SELECTED INTERNATIONAL LEGAL ASPECTS OF THE PROPOSED TRANS-CASPIAN GAS PIPELINE

FOREWORD

This paper was submitted to the postgraduate symposium on Central Asia, the Caucasus and Eurasia held at the School of Oriental and African Studies (University of London) on the 18th of February 20121.

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INTRODUCTION

The Caspian Sea is a strategically located body of water rich in natural resources and potentially connecting a number of regions, including Europe and Central Asia. The fall of the Soviet Union opened up a wide range of possibilities in different directions, including eastwards to China, southwards to Iran, and westwards to Europe2. Concerning the latter, a number of proposals have been made to build a natural gas pipeline connecting Turkmenistan and Azerbaijan (part of the so-called "Energy Corridor"). However, they have met with a number of objections from Moscow and Tehran. Some of these objections concern the alleged failure of the project to comply with international law, chief among them its laying absent an agreement on maritime borders, and its potential environmental impact.

The aim of the paper is to discuss the first of the two points of contention3, presenting both sides of the debate so that the reader can learn about the different points of view and judge for himself. Having briefly referred to the status and significance of the Caspian Sea in energy, geoeconomics, and geopolitics, in the introduction, the core of

1 Further details and a full list of participants is available from "Second Annual Interdisciplinary Eurasia Research Conference", The Eurasian Studies Society (TESS), available at http://eurasiastudies-society.com/submitted-papers-2011/
2 For an overview of current and proposed pipelines in the Caucasus, and their strategic significance, please see BADALYAN Lusine "Interlinked Energy Supply and Security Challenges in the South Caucasus" Caucasus Analytical Digest, No 33, 12 December 2011, available at http://www.res.ethz.ch/analysis/cad/ . This issue also contains two comprehensive maps of oil and natural gas pipelines in the region.
3 The author is also working on the second one and hopes to present his findings in the near future.
the paper is made up of different sections dealing with the various international legal rules defended by the riparian states and which may feature in a future settlement.

The division of the Caspian Sea is of great significance not only for its resources (fisheries, gas and oil, and transportation routes) and geopolitics, but also because its in many ways unique character and legal history bring all sorts of areas of public

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international law (for example the law of treaties or state succession) into play. Although perhaps making the ongoing negotiations more complex, they provide legal scholars with plenty of opportunities to research these aspects.

The paper ends with some conclusions linking the legal issues examined with wider political, security, and geopolitical matters.

THE PENDING APPORTIONING OF THE CASPIAN SEA

The Caspian Sea is one of the many bodies of water yet to be apportioned among coastal states. Even if it had already been divided, or otherwise assigned, there would of course still be some potential for disagreement among the littoral countries in the field of energy exploration, extraction, and transport. The lack of agreement, however, means that such potential is even wider. Furthermore, it may be difficult to separate in practice the controversy over the legal status of the sea and that over the fate of the proposed Transcaspian Pipeline.

Any examination of this issue must include an outline of the positions of the five countries involved, the two main legal principles on which they rely, and their recent efforts to settle the matter. In addition, it is necessary to look back in time in order to understand the historical evolution of sovereignty over this sea. It is also necessary to distinguish between "legal status" and "legal regime", with the former concerning the division of its waters among the different littoral states plus those not under the sovereignty of any of them, and the latter more widely referring to "the entirety of state rights and obligations regarding the use of this sea area". These two concepts are of course related in many ways, not the least of which is the fact that in negotiations over maritime borders, the future regime may be simultaneously decided, with countries sometimes offering some limited powers to other contenders in exchange for a bigger portion of territorial sea or Exclusive Economic Zone. Another possibility is to agree on a regime first, leaving the precise drawing of borders for a later stage, when repeated attempts to settle them have turned out to be fruitless. This may be done with a variety of purposes in mind, one of them being not to unnecessarily delay the exploitation of already located natural resources, and another as a confidence building measure between the contending parties, in the hope that their cooperation in resource exploitation may lay the necessary foundations for the future resolution of the boundary dispute.

The year 2010 ended on an upbeat tone, with Caspian states announcing their intention to reach some agreement before the end of the following year and to further

institutionalize their discussions, with summits taking place every year. However, 2011 ended without any such deal having been concluded.

In November 2011, a working level meeting was held in Astana, with renewed promises of an early end to the negotiations, accompanied by seemingly little actual progress beyond rhetoric. Furthermore, the traditional differences among the five littoral states soon surfaced.

A BRIEF LOOK AT THE PRE-1991 TREATIES

Prior to the breakdown of the USSR, we find a number of treaties in force between Russia (later the Soviet Union) and Persia (later Iran). They were:

* The 1813 Golestan Treaty, which forbade Persia from deploying any naval force in the Caspian.

* The 1828 Turkmenchai Treaty, confirming such limitations.

* The 1921 Treaty of Friendship between Iran and Russia, which abrogated the previous conventions between these two nations and gave Tehran back the right to deploy a navy, stating in its Art. 1 that "the high contracting parties hereby declare that henceforth both parties will have equal rights to free shipping under their own flags in the Caspian Sea".

* The 1935 Treaty of Establishment, Commerce and Navigation, which reserved "to vessels flying its own flag the right to fish in its coastal waters up to a limit of ten nautical miles". Furthermore, in its Art. 14 it was stated that "there shall, throughout the area of the Caspian Sea, be only vessels belonging to the Union of Soviet Socialist Republics or to Iran and to nationals or commercial and transport organisations of one of the two Contracting Parties, flying the flag of the Union of Soviet Socialist Republics or that of Iran, respectively".

* The 1940 Treaty of Commerce and Navigation, reaffirming the 10-mile fishing zone and containing a number of references to the Caspian as a "Soviet-Iranian sea" in an exchange of letters accompanying it. Furthermore, it prevented nationals of third countries from serving on ships and port facilities in the sea.

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* A 1954 boundary treaty, fixing the land border between the two countries but not referring to any sea boundary in the Caspian. This established the so-called "Astara-Hasankuli line", referring to two villages in Azerbaijan and Turkmenistan, but failed to demarcate the sea\(^\text{11}\).

* The 1964 civil aviation agreement, which resorted to the above imaginary line in order to manage flights in the area\(^\text{12}\).

A first approximation to their contents shows us the following main principles, found in all or most, or finally evolved:

* They exclude the presence of ships belonging to third-parties. More generally, they place the Caspian out of the confines of the concept of the high seas, or international waters, with regard to freedom of navigation. This flows directly from the Soviet concept of "closed sea"\(^\text{13}\), which sought to limit both military and commercial activities to the littoral states of certain bodies of water\(^\text{14}\). Furthermore, Iranian municipal law also described the Caspian as a "closed sea", with a 1955 addition to Art. 2 of the Iranian Law on the Exploration and Exploitation of the Continental Shelf reading "As regards the Caspian Sea, the rules of international law relating to closed seas are applicable"\(^\text{15}\).

* They initially reflect a stronger Russian position, which excludes the possibility of a Persian navy, to later give way to permission for both littoral states to deploy naval forces.

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\(^\text{14}\) The Soviet Union also tried to impose this doctrine on the Baltic and the Black Seas, and this was opposed by the West, which managed to prevent its inclusion in the draft 1958 Geneva Convention on the High Seas. MEHDIYOUN Kamyar, "Ownership of Oil and Gas Resources in the Caspian Sea", American Journal of International Law, 2000, Volume 94, pages 179-189, available at http://www.morganlewis.com/pubs/F029F2DA-64A5-46BD-BB046D6957423655_Publication.pdf. Concerning the Black Sea, the Montreux Convention should be noted though, which while not going so far as the concept of "Closed Sea", places a number of significant restrictions on third-party activities, as noted by a number of observers following the 2008 war between Russia and Georgia.

