

Barbara Janusz-Pawletta

The Legal Status of the Caspian Sea

Current Challenges and Prospects for
Future Development

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Barbara Janusz-Pawletta
Berlin Center for Caspian Region Studies
Environmental Policy Research Centre (FFU)
Berlin
Germany

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Preface

The Caspian Sea is a great ecologic, economic and political but also a legal phenomenon worldwide. Its future evolution poses a challenge not only to its five bordering states—Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan—but also to the international community interested in its long term sustainable development. This ambitious intention may be met only by way of interstate cooperation in all dimensions of the development of the Caspian Sea, political, economic, ecological, but also of legal character. More than 20 years after the collapse of the Soviet Union and occurrence of the new geopolitical situation in the region, the balance between the development of mineral resources and environmental protection was not achieved in sufficient way. Ongoing affords of the riparian states and international community may, however, offer a reason to believe that the long-awaited consensus on the sustainable development of the Caspian Sea can still be found.

The presented book represents an attempt to identify comprehensive solution to the problem of the international legal status of the Caspian Sea. The unclear legal situation of the Caspian Sea and the consequent uncertainty of the coastal states about the issue of territorial demarcation, their uncertainty about the extent of their sovereign rights to the exploitation of natural resources and the uncertainty of the neighboring states with regard to shipping in the Caspian prevent continuous economic development of the region, destabilize political situation and result in a lack of security in the Caspian region. These issues are not merely of regional, but of a global importance. This is the way the research is being continued by scientist all over the world. This statement brings me to the sincere wish to express my deepest gratitude to international scholars, thanks to their profound knowledge and expertise in the Caspian issues, they inspired me and the led me through the sometimes difficult way of exploring and assessing the legal status of the Caspian Sea: Dr Friedemann Müller of German Institute for International and Security Affairs (SWP) Berlin, Prof. Dr. Philip Kunig of Free University Berlin,

Prof. dr hab. Leonard Łukaszuk of University of Warsaw, Prof. William E. Butler of Pennsylvania State University, Prof. Alexander N. Vylegzhanin of Moscow State Institute of International Relations (MGIMO), and late Prof. Anatoly L. Kolodkin.

Berlin, Germany

Barbara Janusz-Pawletta

Abbreviations

AnnIDI	Institut De Droit International. Annuaire
ASEAN	Association of Southeast Asian Nations
BAT	Best Available Technology
BEP	Best Environmental Practice
BTC	Baku–Tbilisi–Ceyhan
CASPCOM	Coordinating Committee on Hydrometeorology and Pollution Monitoring of the Caspian Sea
CCWLF	Caspian Centre for Water Level Fluctuations
CEP	Caspian Environment Program
CIRM	Comité International Radio-Maritime
CIS	Commonwealth of Independent States
CNPC	China National Petroleum Corporation
CPC	Caspian Pipeline Consortium
CPUE	Catch-Per-Unit-Effort
CRTC	Integrated Transboundary Coastal Area Management Planning
EC	European Community
ECSC	European Coal and Steel Community
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EPIL	Encyclopaedia of Public International Law
EQO	Environmental Quality Objectives
EU	European Union
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization
GA Res.	General Assembly Resolution
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
IALA	International Association of Marine Aids to Navigation and Lighthouse Authorities

ICARCS	International Commission on Aquatic Resources of the Caspian Sea
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Report
ICLQ	International & Comparative Law Quarterly
IHO	International Hydrographic Organization
ILC	International Law Commission
ILEC	International Lake Environmental Committee
ILM	International Legal Materials
IMO	International Maritime Organizations
ISO	Standardisation
ITCAMP	Integrated Transboundary Coastal Area Management Planning
LBS Protocol	Land-based sources Protocol
LNTS	League of Nations Treaty Series
MEPC	Marine Environment Protection Committee
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NCAP	National Caspian Action Plan
NEAFC	North-East Atlantic Fisheries Commission
NIOC	National Iranian Oil Company
NJW	Neue Juristische Wochenschrift
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Union (since 1968), C series (Communications), L series (Laws)
RIAA	Reports of International Arbitral Awards
SAP	Strategic Action Program for the Caspian Sea from 2003
SC Res.	Security Council Resolution
TAC	Total allowable catch
TDA	Transboundary Diagnostic Analysis
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UN Doc.	United Nations Documents
UNDP	United Nations Development Program
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNTS	United Nations Treaty Series
US	United States
USSR	Union of Soviet Socialist Republics
WB	World Bank
WCED	World Commission on Environment and Development
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

