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The Legal Definition of the Caspian Sea

La definición legal del Mar Caspio

La definition legale de la Mer Caspienne

Rodrigo Labardini*

SUMMARY: I. *Introduction*. II. *The Caspian Sea*. III. *The Caspian Summits*. IV. *Legal issues of the Caspian Sea*. V. *The Convention on the Legal Status of the Caspian Sea*. VI. *Conclusion*. VII. *Bibliography*.

* This paper is part of a Ph.D. Program at Khazar University (*The Hinge. Reshaping of Geopolitics in Eurasia*). Opinions are solely of the author's and are not of any entity or institution he is associated to; e-mail: rodrigo.labardini@live.com.mx.

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ABSTRACT: Eurasia (Caucasus, Caspian Sea and Central Asia) is a natural link connecting Europe and China, in commercial, logistics, transport and energetic issues, while avoiding Russia, Iran and sanctions. For over twenty-five years, the legal definition of the Caspian Sea remained unresolved. In 2018, the five riparian Caspian Sea states adopted the Convention on the Legal Status of the Caspian Sea. The Convention draws heavily from maritime law, yet avoids defining the Caspian Sea as a sea or a lake and stipulates it as an endorheic basin in specific charts. The Convention is pragmatic, to jointly exploit subsoil [hydrocarbon] resources and lay pipelines without demarcation mechanisms, yet enabling possible restrictions on account of environmental issues.

Key words: Convention on the Legal Statute of the Caspian Sea; Law of the sea, international energy law; international treaties.

RESUMEN: Eurasia (Cáucaso, Mar Caspio y Asia Central) es un vínculo natural conectando Europa y China en temas comerciales, logísticos, energéticos y de transporte, evitando Rusia, Irán y sanciones. Por más de 25 años, el estatuto legal del Mar Caspio permaneció irresoluto. En 2018, los cinco países ribereños del Mar Caspio adoptaron la Convención sobre el Estatuto Jurídico del Mar Caspio. La Convención se apoya fuertemente en derecho marítimo, evita definir si el Mar Caspio es un lago o un mar, y estipula que, es una cuenca endorreica establecida en mapas específicos. La Convención es pragmática, para conjuntamente explotar recursos submarinos [de hidrocarburos] y colocar ductos sin demarcación fronteriza, permitiendo restricciones ambientales.

Palabras clave: Convención sobre el Estatuto Jurídico del Mar Caspio; derecho del mar, derecho internacional de la energía; tratados internacionales.

RÉSUMÉ: L'Eurasie (Caucase, Mer Caspienne et Asie centrale) est un lien naturel entre l'Europe et la Chine, pour commerce, logistique, transports et l'énergie, tout en évitant la Russie, l'Iran et les sanctions. Pendant plus de vingt-cinq ans, la définition légale de la mer Caspienne n'a pas été résolue. En 2018, les cinq États riverains ont adopté la Convention sur le statut juridique de la mer Caspienne. La Convention est largement basée sur le droit maritime; évite toutefois de définir la mer Caspienne comme une mer ou un lac, mais comme un bassin endoréique sur certaines cartes. La Convention est pragmatique et vise à exploiter conjointement les ressources souterraines [hydrocarbures] et à installer des pipelines, au milieu de restrictions environnementales.

Mots-clés: Convention sur le Statut Juridique de la Mer Caspienne; droit de la mer, droit international de l'énergie; traités internationaux.

I. INTRODUCTION

Goods travelling by sea between China and Europe take 60 days, by land they will take 12-15 days.¹ All land routes must journey through one of three possibilities: Russia, Iran or the Caspian Sea/Caucasus. Thus, "... the Caspian region threatens Russia's role as a major energy supplier and, by extension, Moscow's political influence over Europe".²

One latent issue has been the legal status of the Caspian Sea. The demise of the USSR transformed this body of water controlled by two states into an object of desire for all five riparian States (Caspian-5).³ The legal regime of the former USSR and Iran governing the Caspian Sea was inadequate as it did not deal with aquatic borders nor subsoil resources.⁴ Vast potential of hydrocarbon resources are the main point of contention, aggravated by unilateral claims.

Academic discussions focused on whether the Caspian Sea is a lake or a sea and consequently apply a predefined legal status. If defined as a sea, the *United Nations Convention on the Law of the Sea* (UNCLOS)⁵ should apply, in spite of only Russia (1997) and Azerbaijan (2016) being a party. If defined as a lake, navigational and non-navigational uses of international watercourses⁶ or lacustrine regimes, would apply, supplemented by customary international law.

¹ Shahbazov, Fuad, "The Trans-Caspian International Transit Route is set to reinvigorate regional economic growth", *The Diplomat*, February 2018.

² Coffey, Luke, "A Secure and Stable Caspian Is in America's Interest", *Backgrounder*, The Heritage Foundation, No. 3070, December 4, 2015, p. 4.

³ Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan.

⁴ The Russian-Persian border was established by the 1881 Border Commission, under the Convention on the Regulation of the Boundary to the East of the Caspian Sea Between Russia and Persia (December 9, 1881). The 1921 Treaty, with some minor modifications, confirmed the land boundary established in 1881 (Article III). However, no maritime border was defined.

⁵ Montego Bay, 10 Dec. 1982, No. 31363, 1833 UNTS 396, entry into force 16 November 1994. *UN Treaty Collection*. As of May 12, 2019: Azerbaijan acceded 16 Jun. 2016, Iran signed 10 Dec. 1982, Russia ratified 12 Mar. 1997, Kazakhstan and Turkmenistan have not signed.

⁶ Vinogradov, Sergei & Wouters, Patricia, "The Caspian Sea: Quest for a New Legal Regime", 9 *Leiden Journal of International Law* 87, 1996, 90.

Five presidential Caspian Sea Summits have taken place, one in each riparian State.⁷ The Summits established general negotiation points alongside strategic issues, *v. gr.*, no foreign military allowed to use the Caspian Sea, environmental issues are quintessential, and only consensus of the Caspian-5 could allow anything to happen in the Caspian Sea. The Fifth Summit (Aug. 12, 2018, Aktau) adopted the Convention on the Legal Status of the Caspian Sea (CLSCS).⁸ It regulates the rights and obligations of the parties dealing with sovereignty, navigation, waters, subsoil, natural resources, and environment. While CLSCS avoids defining the Caspian a lake or sea, by bringing *verbatim* texts from international law and UNCLOS it resembles a lake or a sea.

I present the Caspian Sea basin. I review CLSCS from an international law standpoint, recurring to maritime, lacustrine and customary international law. I present what CLSCS purports to do and future prospects, to determine the legal status of the Caspian Sea: a sea, a lake or a stipulated body of water. It is for the Caspian States to decide the future of the Caspian Sea. No other country nor other sayers may participate in the legal definition of this endorheic basin.

⁷ Ashgabat, Turkmenistan (2002); Tehran, Iran (2007); Baku, Azerbaijan (2010); Astrakhan, Russia (2014); and Aktau, Kazakhstan (2018).

⁸ *Convention on the Legal Status of the Caspian Sea*, signed at Aktau, Kazakhstan, 12 Aug. 2018, not in effect as of May 10, 2019. Official texts in Azerbaijani, Farsi, Kazakh, Russian, Turkmen, and English available at <http://en.kremlin.ru/supplement/5328>. In case of disagreement, English prevails (article 24). Kazakhstan's Parliament approved CLSCS on December 26, 2018, and sent it to the Senate, which approved it on January 31, 2019, *Мажилис Парламента Республики Казахстан*, Dec. 26, 2018, available at: <http://www.parlam.kz/ru/mazhilis/sent-to-the-senate>. On February 8, 2019, the President of Kazakhstan approved the law for the ratification of CLSCS. "Главой государства подписан Закон Республики Казахстан «О ратификации Конвенции о правовом статусе Каспийского моря»", *Президента Республики Казахстан*, Feb. 8, 2019, available at http://www.akorda.kz/ru/legal_acts/laws/glavoi-gosudarstva-podpisan-zakon-respubliki-kazakhstan-o-ratifikacii-konvencii-o-pravovom-statuse-kaspiiskogo-morya. On January 12, 2019, Turkmenistan's parliament approved the ratification of CLSCS. "Парламент Туркменистана ратифицировал Конвенцию о правовом статусе Каспийского моря", *Информационный портал Туркменистана*, Jan. 12, 2019, available at <https://turkmenportal.com/blog/16642/parlament-turkmenistana-ratifitsiroval-konvenciyu-o-pravovom-statuse-kaspiiskogo-morya>.

II. THE CASPIAN SEA

The Caspian Sea is the world's largest inland body of water, lying east of the Caucasus Mountains and west of Central Asia. It is an endorheic basin, *i.e.*, with no outflows.⁹ Due to its large size and brackish waters, people saw a sea, and, as an endorheic basin it also saw a lake.

The Caspian Sea drainage basin has three sectors. The northern part, mainly shallow, occupies 27% of its surface.¹⁰ The middle part occupies 36% of the surface with 35% of its water volume. On the south, the Caspian contains 64% of its water volume and an average depth of 300 meters, with a maximum depth of 1025 meters¹¹—quite more than regional seas, such as the Persian Gulf (max. 90 meters, with an avg. 50 meters). At present, the Caspian Sea is only connected to the world's oceans through the Sea of Azov/Black Sea/Mediterranean Sea, the Baltic Sea, and the White Sea by means of channels constructed in Russian territory using the Volga, Don, Neva, and Svir Rivers.¹² The Caspian Sea receives water from 130 rivers, albeit 88% comes from three rivers: Kura, Terek and Volga. The latter accounts for 80% of the water inflow,¹³ thus Northern waters are sweeter than in the South.

⁹ With an elongated shape it sprawls nearly 1,200 kms. from north to south, with an average width of 320 km. (maximum 435 kms., minimum 124 kms.) and a coastline of 6,500 kms. It has an area of about 386,400 square kms. Heydar Aliyev Foundation, "Caspian Sea/Nature/Formation and Physiography of the Caspian Sea", *Azerbaijan*, 2011, available at http://www.azerbaijan.az/_Geography/_Caspian/_caspian_e.html?caspian_02.