\(^\text{15}\) "Loi Relative à l’exploration et à l’exploitation du 'Falat Gharef' (Plateau continental de l’Iran)", June 19, 1955, Art. 2 note, Laws and Regulations on the Regime of the Territorial Sea 24, UN Doc. ST/LEG/SER.B/6, UN Sales No. 1957.V.2 (1957)
They reserve a 10-mile fisheries zone for both Russia/USSR and Iran, with the remainder of the sea not apportioned.

They do not refer to the seabed, nor to energy in general. They provide for the joint management of the sea, described as "Soviet-Iranian"

In spite of these treaties, the USSR initiated large-scale oil exploration and extraction in 1949, without seeking Tehran's consent, and according to Iranian commentators the latter tacitly accepted it in order not to antagonize her powerful neighbour. Although one of the reasons for the joint management of the Caspian was the alleged desire to protect its environment, the Soviet oil industry was a major polluter, with estimates of up to 10% of the extracted oil being lost, and this caused some major problems in Iran's shores. Finally, in 1971, a treaty was signed, although the impact of oil extraction remained severe.

Finally, we must also refer to the fact that the USSR Ministry of Oil Industry classified the Soviet sector into different subsectors corresponding to Russia, Azerbaijan, Kazakhstan, and Turkmenistan. Later, when these republics became independent, some attempted to use this division as a basis to defend their territorial claims.

THE POSITION OF THE FIVE LITTORAL STATES

Ever since discussions on a treaty began, in 1991, it became apparent that three countries, Russia, Kazakhstan, and Azerbaijan, supported the so-called principle of "equidistance" or "median line", which basically means, quoting the 1958 Territorial Sea Convention, drawing a "line every point of which 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". The reasons are not difficult to guess, as is common state practice, countries simply defend the legal principle according to which a greater share

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of disputed waters (or certain features of particular interest) corresponds to them. In the case of the Caspian, the unadulterated application of this rule would grant Astana the largest portion of its waters. In addition, the principle would allow the laying of pipelines through two or more national sectors without the need for the consent of the rest, unless modified by the sea's overall legal regime.

**Iran**

On the other hand, Iran does not favour this criteria, which would leave her with a rather small share of Caspian waters, around 13%, a percentage fixed in treaties signed in 1921, 1940 and 1970. Therefore, Tehran first pushed to have the Caspian treated as a condominium, and when she was left alone defending this view following Russia's change of mind, she resorted to putting forward a proposal to have the sea equally divided, with each country holding 20% of its surface. From a legal point of view, such equal division may be based on three principles:

* That of equity, which as discussed in more depth later is of great importance in contemporary international legal practice, and which usually tempers the straight application of the median line rule. It could be employed to give Tehran a greater share of the Caspian.

* The legal regime applicable to lakes\(^{21}\), where applicable rules are found in customary international law, and not the 1982 UNCLOS, as later explained.

* A Condominium, where all coastal states have a stake in the joint management of a given body of water, instead of a portion of its waters. As noted, this was Tehran's (and Moscow's) original position. This is also discussed in more detail in a later section.

Iran believes that in the absence of a multilateral treaty among the five riparian states, the legal regime of the Caspian should derive from the different treaties she concluded with Russia and later the Soviet Union. Since such treaties do not cover the exploitation of mineral resources, due to the inadequate technology at the time, Tehran believes that it can only take place on the basis of the consent of the five countries, pending a final settlement comprising this and other issues\(^{22}\). This position is reinforced by two factors. First of all, the depth and resulting difficulty of extracting oil from the areas of the Caspian closest to Iran, and second, Tehran's attempts to prevent a Western presence in the Caspian\(^{23}\). Both provide an incentive for Iran to try to secure a voice in the use of the resources located in the whole of the sea\(^{24}\), rather than just a portion of its waters. However, this seems to be a losing battle once Russia has left behind her initial position.

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\(^{23}\) Or to trade it for a relaxation of the different economic restrictions and sanctions to which she has been subject for decades.

in favour of a condominium, and as a result in 1998 Tehran officially announced that she was accepting the division of the Caspian into national sectors, stating however that the resulting stakes should be equal in size, that is amounting to 20% of its waters.

Russia

Moscow's initial position was that, in accordance with existing treaties with Tehran, the Caspian should be jointly managed until a final settlement was reached, and that, furthermore, that final settlement should be based on the continued respect for the principle of condominium. Although in the past the USSR had not shied away from taking unilateral decisions, in exploiting offshore fields before the Azeri coast, without consulting Iran, the initial Russian position following the breakdown of the Soviet Union insisted on this. After some internal debates and struggles, Moscow changed tack in 1998, agreeing to divide the seabed following the general principle of median lines.

These struggles pitted the Foreign Ministry, on the one hand, and the Ministry of Fuel of Power plus the oil companies, on the other. The original Russian position was stated in a letter dated 5 October 1994, sent by Russia to the UN secretory general, in which it was said that "The Caspian Sea lacks a natural link to the world’s oceans and seas and is thus a land-locked body of water", as a result of which "The norms of international maritime law, particularly those pertaining to the territorial sea, the exclusive economic zone and the continental shelf, are not applicable to it". Therefore there is "no basis for unilateral claims related to the establishment of zones of this type in the Caspian or for the introduction of elements of their regimes". The letter added that the fact that "The Caspian Sea and its resources are of vital importance to all states bordering it" meant that "all utilization" of the sea and "in particular the development of the mineral resources of the Caspian seabed ... must be the subject of concerted action on the part of all states bordering the Caspian".

Moscow first insisted on the validity of the 1921 and the 1940 treaties with Iran not just on the basis of the general principle of state succession, but also because in 1991 the post-Soviet coastal states had signed the "Alma Ata Declaration", which among other points stated that "With the formation of the Commonwealth of Independent States the USSR ceases to exist. Member states of the Commonwealth guarantee, in accordance

with their constitutional procedures, the fulfilment of international obligations, stemming from the treaties and agreements of the former USSR.”

However, there were later two movements which finally succeeded in tilting Russia's position. On the one hand, at the internal level, the powerful oil companies and their political sponsors at the Ministry of Fuel and Power waged a protracted battle against the Foreign Ministry in a bid not to be left out of interesting projects in the Caspian, including some led by Azerbaijan. On the other, at the external level, this country managed to persuade Russia by offering her a measure of participation in her projects, and more generally by steering a careful course aimed at promoting her economic interests while avoiding a full-blown, frontal challenge, to Moscow. Thus Baku's Caspian policy should be seen as part and parcel of her foreign policy, designed to promote her economic interests and increase her margin of manoeuvre, while approaching the US and Europe and at the same time keeping on good terms with Russia.

In 1998 Moscow declared that she now supported the division of the seabed of the Caspian Sea, while insisting on joint ownership over its waters. In a joint statement with Azerbaijan, Moscow said that the seabed should be divided along equidistant lines modified "on the basis of the principles of fairness and the agreement of the parties.”

We can therefore say that the Russia no longer opposes division in principle, and that she supports the drawing of boundaries in accordance with the equidistance rule, suitably modified, but that she insists on a right of veto over certain aspects of the Caspian, foremost among them the laying of submarine pipelines. This is publicly presented as flowing from concern for the environment, saying that overland pipelines are inherently safer than those proposed, but it is actually a response to the threat that such pipelines may present to Russia's economic interests and geopolitical power. When it comes to defending her interests, in addition to sporting the most powerful military forces in the region, Moscow has another trump card, namely her control over the Volga-Don Canal, which "means its participation to move offshore will be essential if any substantial drilling equipment is to enter the Caspian.”

