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## IN THE ‘ERA OF MIGHT AND HAPPINESS’, WILL THE TRANS-CASPIAN PIPELINE PROJECT BE BUILT?

TIFFANY O’KEEFE\*

### *I. Introduction*

Reliable and effective transboundary transportation networks for energy resources are vital for economic development and security. Having acquired sovereignty after the fall of the Soviet Union, Azerbaijan, Kazakhstan, and Turkmenistan sought to assert their independence through constructing transportation networks with their neighbours. By actively cooperating with international oil companies (‘IOC’) to jointly develop major upstream projects and regional cross-border oil and gas pipelines, Azerbaijan has been the most successful in transporting its oil and gas to regional and international markets.<sup>1</sup> In the 1990s, Azerbaijan strayed from Russia’s iron grip and together with several IOCs commenced developing its Azeri-Chirag-Gunashli oil fields. Then in 2006, the IOCs finished construction of the Baku-Tbilisi-Ceyhan (‘BTC’) pipeline to transport Azeri oil from the Caspian to the Mediterranean.<sup>2</sup>

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1. Nurlan Mustafayev, *Production Sharing Agreements in the Petroleum Industry of Azerbaijan* 8 *Journal of World Energy Law and Business* 362, 362 (2015).

2. *The Contract of the Century – a National Strategy for Success*, BP Azerbaijan (2019), <[https://www.bp.com/en\\_az/azerbaijan/home/who-we-are/operationsprojects/acg2/the-contract-of-the-century---a-national-strategy-for-success.html?fbclid=IwAR1vCa1S0uOk\\_wtj92BArkCr67EbfZKwnytoG3eCW88njpf94RC-N8a3jWo](https://www.bp.com/en_az/azerbaijan/home/who-we-are/operationsprojects/acg2/the-contract-of-the-century---a-national-strategy-for-success.html?fbclid=IwAR1vCa1S0uOk_wtj92BArkCr67EbfZKwnytoG3eCW88njpf94RC-N8a3jWo)>; *Agreement on the Joint*

Turkmenistan has not achieved the same level of success. The Trans-Caspian Pipeline ('TCP') was first proposed in 1996<sup>3</sup> to transport Turkmen natural gas along the Caspian seabed to Azerbaijan and on to European markets.<sup>4</sup> However, the TCP has become the geopolitical battleground for various issues within Central Asia over the past few decades, and unlike the BTC, it has not been built. With the global economy in a tailspin as a result of the COVID-19 pandemic and oil and gas prices fluctuating between historic lows, the prospects of completing the project have been doubted.<sup>5</sup> Nevertheless, now is, in fact, the perfect time to turn this pipedream into a reality.

This article explores how the 2018 *Convention on the Legal Status of the Caspian Sea's* ('Convention') newly eased approval mechanism for laying submarine pipelines has provided much-needed legal certainty that could foster completion of the TCP.<sup>6</sup> It argues that while Russian opposition casts doubt over the prospects of success, this is eroded by Europe's strategic interests and financial commitment to the project.<sup>7</sup> Turkmenistan's 'Era of Might and Happiness', typified by a desire to diversify its gas export routes, is then considered against difficulties that emanate from its authoritarian regime and foreign policies.<sup>8</sup> It is contended that while the State restricts

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*Development and Production Sharing for the Azeri and Chirag Fields and the Deep Water Portion of the Gunashli Field in the Azerbaijan Sector of the Caspian Sea*, BP (1994), [https://www.bp.com/content/dam/bp/country-sites/en\\_az/azerbaijan/home/pdfs/legalagreements/psas/ea-az-restated-acg-psa.pdf](https://www.bp.com/content/dam/bp/country-sites/en_az/azerbaijan/home/pdfs/legalagreements/psas/ea-az-restated-acg-psa.pdf).

3. S. Rob Sobhani, Opinion, *A Boost to Global Energy Security*, *The Washington Times*, Jun. 24, 2019, <<https://www.washingtontimes.com/news/2019/jun/24/why-the-trans-caspian-pipeline-must-become-one-of-/>>.

4. See Figure 1.

5. Daniel D. Stein, *Trans-Caspian Pipeline – Still a Pipe Dream?*, Atlantic Council (2020) <<https://www.atlanticcouncil.org/blogs/energysource/trans-caspian-pipeline-still-a-pipe-dream/>>.

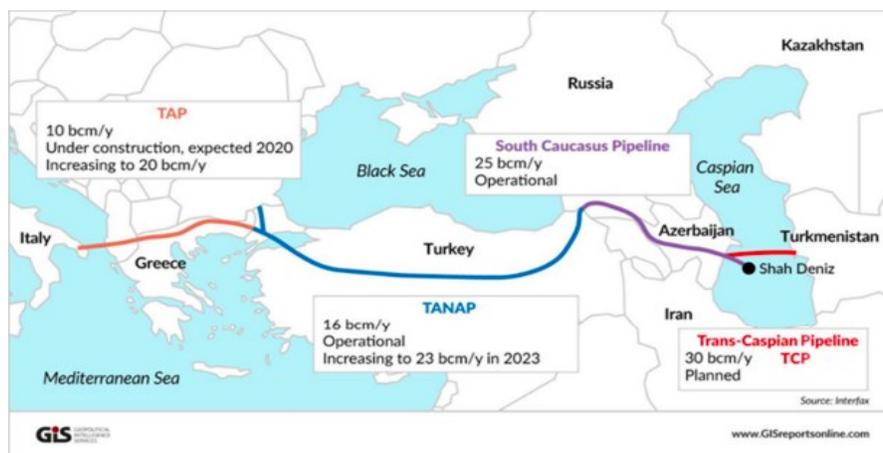
6. *Convention on the Legal Status of the Caspian Sea* (Aktau, 12 August 2018, not yet in force), available at <http://en.kremlin.ru/supplement/5328> ('Convention').

7. Matthew Bryza, Robert M. Cutler, and Giorgi Vashakmadze, *US Foreign Policy and Euro-Caspian Energy Security: The Time is Now to Build the Trans-Caspian Pipeline*, Atlantic Council (2020) <<https://www.atlanticcouncil.org/blogs/energysource/us-foreign-policy-and-euro-caspian-energy-security-the-time-is-now-to-build-the-trans-caspian-pipeline/>>.

8. President of Turkmenistan Gurbanguly Berdimuhamedov, *Ministry of Energy of Turkmenistan* (2020) <<http://minenergo.gov.tm/en>>. See, *Turkmenistan President Berdimukhamedov Reappears After Death Rumours*, British Broadcasting Corp. (2019) <<https://www.bbc.com/news/world-asia-49319380>>. See also, Marika Karagianni, *Turkmenistan Looks to Gas Expansion*, *Petroleum Economist* (2019) <<https://www>>.

foreign investment into its energy market, this will not be fatal to the TCP. Ultimately the questions that arise from this article are: will the Convention and the EU's quest for diverse gas imports bring about the completion of the TCP? Or, will Russia's opposition, together with Turkmenistan's own foreign investment policies, defeat it?

