

A Spider's Web: Jurisdictional Problems in the Caspian Sea

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Introduction

The Caspian Sea has received considerable attention over the past four years, both because of its potential as a source of oil and gas in the next century for world energy markets, and because of the environmental consequences of such development for this ecologically delicate water body. With the break up of the former Soviet Union, jurisdiction over the sea has become an important issue for all the littoral states. Control over offshore resources is one of the most important issues affecting relations between the states, and therefore the future development of both Central Asia and Transcaucasia.

Though many lawyers and other commentators have examined the means by which the Caspian Sea might be divided, no clear plan of action has emerged to organise its proper management. Uncertainty over the legal status of the Caspian is one reason why the economic potential of the littoral states – in particular the newly independent hydrocarbon rich states (Azerbaijan, Kazakhstan and Turkmenistan) – has not been realised.

The Caspian Sea is an enclosed body of water, roughly 700 miles from north to south and 250 miles across, lying directly between the states of Central Asia and the Transcaucasus. Large proven reserves of oil and gas lie off the coast of Azerbaijan, and recent exploration suggests possible reserves in part of the Pricaspian shield covering the north east of the Caspian, off the coast of Kazakhstan. In addition there are important living resources in the Caspian. It is a salt water body, connected to the Black Sea by the Volga and Don rivers, the artificial Volga – Don canal (all passing through Russian territory), and the Sea of Azov, a branch of the Black Sea.

Prior to the break up of the Soviet Union, the management of the Caspian Sea had been regulated by treaties signed by the governments of Iran and the Russian Socialist Federal Soviet Republic in 1921¹ and Iran and the Soviet Union in 1935² and 1940³. The Caspian Sea was regarded by the two governments as “*a Soviet and Iranian sea*”⁴ with control vested in the two governments. No maritime

boundary was ever delimited either between the two states, or between the republics of the Soviet Union. None of the agreements refer specifically to the division between the two states of rights to exploit resources in the continental shelf of the Caspian, such as oil or gas reserves. Though by the 1935 and 1940 treaties, each state reserved, to vessels flying its own flag, the right to fish in its coastal waters up to a limit of ten nautical miles⁵, this was the only geographical zone defined in the Caspian Sea to control the use of resources. This ten nautical mile zone was not defined as a fisheries zone or territorial sea, unlike zones off coastlines in seas other than the Caspian Sea where the two states recognised each other's territorial waters⁶.

The BP Agreement

On 20 September 1994, following almost three years of negotiations, the government of Azerbaijan and a western consortium of oil companies led by BP signed an agreement at Baku to develop two major proven offshore oil and gas fields in the Caspian Sea, the Azeri and Chirag fields, and the deep water section of a third, the Gunashli field, in conjunction with Azerbaijan State Oil Company (SOCAR) and the Russian oil company Lukoil. These fields extend over 70 miles off the coast of Azerbaijan east of Baku, and the combined reserves are reported to exceed 500 million tonnes.

This agreement, together with a meeting between officials from the littoral states held in October 1993 in Astrakhan, have highlighted the fact that there is an urgent need to clarify the legal status of the Caspian; and, to the extent necessary, to establish a regime for its management that recognises the fact that there are now five littoral states. The 1921–1940 agreements signed between the Soviet Union and Iran regarding the Caspian Sea ignore the realities of the present political situation in the region following the break up of the Soviet Union. Moreover, some of their provisions seem to reflect echoes of a colonialist past which Russia today would surely not wish to revive.⁷ Thus, although the agreements continue in force between Russia and Iran, they are of little relevance to the region's future.

The Legal Issues

At first sight, there seem to be two different ways of considering the Caspian Sea. It might be treated as an enclosed lake under the exclusive sovereignty of the riparian states. Alternatively, it might be treated as an international sea between independent states with jurisdiction divided according to principles outlined in the 1958 and 1982 Law of the Sea Conventions. However, neither treatment properly resolves the critical question of how the Caspian's resources are to be allocated, or whether states are to develop these separately or under some form of condominium or joint regime.

Lakes and land-locked seas surrounded by the territories of two or more states are generally considered to be part of the territories of the littoral states. Examples of such lakes include the Great Lakes, divided between the United States and Canada, and Lake Malawi, divided between Malawi, Mozambique and Tanzania. The division of lakes varies: a boundary may follow a median line, a straight line between opposite shores, or may follow one of the shores giving control of the water to only one of the littoral states. Special arrangements may be agreed between the riparian states to improve the management of such international lakes or enclosed seas, for example covering navigation or pollution.

If the Caspian Sea were treated as an inland lake, the littoral states would have to divide the whole area between them, each sector being under the absolute sovereignty of the relevant coastal state, with no rights of innocent passage as provided for in a sea by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Russia might claim jurisdiction as a successor state of the Soviet Union over all the Caspian 'lake', based on the provisions of its Soviet-era agreements signed with Iran. Such a claim would certainly not be acceptable to the other littoral states, and is in any event inconsistent with Russia's apparent acceptance of Kazakhstan's appropriation of its portion of the Caspian seabed for exclusive exploration by the *Kazakhstankaspishelf* consortium of seven companies, again involving BP.

