Maritime Delimitation in the Caspian Sea: Legal Issues

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The legal regime of the Caspian Sea has been the subject of a substantial interest in academic circles during the last decade. This has been mainly triggered by the underlying political and economical realities, to the extent that the question could be raised: What is there still to be added? This plethora of legal writings on the Caspian Sea, of which the added value can sometimes be doubted, has moreover triggered some rather critical remarks lately.[1]

In order not to be classified in this category of contributions without added

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1 Especially relating to the American scholarship on the subject, see the trenchant comment of E. Sievers, The Caspian, Regional Seas, and the Case for a Cultural Study of Law, *Georgetown International Environmental Law Review*, Vol. 13, 2001, p. 361. Who writes: "What is international law scholarship if it is not lawyers acting like and writing like political scientists and economists freed from the pressures of peer review? No better formula for a race to the bottom can be imagined than the system we now have. In this system, students judge scholarship, scholarly credentials are won quickly without attention to language or writing requirements, and, because conferences are incidental, writers are not even exposed to cursory critical feedback. As a discipline, what mechanisms has law developed to ensure that legal scholars publish their best work, acquire relevant skills, or even read foundational texts, not to mention ensure that standards of excellence exist? The answers to these questions place international law on a uniquely fragile foundation as an academic discipline. Most scholars of international law have never seen the things or people about which they write, never use materials in the languages of those people and places, and almost never do original or archival research. Getting the story right is, if quality of published works is any guide, a low priority of American scholars of international law, and getting the story right is simply not rewarded."

value, the present paper will mainly focus on a number of lessons to be learned from the delimitation experience in the Baltic Sea, where a certain special expertise is believed to be at hand. In order to do so, the first part of my intervention will relate to the *sui generis* nature of the Caspian Sea. Secondly, a few words will be devoted to the present day practice of the littoral States. This will then provide a basis for assuming that experience in maritime boundary delimitation gathered elsewhere, particularly in the Baltic Sea, may not be totally devoid of interest.

I. Sui Generis Nature of the Caspian Sea

The main topic of the present paper is "Maritime Delimitation in the Caspian Sea". According to the Latin saying "*in cauda venenum*", the much debated question here is whether the Caspian marine areas are indeed sea or lake. Unlike in some other areas of the world, it is not the penultimate word which causes difficulties here, like in the Persian Gulf, or should one rather say Arabian Gulf.[2] With respect to the Caspian Sea, however, it is the exact legal nature of this geographical feature which is the centre of debate.

Every argument that this water expanse is a sea is easily countered by another one pointing in the direction of a lake. Historically it is undoubtedly correct to call it a sea, but today this water area is cut off from, the other seas and oceans. Whether there is a natural outlet or not, is moreover a hotly debated issue.[3] From an oceanographic point of view, the salt water and the type of fauna and flora again point in the direction of a sea area,[4] whereas the fact that it is located 26.5 meters below the normal level of the other seas and oceans rather gives it affinities with

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2 On the contrary, both parties even agreed to qualify the Caspian Sea as "an Iranian and Soviet Sea". See the exchange of notes between M. Filimonov, the Soviet Ambassador at Teheran, and M. A'Lam, the Iranian Minister for Foreign Affairs, dated 25 March 1940. This exchange took place on the occasion of the signing of the Treaty of Commerce and Navigation between Iran and the Soviet on the same day [as reprinted in English translation in *British and Foreign State Papers*, Vol. 144, 1940-1942, p. 419].

3 The hybridization of Baltic, Black and Caspian marine species indicate a certain link, but the natural character of the latter has been questioned.

4 Or to use the words of an expert of the Intergovernmental Oceanographic Commission of UNESCO: "[F]rom an oceanographic point of view (composition of water, fauna, flora), the Caspian Sea should be considered as a sea." Quoted from S. Vinogradov and P. Wouters, The Caspian Sea: Current Legal Problems, *Zeitschrift für ausländisches öf fentliches Recht und Völkerrecht*, Vol. 55, 1995, p. 604, note 54; S. Vinogradov, Transboundary Water Resources in the Former Soviet: Between Conflict and Cooperation, *Natural Resources Journal*, Vol. 36, 1996, p. 393, note 8.

the lake concept.[5] Finally, if mere size would seem to categorize it as a sea,[6] it could easily be qualified as the largest lake on earth.[7]

Confronted with such a variety of contradictory signals, defying any clear categorization, lawyers often find relief in the *sui generis* concept. G. Gidel, writing in *tempore non suspecto*, made the following comments with respect to the Caspian Sea:

> *Pour que l'on se trouve en présence d'espaces régis par le droit international maritime, if faut que ces espaces communiquent librement et naturellement les uns avec les autres par route l'étendue du monde. Ainsi l'espace d'eau salée dénommé Mer Caspienne peut être l'objet de rapports internationaux, puisque ses rivages se répartissent entre plusieurs dominations politiques: elle n'est pas régie d'office par les règles du droit international maritime, car elle est privée de communication aver le reste des Océans.*[8]

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5 After about 150 years of steady lowering of the water level, this trend drastically turned around since 1977 (2.5 meter rise in 15 years, causing all kinds of serious problems in the area) to the extent that projects to divert certain northern rivers into the basin of the river Volga, which had been on the Soviet drawing board for some time, were finally shelved in1986. See for instance E. Franckx, The Soviet North-South River Diversion: New Options for the Future, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 111, where an English translation can be found of the Decree of the Central Committee of the Communist Party of the Soviet and the Council of Ministers of the U.S.S.R., 14 August 1986, On the Termination of the Works concerning the Reversal of Part of the Flow of Northern and Siberian Rivers, 29 Sobranie Postanovlenii Pravitel'stva S.S.S.R. (Collected Decrees of the U.S.S.R. Government) 158 (1986) (id., pp. 112~114). Point 1 of this Decree stated: "The termination of the projects and preliminary works concerning the reversal of part of the flow of the northern rivers in the river Volga shall be considered as appropriate. The Gosplan (State Planning Committee) of the U.S.S.R., the Gosagromprom (State Committee for Agricultural Production) of the U. S. S. R. and the Ministry of Amelioration and Hydrology of the U. S. S. R. shall exclude the tasks, set by the plans for the period 1986-90 for the execution of the said works. The Gosagroprom (State Committee for Agricultural Production) of the U.S.S.R., the Ministry of Amelioration and Hydrology of the U.S.S.R. and the Council of Ministers of the R.S.F.S.R. shall direct the means and material resources freed in accordance with the present decree to land improvement in the Non-Black soil zone of the R.S.F.S.R., to the increase of the works concerning the reconstruction of the irrigation systems in the basin of the river Volga" (id., p. 113).

6 The area covered, for instance, is larger than the Persian Gulf.

7 In the same way as for instance Greenland is considered the largest island.

8 G. Gidel, *Le droit international public de la mer*, 1st ed., Chateauroux: Etablissements Mellottee, 1932, p. 40.

before coming to the conclusion:

> *[S]i le droit international s'y applique, ce ne peut être que par une entente, tacite ou formelle, entre les riverains, qui seuls, en principe, peuvent naviguer sur ces eaux.*[9]

For present purposes, as will be seen *infra*, these unbiased words of G. Gidel form a perfect starting point. Therefore, instead of trying to advance further arguments to tilt the balance either way, which may well turn out not to be a very rewarding exercise,[10] the present paper rather starts from the *sui generis* character of the Caspian Sea, based as it is partly on treaty law, and for the areas not covered by the latter, on consensus amongst the States directly concerned.

II. Present-day Practice of the Littoral State

It is not the intention here to repeat in detail what has already been written on this subject early 2001, when the present author presented a paper, entitled "The Problem of Delimitation in the Caspian Sea", to a symposium on the "Problems of Regional Seas", held at Istanbul, Turkey.[11] Reference can be made to the publication of the proceedings of this conference for further details.[12]

What seems to be particularly important for present purposes, however, is that all parties are at present apparently moving in a similar direction. As stated by one author after an updated overview of State practice of the littoral States early in 2000:

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9 G. Gidel, *Le droit international public de la mer*, 1st ed., Chateauroux: Etablissements Mellottee, 1932, p. 48.

10 See for instance B. Oxman, Caspian Sea or Lake: What Difference Does It Make?, *Caspian Crossroads Magazine*, Winter 1996, p. 1, at http://ourworld.compuserve.com/homepages/usazerb/141.htm, 1 January 2002, where he writes: "Attempting to determine the rights and duties of the States concerned by a process of deductive reasoning based on the status of the Caspian Sea as a sea or a lake is largely, if not entirely, a pointless endeavor."

11 This conference was held on 12-14 May 2001.

12 E. Franckx and A. Razavi, The Problem of Delimitation in the Caspian Sea, in B. Oztiirk and N. Algan eds, *Problems of the Regional Seas (Proceedings of the International Symposium on the Problems of Regional Seas 12—14 May 2001, Istanbul, Turkey)*, Istanbul: Anadolu Ofset, 2001, pp. 27~35.

> *The contest over mining rights in the Caspian is largely over. All the littoral States now favor sectoral division of the seabed. The dispute has therefore shifted from whether the seabed should be divided to how that division might be accomplished.*[13]

Recent press reports seem to confirm this conclusion. Towards the end of January 2002, officials of the five States concerned met to discuss the issue. At that time the Russian chief negotiator felt that progress had been made and that "a final deal could be struck in April" in Ashkhabad.[14] Even though later press reports seemed to cast some doubts on these optimistic perspectives,[15] the fact remains that in substance all the parties concerned seem to be discussing delimitation of maritime areas, at least as far as the sea-bed and subsoil are concerned.

III. Certain Relevant Principles

Once we start from the premise that, no matter how one has to qualify the Caspian Sea, the littoral States have agreed to rely on the delimitation of maritime areas as far as the sea-bed and subsoil is concerned, the submission can be made that there exists a certain framework in international law which provides guidance to the parties in this endeavour. It is indeed submitted that even when States are totally free to delimit their maritime areas, unencumbered in principle by international law, their actions nevertheless have sometimes been influenced not only by relevant principles of international law, but have even influenced the latter's further development.