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Chapter 1

Introduction and Course of the Investigation

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

Is it possible for the Caspian Sea, which has become a bone of contention between the five bordering countries Russia, Kazakhstan, Turkmenistan, Azerbaijan and Iran after the collapse of the Soviet Union in 1991, to turn into an area of—literally speaking—fruitful cooperation in the legal sense? This question remains open for the time being, but we may have reason to hope, considering the recent state of the negotiations, that the long-awaited consensus can still be found.

More than 10 years after the collapse of the Soviet Union and the emergence of the newly independent republics of the Caspian Sea, a comprehensive solution to the problem of the international legal status of the Caspian Sea has still not been found. The unclear legal situation of the Caspian Sea and the consequent uncertainty of the coastal states about the issue of territorial demarcation, their uncertainty about the extent of their sovereign rights to the exploitation of natural resources and the uncertainty of the neighboring states with regard to shipping in the Caspian prevent continuous economic development of the region, destabilize political situation and result in a lack of security in the Caspian region.

The ineffective attempts to define the legal framework of the Caspian Sea should be explained by pointing to the existing deep differences between geopolitical and economic interests of the five littoral states. Along with the change of the geopolitical situation in the region after the collapse of the Soviet Union and the region's opening to international collaboration in the area of oil and gas resources, the Caspian Sea region has come to the center of attention even for China, the US and the EU, which has intensified the competition of powers existing in the region.

1.2 New Phase of Caspian Negotiations Defines the Importance of Research

Only since the end of the 1990s, a new phase of development of the legal relationship between the Caspian littoral states has been emerging that could provide an answer to the pressing questions of the future status and regime of use of the Caspian Sea.

On the one hand, some progress in the multilateral negotiations on the Draft of the Convention on the future legal status of the Caspian Sea (further referred to as Draft Caspian status convention) has been observed in direct reference to the standards of international law. On the other hand, a not uncontroversial progress in bilateral legal relationships among the north Caspian littoral states has been reached regarding the division of the seabed of the Caspian Sea into sectors for exploitation of natural resources there (so called: North Caspian Agreements). The fact that those bilateral agreements regulate the legal relations in the parts of a region whose general status remains unclear raise legal doubts for Caspian littoral states not involved in these delimitation agreements. Then again, it seems that north Caspian countries have marked progress in clarifying the legal status of the Caspian Sea, which, indispensable as it is, is felt to be a generally positive phenomenon.

Another positive trend is reflected in the “step-by-step development” of new rules for the regimes of use of the Caspian Sea. This is evident in the regulation of the Caspian environmental regime. A positive example of this development, which may be mentioned here, is the Framework Convention for the Protection of the Marine Environment of the Caspian Sea signed in 2003 (further referred to as the Tehran Convention). Another example is the signing of Agreement on Security Cooperation in the Caspian Sea (further referred to as Caspian Security Agreement of 2010). This is dedicated, among other things, to fighting terrorism, drug trafficking, piracy, illegal migration and illegal exploitation of biological resources (poaching).

Although the development of bilateral relations between Caspian littoral states has delayed the process of multilateral negotiation to determine the overall status of the Caspian Sea, it has not prevented it. Even in the recent negotiations between all littoral states concerning the Draft Caspian status convention, new trends are visible. The Draft Caspian status convention is a result of legal negotiations between the coastal countries concerning the future status of the Caspian Sea, and thus it is not a binding legal agreement. However, it clearly demonstrates the will of the neighboring states to develop a legal status where international legal standards would be used as the basis. The analysis of its provisions shows that it comes down to creating a totally new legal framework for the Caspian Sea, which would refer to the provisions of the United Nations Convention on Law of the Sea of 1982 (further referred to as UNCLOS), but without applying the UNCLOS directly.

