

## Current Development of Negotiations on the Legal Status of the Caspian Sea: Sovereignty Issue

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### INTRODUCTION

The Caspian Sea summit of a five-states presidents meeting in Tehran in January 2005, has been put off again. In the next future we can expect following meetings of the Working Group of the deputy foreign ministers of all involved states parties. However, the continuing rifts raise the question of what a presidents summit or the regular meetings of the deputy foreign ministers can accomplish. Much of the work on the Convention of the legal status of the Caspian Sea is reportedly done. However, there still remain unresolved issues of great importance, what the states could not agree upon already over 10 years of negotiations. Therefore, only document setting out the various positions and principles of the sea's new status can be expected in the next future. Documents published after every such a meetings are and will probably in the future remain a symbolic but unenforceable political declarations rather than a eventual version of a legal document, settling the

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dispute around the Caspian legal status acceptable for all coastal states. The current diplomatic niceties might also be seen as a step back toward irrelevance if on the coming up meetings the politicians fail to address the real-world disputes on nearly all sides.

Until now there has only been one agreement accepted by all the littoral states, i.e. the Framework Convention for the Protection of the Marine Environment of the Caspian Sea. It shows, that both aims of establishment of a successful interstate dialog and reaching legal compromise in the Caspian Sea case have been achieved only regarding environmental issues. This fact should be seen as a particular contribution dialog can make towards ensuring long-term regional co-operation and preventing of regional conflicts.

## **CURRENT BINDING LEGAL PROVISIONS ON THE CASPIAN SEA**

Caspian Sea urgently needs new legal regulations. If those regulations are not developed the remaining legal unclarity will keep on inhibiting the arrival of political stability and security in the whole Caspian region, as well as impede its economical development deterring foreign investments.

Existing legal principles governing the Caspian Sea appear to be no longer sufficient to deal with the new complex of political, economic and environmental problems that have given rise to the profound political changes after the dissolution of the Soviet Union. Existing treaties, that comprise the legal framework for the international relations in the Caspian region, have many omissions or are partly obsolete.

The current legal status and regime of the Caspian Sea are based both on the Russian/Soviet-Iranian agreements concluded in the first part of the twentieth century and on state practice.<sup>(1)</sup> The Treaty of Friendship Russian Socialist Federal Soviet Republic and Iran (1921)<sup>(2)</sup> and Treaty of Commerce and Navigation (1940)<sup>(3)</sup> became the basis for the bilateral relations between Soviet Union and Iran. Currently, they have exceeded their scope of application to the new independent former Soviet Republics, such as Azerbaijan, Kazakhstan and Turkmenistan, now bordering the Caspian Sea

as independent states. Though, none of the treaties specifically address the issue of the legal status or the regime of the Caspian. They reserved the military and commercial navigation similarly to the way fishing rights in the Caspian Sea were reserved for Iranian and Soviet vessels, which after desolation of USSR extend to the four former Soviet republics. It, therefore, excludes third states from any arrival in the Caspian Sea as well as restricts the rights of innocent passage of the foreign ships. Other activities such as marine scientific research, oil and gas exploration, and drilling in the areas adjacent to the coast have been mentioned in the 1940 Agreement but in an ambiguous way.<sup>(4)</sup> Therefore, they offer no guidance on of development of natural resources. The coastal States have never resolved the issue of the boundary line in the Caspian Sea, and continue to insist that the Caspian Sea is regarded by both contracting parties as a Soviet and Iranian Sea.

After the disintegration of the USSR, three newly independent Caspian States challenged the legal validity of the Caspian Treaties despite the regulations of the Vienna Convention on Succession of States In Respect of Treaties, 1978. This Convention states that, when a part or parts of the territory of a state separate to form one or more states, whether or not the predecessor state continues to exist, any treaty in force at the date of the succession of states, in respect of the entire territory of the predecessor state continues in force in respect of each successor State so formed.<sup>(5)</sup> Also any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State stays in force in respect of that successor State alone. The rules do not apply if the States concerned otherwise agree; or it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. The agreement on maintaining the obligation, included in the soviet treaties, has been confirmed by the former republic in the so-called The Declaration of Alma-Ate, 1991. In this agreement newly independent states firmly committed themselves to fulfill the obligations deriving from the treaties and agreements concluded by the former Soviet Union.<sup>(6)</sup>

## CONTRARY POLITICAL INTERESTS

Although over a decade has passed since the Caspian states had begun their efforts to build a new viable legal framework for this water basin, their endeavors remain almost fully ineffective. Neither the fundamental issue of the legal regime of development of the mineral resources, nor the issue concerning the exploitation of the living resources with its greatest value-caviar, have found the final binding legal regulation. The greatest obstacle to the negotiation process seems to come from the entirely different and often conflicting geopolitical and economical interests of the Caspian littoral states. Russia's biggest concern is to maintain its political dominance and control over its former republics, especially those rich in natural resources. For this purpose, Russia has tried to inhibit research and development of the natural resources in "their" zones of the Caspian Sea, or used the regional territorial conflicts to weaken them, such as conflict on Nagorno-Karabakh between Azerbaijan and Armenia. Almost all oil and gas export pipelines inherited from the USSR pass through Russia. All other routing options are fraught with technical, financial, legal and political difficulties. The proposed alternative pipelines must pass through - or take expensive detours to avoid - politically troubled mountainous areas where they could become targets for terrorists.