*Figure 1 – TCP Route*<sup>9</sup>



## *II. The Convention and its Impact on the TCP*

On 12 August 2018, after more than twenty years of negotiations, the leaders of the five littoral States to the Caspian Sea – Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan – finally signed a treaty to define its legal status. The Convention created a new legal order in the region for laying submarine pipelines and will likely have a major impact on the TCP's development. Before exploring this, the prior legal uncertainty concerning the status of the waters is outlined to highlight how it prevented many of the littoral States from exporting petroleum products along the Caspian seabed and on to other markets.

petroleum-economist.com/articles/politics-economics/middle-east/2019/turkmenistan-looks-to-gas-expansion>.

9. Mitsui & Co., *European Union Keen on Trans-Caspian Pipeline Development – Improvement of Relations With Russia and Turkey a Key Hurdle* (2019) <[https://www.mitsui.com/mgssi/en/report/detail/\\_icsFiles/afieldfile/2020/01/31/1911e\\_fuhrmann\\_e.pdf](https://www.mitsui.com/mgssi/en/report/detail/_icsFiles/afieldfile/2020/01/31/1911e_fuhrmann_e.pdf)>.

*A. Background to the Convention and the Caspian's New Legal Status*

Prior to the collapse of the Soviet Union, the Caspian Sea was governed by Russia from the north and Iran from the south through several bilateral treaties that were concluded in the first part of the twentieth century.<sup>10</sup> They established that the Caspian Sea was jointly shared and closed to third parties, however, were silent on the question of petroleum distribution and exportation. Throughout this period, shared use heavily favoured the powerful and formidable Soviet Union, who enjoyed regional hegemony. Then, when the Soviet Red Flag was lowered down the Kremlin flagpole on 25 December 1991, three newly sovereign littoral States were born: Azerbaijan, Kazakhstan, and Turkmenistan.<sup>11</sup> Each wanted a share in the Caspian's petroleum deposits and the right to export them via submarine pipelines along the seabed via their own transportation networks. However, the States could not agree to a legal status that would enable a division of the Caspian waters.

The international legal status of a body of water is important because it helps determine which portions fall within or outside the scope of a littoral State's sovereign rights and obligations. This includes the right to exploit certain portions of the seabed, as well as the right to lay submarine pipelines for distributing petroleum products.<sup>12</sup> Over the course of negotiating the legal status of the Caspian Sea, States such as Turkmenistan favoured developing a legal regime for the Caspian waters under the auspices of the United Nations Convention on the Law of the Sea ('UNCLOS').<sup>13</sup> If UNCLOS applied, the Caspian basin would have been legally classified as a 'sea'.<sup>14</sup> The provisions of UNCLOS would have

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10. *Treaty of Friendship*, Russia–Persia, signed 26 February 1921, 9 LNTS 383 (entered into force 7 June 1921) ('Treaty of Friendship'); *Treaty of Commerce and Navigation*, Russia–Persia, 144 British and Foreign State Papers 419 (1940–42) (signed and entered into force 25 March 1940) ('Treaty of Commerce and Navigation').

11. David Reynolds, *One World Divisible: A Global History Since 1945*, 575 (Penguin, 2000).

12. Elena Karataeva, *The Convention on the Legal Status of the Caspian Sea: The Final Answer or an Interim Solution to the Caspian Question?* 35 *The International Journal of Marine and Coastal Law* 232, 255 (2020).

13. *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1835 UNTS 3 (entered into force 16 November 1994) ('UNCLOS') available at [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en); See, Jiao Yiqiang, 'The Signing of the Convention on the Legal Status of the Caspian Sea and its Implications' (2019) 75 *China International Studies* 178, 178-179.

14. See supra note 13.

guided delimitation of maritime zones<sup>15</sup> and adjacent boundaries, resource development, and the right to build infrastructure. Other States such as Iran considered the Caspian Sea to be a ‘shared lake’, subject to customary international law and unanimous consent.<sup>16</sup> There is no uniform State practice for lake utilisation and the methods of boundary delimitation.<sup>17</sup> Although, Iran had suggested an equal division of the Caspian Sea between the five littoral States, with each having a 20 per cent share under its control.<sup>18</sup> Given the littoral States could not agree to one of these legal regimes, the Caspian littoral States obstructed development of the necessary underwater infrastructure to export oil and gas to foreign markets.<sup>19</sup>

Notwithstanding the divergent legal approaches toward division of the Caspian Sea, which at times culminated in military stand-offs bubbling to the surface, the littoral States signed the Convention at the Fifth Caspian Summit in Aktau, Kazakhstan in 2018.<sup>20</sup> Russian leader Vladimir Putin hailed the event as “truly epoch making” and diplomats labelled the document as a regional constitution.<sup>21</sup> Today, Iran's Majles is the only parliament that has not yet ratified the Convention.<sup>22</sup> Through the Convention, the littoral States agreed to a *sui generis* regime by defining the Caspian Sea as a ‘body of water’.<sup>23</sup> As such, neither UNCLOS nor

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15. Maritime zones under *UNCLOS*: Territorial Sea 12 nautical miles, Contiguous Zone 12 nautical miles, Exclusive Economic Zone 200 nautical miles, Continental Shelf, High Seas.

16. Yiqiang, *supra* note 13, at 181; as will be explored later in this article, so too did Turkmenistan at varying intervals.

17. Mariangela Gramola, *State Succession and the Delimitation of the Caspian Sea* in Benedetto Conforti et al (eds), *Italian Yearbook of International Law* vol 14, 237-272, 239 (Brill, 2004); See, *Affairs du lac Lanoux (Spain v. France) (Awards)* (1957) 12 RIAA 281, 281.

18. Iran has the shortest Caspian Sea coastline, and therefore favoured this mechanism of division because it would enable Iran to have a greater share of the sea space.

19. Pierre Thévenin, *The Caspian Convention: New Status but Old Divisions?* 44 *Review of Central and East European Law* 437, 443 (2019); See, Andrey G. Kostianoy et al, ‘Geographic Characteristics of the Black-Caspian Seas Region’ in Sergey S. Zhiltsov, Igor S. Zonn and Andrey G. Kostianoy (eds), *Oil and Gas Pipelines in the Black-Caspian Seas Region*, 8 (Springer, 2016).

20. Karataeva, *supra* note 12, at 255.

21. Phoebe Greenwood, *Landmark Caspian Sea Deal Signed by Five Coastal Nations*, *The Guardian* (online, 12 August 2018) <<https://www.theguardian.com/world/2018/aug/12/landmark-caspian-sea-deal-signed-among-five-coastal-nations>>.

22. Joseph Murray, *Russia Ratifies Caspian Convention*, *Natural Gas World* (2019) <<https://www.naturalgasworld.com/russia-ratifies-caspian-convention-73460>>.

23. *Convention*, *supra* note 6, at art 1.

customary international law concerning lakes apply to the governance of the waters. Although similar to UNCLOS, the Caspian Sea is now divided into different maritime zones. Each littoral State now has exclusive control over an area extending up to 15 nautical miles from its shores for mineral and energy exploration, known as the territorial waters, and a further ten miles for fishing.<sup>24</sup> The area beyond is shared jointly,<sup>25</sup> and questions on delimitation for each maritime zone are to be settled through further negotiation and agreement – a gap in the Convention that has been considered a failure.<sup>26</sup>

Figure 2 – Caspian Maritime Zones<sup>27</sup>



24. *Convention*, supra note 6, at arts 6, 7 and 9. See, Figure 2.