The division of powers between State and federal authorities over maritime

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13 K. Mehdiyoun, Ownership of Oil and Gas Resources in the Caspian Sea, *American Journal of International Law*, Vol. 94, 2000, p. 179.

14 He is reported to have added: "I think that our next meeting in Ashgabat (due in April) could become the final one before a meeting of the leaders of the five Caspian Sea States". See Reuters, Breaking News from Around the Globe, at http://www.renters.com/news_article,jhtml?type=search&storylD=540984, 24 January 2002.

15 The Turkmen president was quoted early February during a visit to Moscow, that he did not feel that the timing was yet ripe for the conclusion of an agreement. See World Oil Magazine, at http://www.Worldoil.com/news/newsstory.asp.../article-e.asp?energy24=24732, 12 February 2002. Also the postponement of the visit of President Aliyev to Iran, where the discussion of the Caspian Sea would be on the agenda, points in that direction. See INRA Europe, at http://www.irna.com/newshtm/eng/24231256.htm, 13 February 2002.

expanses in the United States serves as a good example in this respect. At a very early stage U.S. courts applied international norms to these internal boundary disputes.[16] These court decisions, in turn, have had a profound impact on the further development of the rules of international law governing the subject.[17]

Even more relevant for present purposes is the recent decision of a Canadian arbitral tribunal dividing the respective offshore areas of the Province of Newfoundland and Labrador, and the Province of Nova Scotia.[18] Offshore exploitation rights had been settled between the federal authorities and the above-mentioned provinces by agreements reached in 1985 with Newfoundland and Labrador[19] and in 1986 with Nova Scotia.[20] The principles contained therein were later enacted at the provincial[21] as well as on the federal level.[22] The latter contained two identical dispute settlement provisions, which stated:

> *Where the procedure for the settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require.*[23]

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16 See for instance G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201 note 74.

17 It will suffice here to look at the classic textbook by D. O'Connell, *The International Law of the Sea*, Oxford: Clarendon Press, 1982, pp. 389~416, to understand the importance of these U.S. court cases to a proper understanding of the international law governing bays.

18 Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and The Canada-Newfoundland Atlantic Accord Implementation Act, Award of the Tribunal in the Second Phase, Ottawa, at http://www.boundary-dispute.ca, 26 March 2002. Hereinafter cited as 2002 Arbitration.

19 The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing, 11 February 1985.

20 Canada-Nova Scotia Offshore Petroleum Resources Accord, 26 August 1986.

21 Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act (Statutes of Newfoundland, 1986, c. 37) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Statutes of Nova Scotia, 1987, c. 3).

22 Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c.3) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada, 1988, c. 28).

23 Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) section 6(4), and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada, 1988, c. 28), section 48(4).

As was the case in the United States, Canada thus considered the rules of international law to apply to exclusive intra-Canadian relations. When a dispute arose relating to the offshore line dividing the respective offshore areas of the Province of Nova Scotia and the Province of Newfoundland and Labrador, the compromissory clause just mentioned was activated and terms of reference drawn up by the disputing parties.[24] Of particular importance is the following passage of the second phase in response to certain arguments contesting the application of the rules of international law *in casu*. The Tribunal stated more particularly:

> *Just as in the first phase the Terms of Reference called for the application of international law by analogy to the conduct of provincial governments within Canada claiming the benefit of a resource, so in the second phase they clearly call for the application of the principles of international law governing maritime boundary delimitation by analogy, in order to determine the extent of the offshore areas of the two provinces. In both cases the application of international law is analogical. In both cases it is appropriate and required by the Accord Acts and the Terms of Reference.*[25]

The Tribunal thus found no reasons why the relevant principles of international law governing maritime delimitation should not be suitable, by analogy, to be applied to an area where they were not originally intended to be applicable.

Since no compelling reasons therefore seem to exist to exclude a priori the possible application of this international law legal framework, this part will first try to locate the sources of the law of maritime delimitation in general and then look at the practice of States in the Baltic Sea more particularly.

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24 By means of Art. 3(2) of these Terms of Reference, the disputing parties requested the Tribunal to proceed in two phases: "(i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement. (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined." At http://www.boundary-dispute.ca/terms.html, 13 February 2002.

25 2002 Arbitration, para. 2.35.

A. The Sources of the International Law of Maritime Delimitation

Guidance here may not be as strict as one might have wished it to be, but it nevertheless exists. The starting point is the United Nations Convention on the Law of the Sea,[26] which is slowly, but steadily, approaching the ultimate objective which its drafters had in mind when embarking on this ambitious project, namely to create an "international treaty of a universal character, generally agreed upon".[27] Indeed, with 137 States and the European Community party to this agreement, one could say that this objective is indeed in sight.[28] Nevertheless, in the context of the subject treated by the present paper, it must immediately be added that of all the littoral States bordering the Caspian Sea, only Russia is so far bound by this convention.[29]

This should not, however, unnecessarily worry one in the context of the present paper, for the substantive law governing maritime delimitation is not really conventional in nature any more.[30] As stated by T. Treves, the 1982 Convention

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26 United Nations Convention on the Law of the Sea, U. N. Doc. A/Conf. 162/122, 12 December 1982, multilateral, as reprinted in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea and the Agreement for the Implementation of Part XI of the Convention with Index and Excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea*, New York: United Nations, 1997, p. 294. This convention entered into force on 16 November 1994. Hereinafter cited as 1982 Convention. Also to be found on the Internet, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS.pdf, 13 February 2002.

27 As already envisaged, and required, by GA Res. 2749 (XXV) of 19 December 1970, within the framework of the principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.

28 Situation as of 25 February 2002.

29 The other littoral States did not even sign the document. It might moreover be added that besides Russia only Iran is at present a party to the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (U.N. Doc. A/CONF. 164/37), 8 September 1995, multilateral, as reprinted in *International Legal Materials*, Vol. 34, 1995, p. 1542. This agreement entered into force on 11 December 2001. Also to be found on the Internet, at http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/A_CONF.164_37_English.pdf, 13 February 2002.

30 This part is based on E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 249.

represented add codification of this branch of the law of the sea.[31] If the 1958 conventional system still gave some guidance as to the method to be used beyond the territorial sea,[32] Arts. 74(1) and 83(1) of the 1982 Convention, by stressing the result to be achieved rather than the method to be employed to reach that

31 T. Treves, Codification du droit international et pratique des etats dans le droit de lamer, *Recueil des Cours*, Vol. 223, 1990, pp. 11, 104.

32 See Art. 6 of the Convention on the Continental Shelf, 29 April 1958, multilateral, 499 United Nations Treaty Series (hereinafter cited as UNTS) 311. This convention entered into force on 10 June 1964. This article States: "1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall he determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. 3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land." The territorial sea has to be excluded in this respect for it received a similar treatment in 1958 and 1982，namely an equidistance-special circumstances rule which very much resembles the delimitation method codified in 1958 with respect to the continental shelf. See Art. 12 of the Convention on the Territorial Sea and the Contiguous Zone (hereinafter cited as 1958 Territorial Sea Convention), 29 April 1958, multilateral, 516 UNTS 205 (this convention entered into force on 10 September 1964) and Art. 15 of the 1982 Convention. Even though the formulation is not exactly the same, the essential rule contained therein remained unchanged. Only the 1982 Convention will therefore be cited here: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith". Given the limited extent of this zone, especially when compared with the newly created exclusive economic zone and there defined continental shelf in the 1982 Convention, it is easily understood that the issue receives its full importance today in areas beyond the territorial sea.

objective,[33] are both characterized rather by the complete absence of any such practical method to be followed.[34]

Indeed, according to the first paragraph of Arts. 74 and 83, an agreement has to be arrived at on the basis of international law "in order to achieve an equitable solution."[35] Given the particular drafting history of these articles of the 1982 Convention,[36] it can be stated, as already mentioned by the present author elsewhere, that these provisions represent "an agreement between the participants (of the Third United Nations Conference on the Law of the Sea) to further disagree."[37] The fundamental difference in approach between those who supported the median line or equidistance principle, coupled with an exception for special circumstances, on the one hand, and those favouring a more outspoken reliance on equitable principles, on the other, remained. The relevant articles of the 1982 Convention were able to circumvent the crucial issue of fixing the exact method of delimitation to be applied by emphasizing the final objective to be achieved instead. As a consequence States appear to be free to choose any method they want according to Arts. 74(1) and 83(1), as long as it leads to an equitable solution.[38] This teleological approach of Arts. 74(1) and 83(1) has been emphasized on more

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33 See Anon, Art. 74: Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts, in S. Nandan and S. Rosene eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 796, 814, where it is stated: "The requirement that the delimitation is to achieve an equitable solution places emphasis on the objective of the delimitation instead of on the method of delimitation." A similar remark can be found with respect to Art. 83. See Anon, Art. 83: Delimitation of the Continental Shelf between States with Opposite or Adjacent Coasts, in S. Nandan and S. Rosene eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 948, 983.

34 As stressed by I. Lucchim and M. Voelckel, *Droit de la Mer*, Tome 2, Vol. 1, Paris: Pedone, 1996, p. 89.

35 1982 Convention, Arts. 74(1) and 83(1).

36 Anon, Art. 74: Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts, in S. Nandan and S. Rosene eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 796~816; Anon, Art. 83: Delimitation of the Continental Shelf between States with Opposite or Adjacent Coasts, in S. Nandan and S. Rosene eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 948~985.

37 E. Franckx, Coastal State Jurisdiction with Respect to Marine Pollution-Some Recent Developments and Future Challenges, *International Journal of Marine and Coastal Law*, Vol. 10, 1995, p. 253.