The Caspian oil and gas resources are of immense importance to uphold the national economies of the still weak newly independent former soviet republics Azerbaijan, Kazakhstan and Turkmenistan. Through making use of the natural richness of the Caspian Sea these states try to preserve their economical growth and, thus protect their own political independence. There are five major pipeline projects currently underway in the Caspian Basin - four of which account for some 70 per cent of the total Caspian reserves. These are the offshore Azeri-Chirag-Gunashli oil fields block and the Shah Deniz offshore gas field in Azerbaijan, Tengiz and Karachaganak onshore, and Kashagan offshore fields in Kazakhstan (see a map). However, these new states are not immune to the immense impact done not only by regional powers like Russia, or Iran, but also by players from outside the region, like USA, Turkey, or the EU.

The geopolitical situation in the region has become more complicate since the outbreak of the American interests towards the Caspian natural resources in the early 1990s. The lack of the information from the inside led to the exaggeration. America sought any reason for its presence in the region, because actually desired to expel Russians and Iranians from the region. Today, although the US has declined economical interests in the region, it still remains an influential player. American policy pushed Iran to adopt a hard line approach in the Caspian negotiations. Iran strongly rejects the lawfulness of the recently concluded agreements between Russia, Azerbaijan, and Kazakhstan on the division of the northern part of the Caspian Sea bottom. Since 1995, Iran has consistently taken the position that unilateral actions by coastal states are not permitted until rules for the exploitation of the mineral resources of the Caspian are in an agreement with all the coastal countries. Originally, Russia supported the same approach.<sup>(7)</sup> Afterwards changed its course leaving Iran as only official supporter of the condominium theory for the Caspian Sea or its division into equal 20% parts. Further research will show, that the public statements made by government officials' do not always correspond to the state position expressed in the ongoing negotiations.

Europe can also be regarded as another global player in the Caspian region, since it has understood the need to find dependable sources of energy outside of politically unstable Russia to kick out a habit of dependence on Russian gas and oil supply. Great political tensions in the Caspian region, natural resources of essential meaning, as well as numerous fragile territorial and national conflicts with strong historical background hamper any efforts and initiatives taken to settle this long-lasting conflict on the new legal status of the Caspian Sea.

## **LEGAL WAY OF CONFLICTS RESOLUTION**

Peaceful means for settlement of disputes in such a manner that international peace, security and justice are not endangered, are a fully recognized international approach to conflict resolution. These basic provision include

Art 33 of the Charter of the United Nations 1945, stating that the parties to any dispute shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Peaceful settlement of disputes should provide a basis for co-operation in the fields of economics, science and technology, environment, and humanitarian issues.

Ten years ago the Caspian littoral states have created the so-called Working Group consisting of deputy foreign ministers of all involved states parties. The purpose was to eliminate existing contradictions and work out a set of new legal rules that are applicable for the Caspian case and are acceptable to all participants. Much of the work on the different issues of the legal status and regime of the Caspian Sea has been reportedly completed. The legal status of a territory is defined by provisions dictating which state an area belongs to, (for instance, the territorial sea is entirely subordinated to the state sovereignty, however the high sea is open to all States, whether coastal or land-locked). Thus, the concept of a legal regime would include the entirety of state rights and obligations regarding the use of this marine area. There are continuing efforts to create an agreement on Caspian states' cooperation on hydrometeorology and monitoring of the environment of the Caspian Sea, as well as elaboration of an intergovernmental program regarding these two issues. Supposedly a lot of work has been done on preparing of an agreement on the preservation and the use of living resources of the Caspian Sea, which provides for exclusive rights of the Caspian littoral states on carrying out industry, as well as an agreement on the merchant shipping.

In essence, the Working Group's activities are characterized as not highly successful, mostly due to the inflexible position taken by the national governments. There is no remarkable success in drafting works upon the Convention on the legal status of the Caspian Sea, which is of an essential importance to the whole future of the Caspian Sea's legal system. In present circumstances nothing alludes to the upcoming changes and the speeding- up