¹⁰ United Nations Environment Programme (UNEP), *Global International Waters Assessment*. UN, October 2006, available at: <https://shop.un.org/books/global-intl-waters-assess-caspian-36474>. The average depth is 5-6 meters, NASA, "Caspian Sea", *Earth Observatory*, 2010, available at: <https://earthobservatory.nasa.gov/44253/caspian-sea>, and water volume accounts for less than 1% of the Caspian Sea, Huseynov, Said, "Fate of the Caspian Sea", *Natural History Magazine*, October 2010-January 2011.

¹¹ Aladin, Nicolai and Plotnikov, Igor, "The Caspian Sea", *Lake Basin Management Initiative*, 2004, Vlaams Instituut voor de Zee, available at: www.vliz.be/imisdocs/publications/133415.pdf.

¹² The Volga-Don Canal, the Volga-Baltic Waterway, and the White Sea-Baltic Canal—several of them subject to seasonally freezing waters.

¹³ UNEP, *op. cit.*

Attention has fallen on it due to its hydrocarbons resources. Estimates state the Caspian basin contains 48 billion barrels of proven oil reserves, 8.76 trillion cubic meters of natural gas reserves.¹⁴ Hence, it is “another Persian Gulf”.¹⁵

III. THE CASPIAN SUMMITS

The Commonwealth of Independent States adopted the Alma Ata Declaration to respect all treaty obligations undertaken by the former USSR (1991). Such treaties did not refer to aquatic borders nor subsoil resources. Unilateral claims surged, opposed by other riparians. Turkmenistan (1993) and Kazakhstan (1994) established their claims in domestic legislation.¹⁶ Azerbaijan included its claim into article 12 of its constitution and in 1994 signed the Contract of the Century with a foreign consortium to develop its maritime oil fields; agreement that “signaled the beginning of a new era in world energy politics”.¹⁷ All other riparians opposed this,¹⁸ stating nothing could be unilaterally defined; Russia threatened sanctions¹⁹ and added “it would retain the right to take any appropriate and necessary measures to

¹⁴ Indeo, Fabio, “Settling the Caspian Issue and Realizing the Trans-Caspian Energy Corridor”, *The Diplomat*, July 10, 2018, available at: <https://thediplomat.com/2018/07/settling-the-caspian-issue-and-realizing-the-trans-caspian-energy-corridor/>.

¹⁵ Altunisik, Meliha, “The Political Economy of Caspian Oil”, *Jahrbuch für internationale Sicherheitspolitik* 1999, available at Federal Ministry of Defence - Austria: http://www.bundesheer.at/pdf_pool/publikationen/03_jb99_32.pdf.

¹⁶ The former signed an agreement with foreign companies to develop its “Cheleken” oil field. Granmayeh, Ali, “Legal history of the Caspian Sea”, Akiner, Shirin (ed.), *The Caspian: Politics, Energy and Security*, London, 2004, Routledge, pp. 16 and 17.

¹⁷ Sanei, Faraz, “The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran’s Isolation from the Oil and Gas Frenzy: Reconciling Tehran’s Legal Options with its Geopolitical Realities”, 34 *Vanderbilt Journal of Transatlantic Law* 681 (2001), at 681.

¹⁸ UN Doc. A/49/475, annex, October 5, 1994 (Russian Federation); UN Doc. A/51/59, annex, January 27, 1996 (joint statement of Iran and Russia October 30, 1995); UN Docs. A/51/73, annex, March 1, 1996 (joint statement by Russia and Turkmenistan August 12, 1995); A/51/138, Annex II, May 17, 1996 (joint statement of Kazakhstan and Russia April 27, 1996); UN Doc. A/52/324, Annex, 8 September 1997 (Iran).

¹⁹ Abilov, Shamkal, “Legal Status of the Caspian”, *Hazar Raporu / Caspian Report*, 2013, p. 142, available at https://www.academia.edu/4919798/Legal_Status_Of_The_Caspian.

restore the proper regime of the Caspian Sea”.²⁰ Kazakhstan reciprocally awarded Azerbaijan and Turkmenistan the right to exploit natural resources in the Caspian Sea.²¹ In 1993, the Presidents of Azerbaijan, Kazakhstan, Russia, and Turkmenistan stated that “the comprehensive solution of the problem of rational utilization of the Caspian Sea requires the participation of all Caspian states”.²² All Caspian-5 submitted drafts for a Convention.²³

There have been five Caspian Sea Summits. Tense moments characterized the First (Ashgabat, 23-24 Apr 2002).²⁴ The Second (Tehran, 16 Oct 2007) adopted a declaration as a political guide in Caspian affairs, until the adoption of CLSCS.²⁵ The Third (Baku, 18 Nov 2010) adopted the *Agreement on Cooperation in the Field of Security in the Caspian Sea*, envisaging a conceptual agreement on sovereignty and fishing zones. The Fourth (Astrakhan, 29 Sep 2014) defined further principles applicable to the Caspian Sea, including safety and military issues, and a territorial sea of 15 miles and an exclusive economic rights (over biological resources) sea in further 10-miles.

The Fifth Summit (Aktau, 12 August 2018) was held with protracted expectations for a legal definition of the Caspian Sea or it would remain “a hotly contested piece of water thanks to its oil resources, navigation, and

²⁰ UN Doc. A/49/475, annex, October 5, 1994 (Russian Federation).

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

²² *Communique, Conference on the Problems of the Caspian Sea*, 14 October 1993, Astrakhan.

²³ Iran proposed to jointly use and manage the Caspian. Azerbaijan considered it an international or boundary lake. Kazakhstan would apply, with modifications, principles and rules of the international law of the sea. Russia adduced the exclusive character of the rights of the riparian states. Russia and Iran opposed partitioning the waters. Vinograd & Wouters, *op. cit.*

²⁴ From the outset of this much postponed First Summit, it was doomed to fail. On the first day, all five presidents (Putin, Aliyev, Nazarbayev, Niyazov, and Khatami) stressed their positions with no flexibility or mutual understanding in sight. While Russia and Iran were distant, the main confrontation was between Azerbaijan and Turkmenistan (President Niyazov condemned unilateral operations in disputed areas and stated that “There is a field 84 kms. from the Turkmen shore, and 180 kms. from the Azeri shore; whose territory is it?” to immediately warn: “One can smell blood behind the Caspian Sea issue, and everyone of us must understand that it is not an easy problem to solve”, Granmayeh, *op. cit.*, p. 31.

²⁵ Establishing the Caspian Sea to be exclusively used by vessels flying the Caspian Sea states’ flags, with no other country having the right to deploy ships or military forces into the Caspian Sea. Abilov, *op. cit.*, p. 142.

access to the Middle East and Europe for pipeline routes”.²⁶ Four years spanning from the Fourth Summit, developments became evident. Russia needed economic development and realized its national sector contains important hydrocarbon resources, and evolved from a closed sea/ condominium to an area used by all. Azerbaijan divided the basin in sectors with full sovereignty on available resources, particularly subsea –significant for its development. Kazakhstan partitioned with Russia (1998) and Azerbaijan (2002) the North Caspian Sea. Turkmenistan several times hinted at a Trans-Caspian pipeline as an alternative to its gas exports to China. Iran claimed 20% to stall adverse progress.

After the December 2017 Turkmenistan-Azerbaijan agreement to jointly develop sectors of the Caspian Sea, the Iran’s President Rouhani visit to Baku in March 28-29, 2018, was the turn of the times. One agreement²⁷ was highly relevant. Iran accepted to use the Caspian Sea’s resources without border demarcation but *jointly* developing resources. The day before, Rouhani similarly signed in Turkmenistan.²⁸ The jointly developed fields would seemingly constitute the limits of claims, becoming a pragmatical diffuse border. Five of six additional agreements signed in Aktau include an identical provision: “Nothing in this Agreement [Protocol] shall be interpreted [considered] as predetermining the legal status of the Caspian Sea”.²⁹ Thus, CLSCS is authoritative on the matter.

²⁶ Bebb, Matthew, “The Contested Caspian Sea: Oil, Gas, and Legal Disputes. An Overview and Forecast”, *Lynx Global Interlligence*, Feb. 15, 2017, available at: <http://lynxglobalintelligence.com/2017/02/15/the-contested-caspian-sea-oil-gas-and-legal-disputes-an-overview-and-forecast/>.

²⁷ *Memorandum of Understanding on Joint Development of Relevant Blocks in the Caspian Sea*.

²⁸ Xinhuanet, “Iran’s Rouhani kicks off trip to Turkmenistan, Azerbaijan”, *Xinhuanet*, Mar. 23, 2018, available at: http://www.xinhuanet.com/english/2018-03/27/c_137069517.htm.

²⁹ Agreements 1) *On Prevention of Incidents in the Caspian Sea*, 2) *among the Governments of the Caspian littoral States on Trade and Economic Cooperation*, 3) *among the Governments of the Caspian littoral States on Cooperation in the Field of Transport*, and Protocols to the *Agreement on Cooperation in the Field of Security in the Caspian Sea of November 18, 2010*, 4) *on Cooperation in Combating Terrorism in the Caspian Sea*, 5) *on Cooperation in Combating Organized Crime in the Caspian Sea*, and 6) *on Cooperation and Interaction among Border Authorities*. See article 9-Trade and Economic Cooperation, 7-Transport Agreement, 13-Terrorism Protocol, 17-Organized Crime Protocol, and 13-Border Authorities Protocol.

IV. LEGAL ISSUES OF THE CASPIAN SEA

The legal regime of the Caspian Sea comprises treaties, declarations, joint communiqués and other instruments.³⁰ None deal with maritime boundaries, national sectors nor subsoil demarcation. Relevant is the 1970 Soviet Union's Ministry of Petroleum and Gas Industry administrative decision dividing the soviet Caspian Sea, along a median line, into sectors belonging to Azerbaijan SSR, Kazakh SSR, Russian Federative SSR, and Turkmen SSR. After the USSR collapse, they were reciprocally recognized as borders of the newly independent states.³¹ Russian Prime Minister Viktor Chernomyrdin confirmed it in Astrakhan (1993).

