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LEGAL STATUS OF CASPIAN SEA



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1. Introduction

The Caspian Sea is the biggest enclosed body of water on Earth, having an even larger area than that of the American Great Lakes or that of Lake Victoria in East Africa. The length of the Caspian Sea is 1204 KM and total surface area is 436.000 KM², to compare with total surface area of Great lakes—244.000 KM²; coastline is 6000 KM; and depth varies from 200 m in North to 700 m in Central and 1000 m in South parts.

But the main factor determining the importance of the Caspian Sea is the large deposits of oil and gas as well as rich fisheries.

Taking into account the above mentioned, the question *Is the Caspian Sea a Lake or a Sea* gains new importance and still there is no consensus.

As per information available through various sources, unspecified supplies of oil are 15.31 milliard barrel, i.e. 2.7% of world supplies and regarding the natural gas—230-260 trillion cubic feet—7% of world supplies and 80% of the world's sturgeon.

Forecast regarding the oil varies from 20 to 200 milliard barrel.

At present there are 5 the Caspian littoral countries: Kazakhstan—30.8%, Turkmenistan—16.8%, Iran—18.7%. Azerbaijan—15.2 % and Russian Federation—18.5%.

The status of the Caspian Sea has become the subject of legal researches of various authors not only of littoral nations but worldwide. There are plenty of essays, monographs and even textbooks dealing with this issue. Dozens of international conferences have been called from 1991 by littoral states with active participation of others. But notwithstanding all endeavors, the achievements in determination of legal status of Caspian Sea are still very little.

The present Article is a modest attempt to discuss the problems of legal status of the Caspian Sea from the international maritime law point of view. The paper bears more informative and introductory character rather than comprehensive scientific work.

Authors don't raise the question of delimitation as well as military use of the Caspian Sea, which is indeed very important and for long time was determinative issue in the status of the Caspian Sea. Neither the issue of condominium is considered in the present paper.

2. History

The Caspian Sea has been well known since very ancient times. Some historians believed that the Caspian Sea was connected to Black Sea long ago.

Aristotle, Herodotus etc in their works described the Caspian Sea as closed basin or ocean bay. Strabo described the Caspian Sea as the basin stretched on parallel from West to East.

In different periods the Caspian Sea has been called various names, almost 40 in total. The names originated either from ethnic names of peoples living on the coast or from names of cities surrounding the coast.

The current and best known name of the Caspian Sea derives from the name of the tribe "Caspian" once lived on the west coast.

After the spread of Islam and expansions of Arab Caliphate both Arab warriors and historians expressed their interest in the Caspian Sea.

In the 8th century Caspian Sea was conquered by Abbasids and till 1722 the power of Persia remained invincible in the region.

There are several Persian names of the Caspian Sea used in different times, e.g. Daria-E-Khazar (Khazarian Sea), Daria-E-Mazandari (Mazandari Sea), Khorezm Sea, Gurgjan Sea etc.

In the 16th century during the period of ruling of Safavids the commercial shipping in the Caspian Sea was well developed involving Genoese and lately British merchants.

In the medieval period Russians also expressed their interest in the Caspian Sea via conducting military campaigns in the region from time to time. Prince

Igor's invasion is assumed as the most famous invasion of Russians in the region prior to Mongolians. The Russians renewed their military campaigns in the Caspian Sea littoral territories only after the collapse of Mongolian ruling.

First significant attempt of conquering the Caspian Sea littoral territories has been made by Ivan the Terrible in 1552-1556 during the successful military campaigns against Kazan and Astrakhan.

After Romanovs took Russian throne the interest in Caspian Sea only increased. The first Russian warship "Orel" was built in 1667 under the Order of Tsar Aleksey Michailovich.

Stepan Razin, whose fleet defeated Persian fleet in the Caspian Sea, played his role in future occupation of the Caspian Sea by Russian Empire.