to the legal works on the final version of the convention on the legal status of the Caspian Sea. Therefore, the right solution seems to pave way for separate conventions regarding individual aspects of the future legal regime for the Caspian Sea, for natural resources, shipping, energy, as well as fishing issues. First example of such an approach and its success might be the recent Framework Convention on the Environmental Protection of the Caspian Sea signed by all Caspian states in Tehran in December 2003. In the case of opposition, which occurred among some of the negotiating states to the idea of signing few conventions regarding particular legal issues before the final acceptance to the agreement on the legal status of the Caspian Sea, there may apply rules of the provisional application of an international treaty. A treaty, or a part of a treaty, is applied provisionally pending its entry into force if the treaty itself so provides or the negotiating States have in some other manner so agreed.<sup>(8)</sup> In such case the convention does not enter into force until the Convention on the legal status of the Caspian Sea is signed by all five littoral states. A provisional application of treaties with respect to a state shall be terminated if that state notifies the other states between which the treaty is being applied provisionally of its intention not to become a party to the treaty. Once a Treaty has entered into force provisionally, it is binding on the parties, which agreed to bring it into force provisionally. The nature of the legal obligations resulting from provisional entry into force would appear to be the same as the legal obligations in a treaty that has entered into force, as any other result would create an uncertain legal situation. It is the criteria for formal entry into force that has not been met but the legal standard of the obligation remains. In the Caspian Sea case, there is a truly urgent need to realize the immediate regional cooperation on certain problems of the Caspian shipping, fishing and energy regimes. Therefore it might be recommended for the Caspian states to intensify their works on the provisions of the required conventions on the issues of the Caspian legal regime.

## **INTERNATIONAL LEGAL STANDARDS IN THE LAW OF THE SEA**

Every legal act finished, that has been drafted, regardless already finally signed or not, is a reflection of the political views of the state parties to a particular problem. It is a result of efforts put by negotiators into achieving an all-satisfying compromise that is eventually conceptualized into a judicial rhetoric. Many authors use political statements as the main argument, instead of the legal documents, as a primary source when describing the official position of the state in legal arguments or negotiations. The same scenario is happening in the Caspian case despite the fact that the most reliable information about the current positions of the states in the Caspian dispute should be derived from accessible legal acts. One of such positions might be the current version of the Draft of the Convention on the legal status of the Caspian Sea [hereinafter as Draft]. It might be of greatest assistance while figuring out the recent political positions of each of the Caspian states regarding the future status of the Caspian Sea. Even, if it seems that the policy will overrule any legal effort to achieve legal stabilization in the Caspian region, the outcome of the current negotiations will have a legal character of a convention on the status of the Caspian Sea, which will be binding for all Caspian states. The achieved result will consist primarily of legal terminology paraphrasing the political positions of the negotiating states.

One of the most important conclusion drawn from the Draft is, that the parties abandon a clear definition of what is the Caspian Sea from the geographical point of view, and whether it should be categorized as a “sea” or a “lake”. Consequently, Caspian states have quitted the long, unfruitful discussion on which of the international set of rules is applicable and binding for the Caspian Sea. If the Caspian Sea were a ‘sea’ in legal terms, the United Nations Convention for the Law of the Sea (UNCLOS) of 1982 would be applicable. If, on the other hand, the Caspian Sea were a ‘lake’ in legal terms then customary international law concerning border lakes would be applicable. However, according to the Draft, the Caspian Sea does not fall into either category. Therefore, it will not be entirely covered neither by the

legal provisions characteristic for the enclosed seas nor international lakes exclusively. The new status will be rather a legal precedence referring to various legal models due to consideration of its historical, geophysical and legal peculiarity.

Definition of the Caspian Sea provided in the Draft is neither very informative nor clear in explaining the legal position of the Caspian Sea. It describes the Caspian Sea it as a “water basin surrounded by the territories of the states parties to the convention”. Reading the context of the Draft shows, however, that the future status of the Caspian Sea will be based on widely recognized principles of the international law of the sea. The primary source of references for the Draft was the United Nations Convention Law of the Sea [hereinafter UNCLOS]<sup>(9)</sup> what can be recognized by legal terminology, structures and model solutions, which have been drawn from the UNCLOS. These numerous references are not surprising if one bears in mind the primary role of the UNCLOS as a source of the current international law of the sea. However, it is necessary to emphasize that any of the references to the UNCLOS provisions occurred in the Draft refer to customary legal dimension of the UNCLOS. There is some reason, why the UNCLOS could not be applicable to the Caspian case directly. Only Russia has ratified UNCLOS and is a party to it. According to the international law, the consent of a state to be bound by a treaty must be clearly expressed by this state. It can be done by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if so agreed.<sup>(10)</sup>

Another reason why the only customary dimension of the UNCLOS might be applicable to the Caspian Sea is the limited scope of UNCLOS application, which relates only seas. As mentioned before, there is a big disagreement among the Caspian littoral states about this issue. Political tensions are another obstacles to direct application of the UNCLOS provision. This tension is caused by the fact, that UNCLOS, although established to restrict national sovereignty over maritime space, definitively recognizes existence of state sovereignty upon 12 nautical miles of the territorial sea. It needs to be underlined that the issue of sovereignty is one of

the most controversial political aspects of the Caspian Sea future status. In the past years some states have officially claimed their sovereignty over the Caspian water close to its coast like, which caused great opposition in other states. The sector of the Caspian Sea (lake) close to the Azerbaijan Republic has been claimed as integral part of territory of the Azerbaijan Republic in the Constitution of the Azerbaijan Republic.<sup>(11)</sup> Also Turkmenistan, in its law called “state boundary” 1993, recognized a territorial sea and EEZ principles for the Caspian Sea according to the UNCLOS provisions. In response, Russia or Iran stood in opposition to common property rights on the whole Caspian Sea for all Caspian States, the so-called condominium.<sup>(12)</sup>

Another political obstacle to the direct application of the UNCLOS is the fact, that according to UNCLOS,<sup>(13)</sup> three newly independent states being land-locked states could claim their special right on access to the high sea, an argument which is strongly rejected by Russia.

