

Barbara Janusz-Pawletta

The Legal Status of the Caspian Sea

Current Challenges and Prospects
for Future Development

Second Edition

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Preface

The Caspian Sea is a great ecologic, economic, political, and until recently legal chunk of uncertainty worldwide. For almost 30 years, it posed a challenge not only to its five bordering states—Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan—but also to the international community interested in its long-term sustainable development in the region and mutually beneficial economic cooperation. This ambitious intention could have been met only by way of interstate cooperation in all dimensions of the development of the Caspian Sea—political, economic, ecological, and also legal. In recent decades, following the collapse of the Soviet Union and the new geopolitical situation in the region, the balance between economic profits from the development of mineral resources on one hand and the protection of the natural environment on the other was not achieved in a sufficient way. Finally, in 2018, the Convention on the Legal Status of the Caspian Sea (further as Caspian Sea Convention) was concluded after years of interstate negotiations. It offers a reason to believe that the long-awaited consensus on the sustainable development of the Caspian Sea has been found.

The presented book represents an attempt to analyze the problem of the international legal status of the Caspian Sea. Until recently, the unclear legal situation of the Caspian Sea, the consequent uncertainty of the coastal states about the issue of territorial demarcation, their uncertainty about the extent of their sovereign rights to the exploitation of natural resources, and the uncertainty of the neighboring states with regard to shipping in the Caspian prevented continuous economic development of the region, destabilized political situation, and resulted in a lack of security in the Caspian region. These issues were not merely of regional but also of global importance. Since 2018, however, when the Caspian Sea Convention was finally adopted, there has been a need for a comprehensive look at the newly adopted interstate legal framework, which is offered in this second edition of the book.

This statement brings me to the sincere wish to express my deepest gratitude to international scholars. Thanks to their profound knowledge and expertise in the Caspian issues, they inspired me and led me through the sometimes difficult way of exploring and assessing the legal status of the Caspian Sea: Dr. Friedemann Müller

of the German Institute for International and Security Affairs (SWP) Berlin, Prof. Dr. Philip Kunig of Free University Berlin, Prof. Dr. hab. Leonard Łukaszuk of the University of Warsaw, Prof. William E. Butler of the Pennsylvania State University, Prof. Alexander N. Vylegzhanin of Moscow State Institute of International Relations (MGIMO), and late Prof. Anatoly L. Kolodkin. I also wish to thank my assistant, Angelina Funtikova, for her support in the process of editing the book.

Almaty, Kazakhstan

Barbara Janusz-Pawletta

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Abbreviations

| | |
|---------|---|
| AnnIDI | Institut De Droit International Annuaire |
| AIOC | Azerbaijani International Oil Consortium |
| ASEAN | Association of Southeast Asian Nations |
| BAT | Best available technology |
| BEP | Best environmental practice |
| BTC | Baku–Tbilisi–Ceyhan |
| CASPCOM | Coordinating Committee on Hydrometeorology and Pollution Monitoring of the Caspian Sea |
| CCWLF | Caspian Centre for Water Level Fluctuations |
| CEP | Caspian Environment Program |
| CIRM | Comite' International Radio-Maritime |
| CIS | Commonwealth of Independent States |
| CMI | Comite' Maritime International |
| CNPC | China National Petroleum Corporation |
| CPC | Caspian Pipeline Consortium |
| CPIT | China–Pakistan–Iran–Turk |
| CPUE | Catch-per-unit-effort |
| EC | European Community |
| ECSC | European Coal and Steel Community |
| EEC | European Economic Community |
| EEZ | Exclusive economic zone |
| EIA | Environmental impact assessment |
| EPIL | Encyclopedia of Public International Law |
| EQO | Environmental quality objectives |
| EU | European Union |
| EURATOM | European Atomic Energy Community |
| FAO | Food and Agriculture Organization |
| GA Res. | General Assembly Resolution |
| GATT | General Agreement on Tariffs and Trade |
| GEF | Global Environment Facility |

