite the State practice in Europe and North America which recognizes generally the principle of freedom of navigation for all, most other States have been reluctant to accept such a position, even in a situation where their former colonial powers had “internationalized” navigation on certain rivers and lakes. In the case of Lake Chad, for example, the 1964 Convention and Statute relating to the Development of the Chad Basin, declares the basin open to the four riparians only⁴⁰. It would appear, however, that most States have regulated navigational issues by treaty.

The rules of international law relating to the non-navigational uses of international watercourses have recently been codified (and progressively developed) by the United Nations’ International Law Commission (ILC). In July 1994, the ILC adopted on second (and final) reading Draft Articles and Commentaries on the Law of the Non-Navigational Uses of International Watercourses⁴¹. The ILC has now asked the General Assembly of the UN to convene a conference of plenipotentiaries to elaborate a general convention based on the Draft Articles.

Under the ILC Draft Articles, “international watercourse” is defined as “a watercourse, parts of which are situated in different States”⁴² and “watercourse” is defined as “a system of surface waters and ground wa-

³⁷ For history and development of navigation with respect to international waterways, see Caflisch (note 33), at 37–42, 104–132. See also ILA Helsinki Rules, Chapter 4, Articles XII–XX (note 45).

³⁸ Convention and Statute on the Regime of Navigable Waterways of International Concern, Barcelona 1921, League of Nations Treaty Series 7, at 35.

³⁹ “Territorial Jurisdiction of the River Oder Commission”, Permanent Court of International Justice, series A, no. 23 (1929).

⁴⁰ Sand (note 35).

⁴¹ Draft Articles and Commentaries on the Law of the Non-Navigational Uses of International Watercourses, adopted on Second Reading by the ILC at its Forty-sixth Session, U.N. Doc. A/CN.4/L.493 and Add.1 and Add.2 (July 12, 1994) [hereinafter ILC Draft Articles].

⁴² Article 2(a), ILC Draft Articles.

ters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus"⁴³. The "common terminus" requirement was not accepted unanimously by the Members of the Commission and a compromise led to the inclusion of the qualifier "normally". The definitional issue is an important one as it determines the scope of application of the Articles⁴⁴.

The International Law Association (ILA) in its codification project, the 1966 Helsinki Rules⁴⁵, adopted the term "international drainage basin"⁴⁶. The Institute of International Law (Institut de droit international, IDI) used the term "hydrographic basin" in their Salzburg Resolution of 1961⁴⁷.

The substantive principles relating to the non-navigational uses of international watercourses common to each of the foregoing codification projects are: (i) that watercourse States are entitled to use the waters of an international watercourse in an equitable and reasonable manner (equitable utilization rule), (ii) in such a way as not to cause significant harm to other watercourse States (no harm rule)⁴⁸. To achieve such ends, States are obliged to observe the procedural duties of notification, negotiation, and, possibly, cooperation⁴⁹.

Some controversy has arisen over which principle, "equitable utilization" or "no harm", governs where a conflict of uses arises between riparian States competing for limited water resources insufficient to meet all

⁴³ Article 2(b), ILC Draft Articles. Article 2(c) defines "watercourse State" as "a State in whose territory part of an international watercourse is situated".

⁴⁴ See the history of controversy in the ILC and the Sixth Committee of the UN over the resolution of this definition discussed in J.L. Wescoat, Jr., "Beyond the River Basin: The Changing Geography of International Water Problems and International Watercourse Law", *Doman Colloquium on the Law of International Watercourses*, 3 *Colorado Journal of International Environmental Law and Policy* 1992, 301-330.

⁴⁵ Helsinki Rules on the Uses of the Waters of International Rivers, ILA, Report of the Fifty-Second Conference, Helsinki 1966, 484-532.

⁴⁶ Article 2, Helsinki Rules.

⁴⁷ Salzburg Resolution on the Utilization of Non-maritime International Waters (Except for Navigation), 49-II *Annuaire de l'Institut de droit international*, 381-84 (1961), Article 1.

⁴⁸ The no harm rule generally contains a threshold qualifier such as "appreciable", "significant" or "substantial". The ILC has adopted a "no significant harm" rule based on a duty of due diligence. See Article 7, ILC Draft Articles. A recent multilateral convention has adopted a "no adverse transboundary impact" approach; however its Article 1(2) defines transboundary impact as "any significant adverse affect", see *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, Helsinki, March 17, 1992, 31 *International Legal Materials* 1992, 1312-1329.