In sum, the UNCLOS will not be directly applicable to the new Caspian status, although there are no others legal standards then the UNCLOS itself, which might serve as a legal model for the future legal solution for the Caspian status and regime. It might be applicable to the future model ruling the borders setting in the Caspian Sea, fishing, shipping issues, as well as exploring and exploiting, conserving and managing its natural resources.

## **SOVERENIGTY ON THE CASPIAN SEA**

As it has already been mentioned, the Caspian coastal states are very divided in their views on the future legal status of the Caspian Sea and the main point at issue is state sovereignty on the Caspian Sea. To highlight the differences and similarities of the international legal maritime standards, it is worthwhile to draw some lines between UNCLOS provisions and the proposals made by the Caspian states to the Draft.

UNCLOS establishes five ocean zones: two of them are considered being part of a country’s sovereign territories, such as internal waters and territorial sea, and some zones are beyond state’s sovereignty: contiguous zone, exclusive economic zone (EEZ), continental shelf and high seas.<sup>(14)</sup>

**Internal waters** are formed by waters on the landward side of the baseline of the territorial sea and stand completely under the state's sovereignty.

**Territorial sea** may extend out to 12 nautical miles (1 nautical mile equals 1,852 meters, or 6,076 feet), measured from a baseline on a country's coast. The territorial sea is considered to be a part of the state territory. Although ships may pass through as long as this passage is innocent, what means that it is not prejudicial to the peace, good order or security of the coastal State.

A **contiguous zone** to the territorial sea may not extend beyond 24 nautical miles from the baselines. The coastal state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. The state may also exercise its control to punish infringement of the above laws and regulations committed within its territory or territorial sea.

The **exclusive economic zone** [hereinafter EEZ] is an area beyond and adjacent to the territorial sea extending to 200 nautical miles from the coastal baseline. Within this zone a coastal state does not have complete sovereignty any more. It has sovereign rights only for the purpose of, for instance, exploring and exploiting, conserving and managing the natural resources, whether living or non-living. It applies to the seabed, waters superjacent to the seabed and subsoil. The state jurisdiction over EEZ includes e.g. the establishment and use of artificial islands, installations and structures; marine scientific research; as well as the protection and preservation of the marine environment.

A country may declare establishment of an **exclusive fishing zone**, which is a part of the EEZ, however the state's rights over it are restricted just to living resources.

The **continental shelf** contains the seabed and subsoil of the submarine areas that extend beyond state's territorial sea to a distance, depending on circumstances, max. 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources, mineral and other non-living resources of the

seabed and subsoil. However, these rights over the continental shelf must not infringe navigation and other rights and freedoms of other states.

The **high seas** are open to all states, whether coastal or land-locked. Freedom of the high seas comprises, inter alia, freedom of navigation, overflight, laying submarine cables and pipelines, constructing artificial islands and other installations, and fishing, as well as scientific research. The high seas shall be reserved for peaceful purposes. No State may validly purport to subject any part of the high seas to its sovereignty.

The notion in the Draft of territorial sea and fishing zone advocated by Azerbaijan, Kazakhstan and Turkmenistan was drawn from UNCLOS. The definition of the territorial sea provided by Azerbaijan and Turkmenistan is following, it is sea zone, limited by a line every point of which is at an equal distance from the nearest point of the baseline. The claimed breadth of the territorial sea should be 15 n.m, unlike UNCLOS providing for 10 n.m. The version presented by Kazakhstan does not define upon the breadth of the territorial sea, but similarly as Iran does, it emphasize sovereignty of every coastal state upon its respective territorial sea. However, if in the Azerbaijan and Turkmenistan proposals the reference to the state sovereignty is missing, the reference to the UNCLOS is beyond dispute. The breadth of the zones proposed as described above has not been decided. Although, neither of the states can claim the maximum size fixed in UNCLOS, because the entire breadth of the Caspian averages merely 430 km.

Russia in contrast fully rejects the legal conception of the territorial sea in the Caspian Sea. It advocates for National Jurisdiction Zones, the legal regime of which reflects the regulations for the contiguous zone described in the UNCLOS, however it makes no direct references to the UNCLOS. In the law of the sea a contiguous zone used to be understood as recognition that a coastal state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations. Russia's rejecting position is possibly due to its heavy opposition to any idea of providing Caspian states with even a restricted form of sovereignty.

None of the contracting parties, while defining the rights of the Caspian states to the water, seabed or subsoil of the Caspian Sea, see a necessity for

setting any of the zones established in UNCLOS beyond the distance of max 15 n.m, neither the EEZ nor the continental shelf. Instead, they pass over to set provisions regulating area, known in the international maritime law as beyond any state's claims upon the sovereign rights (High Sea). The Kazakhstan and Turkmenistan proposition to the Draft contains many similarities to the UNCLOS, which allows us to expect respective interpretation of terms adopted, such as freedom of navigation, overflight, laying submarine cables and pipelines, etc.

