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Seabed delimitation of the Caspian Sea

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Dedication

I dedicate this work of mine to the loving memory of my beloved mother, who taught me the courage to stand on my own feet and whose last words I always chase.

Rest in peace my dearest.

*Good fences make good neighbors*¹

¹ Albeit it can be traced to other sources as well, the proverb is an excerpt from the poem “Mending Wall” by Robert Frost, 1914. In the poem, the narrator each spring talks to his neighbor to reconstruct stone wall between their farms. He points out where they do not need a wall and ponders of something that does not love a wall at all. Yet, his neighbor repeatedly tells him “good fences make good neighbors”. The poem is available: <https://www.poetryfoundation.org/poems/44266/mending-wall> (accessed 04.11.2020)

Table of contents

1	INTRODUCTION.....	2
1.1	Statement of the problem and purpose of the thesis	2
1.2	Research questions.....	5
1.3	Structure of the thesis, methodology and limitations.....	5
1.4	Sources of the thesis.....	7
1.4.1	Soviet-Iranian agreements	7
1.4.2	Bilateral agreements between the modern Caspian States	8
1.4.3	International law in focus regarding the Caspian seabed delimitation.....	9
1.4.4	The Convention on the Legal Status of the Caspian Sea.....	10
2	CONCISE POLITICAL AND GEOGRAPHICAL BACKGROUND.....	12
2.1	Positions of the coastal States	12
2.2	Geographical considerations	13
2.3	Contentions of Iran and Turkmenistan.....	14
3	WHAT AGREEMENTS OF THE LITTORALS AND RULES OF INTERNATIONAL LAW ARE APPLICABLE TO THE CASE OF THE CASPIAN?	15
3.1	Dismemberment of the USSR and succession of the former republics	15
3.2	Study of existing bilateral agreements between the current Caspian States	19
3.3	Applicability of UNCLOS	20
3.4	Applicability of customary international law.....	23
4	HOW TO APPLY THE RELEVANT LAW IN ORDER TO REACH EQUITABLE DELIMITATION OF THE CASPIAN SEABED IN ACCORDANCE WITH INTERNATIONAL LAW?.....	25
4.1	How to apply former and existing agreements?.....	25
4.1.1	Effects of Soviet-Iranian agreements	25
4.1.2	Practice of the bilateral delimitation agreements	26
4.2	How to apply customary international law?	27
4.2.1	The role of Absheron peninsula.....	28
4.2.2	Giving effect to Chilov Island	29
4.3	Rational ways to delimit the seabed of the Caspian.....	31
	CONCLUSIONS.....	35
	TABLE OF REFERENCE	37

1 Introduction

1.1 Statement of the problem and purpose of the thesis

With its distinct ecosystem and abundant natural resources, the Caspian Sea is the largest inland water basin of the world². It is home to significant biological resources and thousands of tons of fish feed people living along the coasts of the Caspian each year³. Additionally, the Caspian is well-known for its natural mineral resources, namely oil and gas. The volume of the reserves significantly varies depending on technological advancements and by new discoveries. The US Energy Administration estimates that using field-level data the Caspian basin holds 48 billion barrels of oil and 292 trillion cubic feet of natural gas⁴.

The Caspian is situated at the intersection of Europe and Asia on the historic Great Silk Road⁵. The strategic location of the Caspian historically welcomed a lot of merchants from the west who used to travel to the east and backwards through the passage along the Caspian⁶. Hence only two surrounding States until 1991 – the Russian Empire (then followed by the USSR) and Iran sought to have total control over the region, but oftentimes resulted in Russian dominancy.

In the wake of industrialization, a rapid increase in demand for paraffin in the growing industry of Russia necessitated to put more efforts to explore and exploit oil⁷. With the first mechanically drilled oil well in the world in 1864 in Bibi-Heybat area⁸, the Russian Empire started off what is the current oil industry in the region⁹. It is no surprise that many eager petroleum engineers and companies became interested as well and most of the interest was concentrated on Baku's oil fields¹⁰. The Nobel Brothers were among the foreign enterprises who revolutionized and dominated the industry between 1877 and 1883¹¹. Baku's oil was also crucial during the Second

² JA Roach and RW Smith, "Caspian seabed boundaries" in "International Maritime Boundaries" Colson and Smith (eds), *American Society of International Law, Volume V*, at 3537

³ M.Karpinsky, D.Katunin, V.Goryunova, T.Shiganova, "Biological Features and Resources", Hdb Env Chem Vol. 5, Part P: 191–210, *Springer-Verlag Berlin Heidelberg* 2005, DOI 10.1007/698_5_010, at 191

⁴ U.S. Energy Information Administration, "[Overview of oil and natural gas in the Caspian Sea region](#)" (accessed 25.10.2020)

⁵ The term was first introduced by F.Richthofen in 1877. Via the Great Silk Road from 2nd century BC until the middle of 2nd millennium BC, there were historic trade routes from Europe to Middle East and to Asia, and vice versa along the Caspian. For more, see T.Khalilova, R.Li, E.Khalilov, "Caspian Route of the Silk Road", *International Journal of Asian History*, Vol.4, No.4, pp.1-9, 2017

⁶ *Ibid*

⁷ Paraffin was not only used for lighting lamps, but also as a fuel for the industry. This led to an increase in oil production and emergence. See J.Bahramov and H.Hasanov, "[The pivotal role of Azerbaijan oil and Baku | The Branobel History](#)" (accessed 25.10.2020)

⁸ M.Croissant, B.Aras, "Oil and Geopolitics in the Caspian Sea Region", *Praeger; 1st Edition* (1999), at 102

⁹ Mir-Yusif Y.Mir-Babayev, "[A Brief History of Oil and Gas Well Drilling | Visions of Azerbaijan Magazine](#)", 2012 (accessed 25.10.2020)

¹⁰ *Supra* note 2, at 3540

¹¹ McKay, P.John "Baku Oil and Transcaucasian Pipelines, 1883-1891: A Study in Tsarist Economic Policy", *Slavic Review* 43, no. 4 (1984): 604-23. doi:10.2307/2499309

World War, amounting to 80% of oil utilized by the USSR¹². After the World War II, the Soviets kept on explorations and development of oil fields in shores and off shores of the Caspian long before they found oil in Siberia¹³.

In the ensuing years oil has gradually become a key to security. Shortcomings of reliable oil/gas sources in Europe represented a clear threat to the EU's security¹⁴. In addition, the Kremlin's pursuance even made Europe dependent on Russia's oil/gas¹⁵.

The collapse of the USSR in 1991 changed the political scene of the region by bringing the number of the coastal states of the Caspian to 5. Azerbaijan, Kazakhstan and Turkmenistan gained their independence following the collapse, whose vast petroleum resources piqued interests of Western Countries and the USA. The EU in order to reduce the Russian leverage and in a view of seeking to diversify oil and gas supplies began to strengthen ties with the newly independent States. With this idea in mind, several projects were introduced with financial support of the EU¹⁶. This also overlapped with state agenda of the newly independent States, which was to exploit and transport mineral resources of the Caspian¹⁷.

However, undefined legal status of the Caspian Sea created obstacles to exercise rights over the oil fields and became a matter of urgency to be tackled¹⁸. Therefore, the littorals began negotiations with a view to resolving the undefined legal status, mainly delimitation of the seabed of the Caspian in 1996.

Long lasting negotiations over the legal status of the Caspian Sea yielded no result owing to disagreements between some of the coastal States. Hence, to exercise own petroleum exploration and development rights, Russia, Kazakhstan, Azerbaijan and Turkmenistan entered into bilateral agreements, however, only in respect of the seabed delimitation starting from 1998.

¹² J.Hayward. "Too Little, Too Late: An Analysis of Hitler's Failure in August 1942 to Damage Soviet Oil Production" *The Journal of Military History* 64(3):769-794 (2000), 772. doi: 10.2307/120868

¹³ K.Block, "[A journey to Russia's Siberian oil frontier | BBC News](#)" 2011, (accessed 25.10.2020)

¹⁴ Z.Baran, "EU Energy Security: Time to End Russian Leverage", *Washington Quarterly*, 30:4 (2007), 132, DOI: 10.1162/wash.2007.30.4.131

¹⁵ *Ibid*

¹⁶ In September 1994, Azerbaijan signed PSA – "the contract of the century" with a consortium of 11 foreign oil companies, BP being the main stakeholder. This agreement concerns development of major oil fields in the Azerbaijani sector of the Caspian – Azeri, Chirag and Gunashli (ACG) fields. For more: [The contract of the century – a national strategy for success](#) (accessed 02/10/2020)

A 40-billion-dollar worth project – SGC comprises three phases: South Caucasus Pipeline (SCP), Trans-Anatolian Pipeline (TANAP) and Trans-Adriatic Pipeline (Tap). For more: <https://www.sgc.az/en>. SGC project also includes Trans-Caspian Pipeline which will get Turkmenistan involved in the project. The pipeline is going to run underneath of the Caspian Sea, then proceed with existing infrastructure of Azerbaijan. For more: <http://w-stream-trans-caspian.com/the-project/> (all weblinks accessed 25.10.2020)

¹⁷ *See supra* note 2, at 3538

¹⁸ Mehdiyoun, Kamyar. "Ownership of Oil and Gas Resources in the Caspian Sea." *American Journal of International Law* 94, no. 1 (2000): 179–89, 179. doi:10.2307/2555242

Iran did not see eye-to-eye with these States in regards to method of the delimitation and locations of the baselines. Nor could Turkmenistan concur with Azerbaijan on how to delimit the seabed between them. All this raised (and still raises) the tension in the region which then created threats to the regional security.

For instance, in 2001 Iran trained its guns over the BP's ships doing survey on behalf of Azerbaijan in the "disputed area"¹⁹. Then in 2008, a tension escalated between Azerbaijan and Turkmenistan, where Azerbaijani ships forcefully stopped international oil company ships doing geological survey on behalf of Turkmenistan²⁰ over the area disputed by both.

After a long stalemate, the coastal States reached the Convention on the Legal Status of the Caspian Sea in 2018²¹. However, the Convention has a framework character and places a great deal of discretion on the littorals in the seabed delimitation, while particularly regulates the water surface. Under the Convention the Parties have to agree bilaterally, those who have not done it yet, in relation to the seabed delimitation. Nonetheless, it appears to be difficult, because each State pursues to have more space on the seabed. The reason is simple: the more space, the more natural mineral resources. Therefore, while they dispute each other's solutions to the delimitation issue on the table of negotiations, they continue to flaunt their military power on the site.

All these lead to regional instability. This also hampers the prospective projects in the region²². Additionally, the undefined delimitation entangles to cope with environmental protection and preservation of the biological resources²³.

Moreover, the political history of the Caspian and its geographical character demonstrate that it is even difficult to decide what law would be applicable to the delimitation case. This is because, not only during the USSR-Iran times there had been several agreements over the Caspian, but mainly also after the collapse of the Soviets the 'successors' treated the Caspian differently and entered into new bilateral agreements. Therefore, different agreements with varied nuances concerning the seabed delimitation have historically been evolved. Since the Caspian Convention does not explicitly regulate the seabed delimitation, it leaves the question of what law/agreement is applicable open.