The current legal developments in the Caspian can be summarized as follows: first, there is progress in the multilateral negotiations on the Draft Caspian status convention, second, bilateral agreements are in progress and third, there is the

successful “step by step clarification” of individual regimes in the use of the Caspian Sea. All these suggest a new hope is rising for legal processes in the region. However, in relation to many aspects of the future legal status or legal regime, there is still no unified position of the coastal states. Nevertheless, regional development is visible, which confirms the importance of such an investigation into its details and shedding light on the current legal situation in the region.

1.3 Present State of Research into the Status and Regime of the Caspian Sea

The main part of the book will discuss recent legal developments around the legal issues concerning the Caspian Sea. It is argued here that the negotiating parties have moved far away from the legal-theoretical dilemma of whether the Caspian is a sea or a lake in a legal sense. This question seems to have lost its meaning in the light of the current evolution of the international relations between the countries bordering the Caspian Sea, as countries attempt to regulate all aspects of the legal use of the Caspian Sea independently in a Draft Caspian status convention. The provisions of the Draft Caspian status convention currently negotiated by the coastal countries are considered key sources revealing the current position of coastal states on the future of Caspian maritime transport, fisheries and other economic and military uses of the Caspian Sea, as well as its seabed and its subsoil. The analysis of this draft agreement represents the scientifically innovative part of this book.

To determine the current status of the negotiations between the neighboring states and the foreseeable developments of the legal conception of the future legal status and regime of the Caspian Sea, one shall also refer to relevant literature. One difficulty in this study is the lack of relevant and reliable literature that would represent and analyze the latest legal developments in a scientifically proven way. This does not mean, however, that there are no specialist publications on the legal status of the Caspian Sea. Quite the contrary, many professional publications by the representatives of both the local¹ and international law² doctrine, that deal with the topic have been published recently. However, most publications are limited exclusively to the discussion of contracts signed still in the 1920s and in 1941 between the USSR and Persia/Iran, and do not follow the latest legal developments that play a crucial role for the future of the region. One may often get the impression that many legal writers from the Caspian region strongly support political positions of their countries in the dispute over the Caspian Sea and thus contradict the principle of scientific impartiality.

¹ See: Barsegov (1998), Kolodkin (2002), Mamedov (2001a, b), Merzlyakov (1999), Ranjbar (2004), and Salimgerei (2003).

² See: Butler (1971), Chufrin (2001), Oude Elferink (1998a, b), Oxman (1996), Romano (2000), Uibopuu (1995), and Vinogradov and Wouters (1995).

The aforementioned lack of literature on the current developments in the process of defining the legal status and regime of the Caspian Sea is because of the practical difficulty of most legal documents that bear witness to it not being accessible to interested scientists. The existing documents are working drafts, for the most part only in a rough form and the negotiating states do not like to have them published so as not to predict the outcome of the negotiations. My access to many of these documents, often unpublished, was thanks to personal contacts with regional scientists who do research on the Caspian Sea.

The growing international interest in the exploitation of the natural resources of the Caspian Sea provides the justification and the reason for the continuation of research on the future of the legal status and regime of the Caspian Sea.

1.4 Structure of the Book

After a brief introduction to the geographical, political and economic conditions in the region presented in Chap. 1, an analysis of international legal obligations of the littoral states of the Caspian Sea will be carried out. In this context, it is particularly important to define and interpret the binding legal force of the agreements concluded between the USSR and Persia/Iran in light of the collapse of the USSR and continued existence of legal obligations arising out of the agreements concluded then for the newly created states (succession). Historical dispute over the qualification of the Caspian Sea as a sea, lake or condominium in legal terms, with analysis of legal consequences of such qualification as well were presented in a second chapter. Further, state practice of 1990s including the challenges for the regional cooperation after the dissolution of the Soviet Union, as well as peaceful ways of their resolution were presented: first: five-party negotiations on the convention on the legal status of the Caspian Sea, secondly: step-by-step conclusion of agreements on the use of natural resources, and thirdly: step-by-step multilateral regulations of the legal regimes in the Caspian Sea regarding protection of the marine environment of the Caspian Sea and security cooperation in the Caspian Sea were presented in Chap. 3. This book argues that the negotiating parties have left behind the legal-theoretical dilemma of whether the Caspian Sea is, in the legal sense, a sea or a lake, and the consequent legal implications. States seem to be exclusively concerned with the preparation of the draft, bilateral and multilateral negotiations and the above mentioned “step-by-step” approach focus.