Azerbaijan, Russia and Iran suggest however establishing a Zone of common use, with free merchant shipping. The three countries do not agree upon the extent of the freedom of fishing on the Caspian Sea. Azerbaijan advocates acknowledgment of freedom of fishing on the whole Caspian Sea, which is being opposed by Russia and Iran calling for "coordinated fishing norms".

The above-mentioned discrepancies in the opinions on the future legal status and regime of the Caspian is not merely a question of semantics. The main disagreement during the negotiations concerns the scope of the state's sovereignty upon the Caspian Sea. According to the principles of international law state has complete sovereignty over its territory. International lawyers trying to define state sovereignty emphasize that it means independence from another subject of international law (state or international organization) in the international forum. However, it is not an unlimited power, it can only be defined by the states, "possesses the totality of international rights and duties recognized by international law"<sup>(15)</sup> as long as it has not limited them in a treaty. Full sovereignty of a state extends to its land territory and internal waters and beyond that to an adjacent belt of sea, described as the territorial sea. This sovereignty extends to the air space over the state territory and subsoil under it, as well as over the territorial sea and its bed and subsoil. According to the Draft, merely Azerbaijan, Kazakhstan and Turkmenistan support the recognition of the state sovereignty on all geographical levels, over water column, seabed, subsoil and in the airspace. As UNCLOS provides, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. Passage is

innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage excludes for instance any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or any exercise or practice with weapons of any kind; or any act aimed at collecting information to the prejudice of the defense or security of the coastal state. There is no full state sovereignty beyond the territorial sea, which means that activities of the coastal state are partly restricted in favor of all other states.

As argued below, Caspian states apply indirectly provisions of the international law of the sea, mostly included in UNCLOS, as a model for the Caspian solution. However, some of the legal terms adopted in the Draft have received partially new definition, adjusted to the political position of the Caspian states, and in some cases of the totally opposite meaning to the original one. It can be taken for granted, that there will be no permission for any ships not coming from Caspian states, to enjoy the right of passage through the Caspian Sea, as it is assured in the UNCLOS for weather coastal or land locked states. Passage means continuous and expeditious navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters or a call at such roadstead or port facility.<sup>(16)</sup> Certainly, neither the access to/from the Caspian Sea for ships from other than Caspian coastal states will be allowed. This restricted shipping regime, where freedom of navigation is extended exclusively to ships of the Caspian coastal states, has already been already established under the treaties concluded between Soviet Union and Iran.<sup>(17)</sup>

The discrepancies in views on the Caspian future status, acknowledging or disagreeing with the existence of territorial sea in the Caspian Sea, is of great importance to the understanding of the whole legal dispute on the future states rights towards the Caspian Sea, the course of the borders of the Caspian, etc. Russia adamantly refuses recognition of the territorial sea zone, and oppose approval of the recognition of the nearly exclusive rights of the separate states on the Caspian. Instead, it submitted a proposal for establishing Zones of national jurisdiction, within which the coastal state

may exercise control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations. However, in Russia's proposal the breadth of the Zone of National Jurisdiction should be limited to 15 nautical miles, and the UNCLOS foresees 24 nm for the contiguous zone and just 10 for the territorial sea. The introduction of the contiguous zone in the Caspian would mean that none of the coastal states have any right to exercise sovereignty to any extent on the Caspian Sea. The Russian proposition seems to be based on a very apparent political concern for their dominance in the Caspian region, which has always been a zone of exclusive soviet control.

Iran insists it supports the idea of sovereignty in the Caspian Sea, however its proposition is very unclear from the legal point of view, since it uses inconsistent legal terms and does not provide clear and consistent explanation for them. Iran claims the Caspian Sea contains of national zones, within the shipping freedom, coordinated fishing norms and protection of the environment is guaranteed. Caspian coastal states exercise their sovereignty in so-called national sectors. Unlike other Caspian states Iran understands the term "sector" as a respective part of the Caspian Sea, and not as a part of the Caspian seabed. The next inconsistency is in its claim is that state sovereignty extends on the water area of the sectors (neither on the air space, nor the seabed nor subsoil) and at the same time in referring to conformity of this provision with international legal norms which provide opposite definition. However, explanation provided by Iran for the term "sector" contradicts the widely known legal definition of a territory being "sovereign". The geographic reach of sovereignty includes its land territory and internal waters beyond it, as well as the air space over it and wells as its bed and subsoil. Sovereignty equips a state with comprehensive and complete scope of rights towards territory. As such, "sovereignty" cannot be restricted, otherwise it loses its origin character and becomes a "restricted sovereignty". On one hand, Iran suggests, coastal states should have sovereignty over the respective "sector". On the other hand, it defines

“sector” as a particular part of the Caspian Sea belonging to every particular Caspian state, which is allowed merely to use its resources and conduct other economic activities done by the Caspian States.