¹⁹ A.Dubnov, "[Tehran Guns for Caspian Oil | Institute for War and Peace Reporting](#)" (accessed 26.10.2020)

²⁰ J.Kucera, "[Azerbaijan Gunships Threatened Turkmenistan's Caspian Oil Rigs, Cables Show | Eurasianet](#)" 2012 (accessed: 26.10.2020)

²¹ Convention on the Legal Status of the Caspian Sea, concluded in Aktau, Kazakhstan on 12 August 2018, English text: <http://en.kremlin.ru/supplement/5328> (hereinafter "the Caspian Convention")

²² Trans-Caspian pipeline is a good example. Among other things, due to the regional instability and disagreements among Iran, Azerbaijan and Turkmenistan, the project has not been initiated yet. See S.Jafarli, "[The Trans-Caspian Knot: Why Does the Pipeline Need Geopolitical Consensus? | Baku Research Institute](#)", (accessed 26.11.2020)

²³ Igor Zonn, "Introduction" in (eds), "The Caspian Sea Encyclopedia" *Springer-Verlag, Heidelberg*, 2010, 117, DOI: 10.1007/978-3-642-11524-0

On the other hand, the positions of Turkmenistan and Iran on the matter contradict what the other States have shown so far in terms of methodology (incl. placing baselines) for the delimitation. Therefore, even if the applicable law were certain, it would have been difficult to actually apply it because of the contentions of Turkmenistan and Iran. Nonetheless, the rules of Caspian Convention come in handy at this, which refers to international law according to which the delimitation must be effected. In case of disputes between Parties, international law²⁴ is clear on that the delimitation must be equitable. With their huge margin in the development and identification of customary international law, international courts and arbitrations utilize the equitability as a tool to decide discrepancies between coastal States.

In order to ensure stability and sustainability in the region and foster prosperity of the Caspian littorals, it is of importance to put an end to the long-lasting disagreements. The only way to do so appears to complete ‘negotiations’ over the seabed delimitation with an equitable result. In light of this, it becomes necessary to ascertain what law is applicable to the case first and then how it should be applied in order to achieve an equitable solution as per international law. Having acknowledged the above, this thesis will try to search for ways to resolve the seabed delimitation issue of the Caspian in a fair, legal and equitable manner.

1.2 Research questions

In view of the observations, the research questions will be:

1. What rules of international law and agreements of the littorals are applicable to the case of the Caspian?
2. How to apply the applicable law in order to reach equitable delimitation of the Caspian seabed in accordance with international law?

1.3 Structure of the thesis, methodology and limitations

The structure comprises 3 sections besides the Introduction part.

The first section starts with a brief account of political considerations of the Caspian Sea. Needless to say, these political aspects lay groundwork for the current contentions of Iran and Turkmenistan, which hinders the determination process of the seabed boundaries. Then the section continues with geographical considerations of the Caspian Sea. The geography will play a key role throughout the discussions herein, because Turkmenistan’s contentions are of geographical character. Logically, the section will end up with giving an overview about the contentions of both Iran and Turkmenistan and how the delimitation would look like on the map, if employed.

²⁴ Articles 74(1) and 83(1) of the LOSC, which is established as customary law. This will be further discussed

The second section will be dedicated to identify what law is applicable to the case of the Caspian. As mentioned earlier, there are different agreements – both the ones adopted by the USSR and Iran and the ones between the modern coastal States. International law does not remain silent in coming to the seabed delimitation of the Caspian, as it has been explicitly referred to under the Caspian Convention. The mere fact that not all the coastal States have ratified the United Nations Convention on the Law of the Sea²⁵ will not mean that customary international law, which has been developed and identified by international courts, is applicable to the subject matter. The section, therefore, will try to present which rules of international law and agreements of the coastal States are applicable law by analyzing and assessing their applicability separately.

The final, the third section is the core part of this thesis where an analysis of how the delimitation is to be effected will be presented. Finally, the thesis will seek for rational ways to demonstrate exactly how the applicable law ought to be applied in order to reach equitable delimitation. Iran's and Turkmenistan's contentions, which are the 'obstacles' to reach final agreements over the delimitation, will be placed at the center of the analysis. Together with addressing these contentions, the thesis will try to introduce rational ways based on the applicable law to the seabed delimitation issue of the Caspian Sea.

As regards the methodology, primarily two methods of legal research will be used throughout this thesis: (i) legal theoretical framework and (ii) normative approach²⁶. The first will be used in the sections one and two, while the latter will mainly be utilized in the last section.

Certain limitations have also been faced while composing this thesis. Since some of the coastal states had contradictory views from now and then, their official stances on the matter seem contentious.

On the other hand, for the purposes of this thesis the Caspian Convention will not be discussed in detail. As discussed further below, the Convention is not explicit as to exactly how to delimit the seabed, while places discretion on the coastal States, provided that their acts are consonant with international law. With its broad ruling, the Caspian Convention does not seem to be practical insofar as the seabed delimitation is concerned.

Furthermore, since the Caspian Convention does not exactly define the Caspian as a lake, nor explicitly refers to it, rules on lakes will be omitted. Arguably, there is no codification of mandatory international law on lakes and coastal States generally govern the lake they surround

²⁵ United Nations Convention on the Law of the Sea, 10 December 1982, United Nations Treaty Series, Vol. 1833, No. 31363, available: <http://treaties.un.org/doc/Publication/UNTS/Volume%201833/v1833.pdf> (hereinafter "UNCLOS")

²⁶ Legal theoretical framework discusses current legal background/framework, while a normative approach method is used to introduce solutions to gaps. Paul Chynoweth, "Legal research" *Advanced Research Methods in the Built Environment*, Wiley-Blackwells, 2008, at 28

bilaterally²⁷. Nevertheless, this may not seem to be the exact case for the Caspian, because the seabed delimitation of the Caspian has to follow international law.

1.4 Sources of the thesis

A series of agreements may have impacts on deciding the delimitation of the Caspian seabed. These include several Soviet-Iranian agreements and the bilateral agreements between the modern Caspian States. International law also comes into play after the Caspian Convention has been adopted. This section, will therefore, overview the sources on the basis of what the discussions and analysis throughout the thesis will be conducted.

1.4.1 Soviet-Iranian agreements

Earlier than the USSR, the Russian Empire exerted its influence on the Caspian region. Under the Treaties of Gulistan of 1813²⁸ and Turkmenchay of 1828²⁹, the Empire was the only power who maintained navy presence on the Caspian, whereas Iran was solely given the presence of merchant fleet. However, the demise of the Tsarist Russia following the Russia Revolution in 1917³⁰ led the Russian's tight grip to be loosened and Iran in turn got more favorable conditions.

The Treaty on Friendship and Cooperation was the first agreement signed between the USSR and Iran³¹. Under this Treaty the Parties reached equal bargains for having merchant fleet and navy on the waters of the Caspian³². The Treaty also abrogated former agreements³³. Later agreements between the Parties were reached in 1935 and 1940: Treaty of Establishment, Commerce and Navigation³⁴ and Treaty of Commerce and Navigation³⁵, respectively. Under both Treaties the rules for the navigation in accordance with the Treaty of 1921 were reaffirmed. In

²⁷ David N.Griffiths, "What's in a Name? The Legal Regime in the Caspian Sea (or Lake)", *Ocean Yearbook Online* 23, Vol 23, Is 1, Boston/Leiden: *Martinus Nijhoff Publishers*, 2009, <https://doi.org/10.1163/22116001-90000193>, at 182

²⁸ The Treaty of Gulistan between the Russian Empire and Iran, 1813, <https://www.cais-soas.com/CAIS/Iran/golistan.htm> (accessed 25.10.2020)

²⁹ The Treaty of Turkmenchay between the Russian Empire and Iran, 1828, <https://www.cais-soas.com/CAIS/Iran/torkmanchai.htm> (accessed 25.10.2020)

³⁰ For more: [Russian Revolution - Causes, Timeline & Definition | History.com](https://www.history.com/topics/russia/russian-revolution) (accessed 25.10.2020)

³¹ Treaty on Friendship and Cooperation of 26 February 1921 between the USSR and Iran. In 9 League of Nations Treaty Series (1922), no 268. English text: <http://www.worldlii.org/int/other/LNTSer/1922/69.html> (accessed 29.10.2020)

³² *Ibid*, Article 11

³³ *Ibid*, Article 1. Abrogated the treaties in *supra* note 28 and 29

³⁴ Treaty of Establishment, Commerce and Navigation of 27 August 1935 between the USSR and Iran. In: Soviet Treaty Series, vol. II, p. 140 and in: LNTS, No. 4069

³⁵ Treaty of Commerce and Navigation of 25 March 1940 between the USSR and Iran. In: LNTS, No. 2530 and British and Foreign State Papers, vol. 144, p. 419. English text not found, *see* in Russian <http://docs.cntd.ru/document/901861932> (accessed 01.11.2020)

addition, the Parties agreed to reserve an exclusive fishery zone up to 10 n.m. off the coasts³⁶. The Treaty of 1940 made the Treaty of 1935 void³⁷ and was entered into for a period of 3 years, however, it had never been terminated³⁸. In 1954, on the other hand, the Parties entered into another one – Agreement concerning the Settlement of Frontier and Financial Questions³⁹ whereby they demarcated their land frontiers.

In order to verify the applicability of these agreements, the international instruments – Vienna Convention on Succession of States in respect of Treaties⁴⁰ and Vienna Convention on the Law of Treaties⁴¹ will be deployed below.

1.4.2 Bilateral agreements between the modern Caspian States

After the collapse of the USSR, the newly emerged states rushed to define the legal status of the Caspian and delimit the seabed⁴². This would help them realize their rights over the natural resources off their coasts⁴³. Russia was also interested in entering into agreements for the same reason and for security purposes⁴⁴.

First agreement on the seabed delimitation was concluded between Russia and Kazakhstan on 06 July, 1998⁴⁵. The delimitation under this agreement was effected along a modified equidistance/median line⁴⁶ on the basis of justice⁴⁷. Four years later, the Parties made a Protocol, which was more specific in regards to the coordinates and baselines⁴⁸.

³⁶ Mehdiyoun, *supra* note 18, at 180

³⁷ Barbara Janusz-Pawletta, “The Legal Status of the Caspian Sea: Current Challenges and Prospects for Future Development”, *Springer, Berlin, Heidelberg*, 2015, at 16, <https://doi.org/10.1007/978-3-662-44730-7>

³⁸ *Ibid*

³⁹ Agreement concerning the settlement of frontier and financial questions, Iran-USSR, Tehran, 1954, <https://treaties.un.org/doc/Publication/UNTS/Volume%20451/volume-451-I-6497-English.pdf>

⁴⁰ Vienna Convention on Succession of States in respect of Treaties, 6 November 1996, United Nations, Treaty Series, vol. 1946, p. 3, <https://www.refworld.org/docid/3ae6b38518.html> (hereinafter “VCSS”)

⁴¹ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331, <https://www.refworld.org/docid/3ae6b3a10.html> (hereinafter “VCLT”)

⁴² In their joint letters to the UN Azerbaijan, Kazakhstan and Turkmenistan considered that immediate and urgent task of the littoral states is to conclude agreement on the legal status of the Caspian Sea. UN doc, A/51/529, 21 Oct 1996, <https://undocs.org/A/51/529> and UN doc, A/52/93, 17 Mar 1997, <http://undocs.org/A/52/93>

⁴³ Roach and Smith, *supra* note 2, at 3538

⁴⁴ This way Russia pursued to establish a buffer zone between the Southern Caspian States and himself. For more: Griffiths, *supra* note 27, at 169

⁴⁵ Agreement between the Russian Federation and the Republic of Kazakhstan on the Delimitation of the Seabed, 06 Jul 1998, <https://undocs.org/pdf?symbol=en/A/52/983> (Annex III)

⁴⁶ The words equidistance and median are used interchangeably in this thesis

⁴⁷ *Ibid*, Art 1

⁴⁸ Protocol of 13 May 2002 to the Agreement on delimitation of Northern Part of the Caspian Seabed of 6 July 1998 signed between the Republic of Kazakhstan and the Russian Federation. In Russian: <http://docs.cntd.ru/document/901886265> (accessed 02.11.2020)

In late November 2001, Azerbaijan and Kazakhstan reached an agreement on the seabed delimitation⁴⁹. The coasts of the Parties are opposite and a modified median line has been employed being equidistant from the shorelines and islands along the coasts⁵⁰.