The Persian hegemony on the Caspian Sea ended by the campaigns of Peter the Great in 1727. The same year construction of the first military port was launched in Astrakhan.

It's true that in 1742 Nadir Shah started building of the first Persian warship in the Caspian Sea. In cooperation with Englishman John Elliot he laid the foundation of a great navy, but his death ended all his ambitious plans.

Although History of the Caspian Sea goes back in ancient times, the first intentional accords creating basis for definition of legal status of the Caspian Sea appeared in the 18th century after Russian invasion, namely, ST. Petersburg (1723), Resht (1732) and Ganja (1735) Tractates.

Notwithstanding its content, the Treaty of Resht could not stop Russian expansion towards the Caspian Sea and starting from 1784 (when Makhachkala was captured) to 1828 whole North Azerbaijan fell under Russian ruling (Baku was captured in 1806). The existing situation was legally wrapped in Treaty of Turkmenchay of 1828, pursuant to which Persia lost the right to hold navy in the Caspian Sea, however still kept commercial fleet.

In the second half of 19th century Turkmenistan was also conquered.

In parallel with Russia the Great Britain, France and Germany tried to obtain influence over the the Caspian Sea or at least on some part of the region. In 1870s the importance of the Caspian Sea significantly increased after discovery of reach oil deposits over the West Coast.

The discussions on the legal status of the Caspian Sea as mentioned supra commenced in the 18th century, when Russia, Persia and the Great Britain fought for the influence over the region. But it is widely recognized that since the Great Britain has been involved in the process, later than Russian-Persian confrontation started, the basis for international status of the Caspian Sea was established under St. Petersburg and Resht Treaties.

Resht Treaty granted ownership rights to Russia on some parts of the Caspian Sea previously belonging to Persia. Russia and Persia retained rights to the freedom of commerce and navigation throughout the Caspian Sea as well as on the rivers Kura and Araks; however, only Russian warships were entitled to navigate in the Caspian Sea both in peace and war times.

Turkmenchay Peace Treaty strengthened Russia's presence in the Caspian Sea. Persia had the right of merchant shipping only.

As some authors claim, the above mentioned treaties created basis for determination of the legal status of the Caspian Sea—both ownership (territorial) and navigational rights for long time till the end of the Soviet period.

Next major step in the history of the Caspian Sea was Treaty on Peace and Friendship of 1921. This was beginning of a new era starting from the collapse of Russian Empire and establishing of the RSFR and later on the USSR. The Treaty signed on 26 February 1921 replaced all previous agreements between the parties on the Caspian Sea.

The interesting point is that all issues relating to the Caspian Sea were determined but the issue of borders.

Both Parties obtained equal rights on navigation and fishing, but no third party was allowed in the Sea. Even crew members had to be only nationals of littoral states.

There are plenty of works dedicated to 1921 Treaty, however, as rightly pointed out by some authors, until recent times they never went beyond facade analyzes of the treaty, which in reality established the closed regime over the Caspian Sea divided between the RFSR and Persia (later Iran) with supremacy of Russia.

The very fact that the Russian Federation as legal Successor of the former USSR, and Islamic republic of Iran—successor of Persia, are actively keep the provisions of 1921 Treaty makes clear that other involved or interested parties (i.e. non littoral states) shall draw more attention to the legal content of the document.

The RSFR used the Treaty to hold and guaranty its influence over the Caspian Sea and Persia—to successfully maneuver between the USSR and the Great Britain and keep its sovereignty and independence as well as territorial integrity.

Any interest of non Caspian states was ignored and they were prohibited to have any access to the Caspian Sea and its resources both living and non-living.

In 1927 the agreement on exploitation of living resources of the Caspian Sea was executed between the USSR and Iran, according to which joint Soviet-Iranian fishing company was created to operate within the Iranian part of the Caspian Sea. The Agreement was terminated in 1953.

The spirit of Treaty of 1921 was continued in the Treaty on Commerce and Navigation of 1940, i.e. the Caspian Sea was again declared as only Soviet and Iranian Sea, for exclusive use of littoral states.