⁴⁹ See Articles 8-19, ILC Draft Articles.

needs. The significance of this issue is readily apparent in the case of pollution: is pollution harm to be permitted under the equitable utilization rule, or vetoed automatically under the no harm rule⁵⁰? With environmental concerns growing in importance, the related issues of pollution harm, and protection and preservation of the aquatic environment of international waterways, are becoming key issues in international watercourse management⁵¹. Witness the series of water quality agreements concerning the Great Lakes shared by Canada and the United States. An independent bilateral commission (the International Joint Commission established under the 1909 Boundary Waters Treaty) plays an important role in establishing and monitoring the water quality of the Great Lakes⁵².

But what rules govern such issues where States have not concluded agreements or established international commissions to address such problems? The rules and guidelines presented by the ILC and ILA are inconsistent on the important issue of pollution (and other) harm, and this could lead to many potential problems in the future⁵³. That the fundamental principles governing the allocation of the non-navigational uses of international lakes (and rivers) remain unclear increases the possibility of international conflicts.

c) The Caspian Sea: enclosed sea or international lake?

The Caspian Sea with no direct outlet to another sea or the ocean cannot be qualified as an enclosed sea as defined by the 1982 UNCLOS. The only link of the Caspian Sea to other maritime areas is via a system of artificial canals that connects the Volga river (which flows into the Caspian Sea) to other rivers which eventually empty into the Black or Baltic Seas. Consequently, the rules of the international law of the sea do not

⁵⁰ Article 21, ILC Draft Articles; Article XX, Helsinki Rules.

⁵¹ S.C. McCaffrey, "The Law of International Watercourses: Present Problems, Future Trends", in A. Kiss/F. Burhenne-Guilmin (eds.), *A Law for the Environment. Essays in Honour of Wolfgang E. Burhenne*, IUCN, 1994, 113–120.

⁵² On Canada-United States international lakes and rivers, see P. Wouters, "Allocation of the Non-Navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States," 30 *Canadian Yearbook of International Law* 1992, 43–88.

⁵³ L. Caflisch, "*Sic utere tuo ut alienum non laedas*: Règle prioritaire ou élément servant à mesurer le droit de participation équitable et raisonnable à l'utilisation d'un cours d'eau international?", in: *Internationales Recht auf See und Binnengewässern. Festschrift für Walter Müller*, 27–47 (1992).

automatically apply to the Caspian Sea. Coastal States are free, nevertheless, to apply these rules in their conventional arrangements regarding this body of water.

On the other hand, one cannot readily qualify the Caspian Sea as an international lake⁵⁴. Such unique factors as its geophysical characteristics (e.g. salinity), dimensions (the Caspian Sea is five times larger than the world's second largest lake, Lake Superior, and bigger than the Persian Gulf and the Oman Sea together)⁵⁵, numerous living and mineral resources, and its active use for navigation, call into question the applicability of traditional "international lake" law approaches, such as partition between riparian States. Once again, coastal States might elect to employ rules applicable to international watercourses, including lakes, in the settlement of the legal regime of the Caspian Sea.

The most promising solution would be to create a special regime for the Sea through a general framework treaty defining its legal status (addressing specifically the issues of the territorial extent and substantive scope of sovereign rights of coastal States) and accompanied by a number of specific agreements on particular issues (navigation, protection of the environment, conservation and the use of biological resources, exploitation of the mineral resources of the sea-bed). This regime could be based on a combination of certain rules from the law of the sea and the law of international watercourses. Of particular relevance in this respect are also the UNEP principles on shared natural resources of 1979⁵⁶.

5. Recent Developments

Multilateral and bilateral negotiations between the five Caspian States, which started soon after the demise of the former Soviet Union, have revealed a great divergence of views on the future legal regime of the Sea:

⁵⁴ According to the opinion of the expert of the Intergovernmental Oceanographic Commission, UNESCO, "from oceanographic point of view (composition of water, fauna, flora) the Caspian Sea should be considered as a sea. In fact the Caspian Sea is a relict marine basin". (Minutes of the Meeting on Cooperation of UN Organizations in the Caspian Sea Initiative, 17 January 1995, Geneva, at 5).

⁵⁵ Dabiri (note 16), at 33.

⁵⁶ UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, in 17 International Legal Materials 1978, 1097. UN General Assembly Resolution 34/186 of 18 December 1979 requested all States "to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States ...".

from suggestions for the establishment of a *condominium* to the Sea's complete division by the coastal States.