25. *Convention*, supra note 6, at art 3.

26. *Convention*, supra note 6, at arts 7(1) and 9(1); See Karataeva, supra note 12, at 261.

27. *The Caspian Summit*, Radio Free Europe/Radio Liberty (Infographic, 13 August 2018) <<https://www.rferl.org/a/the-caspian-summit/29430597.html>>.

*B. The Convention's Regime on Submarine Pipelines: New Hope for the TCP*

Among the Convention's greatest achievements is the less onerous approval regime for laying submarine pipelines. This will enhance the prospects of the TCP being built if the littoral States implement the relevant provisions in good faith. Article 14(1) of the Convention provides that each littoral State may construct submarine pipelines on the seabed of the Caspian Sea. The route must be determined by agreement between the laying State and any other State whose seabed sector the pipeline will traverse.<sup>28</sup> Article 14 is similar to Articles 58 and 79 of UNCLOS, which allows States to lay submarine pipelines within a coastal State's exclusive economic zone and continental shelf, subject to the consent of the respective coastal State.<sup>29</sup> Despite the clarity offered through Article 14, the Convention is silent on what factors may or may not lead to granting approvals for the routing of pipelines. Further, it is not clear whether private sector entities themselves may apply for, or benefit from, an agreement reached under Article 14(3).<sup>30</sup>

Nevertheless, the fact that this new approval regime exists at all is significant. In the post-Soviet era Russia rejected the application of UNCLOS to the Caspian Sea,<sup>31</sup> partly because it opposed the construction of any new pipelines along the seabed beyond its territorial waters without its approval, something that would have been permissible under UNCLOS. Russia's position was likely owing to its desire to maintain a degree of control over the transfer of oil and gas to Europe, given it owns the major transportation networks for petroleum products in the region. Russia consistently held this position during negotiations for the Convention, and with Iran, sought to subject the development of pipelines to approval by all littoral States.<sup>32</sup> Even though it is not a party to UNCLOS, Turkmenistan opposed this by expressing its desire for UNCLOS to apply to the waters,

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28. *Convention*, supra note 6, at art 14(1)-(3); See, Norton Rose Fulbright, *The Convention on the Legal Status of the Caspian Sea - A sea or not a sea: that is still the question*, Norton Rose Fulbright (September 2018) <<https://www.nortonrosefulbright.com/en/knowledge/publications/5f222b95/the-convention-on-the-legal-status-of-the-caspian-sea--a-sea-or-not-a-sea-that-is-still-the-question?fbclid=IwAR2Y3xqxdm5vZHKRgkUKUqN6NU8eGdTDDunD0i5eQGUIJfeh2N5VB3aInY>>.

29. *UNCLOS*, supra note 13, at arts 58 and 79.

30. Norton Rose Fulbright, supra note 28.

31. Thévenin, supra note 19, at 443.

32. Andrei Kazanstev, *Russian Policy in Central Asia and the Caspian Sea Region* 60(6) *Europe-Asia Studies* 1073, 1085 (2008).

and by extension, its applicable approval mechanisms for submarine pipelines.<sup>33</sup> Despite Russia's opposition, Turkmenistan succeeded in including Article 14 of the Convention, which as identified above, contains a similar approval mechanism for the laying of submarine pipelines to that which is contained within UNCLOS.

Turkmenistan's victory over this major global power begs the question: why did Russia agree to forgo any veto power to approve or deny the laying of submarine pipelines in areas beyond its territorial waters? It appears that a mutually beneficial compromise was reached, whereby Russia traded the approval right in exchange for restricting navigation in the Caspian Sea and monitoring security developments. Article 3(11) of the Convention restricts navigation in, entry to and exit from the Caspian Sea to ships flying the flag of one of the littoral States.<sup>34</sup> Commercial ships can also access ports and port facilities when flying the flags of the contracting States, thus entitling them to enjoy the same treatment as national ships of the party in whose territory the port is located.<sup>35</sup> This is consistent with the Soviet-Iranian bilateral treaty system of governance that applied before the Convention was signed.<sup>36</sup>

Where the Convention goes further than the previous legal model is in its regulation of the navigation of warships, submarines and other underwater vessels.<sup>37</sup> Article 3(6) expressly prohibits the presence of armed forces not belonging to any of the five littoral States. Russia has persistently stressed the importance of security in the region, especially given its concern of being encircled by the North Atlantic Treaty Organisation ('NATO') and by extension, the United States ('US').<sup>38</sup> Azerbaijan, Kazakhstan, and Turkmenistan joined the North Atlantic Cooperation Council only months after the Soviet Union collapsed,<sup>39</sup> and each receive substantial aid from the

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33. See *UNCLOS*, supra note 13.

34. *Convention*, supra note 6, at art 3(11).

35. *Convention*, supra note 6, at art 10(2).

36. Karataeva, supra note 12, at 244-245, Treaty of Friendship, Treaty of Commerce and Navigation.

37. Daniel Müller and Ketavan Betaneli, *The New Convention on the Legal Status of the Caspian Sea: New Opportunities and New Challenges*, Freshfields Bruckhaus Deringer (1 November 2018) <[http://knowledge.freshfields.com/en/Global/r/3848/the\\_new\\_convention\\_on\\_the\\_legal\\_status\\_of\\_the\\_caspian\\_sea](http://knowledge.freshfields.com/en/Global/r/3848/the_new_convention_on_the_legal_status_of_the_caspian_sea)>.

38. Thévenin, supra note 19, at 460.

39. Elkhan Mekhtiev, *Security Policy in Azerbaijan*, NATO (2001) <<https://www.nato.int/acad/fellow/99-01/mekhtiev.pdf>>; *Relations with Turkmenistan*, NATO (28 September 2018) <[https://www.nato.int/cps/en/natohq/topics\\_50317.htm](https://www.nato.int/cps/en/natohq/topics_50317.htm)>;

US and NATO.<sup>40</sup> Along with Iran, Russia has viewed this as a both a provocation and direct threat to regional security that must be quashed.<sup>41</sup> With the new express exclusion of foreign vessels, NATO or the US will not be able to deploy its ships or troops in the Caspian Sea via Azerbaijan, Turkmenistan or Kazakhstan, which is a major security triumph for Russia. Further, Russia's Caspian Flotilla, which lies ready to strike, now sits unperturbed due to the absence of any nearby foreign vessels that may block its missile attacks,<sup>42</sup> serving Russia's Middle Eastern security strategy.

Finally, to preserve their post-Soviet autonomy, Azerbaijan, Kazakhstan and Turkmenistan have hastened to develop their own national navies. This militarisation of the Caspian Sea responds to several threats, such as avoiding Russian, and to a lesser extent, Iranian domination, and protecting existing and future maritime energy corridors.<sup>43</sup> Because of the foreign aid provided by NATO and the US, Russia has sought to consolidate its hegemonic security position through checks on the navies of Caspian littoral States. On this basis, Russia succeeded in having incorporated into the Convention Articles 3(3) and 3(4), which ensure a stable balance of armaments of the littoral States, whereby they can only develop military capabilities within the limits of 'reasonable sufficiency with due regard to the interests of all the [littoral States] and without prejudice to the security of each other'.<sup>44</sup> Even though Azerbaijan and Turkmenistan attained the unilateral right to construct submarine pipelines in their sovereign maritime zones, this security trade off may, in the future, prove cumbersome.