The Agreement between Russia and Azerbaijan was concluded in September 2002⁵¹. The equidistance line method was also utilized while delimiting adjacent maritime areas between the Parties. By reference to international law, the Parties also enjoy sovereign rights on the seabed up to the boundary line⁵².

Turkmenistan and Kazakhstan reached an agreement in 2004⁵³ under which the median line method was again employed to delimit the area in accordance with international law⁵⁴. Three states – Russia, Azerbaijan and Kazakhstan have then come into an agreement concerning the determination of tripoint where the seabed boundaries of these States meet⁵⁵. All the agreements have entered into force. However, Iran refuses to recognize any of them⁵⁶.

1.4.3 International law in focus regarding the Caspian seabed delimitation

The ‘constitution for the oceans’⁵⁷ – the UNCLOS will be in focus throughout the analysis below. In its preamble, UNCLOS only mentions “ocean space” and “seas and oceans” and gives no definition to a sea. However, the Caspian Sea might meet the prerequisites of the “enclosed sea” in accordance with Article 122. Furthermore, it seems relevant to consider Article 83 of the UNCLOS, because under this Article the delimitation of the continental shelf is effected by agreements of coastal states on the basis of international law in order to achieve an equitable solution.

As of today, only two coastal states – Azerbaijan (2016), the Russian Federation (1997) ratified the UNCLOS and Iran signed it (1982)⁵⁸. It might be contestable that the other coastal States

⁴⁹ Agreement between the Republic of Azerbaijan and the Republic of Kazakhstan on the Delimitation of the Seabed, 29 Nov 2001, <https://cis-legislation.com/document.fwx?rgn=3996> (accessed 02.10.2020)

⁵⁰ *Ibid*, Article 1

⁵¹ Agreement between the Republic of Azerbaijan and the Russian Federation on the Delimitation of the Seabed, 23 Sep 2002, <https://cis-legislation.com/document.fwx?rgn=26502> (accessed 02.10.2020)

⁵² *Ibid*, Articles 1 and 6

⁵³ Agreement between the Republic of Turkmenistan and the Republic of Kazakhstan on the Delimitation of the Seabed, 07 Nov 2014, <https://cis-legislation.com/document.fwx?rgn=71179> (accessed 02.10.2020)

⁵⁴ *Ibid*, Article 1

⁵⁵ Agreement between the Republic of Kazakhstan, the Republic of Azerbaijan and the Russian Federation on the determination of tripoint, 14 May 2003, available: <https://cis-legislation.com/document.fwx?rgn=4875> (accessed 02.10.2020)

⁵⁶ UN doc, A/51/59, 18 Jan 1996, Annex 5

⁵⁷ At the Third UN Conference on the Law of the Sea, LOS Convention was remarked as ‘a constitution of the oceans’ by Tommy Koh, https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf (accessed 03.10.2020)

⁵⁸ The Status of UNCLOS, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en (accessed 02.11.2020)

are not bound by the UNCLOS, because according to Article 34 of the VCLT, “a treaty does not create either obligations or rights for a third State without its consent”. However, this does not exclude certain rules of the UNCLOS from being applicable to the seabed delimitation of the Caspian as customary international law⁵⁹.

As Tanaka observes, customary law is at the heart of maritime delimitation law⁶⁰. Undoubtedly, international court and arbitration cases are cornerstones to identify and develop customary international law. In this sense, the International Court of Justice is granted a subsidiary role which as the Court itself states that it not only marks certain provisions of the UNCLOS as customary law, but also develops some⁶¹. Additionally, ICJ’s findings regarding the existence and content of customary international law are often treated as authoritative statements of the current status of international law⁶². Therefore, to achieve the purposes of this thesis, ICJ’s cases will be referred to below.

1.4.4 The Convention on the Legal Status of the Caspian Sea

As noted earlier, the collapse of the USSR made the number of the coastal States five: Russia, Kazakhstan, Turkmenistan, Iran and Azerbaijan. On the multilateral level, these States established Special Working Group in 1996 in order to tackle the issue of undefined legal status of the Caspian. After having held a plenty of meetings, on 12 August 2018 at the fifth Summit in Aktau city, Kazakhstan, the States reached an agreement on the legal status of the Caspian Sea⁶³.

In its Preamble, the Convention prescribes that the Parties come to an agreement based on the principles and norms of the Charter of the United Nations and international law. Furthermore, the Convention underlines that solving issues related to the Caspian Sea falls within the exclusive competence of the Parties. Furthermore, according to Article 1, the Caspian is “the body of water”, which suggests that the Caspian Convention vaguely defines the status of the Caspian Sea. This also elucidates that it seems to be impossible to fit in the Caspian with any other rules of the law of the sea, since its status – title is none of what international law prescribes.

As for the seabed delimitation, nevertheless, the Convention states under Article 8 that:

⁵⁹ Nordquist, Myron, “Entry into force of the law of the sea convention”, *Brill, Nijhoff*, The Hague, 1995, 173-174

⁶⁰ Yoshifumi Tanaka, “Reflections on Maritime Delimitation in the Nicaragua/Honduras Case”, *Max-Planck-Institute*, (2008), at 913, https://www.zaoerv.de/68_2008/68_2008_4_a_903_938.pdf (accessed 02.10.2020)

⁶¹ Delimitation of the Maritime Boundary in the Gulf of Maine Area, *Canada v United States*, (1984) ICJ Rep 165, at par. 264; *Nicaragua v United States of America - Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986), par. 14

⁶² Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, International Law Commission, para 60, <http://legal.un.org/ilc/sessions/67/> (accessed 05.11.2020)

⁶³ See *supra* note 21

“Delimitation of the Caspian Sea seabed and subsoil into sectors shall be effected by agreement between States with adjacent and opposite coasts, with due regard to the generally recognized principles and norms of international law”

On the other hand, the Caspian Convention introduces new terms to “the law of the sea”. Despite it deserves a separate research, it can be briefed that the Convention divides the water basin into separate sectors with different breadths other than what is stated under the UNCLOS. For instance, according to Article 5, the Caspian surface is divided into internal waters, territorial waters, fishery zones, and the common maritime space. While the breadth of the territorial waters is set to 15 n.m. (unlikely, under the UNCLOS is 12), the fishery zone extends for 10 n.m. following the territorial waters⁶⁴.

That being said, it is worth mentioning that objectives of both UNCLOS and Caspian Convention are somewhat overlapping. In other words, each of the Conventions explicitly refers to cooperation and mutual understanding of the Parties, and preservation of natural resources, etc. Moreover, certain basic principles of the law of the sea have been preserved in the Caspian Convention, such as innocent passage⁶⁵.

⁶⁴ *Ibid*, Articles 7 and 9

⁶⁵ Reference is made to Article 17 of the UNCLOS re the right of innocent passage through the territorial sea. The Caspian Convention governs the matter extensively under Article 11 and recognizes the passage through territorial waters.

2 Concise political and geographical background

2.1 Positions of the coastal States

During the era of the USSR-Iran, the Caspian was treated as a “Soviet-Iranian sea”⁶⁶. With the agreement of 1954⁶⁷, land boundaries between the USSR and Iran were fixed, Astara Port on the west side and Gasankuli Bay on the east side of the Caspian⁶⁸. Later, in 1970 the Ministry of Internal Affairs of the USSR by its unilateral decision set a delimitation line on the Caspian between Iran and USSR connecting these boundary points⁶⁹.



Credits: *Supra* note 115, at 218

In the same year the Russian Ministry adopted another administrative decision on the division of the Caspian into national sectors among its Unions – Azerbaijan, Kazakhstan and Turkmenistan⁷⁰ and employed “center line basis as adopted in international practice”⁷¹.

Later in 1993, after the dissolution of the USSR, the mentioned delimitation was approved by Russia for the benefit of Kazakhstan, Turkmenistan and Azerbaijan⁷².

Following the dissolution of the USSR, political positions of the coastal States have not outright been harmonious. While only Kazakhstan and Azerbaijan were on the same page – pursuing to delimit the Caspian on the basis of an equidistant line⁷³, Russia and especially Iran were unwilling to cooperate and insisted to honor the former Soviet-Iran agreements⁷⁴. After the mid-1990s, Russia under somewhat foreign political pressure reversed its position and opposed Iran’s view. This was mirrored by the bilateral agree-

⁶⁶ W.E.Butler, “The Law of Soviet Territorial Waters: A Case Study of Maritime Legislation and Practice”, *New York, London: Praeger Publishers* (1967), at 167

⁶⁷ *Supra* note 39

⁶⁸ M.Haghyeghi, “The Coming of Conflict to the Caspian Sea,” *Problems of Post-Communism*, 2003, 50:3, 32-41, at 33, <https://doi.org/10.1080/10758216.2003.11656037>

⁶⁹ Vinogradov, S. “The legal status of the Caspian Sea: a card in the new Great Game?” Paper presented at Caspian Oil and Gas Summit, London, United Kingdom (1998), at 55

⁷⁰ Mehdiyoun, *supra* note 18, at 183

⁷¹ *Ibid.*

⁷² M.S.Nourian, “Alternative Viewpoints on the Caspian’s Legal Regime”, *Majalleh*, Summer 1996, at 23

⁷³ UN doc, A/51/529, 21 Oct 1996, <https://undocs.org/A/51/529>

⁷⁴ UN doc, A/49/475, 05 Oct 1994, <https://digitallibrary.un.org/record/163135?ln=en> and UN doc, A/53/741, 14 Dec 1998, annex, <https://undocs.org/A/53/741>

ments Russia entered into on the seabed delimitation with Azerbaijan and Kazakhstan. Turkmenistan, on the other hand, shared different and oftentimes contradictory opinions. For instance, Turkmenistan first agreed with Iran on the fair share principle, then backed up the idea of dividing the Caspian on the basis of median line method⁷⁵. In 2000, Turkmenistan reshaped its view again, expressing that either sectoral approach or “common sea” approach is acceptable⁷⁶.

2.2 Geographical considerations

The Caspian is surrounded by five States: Russia, Kazakhstan, Turkmenistan, Iran and Azerbaijan. With an area of over 371,000 square kilometers, Caspian Sea is not a “sea” in the geographic sense of the word⁷⁷, but rather the largest “lake” – inland water of the world⁷⁸. The Caspian has no natural outlet to the world’s oceans, nor to any sea⁷⁹. There is, however, an artificial canal traversing through the territory of the Russian Federation, linking the Caspian to Sea of Azov via the Volga River, Volga–Don Canal and the Don River⁸⁰.

The Caspian Sea stretches for nearly 750 miles from the north to the south. The average width is around 200 miles, while the narrowest part measures for 125 miles between the shorelines of Turkmenistan and the Absheron Peninsula⁸¹ of Azerbaijan. The Peninsula thrusts out into the sea which is then followed by the Chilov island⁸².

The Chilov Island is located 16 n.m. off the eastern coast of the Absheron peninsula. The island is generally populated by oil workers and economically self-sustainable. There are oil and gas production workshop, medical center, houses and recreation centers. The Chilov also possesses an oil field which is currently under operation. There are even school and kindergarten opened in 1951⁸³.