We should be careful, however, not to oversimplify Russia's position. Moscow is the first to be aware, although this may not be stated in public, that trans-Caspian pipelines cannot probably be held up forever. Therefore, rather than persisting in an all out attempt to block them indefinitely, Moscow may end up trying to co-opt them, so that they do not harm her interests. Recent developments in the Black Sea point at that direction.

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27 In contrast with Georgia, which overestimated both its internal strength with regard to breakaway regions and the degree of external support she could expect in her confrontation with Russia. In examining and comparing Azeri and Georgian foreign policy, the author has benefitted from discussions with his Spring 2012 "International Peace and Security” students at European University (Barcelona Campus).
28 Doc. FBIS-SOV–98–231
Furthermore, Moscow is also looking East, and is aiming at boosting energy exports to the Asia-Pacific region while careful not to become over-reliant on China, hence her plans for a railway and natural gas pipeline across the Korean Peninsula and her support for Japan in the wake of the Fukushima-Daiichi nuclear incident, in the form of increased LNG exports. Russia has some clear interests to defend in the European-Black Sea-Caspian theatre, and has not been shy in doing so, but she must balance this with the need to develop her Fast-Eastern regions without laying them wide open to Chinese influence. Concerning this, an indefinite delay in the building of trans-Caspian pipelines would not serve Russian geopolitical interests if it resulted in Beijing securing all available volumes of gas and oil for export eastward, and while a number of key European countries have been more than willing to accommodate Moscow and are actually taking cooperation with their former foe to unprecedented heights, most notably in the field of defence sales and coproduction arrangements, China is suspected by many to harbour a long-held desire to see Russia become a mere energy and commodity supplier.

Azerbaijan

Baku has consistently been the strongest proponent of the division of the Caspian into national zones, covering both the seabed and the water, and following the principle of equidistance. This has prompted a number of tensions with both Russia and Iran, incidents with the later, and some disputes with Turkmenistan concerning the exact boundaries between the two countries.

In support of their position, the Azeris point out at both state practice and the rules of the law of the sea, both of which favour division rather than condominium. Furthermore, in addition to referring to the law and diplomatic practice in general terms, they stress that in the Caspian itself Iran and the Soviet Union had followed this principle. First of all, in 1970 by drawing a maritime border between themselves, and second, with regard to the USSR, by later subdividing her own resulting sector into four subsectors. Together with Astana, Baku has employed as proof of this a 1970 internal document drafted by the USSR Ministry of Oil Industry. This document apportioned the Soviet sector among Russia, Azerbaijan, Kazakhstan, and Turkmenistan, "on the center line basis accepted in international practice". This division did not, however, imply ownership, since according to Art. 73.5 of the 1977 USSR Constitution "The jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest bodies of state authority and administration, shall cover:" the "determination of the main lines of scientific and technological progress and the general measures for rational exploitation and conservation of natural resources".

31 Between Astar and Husseingholi.
Baku has gone as far as enshrining in her 1995 constitution the principle of sovereignty over a portion of the Caspian, with Art. 11.2 reading "Internal waters of the Azerbaijan Republic, sector of the Caspian Sea (lake) belonging to the Azerbaijan Republic, air space over the Azerbaijan Republic are integral parts of the territory of the Azerbaijan Republic."

By "sovereignty" Azerbaijan may mean exclusive economic rights, or full sovereignty, although the latter would contradict international law as applicable to seas.

There are powerful reasons for the Azeri stance. To begin with, should the Caspian be divided, many of the already known oil and gas deposits would fall within her zone. Furthermore, the waters where they are located happen to be relatively shallow, thus making extraction comparatively easy. Actually Azerbaijan is already actively planning to exploit these resources, and courting foreign partners, but is afraid that continued legal uncertainty may deter international oil majors. We can finally note that Washington has tended to support Baku's stance, and the latter has corresponded by making sure that Tehran is kept out of her plans.

Turkmenistan

The strict application of the equidistance line would somehow also run contrary to the interests of Turkmenistan, which as a result has rejected it, or rather tried to have it modified. Some observers have pointed out that at first Ashgabat accepted the internal Soviet apportioning of the Caspian but that she later claimed that it was just an administrative decision which should not directly determine the drawing of an international border. Others have commented that the country held for some time a "swinging and variable stance between the sectoral division and the Russian stance."

Actually, Azerbaijan and Turkmenistan agree that they should draw a line marking their sectors, and that this should broadly follow a median line. Negotiations are still ongoing, however, and there have been some tensions concerning certain fields located in the disputed are, where their respective claims overlap.

In 1993 Turkmenistan passed a law declaring a 12-mile territorial sea and a "maritime economic zone".

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35 "Turkmenistan, however, does not accept the strict median line and has called for an adjustment that would compensate for the protrusion of the Apsheron Peninsula near Baku. This would give Turkmenistan an additional 30 miles of seabed that includes some of the aforementioned fields" HAGHAYEGHI Mehrdad, "The Coming of Conflict to the Caspian Sea", Problems of Post-Communism, May/June 2003, pages 32-41, available at http://www.mtholyoke.edu/courses/sfjones/242s/restricted/conflict_caspian.pdf, p. 35.
Kazakhstan

Astana’s position is that the Caspian should be divided into national sectors, in accordance with the UNCLOS. Like Azerbaijan, she has strived to provide Russia with a measure of participation in her projects, in order to avoid a full-blown confrontation. Generally speaking, Astana and Moscow have managed their disputes diplomatically, without reaching the degree of tension which has sometimes flared up between Baku and Ashgabat and, above all, Baku and Tehran. Kazakhstan has also made some efforts to accommodate Iran, putting forward compromise solutions combining the principle of partition with that of condominium. An example would be the suggestion, made by President Nazarbayev during his Iranian counterpart Mahmud Ahmadinejad’s April 2009 visit to Kazakhstan, to draw up national sectors extending between 22 to 25 miles from the coast. The two countries have limited oil swap arrangements in place, and Astana has tried to defuse the Iranian nuclear crisis with proposals for a nuclear fuel bank.

Having summarized the positions of the five countries above, we should remember that some observers have noted that the Caspian Sea does not clearly fit into any a priori category, and that therefore only negotiations among these five interested parties may settle its legal status. Actually, even if it could be proved that one of the possible principles should be applied in accordance with the rules of public international law, that would not automatically mean an end to the dispute. The reason is that, states being sovereign, they cannot truly be forced to comply with international law, even when it is clear on a given matter, which, concerning sea boundaries, it rarely is. What international law does provide is a framework for negotiations, as well as arguments to be employed by the contending parties. This is why, regardless of what we have said, it makes sense and it is worthwhile to examine, as this paper does, the rules of public international law applicable in this area, and which have been employed in solving similar territorial disputes.