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| IALA | International Association of Marine Aids to Navigation and Lighthouse Authorities |
| ICARCS | International Commission on Aquatic Resources of the Caspian Sea |
| ICJ | International Court of Justice |
| ICJ Rep. | International Court of Justice Report |
| ICLQ | International and Comparative Law Quarterly |
| IHO | International Hydrographic Organization |
| ILA | International Law Association |
| ILC | International Law Commission |
| ILEC | International Lake Environmental Committee |
| ILM | International Legal Materials |
| IMO | International Maritime Organizations |
| IMCO | Inter-Governmental Maritime Consultative Organization |
| ISO | International Organization for Standardization |
| ITCAMP | Integrated Transboundary Coastal Area Management Protocol |
| LBS | Land-Based Sources Protocol |
| LNTS | League of Nations Treaty Series |
| MARPOL | Marine pollution |
| MEPC | Marine Environment Protection Committee |
| NAFTA | North American Free Trade Agreement |
| NATO | North Atlantic Treaty Organization |
| NCAP | National Caspian Action Plan |
| NEAFC | North-East Atlantic Fisheries |
| NEAP | National Environmental Action Plan |
| NIOC | Commission National Iranian Oil Company |
| NJW | Neue Juristische Wochenschrift |
| OECD | Organisation for Economic Cooperation and Development |
| OJ | Official Journal of the European Union (since 1968), C series (Communications), L series (Laws) |
| RIAA | Reports of International Arbitral Awards |
| RSFSR | Russian Soviet Federative Socialist Republic |
| CACP | Central Asia-China Pipeline |
| SAP | Strategic Action Program for the Caspian Sea from 2003 |
| SC Res. | Security Council Resolution |
| SCP | South Caucasus Pipeline |
| SOLAS | Safety of Life at Sea |
| TAC | Total allowable catch |
| TACIS | Technical Assistance to the Commonwealth of Independent States |
| TANAP | Trans Anatolian Pipeline |
| TAP | Trans Adriatic Pipeline |
| TAPI | Turkmenistan–Afghanistan–Pakistan–India |
| TDA | Transboundary diagnostic analysis |
| TITR | Trans-Caspian International Transport Route |
| TRACECA | Transport Corridor Europe–Caucasus–Asia |

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| UNCED | United Nations Conference on Environment and Development |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCTAD | United Nations Conference on Trade and Development |
| UN Doc. | United Nations documents |
| UNDP | United Nations Development Program |
| UNECE | United Nations Economic Commission for Europe |
| UNEP | United Nations Environmental Programme |
| UNTS | United Nations Treaty Series |
| US | United States |
| USSR | Union of Soviet Socialist Republics |
| WB | World Bank |
| WCED | World Commission on Environment and Development |
| WHO | World Health Organization |
| WMO | World Meteorological Organization |
| WTO | World Trade Organization |

Chapter 1

Introduction and Course of the Investigation



1.1 Situation in the Caspian Sea After the Collapse of the Soviet Union

Is it possible for the Caspian Sea, which after the collapse of the Soviet Union in 1991 has become a bone of contention between the five bordering countries Russia, Kazakhstan, Turkmenistan, Azerbaijan, and Iran, to turn into an area of—literally speaking—fruitful cooperation? This question remains open for the time being, but there is a clear reason to be hopeful, considering the recent milestone in the legal cooperation of the riparian states. Contested since the dissolution of the Soviet Union, the legal status of the Caspian Sea now seems to have been defined. After almost 30 years of negotiations among five Caspian Sea states, which emerged in the course of the dissolution of the Soviet Union, a mutual consent over the problem over the international legal status of the Caspian Sea has been reached. On August 12, 2018, all riparian states have signed the Convention on the Legal Status of the Caspian Sea (hereinafter Caspian Sea Convention) during the fifth Caspian Summit in Aktau. This document shall serve as basis for conducting territorial demarcation and for the clarification of uncertainties about the extent of sovereign rights of the coastal states to the exploitation of Caspian natural resources. Also, the extent of shipping and fishing rights of states as well as the scope of rights on fossil resources have been settled. It gives a legal basis for the hope that previous obstacles for the economic development of the region, deteriorating environmental conditions, destabilizing of the political situation, and, as result, the lack of security in the Caspian region will step by step decrease.