38 E. Manner, Settlement of Sea Boundary Delimitation Disputes According to the Provisions of the 1982 Law of the Sea Convention, in J. Makarczyk ed., *Essays in International Law in Honour of Judge Manfred Lachs*, Dordrecht: Martinus Nijhoff, 1984, p. 641.

than one occasion by the International Court of Justice itself.[39]

If not of conventional nature, is this sub-branch of the law of the sea then governed by customary international law? Once again, the answer appears to be negative. In the field of maritime delimitation not much customary law can be discerned as to the applicable principles which would be of direct relevance.[40] Or to use the words of the International Court of Justice:

> *A body of detailed rules is not to be looked for in customary international law... It is therefore unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of States to areas which were until yesterday zones of the high seas, to look to general international law to provide a ready-made set of rules that can be used for solving any delimitation problems that arise.*[41]

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39 International Court of Justice, Continental Shelf Case (Libya/Tunisia), 24 February 1982, *I.C.J. Reports*, 1982, p. 49, para. 50, where the Court States that "any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved." See also International Court of Justice, Continental Shelf Case (Libya/Malta), 3 June 1985, *I.C.J. Reports*, 1985, p. 30, para. 28, where the Court referred back to the quote just mentioned while adding: "The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to the States themselves, or to the courts, to endow this standard with specific content."

40 Despite the fact that State practice in this field is readily available and has been very carefully analyzed, it is almost impossible to draw general conclusions. See J. Charney, "Introduction", in J. Charney and I. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. xxiii, xlii (hereinafter cited as International Maritime Boundaries) and stressed by the same author in " International Law making in the Context of the Law of the Sea and the Global Environment", in M. Young and Y. Iwasawa eds., *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy, Irvington: Transnational Publishers*, 1986, pp. 13, 18.

41 International Court of Justice, Gulf of Maine Case (Canada/United States), 12 October 1984, *I.C.J. Reports*, 1984, p. 299, para. 111. See also p. 300, para. 114, where this argument is repeated.

As a consequence, the international law of maritime delimitation is not really to be found in treaty law, or in customary law, but is rather to be looked for in judicial decisions.[42] The latter constitutes what J. Charney has called a kind of judge made common law in the classic sense, even though the rule of *stare decisis* is not applicable on the international level.[43] As of now, this implies foremost decisions of the International Court of Justice and awards of arbitral tribunals.[44] The future will tell whether the International Tribunal for the Law of the Sea will have to be added to this list.

The fundamental question has however to be raised at this point whether States negotiating a maritime boundary settlement out of court are bound by the same rules and principles as cases decided by third party settlement. Even though the courts might have suggested at one time that this is actually the case, P. Weil indicates that such a point of view is rather what he calls "an artificial equation."[45] Or as succinctly stated by this author more recently:

> *While there are legal norms binding on the courts, there are no legal norms restricting the contractual freedom of States in this area. Third party delimitations are decided according to legal rules; negotiated delimitations are not, or at least are not necessarily.*[46]

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42 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, pp. 143~156.

43 J. Charney, Progress in International Maritime Boundary Delimitation, *American Journal of International Law*, Vol. 88, 1994, p. 227.

44 See for instance G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201, note 74, also national court decisions can sometimes have an impact on the development of international law.

45 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, pp. 105~114. To this one might add the fact that with respect to the maritime delimitation around the Norwegian island of Jan Mayen, the International Court of Justice in a sense refused Denmark the preferential treatment which Iceland had received earlier in its negotiated boundary with Norway. See International Court of Justice, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway), 14 June 1993, *I.C.J. Reports*, 1993, p. 38, para. 86.

46 P. Weil, Geographic Considerations in Maritime Delimitation, in American Society of International Law ed., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 115, 121.

As already indicated by the last part of the sentence, even P. Weil himself accepts some interaction between the two manners of arriving at a final settlement.[47] Other authors have stressed the close factual link which nevertheless exists between both of them,[48] with State practice even limiting the range of options available.[49] J. Charney as a matter of fact labels the influence which international law exercises on negotiated maritime boundaries "highly relevant" because diplomats are very much aware that if third party dispute settlement is resorted to, certain criteria instead of others will be taken into account. In a sort of preventive action, therefore, negotiators act within certain limits when trying to settle the dispute on a voluntary basis.[50]

This makes the work, sponsored by the American Society of International Law, which tries to analyze all the maritime boundaries settled since the Second World War, so valuable.[51] This project, in which the present author was invited to participate as a regional expert for the Baltic Sea since its inception in 1988, still

47 "No one can deny that the principles and rules expressed in judicial decisions have an important effect on the negotiating positions adopted in maritime boundary delimitation negotiations. In particular, the judge-made concepts of 'particular', 'incidental,' and 'special' geographical features which are to be ignored or given only partial effect have certainly pervaded State practice." P. Weil, Geographic Considerations in Maritime Delimitation, in American Society of International Law ed., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 120~121.

48 J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xxxvii, where he writes: "The law applicable to third party settlements will influence the negotiators, just as trends in boundary settlements will influence the tribunals."

49 J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xliv.

50 J. Charney, Progress in International Maritime Boundary Delimitation, *American Journal of International Law*, Vol. 88, 1994, p. 228.

51 See also J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xlii, emphasizing the importance of these trends and practices.

continues today.[52] The experience so gathered forms the basis of the last and most substantial part of the present paper.

B. Lessons to Be Learned from State Practice in the Baltic Sea

The present part will not cover delimitation practice in the Baltic Sea as a whole. Only the so-called fourth period,[53] which can be distinguished in the overall delimitation effort in the Baltic Sea,[54] will be discussed for the obvious reason that it covers all agreements directly related to the dissolution of the former Soviet Union.

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52 A fourth volume, to which the present author contributed eight new reports relating to the so-called fourth period in the over-all delimitation effort of the Baltic Sea [see E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256; the same author, International Cooperation in Respect of the Baltic Sea, in R. Lefeber, M. Fitzmaurice and E. Vierdag eds., *The Changing Political Structure of Europe: Aspects of International Law*, Dordrecht: Martinus Nijhoff, 1991, pp. 245, 255~261, as later supplemented by the same author in Maritime Boundaries in the Baltic Sea: Past, Present and Future, *Maritime Briefing*, Vol. 2, 1996, p. 6 (International Boundaries Research Unit, University of Durham, United Kingdom), and Maritime Boundary Delimitation in the Baltic, in R. Platzoder and P. Verlaan eds., *The Baltic Sea: New Developments in National Policies and International Cooperation*, The Hague: Martinus Nijhoff, 1996, pp. 167, 169~173. See also the following French articles written by the same author Frontieres maritimes dans lamer Baltique: passe, present et futur, *Espaces et Ressources Maritimes*, Vol. 9, 1996, p. 92 and Les delimitations maritimes en mer Baltique, *Revue de l'Indemer*, Vol. 5, 1997, p. 37 (Institut dudroit economique de la mer, Monaco) and accompanying text], is at the publisher for the moment. See J. Charney and R. Smith eds., *International Maritime Boundaries*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

53 As distinguished in E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256. This period started during the early 1990s and still continues today.

54 The previous periods ran from 1945−1972, 1973−1985, and 1985−beginning of the 1990s respectively. See E. Franckx, International Cooperation in Respect of the Baltic Sea, in R. Lefeber, M. Fitzmaurice and E. Vierdag eds., *The Changing Political Structure of Europe: Aspects of International Law*, Dordrecht: Martinus Nijhoff, 1991, pp. 245, 255~261, as later supplemented by the same author in Maritime Boundaries in the Baltic Sea: Past, Present and Future, *Maritime Briefing*, Vol. 2, 1996, p. 6 (International Boundaries Research Unit, University of Durham, United Kingdom), and Maritime Boundary Delimitation in the Baltic, in R. Platzoder and P. Verlaan eds, *The Baltic Sea: New Developments in National Policies and International Cooperation*, The Hague: Martinus Nijhoff, 1996, pp. 167, 169~173. See also the following French articles written by the same author Frontieres maritimes dans la mer Baltique: passe, present et futur, *Espaceset Ressources Maritimes*, Vol. 9, 1996, p. 92 and Les delimitations maritimes en mer Baltique, *Revue de l'Indemer*, Vol. 5, 1997, p. 37 (Institut du droit economique de la met, Monaco).

For present purposes, the Baltic and the Caspian Sea show some interesting points of correspondence. As a continuing State of the Soviet Union,[55] Russia first of all lost a substantial part of its territory and maritime facade in the Baltic as well as in the Caspian Sea during the early 1990s. In both areas, the issue of State continuation/succession came to the fore and especially its impact on previously concluded maritime boundary agreements or unilaterally established lines became a topical issue.

No analogy is of course perfect, and at least as many good reasons could probably be forwarded to distinguish both areas from a maritime delimitation point of view. Nevertheless, in view of what has already been said above, the submission is made that certain experiences gathered in the Baltic during the 1990s may not be totally irrelevant for the Caspian Sea, especially since they mainly concern relationships between former Soviet republics inter se, and the attitude of some third States with respect to these changes.

The next part will therefore focus on a number of areas where resemblances appear to be present. Five such areas will be highlighted: First of all the treatment of the condominium issue; secondly the impact of exploration and exploitation activities in disputed areas on relations between parties; thirdly the value to be attached to unilateral action of coastal States bearing on the exact juridical nature or outer limits of maritime zones; fourthly the possible closing-off effect of a combination of convex and concave coasts in certain areas; and finally the likeliness of third party settlement of maritime delimitation disputes.

1. Condominium Issue

Much has been written on this topic as far as the Caspian Sea is concerned, based on several treaties concluded between Iran and Russia, or their respective

55 See Circular Note of 13 January 1992 of the Ministry of Foreign Affairs of the Russian Federation, as referred to and stressed by the President of the Russian Association of International Law. See A. Kolodkin, Russia and International Law: New Approaches, *Revue Belge de Droit International*, Vol. 26, 1992/3, p. 552.

predecessors.[56] In the Baltic Sea a similar issue also became relevant, namely the legal status of the Gulf of Riga, disputed between Estonia and Latvia.