⁷⁵ UN doc, A/51/73, 01 March 1996

⁷⁶ UN doc, A/55/309, annex, 6, 22 Aug 2000

⁷⁷ Roach and Smith, *supra* note 2, at 3537

⁷⁸ (2018) “The Caspian Sea Treaty”, *Strategic Comments*, 24:9, i-ii, DOI:10.1080/13567888.2018.1557841

⁷⁹ *See supra* 77

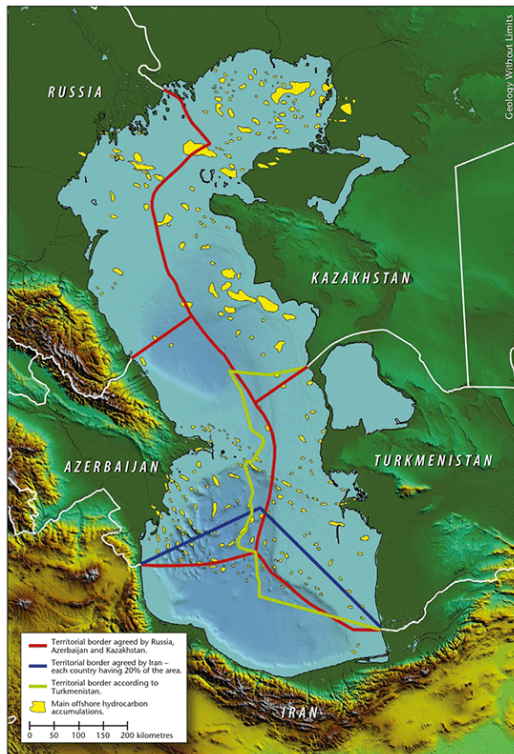
⁸⁰ Navigational capacity of the canal is 5000 vessels with max capacity of five thousand tons, making it enable to load 16 million tons of cargo per year. Transit period via Volga-Don canal takes up to 8 months. Info retrieved from: <https://www.worldatlas.com/articles/where-is-the-volga-don-canal.html> (accessed 02.10.2020)

⁸¹ Absheron Peninsula and Chilov island are important to place the basepoints. [Location of the peninsula and island | Wikipedia](#) (accessed 29.10.2020)

⁸² For more: O.Leontiev, “[Caspian Sea | Facts, Map, & Geography | Britannica](#)” (accessed 29.10.2020)

⁸³ For more: [Life in the Island- VIDEO | Report.az](#) (accessed 03.10.2020)

2.3 Contentions of Iran and Turkmenistan



Credits to [GEO ExPro - Gaining a Regional Perspective](#) (accessed 26.11.2020)

insula is regarded as base-points to its maximum from where the delimitation line will commence, *Azeri* and *Chirag* oil fields, and if the island is given full effect in the delimitation *Kyapaz* oil field will be lost to Azerbaijan⁸⁹. The red line on the picture, on the other hand, shows how the delimitation looks like if an equidistance line approach is employed, and in this case the median line goes over the *Kyapaz* field.

According to Iran's point of view, the Caspian must be shared by 20% among the littorals⁸⁴. Iran refers to the USSR-Iran Agreements of 1921 and 1940, asserting that under those treaties the Caspian was shared between the Parties equally⁸⁵. If Iran's suggestion is taken, the currently disputed oil field between Azerbaijan and Iran – *Alov-Sharg-Araz*⁸⁶ will be saved for Iran. With the blue line on the picture left the portion Iran claims is reflected.

The main contentions (shown with the yellow line) that Turkmenistan puts forward is that if the full effect is given to the *Chilov (Chilos) Island* and *Absheron* peninsula of Azerbaijan, the result will not be equitable⁸⁷. Furthermore, since 1997 Turkmenistan has relied on the approach based on “*the intersection of half-way points on lines of certain parallels of latitude*” while placing basepoints and “*not using all coastal points*” of the *Absheron* peninsula⁸⁸. This way Turkmenistan pursues to avoid full influence of the peninsula, because in case the pen-

⁸⁴ UN doc, A/53/741, *supra* note 33

⁸⁵ *Ibid.*

⁸⁶ Karataeva, Elena. “The Convention on the Legal Status of the Caspian Sea: The Final Answer or an Interim Solution to the Caspian Question?”, *The International Journal of Marine and Coastal Law* 35, 2 (2020): 232-263, doi: <https://doi.org/10.1163/15718085-23521089> at 254

⁸⁷ Roach and Smith, *supra* note 2, at 3547

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

3 What agreements of the littorals and rules of international law are applicable to the case of the Caspian?

As noted earlier, there are a number of agreements concerning the governance of the Caspian and it is unclear which one is relevant. On the other hand, it is also disputed what rules of international law are applicable, because the defined Caspian's status is internationally "undefined", namely, for example, if it were a sea, rules peculiar to seas under international law would be applied, but instead it is just "the body of water"⁹⁰.

Having regard to this, it is necessary to analyze the applicability of all the rules and agreements that could be possibly relevant, and sort out which is applicable and which is not.

3.1 Dismemberment of the USSR and succession of the former republics

In the aftermath of the break-up of the USSR, the matter of whether the new States would be considered successors was brought about⁹¹. This would make them follow the predecessor's international obligations, including the ones under the 1921 and 1940 Agreements⁹².

In order to determine if the Soviet-Iranian agreements are pertinent to today's Caspian, it is important to discuss (i) the validity period of those Agreements, (ii) positions of the coastal states to that effect and (iii) the extent to what international law copes with the matter.

There is no clear provision as to for how long the treaty of 1921 is valid⁹³. On the other hand, the treaty of 1940 was entered into force for 3 years and stated that "if it is not denounced by one of the parties it will be extended for an indefinite period of time"⁹⁴. Only Russia has so far announced itself a continuator⁹⁵ of the former USSR⁹⁶. However, Azerbaijan claims that the

⁹⁰ See subsection 1.4.4

⁹¹ Succession in international law means "the replacement of one State by another in the responsibility for the international relations of territory". See Art 2 lit a, ILC Articles on Nationality of Natural Persons in Relation to the Succession of States, UNGA Res 55/153, 12 Dec 2000, UN Doc A/RES/55/153

⁹² The author thinks that considering unclear stance of the Caspian Convention re the seabed delimitation, there is a need to discuss previous Agreements, as they may still be invoked.

⁹³ Article 26 of the Treaty, *supra* note 31

⁹⁴ Article 16 of the Treaty, *supra* note 35

⁹⁵ Continuity presents a situation where a State preserves its legal identity despite significant changes regarding its constitutional structure, its territory or population. Zimmermann A. and Devaney J. "State Succession in Treaties", In: Wolfrum R (ed), 2006, *The Max Planck encyclopedia of public international law*. OUP, Oxford, MN 1, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1109>

⁹⁶ Bühler, Konrad G. "State Succession and Membership in International Organizations", Leiden, The Netherlands, Brill / Nijhoff, 2001, 161–4, <https://brill.com/view/title/10798>

dissolution of the USSR is the fundamental change of circumstances (i.e. *rebus sic stantibus*⁹⁷) as per the VCLT⁹⁸. According to Article 62 of the VCLT, if a successor is not involved in the decision-making process when a convention is entered into, there is no continuance of legal obligations of the convention for the State. Therefore, Azerbaijan considers itself not bound by the Agreements concluded by the USSR given the fact that it was not involved in the process⁹⁹. Similarly, Kazakhstan in its declaration to UN stated that “the Party to the aforementioned treaties was the USSR, which no longer exist as the subject of international law”¹⁰⁰.

Pursuant to Article 4 of the VCLT¹⁰¹, “without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States”. Since the Soviet-Iranian agreements of 1921 and 1940 come before the date when the VCLT (which is 1969) was entered into, they may seem to fall outside the scope of the Convention. However, the non-retroactivity rule here displays *dispositif*¹⁰². This suggests that, as it also follows from foregoing Article 4, a past treaty can be subjected to the VCLT, either *ad hoc* in case of a dispute or by another subsequent consent¹⁰³.

With Alma-Ata declaration, Azerbaijan, Kazakhstan and Turkmenistan – three ‘successors’ acknowledged that they would fulfill international obligations stemming from the treaties signed by the USSR¹⁰⁴. Moreover, in Ashgabat Meeting in 1996, they agreed that the legal status of the Caspian should be complemented on the basis of unanimous decision of all of the states¹⁰⁵. In addition, according to Minsk Declaration of 1991, Azerbaijan, Kazakhstan and Turkmenistan declared that “*the member governments will undertake their international commitments according to the treaties and agreements signed by the USSR*”¹⁰⁶.

⁹⁷ The principle stands for a fundamental change of circumstances and qualifies as a general principle of law in the sense of Article 38 para 1 lit c of the ICJ Statute. Jennings R, Watts A, “Oppenheim’s International Law”, Vol I, Parts 2–4, 9th edn. Longman, Harlow, 1992, pp 1304–1309, 1306

⁹⁸ Hanna Zimnitskaya, James von Geldern, “Is the Caspian Sea a sea; and why does it matter?”, *Journal of Eurasian Studies*, Vol 2, Issue 1, January 2011, Pages 1-14, <https://doi.org/10.1016/j.euras.2010.10.009> at 8

⁹⁹ Faraz Sanei, “Iran and the Caspian Sea Regime”, *Vand. J. Trans. L.* 34, 2001, at 784

¹⁰⁰ UN doc, A/52/424, 03 Oct 1997, <https://undocs.org/pdf?symbol=en/A/52/424>

¹⁰¹ *Supra* note 41

¹⁰² The term of French law qualifies as “the operative provisions of the judgment” in accordance with Rule 95(1) of the I.C.J. Rules of Court of 1978 (I.C.J. Acts and Documents No. 6). <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095722448> (accessed 01.11.2020)

¹⁰³ ICJ Armed Activities Case (DRC v Rwanda) (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 125

¹⁰⁴ The Alma-Ata Declaration, among Azerbaijan, Russia, Kazakhstan, Turkmenistan and Iran, 1991, par. 5. http://www.operationspaix.net/DATA/DOCUMENT/3825~v~Declaration_d_Alma-Ata.pdf

¹⁰⁵ UN doc A/52/325, Sept 8, 1997, <https://undocs.org/A/52/325>

¹⁰⁶ Barbara Janusz-Pawletta, *supra* note 37, at 214

Coming from the preceding paragraph, it might be claimed that the acknowledgements reflect the consent of the States, and therefore the VCLT becomes applicable to the 1921 and 1940 agreements notwithstanding their prior conclusion date.

In light of this, Barbara argues that the Soviet-Iranian treaty of 1940 is valid until today, since it has not been terminated by either party¹⁰⁷. Nevertheless, Waldock¹⁰⁸ considered that a change in the legal personality of a State could be a ground for terminating a treaty¹⁰⁹. Furthermore, Sanei argued particularly in respect of the Soviet-Iranian agreements that the dissolution of the Soviet Union negated the 1921 and 1940 treaties¹¹⁰.

Under Article 73 of the VCLT, “the provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States”. Furthermore, the ILC took up another position than what Waldock said and regarded the state succession as a separate topic¹¹¹. The ILC then decided that the succession of States in respect of treaties and the effect of the extinction of the international personality of a State upon the termination of treaties should not be dealt within the VCLT¹¹².

Therefore, as a preliminary result, the state succession is not to be discussed within the frame of the VCLT and thus, Azerbaijan’s position¹¹³ does not seem to possess a legal ground under the VCLT.