40 Other, non-energy related, sources of tension come from the presence of a large Azeri minority in Iran, and Baku’s fear of Iranian religious and political interference within her borders. “Nazarbaev offered a third, new proposal: ‘We think it would be more logical to establish sovereign zones, extending 22 to 25 miles from the shore, which would be considered state territory. I think this would be a good compromise.’” MAGAŬIN Edige “Iranian Leader Backs Kazakh Proposal For Nuclear Fuel Bank”, Radio Free Europe, 7 April 2009, available at http://www.rferl.org/content/Iranian_Leader_Backs_Kazakh_Proposal_For_Nuclear_Fuel_Bank/1604048.html
41 "In legal terms, however, the Caspian Sea does not seem to be a sea, a lake or a condominium. Its final legal status needs to be determined by unanimous agreement among all the littoral states.” JANUSZ Barbara, The Caspian Sea. Legal Status and Regime Problems, London, The Royal Institute of International Affairs, August 2005, available at http://www.chathamhouse.org/sites/default/files/public/Research/Russia%20and%20Eurasia/bp0805caspian.pdf, p. 1.
A DEEPER LOOK AT THE MEDIAN LINE PRINCIPLE

We have briefly described the median line principle above, and we will now examine this principle in some more detail. The idea is basically to draw a line equidistant between the baselines drawn by two opposed states, which of course means that difficulties may arise if one of them employs normal baselines, following the contours of the coast, while the other resorts to straight baselines connecting outermost islands, promontories, and rocks.

The median line principle appears in both 1958 conventions as the general rule to be followed, albeit subject to the possibility of modifying the effects from its straight application. Article 12.1 of the Convention on the Territorial Sea and the Contiguous Zone reads "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision." We can thus clearly see how the Convention leaves ample room to modify the median line principle, both to take into account "historic title" and in response to "other special circumstances". This should come as no surprise for at least two reasons. First of all, no rule, no matter how perfect or detailed, can offer an acceptable response to the very different geographical, economic, and historic, circumstances, that one encounters in the wide variety of pending maritime borders delimitations. Second, although states generally welcome the emergence of widely accepted principles of international law, which help them overcome conflicts and provide a measure of protection before the designs of more powerful countries, they are at the same time jealous of their sovereignty and view with suspicion any rule depriving them of any margin of manoeuvre in their dealings with fellow nation-states. It is thus unlikely that an inflexible median line principle, or any other rule for that matter, would have gained the necessary degree of support to be included in a convention, or to become part of customary international law. Furthermore, we must we aware of the fact that international law is not always applied by courts and tribunals. Actually this is rather the exception, with countries often preferring to resort to direct negotiations. While this does not mean that international law is irrelevant, we must understand that it often provides a measure of support to a country's position, that is it may strengthen it, without actually predetermining the outcome of the dispute. Therefore, having a median line principle mentioned and defined in the 1958 conventions, while having their text make it clear that it is subject to a number of different exceptions, fits with the realities.

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of international law and the interests of most states. As we shall see later, this is still the basic position, as evidenced both from state practice and from those cases to have been decided by the International Court of Justice.

Actually, the attempt by some commentators to see the median line principle become the indisputable criteria was soon contested by both the ICJ and arbitration tribunals, since it may lead, in some cases, to inequitable or even unreasonable results. Once more we see the practical aspects of international law rear their head, since judges serving in arbitration tribunals and the ICJ (which in many ways actually resembles an arbitration tribunal, among other reasons because states cannot be forced to appear before it but rather are free to decide whether to leave a dispute in its hands) were obviously reluctant to see their hands tied, not just because of the great variety of circumstances in which a body of water may have to be apportioned, but because states would understandably be less than eager to entrust them to provide a solution to such disputes in the absence of a wide margin to try and seek an outcome mostly acceptable to all the parties involved. In the absence of a superior authority able to impose its will on the parties to a dispute, it is even more important for international law to avoid the mechanistic application of any rule which may lead to patently unjust results, or even to results which may be perceived as such by any party involved. More than ever, the old principle of equity, which we shall discuss in more depth in the coming section, emerges as the key to temper the rigor of any rule to be applied.

Therefore, in many cases it was said that equidistance was just one principle among many, and that it was not part of customary international law. Actually the term "equidistance" was dropped when the 1982 UNCLOS was drafted, with "median line" appearing only in Art. 15, which broadly reproduces Art. 12.1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. French author Prosper Weil went so far as to describe this as a "holy war against equidistance".46

However, we should be careful. In spite of this reaction against attempts to sanctify equidistance and turn it into an iron rule, in its more flexible, equitable, version, it remains the mainstay of state practice, and can often be found in bilateral treaties. What tends to happen in actual diplomatic practice is that countries party to a dispute will start their negotiations with an examination of what a median line would look like, and once each side is clear about the extent to which it would respond to its expectations and interests, it will examine those coastal features and historic factors which may allow it to put forward proposals to modify it. Next, both sides will present the other with its findings, and negotiations will proceed from there, with the result, should an agreement be finally reached, being a modified median line, that is one not strictly following the standard definition seen above.

A similar approach is often followed by judges and arbitrators. They will have consider what a median line would entail, then take into account all other circumstances, which the parties to the dispute will have discussed at length in their briefs, and then strive to find a solution which is just and in accordance with the general principles of the law of the sea. Even if the parties do not explicitly invoke it, judges will take into account this principle, as explained by ICJ Judge Jimenez de Arechaga in his separate opinion in the ICJ Continental shelf case (Tunisia/Libyan Arab Jamahiriya), where he wrote that

"Naturally, in all cases the decision-maker looks at the line of equidistance", even though the court decision begins by simply stating "the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances". Jimenez was careful, however, to remind that "the 1969 Judgment of the Court proclaimed that equidistance was not a binding rule of law but merely one method among others which could lead to an equitable solution in some cases but produce inequitable results in others". That is, the ICJ may have been reluctant in this case to attach too much importance to the median line, but De Arechaga provided some details in his separate opinion on how their decision making really operated, making it clear that the median line was the point of departure "de facto" but that this did not amount to it being the general rule to be applied, only something to be later amended or moderated by "equity".

The 1969 case to which Jimenez referred to, involving the Netherlands, Denmark, and the Federal Republic of Germany, in the view of a commentator "started the demolition of the equidistance principle. Through this case, it ceased to be a principle and became merely one method among others". In that instance, involving the North Sea, the court found the equidistance principle to be inapplicable due to the particular shape and configuration of the coastlines of the parties. A median line would have left Germany with a very small area of the disputed waters, and therefore this would have amounted to an inequitable result. This did not prevent the court from commenting, however, that "It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary, if for instance, the Parties are unable to enter into negotiations, any cartographer can de facto trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree" and that "In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application."

A third ICJ case to which we may briefly refer would be that between the US and Canada in 1984, concerning the delimitation of the continental shelf and fishing zones in the Gulf of Maine. Canada argued that the equidistance principle should be applied in accordance with Article 6 of the 1958 Convention on the Continental Shelf, in force for both States, and asked for the equidistance/special circumstances rule to be applied as a treaty-based rule concerning the delimitation of the continental shelf and as the general rule for the drawing of the fisheries zones. The court was ready to accept the former, but

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rejected the latter. It believed that customary international law did not contain a rule making it mandatory to resort to the median line principle, saying that accepting the Canadian position "would amount to transforming the combined equidistance/special circumstances rule into a rule of general international law, and thus on capable of numerous application, whereas there is no trace in international custom of such transformation having occurred". The Court confirmed the 1969 decision, in the North Sea Case, that equidistance was not part of customary international law, and that therefore it should not be given priority, and applied it only to some of the sectors into which it divided the body of water in dispute for the purposes of apportioning it.