This situation has been kept unchanged till the collapse of the Soviet Union.

3. Major international summits on the status of the Caspian Sea

First international Conference raising the question of the status of the Caspian Sea by all littoral states was Teheran Conference of 1992. The Conference resulted in Joint Communiqué of 4th October 1992. All five littoral states agreed on determination of fields of joint activities, protection of natural resources of the Caspian Sea, conservation of biodiversity as well as determination of navigation lines.

Next meeting was held in Astrakhan (14/10/1993) and the year was closed by Ashkhabad Conference (8-10 December), where the question on establishment of international organization on the Caspian Sea was again unsuccessfully raised.

A very important Conference was held on 11-12 October in Moscow. The main aim of the Conference was the discussion of the proposals of Azerbaijan, Kazakhstan and the Russian Federation on the status of the Caspian Sea. During the conference drafts of the respective conventions were represented. According to the Azerbaijan's approach the Caspian Sea had to be defined as Border lake delimited by respective sectors. Kazakhstan considered the Caspian Sea as "enclosed sea" as per UNCLOS Part IX. The latter proposal was strongly opposed by the Russian Federation and Iran. Finally, both Azerbaijan and Kazakh versions were rejected.

On the other hand Azerbaijan and Kazakhstan opposed the proposal of the Russian Federation which factually led to the recognition of condominium of the Caspian Sea.

A new stage of cooperation between littoral countries and other interested states was commenced in 1995.

On Almaty Conference of 1995 five littoral states agreed on creation of permanent mechanism of negotiations (working groups) on the legal status of the Caspian Sea. The first working group met in Teheran and the next one met in Almaty where the major principles of cooperation of littoral states were

declared, e.g. respect of sovereignty and territorial integrity of each other, declaration of the Caspian Sea as demilitarized zone and using it exclusively for peaceful purposes, conservation of living resources, liability for environmental pollution etc.

Notwithstanding the number of Conferences held within 1995-96 the parties could not agree on the legal status of Caspian Sea. Moreover, shift from multilateral to bilateral negotiations became obvious.

From 1997 the conferences on the status of the Caspian Sea in terms of participation has been widened and become more and more universal.

Next Conference of littoral states on immediate elaboration and adoption of international agreement on the legal status of Caspian Sea was held in Astrakhan in 24-27 June 1997.

In 1998 the Russian Federation and Kazakhstan signed the agreement on delimitation of the Caspian Sea bed between two countries. This was a clear signal that bilateral negotiations of adjacent states become more preferable rather than multilateral negotiations, where the agreement on single decision was not easily envisaged.

The practice was followed by signing of delimitation document between Azerbaijan and the Russian Federation in 2001.

During 2000-2002 Working Group conducted meetings on regular basis and in January 2002 the Communiqué was signed on elaboration of the convention on the legal status of the Caspian Sea. This indeed was a huge step forward.

In April of 2002 heads of five littoral states: Azerbaijan, the Russian Federation, Kazakhstan, Turkmenistan and Iran met in Ashkhabad on the Summit dedicated to the determination of the new legal status of the Caspian Sea. The Summit did not meet the expectations and Parties could not find a single position. Joint position of Azerbaijan, Kazakhstan and the Russian Federation was strongly opposed by Iran. Turkmenistan although shared

the general idea on division of the seabed of the Caspian Sea on national sectors, still was reluctant to support it fully. Iranian position was unchangeable either to divide the Caspian Sea on five equal parts (20% to each littoral state) or apply the principle of Condominium agreed on 1921 Treaty.

Unfortunately the first Summit ended without any results. But everybody agreed that a good start has been taken.

In May 2003 in Almaty during the 9th meeting of the working Group tripartial agreement between Azerbaijan, the Russian Federation and Kazakhstan was signed on the delimitation of the Caspian Sea between the above mentioned countries. According to this Agreement the Russian Federation gained 19%, Kazakhstan—29% and Azerbaijan 18% of the Caspian Sea bed. Iran declared that the Agreement contradicted to the international law.