### **DELIMITATION OF SEABED AND SUBSOIL**

All Caspian States agreed that the seabed and the subsoil of the Caspian Sea is to be divided among the Caspian states for the purpose of making use of their sovereign rights on resources development and other economy activities related to the development of the seabed and subsoil resources. However, decision upon a method for conducting the division of the Caspian Sea causes a real problem. Apart from Iran all states agreed to carry out the division on the basis of the median line method. Also the UNCLOS tends to create boundaries by equitable division of the water surface among the states using the equidistant or median line method of delimitation. The terms "median-line" and "equidistance-line" are synonymous in that both utilize the same geometric method. As principle, neither of two states whose coasts are opposite or adjacent to each other is entitled to extend its territorial sea beyond the median line. This line is drawn in such a way that every point is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.<sup>(18)</sup> Baseline points along the coast form the framework from which the seaward boundaries of maritime zones, territorial sea, contiguous zone, fishery zone and exclusive economic zone, can be computed and defined within the law.

Also in favor of the median line, is the Convention on the Continental Shelf, 1958, providing for determination, by agreement, of the boundary of the continental shelf appertaining to states whose coasts are opposite each other.<sup>(19)</sup> In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line. The Soviet Union ratified this treaty on 2.11.1960, therefore the new independent Caspian States are bound by its provisions. However Iran is not a party to this treaty. In the North Sea Continental Shelf Case, the International Court of Justice rejected the argument made by the Netherlands and Denmark that

the equidistance rule had become a rule of customary international law applicable to continental shelf delimitation between adjacent states.<sup>(20)</sup> There is no international law source, neither a treaty nor customary law, forcing Iran to accept the use of the median line on the Caspian Sea, unless Iran itself agree to fix this rule in the new convention on the Caspian status.

Another inconsistency regarding the proposed use of the median line taking into account widely recognized norms of the international law is the fact that UNCLOS provides for using the median line in cases of delimitation of the territorial sea between states with opposite or adjacent coasts, which means the division of the sovereign areas of different states. Although, among Caspian States there is still no agreement regarding the legal definition of the sectors/zones, whether they are areas under sovereignty of the coastal states, or states have merely rights to use resources found in these sectors/zones. Actually, the Draft keeps quiet about this issue. Nor do, the recently concluded treaties between Russia, Kazakhstan and Azerbaijan mention it.

The lack of clear and consistent regulation of the legal status of the seabed and its subsoil might become a basis for future misunderstandings and disagreements between coastal states. If it turns out that an early agreement on boundary delimitation of the seabed and its subsoil cannot be reached, but the countries involved want to exploit resources, joint-development procedures can be established. An example of such an agreement includes, for instance, the 1975 Japan-South Korea Joint Development Zone Agreement.<sup>(21)</sup>

Whichever legal model will find acceptance among the Caspian states, the most important issue is how to clearly state it in the future convention on the legal status of the Caspian Sea to avoid possible misunderstandings and conflicts during the interpretation of the convention.

There is additional disagreement over the proposition of taking into account state practice developed on the Caspian Sea until now, which is strongly opposed by Turkmenistan. As of late 2004, three bilateral seabed delimitation agreements regarding the northern part of the Caspian Sea had been reached: Kazakhstan-Russia on July 6, 1998, Azerbaijan-Russia on

September 23, 2002, and Azerbaijan-Kazakhstan on November 29, 2001 and its Protocol of February 27, 2003. In addition one agreement has been reached among Azerbaijan, Kazakhstan and Russia on May 14, 2003. The validity of these agreements has been questioned by Iran and Turkmenistan, principally on the ground that the consent of every and all littoral states is a sine qua non for any legal distribution of the Caspian's territorial water and its seabed resources.<sup>(22)</sup>

The mentioned agreements do not affect the legal status of the superjacent water column and leave the water column not delimited. They deal basically with the issue of delimitation of the seabed and subsoil without specifying the legal status of the selected sectors, whether they are under the sovereign rights of the state parties or not. All four North Caspian treaties state they do not inhibit conclusion of a future status convention. Therefore, to keep the treaties in force the parties involved need to get the same principles for the delimitation and development accepted by the remaining two Caspian coastal states.

Another disagreement was over a proposition to base the future seabed and subsoil delimitation also on the rightness principle. The Azerbaijan resistance to it might be explained by bringing up again some claims for, mostly raised by Iran, dividing the Caspian Sea on the sector of 20%, in accordance to the equality principle.

Iran is the only country, which rejects the application of the median line to the Caspian delimitation, because it would mean it is agreeing to accept the smallest part of the Caspian Sea in case of its division.

Closely looking at the Draft in terms of future delimitation of the Caspian seabed and subsoil it is necessary to emphasize the basic discrepancy among the Caspian states in the understanding of the term "sector/zone". Unlike Iran, Azerbaijan and other Caspian states, mean, in this regard parts of the seabed and subsoil divided among the Caspian states for purposes of exploring and other lawful economically activities related to the development of the seabed and subsoil resources.