On the other hand, the applicability of the 1921 and 1940 Agreements can be looked through another controlling instrument of international law – the VCSS¹¹⁴. The Convention differs commitments of newly independent States from those that acquired its independence through disintegration of a predecessor¹¹⁵. Here lies a matter of whether the three post-Soviet states have

¹⁰⁷ *Ibid*, at 16

¹⁰⁸ Sir Humphrey Waldock was appointed by the International Law Commission as the successive special rapporteur on the matter of succession of states in respect of treaties, *See* ILC’s website, https://legal.un.org/ilc/summaries/3_2.shtml (accessed 01.11.2020)

¹⁰⁹ Document A/CN.4/202, First report on succession of States and Governments in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur, 15 March 1968, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1968_v2.pdf (accessed 01.11.2020)

¹¹⁰ Sanei, *supra* note 99, at 751

¹¹¹ Yearbook of the International Law Commission, Volume II, 1966, at 42, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (accessed 01.11.2020)

¹¹² *Ibid*, at 237

¹¹³ Regarding *rebus sic stantibus*, *supra* note 98

¹¹⁴ *Supra* note 40. The Convention has neither been ratified nor acceded to by any coastal State of the Caspian yet. Nor the Convention seems to be customary international law. Nonetheless, its norms and principles can be used as a standpoint to assess validity of the Soviet-Iranian agreements. *See* Barbara, *supra* note 37, at 18

¹¹⁵ Siamak Namazi and Farshid Farzin, “Division of the Caspian Sea: Iranian policies and concerns”, in *The Caspian: Politics, Energy and Security*, ed., Shirin Akiner (London: *RoutledgeCurzon-Taylor Francis Group*, 2004), at 214

gained their independence or they have been formed through the dissolution of the predecessor¹¹⁶. Given the fact that the USSR collapsed on the exact date of 26 December 1991¹¹⁷ and the independence of Kazakhstan¹¹⁸, Turkmenistan¹¹⁹ and Azerbaijan¹²⁰ occurred prior to that date, this might entitle the three States to consider themselves as newly independent states.

This also suggests that under Article 16 of the VCSS these States are “*not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates*”. This is also known as “clean slate” rule¹²¹. Moreover, according to the Preamble of the VCSS, newly independent State means a successor State which was dependent for “*international relations of which the predecessor State was responsible*”.

Under Article 72 and 80 of the constitution of the USSR¹²², each Union had a right to secede from the USSR and to enter into relations with other states. These rights included, *inter alia*, to conclude international agreements, exchange diplomatic and consular representatives, and take part in the work of international organizations¹²³. From this standpoint, it might be suggested that all of the “newly independent States” were actually free on the scale of their international relations. Therefore, they cannot fully be considered newly independent states under the norms of the VCSS.

There is however much left in regards to the state succession under customary international law. Customary law is key in coming to state succession, especially due to the fact that after the Cold War state practice significantly increased in this regard¹²⁴. Concerning treaties establishing a territorial regime, Articles 11 and 12 of the VCSS affirms that successor State *ipso jure* succeeds to the predecessor’s agreements¹²⁵. In addition, in *Gabčíkovo-Nagymaros Project*, the

¹¹⁶ Mohammad Sadeqi, “The Legal Regime of the Caspian”, *CACR*, vol. 4, no. 10, Summer 1995, at 164–165

¹¹⁷ [Collapse of the Soviet Union | History.com](#), The last time Soviet Union’s flag was seen over the Kremlin was 25 Dec 1991 (accessed 01.10.2020)

¹¹⁸ [Kazakhstan - Independent Kazakhstan | Britannica](#) (accessed 01.10.2020)

¹¹⁹ [Independence Day in Turkmenistan | Office Holidays](#) (accessed 01.10.2020)

¹²⁰ [Independent Azerbaijan \(preslib.az\)](#) (accessed 01.10.2020)

¹²¹ First introduced by McNair, the metaphor of “clean slate” means in his eyes “newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate..., except as regards the purely local or ‘real’ obligations of the State formerly exercising sovereignty over the territory of the new State.” Oscar Schachter, “State Succession: The Once and Future Law,” *Virginia Journal of International Law* 33, no. 2 (Winter 1993): 253-260, at 255

¹²² Soviet Union. Constitution (Fundamental Law) of the USSR: [White Plains, N.Y.]. *Compass Publications*, 1977, <https://www.departments.bucknell.edu/russian/const/77cons03.html#chap09> (accessed 01.11.2020)

¹²³ *Ibid.* Article 80

¹²⁴ Considering the dissolution of the USSR, the former Yugoslavia and Czechoslovakia, as well as the reunification of Germany.

¹²⁵ O.Dörr, K.Schmalenbach (eds.), “Vienna Convention on the Law of Treaties”, *Springer-Verlag GmbH Germany*, 2018, DOI 10.1007/978-3-662-55160-8_773, at 1336

ICJ concluded that Art 12 of the VCSS reflects a rule of customary international law and “treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties”¹²⁶. Therefore, it is under customary law that newly emerged coastal States of the Caspian seem to have succeeded to the Soviet-Iranian agreements.

3.2 Study of existing bilateral agreements between the current Caspian States

The bilateral delimitation agreements between the modern Caspian States refer to international law¹²⁷. However, neither any particular rule or principle of international law is mentioned, nor the agreements have been subjected to UNCLOS. The delimitation under these agreements was effected by the application of equidistance method. All the Parties enjoy exclusive sovereign rights over the areas up to the delimitation line as per each Agreement¹²⁸. In regards to the natural reservoirs where the median line runs through between the Parties, three Agreements out of 4 (except for the one between Kazakhstan and Turkmenistan), state that such fields will be developed jointly¹²⁹.

There has also been such a case in which Russia and Kazakhstan have made another protocol to their Agreement regarding unitization of petroleum reservoirs¹³⁰. Under the Protocol the Parties have identified three joint arrangements: Kurmangazy field, Tsentral'naya and Khvalynskoye structures¹³¹. The first was agreed to be developed by Kazakhstan under Kazakh law¹³², whereas the latter two were developed under Russian law by the Russian Federation¹³³. However, each arrangement has allowed the other party to get involved in the respective project by holding 50/50% shares¹³⁴.

¹²⁶ ICJ Gabčíkovo–Nagymaros [1997] ICJ Rep 7, para. 123

¹²⁷ In the Preambles of the Agreements

¹²⁸ Article 1 of the Agreement between Russia and Kazakhstan, Article 3 of the Agreement between Azerbaijan and Kazakhstan, Article 1 of the Agreement between Azerbaijan and Russia

¹²⁹ Article 2 of the Agreement between Russia and Kazakhstan, Article 3 of the Agreement between Azerbaijan and Kazakhstan, Article 2 of the Agreement between Azerbaijan and Russia

¹³⁰ *See supra* note 75

¹³¹ *Ibid*, Articles 2 and 3

¹³² *Ibid*, Article 2

¹³³ *Ibid*, Article 3

¹³⁴ *Ibid*, Articles 4 and 5

Caspian Sea region oil and natural gas infrastructure



Credits to [Oil and natural gas production is growing in Caspian Sea region | U.S. Energy Information Administration \(EIA\)](#) (accessed 26.11.2020)

In this allocation, several aspects have been considered. For instance, natural geographical considerations – the Kazakh islands Ostrov Kulaly and mainland peninsula of Kazakhstan have not been given full effect. Nor some small islands in the north of the Caspian on Russian part have been regarded.

Nonetheless, under the Russian-Kazakh Agreement, the median line has been modified by “taking into account islands, geological structures, as well as other special circumstances and geological costs incurred”¹³⁵. Notably, the Parties have not elucidated what constituted the special circumstances.

The image herein manifests what a huge deviation of the line there is, accommodating the median line much closer to the Kazakhstan coast and entitling Russia to the natural gas field. It is worth to restate, this allocated field is being developed jointly, even though it is entitled to Russia.

3.3 Applicability of UNCLOS

As mentioned above, the Caspian due to its geographical considerations may be subjected to Article 122 of the UNCLOS¹³⁶, which reads:

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

In order to determine whether the Caspian is covered by this scope, it is necessary to assess the two elements underlined which are separated by a “or”.

As already indicated, the Caspian has an outlet to the Sea of Azov¹³⁷. Here lies a question of whether this outlet can be viewed as a “narrow outlet” as prescribed under Article 122.

¹³⁵ *Supra* note 45, Article 1

¹³⁶ *See* subsection 1.4.3

¹³⁷ *Supra* note 80

Under UNCLOS, it is not distinct whether the outlet stands for a natural or an artificial one. Some scholars argue that the entire meaning of Article 122 rests on the two-letter word – “or”. For instance, Clagett contemplates that the Caspian is not the enclosed sea, because it lacks a narrow outlet to another sea or the ocean¹³⁸. Blum also agrees with Clagett¹³⁹. However, they seem to dismiss the existence of the “or”. Barry, however, suggests that the Caspian by nature suits Article 122, “given that it is linked to the Sea of Azov via the Don-Volga canal”¹⁴⁰. Interestingly, Griffiths proposes that the “or” might serve as an amplification to the whole meaning of Article 122¹⁴¹.

In light of this, it can be argued that if the “or” holds the meaning to link two alternatives, then the Caspian totally comes to the terms of the precondition which follows the “or” – “*consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States*”¹⁴².

Since there are various views on the matter among the scholars, it is vital to see what international law dictates. Article 32 of the VCLT reads as follows:

“recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”

In other words, preparatory works of a convention can be seen as a tool to reveal the true meaning of an ambiguous or questioned rule of law. Therefore, with the aim of interpretation of Article 122 of the UNCLOS, reports and results of the Third United Nations Conference on the Law of the Sea¹⁴³ will be worth taken into account.

The official recordings of the UN Conference made a difference between “closed sea” and “enclosed sea”¹⁴⁴. The Caspian and Aral Seas were given as examples to the closed sea¹⁴⁵. The

¹³⁸ B.M.Clagett, “Ownership of Seabed and Subsoil Resources in the Caspian Sea Under the Rules of International Law”, *Caspian Crossroads Magazine 1*, (1996), at 3

¹³⁹ D.Blum, “Sustainable Development and the New Oil Boom: Cooperative and Competitive Outcomes in the Caspian Sea”, *Center for Strategic and International Studies, Working Paper*, 1998, at 3–4

¹⁴⁰ Barry Dubner, “The Caspian: Is It a Lake, a Sea or an Ocean and Does It Matter? The Danger of Utilizing Unilateral Approaches to Resolving Regional/International Issues”, *18 Penn St. Int'l L. Rev.* 253 (2000), 277-278

¹⁴¹ Griffiths, *supra* note 27, at 181

¹⁴² Obviously, the Caspian is consisted of the territorial seas and EEZs of the bordering states, just like, for example the Black Sea

¹⁴³ The Conference was convened in 1973 with participation of 160 States. Works of the Conference ended in 1982. [Third United Nations Conference on the Law of the Sea, 1973-1982 — Diplomatic Conferences — Codification Division Publications](#) (accessed 04.11.2020)

¹⁴⁴ Official records of Third UN Conference on the Law of the Sea 295, 23 Aug 1974, para. 31, https://legal.un.org/diplomaticconferences/dtSearch/Search_Forms/dtSearch.html (accessed 03.10.2020). It is required to insert Caspian in the search bar and give a search to access to the source.

¹⁴⁵ In Soviet jurisprudence the Caspian was referred to as a “closed sea”. Iran’s municipal law also took this approach. See Mehdiyoun, *supra* note 18, at 181

Iranian Gulf and the Baltic Sea, on the other hand, were viewed “enclosed seas”, as they are “*a small body of inland water and have at least one outlet to the open sea*”¹⁴⁶. On the other hand, “semi-closed sea” was seen as “*larger sea basins along the margins of the main ocean basins, more or less enclosed by a land mass— whether continental or insular—and with one or more narrow outlets to the oceans*”, such as the Caribbean Sea or the Andaman Sea¹⁴⁷.

Notably, the condition of narrow outlet was also touched upon during the Conference. In essence, the Conference rendered its existence necessary for both enclosed and semi-closed seas under the meaning of Article 122¹⁴⁸. More primarily, the preparatory works explicitly disregarded to insert the Caspian Sea into the scope of the UNCLOS. As such, the Conference concluded that since the Caspian has no direct access to the oceans, the provisions of the 1982 LOSC would not apply to it¹⁴⁹. Diba has even elaborated on this, stating that during the ten years of preparatory work of the UNCLOS there appears to have been “not even one case of recourse to the Caspian Sea”¹⁵⁰.