Although in 2002 the ICJ resorted to an unadulterated median line to settle the dispute between Cameroon and Nigeria, we can thus see how international courts have been reluctant to see this tool as an inflexible rule, to be applied in each and every case. Furthermore, the ICJ has made it clear that it is not a principle of customary international law to always resort to equidistance. At the same time however, we see how both courts and governments often resort to it, if not in its pure straight form, at least as a starting point for their negotiations and decisions, respectively. They will tend to first see what the results would be, and from there apply other principles, historical precedents, and exceptions, in order to arrive at a solution broadly acceptable to all the parts in dispute. However, this does not suffice to turn it into a rule of customary international law, since that would require not only extensive state practice but also a subjective element, that is the belief by states that they have a duty to act in this way, what is usually termed "opinion juris" or subjective element. We cannot conclude, just by looking at the large percentage of negotiations where a median-line, in its pure or more often modified form, was employed, that the reason was a feeling by actors that this had to be the case. Furthermore, governments are usually reluctant to imply that they have acted under such compulsion, since that would curtail their margin of manoeuvre in future instances. Thus, to give an example related to the Caspian, the fact that the equidistance principle may have served as the basis for a number of agreements between Russia and other countries such as Norway, or the perpendicular line may have been employed in the treaty with Lithuania, does not mean, neither from a legal nor from a practical point of view, that Moscow should be seen as bound by them.

Here we must stress two factors, both of general application and with particular regard to the Caspian Sea. First of all, not all disputes reach the ICJ or other international courts and arbitration tribunals, actually only a small percentage ever does. This means that, while it is interesting and necessary to look at their decisions and reasoning, as done above, we should not fall into the trap of thinking that they will automatically pre-determine the outcome of any given maritime border conflict. Furthermore, in the case of the Caspian, it is most unlikely that any court will ever be called on to intervene, since most (not to say all) the riparian states are reluctant to bring the matter to a tribunal, and very much prefer to deal with it by a combination of bilateral and multilateral negotiations. Second, in spite of the general principle of international law

that all sovereign states are equal\textsuperscript{52}, they of course enjoy a very different degree of political, military, and economic power, as is clear in any negotiation. As a result, the outcome of any negotiation is not only dependent on the legal principles applicable to the dispute but also on the degree of power enjoyed by the different parties. This does not mean, however, that international law is irrelevant, since it is to some extent also a factor to be taken into account, and one which any government would rather have on its side, rather than opposing its position.

We can thus conclude this section saying that the median line principle is probably called to play an important role in the final settlement of the Caspian, if and when it takes place, for two reasons. First, as seen, because juridical protestations to the contrary, it is actually the starting point in most court cases and inter-state negotiations, albeit often modified when it comes to reaching a decision. Second, because as we shall examine later in the section of this paper devoted to "partial agreements", it has indeed already been applied in the Caspian Sea in the bilateral treaties concluded to date. This has been the case in spite of some warnings about the difficulty to achieve an equitable result given the Caspian's particular geographic circumstances\textsuperscript{53}.

**EQUITY, ANOTHER PRINCIPLE OF GREAT SIGNIFICANCE**

We have already mentioned equity a number of times in our examination of the equidistance principle. This concept constantly pops up in two different ways. First of all, as an instrument to temper the results of the median line approach, making them more just and compatible with the core interests of the parties in dispute, as well as with the special historical, geographic, and economic circumstances of the case at hand. This is often described as the "equidistance-special circumstances method" and fits with the general definition of equity often encountered in other areas of the law, for example Canon Law, which had a strong influence on the development of some European legal systems. Second, as an approach of its own, often labelled the "equitable principles/relevant circumstances rule", where it takes centre stage and becomes the mainstay of the search for a way to apportion a disputed body of water.

In actual practice, these two roles of equity often overlap, and this has even been explicitly recognized in some court decisions. For example, in the 2001 Qatar-Bahrain case, the ICJ said "The Court further notes that the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law and State practice with regard to the delimitation of the continental shelf and

\textsuperscript{52} Which is however subject to some exceptions, such as the presence of permanent members of the UN Security Council and the division of NPT signatories between nuclear weapons and non-nuclear weapons states.

\textsuperscript{53} "Given the Caspian’s unique layout and the decidedly uneven distribution of its hydrocarbon resources, devising a median line that would encompass the principles of equity and proportionality verges on the impossible." Mehrdad, "The Coming of Conflict to the Caspian Sea", *Problems of Post-Communism*, May/June 2003, pages 32-41, available at http://www.mtholyoke.edu/courses/sfjones/242s/restricted/conflict_caspian.pdf, p. 33.
the exclusive economic zone, are closely interrelated. This same case provides a good idea of how the ICJ approaches this kind of dispute, since its decision also states that "For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line."

The concept of equity is actually linked to the original entry of the seabed into the realm of the law of the sea, having been placed by US President Truman at the centrepiece of his "1945 proclamation" on the seabed, where he said "Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

This later inspired the ICJ, which in the already mentioned 1969 North Sea case stated that "delimitation is to be effected by agreement in accordance with equitable principles, and taking into account all the relevant circumstances", an approach later to become doctrine and be confirmed in subsequent cases decided by the ICJ and arbitration tribunals. The 1982 UN Convention on the Law of the Sea also refers to equity with regard to the delimitation of EEZs and the continental shelf, in arts. 74 and 83. Art. 74.1 reads "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution", thus confirming the notion that the end result must be an equitable sharing of natural resources among the parties involved. With regard to the definition of equity, the ICJ said in the 1982 Tunisia-Libya case that "Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. Application of "Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)", International Court of Justice, 16 March 2001, available at http://www.icj-cij.org/docket/files/87/7027.pdf, Par 231, p. 75.


equitable principles is to be distinguished from a decision ex aequo et bono. The Court can take such a decision only on condition that the Parties agree (Art. 38, para. 2, of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice. This is a good summary of the view of equity in International Law, and the distinction between this concept and others, and between it and other notions of the term. It also makes it clear that, rather than a method, equity is an objective.

We can again say, after stressing that only a portion of the maritime border disputes will ever end before an international court or arbitration tribunal, that what we have just seen fits with state practice in diplomatic negotiations. Governments will basically begin by having a look at median lines but this is only a tool, an approximation, and a weapon in their arsenal to make as good a case as possible, which together with their relative strength will finally determine the degree to which the final settlement responds to their wishes and interests.

The conclusion to this section must therefore be just a reinstatement of that of the previous one. Since it is most unlikely that it will be an international court or arbitration tribunal which will finally apportion the Caspian and establish its legal regime, we still need to examine the principle of equity, in its different forms, but having in mind that each of the five littoral states will use it together with others to strengthen its position and try to achieve as good a deal as possible.

We can therefore see how the tempering of the median line approach in view of other circumstances is the most realistic way to describe how most disputes are solved, with the proviso that when not before a court, those circumstances also (although not only) include the relative power of the parties to the dispute, understanding power in a broad sense of the word, to comprise not just naked military power but also economic, political and diplomatic, and soft power. International law, as always, cannot be seen in isolation, but must rather be understood within the confines of the realities of the international system.

It may be tempting to conclude this section by having a look at the use of both equidistance and equity in successful inter-state negotiations to date, such as those leading to the delimitation of the maritime border between Turkey and the Soviet Union

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and later Georgia\textsuperscript{61}, however this would not be too realistic in view of the particular circumstances of the Caspian, by which we mean above all its geopolitical circumstances. We have already noted how the sea has a number of particularities in many domains, including geography and the environment, but above all what stands out is not just the presence of oil and natural gas but its potential role as a conduit for their direct export from Central Asia to Europe, and the resulting potential conflict between some of the littoral states and Russia, and to a lesser extent Iran. This makes it more suitable to be compared with areas like the East-China Sea, with an ongoing territorial dispute fuelled by the discovery of large deposits of natural gas and where wider geopolitical issues are also at stake.