International law does not provide a clear-cut definition of the notion of a historic bay. In fact, treaty law only refers to this notion in a negative way, i.e. indicating that the provision on bays does not apply to historic bays. Such a negative description was already included in the 1958 Territorial Sea Convention[57] and an identical provision can also be found in the 1982 Convention.[58] Whether Latvia and Estonia are actually bound by any of these treaty provisions is not really important because the International Court of Justice already confirmed that these articles "express general customary law."[59]

It lies beyond the purpose of the present article to analyze in detail the general legal requirements necessary under international law to validate such a claim. This has already been sufficiently treated in the legal literature.[60] What will rather be looked at is the possible application of this notion to the Gulf of Riga and the legal implications this could have on the present day situation.

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56 E. Franckx and A. Razavi, *The Problem of Delimitation in the Caspian Sea, in B. Ozturk and N. Algan eds, Problems of the Regional Seas (Proceedings of the International Symposium on the Problems of Regional Seas 12−14 May 2001, Istanbul, Turkey)*, Istanbul: Anadolu Ofset, 2001, pp. 28~29. It concerns the Treaty of Turkmenchai of 22February 1828, the Treaty of Friendship of Moscow of 26 February 1921, the Treaty of Establishment, Commerce and Navigation of 27 August 1935, and the Treaty of Commerce and Navigation of 25 March 1940. Together with the historic Treaty of Gulistan of 12 October 1813 (as reprinted in G. De Martens, *Nouveau recited de Traites d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange, et de plusieurs actesservant à la connaissance des relations étrangères des puissances et Etats de l'Europe*, Gotingen: Dietrich Library, 1808−1819, pp. 89~95, these treaties are hereinafter cited as historic treaties.

57 1958 Territorial Sea Convention, Art. 7(6).

58 1982 Convention, Art. 10(6). Because of the similar nature of these provisions of 1958 and 1982, reference will only be made to the latter.

59 International Court of Justice, Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening), 11 September 1992, *I.C.J. Reports*, 1992, p. 351, para. 383. Hereinafter cited as Gulf of Fonseca judgment.

60 See for instance the following manuals on the topic: G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, pp. 176~178; L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 149~302; M. Strobl, *The International Law of Bays*, The Hague: Martinus Nijhoff, 1963, pp. 251~331.

The Gulf of Riga does not qualify as a juridical bay as defined under treaty law for a number of reasons. First of all because the bay is presently surrounded by two littoral States. Indeed, Art. 10 of the 1982 Convention starts out by limiting its application to "bays the coasts of which belong to a single State."[61] Secondly, because the closing line of the Gulf of Riga measures more that 24 nautical miles (n.m.),[62] something which Art. 10(4) does not allow. The latter element must have especially urged the Soviet Union in 1947 to opt for the historical claim[63] in order to side-step this requirement of maximum width which international law at that time even seemed to locate below the present day 24 n.m. threshold.[64] By doing so, a third obstacle was created in order to qualify the Gulf of Riga as a juridical bay under present day treaty law as mentioned above.[65]

Western commentators, analysing Imperial Russian and Soviet literature on the subject, come to the conclusion that these countries did claim the Gulf of Riga

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61 1982 Convention, Art. 10(1).

62 Bouchez mentions that the distance between the headlands of the bay is about 28 n.m. See L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, p. 219. It is difficult to conceive how the author arrived at this particular figure as the distance between Kolkasrags on the Latvian side and Vainu Point on the Estonian side is more than twice that width.

63 Decree of 10 April 1947, On the Proclamation of Bays and Islands Located in the Northern Arctic Ocean and Baltic Sea as Territory of the U. S. S. R., as mentioned by A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 20, note 11. But see P. Solodovnikoff, *La navigation maritime dans ladoctrine et la pratique sovietiques*, Paris: Librairie Générale de Droit et de Jurisprudence, 1980, p. 299, where he writes: "Aucune disposition législative ne fut prise par l'Union Soviétique au sujet de la baie de Riga, celle-ci étant considérée, tant par les juristes tsaristes que par les juristes soviétiques, comme étant un exemple classique d'eaux historiques." See in this respect also F. Volkov ed., translated from Russian by K. Pilarski, *International Law*, Moscow: Rogress Publishers, 1990, p. 223 and accompanying text.

64 Figures like 6, 10 or 12 n.m. were to be encountered during the first half of the twentieth century. See G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, pp. 37~74.

65 Namely that the existing conventional framework does not cover historic bays. See 1958 Territorial Sea Convention, Art. 7(6), 1982 Convention, Art. 10(6) and accompanying text.

as a historic bay.[66] Soviet literature of the 1980s apparently no longer mentioned the Gulf of Riga explicitly when discussing the concept of historic bays.[67] This omission does not appear to indicate that the claim concerning the Gulf of Riga was no longer made, as can be inferred from a 1990 manual on international law where it is stated:

> *In 1957, Soviet legislation defined as historical waters the Bay of Peter the Great (up to the line connecting the mouth of the Tyumen-Ula River with Povorotny Cape), the Sea of Azov and the White Sea, the Bay of Riga, the Kola Bay, the Pechorskaya and Cheshskaya bays, and the Vilkitsky and Sannikov straits.*[68]

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66 See for instance E. Rauch, *Die Sowjetunion and die Entwicklung des Seevölkerrechts*, Berlin: Wissenschaftlicher Autoren-Verlag, 1982，p. 66 and P. Solodovnikoff, *La navigation maritime dans la doctrine et la pratique soviétiques*, Paris: Librairie Générale de Droit et de Jurisprudence, 1980, pp. 298~299. About the Soviet point of view, see also V. Sebek, *The Eastern European States and the Development of the Law of the Sea*, New York: Oceana Publications, Inc., 1979, p. 170 ["Most international lawyers quote the Bay of Riga as part of the internal waters of the U. S. S. R."]; W. Butler, *The Law of Soviet Territorial Waters*, New York: Praeger, 1967, pp. 13, 74; M. Strobl, *The International Law of Buys*, The Hague: Martinus Nijhoff, 1963, pp. 267, 274; F. de Hartingh, *Les conceptions soviétiques du droit de la mer*, Paris: Librairie Générale de Droit et de Jurisprudence, 1960, pp. 30~34; A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 32; W. Butler, The Legal Regime of Russian Territorial Waters, *American Journal of International Law*, Vol. 62, 1968, p. 51.

67 As far as law of the sea textbooks are concerned, see for instance I. Blishchenko ed., translated from Russian by D. Belyavsky, *The International Law of the Sea*, Moscow: Progress Publishers, 1988, p. 26, as based on I. Blishchenko ed., *The International Law of the Sea*, Izdatel'stvo: Universiteta Druzhby Narodov, 1988, p. 32 (in Russian) [Peter the Great Bay and Bay of Penzhinsk]; G. Gorshkov ed., *International Law of the Sea Manual*, Moscow: Voennoe Izdatel'stvo, 1985, p. 69 (in Russian) [Peter the Great Bay]; Iu. Barsegov ed., *International Law of the Sea Dictionary*, Moscow: Izdatel'stvo Mezhdunarodnye Otnosheniia, 1985, p. 75 (in Russian) [Peter the Great Bay]; I. Barinova ed., *Contemporary Law of the Sea and the Practice of Its Application*, Moscow: Izdatel'stvo Transport, 1985, p. 62 (in Russian) [Peter the Great Bay]; S. Molodtsov, *Legal Regime of the Waters of the Sea*, Moscow: Izdatel'stvo Mezhdunarodnye Otnosheniia, 1982, p. 51 (in Russian) [Peter the Great Bay and Bay of Cheshsk]. With respect to manuals on international law, see for instance N. Blatova ed., *International Law*, Moscow: Izdatel'stvo Iuridicheskaia Literatura, 1987, p. 374 (in Russian) [White Sea and Peter the Great Bay]; B. Klimenko ed., *Dictionary of International Law*, Moscow: lzdatel'stvo Mezhdunarodnye Otnosheniia, 1986, p. 107 (in Russian) [Peter the Great Bay, Bayof Cheshsk and Bay of Pechorska]. None of these enumerations, however, is exhaustive. Besides Soviet examples, these works normally also refer to the practice of other States in this respect. Inter alia, reference is often made in this respect to the Hudson Bay in Canada.

68 F. Volkov ed., translated from Russian by K. Pilarski, *International Law*, Moscow: Rogress Publishers, 1990 , p. 223.

It is moreover noteworthy in this respect that a 1999 Russian international law manual even lists the Gulf of Riga as a historic bay belonging to Latvia.[69]

The conclusion can therefore be reached that, even though some uncertainty remained as to the exact juridical basis,[70] the Soviet Union did claim the Gulf of Riga as a historic bay. In this respect, the Soviet Union simply continued the practice set by its predecessor, Imperial Russia.

Whether this unilateral claim of the Soviet Union formed part of international law is of course a totally different question. One western author, basing herself on the 1947 situation, comes to the conclusion that the Soviet claim to the Gulf of Riga as a historic bay cannot be substantiated, mainly because of a lack of immemorial usage and continuous sovereignty.[71] This may well have been the case in 1947, but the author does not adequately answer the question whether the situation remained essentially unchanged during the early1990s. Indeed, Bouchez in his authoritative work on the subject has stressed that, taking into account present-day communication means, the time element has to be understood against this new changed background.[72] He in fact lists the Gulf of Riga as an example of the practice of States with reference to historic bays.[73] It cannot be denied that since 1947, the Soviet Union has exercised complete sovereignty over these waters in an uninterrupted manner. Already in 1982, E. Rauch came to the following conclusion:

> *Schon der Ausdruck 'historische Bucht' besagt, daß eine Inanspruchnahme als Eigengewässer unter Ausschluß anderer Staaten seit unvordenklicher Zeit und eine zumindest stillschweigende Hinnahme anderer Staaten, insbesondere der potentiell am meisten betroffenen Nachbarstaaten, gegeben sein muß. Legt*

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69 K. Bekiashev ed., *Public International Law Textbook*, Moscow: lzdatel'skaia Gruppa Prospekt, 1999, p. 417. (in Russian)

70 This is most probably the reason why the Gulf of Riga does not appear in G. Francalanci, D. Romano and T. Scovazzi eds., *Atlas of the Straight Baselines*, Milano: Dott. A.Giuffre Editore, 1986, p. 137. See especially the foreword (p. v) where the grounds are indicated on the bases of which selections were made for inclusion.