In conclusion, the UNCLOS does not seem to be applicable to the Caspian. On the other hand, one may contend that it is fairly unlawful to exclude the UNCLOS from the case of the Caspian Sea, because the UNCLOS is meant to regulate “ocean space” and “seas and oceans” pursuant to its preamble. According to Article 311 of the UNCLOS:

“This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”

The provision further reads that, “*two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them*”. Additional conditions follow that in this sort of agreements the Parties cannot derogate from the object and principle of the UNCLOS, and cannot affect the application of fundamental principles thereof¹⁵¹.

Without diving deeper into the topic on comparison of the UNCLOS with the Caspian Convention, since it stands as a separate topic itself, for the purposes of this thesis, it is worth to recall that the Caspian Convention aims somewhat similar objectives with those that the UNCLOS stipulates. Above all, the Caspian Convention refers to international law where the seabed delimitation is regulated.

¹⁴⁶ *Supra* note 144

¹⁴⁷ *Ibid*, para. 32

¹⁴⁸ *Ibid*, para. 31-32, also *see* Mitja Grbec, “The Extension of Coastal State Jurisdiction in Enclosed or Semi-Enclosed Seas: A Mediterranean and Adriatic Perspective”, 1st ed, *Routledge*, New York, 2013, 22–23

¹⁴⁹ *Supra* note 144, par. 31

¹⁵⁰ Bahman Diba, “Law and politics of the Caspian Sea in the twenty-first century”, *Bethesda, MD: IBEX Publishers*, 2003, at 118–119

¹⁵¹ Article 311.3, UNCLOS

Having regard to this equivalence between the UNCLOS and the Caspian Convention, it might be concluded that the UNCLOS seems to have no objections to the validity and application of the Caspian Convention.

3.4 Applicability of customary international law

A Resolution of the International Law Commission states that: “*to determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris)*”¹⁵².

That is, the two elements (i) an objective element¹⁵³ – a general practice of states and (ii) a subjective element¹⁵⁴ – *opinio juris* must be met in order for a rule to be identified as customary law. Certain rules of the UNCLOS that will be referred to in the following section has gained recognition as customary international law, like the other rules of the UNCLOS, for instance, 200-mile economic zone¹⁵⁵ or innocent passage¹⁵⁶. In *Gulf of Maine*, the ICJ found the UNCLOS provisions on the continental shelf reflect customary international law¹⁵⁷. More particularly, according to Article 83 par. 1 of the UNCLOS:

“The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”

As this preceding provision has proven to be customary law, it is no doubt that although the UNCLOS has not been ratified in due manner by all the coastal States of the Caspian, the application of this Article cannot be excluded.

¹⁵² Resolution on Identification of customary international law, A/Res/73/203, at part 2, <https://un-docs.org/pdf?symbol=en/A/RES/73/203>

¹⁵³ The element requires the practice to be general. Christian Dahlman, “The Function of Opinio Juris in Customary International Law”, January 2012, *Nordic Journal of International Law* 81(3):327-339, at 329

DOI: 10.1163/15718107-08103002

¹⁵⁴ Sometimes it is called “a state of mind” in relation to that conduct or “psychological element”. Maurice Mendelson, “The Subjective Element in Customary International Law”, *British Yearbook of International Law*, Volume 66, Issue 1, 1995, Pages 177–208, <https://doi.org/10.1093/bybil/66.1.177>

¹⁵⁵ North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20), par. 74

¹⁵⁶ *Gulf of Maine*, supra note 61, par. 14, and James Crawford, “Brownlie’s Principles of Public International Law”, 8th ed. Oxford: Oxford University Press, 2012, at 265

¹⁵⁷ *Ibid.*

As perceived under Article 83, the delimitation must not be unilateral, rather it must be achieved by agreements of Parties¹⁵⁸. Plus, the delimitation must aim at an equitable solution, which, although it describes a result, under the UNCLOS it is the overall constitutional obligation to fulfil no matter what method is used in adjudication¹⁵⁹. In other words, the use of particular method in the delimitation process has not been identified as customary law by the ICJ, for instance, the equidistance/median line method¹⁶⁰. On the contrary, regardless of whatever method is employed the delimitation must be equitable.

In *North Sea Continental Shelf*, the ICJ pronounced that “*the parties are under an obligation to act in such a way that ... and taking all the circumstances into account, equitable principles are applied, for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination*”¹⁶¹.

The principle of equity not only is used in maritime delimitation law, but also in different fields of international law¹⁶². Inherently, the principle of equity implies fairness, impartiality, even-handed dealing; the body of principles constituting what is fair and right; natural law; the recourse to principles of justice to correct or supplement the law, as stated in the Black’s Law Dictionary¹⁶³. When a dispute occurs between Parties in the delimitation process, international courts or arbitrators is required to apply this principle¹⁶⁴. In recent ICJ and arbitration cases there has been a positive tendency toward referring to the principle of equity in the field of maritime delimitation¹⁶⁵. Therefore, throughout the analysis below the principle of equity will be drawn into attention.

* * *

In summary, the applicable law to the Caspian case is the Soviet-Iranian agreements, bilateral delimitation agreements between the modern coastal States and customary international law.

¹⁵⁸ Cottier, Thomas, “The Rule of Equity”, in *Equitable Principles of Maritime Boundary Delimitation*, Cambridge University Press, 375-439, 2015, at 418, <https://doi-org.ezproxy.uio.no/10.1017/CBO9781139944588.010>

¹⁵⁹ Cottier, Thomas, “Justiciable Standards of Equity”, in *Equitable Principles of Maritime Boundary Delimitation*, Cambridge University Press, 505-601, 2015, at 525
<https://doi-org.ezproxy.uio.no/10.1017/CBO9781139944588.012>

¹⁶⁰ Louis Sohn, John Noyes, Erik Franckx, and Kristen Juras. “Cases and Materials on the Law of the Sea”, Second Edition, Leiden, The Netherlands, Brill / Nijhoff, 2014, 276, doi: <https://doi.org/10.1163/9789004203563>

¹⁶¹ *North Sea*, *supra* note 155, para. 85 (b)

¹⁶² F. Francioni, “Equity in International Law”, in *Max Planck Encyclopedia of Public International Law* (2013), at 632

¹⁶³ Black’s Law Dictionary, 9th ed. (West Minnesota 2009), at 619

¹⁶⁴ Delabie, Lucie, “The Role of Equity, Equitable Principles, and the Equitable Solution in Maritime Delimitation”, in *Maritime Boundary Delimitation: The Case Law*, 145-72. Cambridge University Press, 2018, at 145

¹⁶⁵ M. Miyoshi, “Considerations on Equity in Maritime Boundary Cases before the International Court of Justice”, in N.Ando, E.McWhinney, R.Wolfrum and B.BakerRöben (eds.), *Liber Amicorum Judge Shigeru Oda* (Brill/Nijhoff Leiden 2002), at 1087–1101.

4 How to apply the relevant law in order to reach equitable delimitation of the Caspian seabed in accordance with international law?

As observed above, due to the contentions of Iran and Turkmenistan, the three States cannot reach a final result, which also hampers the regional security. This final core section will try to address those contentions on the basis of the applicable law and then will seek for rational ways to effect the delimitation in order to reach an equitable solution in accordance with international law.

4.1 How to apply former and existing agreements?

4.1.1 Effects of Soviet-Iranian agreements

As mentioned above, by agreements the Parties considered the Caspian as a “Soviet-Iranian sea”¹⁶⁶. This may present the fact that the Caspian was under condominium principle and equally shared by the littorals then. This principle refers to the situation in which two or more States exercise joint sovereignty over a territory¹⁶⁷. Griffiths argues that the agreements establish such principle for the Caspian¹⁶⁸. On the other hand, Akiner and Gizzatov suggest that a study of the whole body of the agreements shows no support towards the condominium principle¹⁶⁹.

Remarkably, the exception of 10 n.m. exclusive zone¹⁷⁰ also appears to be a hurdle to the complete “shared” status of the Caspian. As argued by Mamedov, the establishment of the exclusive fishing zone might undermine the idea of total common use of the Sea between the Parties¹⁷¹, which may contradict the notion of condominium.

Moreover, it is fairly important to say that the agreements do not purport to touch upon the delimitation of the seabed of the Caspian. This might be because of the fact that the seabed was not actual at that time. Therefore, even though the former republics are considered successors

¹⁶⁶ *Supra* note 66

¹⁶⁷ Joel Samuels, “Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution”, 29 *MICH. J. INT’L L.* 727 (2008), <https://repository.law.umich.edu/mjil/vol29/iss4/3>

¹⁶⁸ Griffiths, *supra* note 27, at 165

¹⁶⁹ Vyacheslav Gizzatov, “Negotiations on the legal status of the Caspian Sea 1992–1996: view from Kazakhstan”, in *The Caspian: Politics, Energy and Security*, ed., Shirin Akiner, (London: *Routledge Curzon-Taylor Francis Group*, 2004), at 48

¹⁷⁰ *Supra* note 36

¹⁷¹ Rustam Mamedov, “International Legal Status of the Caspian Sea in its Historical Development”, *Turkish Yearbook*, Vol XXX, 125, <https://pdfs.semanticscholar.org/f23d/23c5a4f6e5e2ee7d361b52046ad740117c47.pdf>

of the USSR¹⁷², in case these agreements are employed as a standpoint to delimit the seabed, due to (i) the exclusive fishery zones (i.e. no condominium) and (ii) no indication of the seabed delimitation in the Agreements, the USSR-Iran Agreements do not seem to govern the current seabed issue particularly, even though they are applicable law.

4.1.2 Practice of the bilateral delimitation agreements

The study of the existing Agreements among the littorals¹⁷³ shows that all the four States of the Caspian has sided with international law. However, certain differences also occurred when they applied it. For example, while islands have been given zero effect in the relations between Kazakhstan and Russia, under the Agreement between Kazakhstan and Azerbaijan the Parties made a recourse to an equidistance line method while considering islands as well¹⁷⁴.

Regarding the oil fields locating on the intersection of the sectors of two different States, most of the Agreements prescribe that those will be jointly developed. On the other hand, in case of the joint development between Kazakhstan and Russia, a geological condition was given preference as a circumstance, which made the median line move much closer to the Kazakhstan' shore. In a nutshell, these agreements introduce a series of peculiarities: (a) equidistance line method in the delimitation process, (b) unitization of natural reservoirs residing on the line, (c) geological considerations as relevant circumstances and (d) giving zero effect to islands when the delimitation actually took place.

Certainly, the first Agreement between Russia and Kazakhstan¹⁷⁵ played a critical role. Subsequently, under all of the bilateral agreements the Parties adhered to the same principles and methodology of the delimitation. Therefore, these agreements seem to have developed kind of 'customary regional law', because the principles which have preliminarily been employed in the Russian-Kazakh Agreement were then recognized as *opinio juris* by entering new agreements on the same basis between the other coastal States of the region, except for Iran¹⁷⁶.

¹⁷² See subsection 3.1

¹⁷³ Subsection 3.2

¹⁷⁴ *Supra* note 45

¹⁷⁵ *Ibid.*

¹⁷⁶ Bantekas, Ilias, "Bilateral Delimitation of the Caspian Sea and the Exclusion of Third Parties", *The International Journal of Marine and Coastal Law* 26, 1 (2011): 47-58, doi: <https://doi.org/10.1163/157180811X541396>, at 56

4.2 How to apply customary international law?

As mentioned, Iran's and Turkmenistan's assertions render it difficult to complete the whole delimitation process in the Caspian. Here lies a question of how customary international law is in support of these contentions?