Many years of ineffective attempts to define the legal framework of the Caspian Sea could be explained by pointing to the existing deep differences between the geopolitical and economic interests of the five littoral states. Along with the change of the geopolitical situation in the region after the collapse of the Soviet Union and the region's opening to international collaboration, mainly in the field of oil and gas resources, the Caspian Sea region has come to the center of attention for China, the



Fig. 1.1 Map of the Caspian Sea, 2018 Source: Wikimedia Commons, the free media repository https://commons.wikimedia.org/wiki/File:CaspianSeaDrainage_v1.png

US, and the EU, which has intensified the competition of powers existing in the region already for a long time. The signature of the Convention on the Legal Status of the Caspian Sea offers a starting point for the process in defining and implementing the rights and obligations of the riparian states with respect to the use of the Caspian Sea, including its waters, seabed, subsoil, as well as air space above (Fig. 1.1).

1.2 Adoption of the Caspian Sea Convention Defines the Importance of Research

The efforts to determinate the legal status of the Caspian Sea after the collapse of the Soviet Union followed in three parallel tracks. The main goal of the mutual negotiations conducted by all coastal states was the adoption of the Convention regulating the overall legal status of the Caspian Sea. The draft of this Convention was developed by the commission comprising vice ministers of foreign affairs and discussed until the end of the 1990s to be finally adopted in 2018. Simultaneously,

between 1998 and 2003, the North Caspian coastal states prepared and signed bilateral agreements regarding the division of the seabed of the Caspian Sea into sectors for the exploitation of natural resources there (hereinafter North Caspian Agreements). The adoption of the North Caspian Agreements between Azerbaijan, Kazakhstan, and Russia, and a few years later also Turkmenistan, gave rise to doubts as to their legality among those Caspian littoral states, which have not been involved in their preparation and signature, mainly Iran. Today, we see, however, that the regulation of the North Caspian Agreements has been accepted by the newly adopted Caspian Sea Convention. The third parallel track of intergovernmental negotiations over the Caspian Sea was reflected in the "step-by-step" approach to the development of regulations concerning environmental protection issues and regional security. The Framework Convention for the Protection of the Marine Environment of the Caspian Sea, in 2013, was signed (hereinafter Tehran Convention) to regulate the issue of the fragile Caspian Sea environment threatened by the multiple economic activities undertaken by the coastal states in the Caspian Sea and, in 2014, the Agreement on the conservation and rational use of aquatic biological resources of the Caspian Sea. Additionally, the Agreement on cooperation in the field of prevention and liquidation of emergency situations in the Caspian Sea entered into force in 2017. In 2010, the Agreement on Security Cooperation in the Caspian Sea (hereinafter Caspian Security Agreement) was adopted to facilitate interstate cooperation in fighting terrorism, trafficking, and illegal exploitation of natural resources.

The multiple and often parallelly undertaken efforts to regulate the use and protection of the Caspian Sea might have delayed the process of determination of the overall legal regulation but have finally not prevented the adoption of the Caspian Sea Convention, which crowns these efforts to establish a suitable framework for the lawful development and protection of the natural resources of the Caspian Sea.

Natural resources of a transboundary nature, like those in the Caspian Sea, are always the object of interest of all riparian states and therefore shall be based on international law.¹ Such an approach is reflected also in the global agenda for sustainable development and its 17 Sustainable Development Goals, which include clear targets for global and national policies to ensure the sustainable development of natural resources.² The legal status of a maritime territory, which bears such natural resources, as well as the clarification of legal regimes regulating the use of the resources are key for guaranteeing the sustainable development of the region. The newly adopted Caspian Sea Convention defines the scope of the states' sovereignty in the area, as well as their rights to use water, subsoil, resources, and regulates transit and transportation on the water, as well as the laying of underwater pipelines and cables. The Convention reinforces the regulations for the environmental protection of the Caspian Sea as well as regulates the security issues, challenges, and

¹ILA Resolution, 3/2002, ILA Report of the Seventieth Conference, New Delhi.

²Transforming our world: the 2030 Agenda for Sustainable Development, Oct. 21, 2015, UN General Assembly.

threats in the region. All this confirms the importance of the investigation on the legal details concerning the new developments within the legal framework for the Caspian Sea shedding light on the current legal situation in the region.