1. Lake or Sea

Historically, the Caspian Sea has been considered lake or sea depending on who geopolitically controlled its waters.³² Researchers—even official documents—³³

³⁰ These include the conventions and treaties of Saint Petersburg (1723), Resht (1729), Golestan (1813), Turkmenchai (1828), Regulation of the East Boundary of the Caspian Sea (1881), Friendship and Cooperation (1921), Fisheries (1927), three on Commerce and Navigation (1931, 1935 and 1940), Russia-Kazakhstan (1998), Azerbaijan-Kazakhstan (2001), Russia-Azerbaijan (2002), Russia-Azerbaijan-Kazakhstan (2003), Framework Convention on Protection of Marine Environment (2003), and Agreement on Cooperation in the Field of Security in the Caspian Sea (2010).

³¹ Shafiyev, Farid, "The Legal Regime of the Caspian Sea: Views of the Littoral States", *Prism*, 7(6), Jun 30, 2001, available at: <https://jamestown.org/program/the-legal-regime-of-the-caspian-sea-views-of-the-littoral-states/>.

³² It was a lake "when it was entirely or to a considerable degree under the control of a single power which supervised the access to it and determined the legal-political regime that governed navigation and trade. When, on the other hand, the geopolitical influence was diffused among several states or when a geopolitical void prevailed in the area, it was a «sea». Raczka, Witt, "A sea or a lake? The Caspian's long odyssey", *Central Asian Survey*, 19 (2), p. 197.

³³ "If the Caspian is a «sea» in legal terms, coastal countries would apply the United Nations Convention on the Law of the Sea of 1982 (UNCLOS). If the Caspian is legally defined as a «lake», the countries could use the international law concerning border lakes to set boundaries", considering border lakes are part of the internal waters of a country. EIA,

concentrated on the Caspian Sea as a lake or sea.³⁴ The debate was fundamental to the region's future.³⁵

Discussions indicated that “lakes with their delimitation and resources are not subject to any particular international convention and are left to be governed predominantly by customary international law”.³⁶ For others, UNCLOS “enjoys no direct application to a border lake; however, some of its legal principles may serve as guidance”.³⁷ Save few exceptions, border lakes are divided among coastal states, “in the absence of an international treaty governing delimitation and governance of the international or transboundary lakes”.³⁸ Lake delimitation has used: “thalweg” (line of the lowest elevation within a watercourse) mainly for international rivers, rarely for border lakes,³⁹ “coastal line”,⁴⁰ astronomical line,⁴¹

Caspian Sea Region, Overview of oil and natural gas in the Caspian Sea region, U.S. Energy Information Administration, Aug. 26, 2013, p. 4, available at: https://www.eia.gov/beta/international/analysis_includes/regions_of_interest/Caspian_Sea/caspian_sea.pdf.

³⁴ “The legal status of a geographical area determines the application of the body of laws governing that area”, Janusz, Barbara, *The Caspian Sea Legal Status and Regime Problems*, Royal Institute of International Affairs, 2011, p. 2, available at: <https://www.chathamhouse.org/sites/default/files/public/Research/Russia%20and%20Eurasia/bp0805caspian.pdf>.

³⁵ Coffey, Luke, “A Secure and Stable Caspian Is in America’s Interest”, *Backgrounder*, The Heritage Foundation, Dec. 4, 2015, p. 17, available at: <http://report.heritage.org/bg3070>.

³⁶ Karataeva, Elena, “Can the Caspian Sea Survive Its Own Oil - Environmental Regulation of the Offshore Oil and Gas Industry in the Caspian Sea”, *29 International Journal of Marine and Coastal Life* 2014, p. 421.

³⁷ Janusz-Pawletta, Barbara, *The Legal Status of the Caspian Sea: Current Challenges and Prospects for Future Development*, Berlin: Berlin Center for Caspian Region Studies Environmental Policy Research Centre, 2015, p. 24.

³⁸ The only exceptions being the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, Helsinki, Mar. 17, 1992, in force Oct. 6, 1996, 1936 UNTS 269, and the *Convention on the Law of the Non-navigational Uses of International Watercourses*, New York, May 21, 1997, in force Aug. 17, 2014, UN. Doc. A/51/869.

³⁹ *Minnesota vs. Wisconsin*, 252 US 273 (1920), *Louisiana v. Mississippi*, 202 US 1 (1906).

⁴⁰ Lake Ladoga: *Moscow Peace Treaty* (1940). Used in colonial countries. Later replaced by the principle of middle line. Lake Malawi: *Anglo-German Agreement* (1890) and *Luso-British Agreement* (1891), *Anglo Portuguese Agreement* (1954). Caspian Sea: *Treaty of Turkmenchay* (1828), *Treaty of Commerce and Navigation Russia-Iran* (1940).

⁴¹ Lake Victoria (Uganda, Kenya, Tanzania): *Anglo-German Agreement* (1890). Lake Chad (Chad, Cameroon, Niger, Nigeria): *Anglo-French Conventions* (1898, 1904 and 1906). Lake Prespa: *Florence Protocol* (1926). Lake Tanganyika (Tanzania, Burundi, Congo): *English-Belgian Protocol* (1924).

straight line,⁴² historical boundaries,⁴³ geographical middle lines,⁴⁴ and formal middle line.⁴⁵ Some lakes, like Lake Constance, require consent of all littoral states to set boundary lines. Only Lake Titicaca has a condominium status.⁴⁶

Were the Caspian a sea, several⁴⁷ ascertained UNCLOS would —implying should— apply —as *conventional* law— not inquiring about customary international law. Hence, “oceans and seas in international law are governed by the United Nations Convention of the Law of the Sea”,⁴⁸ assuming UNCLOS would apply in all circumstances, regardless of *necessary* conditions such as ratification.⁴⁹

International agreements refer to “customary law of the sea as reflected in” UNCLOS⁵⁰ and various international judicial bodies —*ex. gr.*, International Court of Justice and International Tribunal on the Law of the Sea— have ruled certain issues are recognized as customary law, including in-

⁴² Lake Ohrid: *Florence Protocol* (1926). Lake Doyran: *Border Treaty between Yugoslavia and Greece* (1959). Lake Khanka: *Convention of Peking* (1860).

⁴³ Neusiedler See: *Treaty of Trianon* (1920).

⁴⁴ Lakes Malawi/Nyasa: *British-Portuguese Agreement* (1954); and Lugano: *Switzerland–Italy Agreement*.

⁴⁵ Lake Geneva: *Convention between Switzerland and France on the Determination of the frontier in Lake Geneva* (1953). Lake Albert (Uganda and DRC): *London Agreement* (1915).

⁴⁶ *Agreement for the boundary correction Peru-Bolivia* (17 September 1909) and its *Additional Protocol* (2 June 1925), *Treaty Amendment* (19 February 1957). According to these instruments, there is an “indivisible and exclusive condominium over the waters of Lake Titicaca” between Peru and Bolivia “without amending the fundamental conditions of navigation, sheries and water column” (article 1).

⁴⁷ Vinograd & Wouters, *op. cit.*, Bebb, *op. cit.*

⁴⁸ Karataeva, *op. cit.*, p. 421.

⁴⁹ Shafiyev, *op. cit.* See *supra* note 6. Iran’s signature of UNCLOS obliges it to not defeat the object and purpose of UNCLOS, article 18, *Vienna Convention on the Law of Treaties*, 23 May 1969, No. 18232, 1155 UNTS 331 (1980), entry into force 27 Jan 1980; the latter to which Azerbaijan acceded 11 Jan. 2018, Kazakhstan 5 Jan 1994, Russia 29 Apr 1986, and Turkmenistan 4 Jan. 1996, while Iran signed it 23 May 1969.

⁵⁰ *Ex. gr.*, article 15, *International Convention on the Control of Harmful Anti-Fouling Systems on Ships*, 5 October 2001, available at: <https://www.state.gov/documents/organization/208110.pdf>, article 16, *Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic*, 15 May 2013, available at: <https://oarchive.arctic-council.org/handle/11374/529>, and article 16, *International Convention for the Control and Management of Ships’ Ballast Water and Sediments*, 13 February 2004, available at: <http://library.arcticportal.org/1913/1/International%20Convention%20for%20the%20Control%20and%20Management%20of%20Ships%27%20Ballast%20Water%20and%20Sediments.pdf>.

nocent passage, territorial sea, contiguous zone, exclusive economic zone, immunity of warships, international navigation straits, continental shelf, and submarine cables.

Even if UNCLOS may not apply, other international instruments that regulate the use of marine resources and protect marine environment may still be applicable.⁵¹ Since 1999, the Caspian Sea has been included in the Regional Seas Programme (RSP)⁵² under the United Nations Environmental Programme (UNEP).⁵³ RSP was the animus behind the *Framework Convention for the Protection of Marine Environment of the Caspian Sea* (Tehran Convention).⁵⁴ Work on the Tehran Convention involved significant assistance from International Maritime Organization (IMO).⁵⁵ IMO standards are referred to in *Protocol Concerning Regional Preparedness, Response and Cooperation in Combating Oil Pollution Incidents* to the Tehran Convention.⁵⁶ Thus, while the Caspian Sea may not be a sea under UNCLOS or CLSCS, it is recognized as a sea for purposes of RSP and IMO.

This obviates that the Caspian Sea is, in fact, accessible only to the five riparian Caspian States.⁵⁷ Only the Caspian-5 possess the natural reality to define the Caspian's legal status recurring to local and regional practices.

2. Closed Sea

The former Soviet Union pushed forward the highly controversial closed sea⁵⁸ doctrine whereby “because of geographical, historical and military-

⁵¹ Karataeva, *op. cit.*, p. 422.

⁵² The Caspian is in the same category as other regional seas such as the Mediterranean, Black and Baltic. All these are enclosed or semi-enclosed seas regulated by UNCLOS.

⁵³ Available at: <http://www.unep.org/regionalseas/programmes/independent/caspian/default.asp>. The RSP aims to address the degradation of marine environment through comprehensive management, covering causes and consequences of environmental degradation. The list of the Regional Sea Conventions is available on the UNEP Regional Seas Programme website: <http://www.unep.org/regionalseas/>.

⁵⁴ Tehran, 4 November 2003, in force 12 August 2006, 44 ILM 1.

⁵⁵ IMO, *Implications of the United Nations Law of the Sea Convention on the International Maritime Organization*, LEG/MI sc/3/Rev.i, 6 January 2003.

⁵⁶ Aktau, 12 Aug. 2011, into force 25 Jul. 2016. Text available at: www.tehranconvention.org.