71 See A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 32.

72 L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 256~257.

73 L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 215, 219~220.

man diesen Ma? stab an, können lediglich die Bucht von Riga, das Weiß e Meer, die Tscheskaja Bucht und das Asow'sche Meer als historische Buchten der UdSSR i. S. des Art. 9 Abs. 6 RSNT(II) anerkannt werden.[74]

As has been stated above, Soviet authors normally like to refer to the Hudson Bay in Canada as another example of a historic bay.[75] Even though foreign objections to this claim appear to have been much more pronounced than with respect to the Gulf of Riga, an authoritative American scholar came nevertheless to the conclusion during the early 1990s, after a careful examination of all the pro's and con's, that Hudson Bay today does form part of the internal waters of Canada.[76]

An essential element in the proper evaluation of this claim is certainly the es-

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74 E. Rauch, *Die Sowjetunion und die Entwicklung des Seevölkerrechts*, Berlin: Wissenschaftlicher Autoren-Verlag, 1982, p. 67. Art. 9 of the Revised Single Negotiating Text corresponds with Art. 10 of the 1982 Convention.

75 See I. Blishchenko ed., translated from Russian by D. Belyavsky, *The International Law of the Sea*, Moscow: Progress Publishers, 1988, p. 26, as based on I. Blishchenko ed., *The International Law of the Sea*, Izdatel'stvo: Universiteta Druzhby Narodov, 1988, p. 32 (in Russian) [Peter the Great Bay and Bay of Penzhinsk]; G. Gorshkov ed., International Law of the Sea Manual, Moscow: Voennoe Izdatel'stvo, 1985, p. 69 (in Russian) [Peter the Great Bay]; Iu. Barsegov ed., *International Law of the Sea Dictionary*, Moscow: Izdatel'stvo Mezhdunarodnye Otnosheniia, 1985, p. 75 (in Russian) [Peter the Great Bay]; I. Barinova ed., *Contemporary Law of the Sea and the Practice of Its Application*, Moscow: Izdatel'stvo Transport, 1985, p. 62 (in Russian) [Peter the Great Bay]; S. Molodtsov, *Legal Regime of the Waters of the Sea*, Moscow: lzdatel'stvo Mezhdunarodnye Otnosheniia, 1982, p. 51 (in Russian) [Peter the Great Bay and Bay of Cheshsk]. With respect to manuals on international law, see for instance N. Blatova ed., International Law, Moscow: Izdatel'stvo Iuridicheskaia Literatura, 1987, p. 374 (in Russian) [White Sea and Peter the Great Bay]; B. Klimenko ed., *Dictionary of International Law*, Moscow: lzdatel'stvo Mezhdunarodnye Otnosheniia, 1986, p. 107 (in Russian) [Peter the Great Bay, Bay of Cheshsk and Bay of Pechorska] in fine.

76 J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 343. This notwithstanding the fact that one of the parties directly involved, namely the United States, for a long time seems to have contested this claim.

tablishment of a list of geographic coordinates by the Soviet Council of Ministers in 1985 determining the position of the baseline from which the territorial waters, the economic zone and the continental shelf is measured in the Baltic Sea.[77] The possibility of establishing such a system of straight baselines had first been introduced in Soviet legislation in 1971[78] and later consolidated by a new Law on the State Boundary of the U. S. S. R.[79] Of special importance here is a final paragraph of the 1985 Decree which was added to this list of coordinates. The latter provided that the following water expanses were considered to be "internal waters of the U.S.S.R., historically belonging to the U. S. S. R.", namely the White Sea and the Gulf of Cheshsk in the Barents Sea, the Gulf of Baidaratsk in the Kara Sea, and the Bay of Penzhinsk in the Sea of Okhotsk. A special entry was moreover added to this list stating that a decree of the Council of Ministers of 1957 declared the Peter the Great Bay to be "internal waters of the U. S. S. R. as waters of a historic bay."[80] One possible interpretation of this limited list could be that the Soviet Union only claimed these five bays as historic bays.[81] Another one, however, is that only those bays were explicitly mentioned of which the single segment closing the bay, i.e. the closing line, was bordered by the normal baseline on both sides. Since the Gulf of Riga was totally enclosed by a system of straight base lines, running from Cape Ovishi in the south, over the islands of Saaremaa and Hiiumaa to Cape Pakri in the north, and, as a consequence, no segment closed the bay between its natural entrance points, this enactment might not really have been the appropriate place to raise the historical status of the Gulf of Riga.

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77 Decree of 15 January 1985, On the Confirmation of a List of Geographic Coordinates Determining the Position of the Baseline in the Arctic Ocean, the Baltic Sea and Black Sea from which the Width of the Territorial Waters, Economic Zone and Continental Shelf of the U. S. S. R. is Measured, (Annex), *Izveshcheniia Moreplavateliam*, Vol. 1, 1986, p. 22. Hereinafter cited as 1985 Decree.

78 Edict of 10 June 1971, On the Introduction of Modifications to the Statute on the Protection of the State Border of the U. S. S. R., *Vedomosti Verkhovnogo Soveta S. S. S. R. (Communications of the Supreme Soviet of the U. S. S. R.)*, Vol. 24, 1971, p. 254.

79 Law of 24 November 1982, On the State Boundary of the U. S. S. R., *Vedomosti Verkhovnogo Soveta S. S. S. R. (Communications of the Supreme Soviet of the U. S. S. R.)*, Vol. 48, 1982, p. 891 and *Svod Zakonov S. S. S. R. (Code of Laws of the U. S. S.R.)*, Vol. 9, 1986, p. 202. See Art. 5.

80 See 1985 Decree, p. 47.

81 T. Scovazzi, New Developments Concerning Soviet Straight Baselines, *International Journal of Estuarine and Coastal Law*, Vol. 3, 1988, p. 37.

As far as the applicable legal regime is concerned, not much difference is to be noted between waters enclosed by straight baselines on the one hand and waters located in historic bays on the other. Both are subjected to the regime of internal waters, i.e. complete sovereignty. The only difference is the possible application of Art. 8(2) of the 1982 Convention to waters enclosed by straight baselines.[82] But because of the continued exercise of complete sovereignty by the Soviet Union over the Gulf of Riga, certainly since 1947, it appears beyond any shadow of a doubt that the regime of internal waters applies.

Again the question has to be raised concerning the international validity of these baselines. No easy answer can be put forward. It can certainly not be denied that official protests were lodged against the 1985 Decree.[83] It must however be remembered that the Baltic Sea is only one of the maritime areas covered by the Decree. Indeed, it only accounts for 32 of the 726 base points established by the Decree. Moreover, it is not very clear from the information available, against which segments exactly of this system of straight baselines protests were lodged.[84] Taking into account the special interest of the United States in the Arctic, one can assume that the essence of the protests was aimed at certain baselines in the Soviet Arctic.[85] The straight baselines here under consideration, namely from Cape Ovishi in the south to Cape Pakri in the north, by and large comply with the standards and guidelines for the establishment of straight baselines as elaborated by the Office of Ocean Law and Policy of the U. S. Department of State "in the light of current

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82 This article reads: "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

83 See for instance United States Responses to Excessive National Maritime Claims, 112 Limits in the Seas 22 (1992). Here a list is published of claims made to straight baselines. From this list it can be inferred that the United States made multiple protests against the 1985 Decree. See p. 24.

84 For a more detailed analysis of this issue, see E. Franckx, *Martzme Claims in the Arctic: Canadian and Russian Perspectives*, Dordrecht: Martinus Nijhoff, 1993, pp. 224~225, note 471 and accompanying text.

85 Especially those closing off the Arctic straits located between the northern islands groups and the Eurasian continent. For more details and general background, see E. Franckx, *Martzme Claims in the Arctic: Canadian and Russian Perspectives*, Dordrecht: Martinus Nijhoff, 1993, pp. 145~195 with respect to the Soviet, and pp. 75~107 with respect to Canada.

international law and practice".[86] The baselines here under consideration easily pass what the study itself even called "one of the more controversial guidelines articulated in this study",[87] namely the 48 n.m. in maximum baseline length. The recently established Estonian straight baselines,[88] which closely follow the former Soviet system as established in 1985, has moreover been labelled as " satisfying the requirements under international law for the establishment of straight baselines",[89] especially with respect to the segments here under consideration.[90]

It seems therefore reasonable to submit that the Gulf of Riga had all the necessary characteristics to be considered as a historic bay. When the Soviet Union disintegrated in 1991, as a logical consequence, title passed to the two new coastal States in the area. As stated by the International Court of Justice in the Gulf of Fonseca judgment:

> *A State succession is one of the ways in which territorial sovereignty passes from one State to another; and there seems no reason in principle why a secession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States*.[91]

If Latvia and Estonia, therefore, should have been willing to continue this practice, it is believed that a strong claim could have been made to uphold the existing histo-

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86 Developing Standard Guidelines for Evaluating Straight Baselines, 106 Limits in the Seas 37 (August 1987). See pp. 17~18 for the proposed criteria for fringing islands which have to be complied with.

87 Developing Standard Guidelines for Evaluating Straight Baselines, 106 Limits in the Seas 37 (August 1987). See p. 14.

88 Law on the Boundaries of the Maritime Tract, *Riigi Teatala*, Vol. 1, 1993, p. 14. As reprinted in *Law of the Sea Bulletin*, Vol. 25, June 1994, p. 55.