1.3 Present State of Research Into the Legal Status and Regime of the Caspian Sea

The new edition of the book will discuss the recently adopted Convention on the Legal Status of the Caspian Sea from 2018. In the first edition of this book, an analysis of the legal status of the Caspian Sea was made based on the Draft of the Caspian Sea Convention, which was prepared and discussed during the years of multilateral negotiations by the coastal states undergoing until 2018. The current second edition of the book significantly differs from its previous edition. It reflects not anymore on the process but on the finally adopted document of the Caspian Sea Convention, which offers currently binding framework for the Caspian Sea and was adopted after almost 30 years of negotiations, which took place in the context of a significantly changed geopolitical situation around the Caspian Sea and the emergence of five independent states around its waters. The adoption of the Caspian Sea Convention offers a milestone in the understanding of the current state positions over the legal framework for the Caspian Sea. It gives a firm basis for the lawful development and use of natural resources as well as reinforces the principles for its protection. The Caspian Sea Convention offers a new regulation for territorial delimitation as well as maritime transport, fisheries, and other economic uses of the Caspian waters, its seabed, and its subsoils. The analysis of the provisions of the newly adopted Caspian Sea Convention represents the scientifically innovative part of this book. Since the adoption of the Caspian Sea Convention, there has been no comprehensive analysis of this new legal status regime of the Caspian Sea. Some publications undertook an analysis of the regional and local levels of newly introduced regulations, but these works have not comprehensively analyzed the whole texts of the Convention. Also, in the past two decades, there had been a number of specialized literature on this topic, publications on local³ and international legal aspects concerning the Caspian Sea,⁴ which were mainly limited to a discussion on the legal status of the Caspian Sea based merely on the legal framework developed under the USSR and Persia/Iran framework without comprehensively analyzing the outcomes of ongoing negotiations between the coastal states on the legal status of the Caspian Sea. A reading of a number of sources could offer an impression that some authors merely presented the political positions of each coastal states in the dispute

³See: (Barsegov 1998; Kolodkin 2002; Mamedov 2001; Merzlyakov 1998; Ranjbar 2004, and Salimgerei 2003).

⁴See: (Buttler 1971; Chufirin 2001; Elferink 1998a, b; Oxman 1996; Romano 2000; Uibopuu 1995, and Vinogradov and Wouters 1995).

over the status of the Caspian Sea rather than following the scientific impartiality required for a legal analysis of the subject. The aforementioned lack of literature was mainly due to the practical difficulty to access legal documents that reflected the status of interstate negotiations over the Caspian Sea. The newly adopted Caspian Sea Convention is nowadays publicly available and offers a ground for further scientific research and legal analysis, as presented in this edition of the book. The growing international interest in the Caspian region, mainly in the exploitation of the natural resources of the Caspian Sea, provides continues justification for research on the legal status and regime of the Caspian Sea.

The updated edition of this book offers insights into other interstate agreements concluded between the Caspian Sea states after 2014, when the first edition of the book was published, including the bilateral agreement between Kazakhstan and Turkmenistan on the use of natural resources in their relevant sectors of the Caspian Sea seabed and subsoil, as well as multilateral arrangements, including the Agreement on the conservation and rational use of aquatic biological resources of the Caspian Sea and a set of additional Protocols to the Caspian Security Agreement of 2010, as well as additional Protocols to the Tehran Convention of 2006 regulating the environmental conditions of the region.

1.4 Structure of the Book

This chapter is offering a general introduction to the content of the book and presenting the course of investigation. As first, it trusses the complex situation within the Caspian Sea region apart upon the collapse of the Soviet Union, which set the framework for the interstates negotiations of the Caspian Sea riparian states to define the new Legal Status of the Caspian Sea. The recent developments in the region and especially signature of the Convention of the Legal Status of the Caspian Sea explain the novelty and need for an update. The chapter highlights also the current state of the research over the legal framework for developing the cooperation of countries, and also it presents the structure of the book.

The Chap. 2 of this book offers a brief introduction into the changing geographical, political and economic conditions in the Caspian Sea region. It offers a broader regional picture to allow for a better understanding of the importance of the legal framework and regime, which has been newly adopt for the Caspian Sea. The clarity and transparency in the management of transboundary natural resources, as well as protection of the environment of shared water basins are a sine qua non condition for sustainable economic development as well as for political stability in the region. This chapter presents the situation in the Caspian Sea region after the collapse of the Soviet Union, as well as provides the overview of the current outcomes of decades of interstate negotiations over the legal status and regimes of use of the Caspian Sea, which ended up finally in the adoption of the Convention on the Caspian Sea Legal Status in 2018.