⁵⁷ “The unique characteristics of the Caspian Sea precluded its geographical and legal classification as either an enclosed sea or a transboundary lake”, Karataeva, *op. cit.*, p. 422.

⁵⁸ A “closed sea” is different from an “enclosed sea” included in article 122 of UNCLOS (“a gulf, basin or sea surrounded by two or more States and connected to another sea or the

strategic reasons, certain seas located on the periphery of the USSR should be governed by special and exceptional international law rules”.⁵⁹ The doctrine was to restrict/protect the use of water corridors accessing such seas from foreign warships,⁶⁰ and forgotten after the USSR’s demise.

3. *Condominium principle*

Only USSR and Iran (and their nationals) were entitled to naval and commercial navigational rights on the Caspian Sea.⁶¹ A theory arising from the Soviet-Iranian Treaties of 1921, 1935 and 1940 was that they created a condominium regime.⁶² Per condominium, a border sea is under all coastal states joint political authority, which are equally sovereign in the sea.⁶³ The regime requires a “clear convincing” consent on the existence of the condominium.⁶⁴ Condominium applies in very few cases, notably the Gulf of

ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”).

⁵⁹ Darby, J., “The Soviet Doctrine of the Closed Sea”, 23 *San Diego Law Review* 685 (1986), p. 688. This responded to the fact that its international maritime boundary consisted of (a) the Caspian Sea, bordering Iran, (b) the Black Sea, bordering Turkey, Bulgaria and Romania, (c) the Baltic Sea, bordering Finland, Poland, Sweden, Germany, and Denmark, (d) the Barents Sea, bordering Norway (Spitzbergen, Svalbard) and its inlet the White Sea, (e) the Kara, Laptev and East Siberian Seas, bordering the Arctic Circle, (f) the Sea of Okhotsk, bordering Japan, (g) the Sea of Japan, bordering Japan and Korea, and (h) the Bering Sea, bordering the United States (Alaska).

⁶⁰ Bradshaw, R., “The Politics of Soviet Maritime Security: Soviet Legal Doctrine and the Status of Coastal Waters”, *Journal of Maritime Law and Commerce* (1979), pp. 411-447.

⁶¹ Articles 12, 13, 16 and 17 of the 1940 Treaty. See also the *Treaty of Establishment, Commerce and Navigation Between the USSR and Iran*, 27 August 1935, 176 LNTS 299 (1937). The 1940 Treaty replaced the *Convention of Establishment, Commerce and Navigation Between the USSR and Iran*, 27 October 1931.

⁶² This “implies that the Caspian is a shared resource that legally cannot be privatized by any littoral state and has to remain an object of joint usage”, Zimmitskaya, H., & von Geldern, J., “Is the Caspian Sea a sea; and why does it matter?”, 2(1), *Journal of Eurasian Studies* 1 (2011), p. 9. The principle must be established by treaty or recognized by customary international law. Gizzatov, Vyacheslav, “Negotiations on the legal status of the Caspian Sea 1992-1996: view from Kazakhstan”, Akiner, Shirin, *The Caspian. Politics, energy and security*, Routledge Curzon, 2004, pp. 42-53.

⁶³ Janusz-Pawletta, *op. cit.*, p. 25.

⁶⁴ *Lake Lanoux Arbitration Case*, 24 Int’l L. Rep. 101 (1957) (Spain vs. France).

Fonseca⁶⁵—quite different, as the area had previously been under one single sovereign—. Russia and Iran in 1990's supported condominium, with occasional Turkmeni support.

International practice disputed condominium in the Caspian Sea.⁶⁶ Post-Soviet Russia and Iran supported a “common sea”,⁶⁷ not reflected in practice.

V. THE CONVENTION ON THE LEGAL STATUS OF THE CASPIAN SEA

The Convention has 11 preambular paragraphs and 24 articles. It refers to multiple issues, including sovereignty, navigation, environment, borders, innocent passage, fisheries, peace, military, and scientific research.⁶⁸

⁶⁵ *Land, Island and Maritime Frontier Dispute, El Salvador and Nicaragua (intervening) v Honduras*, I.C.J. Reports 1992, Judgment, Merits, 11th September 1992, 351-598, f. para 400. Also see *Convention of Gastein* (1865); *Cromer-Ghali Agreement* (1899); *Anglo-Egyptian Condominium of Sudan* (1898-1955); *Anglo-French Condominium of New Hebrides* (1914-1980).

⁶⁶ The Soviet Union began exploring oil in the Caspian Sea in 1949. Had there been a condominium principle, it would have entailed joint ownership. Yet there was no bilateral cooperation. Furthermore, Iran also began extracting oil without consulting the USSR. The 1966 Soviet naval international-juridical reference book declared that “the resources of the continental shelf also belong to each party (USSR and Iran) within the limits of its respective area of the sea”, Gizzatov, *op. cit.*, p. 46. The official Soviet Union-Iran land boundary was drawn in 1956 connecting Astara village in Azerbaijan to Hasankuli, Turkmenistan. While “the agreement did not demarcate the Caspian Sea, it had been in practice the unofficial demarcation line”, Abilov, *op. cit.*, p. 126. The 1964 Soviet Union-Iran aviation agreement confirmed the Astara-Hasankuli line as an airspace boundary and heavily guarded by the USSR. “Those who wished to over-fly the area had to obtain permission from the Soviet authorities”, Gizzatov, *op. cit.*, *supra* note 63, p. 46. In July 2001, an Iranian air force jet crossed the Astara-Hasankuli line, “the sea border between Iran and the Soviet Union,” Haghayeghi, M., “The Coming of Conflict to the Caspian Sea”, *Problems of Post-Communism*, 50(3), p. 35, and circled over two Azeri survey ships, demanding they move 5 miles northward. Six days later, another Iranian jet entered the area at an altitude of 600 feet. In August 2001 Azerbaijan announced that the its air-defense forces would prevent further incursions. Iran continued to violate Azerbaijan's airspace and sea borders. On April 18, 2002, an Iranian ship entered Azeri waters prior to the First Caspian Summit.

⁶⁷ Abilov, *op. cit.*, p. 123.

⁶⁸ Unless otherwise noted, articles cited are from CLSCS.

1. *Definitions in the Convention*

“Parties” to the Convention are the “Caspian littoral States” that execute CLSCS (1st-Preamble paragraph [Pp]), term only used in the definition of “normal baseline” (article 1). It repeatedly uses “Party” or “Parties” (136 times) —distinguishing the “Parties” to the Convention from “parties” to other agreements (article 20)—. A “Party” is any of the Caspian-5, also referred as a “coastal State”. Like UNCLOS, CLSCS repeatedly uses “coastal State” without defining it.⁶⁹

The differing use of “coastal State” and “Party” in the Convention may impact the *lege ferenda* period between signature and entry into force.⁷⁰ CLSCS will enter into force with the fifth instrument of ratification (article 22), simultaneously for all signatories. By signing CLSCS, all are obliged to not defeat its object and purpose.⁷¹ As CLSCS refers to activities and regulations of the “coastal State” and not of the Parties, any “coastal State” may not freely regulate/use live resources in view of CLSCS-obligations to other “coastal States”, such as “shared aquatic biological resources”, “jointly managed by the Parties” (article 1).

2. *Links to international law*

CLSCS is adopted based on the UN Charter, as well as international law (1st Pp) and “arrangements”.⁷² CLSCS does not affect rights and obligations

⁶⁹ Definitions of straight baseline, territorial waters and fishery zone (article 1), principles of freedom of navigation and conduct of maritime scientific research (articles 3(8) and 3(17)), in addition to articles 8(2), 8(4), 11(2), 11(3), 11(6), 11(6)a, 11(6)c, 11(6)d, 11(6)g, 11(6)k, 11(8)e, 11(8)f, 11(8)h, 11(10), 11(12), 11(14), 11(15), 14(4) and 19.

⁷⁰ The five signatories are obliged to respect sovereignty, exclusive fishery, administration of biological resources, and regulations adopted by “coastal States”, *i. e.*, the Caspian-5, even before the entry into force of CLSCS.

⁷¹ See *supra* note 50. International State practice on this respect was evidenced when on May 6, 2002, the USA announced that it “does not intend to become a party” to *Rome Statute of the International Criminal Court* and “[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000”. Israel (2002), Sudan (2008) and Russia (2016) also withdrew their signatures.

⁷² CLSCS recognizes “the existing arrangements between the Parties” and intends to “strengthen the legal regime of the Caspian Sea” (11-Pp). CLSCS refers to “arrangements”

from other treaties (article 20). CLSCS-Parties must comply with international law.⁷³

3. Principles to follow in activities in the Caspian Sea

Seventeen principles regulate the Parties' conduct in the Caspian Sea. They relate to international law (article 3(1)), peace and security (articles 3(2) and 3(3)), military (articles 3(4), 3(5), 3(6), and 3(7)), and navigation and overflight issues (articles 3(8), 3(9), 3(10), 3(11), and 3(16)), environmental matters (articles 3(12), 3(13), 3(14), and 3(15)), and scientific research (articles 3(15) and 3(17)). Activities shall be conducted in accordance with: 1) the Convention, 2) "other agreements between the Parties consistent with this Convention, and [3] their national legislation" (article 4). One ponders whether "other agreements between the Parties consistent" with CLSCS only refers to agreements executed between *all* the Parties or between some of them.

4. The Caspian Sea: stipulated endorheic basin. Not a lake, not a sea.

In a pragmatic way, the drafters did not define the Caspian Sea as a lake or a sea. "Caspian Sea" is the current designator for the body of water between contemporaneous Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan. CLSCS stipulated it is the body of water surrounded by the territories of the Caspian Sea States as outlined in three nautical charts of the General Department of Navigation and Oceanography of the Ministry of Defense

and not "treaties" nor "international agreements". Hence, it would encompass formal and informal agreements and arrangements.

⁷³ All Caspian Sea activities must respect "the sovereignty, territorial integrity, independence and sovereign equality of States, non-use of force or the threat of force, mutual respect, cooperation and non-interference into the internal affairs of each other" (article 3(1)-CLSCS). Navigation of ships bearing a Party's flag (article 3(10)-CLSCS) and delimitation of the fishery zones (article 9(1)-CLSCS) must be in accordance with international law principles and norms.

of the Russian Federation in Saint Petersburg (article 1).⁷⁴ The evident—silent—truth of this endorheic basin is that only these five states have natural means to reach its waters. With no other country claiming Caspian Sea's waters, only they can purport to exercise sovereignty over any part.