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*Relations with Kazakhstan*, NATO (26 March 2019) <[https://www.nato.int/cps/en/natohq/topics\\_49598.htm](https://www.nato.int/cps/en/natohq/topics_49598.htm)>.

40. Thévenin *supra* note 19, at 459; Sebastian Engels, *Military Professionalisation Programs in Kazakhstan and the United States: How to Implement and What Will We Gain?* 2 *Connections: The Quarterly Journal* 91, 91-104 (2017); Joshua Kucera, *Azerbaijan Has Advantage Over Armenia In U.S. Military Aid*, Eurasianet (17 May 2016) <<https://eurasianet.org/azerbaijan-has-advantage-over-armenia-us-military-aid?fbclid=IwAR2WeO7358xccHaCYLn5T-91wxZEqVWspXhd57aV3NfQ9QMp4bqmm5gf7qs>>.

41. Thévenin, *supra* note 19, at 459.

42. Yiqiang, *supra* note 13, at 187; See *Russian Missiles 'Hit IS in Syria from Caspian Sea'*, BBC (7 October 2015) <<https://www.bbc.com/news/world-middle-east-34465425>>.

43. Marlène Laruelle and Sébastien Peyrouse, *The Militarization of the Caspian Sea: "Great Games" and "Small Games" Over the Caspian Fleets*, *China and Eurasia Forum Quarterly* 7/2 (2009) 17, 28.

44. *Convention*, *supra* note 6, at arts 3(3), 3(4).

*C. Environmental Objection to the TCP*

The new environmental provisions within the Convention suggest that Russia has not entirely eroded its ability to obstruct the TCP. However, this is limited by gaps within the Convention, as well as the EU's interest in finalising the TCP. Article 14(2) of the Convention stipulates that submarine pipeline projects must comply with environmental standards embodied within international agreements, such as the *Framework Convention for the Protection of the Marine Environment of the Caspian Sea* ('Tehran Convention') and its relevant protocols.<sup>45</sup>

Concern presently exists over whether Russia, alongside Iran, will shape their long-standing opposition to the TCP through the guise of environmental concern, by utilising this environmental protection mechanism contained within Article 14(2) of the Convention. This is supported by past statements the two have made. At the 2019 Caspian Economic Forum which took place in Avaza, Turkmenistan, Behrouz Namdari, of Iran's National Gas Company said, "Iran is against any trans-Caspian pipelines."<sup>46</sup> He suggested that any party seeking to transport gas from the eastern border of the Caspian Sea to the western border should deliver it through Iran's pipeline network. At that time, the then current Russian Prime Minister, Dmitry Medvedev, who was also at the Economic Forum, said he was "absolutely convinced that all major projects in the Caspian Sea should undergo a thorough and impartial environmental evaluation involving specialists from all Caspian countries." Medvedev's statement is consistent with Article 17 of the Tehran Convention, which allows each littoral State to introduce and apply procedures of environmental impact assessment for any planned activity that is likely to cause a significant adverse effect on the marine wildlife environment of the Caspian Sea.<sup>47</sup> While this requirement has the potential to be used as a delaying tactic, Article 17(3) of the Tehran Convention requires the parties to cooperate with one another, as does Article 3(1) of the Convention.

Moreover, there are two key gaps within the Convention that render the impact of any environmental objection uncertain. First, Article 14(2) does not specify what is to occur when one of the littoral States does not comply

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45. *Convention*, supra note 6, at art 14(2).

46. Bruce Pannier, 'Russia, Iran Cite 'Ecological Concerns' In Opposing Trans-Caspian Pipeline', Radio Free Europe/Radio Liberty (15 August 2019) <<https://www.rferl.org/a/russia-iran-trans-caspian-pipeline-turkmenistan/30111805.html>>.

47. *The Framework Convention for the Protection of the Marine Environment of the Caspian Sea*, opened for signature November 2003, (entered into force 12 August 2006) art 17.

with the condition that their projects conform to environmental standards – nor does any other provision within the Convention. Second, Article 21 of the Convention provides that disagreements and disputes, regarding interpretation of the application of the Convention, shall be settled through consultations and negotiations between the littoral States.<sup>48</sup> If these consultations and negotiations fail, recourse may be obtained through international law.<sup>49</sup> This dispute resolution mechanism is vague, and the Convention does not contain provisions for judicial or quasi-judicial review. Accordingly, fully understanding the impact of any environmental objections to the TCP will remain unclear until these provisions are tested in a legal forum, and until then, their potential legal effect should not be overstated.

*D. Can the European Union's Interest in the TCP Stem the Tide Against Russia's Opposition to the Project?*

Diversification and security of energy supply is at the heart of the European Union's ('EU') gas policy.<sup>50</sup> When Russia's gas flow to Ukraine ceased in 2006, as well as on numerous occasions thereafter,<sup>51</sup> it dawned on the EU and other European States just how susceptible they were to Russian supply shortages.<sup>52</sup> For instance, Germany, Austria, and Slovakia experienced a 33 per cent shortfall in their gas supply, leaving millions of people to face a bitterly cold winter.<sup>53</sup> Approximately 40 per cent of natural gas imports to the EU come from Russia, and given Russia's propensity to 'turn off the taps', the EU has resolved to diversify and expand its gas

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48. *Convention*, supra note 6, at art 21(1).

49. *Convention*, supra note 6, at art 21(2).

50. See *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>, Article 194; *Energy Supply and Energy Security*, European Parliament (Briefing, July 2016) <[https://www.eesc.europa.eu/sites/default/files/files/briefing\\_energy\\_supply\\_security.pdf](https://www.eesc.europa.eu/sites/default/files/files/briefing_energy_supply_security.pdf)>.

51. Russia also ceased gas supply to Ukraine in 2009 and 2014. See Moniek de Jong et al., *A Matter of Preference: Taking Sides on the Nord Stream 2 Gas Pipeline Project*, *Journal of Contemporary European Studies* (8 December 2020), 1 <<https://www.tandfonline.com/doi/pdf/10.1080/14782804.2020.1858763?needAccess=true>>.

52. Friedbert Pflüger, *A European View: Europe, Nord Stream 2, and Diversification*, Atlantic Council (15 March 2019) <<https://www.atlanticcouncil.org/blogs/energysource/a-european-view-europe-nord-stream-2-and-diversification/>>.

53. Angela E. Stent, *Putin's World: Russia Against the West and with the Rest* (Twelve, 2019), 76.

supply routes and sources.<sup>54</sup> As part of this strategy, the European Commission deemed it necessary to build a Southern Gas Corridor ('SGC') linking the EU with the gas fields of Azerbaijan and Turkmenistan through Turkey. December 2020 marked the first time in history that gas from Azerbaijan was transported directly through pipelines on to European markets,<sup>55</sup> resulting in yet another success story for Azerbaijan. However, the TCP presently remains the 'missing link'<sup>56</sup> that would enable the EU to bring the SGC to completion. On this basis, the EU's interest in the TCP represents a strong opportunity to advance completion of the project and bulwark Russia's environmental opposition.