89 A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p. 235.

90 Some doubts were expressed with respect to the part close to the Russian coast. Also the incorporation of one particular base point inside the Gulf of Riga was highlighted in this respect. See A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p. 237.

91 Gulf of Fonseca judgment, para. 399. Even though the Baltic republics do not consider themselves to be successor States of the former Soviet, it is believed that the substance of the argument remains valid.

ric bay argument.[92] No boundaries, even administrative ones, existed in the Gulf of Riga during the Soviet period and maritime activities, such as navigation and fishing, took place indiscriminately by nationals of both sides. Since no single regime for historic waters exists under present day international law,[93] it would be left to the parties to work a specific regime acceptable to both.[94] Estonia, however, clearly indicated that it did not wish to pursue this kind of reasoning.[95]

Indeed, one of the essential requirements for such a system to function appears to be the consent of all the parties involved.[96] Nevertheless the Court in this case stated that, once established, the dissolution of a condominium requires the agree-

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92 Or a statement by a Latvian author: "It seems that the Gulf of Riga could be claimed by Latvia and Estonia as historic." See I. Bergkhol'tsas, *Public Law of the Sea*, Riga: Jumi, 1997, p. 64. (in Russian) Our translation.

93 International Court of Justice, Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya), 24 February 1982, *I. C. J. Reports*, 1982, p. 18, para. 100, where the Court explicitly stated: "It seems clear that the matter continues to be governed by general international law which does not provide for a single 'regime' for 'historic waters' or 'historic bays', but only for a particular regime for each of the concrete, recognized cases of 'historic waters' or 'historic bays".

94 Nothing even prevents parties from dividing such historic waters between them, as was done with respect to Palk Strait and Palk Bay between India and Sri Lanka. These historic waters form part of the internal waters of both countries. It is interesting to note that a disputed island located near the equidistant line was totally disregarded for delimitation purposes and that traditional fishing rights were secured in the waters of the other country. See India-Sri Lanka (Historic Waters): Report Number 6~10(1), in *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 1409~1417. Taking into account the similar interests and situations present in the Gulf of Riga, this precedent in State practice could well have served as a model.

95 E. Franckx, Two New Maritime Boundary Delimitation Agreements in the Eastern Baltic Sea, *International Journal of Marine and Coastal Law*, Vol. 12, 1997, p. 365, where an explanation is suggested for this Estonian refusal.

96 As stressed by the Court in the Gulf of Fonseca judgment, para. 394: "This unanimous finding that the Gulf of Fonseca is an historic bay with the character of a closed sea presents now no great problem. All three coastal States continue to claim this to be the position..." The same paragraph further cites the following statement of a United Nations Secretariat study: "If all the bordering States act jointly to claim historic title to a bay, it would seem that in principle what has been said above regarding a claim to historic title by a single State could apply to this group of States." See also J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 368, who writes: "Such a title [historic waters] should, however, be founded upon the agreement of all the littoral States."

ment of all States involved.[97] Whether this requirement also applies to the transformation of common internal waters to offshore maritime water expanses is not that clear. J. Charney, who explicitly tries to apply this hypothesis in case of State secession with respect to the Hudson Bay, i.e. a water expanse possessing a natural outlet to the world oceans, simply States that two possible lines of argumentation are conceivable: One indicating that the new State has the right either to ratify or terminate the historic status of the waters, the other asserting that new States must be bound by the preexisting situation.[98]

Quite a number of interesting lessons for the Caspian Sea can therefore be learned from State practice in the Baltic Sea. The most important one is the submission that the absence of consent, which existed in the case of the Gulf of Riga, and is manifestly also present in the Caspian Sea, would probably make it very difficult for Iran and Russia to extend the condominium idea to areas not covered by the historic treaties concluded between these two parties.[99]

2. "First Exploration/ Exploitation, Then Delimitation" Theory

In the Caspian Sea, Azerbaijan especially seems to be a staunch supporter of the thesis that exploration and exploitation are not to be hindered by the absence of a delimitation agreement.

A similar tendency was present in the southeastern part of the Baltic Sea, which is the most promising area of that sea from a mineral exploitation point of

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97 Gulf of Fonseca judgment, para. 409. In this respect, reference can also be made to the judgment of the Central American Court of Justice, Gulf of Fonseca (El Salvador/ Nicaragua), 9 March 1917, as translated and reprinted in *American Journal of International Law*, Vol. 11, 1917, p. 700, where consent of all the parties was required for changing the legal relationship of the parties inside the Gulf of Fonseca.

98 J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 368.

99 In the areas which are covered by the historic treaties, a plausible argument can indeed be made that, since the latter can be qualified as so-called territorial treaties, they apply today to the new littoral States surrounding the Caspian, namely Azerbaijan, Kazakhstan and Turkmenistan. See for instance D. Allonsius, *Le regime juridique de la mer Caspzenne: Problemes actuels de droit international public*, Paris: Universite Pantheon-Assas (Paris II), L. G. D. J. , E. J. A., 1997, pp. 30~37.

view. The relationship between Lithuania and Russia[100] was characterized by the fact that every time the Russian Federation declared its intention to explore or exploit the presumed off-shore oil fields, it triggered a strong Lithuanian reaction.[101] The so-called Kravtsovskoye (D-6) oil field, located rather close to the coast, proved to be a difficult obstacle to overcome throughout the negotiations. The period until early 1996 was characterized by the fact that negotiations were held in the shadow of Russian initiatives to establish a consortium with foreign partners in order to start the exploitation of the D-6 oilfield.[102] But when the head of Lukoil announced during the month of April 1996that his company planned to finance the exploitation of the D-6 oil field with its own funds, the situation changed since it meant that development would not be further delayed by the need to obtain foreign capital.[103] Press reports suggest that Lithuania finally relinquished its claims to "a promising oil deposit in an undelimitated section of the Baltic Sea shelf not far from the coastal resort of Nida."[104] The understanding that Lithuania had renounced claims it might have had to this particular area facilitated the conclusion of the negotiations.[105] Indeed, the Russian newspaper Izvestiia inferred from unofficial sources that the quid pro quo was to grant Lithuania a sea corridor of about 1.1

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100 This part is based on E. Franckx, Lithuania-Russia: Exclusive Economic Zone and Continental Shelf [Report Number 10~18(1)], and by the same author, Lithuania-Russia; Territorial Sea [Report Number 10~18(2)], both accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

101 See for instance Izvestiia, 1 March 1994, p. 3, cols 3~6 and Finansovye Izvestiia, 12 September 1995, p. 2, col. 1.

102 For details of this period, see E. Franckx, Maritieme afbakening in de oostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the EasternBaltic Sea: Internet and Scientific Research), in P. De Meyere, E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid en verscheidenheid* [Huldeboek aangeboden aan Frits Gorlé], Brussels: VUB Press, 1996, pp. 275, 283~285.

103 For details of this period, see E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, pp. 275, 286~287.

104 See Baltic News Service, 17 September 1997, at http://gopher://namejs.latnet.lv, 15 December 1997.

105 E. Franckx and A. Pauwels, Lithuanian-Russian Boundary Agreement of October 1997: To Be or not To Be?, in V. Gotz, P. Selmer, and R. Wolfrum eds., *Liber Amicorum Gunther Jaenicke-Zum 85 Geburtstag*, Berlin: Springer, 1998, pp. 63, 74~75.

n.m. to the middle of the Baltic Sea.[106] It avoided the threat of enclosure by the adjacent maritime zones of Latvia and Russia, by securing Lithuania a maritime boundary with the country located opposite, namely Sweden.

Non-living resources also formed the crux of the maritime boundary dispute between Latvia and Lithuania in this area.[107] When one views the course of the negotiations, it appears that the many cooling off periods in the relationship between the two countries, which occurred during the period 1993—1999,were often directly related to particular actions taken by the Latvian authorities relating to the granting of licences with respect to those resources.[108] Until 1994 the negotiations went rather smoothly. But when the Latvian government publicly announced later that year that an American (AMOCO) and Swedish firm (OPAB) had been chosen to develop the Latvian continental shelf resources, including areas claimed by both sides, a dispute arose. The problem flared up once again a year later when in October Latvia signed contracts with these companies. A letter of protest followed the first event. After the second, Lithuania recalled its ambassador for consultations. This cycle repeated itself after every later action taken by the Latvian authorities in this respect.[109] The foreign oil companies involved did not push their luck, however, and it can now be stated with certainty that no exploration or exploitation took place in the area before the maritime boundary agreement was concluded on 9 July 1999.

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106 Izvestiia, 24 October 1997, p. 3, col. 3. This information was neither confirmed nor denied by the Lithuanian Minister of Foreign Affairs according to that same source (Izvestiia, 24 October 1997, p. 3, col. 4).

107 This part is based on E. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

108 For a detailed description of the course of these negotiations, see E. Franckx, Maritieme afbakening in de oostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the Eastern Baltic Sea:Internet and Scientific Research), in P. DeMeyere, E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid en verscheidenheid* [Huldeboek aangeboden aan Frits Gonlé], Brussels: VUB Press, 1996, pp. 275, 280~281 and 285~296, and by the same author, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, pp. 275, 283~286. The rest of this paragraph is based on these sources.

109 For instance when the Latvian government's Economics and Finance Committee decided to pass the bill on oil concessions for government consideration, or when a bill was passed for parliamentary adoption to allow foreign companies to drill in the Latvian continental shelf.