The Convention strives to avoid a legal inference to identify it as lake or sea.⁷⁵ Nonetheless, CLSCS implies it is a lake, for it is “the body of water surrounded by the land territories of the Parties” (article 1). Its provisions affect the Caspian Sea waters and the “land affected by the proximity of the [Caspian] Sea”.⁷⁶ The latter may portray the Caspian Sea as common good and transboundary resource—with joint administration of its waters and sources. On the other hand, the Convention alludes to a maritime context by referring to the “Kronstadt sea-gauge” (article 1), establishing “sea lanes” (article 11(11)) and using “belt of sea” and “sea belt” to define territorial waters and fishery zones. More striking, CLSCS refers to “sea water”,⁷⁷ connections “to other seas and the Ocean”,⁷⁸ prevention of “smuggling of migrants by sea”⁷⁹ and mentions seven times the “seabed”.⁸⁰

⁷⁴ Charts No. 32003, archive edition Apr. 17, 1997, published 1998, No. 31004, archive edition July 4, 1998, published 1999, and No. 31005, archive edition Nov. 16, 1996, published 1998.

⁷⁵ Калмыков, Алексей, *Ни море, ни озеро: Каспий поделили на пятерых. На это ушло 22 года*, BBC News, Aug. 12, 2018, available at <https://www.bbc.com/russian/features-45156199>.

⁷⁶ “Ecological System of the Caspian Sea” (article 1). The individual use of the word “Sea” in capitalized form indicates the drafters’ desire to refer to the Caspian Sea in another way.

⁷⁷ “... including harvesting of aquatic biological resources and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.” (“Pollution”, article 1) (emphasis added). While the first mention of sea may refer to the “Caspian Sea”, it is not capitalized as in “Ecological System of the Caspian Sea”, *supra* note 77 (article 1-CLSCS). Hence, the first “sea” refers to a marine space, separate from a misnomer for the Caspian Sea. The second mention of sea clearly refers to marine water.

⁷⁸ “The Parties shall carry out their activities in the Caspian Sea in accordance with the following principles: ... (10) The right to free access from the Caspian Sea to other seas and the Ocean, and back” (article 3(10)) and “The Parties shall have the right to free access from the Caspian Sea to other seas and the Ocean, and back. ...” (article 10(4)-CLSCS).

⁷⁹ “The Parties shall cooperate ... in preventing and suppressing smuggling of migrants by sea and other crimes in the Caspian Sea” (article 17-CLSCS).

⁸⁰ “... parts of the seabed and subsoil delimited between the Parties ...”, Definition of “Sector”, article 1-CLSCS, and articles 2(2), 4, 6, 8(1), 12(3), and 13(2)-CLSCS.

5. *The water area*

Similar to UNCLOS, CLSCS divides the Caspian Sea waters into blocks (article 5).

- I. 15 nautical mile territorial waters (article 7(1)) where sovereignty applies, including internal waters (article 1).
 - a) The outer limit may not exceed 15 miles from the baselines.
 - b) The outer limit is a line resulting from every point located at a distance from the nearest point of the baseline (article 7(2)). The outermost permanent harbour works point forms part of the coast; not off-shore installations and artificial islands (as in article 11-UNCLOS).
 - c) Adjacent coast States must effect the delimitation of internal and territorial waters by agreement (article 7(3)).
 - d) Roadsteads may become an issue, as CLSCS is silent. Article 12-UNCLOS specifically states that roadsteads “which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea”. Should no CLSCS-Party have such roadsteads, the issue may become moot.
- II. 10 mile (article 9(1)) fishery zones adjacent to territorial waters (article 1), and
- III. The common maritime space used “by all Parties” (articles 1 and 5). It is unclear if the intention was to allow open use of “by all Parties” in joint or separate activities. *I.e.*, individual or joint use by all Parties.

6. *Sovereignty and exclusive competence*

Parties “exercise their sovereignty, sovereign and exclusive rights, as well as jurisdiction” (article 2(1)). Sovereignty over the land territory and internal waters is extended to territorial waters, seabed and subsoil thereof, and airspace over it (article 6). Exploitation of subsoil resources and economic

activities are exercised as sovereign rights (article 8(1)).⁸¹ The Parties consider CLSCS akin to a “Constitution of the Caspian Sea” because this document “shall define and regulate the rights and obligations of the Parties in respect of the use of the Caspian Sea” (article 2(2)), including its waters, seabed, subsoil, natural resources, and airspace over the Caspian Sea.

The Caspian Sea is “of vital importance” to the littoral States (5-Pp). Solving any issue related to the Caspian Sea “falls within the exclusive competence” of the Parties (6-Pp)].⁸² CLSCS conveys that Caspian Sea issues fall within the “exclusive competence” of all CLSCS-Parties acting as a unique body of decision.⁸³ No other state may aspire sovereignty or jurisdiction in the Caspian, because “only they possess sovereign rights over the Caspian Sea and its resources” (5-Pp). Consensus is needed for “exclusive competence” to solve Caspian Sea issues, falling to *all* Caspian-5 and not to any one of them.

7. Jurisdiction

Each Party exercises jurisdiction over ships flying its flag (article 12(1)) and “artificial islands, installations, structures, its submarine cables and pipelines” (article 12(2)) in its national sector. Laconic provisions compared to articles 27, 28, 91, 92, and 94-UNCLOS dealing with criminal and civil jurisdiction, nationality and status of ships, and duties of the flag State, including maintaining a register of ships and assuming jurisdiction under domestic law over ships and its crews.

Parties may adopt measures regarding ships to ensure compliance with its laws and regulations, including boarding, inspection, hot pursuit, detention, arrest, and judicial proceedings (article 12(3)). The Convention is silent on their meaning, wherefore UNCLOS becomes supplementary—particularly articles 110 and 111, regarding the right to visit, hot pursuit,

⁸¹ These provisions are similar to article 2-UNCLOS, where sovereignty extends, beyond its land territory, to the territorial sea, the airspace above the latter, and the bed and subsoil thereof.

⁸² The term “exclusive competence” is used in the *Treaty on the Functioning of the European Union*, applicable to areas in which the EU alone is able to legislate and adopt binding acts.

⁸³ This falls in line with prior agreements by the Caspian-5 whereby fundamental decisions pertaining the Caspian are decided by all littoral states by consensus.

criminal and civil jurisdiction on ships bearing another flag. Boarding, inspection, hot pursuit and detention may only be undertaken by warships or vessels bearing external marks indicating government service and authorized for such purposes (article 12(3)).⁸⁴

8. Borders

CLSCS does not set mechanisms for border demarcation. A “baseline” (article 1) consists of “normal baselines” and “straight baselines”. While a normal baseline is the “low-water line along the coast as marked on large-scale charts officially recognized by the coastal State” (article 5-UNCLOS), CLSCS fixes the normal baseline at minus 28 meters below median sea level (article 1).⁸⁵ This responds to substantial fluctuations of the Caspian Sea level recorded in past centuries, including several meters in recent decades. The current 7 cm. annual decrease in its level —evaporation rates [due to rising global temperatures] overcome the influx of water— will disappear the Northern Caspian in 75 years.⁸⁶ This will have an impact on subsoil resources —currently underwater. Since the Caspian Sea is identified at minus 28 meters below median sea level, the median baselines will become—in no more than 75 years— the Parties’ boundary between its territory and “landed-Caspian Sea” territory with no fish in dried up territorial waters and fishery zones, but with easier access to hydrocarbon resources.

Whereas article 7-UNCLOS defines a straight baseline and its methodology, CLSCS provides that such methodology “shall be determined in a

⁸⁴ Such activities may not be exercised against warships and government ships operated for non-commercial purposes, as only the cases specified in article 11 may affect the corresponding immunity. This is somewhat similar to articles 30, 31 and 32, and Subsection A of UNCLOS, regarding non-compliance by warships of a coastal State laws and regulations or responsibility by warships and government ships for non-commercial purposes, and right of innocent passage.

⁸⁵ “The line of the multi-year mean level of the Caspian Sea measured at minus 28.0 meters mark of the 1977 Baltic Sea level Datum from the zero-point of the Kronstadt sea-gauge, running through the continental or insular part of the territory of a Caspian littoral State as marked on large-scale charts officially recognized by that State”, article 1-CLSCS.

⁸⁶ American Geophysical Union, *Caspian Sea Evaporating as Temperatures Rise, Study Finds*, AGU, Aug. 29, 2017, available at: <https://news.agu.org/press-release/caspian-sea-evaporating-as-temperatures-rise-study->.

separate agreement among all the Parties” (article 1).⁸⁷ Taking into account “existing arrangements” (13-Pp) between Parties, methodologies therein should prevail.

Delimitation of the Caspian Sea seabed and subsoil into national sectors may only be effected by agreement between States with adjacent and opposite coasts (article 8(1)).⁸⁸ Delimiting seabed national sectors will amount to exploit subsoil resources in quasi-territories.⁸⁹ Within its sector, a coastal State has the exclusive right to construct and regulate construction, operation and use of artificial islands, installations and structures (article 8(2)).⁹⁰

9. *Freedom of navigation*

Ships flying the flags of the Parties have freedom of navigation beyond territorial waters (article 10(1)). All Caspian-5 ships receive the same national treatment a Party gives to its ships (article 10(2)) in ports “open to ships flying the flags of the Parties” (article 10(3)). These would not apply to military ports.

Freedom of navigating in accordance to the Convention “and other compatible agreements between the Parties” without prejudice to sovereign and

⁸⁷ If the coastal configuration would put a “coastal State” at “a clear disadvantage”, it must be taken into account in order to reach consensus among all Parties. These provisions require the consensus of *all* Parties in order to delineate (bilateral) borders. This entails the formal recognition by all Caspian-5 of baselines between two adjacent Parties.

⁸⁸ There are two “opposite coasts”: Azerbaijan-Kazakhstan and Azerbaijan-Turkmenistan. Said agreements must take into account generally recognized principles and norms of international law. Delimitation of seabed and subsoil amounts to a border, but only up to 25 miles.