## PRINCIPLES RULLING ON THE CASPIAN SEA

An important aspect of the Caspian states dispute over the future legal status and regime of the Caspian Sea is to establish a new set of legal principles, what the Caspian States should obey in conducting their future activities in the Caspian Sea.

The set of principles was worked out on the basis of few fundamental international legal treaties widely recognized as international common law. Some of the proposed principles all Caspian states agree upon, however, some of them are still heavily disputable. Lets start the review of the rules proposed during the dispute and fixed in the Draft, which do not cause any doubts among coastal states. They were drawn from the internationally widely recognized legal documents, developed by international community in hope avoiding future war. In accordance to the Draft Caspian states should carry out their activities on the Caspian Sea in compliance with following principles. Regarding the coastal states relations they shall have respect for the sovereignty, territorial integrity and independence of any state<sup>(23)</sup> and the sovereign equality of all Caspian states.<sup>(24)</sup> States shall refrain from the threat or use of force in their international relations.<sup>(25)</sup>

The Caspian Sea shall be reserved for peaceful purposes<sup>(26)</sup> and shall be converted into a zone of peace, of proper neighborly relations, friendship and cooperation.<sup>(27)</sup> All disputes concerning the Caspian Sea shall be settled by peaceful means. The freedom and security of the admiralty of the ships flying the flag of the parties to the Caspian convention shall be guaranteed<sup>(28)</sup> No permission will be given for any ships flying flags of states not being part to the Caspian convention, to enjoy the right of passage neither in, nor from or inside of the Caspian Sea.<sup>(29)</sup> Agreed norms and principles concerning reproduction and regulation of the use of living resources shall be applied and the responsibility of the states causing pollution for the damage to the ecological system of the Caspian Sea.<sup>(30)</sup> Caspian States should protection the environment of the Caspian Sea, preserve it and restore<sup>(31)</sup> as well as reassure inexhaustible use of its living resources.<sup>(32)</sup> They shall help each other in carrying out scientific research in ecology, control and use of the living resources of the Caspian Sea.

## CONCLUSIONS

The Caspian negotiations are advanced in comparison with the beginning stage, however their level is still not fully satisfying. Therefore, when talking about the general principles which should rule the Caspian states actions in the region one will stumble across many unresolved issues.

1. Unlike Russia all Caspian states support the idea of demilitarization of the Caspian Sea, claiming, that the Caspian Sea is a demilitarized zone, which shall be reserved for peaceful purposes.

2. Russia, on the contrary, proposes fixing a prohibition of presence of any military forces, if not Caspian states, in the Caspian Sea as well as prohibition of any military activities in the Caspian Sea, neither by any foreign power nor organization. Azerbaijan, Iran and Kazakhstan oppose this proposition. Facing such a big misunderstanding among negotiating states, Russia has proposed to remove this issue of demilitarization from the agenda of the working group of deputy foreign ministers as exceeding its authorities.

3. In terms of regulating the shipping on the Caspian Sea there is still the unresolved issue of innocent passage of warships. Azerbaijan draws its proposal in this respect from the UNCLOS suggesting, that there should be a passage for warships or other government ships flying Caspian states' flags operating for non-commercial purposes through the water area of respective sector/zones of the Caspian Sea. Russia disagrees with this version and calls for passage of warships flying Caspian Sea states flags through zones of national jurisdiction of all states traversing them without entering into harbors neither dropping anchor.

4. Great disagreements provoked a proposal submitted by Kazakhstan, Azerbaijan and Turkmenistan to guarantee the freedom of passage of all ships/ means of transport from the landlocked Caspian states into other seas and World Ocean. Russia refuses these claims stating that rights of the landlocked states are a subject matter for the UNCLOS and not the convention on the status of the Caspian Sea. It permits agreements on that issue of a transit of the ships from the Caspian states on Russia's internal waterways into the World Ocean exclusively on the bilateral level. Azerbaijan and Turkmenistan base their demand on "their rights to use the

Caspian Sea's potentialities. The UNCLOS provides the right of access to and from the sea for land-locked states and calls for treaties concerning terms and modalities for exercising freedom of transit agreed between land-locked States and transit States on bilateral, sub-regional or regional level.

### **FUTURE OF THE DISPUTE ON THE CASPIAN SEA**

The Caucasus region entered the global political scene only recently after dissolution of the Soviet Union. Unfortunately, it not only failed to make a positive contribution to international peace and security, it became a birthplace for many bloody territorial conflicts. The Caspian Sea is an important part of the Caucasus. Until now, however not without difficulties, it succeeded in avoiding escalation of the conflict in its territorial affiliations, even if the consultation on this project has lasted already over a decade. Creation of a new, actual legal status and regime for the Caspian Sea seems to be a very important issue in the international law. Success at this point might prevent the littoral states from making overlapping claims, which would foster mistrust and competition among the coastal states, being at the same time the most important players in the whole Caucasus region. The clarification of the legal affiliation of the Caspian Sea and its eventual division might contribute to instability in the region. It is difficult to assess, what the chances are for the positive resolution of the Caspian conflict, where the great role-play contradictory political and economical interest and in what time frame. We are already seeing how disputes among the littoral states are delaying cooperation not only in extracting the Caspian's mineral resources, but also in constructing gas and oil pipelines across state borders and across the seabed of the Caspian itself – which pipelines have to some extent become additional bargaining chips in the greater game of negotiating extraction rights.