In Chap. 3, the historical overview of the legal framework applicable to the Caspian Sea use and protection will be presented. The agreements concluded between the USSR and Persia/Iran remained in force despite the collapse of the USSR and the emergence of the new independent countries for the last almost 30 years and served as a main basis for the assessment of the states' rights and obligations over this area and its resources. Based on these agreements, in the course of the development of the new legal framework for the Caspian Sea, there were heated debates on whether the Caspian Sea should be recognized in legal terms as a lake, sea, or condominium. The analysis of the legal consequences of such a qualification is briefly presented in this chapter. It revealed that the negotiating states left behind the legal-theoretical dilemma over whether the Caspian Sea is in a legal sense a sea or a lake and have developed a fairly complex set of provisions reflecting a unique legal system applicable to the Caspian Sea.

Further on, in Chap. 4, the book reflects on the states' position in the intergovernmental negotiations ongoing since the late 1990s. Three parallel tracks of these negotiations were presented in this chapter: firstly, the multilateral five-party negotiations on the development of the Caspian Sea Convention; secondly, the development of the North Caspian Agreements aimed at the use of natural resources between Russia, Kazakhstan, and Azerbaijan, and later Turkmenistan; and thirdly, the "step-by-step" development of the multilateral agreements conducted by all five littoral states on the separate regimes of the Caspian ecosystem, as well as interstate cooperation on regional security. This chapter also discusses the separately adopted legal agreements regarding the security of the Caspian Sea, as well as the hydro-meteorological conditions, and conservation and rational use of aquatic biological resources of the Caspian Sea.

Starting from the following chapter, a legal analysis of the separate aspects of the use and protection of the Caspian Sea was provided in reference to the provisions of the newly adopted Caspian Sea Convention.

The Chap. 5 discusses the delimitation of the Caspian Sea, which used to be always the most contested issue in settling the legal status of the Caspian Sea. This Chapter discusses the interrelations between territorial delimitation and the regime of the use of the Caspian Sea. It presents firstly the nonlegal aspects of settlement of the seaward boundaries of the Caspian Sea and follows with an elaboration on territorial delimitation and the issue of state sovereignty in the Caspian Sea before and after the adoption of the Caspian Sea Convention in 2018. The regulations of the bilateral and trilateral agreements on sharing the Northern Part of the Caspian Sea seabed and its subsoil for the use of its resources were also discussed. These regulations stay in force despite the adoption of the new Caspian Sea Convention and provide more detailed provisions for the management of the Caspian Sea of the Northern Part.

It's followed by analysis of the new Caspian Sea Convention, which has introduced the new maritime border lines in the Caspian Sea allowing for the defining of the scope of the states' territorial sovereignty, including the issue of living and nonliving natural resources. Highlighting the importance of territorial delimitation in the context of state sovereignty, the chapter offers and overviews over the state practice in delimitation of the Caspian Sea until 2018. It is offering a

brief overview of the bilateral and trilateral agreements adopted early 2000 between Kazakhstan, Azerbaijan and Russia (between 1998 and 2003), so called “North Caspian Agreement”⁵ as well as finally with Turkmenistan (2014).⁶ The new maritime zones in the Caspian Sea, despite steering clear of the law of the sea regulations, refer to the globally recognized legal models offering legal solutions for regional state conflicting interests while determining boundaries.

Chapter 6 reflects on the regime for the use of nonliving resources in the Caspian Sea---especially oil and gas---which significantly impacts states' economic development and which was one of the most acute reasons for riparian states to claim the delimitation of the Caspian Sea. First, this chapter provides information on the existing reserves of nonliving resources in the Caspian Sea. It discusses the existing international regulation of nonliving resources as a reference point for analysis of the newly adopted provisions of the Caspian Sea Convention. Additionally, it discusses the content of bi- and trilateral North Caspian Agreements, which were adopted in parallel with the overall negotiations on the legal status of the Caspian Sea from 1998 to 2003 and expended by a Kazakhstan-Turkmenistan agreement from 2014 and which remain in force.