The EU's interest in realising the TCP is demonstrated by its political and commercial commitments. Practical movements were first made in 2011, when the EU initiated negotiations with Turkmenistan and Azerbaijan for construction of the TCP.<sup>57</sup> Just two weeks after the Caspian Convention was signed in 2018, German Chancellor, Angela Merkel, visited Azerbaijan to discuss the SGC and expressed clear interest in advancing development of the TCP.<sup>58</sup> Emphasis on the TCP's potential to diversify EU gas supply sources was also expressed in a statement by the German Federal Foreign Office two months after Merkel's visit.<sup>59</sup> Since 2013, the economic potential of the TCP has been included in every European Commission Project of Common Interest list.<sup>60</sup> Projects on this list are eligible to receive public funds and are deemed a key priority for

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54. Mitsui & Co., *supra* note 9.

55. *First Commercial Gas Delivery to Europe via Southern Gas Corridor*, SOCAR (December 2020) <<https://socar.az/socar/en/news-and-media/news-archives/news-archives/id/11516>>.

56. Mitsui & Co., *supra* note 9.

57. Dr Robert M. Cutler, *How Central Asian Energy Complements the Southern Gas Corridor*, Euractive (25 January 2018) <<https://www.euractiv.com/section/energy/opinion/how-central-asian-energy-complements-the-southern-gas-corridor/>>; *EU Starts Negotiations on Caspian Pipeline to Bring Gas to Europe*, European Commission (2011) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_11\\_1023](https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1023)>.

58. Ilgar Gurbanov, *Caspian Convention Signing and the Implications for the Trans-Caspian Gas Pipeline*, 15/127 *Eurasia Daily Monitor* (2018) <<https://jamestown.org/program/caspian-convention-signing-and-the-implications-for-the-trans-caspian-gas-pipeline/>>; Dr Robert M. Cutler, *Momentum Accelerates for the Trans-Caspian Gas Pipeline*, NATO Association of Canada (11 March 2019) <<https://natoassociation.ca/momentum-accelerates-for-the-trans-caspian-gas-pipeline/>>.

59. *'Independence through Diversification'*, Federal Foreign Office (1 October 2018) <<https://www.auswaertiges-amt.de/en/aussenpolitik/themen/energie/facts-on-germanys-energy-supply/2142654>>; Mitsui & Co., *supra* note 9.

60. Matthew Bryza, Robert M. Cutler, and Giorgi Vashakmadze, *supra* note 7.

Europe's energy system infrastructure; thus, the TCP's inclusion signals the EU's commercial commitment.

The project has also been advanced on the engineering, economical, and environmental front. In 2017, through the Connecting Europe Facility of the European Commission, the EU agreed to a grant of up to €1,871,725 for the pre-Front-End Engineering Design ('pre-FEED') of the project, to be carried out between 2018 and 2020.<sup>61</sup> The purpose of a pre-FEED survey is to confirm the technical and economic feasibility of a project. As of March 2021, the status of the pre-FEED surveys is 'ongoing',<sup>62</sup> and depending on the results, a process of consultation and design will likely follow. The World Bank and the European Commission also executed a comprehensive environmental scoping for the TCP in 2015, wherein it was concluded that there were no major environmental concerns. In the event that issues may arise, industry best practices would likely offer a solution, thus circumventing Russia's ability to rely on the environmental provisions of the Caspian Convention as a means to obstruct development of the TCP.<sup>63</sup>

Funding aside, legitimate concern has been expressed about the capacity of the SGC to receive gas from Turkmenistan.<sup>64</sup> The SGC begins in Azerbaijan and links seven States before ending in Italy. It consists of three interconnected gas pipelines, being the South Caucasus Pipeline, the Trans-Anatolian Natural Gas Pipeline ('TANAP'), and the Trans Adriatic Pipeline ('TAP').<sup>65</sup> At 'plateau', the SGC is expected to deliver up to sixteen billion

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61. 'Trans-Caspian Pipeline', W-Stream (2020) <<http://w-stream-transcaspian.com/milestones/>>; for more information on pre-FEED funding, see European Commission, 'Gas Pipeline to the EU from Turkmenistan and Azerbaijan, via Georgia and Turkey, [Currently Known as the Combination of "Trans-Caspian Pipeline" (TCP), "South-Caucasus Pipeline Future Expansion" (SCPFX)]', Europa (February 2021) <[https://ec.europa.eu/energy/maps/pci\\_fiches/PciFiche\\_7.1.1.pdf](https://ec.europa.eu/energy/maps/pci_fiches/PciFiche_7.1.1.pdf)>.

62. Innovation and Networks Executive Agency, *Pre-FEED, Reconnaissance Surveys and Strategic and Economic Evaluations of the Trans-Caspian Pipeline*, Europa (March 2021) <<https://ec.europa.eu/inea/en/connecting-europe-facility/cef-energy/7.1.1-0007-elaz-sm-17>>.

63. Robert Cutler, 'Third time lucky for Trans-Caspian Gas Pipeline?', *Petroleum Economist* (6 June 2019) <<https://www.petroleum-economist.com/articles/politics-economics/europe-eurasia/2019/third-time-lucky-for-trans-caspian-gas-pipeline>>.

64. Stanislav Pritchkin, *Energy Control Room for the Whole of Eurasia*, *Russia in Global Affairs* (19 March 2015) <<https://eng.globalaffairs.ru/articles/energy-control-room-for-the-whole-of-eurasia/>>; the author thanks Stanislav Pritchkin, Senior Research Fellow at the Institute of World Economic and International Relations, for providing access to his publications for this article.

65. *What is the Southern Gas Corridor?*, Southern Gas Corridor (2021) <<https://www.sgc.az/en>>; See Figure 1, which provides a map of the respective pipelines.

cubic metres per annum of natural gas from Azerbaijan's Shah Deniz gas field to consumers in Southeast Europe.<sup>66</sup> Now if the TCP were built with a capacity to move 30 billion cubic metres of gas, Turkmenistan would need to install compressors at the East-West pipeline that connects its large fields with the Caspian Sea.<sup>67</sup> Then, the capacity of both TANAP and TAP would need to be expanded to accommodate increased gas flow.<sup>68</sup> While this would be a costly endeavour, the CEO of the TANAP operating company, Saltuk Duzyol, said in January 2021 that "any expansion of the pipeline would happen only if gas were available at one end the pipeline and a market for the gas existed at the other".<sup>69</sup> Given the EU's listing of the TCP as a priority project, and its continued resolve to diversify its gas supply routes and sources, the market does appear to exist. Further, since commercial gas deliveries to Europe from Azerbaijan have commenced via TAP, satisfying the first market test for the pipeline, the EU's appetite for expansion to accommodate the TCP remains strong. The president of the State Oil Company of Azerbaijan Republic, Rovnag Abdullayev, has also said that the second market test enabling future expansion of TAP will be launched mid-2021.<sup>70</sup>

Germany's ongoing commitment to Nord Stream 2 ('NS2') may also encourage Russia to abandon its opposition to the TCP.<sup>71</sup> As explored above, Russia's decision to cut off the supply of gas to Ukraine,<sup>72</sup> which flows own to European markets, sparked an urgent move by the EU to diversify its gas supply routes and sources. Simultaneously, Russia now wants to eliminate Ukraine as a transit State through construction of NS2, which will deliver gas across the Baltic Sea directly to Germany. However,

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66. Stein, *supra* note 5; BP Welcomes Completion of Southern Gas Corridor Mega-Project, BP (2021) <<https://www.bp.com/en/global/corporate/news-and-insights/reimagining-energy/southern-gas-corridor-mega-project-completes.html>>.