Alternatively, the Caspian might be treated as a sea on the basis that:

"...when the shores of a land-locked sea belong to two or more countries, and there is no agreement to the contrary among them fixing the limits of their respective boundaries, the sovereignty of each must be

*respected in the zone of its territorial waters, and the legal regime in the central part is then similar to that on the high seas."*⁸

This suggests that the various jurisdictional zones of coastal states described in UNCLOS might apply to a sea such as the Caspian, with littoral states having full jurisdiction over their territorial waters out to 12 nautical miles off the coast, the right to assert a contiguous zone up to 24 nautical miles and distinct rights within an Exclusive Economic Zone and the Continental Shelf beyond 12 miles.⁹ Boundaries between different national sectors would have to be delimited according to applicable international principles, suggesting a set of boundary lines extending out from the coast, and other lines running parallel to the coast at varying distances from it – a spider's web of boundary lines. But those principles are far from clear, whatever the conventional legal position governing the respective legal relations between the five littoral states.

Jurisdiction over inland waters, whether saline or freshwater, were considered by the International Law Commission when commenting on Article 26 of the 1956 draft Convention on the Law of the Sea, Part II (the High Seas), on internal waters of the state.¹⁰ The ILC's commentary stated that:

*"Some large stretches of water, entirely surrounded by dry land, are known as 'lakes', others as 'seas'. The latter constitute internal seas, to which the regime of the high seas is not applicable. Where such stretches of water communicate with the high seas by a strait or arm of the sea, they are considered as 'internal seas' if the coasts, including those of the waterway giving access to the high seas, belong to a single State. If that is not the case, they are considered as high seas. These rules may, however, be modified for historical reasons or by international agreement."*¹¹

Other commentators have gone rather further than the ILC regarding salt water seas, arguing that a salt-water body such as the Caspian is part of the open sea, provided it is not isolated from, but coherent with, the general body of salt-water extending over the globe, and provided that the salt-water approach to it is navigable and open to vessels of all nations. The test in this case is *"what is the status of the navigable connection between the Caspian and the open seas (the Black Sea and Mediterranean)?"* The enclosure of a sea by the land of one and the same State does not matter, provided a navigable connection of salt water, open

to vessels of all nations, exists between such sea and the general body of salt water, even if that navigable connection itself is part of the territory of one or more littoral States.¹²

Thus, the Aral Sea in Central Asia is not part of the open sea, but the Sea of Marmara between the Bosphorus and the Dardanelles is part of the open sea, even though it falls within the territorial waters of Turkey. Similarly, the Sea of Azov between Russian territory and the Crimean peninsula (part of Ukraine) can be considered part of the open sea since it is connected to the Black Sea by a narrow strait. The Caspian might fail this test despite being a salt-water body, surrounded by more than one state, and connected by a navigable channel, the Don and Volga rivers connecting the Caspian to the Black Sea are *not* salt-water bodies. In order to resolve a somewhat academic question as to whether the Caspian Sea is an enclosed 'sea' or 'lake', it seems that the status of the Don-Volga link between the Caspian Sea and the Sea of Azov would need to be resolved.

The Black Sea is an example of an enclosed sea which has had its status altered by an increase in the number of littoral states similar to that of the Caspian Sea. Prior to the Treaty of Kutschuk-Kainardji in 1774, the Black Sea was entirely surrounded by Ottoman territory and closed to foreign vessels. It was in effect an extension of Turkish territory, similar to a conception of the Caspian Sea as a *mare nullius*¹³, reserved for the Soviet Union and Iran in their 1940 arrangements.

When Russia, Rumania and Bulgaria became littoral states, the Black Sea was opened to foreign shipping as a result of the Treaty of Paris in 1856. The Montreux Convention of 1936 declared the Black Sea to be an open sea, and this convention still regulates the use of the Bosphorus, Dardanelles and the Black Sea. The Convention does not address the delimitation of the Black Sea for other purposes. It is a sea subject a co-operative international regime established for certain purposes, allowing littoral states to claim territorial waters and other sovereign rights, rather than full sovereignty across the whole of maritime zone.

In practical terms, the littoral states will have to go through a similar exercise, and are likely to arrive at similar conclusions irrespective of whether the Caspian is considered a sea or a lake, and much of the debate is sterile. It is perhaps an unfortunate reflection of their present uncertainty that these once-close states should now find it difficult to see beyond their superficial differences, to appreciate

that they continue to share a mutual interest in economic transformation and development which would not threaten their independence in other spheres.

The real need in the Caspian Sea is to decide what sort of regime to create, so that the resources of the region can be properly developed with minimum friction between the states. There seems little reason to change the *status quo* agreed with Iran in 1921 and 1940, although some modification would no doubt be appropriate in the light of what the other four states can now agree. Russia, as successor to the rights and obligations of the Soviet Union, remains answerable to Iran for those agreements; and none of the other states should act so as to conflict with the provisions of the agreements.