Chapter 7 on the legal regime of the living resources of the Caspian Sea starts from describing continuous tensions between the protection of fish stocks and the oil industry in the Caspian Sea. It focuses on the presentation of the newly adopted regime for the regulation of the living resources of the Caspian Sea in comparison with the existing regime for living resources in the international law. The transition from the regime of common use of fish stock during the Soviet era to the new stage of legal regulation of living resources resulted in an extensive exploitation of these resources. The International Commission on Aquatic Resources of the Caspian Sea (ICARCS), the Tehran Convention and Agreement on the Conservation and Rational Use of Aquatic Biological Resources of the Caspian Sea, as well as the newly adopted Caspian Sea Convention, presented in this chapter, offer a comprehensive framework for the regulation and protection of the living resources of the Caspian Sea.

Chapter 8 deals with the legal regime of the pipelines in the Caspian Sea, showing the current framework for the use of pipelines in this area, these being an important way of transporting Caspian oil and gas resources towards the world markets. The chapter presents an overview of the international law on pipelines as a reference point for discussing regulations of the newly adopted Caspian Sea Convention. In the past, the legal regime of the Caspian maritime pipelines has never been subject to interstate agreements but rather has been an issue of general practice of the Caspian Sea states. Therefore, it is of special importance to analyze the Caspian Sea Convention, which regulated the pipeline regime and allowed the coastal states to lay transboundary pipelines and cables.

⁵Charney and Alexander (2003), pp. 1057 et seq. No. 5–12.

⁶Legal status of the Caspian Sea, Ministry of Foreign Affairs of the Republic of Kazakhstan <https://www.gov.kz/memleket/entities/mfa/press/article/details/591?lang=en>. Accessed 7 July 2020.

Chapter 9 discusses the legal regime of maritime navigation on the Caspian Sea, it being traditionally the most important regime for the use of the Caspian Sea. It presents the legal regime of shipping in international law as well as newly adopted regulations on shipping included in the Caspian Sea Convention in 2018. An initial regime of freedom of shipping was to some extent recognized as valid; however, some unique new regulations on the scope of shipping rights in the Caspian Sea, especially of third states, differentiate it from the standards existing in the international law of the sea. The chapter discusses freedom of navigation in the Caspian Sea including innocent passage regulation as well as write to access to oceans through the Volga River.

Chapter 10 elaborates on the protection of the marine environment of the Caspian Sea. It begins with an analysis of the environmental principles applicable to the Caspian Sea. Following the structure of the most comprehensive legal act providing for the protection of the Caspian environment---the Tehran Convention and its ancillary Protocols---this chapter adds the newly adopted environmental regulations, as settled in the Caspian Sea Convention, which has reinforced the importance of the provisions included in the Tehran Convention and existing environmental regulations. This chapter has been divided into parts concerning the prevention, reduction, and control of pollution of the Caspian Sea and the protection, preservation, and restoration of the marine environment. Further, it describes the institutional framework for cooperation in the legal protection of the Caspian environment and existing environmental procedures. With the adoption of the Tehran Convention, the states parties set specific environmental goals but avoided taking on explicit commitments. Its full legally binding effect can only be achieved through the adoption of implementing protocols, which takes place only gradually.

This book does not present the national legislation of the Caspian Sea littoral states concerned, although it is locally referenced. The main reason for this comes from the subject of the research, which is restricted to the international legal aspects of the regulation of the state and the regime of the Caspian Sea. Any provisions of national law can have no binding effect on the legal status of third countries and thus cannot contain requirements for these third countries. Since the adoption of the Convention on the Legal Status of the Caspian Sea, which happened only recently, it will take time to adopt the respective national regulations introducing its provisions into national legislation. This does not mean that the significance of coastal states' national legislation on the use of the Caspian Sea and its resources as well as its protection were put in question. Quite the contrary, awareness of the importance of national legal solutions and their complexity, which cannot be fully analyzed within this book, encourages only a local reference to the existing provisions, with the intention to avoid only a cursory presentation of complex national legal regulations.

An analysis on the legal status and regime of the Caspian Sea presented in this publication covers a period ending on July 1, 2020.