In the Caspian Sea a similar action-reaction pattern is apparently to be discerned. Iran, for instance, has officially protested against what it considers to be a provocative attitude on the part of Azerbaijan. A letter addressed to the Secretary-General of the United Nations clearly stated that the Iranian government " reserves the right to take any action in the future to protect its inalienable rights to the sea. "[110] It did so in July 2001 by sending a gunboat to chase two Azerbaijani survey vessels operated by a British Petroleum ship in disputed waters.[111] The basic fall back position of Iran has been described in the literature as being guided by two foremost considerations: Primo, that any unilateral action must cease until a comprehensive regime has been set up and, sec undo, that all unilateral joint venture contracts concluded by littoral States with foreign companies are invalid under international law.[112]

Turkmenistan also has officially protested against the proposed exploitation of a field located in the border area by Azerbaijan,[113] resulting in the Russian president cancelling an agreement between Luk oil and Rosneft tode velop this field together with Azerbaijan.[114] Here too, the patrolling of the area by Turkmen fighter planes

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110 Letter dated 30 March 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations, addressed to the Secretary-General, UN. Doe. A/53/890. It is interesting to note that the National Iranian Oil Company had concluded a similar agreement the previous year with some foreign oil companies to conduct an exploratory survey in an area claimed by Azerbaijan, and which had been vigorously protested at that time by the latter. See F. Sanei, The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with its Geopolitical Realities, *Vanderbilt Journal of Transnational Law*, Vol. 34, 2001, p. 681.

111 *The Moscow Times*, 27 February 2002, p. 7, col. 1. This Iranian action has been labeled the most serious incident in the area since the break-up of the former Soviet. See N. Sohbetqizi, Caspian Basin Nations Prepare Again to Tackle Territorial Conundrum, at http://www.eurasianet.org/departments/business/articles/eav032202.shtml, 22 March 2002.

112 F. Sanei, The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with its Geopolitical Realities, *Vanderbilt Journal of Transnational Law*, Vol. 34, 2001, p. 764.

113 Letter dated 23 July 1997 from the Permanent Representative of Turkmenistan to the United Nations, addressed to the Secretary-General, UN. Doc. A/52/259.

114 As mentioned in K. Mehdiyoun, Ownership of Oil and Gas Resources in the Caspian Sea, *American Journal of International Law*, Vol. 94, 2000, p. 185, note 59.

proved sufficient to halt all exploratory activities.[115]

It is believed that States in the Caspian Sea, if they want to promote regional stability and good-neighborliness, should not try to fix their maritime boundaries by granting concession blocs to oil companies in disputed areas. For one reason or another, gas and oil fields often have a tendency to be located just here !

3. Arguments Based on National Legislation or Enactments

In both areas, legal arguments have sometimes been advanced, based on national legislation, in an attempt to prove the correctness of positions on the international level.

In the Baltic Sea, an example can first of all be found in the system of straight baselines established by Estonia in the Gulf of Riga in 1993,[116] which soon became a bone of contention in the maritime delimitation negotiations with Latvia.[117] Especially the segment in front of the Gulf of Riga, connecting the islands of Allirahu, Ruhnu and Kihnu, gave rise to serious disagreement between the parties. Latvia, which itself did not claim any baselines in the area, especially contested the fact that these particular baselines did not follow the general direction of the coast. A careful analysis of the boundary agreement finally concluded by both parties in 1996 clearly indicates that this particular segment of the baseline system was totally disregarded.

Between the same two parties, a second example can be found in unilateral actions to determine the outer limits of their maritime zones in the area. Estonia was the first country to do so in 1993 by means of the same municipall enactment which established straight baselines along the Estonian coast.[118] Latvia also issued a proclamation in the midst of the dispute in which it unilaterally determined the outer limit of its fishery zone in the Gulf of Riga.[119] The latter intruded up to 18

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115 R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law (Moscow)*, Vol. 14, 2001, p. 84.

116 Law on the Boundaries of the Maritime Tract, *Riigi Teataja*, Vol. 1, 1993, p. 14. As discussed in A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p. 235.

117 This part is based on E. Franckx, Estonia-Latvia (Report Number 10~15), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

118 Law on the Boundaries of the Maritime Tract, *Riigi Teataja*, Vol. 1, 1993, p. 14.

119 Regulations on the Provisional Fishery Arrangements in the Gulf of Riga, 2 April 1996, Unofficial English translation kindly received from R. Stafeckis, Latvian Ministry of Foreign Affairs,15 July 1996 (on file with the author).

n, m. into waters claimed by Estonia.[120] Once again, the move sharply increased the tension between the parties even though its content had no practical impact whatsoever on the final boundary line.

A similar example can be found in the maritime boundary dispute between Latvia and Lithuania.[121] Here the Lithuanian President took a rather peculiar initiative by issuing a decree in which he stated that, until a bilateral agreement is reached:

> *The following principles of negotiations with[the] Republic of Latvia are confirmed: The border of the territorial sea of the Republic of Lithuania in the Baltic sea is a straight line starting from the last point of the State border of Latvia and Lithuania at the coast of the Baltic sea, the coordinates of which are N 56.04.10; E 21.03.53 to the point in the Baltic sea 12 nautical miles from the coast, the coordinates of which are N 56.03.06; E 20.42.37.*[122]

The Presidential decree also addressed the EEZ and the continental shelf:

> *The northern border of the economic zone and continental zone of the Republic of Lithuania in the Baltic sea is[a] straight line from the point in the Baltic sea the coordinates of which are N 56.03.06; E 20.42.37 to the point where the geographical parallel N 56.07.35 meets a border of the continental shelf of the third State in the Baltic sea.*[123]

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120 E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 280.

121 This part is based on E. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

122 Decree of the President of the Republic of Lithuania, On the Northern Border of the Territorial Sea, Economic Zone and Continental Shelf o[f] the Republic of Lithuania, 13 November 1996, *State News*, No. 112~2537 (1996), Art. 1(1).

123 Decree of the President of the Republic of Lithuania, On the Northern Border of the Territorial Sea, Economic Zone and Continental Shelf o[f]the Republic of Lithuania, 13 November 1996, *State Nexus*, No. 112~2537 (1996), Art. 1(2).

Whether the purpose of this decree was to influence the Lithuanian negotiating team or the Latvian government was not immediately clear. Fact is that the delimitation line finally agreed upon does not follow this unilateral declaration.

In the same vein, one of the arguments sometimes encountered in the literature is that a constitutional provision or other high level enactment, by means of which part of the Caspian Sea located in front of a particular littoral State is included in the territory of that State, renders the issue of the sharing of the sea expanses moot.[124]

Such a unilateral manner of trying to settle maritime boundaries, however, raises serious problems from an international law point of view. As stated by P. Weil:

> *A delimitation cannot be effected unilaterally, without taking into account the position of other States, and it is opposable to other States only to the extent that they accept it.*[125]

The International Court of Justice could not have said it more clearly, when it stated in 1951:

> *The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation I necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon*

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124 See for instance Art. 11(2) of the 1995 Constitution of Azerbaijan, at http://www.constitutional-court-az.org/const-contents.htm, as provided by the Constitutional Court of Azerbaijan, which reads: "Internal waters of the Azerbaijan Republic, sector of the Caspian Sea (lake) belonging to the Azerbaijan Republic, air space over the Azerbaijan Republic are integral parts of the territory of the Azerbaijan Republic." A slightly different wording can be found in the version provided by website of the President (at http://www.president.az/azerbaijan/const.htm). See also the 1999 decree by Turkmenistan's President in which he qualified the Turkmen sector of the Caspian Sea as an "inseparable part of the State". As mentioned in S. Vinogradov, The "Tug of War" in the Caspian: Legal Positions of the Coastal States, in W. Ascher and N. Mirovitskaya eds., *The Caspian Sea: A Quest for Environmental Security*, The Hague: Kluwer Academic Publishers, 2000, pp. 189, 193.

125 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, p. 110. On this point see also p. 107.

international law.[126]

The conclusion seems therefore to be justified that, since the unilateral approaches in the Baltic Sea have not had any impact on the maritime boundary finally agreed upon, a similar fate will most probably be encountered by similar attempts in the Caspian Sea. Nothing can prevent States from making unilateral claims in theory,[127] but in the final analysis their validity with respect to other States will always need to be judged on the international plane.

4. Consideration to Be Given to the Possible Enclosing Effect of the Interplay between Convex and Concave Coasts

Present-day international law casebooks still rely on the 1969 Continental Shelf Cases before the International Court of Justice[128] to illustrate how equity forms part and parcel of the contemporary sources of international law.[129] The court clearly stated:

> *Equity does not necessarily imply equality... But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here is a case where, in a theoretical situation of equality within the same order, an inequity is created.*[130]

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126 International Court of Justice, Anglo-Norwegian Fisheries (United Kingdom/Norway), 18 December 1951, *I. C. J. Reports*, 1951, p. 116.

127 Even though the appropriateness of such actions has been questioned by some authors, especially with respect to the Caspian Sea. See for instance B. 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, *Dickinson Journal of International Law*, Vol. 18, 2000, p. 253, where he concludes: "There is simply no room for unilateral declarations in the area."

128 International Court of Justice, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969, *I. C. J. Reports*, 1969, p. 3.

129 See for instance M. Janis and J. Noyes, *International Law: Cases and Commentary*, St. Paul: West Group, 2001, pp. 155~172.

130 International Court of Justice, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969, *I. C. J. Reports*, 1969, p. 3, para. 91.

In the southeastern Baltic Sea such a situation presents itself with respect to the relationship between the convex coasts of Latvia and the Russian Federation (Kaliningrad) and the concave coast of Lithuania. When Lithuania and Russia negotiated their maritime boundary, as already mentioned above, part of the compromise was that Russia allowed Lithuania a 1. 1 n.m. wide sea corridor reaching the middle of the Baltic Sea.[131] Since also Latvia took a similar approach later on, this combined action results in a situation today where Lithuania's maritime zones touch those of Sweden.[132] Instead of having a third party oblige Latvia and Russia to take the above-mentioned notions of equity into consideration,[133] in casu these countries did so out of their own free will in their respective bilateral negotiations with Lithuania.

In the Caspian Sea, a somewhat similar situation appears to be present in the southern part. A quick glance at a map depicting the hypothetical equidistant line[134] suffices to note that Azerbaijan, Iran and Turkmenistan, even though possessing coastlines which are roughly comparable in length, would end up receiving rather unequal portions simply because of the particular configuration of the coastlines in the area.