However, Russia's succession to the Soviet-Iran agreements does not entitle it to control over the maritime areas of the other former Soviet states, including the bulk of the Caspian Sea. Each newly independent littoral state has a distinct interest in the Caspian Sea; and the challenge now is to reconcile those interests so that development can take place to the benefit of the peoples of the entire region. In effect the sterile debate over sovereignty deflects attention from the important work of developing regimes for managing the different uses made of the Caspian.

The obvious candidates for some form of joint regime are: navigation, environmental management, conservation of fish stocks and positioning of permanent installations and pipelines. Equally obvious are those areas where national interests will prevail, in particular over the resources of the seabed and subsoil. For the former, the content of the joint regime has to be agreed, and the composition of the body suitable to operate and maintain that regime decided. It is for consideration that an international organisation independent of its members would be the best mechanism, because part, at least, of its functions are such that no one state could undertake them.

For the latter, the primary need is to delimit an area over which it can control development, without compromising the sovereignty claims of different states. An international commission established between the littoral states might best ensure the consistency of treatment between the various parties. This would need to take into account the extraordinary geographical feature at the northern end of the Caspian whereby the coast is retreating at a significant annual rate as a result of major engineering works further south which took place

decades ago. It is perhaps the lessons that should be learned from that well-intentioned but damaging episode which most clearly points to the urgency for active collaboration between all five littoral states.

Clearly, political relations between the various states will have a fundamental influence on whether such agreement is possible. However, it should not be rejected simply because there appears to be little agreement between the littoral states at present. The recent announcement of agreement between the Argentine and British governments over the exploitation of mineral resources off the Falkland Islands (see documents section), over which they fought a bitter war only 13 years ago, shows that states can reach such practical solutions, even in the face of possibly irreconcilable views regarding sovereignty. It is to such models that the littoral states of the Caspian should look.

Notes

- ¹ 1922 *League of Nations Treaty Series* (LNTS), pp. 401–413. Treaty of Friendship between Persia and the Russian Socialist Federal Soviet Republic, signed at Moscow, 26 February 1921.
- ² 1937 LNTS, pp. 301–333. Treaty of Establishment, Commerce and Navigation between Iran and the Union of Soviet Socialist Republics, signed at Tehran, 27 August 1935. Ratifications exchanged at Moscow, 8 June 1936.
- ³ 144 *British and Foreign State Papers* (BFSP), p.419. Treaty of Commerce and Navigation between Iran and the Soviet Union with Exchange Notes, signed at Tehran, 25 March 1940.
- ⁴ 1937 LNTS pp.330 – 331. Letter from A.S. Tchernykh, Soviet Ambassador in Tehran, to S.B. Kazemi, Iranian Foreign Minister, dated 27 August 1935 and reply. The position was reiterated in the treaty and exchange of notes signed on 25 March 1940. The exchange of notes dated 25 March 1940 included a statement that the two Governments would: “...take the necessary measures to ensure that nationals of a third country employed on vessels belonging to [the Soviet Union and Iran] or in ports situated on the Caspian Sea shall not take advantage of their employment or presence in those vessels or harbours for purposes outside the limits of the professional duties with which they are charged.” (144 BFSP, at p.431).
- ⁵ Article XV(4).
- ⁶ Article XV(5) of the 1935 Treaty, repeated in Article 12(5) of the 1940 Treaty.
- ⁷ The exchange of notes of 25 March 1940 excluding third state nationals from any influence in the region is reminiscent of the so-called ‘Exclusive

Agreements’ of the late 19th Century, made between the British government of India and numerous Arabian and East African rulers, whereby the latter agreed not to allow foreigners to acquire interests in their respective territories (see Aitchison, *Treaties, Engagements and Sanads*, 5th ed., volumes 1 – 14, (Calcutta, 1931)).

- ⁸ Colombos, *The International Law of the Sea*, p.191, (1967).
- ⁹ Butler argues that there are “no territorial waters in the Caspian, only a 10-mile fishing zone”; while acknowledging that internal Soviet documents speak of the Caspian as other than an enclosed lake, and that a 1966 Soviet international law manual speaks of the resources of the “continental shelf” belonging to “each Party [USSR and Iran] within the limits of its respective area of sea” (Butler, *The Soviet Union and the Law of the Sea*, (1971) pp.103 & 136).
- ¹⁰ Article 26(2) of the draft convention was incorporated into Article 5(1) of the 1958 Convention on the Territorial Sea and Contiguous Zone.
- ¹¹ *Report of the International Law Commission covering the work of its eight session, 23 April – 4 July 1956*, A/3159, pp.23–24; II *Yearbook of the International Law Commission 1956*, pp.277–278.
- ¹² *Oppenheim's International Law*, 8th ed. (ed. H Lauterpacht), Volume I – Peace, p.587.
- ¹³ See Verzijl, 3, *International Law in Historical Perspective*, p.587.

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