⁸⁹ UNCLOS elaborates that neither of the opposite or adjacent coast States, failing agreement to the contrary, may extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines (article 15).

⁹⁰ Safety zones not exceeding 500 meters may be established surrounding these artificial facilities and must be communicated to all Parties to the Convention. “All ships”—civil and military—must respect such safety zones (article 8(3)). The exercise of seabed and subsoil exploitation and economic activities sovereign rights is limited inasmuch as it may not infringe rights and freedoms of other Parties nor unduly interfere with their enjoyment (article 8(4)). These provisions mirror article 60-UNCLOS.

exclusive rights of the Parties (article 10(1)). CLSCS is silent on ships flying other flags.⁹¹

The Caspian Sea is not naturally connected to the world's oceans. CLSCS recognizes the Parties "the right to free access from the Caspian Sea to other seas and the Ocean, and back" (articles 3(10) and 10(4)). Wherefore the Parties have "the freedom of transit for all their means of transport through the territories of transit Parties" (article 10(4)).⁹² Terms and procedures are determined bilaterally with the transit Parties or in accordance with the latter's legislation. Thus, Russia retained control yet opened its canals to CLSCS-Parties.

10. *Innocent passage*

CLSCS does not formally include innocent passage, yet uses similar wording to articles 17 and 18(1)-UNCLOS and refers to ships flying the flags of the Parties may navigate through territorial waters.⁹³ Navigation through territorial waters is only to traverse territorial waters "without entering internal waters" or for calling at a port facility outside internal waters, and to proceed to/from internal waters (article 11(1)). This applies to civil vessels. Military vessels may traverse territorial waters and internal waters in case of force majeure or distress. CLSCS does not define submarines or underwater vehicles as warships, but later encompasses all three in one phrase (article 11(2)).

⁹¹ This contrasts with UNCLOS which specifically provides freedoms of the high seas (article 87) and of navigation (article 90) to (other) coastal or land-locked states. CLSCS is not incompatible with UNCLOS, with no explicit ban on ships flying non-Parties' flags and the Caspian Sea is not identified as a sea, but it implies that the Caspian is only open to Caspian-5 ships.

⁹² Azerbaijan put at least three ships to berth in Baku through Russian channels. The former U.S. Coast Guard Cutter Point Brower was officially turned over to Azerbaijan on 20 September 2003. Two smaller U.S. Coast Guard cutters were given to Azerbaijan in 2000. They were piloted it to the Caspian across the Black Sea and Sea of Azov, through the Volga Don canal to the Caspian Sea, and then to Baku.

⁹³ The "right of innocent passage" through territorial sea included in article 17-UNCLOS is not in CLSCS. However, CLSCS articles closely follow UNCLOS by using "right of passage through territorial waters", thus equivalent to the right of innocent passage.

11. Navigation rules

CLSCS does not allude to “foreign ship”. UNCLOS uses “foreign ship” to refer to a ship flying the flag of an UNCLOS-Party different to the coastal State. CLSCS forbids non-Parties’ armed forces in the Caspian (article 3(6)), but does not forbid ships from non-Caspian countries. Article 11(16) (a) closely follows article 24-UNCLOS: a Party shall not hamper passage of ships by imposing requirements which have the practical effect of denying or impairing the right of passage, substituting “foreign ships” with “ships flying the flags of other Parties”. The Convention seemingly confines navigation to CLSCS-Parties’ vessels. Yet, article 11(16)(b) brings *verbatim* article 24-UNCLOS and allows for the presence in the Caspian Sea of “ships flying the flags of other Parties *or ships carrying cargoes*” (emphasis added). Article 16 provides cooperation with non-CLSCS persons as well as international organizations. It is foreseeable they will own non-Caspian flag ships. Thus, the presence of non countries’ ships is not inconceivable.⁹⁴

A Party may adopt laws and regulations, in conformity with CLSCS and other “norms” of international law, relating to passage through territorial waters, including safety of navigation, regulation of maritime traffic, protection of navigational aids and facilities, cables and pipelines, living resources, fishing, environment, scientific research and surveys. CLSCS includes ensuring national security, unforeseen in UNCLOS.⁹⁵

As in article 22(1)-UNCLOS, navigation lanes and traffic separation in territorial waters may be set by each Party (article 11(11)).⁹⁶ As in article

⁹⁴ Freedom of navigation outside territorial waters is a CLSCS-principle, “subject to respect for sovereign and exclusive [fishery zone] rights of the coastal States”, and to rules “established by them” regarding “activities specified by the Parties” (article 3(8)). Freedom of navigation must comply with the coastal States. It is unclear if this refers to each individual Party or all CLSCS-Parties. Safety of navigation is another principle (article 3(9)). Air navigation by civil aircraft will be executed in accordance with the International Civil Aviation Organization (article 3(16)).

⁹⁵ Navigation through territorial waters must comply with coastal State laws and regulations (article 11(10)). Per article 21(3)-UNCLOS ships abide with generally accepted international regulations relating to prevention of collisions at sea. Hence the Aktau 2018 Summit also adopted the *Agreement on Prevention of Incidents in the Caspian Sea*.

⁹⁶ Like article 25(2)-UNCLOS, CLSCS may take necessary steps to prevent breach of admission conditions of ships proceeding to internal waters or calling at port facilities outside

30-UNCLOS, per article 11(14) a State may require a warship not complying with its laws and regulations to leave its territorial waters immediately. The Convention also includes in this provision any government ship, operated for non-commercial purposes; issue not included in UNCLOS.⁹⁷

In similar fashion to article 24-UNCLOS, a Party shall not hamper the right of passage except by means of laws and regulations adopted in conformity with CLSCS, and must give appropriate publicity of any danger to navigation within its territorial waters of which it has knowledge (article 11(16)).⁹⁸

12. *A sea of peace*

Per article 88-UNCLOS, high seas are reserved to peaceful purposes. CLSCS underlines a favorable atmosphere of cooperation, good-neighbourliness and mutual understanding (3-Pp) wanting to expand such good relations (4-Pp). Thus, the Parties use the Caspian “for peaceful purposes... solving all issues related to the Caspian Sea through peaceful means” (article 3(2)).

13. *Military issues*

“Warship” is a naval vessel belonging to Party’s armed forces with external marks and under military discipline under the command of an officer

internal waters. A Party may temporarily suspend navigation in territorial waters to protect its security; but only after being duly published (article 11(13)), with practically the same wording as article 25(3)-UNCLOS. In fact article 11(6)(b) is drafted *verbatim* to article 19(2)(b)-UNCLOS.

⁹⁷ In identical fashion to article 31-UNCLOS, article 11(15) provides that the flag Party bears international responsibility for any loss or damage to another Party due to non-compliance by a warship or government ship operated for non-commercial purposes with the coastal State’s laws and regulations. CLSCS however also includes specifically damages resulting from entering territorial waters and anchoring therein.

⁹⁸ It may not impose requirements which would have the practical effect of denying or impairing such passage, and must not discriminate in form or in fact against other CLSCS-Parties’ ships. article 11(16)(a) provides such denial or impairment may not be in unjustifiable terms. This is in contrast with UNCLOS where the term unjustifiable is not used in this context. The term unjustifiable is used in UNCLOS only four times (article 78(2), 194(4), 240(c) and 246 (8)) in its 320 articles and the 116 articles of the nine annexes to UNCLOS.

governmentally commissioned (article 1).⁹⁹ Passage through territorial waters must not be prejudicial to the peace, good order or coastal State's security.

Activities will ensure "a stable balance of armaments of the Parties... developing military capabilities within the limits of reasonable sufficiency with due regards to the interests of all the Parties and without prejudice to the security of each other" (article 3(4)). This is subject to the interests of all Caspian-5. It is unclear if no Party should develop military capabilities in excess of their neighbors or maintain the current balance of weaponry in the Caspian Sea.¹⁰⁰

The presence of armed forces from countries not party to the CLSCS is prohibited (article 3(6)). All Parties are prohibited from providing its territory "to other States to commit aggression and undertake other military actions against any Party" (article 3(7)). Nothing is said about military conducts against non parties; situation against a sea of peace (3-Pp, 4-Pp, 11-Pp, articles 3(2) and 3(3)) and the UN Charter. But one that recognizes past *de facto* situations in the region,¹⁰¹ while also implying that "common

⁹⁹ CLSCS does not formally include a submarine, yet later speaks about "warships, submarines and other underwater vehicles" (article 11(2)). It follows UNCLOS, which speaks of "ships of all States" (article 17) and later talks about submarines and underwater vehicles (article 20). article 11(5), as article 18-UNCLOS, requires submarines and underwater vehicles to navigate on the surface and show their flag while passing through territorial waters.

¹⁰⁰ Parties will comply "with the agreed confidence-building measures in the military field in the spirit of predictability and transparency" to strengthen regional security and stability, "including in accordance with treaties concluded among all the Parties" (article 3(5)). Measures to maintain the "stable balance of armaments" (article 3(4)) shall be in accordance with "international treaties concluded among all the Parties", hence not allowing for treaties where one littoral state is a party. The drafting, however, is imprecise whether such treaties are executed only by the Caspian-5, or by all the Caspian-5 and additional parties. Examples would be *Agreement on Cooperation in the Field of Security in the Caspian Sea of November 18, 2010*, and *United Nations Convention against Transnational Organized Crime*, A/RES/55/25, 15 Nov. 2000, UNTS 39574 (Azerbaijan ratified 30 Oct. 2003, Iran signed 12 Dec. 2000, Kazakhstan ratified 31 Jul. 2008, Russia ratified 26 May 2004, and Turkmenistan acceded 28 Mar. 2005).