Although during the next meeting of the Working group some drafting progress has been noticed (some articles were agreed, mainly of environmental nature), no Convention on the Legal Status of the Caspian Sea has been signed yet.

Next Summit was held in Teheran on the 16th October of 2007. Although declared purpose of the Summit was Convention on the Legal Status of the Caspian Sea, main focus was made on the security issues. The position of the Russian Federation to exclude participation of foreign military forces in the Caspian Sea reflected in joint Declaration.

The third Summit was held in Baku on the 18th November of 2010. Five heads of states issued joint Declaration reaffirming intention to sign a Convention on the Legal Status of the Caspian Sea.

Although parties were optimistic on signing the convention in a year time, still no document has been signed.

During the last meeting of the Working Group in Ashkhabad the progress in drafting was underlined and parties expressed readiness to sign the convention in 2013.

4. Sea or Lake?

The scientific debates on the status of the Caspian Sea go back to 1813, when first works on this issue were published. One of the first who gave legal characteristics to the Caspian Sea was a famous Russian lawyer Feodor Martens. He claimed that *legal status of the sea surrounded by territories of a single state and not having any connection to the ocean is completely different rather than one of the open seas. The above mentioned is considered 'closed sea' and falls under the full sovereignty of coastal states. Based on this conclusion, the Caspian Sea, although it belongs to both Russia and Persia, shall be counted as Russian Sea.*

Although 1921 Treaty determined or at least tried to determine the international status of the Caspian Sea nothing was told precisely about the legal status of the seabed and surface waters.

The legal status of the Caspian Sea largely depends on whether the Caspian Sea is a lake or sea in terms of both geography and law.

It is not a surprise that littoral states still can not agree on a single approach to this question. Besides, there is no consensus on this issue at a global level either.

Although according to the original and dominant vision, the Caspian Sea is a lake in terms of geography and hence legally, raising number of authors try to prove the contrary. And among others those of littoral states, say Kazakhstan.

The issue can be more important for non-littoral states, since interest in the Caspian Sea resources is not limited by the region alone. So the right of the third states on access to the Caspian Sea shall be totally different if the Caspian Sea is a sea and not lake. In former case rules of international maritime law embodied in LOSC may apply and the various exclusive rights of littoral states may be restricted. Therefore allowing foreign interest in the Caspian Sea shall not be good will of littoral states but to some extent—the obligation. Besides, all legal issues such as delimitation, navigation, preservation of marine environment, exploitation and exploration of resources and dispute settlement may become subject of

well established rules and procedures. On the other hand one should bear in mind that not all littoral states of the Caspian Sea are members of UNCLOS.

Before introduction of legal definitions, it is interesting to go through generally accepted definitions of a sea and lake that are the following:

Sea is the salt water covering the Earth or a large body of salt water which is partially enclosed by land.

Lake is an expanse of relatively still fresh or salt water of considerable size, localized in a basin, entirely surrounded by land and unconnected to the sea except by rivers or streams related adjective lacustrine. Lakes are inland and are not a part of the ocean.

Although UNCLOS does not give a legal definition of Sea, it does define enclosed and semi-enclosed seas. Namely, Article 122 of UNCLOS states that for the purposes of the Convention “enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Apart from UNCLOS there are some encyclopedical definitions of semi-enclosed seas, Namely according to the Great Soviet Encyclopedia, which is rather detailed, *a sea that is partially bounded by continents and cut off from the ocean or an adjacent sea either by islands or by a chain of islands linked by shoals that limit the sea's water exchange with adjacent bodies of water. Currents in semi-enclosed seas form an independent system of circulation. Temperature, salinity, and other hydrological and hydrochemical characteristics have their own regimes, which are, nonetheless, more or less influenced by the adjacent body of water. Examples of semi-enclosed seas include the Coral Sea, the South China Sea, the Sea of Okhotsk, the Bering Sea, and the Caribbean.*

It is clear that only chance to apply LOSC on the Caspian Sea is to claim that latter is an enclosed sea as defined under Article 122.