Ideally, the issue of who controls what in the Caspian Sea should be settled and codified in a single multilateral treaty among all five littoral states – all parties agree on this point. That is true, the Caspian coastal state has negotiated for a long time but with such little success and still much

work remains to be done. What may appear more realistic in terms of the multilateral solution, however, are separate multilateral treaties on selected aspects of legal regime of the Caspian. The last time five Caspian states' deputy foreign ministers met in Moscow November 02, 2004 to hold discussions on the draft convention on the legal status of the Caspian Sea, it ended up with expression of hope for the future. The first good example of a successfully settled aspect of the Caspian regime might be a recent Framework Convention for the Protection of the Marine Environment of the Caspian Sea, which meets the basic international legal standards expressed in the main globally recognized judicial instruments.

The Caspian has long been known to contain petrochemical resources in its seabed and great stocks of living resources in its water. In order for those riches to be fully and profitably exploited by any of the five littoral states, it is first necessary to settle the issue of what belongs whom, who controls what, define the new legal status and regime for the Caspian Sea. ◆

#### **LIST OF MAPS:**

1. Map of the Caspian Sea Region
2. Delimitation in the Law of the Sea

**NOTES:**

1. The Treaty of Resht 1729; Golestan Treaty (1813); Turkomanchai Treaty (1828),
2. Treaty of Friendship of 26 February 1921, LNTS, No.268
3. Treaty of Commerce and Navigation of 25 March 1940, LNTS, No. 2530
4. 1940 Treaty of Commerce and Navigation. Art. 9(8)
5. Art 34, Text: United Nations Conference on the Succession of States in respect of treaties-Official Documents-Volume III-Conference Documents, United Nations Publications, Sales No. F.79.V.10.
6. 31 International Legal Materials 1992, s.143-149
7. 31 International Legal Materials 1992, s.143-149
8. UN docs. A/51/59, annex, Jan. 27, 1996, joint statement of Iran and Russia Oct. 30, 1995.
9. Art. 25, United Nation Convention Law of the Treaties United Nations, Treaty Series, vol. 1155, p.331
10. opened for signature Dec.10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994)
11. Art 11 Vienna Convention on the Law of Treaties, Text: United Nations, *Treaty Series*, vol. 1155, p.331.
12. Article 11(II) of the Constitution of the Azerbaijan Republic, Nov. 27, 1995
13. UN docs. A/51/59, annex, Jan. 27, 1996 (joint statement of Iran and Russia Oct. 30, 1995)
14. Art 69, 124 -132 UNCLOS
15. Art. 2-19; 55-75; 76-85; 86-120 UNCLOS
16. ICJ, Advisory Opinion, Reparation for Injuries Suffered in the Service of the United Nations, ICJ Rep. 1949, p. 180
17. Art 18 UNCLOS
18. Art. 12(4) Treaty of 1940, see Footnote no.2
19. Art.15 UNCLOS
20. Art. 6, United Nations, *Treaty Series*, vol. 499, p. 311

21. North Sea Continental Shelf Case, (W. Germany v. Den., W. Germany v. Neth.), 1969 I.C.J. 3

22. Park "Joint development of Mineral Resources in Disputed Waters"; Miyosji, "Japan-South Korea Agreement"; Rhee and MacAulay, "Ocean Boundary Issues in East Asia"; Takayama, "Japan's Foreign Negotiations over Offshore Petroleum Development"; Park, "East Asia and the law of the sea", 127-140

23. Iran has refused to recognize this agreement. See UN doc. A/56/850, March 1, 2002.

24. Art 2.4 Charter of the United Nations

25. Art 2.1 Charter of the United Nations

26. Art 2.4 Charter of the United Nations

27. Reference to the Art. 88 UNCLOS

28. Art 2.3 Charter of the United Nations

29. Reference to the Art. 87 UNCLOS

30. 1940 Treaty of Commerce and Navigation. Art. 12,13

31. 1985 ASEAN Convention, Art. 10(d); 1991 Alps Convention, Art. 2(1); 1992 UN/ECE Transboundary Waters Convention, Art. 2(5)(b); 1992 OSPAR Convention, Art. 2(2)(b); 1992 Baltic Sea Convention, Art. 3(4); 1990 Oil Pollution Preparedness Convention, Preamble; 1992 Industrial Accidents Convention, Preamble

32. United Nations Conference on Environment and Development (UNCED) Agenda 21.Para. 17.46, A/CONF.151/26 (Vol. II) 13 August 1992

33. Stockholm Declaration Principle 13 and 14; 1958 Danube Fishing Convention, Preamble art VIII; 1959 North- East Fisheries Convention, Preamble and Art. V(1)(b); 1982 North Atlantic Salmon Convention, Preamble, 1968 African Conservation Convention, Art. II, 1978 Amazonian Treaty, Art. V