¹⁰¹ Defence Minister Shoigu said Russia launched 26 sea-based cruise missiles at 11 Islamic State group targets in Syria from four Russian warships in the Caspian Sea - about 1,500km away, BBC News, "Russian missiles 'hit IS Syria from Caspian Sea'", *BBC News*, Oct. 7, 2015, available at: <https://www.bbc.com/news/world-middle-east-34465425>.

waters” are akin to “high seas”.¹⁰² The main concerns, for Russia and Iran,¹⁰³ were not pipelines nor environment issues but security, non-interference and military aspects.¹⁰⁴ Impasse over the Caspian’s status contributed to naval buildups and militarization albeit it never resulted in massive clash between littoral states; common security as norm.¹⁰⁵

14. *Military navigation*

Warships, submarines and other underwater vessels are entitled to freedom of navigation in territorial waters in terms accorded between the flag and coastal States.¹⁰⁶ In case of force majeure and distress, including rendering assistance, warships may approach territorial waters and en route the warship’s captain must agree with the coastal State terms, procedures, and exit.¹⁰⁷

Article 11(6) provides, alike article 19-UNCLOS, that certain conducts are prejudicial to peace, good order and security of the coastal state.¹⁰⁸

¹⁰² If non-territorial and non-fishery waters are “common waters”, would there be some “common” responsibility for acts undertaken by a ship in “common waters”? Particularly, where the security and protection of the Caspian Sea is guaranteed by the Caspian-5 in CLSCS.

¹⁰³ O’Byrne, D., “With draft convention, resolution of Caspian Sea status appears closer than ever”, *Eurasia.net*, Jun. 6, 2018, available at: <https://eurasianet.org/with-draft-convention-resolution-of-caspian-sea-status-appears-closer-than-ever>. Mamedov, R., “International Legal Status of the Caspian Sea: Issues of Theory and Practice”, *32 Turkish Yearbook of International Relations* 217 (2001), p. 243, available at: <http://dergiler.ankara.edu.tr/dergiler/44/672/8561.pdf>.

¹⁰⁴ Zimmitskaya, & von Geldern, J., *op. cit.*, p. 9.

¹⁰⁵ Gurbanov, I., “Difficult Geopolitics of the Caspian Complicate Potential Energy Projects”, *Eurasia Daily Monitor*, 15(18), Feb. 2, 2018, available at: <https://jamestown.org/program/difficult-geopolitics-caspian-complicate-potential-energy-projects/>.

¹⁰⁶ Absent such agreement, passage through territorial waters follows coastal State’s legislation (article 11(2)) and not be prejudicial to peace, good order or security of the coastal State (article 11(3)).

¹⁰⁷ This does not include the right to call at ports and anchor within the territorial waters of another Party unless having proper permission or need to do so due to force majeure or distress, or to render assistance to persons, ships or aircraft in distress (article 11(4)).

¹⁰⁸ They include threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State or in violation of international law principles embodied in the UN Charter, exercise or practice with weapons, acts of propaganda, willful and serious pollution, and fishing activities.

CLSCS expands UNCLOS to include carrying out “hydrographic survey” (article 11(6)(j)), “boarding or disembarking” of any person contrary to coastal state laws and regulations (article 11(6)(g)-CLSCS), “putting afloat, submerging or taking on board any military device and controlling it” (article 11(6)(f)), and “controlling” the launching, landing or taking on board any aircraft or military device (article 11(6)(e)). This refers to the 2015 launch of sea-based missiles from warships in the Caspian.

15. *Security and safety*

The Parties agree to combat crimes in the Caspian. Namely, international terrorism and financing thereof, trafficking in arms, drugs, psychotropic substances and their precursors, poaching, preventing and suppressing smuggling of migrants by sea, and other crimes (article 17-CLSCS).¹⁰⁹

16. *Economic development*

The Caspian Sea is an important source of political, economic, social, and cultural development for the Parties (7-Pp). CLSCS is the vehicle “to create favorable conditions for the development of mutually beneficial economic cooperation in the Caspian Sea” (10-Pp). With economic development in view, there is a right to free access from the Caspian Sea and back (article 3(10)) in principle restricted ships flying the flag of one of the Parties (article 3(11)).¹¹⁰

17. *Submarine cables and pipelines*

Of interest is the possibility to lay submarine cables and pipelines on the Caspian Sea’s bed.¹¹¹ The issue is driven by proposals for a Trans-Cas-

¹⁰⁹ In Aktau 2018 three protocols to *Agmt on Cooperation in the Field of Security in the Caspian Sea* were adopted on combating terrorism, organized crime and border authorities cooperation.

¹¹⁰ CLSCS foresees vessels carrying cargoes (article 11(16)(b)), possibly non-CLSCS flag ships.

¹¹¹ Articles 79 and 112-UNCLOS allow Parties to lay submarine cables or pipelines on the seabed, continental shelf and beyond.

pian Pipeline to transport hydrocarbons to Europe, something European officials have long hoped for, but which Russia and Iran had opposed.¹¹² To lay such infrastructure (article 14(1)) must comply with environmental standards and requirements of international agreements,¹¹³ and for cables or pipelines require the agreement of the Party whose sector is to be crossed (article 14(3)). They must comply with environmental standards, wherefore the obligation to prevent, reduce and control pollution of the Caspian Sea “from any source” (article 15) may be used to dampen any such possibilities.¹¹⁴

18. *Biological resources*

Having 90% of world’s sturgeon stock —source of caviar—, exploitation and administration of living organisms is in article 1-CLSCS. “Aquatic biological resources” are “fish, shellfish, crustaceans, mammals and other aquatic species of fauna and flora” distinguishable from “shared aquatic biological resources” “jointly managed by the Parties”. “Harvesting” may happen in a “fishery zone” as well as in the “common maritime space”. The Parties commit to conserve, restore and rationally use biological resources (article 3(14)-CLSCS).¹¹⁵ While biological resources will be administered in an exclusive manner by the coastal State in its fishery zone, the same stocks shall be harvested in conformity with “agreed norms” while found in

¹¹² O’Byrne, D., “Caspian Pact Paves Way for Turkmen Gas Exports to Europe”, *Eurasia.net*, Dec. 13, 2017, available at: <https://eurasianet.org/caspian-pact-paves-way-for-turkmen-gas-exports-to-europe-eventually>. The World Bank and the European Union have given a clean bill of health to the Trans-Caspian Pipeline.

¹¹³ Including *Framework Convention for the Protection of the Marine Environment of the Caspian Sea* and its protocols (article 14(2)-CLSCS). The Convention is not clear on whether all Parties to CLSCS, or only the Parties involved in the corresponding cable or pipeline, must be a party to such international agreements. The Parties must communicate to the other littoral states the coordinates for submarine cables and pipelines, as well as where anchoring, fishing with near-bottom gear, submarine and dredging operations are not allowed (article 14(4)).

¹¹⁴ In fact, in July 2019, Russia voiced its opposition to trans-Caspian pipelines on environmental issues. “Россия выступает против строительства Транскаспийского газопровода”, *Regnum*, Jul. 5, 2019, available at: <https://regnum.ru/news/polit/2660741.html>.

¹¹⁵ The Parties shall apply “agreed norms and rules related to the reproduction and regulation” of “shared aquatic biological resources” (article 3(12)-CLSCS).

the common maritime space. This may present complications as such stocks do not restrict themselves to specific areas.¹¹⁶

19. *Fishery zones*

CLSCS provides fishery zones (article 9(1)) similar to an exclusive economic zone (EEZ) in UNCLOS-Part V. While EEZ measures 200 miles (article 57-UNCLOS), the fishery zone is 10 miles adjacent to territorial waters (article 9(1)), hence a maximum 25 miles.

In its fishery zone, each Party has exclusive right to harvest aquatic biological resources, with CLSCS-compliant rules. Agreements have to be separately executed by “all Parties” based on CLSCS and national legislation (article 9(2)). Adjacent coastal States will jointly determine the total allowable catch of *shared* aquatic biological resources and divide it into national quotas (article 9(3)-CLSCS). A striking difference is that article 9(4)-CLSCS makes this a prerogative of the Party (“it may grant access”) while article 62(2)-UNCLOS makes it mandatory to grant such access (“it shall... give access”).

20. *Environmental issues*

A recurrent theme is the CLSCS-Parties’ responsibility to secure the environment and the region’s sustainable development. The Parties are conscious of “their responsibility before the present and future generations” to preserve the Caspian Sea, as well as the need for its sustainable development (8-Pp), with “rational management of its resources as well as exploration, protection and conservation of its environment” (9-Pp). Ecol-

¹¹⁶ The Parties shall develop scientific research for the [rational] use of biological resources (article 3(15)-CLSCS). This is in contrast with UNCLOS which includes specific provisions dealing with stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it (article 63), and dealing with highly migratory species (article 64), marine mammals (article 65), anadromous (article 66) and catadromous species (article 67) [respectively, fish migrating to spawn up rivers from sea or migrating down rivers to the sea], as well as sedentary species (article 67).

ogy scientific research is facilitated by the Parties (article 3(15)-CLSCS).¹¹⁷ Harm by pollution occur to “biological resources and marine life” (article 1-CLSCS). The inclusion of “marine life”, from UNCLOS-1(1)(4), is odd, since it is only used in the definition of “pollution” and CLSCS deals with “biological resources”.¹¹⁸

A point not discussed is whether to consider the totality of the aquifer and its basin as a *shared natural resource*.¹¹⁹ I. e., since the Caspian Sea receives waters from rivers crossing multiple countries, this seemingly needs to precise the (*joint*) rights and obligations of upstream and downstream states, just as the Caspian-5 would have towards each other.¹²⁰

21. Final provisions

Amendments to CLSCS become an integral part of the Convention (article 18(1)). While the entry into force of CLSCS requires an instrument of

¹¹⁷ The “ecological system of the Caspian Sea” includes the aquatic component of this body of water, human beings and “parts of the land affected by the proximity of the Sea”. The purpose of the Parties is to prevent “pollution” (article 1-CLSCS), similarly defined to article 1(1)(4)-UNCLOS stating it is the introduction by man, directly or indirectly of substances or energy into the marine environment. However CLSCS adds that pollution may occur from land-based sources and by introduction of organisms.

¹¹⁸ As in article 192-UNCLOS, the Convention provides that the Parties commit to protect the regional environment and the ecological system of the Caspian Sea and all elements thereof (articles 3(14) and 15(1)). Should pollution occur, the polluting Party is liable for damage caused to the ecological system (articles 3(13) and 15(4)). Liability determination is not foreseen in CLSCS.

¹¹⁹ The International Law Commission has worked on the Law of Transboundary Aquifers. It also touched upon the relationship of these transboundary aquifers with oil and natural gas. ILC adopted a complete set of 25 articles of a draft convention on transboundary aquifers, Yamada, C., *Fifth Report on Shared Natural Resources: Transboundary Aquifers*, International Law Commission, Feb. 21, 2008.