67. Stein, *supra* note 5.

68. Pritchins, *supra* note 64.

69. David O'Byrne, *Azerbaijan and Turkmenistan Agreement Advances Caspian Gas Cooperation*, *Natural Gas World* (31 March 2021) <<https://www.naturalgasworld.com/azerbaijan-and-turkmenistan-agreement-advances-caspian-gas-cooperation-84923>>.

70. *First Commercial Gas Delivery to Europe via Southern Gas Corridor*, *supra* note 47.

71. *Germany Backs Nord Stream 2 'for the time being': Merkel*, *Euractiv* (2021) <<https://www.euractiv.com/section/global-europe/news/germany-backs-nord-stream-2-for-the-time-being-merkel/>>.

72. See Moniek de Jong et al, *supra* note 51.

the \$11 billion pipeline that is 90 per cent complete<sup>73</sup> has been an enormously polarising project within the EU, owing to fears that the EU has become too dependent on Russian gas.<sup>74</sup> The US has also imposed sanctions on NS2 affiliated companies in attempts to halt the project, calling it a “bad deal for Europe” that “undermines basic EU principles in terms of energy security and energy independence”.<sup>75</sup> Nevertheless, Russia and Germany, along with other EU member States, remain committed to the project. Given the TCP is of strategic interest to the US,<sup>76</sup> a compromise may be possible, whereby the US and EU could agree to development of NS2 in exchange for Russia backing down from its opposition to the TCP.

Considering the political and commercial trends that have been progressed by the EU, it is unlikely that Russia’s environmental opposition to the TCP will succeed. The wheels are in motion for accelerating construction, and it seems unlikely the EU would abandon the project after making significant political and financial contributions to the pre-FEED phase of the TCP, and the SGC.

### *III. Authoritarianism and Gas Diversification – Can the Two Co-Exist to Bring About the TCP?*

The authoritarian political system in Turkmenistan and its respective gas policies may be a barrier to completion of the TCP. Turkmenistan has solidified a firm reputation as one of the twenty-first century’s most capriciously corrupt and repressive political regimes.<sup>77</sup> Following the collapse of the Soviet Union in 1991, the first post-independence President, Saparmurat Niyazov, cultivated an atomised and isolationist Turkmen society, whilst consolidating a centralist political regime based on fear,

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73. *Germany Backs Nord Stream 2 ‘for the time being’: Merkel*, supra note 70.

74. Jong et al., supra note 51; Stent, supra note 53, at 98.

75. *Nord Stream 2 is a Bad Idea and a Bad Deal for Europe, US’ Antony Blinken tells Euronews*, Euronews (25 March 2021) <<https://www.euronews.com/2021/03/25/nord-stream-2-is-a-bad-idea-and-a-bad-deal-for-europe-us-antony-blinken-tells-euronews>>.

76. Matthew Bryza, Robert M. Cutler, and Giorgi Vashakmadze, supra note 7.

77. ‘*Our Work In: Turkmenistan*’, Transparency International (2020) <<https://www.transparency.org/en/countries/turkmenistan>>; see Amnesty International, ‘*Turkmenistan: An “Era of Happiness” or More Repression?*’ (Report, 2013) <<https://www.amnesty.org/en/documents/EUR61/005/2013/en/>>.

coercion, and secrecy.<sup>78</sup> As the successor since 2007, President Gurbanguly Berdimuhamedow ('PGB'), has followed in Niyazov's footsteps and has instituted a fervent cult of personality, cemented by a gilded six-metre-high statue of the leader on horseback perched on a white cliff.<sup>79</sup> It is this style of government that underwrites decisions relating to the State's energy policy.

Despite exact figures being hidden behind a wall of secrecy, Turkmenistan holds the fourth largest natural gas reserves in the world, having an estimated holding of 71 billion tons.<sup>80</sup> With natural gas as its largest export, this means that the political and economic fate of Turkmenistan is deeply connected to its hydrocarbon deposits and the ability to export them to markets across the globe. When re-elected in 2012, PGB labelled his ongoing presidency as an 'Era of Might and Happiness', to be typified by an uninterrupted and reliable supply of energy to a diverse range of foreign consumers.<sup>81</sup> Indeed, PGB regularly announces his desire to attract foreign investment toward the Turkmen oil and gas sector.<sup>82</sup> Foreign investment is undeniably a necessary ingredient for developing the TCP, for an IOC could take on the financial risks Turkmenistan could not bear alone on such a major project.<sup>83</sup> However, the Turkmen government prohibits foreign investment in onshore gas production and refuses to grant foreign buyers equity stakes in its upstream fields.

Upstream natural gas operations involving foreign investors are governed in Turkmenistan by Production Sharing Contracts ('PSC'). Turkmengaz, the State-run natural gas company, presently owns 100 per

78. Gregory Gleason, 'Natural Gas and Authoritarianism in Turkmenistan' in Indra Overland, Heidi Kjaernet and Andrea Kendall-Taylor (eds), *Caspian Energy Politics: Azerbaijan, Kazakhstan and Turkmenistan* (Taylor & Francis Group, 2010), 78.

79. 'Turkmen Leader Cements Personality Cult with Gilded Monument', *Reuters* (online, 25 May 2015) <<https://www.reuters.com/Article/us-turkmenistan-monument-idUSKBN0OA0F220150525>>.

80. Oil & Gas Turkmenistan, 'Market Overview', *OGT 2020* (2020) <<https://ogt-turkmenistan.com/marketoverview#:~:text=The%20country's%20hydrocarbon%20resources%20are,after%20Russia%2C%20Iran%20and%20Qatar>>.

81. 'President of Turkmenistan Gurbanguly Berdimuhamedov', *Ministry of Energy of Turkmenistan* (2020) <<http://minenergo.gov.tm/en>>; see 'Turkmenistan President Berdimukhamedov Reappears After Death Rumours', *British Broadcasting Company* (12 August 2019) <<https://www.bbc.com/news/world-asia-49319380>>; see also Marika, *supra* note 8.