For this reason more attentions shall be given to the definition given in Article 122. There are several points underlined by Article 122 which should be beard in mind while determining status of exact water space.

But before going into details it might be interesting to look at the position of the Caspian Sea littoral states expressed in the process of drafting of Article 122. The position of Iran was that the term ‘enclosed sea’ should not be confused with the term ‘closed sea’ and the term should be used in the strictest sense and only in reference to small bodies of water such as the Persian Gulf and the Baltic Sea. Under the term ‘closed sea’ Iran meant the Caspian Sea. The same position was taken by the former USSR. Famous Soviet lawyers developed the concept of ‘*mare clausum*’ regarding the Caspian Sea. In various official publications the Caspian Sea indirectly and sometimes directly was declared as ‘closed sea’. Same approach was elaborated in the 19th century and later when the Caspian Sea was declared as Russian and Iranian Sea. The term ‘closed sea’ has born different meaning rather ‘enclosed sea’ and is closer to the definition of ‘*mare clausum*’ developed by John Selden in the 16th century rather than of those given in Article 122 of LOSC.

Never during the drafting process of LOSC the Caspian Sea has been under consideration since it was widely accepted that the latter was the Soviet (and not even Soviet-Iranian) Sea.

Nobody argues that nowadays the picture differs and new reality may raise new legal approaches.

To turn back to the definition of enclosed and semi-enclosed seas, two key points will be underlined, since they are most important in the Caspian Sea context. Namely: (i) the connection to other marine areas; and (ii) the existence of territorial seas and exclusive economic zones.

Although there is no natural waterway connecting the Caspian Sea to world ocean, the reference on this context is done to Volga-Don Canal (VDC) as the connecting way of the Caspian Sea to the Black Sea and hence the world ocean.

This argument for several reasons does not seem solid for application of UNCLOS on the Caspian Sea.

There are two main issues to be raised: (1) the VDC is not natural waterway, neither the strait used for the international navigation; and (2) the VDC is located within the territory of one country and is considered as the internal waters of the Russian Federation.

One can argue that LOSC does not define ‘narrow outlet’ as necessarily natural waterway, but the very fact that VDC itself is not a part of UNCLOS regime or any other international treaty, does not serve in its favor. The navigation there can’t be considered as international navigation, since navigation rights are under full control of national authorities and no outside interference is allowed; on the other hand navigation through VDC is restricted for technical reasons and only vessels bellow 5000 DWT are allowed in there. Therefore main idea of UNCLOS to facilitate the international navigation can not be envisaged here.

The second question refers to the existence of territorial seas and exclusive economic zones in the Caspian Sea. Although the space of the Caspian Sea may give the ground to claim not only the territorial sea but also exclusive economic zones by the littoral states, that is not enough ground for claiming these zones.

The issue is that the territorial sea and EEZ are maritime zones and from this point of view, if there is no sea no maritime zone can exist. Therefore only after the determination of the status of the Caspian Sea as a real sea, the issue of the territorial sea or EEZ can be raised and not vice versus.

And finally, for definition of the legal status of the Caspian Sea it seems interesting to observe various shipping conventions, namely some IMO compulsory Conventions. Most of them contain direct reference to the exclusion of the navigation conducted solely in the Caspian Sea like in Great Lakes, from the scope of application. E.g. International Convention on Load Lines, 1966, states that nothing therein shall apply to ships solely navigating *inter alia* the Caspian Sea

(Article 5). Likewise, the International Convention on Tonnage Measurement of Ships, 1969, states that the Convention shall not apply to ships solely navigating inter alia in the Caspian Sea (Article 4).