¹²⁰ With over 130 rivers irrigating, Huseynov, *op. cit.*, this could become very complex with several basins in the Caspian Sea. *Ex. gr.*, Volga River basin: Russia; Kura/Aras River basin: Turkey, Georgia, Armenia, Iran, Azerbaijan, and Russia; Terek River basin: Georgia and Russia; Atrek River basin: Iran and Turkmenistan; Ural River basin: Russia and Kazakhstan; Emba River basin: Turkmenistan (on years prone to precipitation), “Caspian Sea/Nature/Gulfs, Rivers and Harbors”, *Azerbaijan.az*, (2016), available at: http://www.azerbaijan.az/_Geography/_Caspian/_caspian_e.html?caspian_04. Examples may be the European regime applicable to the Danube river, or the Mexico-USA regime on the Colorado and Bravo rivers.

ratification (article 22), amendments only require notification of completion of internal procedures. As a follow-up mechanism a regular high-level five-party consultation under their Ministries of Foreign Affairs must meet annually (article 19).

Disagreements and disputes about interpretation and application of CLSCS shall be settled by the Parties through consultations and negotiations. Any unsettled dispute may be referred to international law peaceful means, “at the discretion of the Parties” (article 21), without identifying if a dispute occurs between two Parties or between *all* Parties. Furthermore, one should ponder whether “discretion of the Parties” requires the acquiescence of *all* Parties, the discretion of one Party or of those involved in the dispute. One should also consider what will be a dispute in the Caspian Sea; particularly with recent case law by the International Court of Justice,¹²¹ with a different regional standard.¹²²

VI. CONCLUSION

The Caspian Sea is neither a lake nor a sea. Per CLSCS, it is a stipulated body of water —identified in specific archived documents— with a unique legal regime.

¹²¹ International courts had established case law that “A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.” *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No.2, at 11, and that it is “a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.”, *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Rep. 65, at 74, as well as in other case law, such as the *South West Africa cases (South West Africa (Ethiopia vs. South Africa, Liberia v South Africa) (Preliminary Objections)*, Judgment [1962] ICJ Rep 328), the *Nuclear Tests cases (Nuclear Tests (Australia v France, New Zealand v France)*, Judgment [1974] ICJ Rep 253, para 55). However, the *Marshall Islands cases (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom, Marshall Islands v India, Marshall Islands v Pakistan) (Preliminary Objections)*, ICJ Judgment 5 October 2016) have rendered “the proof of the existence of a dispute unnecessarily difficult and uncertain when there were no prior diplomatic exchanges between the parties”.

¹²² Upon signature, the Convention became open to ratification; such instruments should be deposited with Kazakshtan. CLSCS shall enter into force on the date the Depositary receives the fifth ratification, who registers the Convention per article 102 of the UN Charter. The Convention has no time limit once it enters into effect (articles 22, 23 and 24).

The Caspian Sea is an endorheic basin, *i.e.*, with no outflows. It is the largest body of water surrounded by land. Ancient peoples saw a lake. Due to its size and salinity it was concomitantly considered a sea. This ambivalence is reflected in the *Convention on the Legal Status of the Caspian Sea*. While CLSCS does not define the Caspian Sea as lake or sea, by *verbatim* drawing on international law and UNCLOS, it sometimes implies a lake or a sea. Regardless, CLSCS sets a unique legal regime applicable to the Caspian Sea.

CLSCS incorporates into (regional) international law, practices and principles adopted by the Caspian-5 before and after the demise of the USSR.

- 1) The Caspian Sea is a body of water identified in specific archived charts.
- 2) Territorial waters: 15 miles.
- 3) Exclusive economic (fishing) zone: 10 miles.
- 4) Other waters are considered common waters.
- 5) Seabed pipelines require approval only from States whose territories are involved, yet opposable by any Caspian-5 on environmental issues.
- 6) No foreign military forces are allowed in the Caspian Sea.
- 7) Only vessels of the Caspian-5 may formally navigate its waters.
- 8) CLSCS only applies to the riparian States, who could only *ab initio* define the Caspian Sea's legal regime because *per natura* only they have access to it.

The Caspian Sea shares provisions with a sea status and with rules of bordering lakes. It follows international maritime norms, such as territorial sea, exclusive economic zones, and high seas, albeit with different designations and dimensions. It resembles a lake wherein only riparian States may use the Caspian Sea, only Caspian littoral State's military presence is allowed, no third country may demand to use waterways connecting the Caspian Sea. The CLSCS is aligned with public international law with a general concept of innocent passage, freedom of high seas and international legal responsibility (*vis-à-vis* third countries for environmental damages).

Per CLSCS, the Caspian-5 have jurisdiction over 15 nautical miles of territorial waters and exclusive fishing rights in 10 additional miles. CLSCS allows laying of pipelines requiring approval of the countries whose territory they pass, subject to environmental issues. It forbids military assets in the region from non-Caspian countries. To preserve its ecology, CLSCS

regulates human beings and “parts of the land affected by the proximity of the Sea”. After delimitation, each state enjoys sovereign rights for subsoil use within its national sector.

CLSCS combines important political factors with substantive legal elements. It is a treaty agreeing to disagree on fundamental issues, such as demarcation of borders —unsolved for twenty-five years— yet *with a very pragmatic fashion* the Caspian-5 found compromise and set rules for joint/non-vetoed exploration and exploitation of subsoil [hydrocarbon] resources. The delimitation of the seabed, which caused past disputes, requires additional agreements between littoral nations. With CLSCS, the Caspian-5 signaled the world their desire to move forward and establish a legal framework to jointly develop and exploit the Caspian Sea’s biological but particularly subsoil resources. With CLSCS, all Caspian littoral states enjoy a much stronger legal position for developing projects —as do transnational companies and international financial institutions.

CLSCS allows the Caspian-5 to use the Russian canals connecting the Caspian Sea to other seas and the oceans, yet Russia retained control over them. On the other hand, no discussions have surfaced touching the Caspian Sea as a common good, requiring joint administration of rivers, the Caspian Sea itself, and land affected by it.

The Convention’s approach regarding seabed delimitation was deemed “evasive” but “expected”¹²³ or having “kicked the can down the road”.¹²⁴ Yet it opened the way for littoral States to develop the Caspian Sea’s subsoil resources. In 2017 and 2018 they agreed to jointly develop offshore Caspian hydrocarbon resources: Azerbaijan and Iran, Iran and Turkmenistan, Azerbaijan and Turkmenistan, and even trilaterally.¹²⁵ These agreements announced the adoption of CLSCS and propelled arrangements to jointly de-

¹²³ O’Byrne, *op. cit.*

¹²⁴ Dudley, D., “Tehran Tries To Face Down Domestic Critics Of Caspian Sea Deal”, *Forbes*, Aug. 14, 2018, available at: <https://www.forbes.com/sites/dominicdudley/2018/08/14/tehran-skeptics-of-caspian-sea-deal/#2d0012b750fc>.

¹²⁵ Rahimov, Rahim, “Azerbaijan, Iran Reach Breakthrough on Disputed Fields in the Caspian Sea”, *Eurasia Daily Monitor*, 15(52), Apr. 5, 2018, available at: <https://jamestown.org/program/azerbaijan-iran-reach-breakthrough-on-disputed-fields-in-the-caspian-sea/>, and O’Byrne, *op. cit.* “Azerbaijan, Iran, Russia, create joint energy corridor”, *AzerNews*, Mar. 13, 2018, available at: https://www.azernews.az/oil_and_gas/128685.html.

velop the Caspian Sea in oil and gas matters (Azerbaijan-Kazakhstan, and Azerbaijan-Russia), as well as marine research (Azerbaijan-Russia).¹²⁶

CLSCS leaves undefined the specific demarcation mechanisms to define borders, issue that could prove disruptive in the future. But it provides momentum to develop Caspian Sea resources, allowing bordering States to define the conditions on (joint) exploration and exploitation in disputed areas yet subjecting these to the implied veto of any and all Caspian-5 on environmental concerns. CLSCS, without border demarcation nor defining ownership of disputed areas, paves the way for States to benefit from the exploration and exploitation of (hydrocarbon) resources.

The Convention opens the way for Trans-Caspian (oil and gas) pipelines (TCP). It evidences the need to coordinate between coastal states regarding environmental issues, as environmental impact evaluations of TCP may delay any TCP construction. From the outset, Russia and Iran demanded construction of TCPs contingent on environmental authorization by all Caspian-5. While there are high hopes CLSCS will enter into force soon, any country may oppose any TCP, which they hitherto succeeded in blocking by subjecting any TCP's construction to the approval of all Caspian-5.¹²⁷ Just a month after CLSCS was adopted, Russia recalled that, while it does not have plans to lay pipelines on the basin's seabed, "the laying of pipelines along the Caspian Sea bottom is ruled out in case of objections on the part of Caspian states",¹²⁸ and less than a year later it stated opposition to a TCP due to environmental issues.¹²⁹

The Convention is a hiatus; a very important achievement. It evidences the will to move beyond past disputes and jointly develop the Caspian Sea.

¹²⁶ Respectively, "Kazakhstan and Azerbaijan plan joint oil and gas venture", *AzerNews*, Nov. 9, 2018, available at: https://www.azernews.az/oil_and_gas/140647.html, "Azerbaijan, Russia to develop gas fields in northern part of Caspian Sea", *AzerNews*, Nov. 19, 2018, available at: https://www.azernews.az/oil_and_gas/141138.html, Mammadova, L., "Russia is eager to conduct joint expeditions in Caspian Sea", *AzerNews*, Nov. 23, 2018, available at: <https://www.azernews.az/nation/141462.html>.

¹²⁷ Gurbanov, *op. cit.*

¹²⁸ "Russian FM Hopes Caspian Sea Convention Will Be Ratified Without Delay", *AzerNews*, Sep. 16, 2018, available at <https://www.azernews.az/region/137615.html>.

¹²⁹ "Посол РФ в Баку заявил, что Россия выступает против Транскаспийского газопровода", *Хроника Туркменстана*, Jul. 5, 2019, available at: <https://www.hronikatm.com/2019/07/rf-against-pipeline/>.

Pragmatism hoping to develop this stipulated at minus 28 meters below median sea level non-lake/non-sea endorheic basin.

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