Based on Baltic Sea practice, the submission is that some adjustment might be required to delimit the convex coasts of Azerbaijan and Turkmenistan in their relation with the concave coast of Iran in the southern Caspian Sea.

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131 See Izvestiia, 24 October 1997, p. 3, col. 3 and accompanying text. On this point, see E. Franckx and A. Pauwels, Lithuanian-Russian Boundary Agreement of October 1997: To Be or not To Be?, in V. Gotz, P. Selmer, and R. Wolfrum eds., Liber Amicorum Gunther Jaenicke-Zum 85 Geburtstag, Berlin: Springer, 1998, pp. 74~75, as well as E. Franckx, Lithuania-Russia: Exclusive Economic Zone and Continental Shelf [Report Number 10~18(1)], and by the same author, Lithuania-Russia: Territorial Sea [Report Number 10~18(2)], both accepted for publication in International Maritime Boundaries, Vol. 4, The Hague: Martinus Nijhoff, 2002. Forthcoming.

132 E. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

133 It will be remembered that in the North Sea the Netherlands and Denmark had already concluded a bilateral agreement which totally enclosed the German maritime zone so that the latter would have no common boundary with the maritime zones of the United Kingdom. See Agreement Concerning the Delimitation of the Continental Shelf Between the Two Countries (Denmark/The Netherlands), 31 March 1960, 604 UNTS 209. This agreement entered into force on 1 August 1967.

134 See for instance the map reproduced in S. Vinogradov, The Legal Status of the Caspian Sea and its Hydrocarbon Resources, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998 , pp. 137, 144.

5. Third Party Settlement

A final comment concerns an evaluation of the manner in which States are likely to settle their maritime boundary disputes in the Caspian Sea, based once again on the practice so far encountered in the Baltic Sea.

One of the typical features of the over-all delimitation effort until the early1990s in the Baltic Sea was that not one single maritime boundary was arrived at by means of third party dispute settlement.[135] During the so-called fourth period,[136] a certain development took place in this respect. Estonia, Latvia and Lithuania all expressed the view, at least at one point during the negotiations leading to the maritime boundary agreements between them, that they would be willing to submit the dispute to either arbitration or third party settlement if a solution would not be forthcoming.[137]

The fact remains, however, that despite these expressions of intention, all the agreements in question were finally arrived at by means of direct negotiations between the parties. The closest one comes to the involvement of a third party in the process, but then not to decide the issue but simply to help out, is the involvement of Sweden in the negotiations between Estonia and Latvia. Even though the Swedish Minister of Foreign Affairs was quoted in the press as having said at the time of signature that her country was proud to have served as a mediator, it is believed that the country rather rendered its good offices.[138] At the same time it should be added that similar proposals, made in other maritime

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135 E. Franckx, Region X: Baltic Sea Maritime Boundaries, in *International Maritime Boundaries, Vol. 1*, Dordrecht: Martinus Nijhoff, 1992, pp. 345, 364.

136 As distinguished in E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256 and accompanying text.

137 For an overview of these different instances, see E. Franckx, Maritieme afbakemng in deoostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the Eastern Baltic Sea: Internet and Scientific Research), in P. De Meyere and E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid enverscheidenheid [Huldeboek aangeboden aan Frits Gorlé]*, Brussels: VUB Press, 1996, pp. 287, 289, 291, 293, 295, 297, 298, 300, 311 (especially Latvia favoured this approach) and by the same author, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 282.

138 As discussed in E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 283.

delimitation disputes in the area at that time, were rejected by the parties.[139]

In view of this experience in the Baltic Sea, it appears unlikely that the maritime delimitation disputes in the Caspian Sea will be settled by means of third party settlement. If some signs of possible changes in this respect were visible in the southeastern part of the Baltic Sea between Estonia, Latvia and Lithuania inter se, this was certainly not the case in the bilateral relations between Lithuania and Russia on the one hand, or between Estonia and Russia on the other. In the Caspian Sea area, it is also in relationships between the newly independent States inter se that this possibility has been raised.[140] But neither Iran nor Russia seem to be directly inclined to appear before the International Court of Justice, or before any arbitration tribunal for that matter, with respect to this particular dispute. And neither country would seem to allow others to do so inter se because of their particular interests based on the above-mentioned historic treaties.

6. Conclusions

Starting from the premise that the littoral States of the Caspian Sea have apparently reached a stage, after about a decade of negotiations, where they all accept that the seabed underlying this water expanse may be divided in order to allow for an orderly development of the non-living resources of the area, this article tried to discern whether international law offers any guidelines to help the States involved in accomplishing this objective. Having found that the general framework provided by international law is neither to be found in treaty law nor in customary law, but rather in judicial decisions, the impact of the latter on State practice was highlighted.

These general principles, no matter how vague and circumstance-related they may be, subsequently find their reflection in certain trends and practices in State behaviour. States, in their endeavour to find an equitable solution, often prove will-

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139 Latvia and Lithuania rejected the offer made by Estonia, and the involvement of the OSCE was rejected in the framework of the Estonia and Russia land and maritime dispute. See E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 288.

140 Turkmenistan has suggested making use of this alternative in its dispute with Azerbaijan. See R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law (Moscow)*, Vol. 14, 2001, p. 111.

ing to restrict their initial claims by relying on these trends and practices.[141] Even the hypothesis that littoral States are not bound, as a matter of law, to take the general principles just mentioned into account when settling the division of the Caspian seabed,[142] should not necessarily imply the negation of the above-mentioned submission that the trends and practices to be discerned in State practice may well play an influential role. As demonstrated above, examples exist where States were nevertheless guided by such international norms which might not be, strictly speaking, legally binding.[143] Especially in view of the high risk of a possible escalation in tension in the Caspian region, this might not be such a bad idea after all, since these trends and practices would at least provide some kind of upper limit to the claims of the States involved.

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141 The present author was able to witness such a tendency in a number of bilateral maritime boundary negotiations held in the southeastern Baltic Sea.

142 I.e. the supposition that the Caspian Sea were to be qualified by all five littoral States as constituting an international border lake, quod non. In fact only Azerbaijan officially recognizes this water expanse as a lake in its constitution. As stressed by R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law (Moscow)*, Vol. 14, 2001, p. 126. Reference is made by this author to the above-mentioned the 1995 Constitution of Azerbaijan Art. 11(2), which however in English translation on the website of the President, as well as of the Constitutional Court, reads "Caspian Sea (Lake)".

143 See G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201 note 74; D. O'Connell, *The International Law of the Sea*, Oxford: Clarendon Press, 1982, pp. 389~416; 2002 Arbitration; The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing, 11 February 1985; Canada-Nova Scotia Offshore Petroleum Resources Accord, 26 August 1986; Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act (Statutes of Newfoundland, 1986, c. 37) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Statutes of Nova Scotia, 1987, c. 3); Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act（Statutes of Canada, 1988, c. 28); Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) section 6(4), and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada, 1988, c. 28), section 48(4); By means of Art. 3(2) of these Terms of Reference, the disputing parties requested the Tribunal to proceed in two phases: "(i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement. (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined." At http://www.boundary-dispute.ca/terms.html; 2002 Arbitration, para. 2.35 and accompanying text.

Based on these assumptions, the present article tried foremost to discern certain lessons from the practice of former Soviet Socialist Republics in an area, just like the Caspian Sea, where the Russian Federation lost a substantial part of the coastal facade it held in Soviet times, namely the southeastern Baltic Sea. Several issues which created serious difficulties between the parties there, before they were finally able to settle their maritime boundaries, at present still form bones of contention between certain littoral States of the Caspian Sea.

The comparison undertaken by the present article leads to a number of concrete suggestions: Primo, the condominium issue is not believed to possess a high potential in areas not covered by the historic agreements, because it essentially rests on the agreement of all the littoral States, quod non in the Caspian Sea. Secundo, exploration and exploitation without a prior delimitation agreement does not appear to be an appealing solution for the Caspian Sea. Besides the high risk potential involved in such course of action, practice in the Baltic Sea is instructive in the sense that oil companies never envisaged actual exploitation in disputed zones which the countries involved had not yet managed to delimit. Tertio, unilateral enactments, even of a constitutional nature, are not likely to influence delimitation agreements which always have an international aspect attached to them. Quarto, if the Baltic Sea littoral States were willing, out of their own free will, to heed the North Sea Continental Shelf judgment by preventing inequity in a theoretical situation where coastlines were of comparable length. In the southern Caspian Sea, States should therefore be advised to give this issue appropriate consideration. Quinto, it appears unlikely, in view of the Baltic Sea State practice, that the dispute in the Caspian Sea will ever be settled by means of third party settlement.

It is hoped that these comparative comments, no matter how rudimentary they may be, will nevertheless contribute to the further clarification of this topic by focusing on it from a totally different angle. As already indicated, however, it is clear that no analogy is perfect. Therefore, the peculiarities of the Caspian Sea will always have to be taken duly into account. In view of the topical nature of the Iranian letter to the Secretary-General of the United Nations, which was written on the very next day after the present conference closed its doors, namely on 28 February 2002, it might be appropriate to conclude the present article by indicating at least one potential distinguishing factor. Before being able to start the bilateral delimitation of the subsoil in the Caspian Sea, a unanimous agreement of all littoral

States may well be required.[144]

144 Letter dated 28 February 2002 from the Charge d'affaires a. i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations, addressed to the Secretary-General, UN. Doc. A/56/850. The operative part of this letter reads as follows: "The Islamic Republic of Iran, while reaffirming its position on the legal status of the Caspian Sea as contained in General Assembly document A/52/913, dated 21 May 1998, that the Agreement signed on 29 November 2001 by the Republic of Kazakhstan and the Republic of Azerbaijan regarding the division of the Caspian Sea is in contravention of the existing legal instruments governing the legal status of the Caspian Sea, and therefore does not recognize the said Agreement as valid. Clearly as long as the legal regime of the Caspian Sea is not complemented with the unanimous agreement of all coastal States, any decision taken in this regard is unacceptable and bears no legal basis."