COULD THE CASPIAN SEA BECOME A CONDOMINIUM?

An alternative to partitioning the Caspian Sea would be to treat it as the joint property of all the five riparian states. As we have examined earlier, this was the position originally defended by both Russia and Iran, although the former gradually moved towards partition and the latter was forced to present alternative proposals for fear of being isolated. In this section, we shall briefly look at the concept of condominium\textsuperscript{62} and the possibility of applying it to the Caspian Sea, which is necessary since Russian proposals still include an area in the sea to be jointly owned, beyond the sectors to be allocated to each riparian state.

The 1940 Treaty between the USSR and Iran stated that the Caspian Sea was "regarded by both contracting parties as a Soviet and Iranian Sea"\textsuperscript{63} and this was seen by some observers as an enunciation of the condominium principle, applicable to all the post-Soviet states in accordance with the principle of state succession as provided for in the Vienna Convention on Succession of States in Respect of Treaties (1978). However, as already noted, the three former Central Asian soviet republics soon pressed for a division of the sea into national sectors, and Moscow gradually veered toward that solution.

Furthermore, some observers have noted that the contents of the Russian/Soviet-Iranian treaties notwithstanding, actual state practice by both Moscow and Tehran failed to comply with the condominium principle. Such voices point out at oil exploration and extraction in Soviet Azerbaijan as the foremost evidence of this, since it was launched


and proceeded without any agreement in place with Iran, and with Tehran keeping silent for forty years.\textsuperscript{64}

Other voices have stressed that "there are few examples of shared ownership of seabed resources in international case law and state practice"\textsuperscript{65}, with the ICJ having ruled in favour of this option in the single instance of the Gulf of Fonseca, in the Pacific Ocean, a case where it took into account the difficulties in terms of navigation which partition may entail, a factor not applicable to the Caspian\textsuperscript{66}.

Why is then a partial condominium still a possibility deserving some discussion? We have noted how Russian proposals combine national sectors with an area to be jointly managed, but we have to understand the ultimate reason for this. In the Caspian Sea, two different potential conflicts overlap. First of all, we have a competition to secure as big a share of the oil and natural gas deposits as possible, which of course means that all countries will try to obtain as large a portion of its seabed as possible, and as many as possible of those already identified or suspected fields. This is not the end of the story, however, since we also have, in addition, the issue of shaping the direction of future transport infrastructures, and more generally the geopolitical orientation of the region. It is this second issue at stake which seems to be the basis for Moscow's continued reluctance to a final division of the Caspian into national sectors. That is, although the allocation of certain parts of the sea, and of certain fields, may involve protracted negotiations, there is no reason to believe they should pose an insurmountable obstacle, and as discussed later in this paper a number of bilateral deals have already been reached, thus making it clear that the situation is not hopeless. However, the red line for Moscow seems to be the possibility of laying undersea pipelines bypassing its territory and offering Central Asia the possibility of direct exports to Europe.

Therefore, Russia may insist on, and depending on her relative power may end up obtaining, a settlement whereby some of the waters were subject to joint ownership or at least management. The latter would mean dividing the whole of the sea into national sectors, but establishing a legal regime whereby certain activities were subject to a right of veto by all the coastal states. This could well happen under the cover of environmental protection, albeit the true reason, as noted, would be geopolitical. The three other former Soviet republics do not look forward to this possibility, however, since it would be tantamount to the "Finlandization" of their waters, but current political realities may well bring about this result.

There is a second, defence and security aspect, of the concept of Condominium. As already seen, one of the outstanding principles found in successive Russian (later Soviet) - Iranian treaties was the proviso that no third-parties were to deploy any naval forces in the Caspian. This principle has later been reinstated in successive Caspian summits. However, strictly speaking, if and when the sea was finally allocated to the


\textsuperscript{66} CLAGETT Brice M. "Ownership of Seabed and Subsoil Resources in the Caspian Sea under the Rules of International Law", \textit{Caspian Crossroads Magazine}, Summer/Fall 1995.
five riparian states, they would be free to engage in security and defence cooperation with non-littoral powers, and this may include an invitation to other countries to deploy naval and air forces.

Furthermore, a straight application of the law of the sea would mean, according to its standard interpretation[^67], that waters beyond the 12-mile territorial sea may be traversed by warships of any nationality, in contravention of earlier Russian (Soviet) - Iranian treaties and repeated assurances by coastal states in successive Caspian summits. This is most unlikely to be accepted by Russia, and Iran would of course also object. Turkmenistan has traditionally been keen to stress its non-alignment[^68], while Kazakhstan and Azerbaijan have been careful to deploy a "multivector" diplomacy while mindful of not confronting or offending Russia, with the former a key partner in initiatives such as the Customs Union and its follow-on economic integration institutions. Both Baku and Astana are members of NATO's Partnership for Peace, but they have not tried to join the Atlantic Alliance, and it is unclear to what extent they would be ready to press for the possibility of opening up their waters to foreign navies. It is likely that they would prefer not to insist on this, in order not to unnecessarily provoke Moscow and with the goal of speeding up a settlement paving the way for the exploitation of energy resources and the attraction of much-needed foreign investment. As a result, a final settlement in the Caspian may also well include an agreement, whatever its juridical form[^69], whereby third-party navies would be excluded from its waters. Rather than a result of any debate on the legal nature of the Caspian, this is likely to flow from the relative power of the parties involved, with China, the country which has proved willing and able to break Russia's monopoly on oil and gas export routes from the region unlikely to press the issue for fear of going too far and on account of her many other currently open fronts, including the East-China and South-China Seas.

**THE LEGAL REGIME APPLICABLE TO LAKES**

Another possibility, discussed by some observers, would be treating the Caspian as a lake. In that case, "customary international law concerning border lakes would apply", in lieu of UNCLOS or other rules concerning seas[^70]. As already discussed, however, this would not automatically translate into a given legal regime, but may only be put forward by those riparian states interested in the resulting consequences, as a way to reinforce their negotiating position.

[^67]: Contested by China.
[^68]: It is, for example, the only Central Asian former Soviet republic not to have joined the Shanghai Cooperation Organization.
[^69]: Partial condominium, legal regime applicable to the whole of the sea, ad-hoc security and defence treaty, or even just a "gentlemen's agreement".
The following is a map\textsuperscript{71} comparing a possible division of the Caspian in accordance with the rules governing seas and lakes. It must be stressed that in actual state and international court practice, such rules are rarely applied without amendment, as already explained.

Some voices have referred to the difficulty of classifying the Caspian, noting that it has at different times been described as "a lake, an enclosed sea, a closed sea, an inland sea, a sea, and finally a 'unique body of water'"\textsuperscript{72}. This classification is seen by some as an essential step in determining the applicable body of law, whereas others do not view it as an essential factor in the determination of its legal regime\textsuperscript{73}. Furthermore, UNCLOS does not seem to cover it, since the Caspian is not connected to other seas (other than through man-made canals) and in any case only Russia and Iran have signed this convention\textsuperscript{74}\textsuperscript{75}. Past treaties between Moscow and Tehran do not answer the question.