As noted earlier, Iran contends to have the Caspian be divided into equal sectors, 20% per each¹⁷⁷, namely pursuant to condominium principle. The only case in which the ICJ upheld the principle of condominium is *Gulf of Fonseca*¹⁷⁸. In the case the Court took up the position that the gulf historically fell into a sole ownership, thus it should be treated as a common area, even though there had not been a treaty on condominium¹⁷⁹.

The facts suggest that *Gulf of Fonseca* does not appear to fit in with the Caspian case. Historically, unlike the Gulf of Fonseca, the Caspian was surrounded by two states, not one. In addition, even within the USSR, there was an administrative decision whereby the Caspian was divided among the former Republics¹⁸⁰. This means, there was an explicit agreement among some of the Parties, which opposed the condominium regime. Therefore, Iran's contentions do not appear to have legal basis under customary international law.

On the other hand, Turkmenistan's arguments may seem justifiable owing to the Absheron peninsula's convex character. Additionally, giving full effect to the Chilov Island would add value to this convex character in volume. This, in turn, may impact on the delimitation in an unjust way.

In *North Sea Continental Shelf*, the ICJ found that it is unacceptable that a State should enjoy continental shelf rights considerably different from those of its neighbors merely because in the one case the coastline is roughly convex in form and although those coastlines are comparable in length¹⁸¹. That is, an exaggeration in the natural geographical feature must be remedied or compensated insofar as it leads to an equitable result¹⁸².

In light of this, it is important to analyze certain general aspects of customary international law, which deserves new subsections, to determine how the Turkmenistan's contentions can be coped with.

¹⁷⁷ *Supra* note 84

¹⁷⁸ *Land, Island and Maritime Frontier Dispute, El Salvador and Nicaragua (intervening) v Honduras*, (1992) ICJ Rep 351. Brief background of the case: three states succeeded to one country which formerly emerged as a consequence of collapse of Spanish colonization in the area in 1821. The gulf previously was under total control of one country before the modern Gulf of Fonseca states emerged.

¹⁷⁹ *Ibid*, para. 79

¹⁸⁰ *Supra* note 70

¹⁸¹ *North Sea*, *supra* note 155, para. 91

¹⁸² *Ibid*, para. 89 (a)

4.2.1 The role of Absheron peninsula

If the Turkmenistan's claim is put into effect, this would lead to modification of the landmass on the Azerbaijani coast in order to place the basepoints from which the seabed will be measured¹⁸³. In *North Sea Continental Shelf*, the ICJ concluded that "there can never be any question of completely refashioning nature"¹⁸⁴. The court also noted this approach in regards to application of the non-cut-off rule¹⁸⁵, stating that remedy for the cut-off effect should not be done in a way to refashion the geography¹⁸⁶. Moreover, in *Libya-Malta*, the "geography" was considered as "the coast of each of the Parties"¹⁸⁷.

In this sense, another solid point might be the principle of "land dominates the sea"¹⁸⁸. In *North Sea Continental Shelf*, the Court relied on this principle while discussing the geography so as to justify its view that the continental shelf is the natural prolongation of the land territory¹⁸⁹. The ICJ further emphasized that "it is necessary to examine closely the geographical configuration of the coastlines of countries whose continental shelves are to be delimited"¹⁹⁰. Thus, the land is the legal source of the power which a State may exercise over territorial extensions to seaward¹⁹¹.

Nonetheless, with a view to achieving equitable delimitation it is necessary to discuss whether an equitable result would be reached if the aforementioned two points were considered.

In *North Sea Continental Shelf*, the ICJ upheld that "equity does not necessarily imply equality"¹⁹². Furthermore, the Court clarifies that "the object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas"¹⁹³. The subtle difference here seems to be that the principle of equitable delimitation does not particularly mean that

¹⁸³ See *supra* note 88

¹⁸⁴ See *supra* note 196

¹⁸⁵ First introduced into maritime delimitation law by the ICJ in *North Sea Continental Shelf* as "the principle of non-encroachment". In order to reach an equitable result, the coasts of parties should produce effects in a reasonable and mutually balanced way, to preclude cutting off areas that more naturally belong to one of the states concerned rather than the other. Yunus Acikgonul, "Reflections on the Principle of Non-Cut Off: A Growing Concept in Maritime Boundary Delimitation Law", *Ocean Development & International Law*, (2016) 47:1, 52-71, 53 DOI:10.1080/00908320.2016.1124485

¹⁸⁶ See *supra* note 198

¹⁸⁷ *Continental Shelf (Libya v. Malta)*, 1985 ICJ 13 (June 3), para. 47

¹⁸⁸ Being a basic premise of the international law of the sea, the principle may relate either to geology or geography. *Supra* note 160, 285

¹⁸⁹ See *North Sea*, *supra* note 155, para. 96

¹⁹⁰ *Ibid*

¹⁹¹ *Ibid*

¹⁹² *Ibid*, para. 91

¹⁹³ *Ibid*, para. 18; and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 67, para. 64

division of a sea area into two “equal” sectors stands for the delimitation equally from the geographical and mathematical point of view. Rather it appears in a sense that the area must be delimited not mathematically, but in a view of achieving equal and fair result between coastal States.

Therefore, given that refashioning of the land mass is unacceptable under international law; land is a source of the seaward projection; and equity does not mean equality, the outlines of the Absheron peninsula seems to be uncontestable in regards to determination of the basepoints from where the seabed delimitation will begin.

4.2.2 Giving effect to Chilov Island

Another factor on which Turkmenistan and Azerbaijan cannot come to an agreement is whether to include the Chilov Island into the delimitation process. A question arises as to whether full effect to the island is to be given or not.

As a starting point, it is worth noting that pursuant to Article 121 of the UNCLOS “an island is a naturally formed area of land, surrounded by water, which is above water at high tide”. Additionally, islands are entitled to the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf as other lands are¹⁹⁴. In contrast to islands, rocks which cannot sustain human habitation or economic life of their own have no rights for the exclusive economic zone and continental shelf¹⁹⁵. Considering self-sustaining and economically independent features of the Chilov Island¹⁹⁶, there is no question that the island falls within the scope of Article 121. Therefore, the island is entitled to extend the continental shelf¹⁹⁷ beyond its shores.

The island can affect the delimitation line in two ways: as a point to form the baseline from where the delimitation line will begin to be measured; or after determination of the median line the island can be used as a special circumstance¹⁹⁸ to adjust the line¹⁹⁹.

Over the court history of the ICJ, the Court has handled several cases where it manifested different approaches regarding considering islands in the process of placing baselines. For example, in the 1951 *Anglo-Norwegian Fisheries* the ICJ recognized straight baseline method in favor of Norway given the fact that the coast of Norway is well indented²⁰⁰. In addition, in one

¹⁹⁴ UNCLOS, Article 121

¹⁹⁵ *Ibid*, 3rd par.

¹⁹⁶ *Supra* note 83

¹⁹⁷ For the purposes of this thesis, entitlements to the territorial sea and EEZ of the island are omitted.

¹⁹⁸ *See supra* note 161

¹⁹⁹ In order to get an equitable result, the Court in the *Romania-Ukraine case* suggests to firstly employ the equidistance method, then modify/adjust it on the basis of special circumstances. This will be further referred to in the next section. *Maritime Delimitation in the Black Sea, Romania v Ukraine*, Judgment, ICJ GL No 132, (2009) ICJ Rep 61, para. 120

²⁰⁰ Sohn, Noyes, Juras and Franckx, *supra* note 160, at 225, also *see cf.* Article 7 of the UNCLOS

arbitration case, the international tribunal placed base-points on a fringe of islands in low-tide, constituting the very coast of Eritrea²⁰¹.

However, in *Qatar/Bahrain*, the ICJ denied to recognize the straight baseline method to be applicable to the determination of baselines of Bahrain²⁰². The Court concluded that “the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met²⁰³”, for example, provided to close off the mouths of bays or rivers²⁰⁴, or if there is a fringe of islands along the coast in the immediate vicinity²⁰⁵.

Considering above, since the Chilov Island does not stand as “a fringe of islands” along the coasts of the Absheron peninsula, there hardly seems to be a reason to draw a straight baseline along the coasts, namely the island does not constitute the very coast of the peninsula.

On the other hand, the ICJ also touched upon cases where single islands affected the delimitation. In *Anglo-French*, for instance, the Eddystone Rock, irrespective of its unpopulated feature, was selected as a base-point from which the continental shelf of the UK began to extend. The reason behind this was that the rock had been treated as germane to the delimitation back in 1971 between the Parties²⁰⁶. However, as for the British Channel Islands lying near the French coast, the Court concluded that if the islands were given full effect in delimiting the continental shelf, it would manifestly result in substantially diminution of the area²⁰⁷, which appeared to be, *prima facie*, an inequitable delimitation.

In *Ukraine-Romania*, on the other hand, the ICJ upheld that the Serpents’ Island (inhabited), lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting the coast of Ukraine²⁰⁸. Another point the Court concluded upon was that regarding the island as a special circumstance to modify the delimitation line after having it decided would not make sense, because it would not project EEZ or the continental shelf farther

²⁰¹ Maritime Delimitation Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen, 17 Dec 1999, RIAA, Vol. XXII, at 367-368, para. 139-146

²⁰² Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, 2001 ICJ 40, para. 215

²⁰³ *Ibid*, para. 212

²⁰⁴ UNCLOS, Articles 10 and 9, respectively

²⁰⁵ In the *Qatar/Bahrain case*, ICJ saw the coast of Bahrain as “cluster of islands” or “island system”, which did not qualify “a fringe of islands”, because the islands are small in numbers. *Supra note 202*, para. 214

²⁰⁶ Continental Shelf Boundary Arbitration Between France And the United Kingdom, 18 Intl. Leg. Materials 397 (1979), para. 143

²⁰⁷ *Ibid*, para. 196

²⁰⁸ *Romania-Ukraine*, *supra note 199*, para. 149

than the projection which the mainland of Ukraine did²⁰⁹. In *Libya/Malta*, the ICJ also disregarded the Filfla Island (unpopulated) as a base point for constructing an equidistant line and found that it would lead to inequality²¹⁰.

As it is seen, the ICJ has given full effect to islands regardless of them being inhabited or uninhabited²¹¹ and took account of how far islands lie off coasts and how far their projections would extend. In light of this, since it is very likely based on geographical considerations²¹², the Chilov Island might be considered as a special circumstance to prolong the breadth of the seabed after the provisional median line has been constructed, since its projection goes beyond farther than what the Absheron peninsula would stretch.

4.3 Rational ways to delimit the seabed of the Caspian

In order to reach an equitable solution in the delimitation process, there is no required method to implement. In terms of the frequently referred method – equidistance method²¹³ the ICJ pronounced that it is not obligatory as customary law²¹⁴. The Court itself developed result-oriented-equity-approaches over the course of court history²¹⁵, however it shifted to corrective-equity approaches over time²¹⁶. One of them is the ‘three-stage’ approach that the ICJ put forth with its full-fledged elements in *Ukraine-Romania* in 2009, and then oftentimes referred to it, such as in *Peru-Chile*²¹⁷.

According to the Court, under this approach first a provisional delimitation line is established, then relevant factors are considered to adjust the line so as to achieve an equitable result, and lastly it is verified that the line does not lead to an inequitable result by reason of any marked disproportion between the ratio of respective coasts length and the ratio between the maritime area of each State by reference to the delimitation line²¹⁸.

²⁰⁹ *Ibid*, para. 187

²¹⁰ *Libya-Malta*, *supra* note 187, para. 73

²¹¹ Only if there was an agreement on this, as in the *Anglo-French case*

²¹² The island geographically follows the peninsula in a seaward direction. *See* subsection 2.2

²¹³ Median line is also used in this thesis interchangeably

²¹⁴ *North Sea*, *supra* note 155, para. 83

²¹⁵ Separate opinion of Judge Jimenez de Arechaga, p. 107, para. 28 in *Continental Shelf (Tunisia v. Libya Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18.