The most alarming tendency, which might well undermine efforts to find a compromise acceptable to all interested parties, is the attempt on the part of some coastal States to unilaterally extend their sovereign rights and jurisdiction over certain parts of the Caspian Sea which they claim belong to them. This is particularly the case of those countries that benefit from a long coastline and considerable deposits of mineral resources in the areas adjacent to their coasts.

Through enactment of the Law on the State Border in 1993 Turkmenistan was the first State to establish, according to the rules of the law of the sea, a territorial sea and exclusive economic zone, thereby extending its coastal jurisdiction over vast areas of the Caspian Sea. As was already noted above, Azerbaijan, despite persistent Russian objections, signed an agreement in September 1994 with an international consortium regarding exploitation of some oil fields in the Caspian Sea⁵⁷. Kazakhstan is now contemplating entering into a similar contract with another international consortium. Not only are these unilateral acts inconsistent with expected behavior of States involved in diplomatic negotiations, but they also violate international obligations and commitments of these States.

At present there is no legal "vacuum" in the Caspian Sea. The Soviet-Iranian treaties, which constitute the existing legal regime of the Caspian Sea, no matter how incomplete, are still in force for all coastal States. All former republics of the USSR, as successor States, are bound by the international obligations of the former Soviet Union. This was confirmed by the Declaration of Alma-Ata (December 21, 1991), wherein the participants of the Commonwealth of Independent States undertook to fulfil all

⁵⁷ The Russian standpoint with respect to the legal status of the Caspian Sea and its natural resources, and current legal and political situation in the region was spelled out in a letter "Position of the Russian Federation regarding the legal regime of the Caspian Sea", addressed to the UN Secretary-General (A/49/475, 5 October 1994). The document stipulates, *inter alia*, that "the Caspian Sea and its resources are of vital importance to all the States bordering on it. For this reason, all utilization of the Caspian Sea, in particular the development of the mineral resources of the Caspian seabed and the rational use of its living resources ... must be the subject of concerted action on the part of all States bordering the Caspian ...". The document concludes in a very strong wording: "Unilateral action in respect of the Caspian Sea is unlawful and will not be recognized by the Russian Federation, which reserves the right to take such measures as it deems necessary and whenever it deems appropriate, to restore the legal order and overcome the consequences of unilateral actions. Full responsibility for these events, including major material damage, rests with those who undertake unilateral action and thereby display their disregard for the legal nature of the Caspian Sea and for their obligations under international agreements".

international obligations contained in the treaties and agreements concluded by the former Soviet Union.

The adherence to the principles of international law and the recognition of the ecological unity of the Caspian Sea was expressed in a Communiqué (October 14, 1993) adopted by the Conference on the problems of the Caspian Sea⁵⁸. The parties thereto acknowledged that “the comprehensive solution of the problem of rational utilization of the Caspian Sea requires the participation of all Caspian States”. Several areas of “joint activities” were defined, including protection of natural reserves and natural resources of the Caspian Sea; conservation, reproduction and optimal utilization of the biological resources; development of mineral resources with due account of economic interests of the Parties; determination of rational sea lanes with due account of environmental requirements; and control of the level of the Sea.

The controversial approach to this issue adopted by some of the coastal States is particularly evident in the context of the ongoing multilateral negotiations aimed at drafting a framework Treaty on Regional Cooperation in the Caspian Sea. The work on the Treaty was initiated at the Teheran Conference of Caspian States in 1992. The draft Treaty, prepared by Iran in consultation with other interested States, was completed in 1993. The draft is based on the notion of cooperation of Caspian States in the utilization of the Sea, which is regarded as a unique environmental system of particular importance to all coastal States. The draft provides for the establishment of a regional organization of Caspian States as an institutional framework for future activities, which decisions would be based on the principle of consensus. The draft Treaty rejects the idea of the partition of the Sea between coastal States, as well as any unilaterally-asserted territorial claims.

However, in December 1993 Azerbaijan prepared its own draft Convention, proposing to divide the entire Caspian Sea into sectors which would have a regime of internal waters. In practical terms this called for the complete partition of the Sea among the coastal States. A similar draft Convention on the Legal Status of the Caspian Sea was presented by Kazakhstan in August 1994. This approach was not approved by the other Caspian States. In its Note to the Ministry of Foreign Affairs of Azerbaijan (January 14, 1994) the Russian Foreign Ministry defined the

⁵⁸ The Conference, which took place in Astrakhan (Russia) in October 1993, was attended by the Heads of Governments of Azerbaijan, Kazakhstan, Russia and Turkmenistan.