\textsuperscript{74} "UNCLOS only covers bodies of water that have outlets to other seas or oceans. Even under its provision of "enclosed or semi-enclosed waters," it clearly does not apply to the Caspian, since no narrow outlets connect the sea to other bodies of water." Moreover, none of the newly independent republics bordering the Caspian are signatories to UNCLOS. Russia and Iran joined the treaty in 1997 and 1998, respectively, but from a strictly legal point of view it does not have binding jurisdiction on the current Caspian dispute" HAGHAYEGHI Mehrdad, "The Coming of Conflict to the Caspian Sea", \textit{Problems of Post-Communism}, May/June 2003, pages 32-41, available at http://www.mtholyoke.edu/courses/sfjones/242s/restricted/conflict_caspian.pdf, p. 33.
PARTIAL AGREEMENTS

The fact that the five Caspian littoral states have been unable to decide on the division of the sea does not mean that no agreements have been reached since the demise of the Soviet Union. In addition to bilateral deals between two of the parties in dispute, some multilateral agreements dealing with specific issues or policy areas have been concluded. An example would be the agreement on security cooperation signed at the November 2010 Baku summit, saying that the five countries alone are responsible for security in the sea.

In a way, we could say that a certain "institutionalization" is taking place, with summits being held more regularly, and contacts at all levels becoming more frequent. It must be stressed, though, that this in itself is no guarantee that negotiations will effectively move forward.

In addition, we must note that while Moscow has been keen to negotiate and conclude bilateral agreements, in the absence of a general convention among the five littoral states, Tehran has taken the opposite view. Iran not only has chosen not to enter into such deals, but has announced that it will not recognize any agreements concluded between two or more claimants. On 24 November 2010, Deputy Foreign Minister Mohammad Ahunzade reiterated this view. Some observers are of the opinion that bilateral treaties can help pave the way for a 5-way convention, whereas others believe that they are ambiguous when it comes to drawing maritime borders, and have deepened

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77 "The Caspian security agreement stipulates that only the littoral states are responsible for Caspian security, while security cooperation could be carried out in both bilateral and multilateral formats. The leaders also discussed plans to settle 25 mile national zones in the Caspian Sea and ban fishing sturgeon for five years" BLAGOVA Sergei "Moscow Aims for Caspian Settlement in 2011", Eurasia Daily Monitor, Volume 7, Issue 216, Jamestown Foundation, 03 December 2010, available at http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=37238
the divide between participating and non-participating states, thus fuelling potential conflicts and failing to contribute to a lowering of tensions.\textsuperscript{80}

Iranian opposition has not prevented other states from negotiating bilateral treaties, however, with the following among those having been signed:

- Azerbaijan–Kazakhstan (1997)\textsuperscript{81}.
- Azerbaijan–Kazakhstan (2001), "reaffirming the earlier treaty and calling for both sides to adhere to the borders of their sectors along the median line until a broader multilateral convention is signed"\textsuperscript{82}.
- Kazakhstan–Turkmenistan joint communiqué (2001), "that in principle divided their sectors of the sea along median lines drawn during the Soviet era."\textsuperscript{83}
- Kazakhstan–Russia (1998), dividing the northern part of the Caspian shelf but leaving "navigation, fishing, and environmental matters in common jurisdiction"\textsuperscript{84}.
- Kazakhstan–Russia protocol (2002), agreeing to jointly develop three fields on the median line between the two countries and describing in detail that modified median line\textsuperscript{85}.
- Azerbaijan–Russia (2001), dividing the seabed in accordance with a modified median line, and keeping joint control over navigation\textsuperscript{86}.
- Tripartite Russian–Kazakh–Azerbaijani agreement (2003), dividing "the northern 64% of the Caspian seabed into national sectors based on the length

\textsuperscript{80} "Unfortunately, the bilateral agreements were made by states that are not seriously in dispute with one another, and the language of some of the agreements leaves the position of the median line subject to future reassessment. Thus, the bilateral treaties only postpone the conflict that may emerge as new fields are discovered. In addition, they have raised the level of tension between the participating and non-participating states. Therefore, it is highly unlikely that bilateral agreements will reduce the growing tension, especially in the southern Caspian region" HAGHAYEGHI Mehrdad, "The Coming of Conflict to the Caspian Sea", Problems of Post-Communism, May/June 2003, pages 32-41, available at http://www.mtholyoke.edu/courses/sfjones/242s/restricted/conflict_caspian.pdf, p. 35.


\textsuperscript{85} "In May 2002, President Vladimir Putin of Russia and President Nursultan Nazarbaev of Kazakhstan signed a new protocol on demarcation of the Caspian Sea shelf. The two sides agreed to develop jointly three fields located on the median line between the two countries: Kurmangazy, Khvalynskoe, and Tsentralnoe.26 For the first time, the document stipulated the precise latitude and longitude coordinates of the modified median line between the two countries’ sectors" HAGHAYEGHI Mehrdad, "The Coming of Conflict to the Caspian Sea", Problems of Post-Communism, May/June 2003, pages 32-41, available at http://www.mtholyoke.edu/courses/sfjones/242s/restricted/conflict_caspian.pdf, p. 36.

of their respective coastlines, which gave an 18% share to Azerbaijan, 19% to Russia and 27% to Kazakhstan. Russia made sure in its bilateral and tripartite agreements that the Caspian seabed and subsoil are divided into national sectors along a modified median line principle, while the Sea’s waters are left open to shared use for maritime commerce and fishing.\(^{87}\)

The agreement between Moscow and Baku is of particular interest, since it has paved the way for the joint exploitation of natural gas deposits.

On the other hand, attempts to reach an agreement on fisheries, and more precisely a temporary ban on sturgeon catches, have come to naught, according to some observers at least in part due to the perceived link between this and another environmental matter: the construction of pipelines, where Moscow has consistently put forward the idea that their potential environmental impact makes it necessary for them to proceed only if unanimously approved by the five littoral states.\(^{88}\)

**PRINCIPLES WHERE SOME CONSENSUS MAY BE OBSERVED**

The lack of a comprehensive agreement, and even of the principle to be employed to apportion the sea, does not mean that the five parties are completely at odds in terms of the future legal regime that they envision for the Caspian. An important aspect where they have already signalled their consensus, not just in terms of political and diplomatic discourse but by means of legally binding treaties, is the view that only their naval forces should be present, and more widely, that sovereign rights over the body of water belong to them only. This was reflected in the communiqué issued at the end of the 2007 Tehran summit.\(^{89}\)

There is however some ambiguity in these pronouncements, since the presence or otherwise of non-native naval forces may not always be so easy to ascertain, and may be interpreted differently by the countries involved. Military assistance, in the form of training or supply of second-hand vessels for example, may be seen by some observers as a breach of this undertaking, whereas others may believe it to fall outside of its scope.

Moscow may tolerate, or be forced to put up with, a certain degree of defence cooperation, specially if it fits with some of her security concerns and interests, but it is

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\(^{89}\) "the littoral states agreed in Tehran not to allow third-party ships to enter the Caspian Sea. The joint declaration of the Tehran summit stipulated that only the littoral states have sovereign rights to control the Caspian Sea." BLAGOVSergei "Moscow Aims for Caspian Settlement in 2011", *Eurasia Daily Monitor*, Volume 7, Issue 216, Jamestown Foundation, 03 December 2010, available at http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=37238
unlikely that she will accept a US military presence. Concerning China, the Russian official position is still very much one of mutual support and friendship, but beneath the surface, Russian elites are increasingly worried about Beijing's assertiveness and rearmament, and may also have that power in mind when objecting to a strict partition of the Caspian which allowed riparian states to let third countries deploy their military forces.

A TRANSCASPIAN PIPELINE IN AN UNAPPORTIONED CASPIAN SEA?