This can be serving as argument that since navigation in the Caspian Sea is not subject of international regulations, and in exemption clauses is equalized with Great Lakes and several navigational rivers, it is definitely not considered as a sea by IMO and hence by its member states.

5. Environmental Issues

The past history of the Caspian Sea reveals an environmental system that is highly stressed by natural factors and the human use. Under existing hard environmental conditions, the future development of oil and gas resources has the potential to introduce environmental impacts that could add fuel to existing regional tension around national security, fishing resources, water quality, oil and gas rights, pipeline routes, and land use.

Determination of the Status of the Caspian Sea is also very important from environmental point of view. Since the Caspian Sea is reach of both living and non-living resources which are gravely exploited, the environmental risks are very high. Therefore in the situation when the status of water and subsoil and thus strict and clear scope of application of the rights and obligations of coastal states, when neither state bears concrete liability for certain area of the territory, conservation of living resources as well as environmental in general seems unfeasible task.

Although the Caspian Sea stays outside the scope of application not only of UNCLOS but also other international conventions relating to protection of marine environment, e.g. London Dumping Convention etc., all littoral states are members of various UN conventions on environment, including Framework Convention on Climate Changes and bear direct responsibility to protect environment in the region. In this sense again the question of delimitation of the Caspian Sea becomes actual, since the scope of liability of states should be determined clearly.

It is important, that Memorandum of Understanding is signed by 5 littoral states in 1992, by which an organization was formed for the Caspian Sea conservation, essentially to regulate the exploitation of marine resources. But without clear delimitation of maritime boundaries including in those EEZ, effective application of the agreements seems unfeasible.

6. Conclusion

Taking into account strategic location of the Caspian Sea together with deposits of oil and gas resources therein, the solution of the question of the legal status goes far beyond of purely legal issues and gains political and economic importance.

Although some successful bilateral and trilateral negotiations are conducted between littoral states, it is obvious that if no joint agreement is reached between all five littoral states no legal status of the Caspian Sea shall be determined.

After so many years of intensive works and negotiations the finalization of convention on the legal status looks feasible. However without getting clear answer whether the Caspian Sea is sea or lake (or so-called "closed sea"), no solution can be reached.

Although our position is that the Caspian Sea in strict sense is a lake but it certainly wears the features of sea (size, continental shelf, salt water). Therefore, we believe that the status can not be subject solely of rules applying either to inland waters or to maritime zones. We can consider the status of the Caspian Sea as *sui generis* and special regime shall be developed by the respective Convention, as opposed to existing rules. The discussions maybe opened for non Caspian actors, since development of the status affect not only littoral states but also interest of various other stakeholders. Regarding the status of subsoil and water space over it, the various provisions of LOSC may apply without direct references to certain articles. Besides, the very clear and direct reference can be done that such application does not change the status of the Caspian Sea from lake to sea and does not create legal basis for compulsory application of other rules of LOSC, if final decision on the status will be in favor of lake.

While determining the status of water space of the Caspian Sea the concept of EEZ may be widely exploited. The sovereign rights over the natural living resources as well as exclusive right on the construction of artificial islands, carrying on of the scientific research and protection of environment can be granted to littoral states over some part of Caspian Sea beyond those under their complete jurisdiction.

As for the delimitation purposes may be shared the practice of International Court of Justice which is indeed very wide starting from the judgment on the North Sea Continental Shelf cases in 1969 to very recent one on continental shelf of Black Sea.

In case all littoral states agree on division of water space, the delimitation of continental shelf of Caspian Sea will settle that problem as well. The general rule applied in international maritime law states that boundaries of the continental shelf (if not prolonged) matches the boundaries of EEZ, if declared. Therefore the legal status of subsoil and water resources may differ, but the boundaries my match each other.

The ecology of the Caspian Sea is also very important. The grave pollution of water may affect not only riparian but also remote regions. Therefore, it is very important that a multilateral convention having been signed by littoral states is the only Framework Convention for the Protection of the Marine Environment of the Caspian Sea.

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