82. Marika, *supra* note 8.

83. Randy Fabi, 'Turkmenistan Won't Allow Foreign Firms into Onshore Gas Production Sharing Deals', *Reuters* (4 March 2011) <<https://www.reuters.com/Article/turkmenistan-oil/turkmenistan-wont-allow-foreign-firms-into-onshore-gas-production-sharing-deals-idUSL3E7E405Y20110304>>.

cent of all onshore gas projects and the State normally takes a carried 20-50 percent stake.<sup>84</sup> Turkmenistan's energy policy dictates that IOCs contribute to PSCs on a service-basis only, and this must be done in partnership with Turkmenengaz.<sup>85</sup> When an IOC agrees to participate solely on a service-basis, it agrees to perform certain specified activities for the host government in return for a fixed payment.<sup>86</sup> In some instances, payment to the IOC is in the form of a priority to purchase the resulting oil at a discounted rate, as opposed to having a share in the profit, which would occur with a typical PSC. Under this model, if the project is only financed by the IOC on a service-basis, absent capital investment from Turkmenistan or Turkmenengaz, the IOC becomes the sole bearer of financial risk in the event that the project is not profitable. Considering this, many observers believe the Turkmen model for natural gas production poses unfavourable finance and market conditions that deter IOCs, meaning the TCP cannot be realised.<sup>87</sup>

*A. Prior and Current Contractual and Financial Models for Constructing the TCP*

It was recently observed that Turkmenistan does not need to enter into PSCs to develop the TCP.<sup>88</sup> Rather, investment may be sufficiently provided by the EU through an 'independent carrier' model. This requires initial capital to execute studies and obtain permits, which has already commenced, as mentioned above.<sup>89</sup> To understand how this conclusion was reached, the three key attempts at developing the TCP need to be explored. The first attempt at development began in the late 1990s, when Turkmenistan, along with Azerbaijan, Turkey, and Georgia concluded agreements for the project at an Organisation for Economic Co-Operation and Development meeting in Istanbul.<sup>90</sup> It was hopeful that the TCP would

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84. Stein, *supra* note 5; see 'Turkmenistan Upstream Fiscal Summary', Wood Mackenzie (4 July 2018) <<https://www.woodmac.com/reports/upstream-oil-and-gas-turkmenistan-upstream-fiscal-summary-16105900/>>.

85. *Id.*

86. Abbas Ghandi and C. Y. Cynthia Lin, 'Oil and Gas Service Contracts Around the World: A Review' (2014) 3 Energy Strategy Reviews 63, 64.

87. Olzhas Auyezov, 'Turkmenistan Should Ease Gas Investment Rules, U.S. Official Says', Reuters (online, 4 December 2015); Stein, *supra* note 5; see also 'Turkmenistan', International Energy Agency for EU4Energy (2020) <<https://www.eu4energy.iea.org/countries/turkmenistan>>.

88. Cutler, *supra* note 63.

89. *Id.*

90. 'Trans-Eurasian Transportation Networks, Transportation Politics and Economics in Eurasia' (2016) 6(1) Caucasus International 31.

be the eastward phase of the South Caucasus gas corridor. President Niyazov stalled talks with Turkey because he insisted on leading the negotiations and production without the necessary experience, which led to the agreements never being realised.<sup>91</sup> Azerbaijan's natural gas discoveries at the time and the disputed legal status of the Caspian Sea, outlined above, only further added to the complexity of getting construction of the TCP started.

The second attempt occurred in conjunction with the White Stream pipeline project, which was later integrated with the EU's SGC program, announced in 2009. The EU and the World Bank commissioned a study for a Caspian Development Corporation, to become the sole purchaser of Turkmenistan's gas to aid in facilitating planning for the project, however, this study was unable to respond to Turkmenistan's need for economies of scale at export quantities.<sup>92</sup> This gave rise to the 'two-entry points' idea for Turkmen gas to enter European markets, which now forms part of the third, and currently ongoing, attempt. The first entry point is through the SGC via Azerbaijan and Turkey, with the second to travel through existing infrastructures under the Black Sea from Georgia to Romania.<sup>93</sup>

While the restriction on IOC onshore investment remains during this third major attempt, constructing the TCP will not require Turkmenistan to enter into a PSC with foreign entities. Turkmenistan has already developed its abundant gas deposits in the east, and the East-West Pipeline ('EWP') for transmitting the gas to Turkmenistan's border has already been constructed. The EWP is now capped, awaiting connection across the sea by way of the TCP.<sup>94</sup> Additionally, the TCP itself will be built and operated by a pipeline company that is not owned by gas producers, following a standard industry business and financing model. This means that an 'independent carrier' will execute the technical studies leading to sales-purchase agreements between European buyers and Turkmenistan.<sup>95</sup> The 'independent carrier' model has provided a viable way to overcome any requirement for a PSC that secures onshore development, therefore making it likely that the TCP will be built.

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91. Cutler, *supra* note 63; see 'Trans-Eurasian Transportation Networks, Transportation Politics and Economics in Eurasia' (2016) 6(1) *Caucasus International* 1, 20.

92. Cutler, *supra* note 63.

93. *Id.*

94. *Id.*

95. *Id.*

*B. Cooperation Between Azerbaijan and Turkmenistan*

While foreign investment is necessary for constructing the TCP, and PGB has endeavoured to attract this,<sup>96</sup> so too is cooperation between Turkmenistan and Azerbaijan. For Turkmenistan's gas to reach European markets via the TCP, it is necessary that the pipeline integrate with Azerbaijan's pipeline infrastructure. However, their relationship has been marred with conflict since the collapse of the Soviet Union, subsequently delaying construction. Central to their dispute was how to divide their maritime borders, and in turn, determine ownership of three petroleum rich sections: Azeri/Khazar-Omar, Chirag/Osman, and Kyapaz/Serdar in Azerbaijani and Turkmen, respectively.<sup>97</sup> British Petroleum ('BP') has already developed the first two fields after signing contracts with Azerbaijan,<sup>98</sup> but the third field has never been developed as ownership remained under dispute.<sup>99</sup>

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96. 'President of Turkmenistan Gurbanguly Berdymuhamedov', *Ministry of Energy of Turkmenistan*, supra note 81.

97. Shamkhal Abilov, Ceyhun Mahmudlu, and Natig Abdullayev, *Contested Waters: Implications of the 2018 Convention on the Legal Status of the Caspian Sea and the Future of the Trans-Caspian Pipeline*, *Insight Turkey* 22/4 (2020) 229, 230.

98. *Caspian Calling: A View of Azerbaijan's Oil Fields*, BP (14 September 2017) <<https://www.bp.com/en/global/corporate/news-and-insights/reimagining-energy/in-photos-azeri-chirag-deepwater-gunashli-oil-fields-azerbaijan.html>>.

99. Ashley Sherman, *Revisiting the Landmark Caspian Sea Agreement*, Wood Mackenzie (6 September 2019) <<https://www.woodmac.com/news/opinion/revisiting-the-landmark-caspian-sea-agreement/>>.

*Figure 3 – Azerbaijan and Turkmenistan Maritime Boundary*<sup>100</sup>

Diplomatic tensions between the two States reached a high point in 2001, when Azerbaijan and Turkmenistan were in talks with the other littoral States to determine the legal status of the Caspian Sea. Khalaf Khalafov, chairman of the Azerbaijan delegation and deputy minister of Foreign Affairs, promoted drawing a median line according to the points of equidistance and stated this would be consistent with international law.<sup>101</sup> Conversely, Turkmenistan’s delegate advocated for the principle of granting a 20 per cent division,<sup>102</sup> which is inconsistent with its later preference of having UNCLOS apply in determining the delineation of maritime zones.<sup>103</sup> At the close of discussions, the Ministry of Foreign Affairs of Turkmenistan published an official note stating that “such a position of Azerbaijan, not considering the necessity of developing a mutually acceptable solution, brings the process of talks to a dead end” and

100. *Caspian Summit: Consequences for the Region*, Warsaw Institute (14 September 2018) <<https://warsawinstitute.org/caspian-summit-consequences-region/>>.