Having examined the positions of the different countries involved, the big question is whether a submarine pipeline may proceed on the basis of a bilateral agreement between the two countries directly involved, namely Turkmenistan and Azerbaijan, or whether it would require an agreement among the five littoral states.

At the 18 November 2010 Baku summit, Turkmen leader Gurbanguly Berdimuhamedov told other participants that it sufficed to have an agreement between the nations on whose seabed the pipeline would run. This was rejected by Russian President Medvedev, who issued a warning against "unilateral attempts" to set out the Caspian Sea's legal status before the conclusion of a 5-way convention. It is interesting to note that Moscow's position is in direct contradiction of her views on the Black Sea, where a bilateral agreement with Ankara (bypassing Kiev) in December 2011 is paving the way for the construction of the South Stream natural gas pipeline ⁹⁰.

Basing his arguments on the need to protect the environment, Medvedev reinstated the traditional Russian position that any major energy project should be subject to the approval of the five littoral countries ⁹¹. On the other hand, the Azeris insisted on their position at the 22-23 November 2011 meeting in Astana, where Deputy Foreign Minister Khalaf Khalafov said that his country and Kazakhstan had a "sovereign right" to build a Trans-Caspian pipeline ⁹². Russia, however, is not just stressing the need for a 5-way agreement, but has also issued clear warnings to the European Union to "refrain from meddling", "announced that Moscow and Tehran had similar positions on the legal

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⁹⁰ "Ukraine had barred South Stream from its own Black Sea exclusive economic zone. There is no corridor available between Ukraine's and Turkey's zones; they are directly adjacent to each other. Thus, Russia could only launch this project in Turkey's zone with Turkish consent." SOCOR Vladimir "Turkey Gains Little, Ukraine Has Much To Lose In Ankara Backing Russian South Stream", Eurasia Daily Monitor, Volume 9, Issue 5, Jamestown Foundation, 09 January 2012, available at http://www.jamestown.org/programs/edm/single/?tx_ttnews[tt_news]=38861&cHash=ef6ee4ec8756f3e4889a4db94e9e0f8b


status of the Caspian”, has cautioned to Turkmenistan to be careful, and conducted naval exercises in August 2011 (part of the Tsentr 2011 drills). Some observers noted a few years ago the risk of armed incidents in the Caspian, and this can in no way be ruled out. The 2008 summer war between Russia and Georgia is a reminder of the possibility of force being applied in the region, although countries like Kazakhstan and Azerbaijan have strived to maintain good relations with Moscow and steer a course between the assertion of their national interests and cooperation with Russia, being largely successful to date. We must note also that, while some Caspian states are making an effort to develop some basic naval capabilities, Russia’s Caspian Flotilla and associated units remain by far and large the main military power in this body of water.

As we have seen, Moscow and Tehran defend conflicting principles on the division of the Caspian, but they share a concern not to let the West directly access Central Asian energy. This does not mean that their positions are identical. In the case of Iran, the country has been at loggerheads with Washington and her allies for years, and an aspect of the resulting undeclared war is her exclusion from some energy projects, such as Nabucco. Moscow on the other hand has a more complex relationship with the US and Europe, which involves a degree of competition in the energy field but which is accompanied by cooperation in the same arena, a number of common interests, and a shared apprehension about Chinese expansion.

CONCLUSIONS. THE RESULTING PROSPECTS FOR A CASPIAN SEA CONVENTION

Having examined the positions of the five littoral states and the pre-1991 legal status and regime of the Caspian Sea, we can first of all conclude that prior to the breakup of the Soviet Union, Moscow’s first and foremost concern had been to keep hostile powers out of its waters. This had been done with reference to the doctrine of the "closed sea" and by continued references to a "Soviet-Iranian sea" in treaties and other diplomatic instruments entered into with Tehran.


95 "Most oil and gas industry observers have so far downplayed the prospects for a military conflict over the hydrocarbon resources of the Caspian. However, it is not a question of if but when such a conflict will occur. Although it is unlikely that such a conflict would be protracted and large-scale, even a limited confrontation between two or more littoral states would be enough to slow or halt offshore exploration and cause investor flight. Either of these developments would have major regional economic consequences" HAGHAYEGHI Mehrdad, “The Coming of Conflict to the Caspian Sea”, Problems of Post-Communism, May/June 2003, pages 32-41, available at http://www.mtholyoke.edu/courses/sfjones/242s/restricted/conflict_caspian.pdf, p. 32.
Although the Soviet Union succeeded in preventing the presence of hostile powers in the waters of the Caspian, the other great legal principle solemnly enunciated, and which Tehran is still stressing today, did not fare so well. Although "joint management" and "condominium" were often proclaimed, in actual practice the USSR chose to develop her own oil industry in the area without seeking the permission or cooperation of Iran, and the latter did not officially protest.

Although the break-up of the Soviet Union implied the succession of Russia and the three Central Asian republics bordering the Caspian to the USSR's international obligations, and this was furthermore confirmed by the 1991 Alma Ata Declaration and later instruments, not only was the principle of condominium rather a fiction, but it run counter to state practice, which in the last few decades has tended to stress partition. Some actors stressed this, while Iran insisted on shared use, and Russia gradually shifted her position. At the same time, a number of bilateral treaties were concluded, based on a modified median-line approach.

This has led to the current situation, where all parties, even Iran, have accepted the concept of at least a partial division of the Caspian's seabed into national sectors, plus the idea that the final settlement of its legal regime should be effected by means of a multilateral treaty bringing together all of the five riparian states. On a first examination this would seem to mean that it would only be a matter of time until a workable arrangement was struck, after the usual horse-trading and power play to be found in such cases.

However, in addition to competing for the Caspian's energy resources, the littoral states are also engaged in a struggle for the geopolitical status of the region, and to be more precise for the future shape of undersea pipelines. Although Russia is often said to oppose them, in order to preserve both her economic and geopolitical interests, this view is too simplistic on at least two counts.

First of all, Moscow has been able to strike a working relationship with a number of European capitals, plus Ankara, not just in the energy domain but even in sensitive areas like the defence industry. Energy infrastructures in the Black Sea, where some sort of consensus may be emerging, may point to the way forward, although the possibility of military conflict in the Caspian cannot be ruled out. This would likely take the form of a short limited armed clash designed to send a shot across the bow of countries threatening Russian vital interests.

Second, Russia is also concerned with her energy exports to the Far East, where she would like to increase sales volumes and avoid becoming too dependent on China. This objective, which has seen Moscow put forward ambitious infrastructure proposals (a railway and a natural gas pipeline) for the Korean Peninsula and provide crucial support to Japan following the Fukushima-Daichi energy crisis, means that Russian leaders may have to tread a careful path since indefinitely postponing the opening of direct export outlets from Central Asia to Europe may see the available volumes of oil and natural gas be secured by Beijing, which is already operating a natural gas pipeline from Turkmenistan and an oil pipeline from Kazakhstan.

From a legal point of view, it is extremely unlikely that any court or arbitration tribunal will ever be called upon to decide the fate of the Caspian, and the legal rules applicable
to this body of water are not completely clear, both due to doubts about its precise nature and because only two littoral states have signed the UNCLOS. This does not mean that the legal debate on its future status and regime is irrelevant, since juridical arguments are a component of any negotiator's arsenal, but it does mean that the final shape of the sea will derive not only from them but first and foremost from the realities of power politics. With this regard, what we may likely see is a division of the Caspian seabed in national zones, with boundaries drawn up in accordance with the modified median-line principle, plus, at least for some years, some sort of, de jure or de informal, veto power recognized in Moscow's favour.

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