²¹⁶ Yoshifumi Tanaka, “Reflections on Maritime Delimitation in the Romania/Ukraine Case before the International Court of Justice,” *Netherlands International Law Review*, volume 56, issue 03, December 2009, pp. 397–427.

²¹⁷ *Maritime dispute (Peru v. Chile)*, Judgment of 27 January, 2014, para. 180.

²¹⁸ *Ukraine-Romania*, *supra* note 159, paras. 115, 116, 120, 122

In light of the above, this section will try to resolve the seabed delimitation of the Caspian by applying the ‘three-stage’ approach. For this purpose, the first stage is to determine a provisional delimitation line. However, the Iran’s and Turkmenistan’s objections make it hard to easily put forward the provisional delimitation line. Thus, firstly these contentions must be addressed.

The Iran’s contentions are not proved to be justifiable under international law given the fact that there seems to be nothing to take out of the Soviet-Iranian Agreements in favor of Iran as discussed above. Furthermore, Iran agrees with the bilateral agreements approach under the Caspian Convention. Hence, Iran’s 20% fair share²¹⁹ principle per each littoral seems to have fallen down. In fact, some suggest that Iran has already started negotiations with Turkmenistan to delimit their part of the Caspian seabed on the basis of the median line method²²⁰.

Since the Turkmenistan’s contentions have nothing to do with whether to employ the median line approach or not, the author comes to the next questions of how to determine basepoints from where the provisional delimitation line will commence.

The contentions against giving full effect to the Absheron peninsula also seem to be a failure. As analyzed above, international law does not support to refashion land mass of a coastal State. This means, it is not acceptable to “compensate for the inequalities of nature”, as well as to seek to “make equal what nature has made unequal”²²¹. Turkmenistan’s next contention concerning the Chilov Island, however, remains controversial. This is because there is no definite position under customary international law as to whether to give full effect to islands of this kind or not. The Russian-Kazakh agreement, which seems to emerge sort of precedent for the region²²², disregards the existence of islands in the delimitation process. This would suggest that the Chilov Island might be avoided when the provisional median line is established.

As regards adjusting the provisional line, it is not outright clear whether the island will be considered as a ‘relevant circumstance’. The ICJ in most of its cases added an emphasis on the matter of ‘relevant circumstances’ with a view to achieving an equitable result²²³. However, it has never clarified exactly what the ‘circumstances’ stand for. In *Tunisia-Libya*, the ICJ expounded that “each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances”²²⁴. This position was also taken up by the International Tribunal for Law of the Sea (“ITLOS”) in *Bangladesh/Myanmar* where the

²¹⁹ Including Iran’s assertions on the Alov-Sharg-Araz oil field, *see supra* note 1.4.4

²²⁰ Turkmenistan-Iran consultations on the Caspian Sea (in Russian): <https://ca-news.info/2003/03/27/2> (accessed 04.10.2020)

²²¹ *Libya/Malta*, *supra* note 187, para. 46

²²² *See* subsection 4.1.2

²²³ Evans, Malcolm. “Relevant Circumstances.” Chapter. In *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, edited by Alex G. Oude Elferink, Tore Henriksen, and Signe Veierud Busch, 222–61. Cambridge: *Cambridge University Press*, 2018., at 227, doi:10.1017/9781108344302.010

²²⁴ *Continental Shelf (Tunisia v. Libya Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 132

Court propounded that the St. Martin's Island stands as a 'relevant circumstance' in the maritime boundary delimitation. However, the ITLOS dismissed to adjust the delimitation line for the continental shelf in favor of Bangladesh, because the Court considered that it would block the seaward projection of Myanmar's coast, which would result in an inequitable solution²²⁵.

Being cognizant of the above, it remains contentious whether the Chilov Island might be considered a 'relevant circumstance' to adjust the provisional line.

On the other hand, under the bilateral agreements the coastal States resorted to "other special circumstance and geological costs"²²⁶ when elucidating on how to define the delimitation line. Be that as it may, the littorals have only considered oil fields under development in the process of adjusting the delimitation line²²⁷.

The ICJ's position on the matter is that unity of deposits constitutes only a factual element and the Court does not consider this a reasonable element in the delimitation²²⁸ and States themselves must agree as to how to develop the deposits²²⁹. Additionally, as Tanaka observes, the ICJ's position is that when there is a question of preserving the unity of deposits in overlapping areas it is appropriate to jointly develop them²³⁰. Moreover, this is what the bilateral agreements on seabed delimitation states²³¹. There have also been such cases where the joint development in fact took place²³².

In light of this, under international law and regional precedent²³³, without refashioning the land mass of Azerbaijan and for the sake of equity and regional security, it would seem fair to develop *Kyapaz* field, upon which Turkmenistan has assertions, by establishing a joint venture company holding 50/50% shares of the Azerbaijani and Turkmen sides. This kind of case has already been practiced in the Caspian between Kazakhstan and Russia, and determined nearly by all the coastal States as a means to tackle oil fields where delimitation lines run through. In fact, Azerbaijan had already suggested this solution, however, Turkmenistan denied²³⁴.

²²⁵ Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, ITLOS Case No 16, 52014XC0830(01), ICGJ 448 (ITLOS 2012), paras. 317, 318

²²⁶ *Supra* note 135

²²⁷ *See* subsection 3.3

²²⁸ *North Sea*, *supra* note 155, para. 97

²²⁹ *Ibid.*

²³⁰ Yoshifumi Tanaka (2015) "Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the Ghana/Côte d'Ivoire Order of 25 April 2015 before the Special Chamber of ITLOS", *Ocean Development & International Law*, 46:4, 315-330, DOI: 10.1080/00908320.2015.1089743, at 316

²³¹ *See* subsection 4.1.2

²³² M. Miyoshi, "The Joint Development of Offshore Oil and Gas in relation to Maritime Boundary Delimitation," *IBRU Maritime Briefing* 2(5), (1999)

²³³ In the para. 4.1.2 the author has discussed that Kazakh-Russian bilateral agreement can emerge regional precedent

²³⁴ Stanislav Pritchkin, "[What Comes After the Caspian Sea Deal? | The Diplomat](#)", 2018 (accessed 03.10.2020)

As the final stage of the delimitation, the ICJ formulated ‘proportionality’ to verify the equitableness of the delimitation line²³⁵. If coasts of one of States are concave or convex which are comparable in length, the equidistance method would entail a distorting effect in the delimitation²³⁶. Bowett argues that the proportionality factor might be applied only when delimitation is between States with adjacent coasts²³⁷. However, the ICJ utilized this aspect in *Libya/Malta*, where the coasts were opposite, and recognized length of coasts as a relevant circumstance²³⁸.

Coming from the ICJ’s position on the proportionality, it seems to be important to verify, in the end, to see if the proposed way of delimitation in this thesis makes any marked disproportion among the coasts of the Southern Caspian States whose seabed has yet to be officially delimited.

The table²³⁹ below illustrates the length of coasts of each Caspian littoral:

	Lengths geographically (%)	Already negotiated boundaries and unmodified equidistant lines in the southern Caspian (%)
Azerbaijan	15.2	19.8
Russia	18.5	18.1
Kazakhstan	30.8	28.4
Turkmenistan	16.8	19
Iran	18.7	14.7

As can be seen, potential ratios among the lengths are not far from one another and, thus, do not make any significant disproportion. Therefore, it seems appropriate to employ the equidistance/median line method between Azerbaijan and Turkmenistan without giving effect to the Chilov Island, provided the *Kyapaz* field is developed jointly.

Notably, the ICJ makes it obligatory for Parties “to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation”²⁴⁰.

²³⁵ Sohn, Noyes, Juras and Franckx, *supra* note 160, at 300

²³⁶ Tanaka, Yoshifumi. “The Disproportionality Test in the Law of Maritime Delimitation.” in *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?*, edited by Alex G. Oude Elferink, Tore Henriksen, and Signe Veierud Busch, 291–318. *Cambridge: Cambridge University Press*, 2018. doi:10.1017/9781108344302.012, at 293

²³⁷ D.W.Bowett, “The Legal Regime of Islands in International Law”, *Oceana Publications New York*, 1979, at 164

²³⁸ Tanaka, *supra* note 236, at 297

²³⁹ Data retrieved from: Griffiths, *supra* note 27, at 178 and Roach and Smith, *supra* note 2, at 3547

²⁴⁰ *North Sea*, *supra* note 155, para. 85 (a)

Conclusions

The legal status of the Caspian Sea had long been unclear. When the Convention on the Legal Status of the Caspian Sea was adopted back in 2018, the definition given to the Caspian Sea was again a bit far from clarity. Moreover, the Convention vaguely regulated the seabed delimitation, completely leaving it for the Parties, provided they comply with international law.

Uncertainty gives rise to disagreements, which is followed by tension and instability. The thesis saw the regional tension in the eyes of Iran, Azerbaijan and Turkmenistan those who could not come to an agreement as to what law to apply and how to effect the seabed delimitation. It was also discussed how the tension hampered the regional security and prosperity.

In light of the above, the primary purpose of this thesis was to analyze and discuss how the delimitation issue can be resolved. First the thesis gave a brief account of introduction of the issue and sources on the basis of what the analysis and discussion would be presented. Main sources of the thesis were (i) the Soviet-Iranian agreements concerning the Caspian Sea, (ii) bilateral seabed delimitation agreements between the modern States of the Caspian, (iii) international law and (iv) the Caspian Convention. The political and geographical considerations of the region were then touched upon very concisely. Moreover, Iran's and Turkmenistan's contentions were presented, which, needless to say, complicates to reach the final result on the delimitation.

After covering the introductory parts, the thesis turned to the primary discussion and analysis sections. Firstly, an emphasis was placed on what agreements of the Parties and rules of international law are relevant to the Caspian case. In essence, it was discussed and analyzed that former Soviet-Iranian agreements, current bilateral delimitation agreements and customary international law are the applicable law. The thesis also presented that the UNCLOS is not applicable, except for its rules which have been identified as customary law.

Finally, the thesis placed the question of how to apply the applicable law at the heart of the analysis with a view to determining how the seabed delimitation issue can be resolved. To reach this goal, the thesis analyzed how the former and existing agreements and customary international law are to be applied. As a result, the thesis found out that former Soviet-Iranian agreements are not related to the seabed delimitation. On the contrary, it concluded that the bilateral agreements between the modern Caspian States are relevant and constitute 'regional customary law'. Furthermore, the thesis sought to apply customary international law and to ascertain whether the Iran's and Turkmenistan's contentions against considering the Absheron peninsula and Chilov Island in the delimitation process have a legal basis.

Last but not the least, the thesis introduced ways to the delimitation issue. For the sake of achieving an equitable solution, the 'three-stage' approach as put forth by the ICJ was employed. The author was of the view that the contentions of Turkmenistan and Iran must be addressed first to resolve the issue. With this in mind, the thesis expounded that Iran's contentions have no legal basis and Turkmenistan's contention in terms of the Absheron peninsula

lacks legal ground as well. As for the Chilov Island, it was concluded that the island could not be considered as a factor to constitute the coast of Azerbaijan, however, after the provisional median line was drawn the island could be used as a 'relevant circumstance' to adjust the line.

Furthermore, as regards the natural resources over which equidistance lines run, it was identified that the position of the ICJ was of unitization of such reserves. On the basis of the international and 'regional' customary law, the author presented his own solution to the delimitation issue of the Caspian by stating that one single oil field which is at the intersection of Azerbaijani and Turkmen seabed territories could be developed jointly by holding 50/50% shares on each side. The author thinks that this way the delimitation would be considered equitable in all senses. Additionally, the thesis in the end made a quick (dis)proportionality test as required by the 'three-stage' approach so as to ensure whether the solution of the delimitation is equitable.

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