101. Gulnara Ismayilova and Nailia Sohbetqizi, *Diplomatic Tensions Between Azerbaijan and Turkmenistan*, *The Central Asia-Caucasus Analyst* (20 June 2001) <<https://www.cacianalyst.org/publications/field-reports/item/7357-field-reports-caci-analyst-2001-6-20-art-7357.html>>.

102. *Id.*

103. However, Turkmenistan generally vacillated between the two positions of having either *UNCLOS* apply, or customary international law relating to lakes.

called on Azerbaijan to “stop all work related to the exploration and extraction of hydrocarbons as well as seismic explorations in the deposits of hydrocarbons located in the disputable areas... until the matter of defining the middle line is settled”.<sup>104</sup> Turkmenistan then closed its embassy to Azerbaijan, and warned it would take their disagreement to the International Court of Justice in the Hague.<sup>105</sup>

Thereafter, both States engaged in an undeclared ‘arms race’, militarising their respective territorial waters of the Caspian Sea, instilling concern that a legal regime for the waters could never be agreed upon.<sup>106</sup> Wikileaks documents revealed that on two occasions in 2008, Azerbaijani gunboats threatened IOC ships working on behalf of Turkmenistan in the disputed zones.<sup>107</sup> On the first occasion, Malaysian company Petronas, operating on contract with Turkmenistan, was allegedly working too close to Azerbaijan’s maritime zone. During this incident, PGB claimed he had been personally insulted by his Azerbaijani counterpart, Ilham Aliyev, and stated Aliyev was “running like a little boy” and engaging in “hooliganism”.<sup>108</sup> On the second occasion, Azeri gunboats intercepted a vessel that Canadian company, Buried Hill, had hired to perform research around the Serdar/Kyapaz and Azeri-Chirag-Guneshli maritime oil fields. However, BP, who was working on the Azeri side, was allegedly drilling diagonally into Turkmenistan’s zone, further fueling their dispute.<sup>109</sup> Not only did this negatively impact upon negotiations pertaining to the Convention, it also hindered efforts to construct the TCP, serving Russia’s obstructionist position.

Despite tensions escalating between Azerbaijan and Turkmenistan, they, along with the other Caspian littoral States, continued negotiations to attribute a legal status to the Caspian waters, and as explored earlier, were

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104. Gulnara Ismayilova and Nailia Sohbetqizi, *supra* note 101.

105. Though, the plausibility of this was limited by the fact that both States have not recognised the jurisdiction of the International Court of Justice, nor any other international arbitration court. See Shamkhal Abilov, Ceyhun Mahmudlu, and Natig Abdullayev, *supra* note 96, at 235.

106. Hooman Peimani, *Growing Tension and the Threat of War in the Southern Caspian Sea: Unsettled Division Dispute and Regional Rivalry*, *Perspectives on Global Development and Technology* 2/3-4 (2003) 575, 576.

107. O’Byrne *supra* note 69; Joshua Kucera, *Azerbaijan Gunships Threatened Turkmenistan’s Caspian Oil Rigs, Cables Show*, Eurasianet (14 June 2012) <<https://eurasianet.org/azerbaijan-gunships-threatened-turkmenistans-caspian-oil-rigs-cables-show>>.

108. *Id.*

109. *Id.*

successful in finalising this in 2018. The approval mechanism for laying submarine pipelines is groundbreaking for Turkmenistan and Azerbaijan alike. Moreover, the Convention established a framework for future bilateral talks, but terms for border delimitation remain subject to agreement between States with adjacent and opposite coasts, with due regard to the generally recognised principles and norms of international law (which has been considered one of the Convention's failings).<sup>110</sup> As such, Turkmenistan and Azerbaijan must still divide their common maritime border and determine ownership of the Kyapaz/Serdar field through a bilateral agreement.

Remarkably, on 21 January 2021 the presidents of Azerbaijan and Turkmenistan signed a Memorandum of Understanding ('MoU'), for joint exploration of the Kyapaz/Serdar hydrocarbon field.<sup>111</sup> They renamed the field 'Dostluk' or 'Donstlug', meaning friendship in their respective languages, which highlights just how far relations have come between the two. While an MoU is not legally binding, Azerbaijan's Milli Medzhilis and Turkmenistan's Mejlis, have both ratified the agreement.<sup>112</sup> More significant than this new source of new revenue for the States given low natural-gas prices in 2021, is the indication of an intention to establish a dialogue for the TCP.<sup>113</sup> As previously mentioned, cooperation between Azerbaijan and Turkmenistan is pertinent for realisation of the project. This warming of relations demonstrates cooperation on both sides, and will likely secure investor confidence in the region for IOCs and the EU.

#### IV. Conclusion

It is a critical moment in time for advancing construction of the TCP. Since the dissolution of the Soviet Union, laying submarine pipelines across the Caspian seabed was stymied by uncertainty concerning the legal status of the waters. The Convention has now settled this long-standing issue and presents an opportunity for Turkmenistan and Azerbaijan to embrace the

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110. *Convention*, supra note 6, at arts 7(3), 8(1) and 9(1); Karataeva, supra note 12, at 261 Sherman, supra note 98.

111. O'Byrne supra note 69.

112. Vladimir Afanasiev, *Azeri Parliament Ratifies Agreement with Turkmenistan on Caspian Sea 'Friendship' Block*, upstream (24 February 2021) <<https://www.upstreamonline.com/exploration/azeri-parliament-ratifies-agreement-with-turkmenistan-on-caspian-sea-friendship-block/2-1-969155>>; Azernews, 'Turkmenistan Ratifies Memorandum with Azerbaijan on "Dostluk" Field', Azernews (14 March 2021) <[https://www.azernews.az/oil\\_and\\_gas/177083.html](https://www.azernews.az/oil_and_gas/177083.html)>.

113. O'Byrne, supra note 69.

newly eased approval requirements for laying submarine pipelines. Russia and Iran have raised environmental concerns with the TCP, casting doubt over whether the pipeline can be built. However, this will likely be overcome by EU investment and the European Commission's environmental scoping study, which concluded there were no major concerns. Even if environmental issues were to arise, the Convention requires the littoral States to cooperate, and industry best-practices could guide completion of the TCP.<sup>114</sup>

Concerns about PGB's restrictive policies toward onshore field development can also be assuaged, as Turkmenistan does not need to enter into PSCs to develop the TCP. Rather, investment may be sufficiently provided through an 'independent carrier' model.<sup>115</sup> Nevertheless, Turkmenistan's 'Era of Might and Happiness' centres on the nation's ability to diversify its natural gas exports and increase demand, and therefore its cooperation with the EU can be expected. The remaining issue is whether current low natural-gas prices can justify development costs. Given the political and economic backing behind the TCP, this article firmly believes it can.

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114. Cutler, *supra* note 63.

115. *Id.*