Caspian Sea as an “enclosed intra-continental body of water”, which had always been the subject of joint utilization by riparian States. Its legal status could be developed through a number of agreements designed to regulate the particular uses of the Sea, based generally on the Treaty on Regional Cooperation. A number of agreements on such issues as environmental protection and conservation and rational utilization of biological resources of the Caspian Sea have already been drafted by the coastal States⁵⁹.

A meeting of the five coastal States, which was convened in Moscow in October 1994, was supposed to finalize the work on the draft Treaty. Following preliminary bilateral consultations conducted by Iran with all other coastal States, only a few questions of minor importance remained unresolved before the meeting. However, it became obvious at the meeting that Azerbaijan had reconsidered its position with respect to the Treaty, motivated primarily by the signing of its oil contract. According to its representative, the conclusion of the Treaty and creation of a regional organization were premature. Particularly unacceptable for Azerbaijan were the provisions of the draft Treaty stipulating that “the Caspian Sea is a subject of a joint utilization of the Caspian States” and calling for “coordination of approaches to the various aspects of activities in the Caspian Sea”.

The position of Azerbaijan was shared, although with greater flexibility, by Kazakhstan and Turkmenistan, which, nonetheless, participated in the final drafting of the Treaty at the meeting. Eventually, the draft was agreed to in principle by four coastal States and opposed by Azerbaijan. In view of the fact that all coastal States should agree on the final determination of the legal regime of the Caspian Sea, no decision on the signing of the Treaty was taken. As of the time of the writing of this

⁵⁹ The multilateral negotiations of the Caspian States held January, 30–February, 2, 1995 in Ashkhabad (Turkmenistan) considered a draft Agreement on the conservation and utilization of biological resources of the Caspian Sea. The only major issue which remained unresolved before the meeting was the extent of the exclusive fishing jurisdiction of coastal States; positions of the parties varied from 15 (Russia) and 25 (Kazakhstan) to 30 (Iran) and 40 (Azerbaijan and Turkmenistan) miles. Finally the four Caspian States: Iran, Kazakhstan, Russia and Turkmenistan adopted the final text of the Agreement and agreed on the 20-mile limit of the coastal States’ fishing zones. Azerbaijan remained the only State which refused to accept the Agreement. As was declared by its delegation, the Agreement predetermines the legal regime of the Caspian sea, and thus should be considered within the framework of the general Treaty.

paper, bilateral consultations between the interested States continue in the hope that an acceptable compromise can be reached⁶⁰.

6. Conclusions

The Caspian Sea is a unique geophysical and geopolitical phenomenon which requires a special international legal regime. The extant legal regime, which is based on the bilateral State practice of Russia (the USSR) and Iran, is not adequate to cope with today's political, economic and environmental problems. However, the underlying idea of the current regime – the Sea as the exclusive domain of coastal States and a community of their interests with respect to the uses and management of the Sea – can become the basis for a new regime. The Caspian Sea and its resources are of particular importance to all coastal States and have always been the subject of their joint utilization. One can even argue that there exists a regional custom based on the longstanding practice of coastal States which considered the Caspian Sea as their common resource. This custom can be changed only through the establishment of a new regime based on the agreement of all States concerned.

Neither division of the Sea between the Caspian States, nor the application of the concept of *condominium* seem to be acceptable to all coastal States. Unilateral claims and actions are not productive in resolving this complex issue. From the legal point of view such unilateral actions, despite persistent objections on the part of other coastal States, cannot change the existing legal regime of the Caspian Sea. Politically, such acts can negatively affect relations between coastal States and undermine the fragile political stability in the region.

⁶⁰ The summit of the presidents of Russia and Turkmenistan, which took place in May 1995 in Moscow, showed that the positions of two countries are getting closer. At the meeting the Russian president underlined the necessity of a common program for the utilization of the Caspian natural resources, biological and mineral. He stressed that "the Caspian Sea is a special inland sea, which cannot be divided". The Turkmenian president agreed that the Caspian Sea should not become a source of distrust or tension between coastal States. Both leaders saw a need to agree on a general legal status of the Sea, with due account taken of the interests of coastal States, prior to undertaking mineral resource development. See Rossiyskaya Gazeta, 19 May 1995.