Next chapters include legal analysis of particular aspects of the use of the Caspian Sea. Starting from Chap. 4, interrelations between territorial delimitations and the regime of the use of the Caspian Sea were presented, showing respectively non-legal aspects of settlement of the seaward boundaries in the Caspian Sea and following with elaboration on territorial delimitation and the state sovereignty in the Caspian Sea, state practice in delimitation of the Caspian Sea and prospects for the future division of the Caspian Sea. The ongoing debate of the coastal states to settle the delimitation issue takes two different forms: first, bi- and trilateral

agreements on sharing northern parts of the Caspian seabed for using resources located there, and second, multilateral negotiations on the future delimitation conducted in the framework of the Draft Caspian Status Convention. The latter shall define maritime zones in the Caspian Sea. However, there are still certain disagreements among the coastal states, especially regarding their sovereignty over maritime zones.

Chapter 5 reflects the regime for the use of non-living resources in the Caspian Sea—especially oil and gas—which significantly impact states' economic development's and bring coastal states to claim delimitation of maritime areas. This chapter defines existing reserves of non-living resources in the Caspian Sea and presenting existing international legal regulation of non-living resources. Further, it discusses the controversial claims on the rights to use non-living resources in the Caspian Sea and prospects of adopting new relevant legislation. Departing from the legal transformation from the Soviet-Iranian concept of *mare clausum* for the Caspian Sea it presents current developments including conclusion of bi- and trilateral agreements on using the northern parts of the Caspian seabed, and on the other hand, multilateral negotiations undertaken in the form of a convention on the Caspian legal status.

Chapter 6 on the legal regime of the living resources of the Caspian Sea starts from describing tensions between the protection of fish stocks and the oil industry in the Caspian Sea, and presenting of the existing regime of the living resources in international law. It discusses previous and existing regulations of fishing in the Caspian Sea as well as possible future regulations of the living resources in the Caspian Sea. Transition from the regime of common use during the soviet era up to the unclear stage of today resulted in extensive exploitation of the fish deposits and possible competing regulations offered by International Commission on Aquatic Resources of the Caspian Sea (ICARCS) and the Tehran Convention.

Seventh chapter on the legal regime of the pipelines in the Caspian Sea shows the existing status of pipelines in the Caspian Sea, which offer a sufficient way of Caspian oil and gas resources transportation to world markets. It refers to international law on pipelines as well as to future regulations on pipelines in the Caspian Sea. As the legal regime of Caspian maritime pipelines has never been subject to interstate agreements, but rather of a general practice of the Caspian states, it remains disputable whether and which parts of the Caspian Sea shall be covered by the coastal states' sovereignty, which would allow the coastal states to freely build transboundary Caspian pipelines.

Chapter 8 discusses the legal regime of maritime navigation on the Caspian Sea, being traditionally the most important regimes of the use of the Caspian Sea. It presents the legal regime of shipping in international law as well as the existing and possible solutions on Caspian navigation. Initial regime of freedom of shipping is valid until today, however the existing negotiations regarding differentiation in the scope of the shipping rights of third-party states typical for maritime zones existing in the law of the sea have not been settled yet.

Last chapter, ninth, elaborates over protection of the marine environment of the Caspian Sea. It begins with analysis of environmental principles applicable to the

Caspian Sea. Reflecting the structure of the most important act providing for the protection of the Caspian environment—the Tehran Convention and its ancillary Protocols—this chapter has been divided into parts regarding prevention, reduction and control of pollution in the Caspian Sea and protection, preservation and restoration of the marine environment. Further, it describes institutional framework for cooperation in the legal protection of Caspian environment and existing environmental procedures. With the adoption of the Tehran Convention, the states parties set specific environmental goals, but avoided taking on explicit commitments. The legally binding effect can only be achieved through the adoption of implementing protocols, something that takes place gradually.

This book does not present the national legislation of the Caspian Sea littoral states concerned, although it is locally referenced. The main reason for this arises from the subject of the research, which is restricted to international legal aspects of the regulation of the state and the regime of the Caspian Sea. Any provisions of national law can have no binding effect on the legal status of the third countries and thus cannot contain requirements for these third countries. Once the negotiations are finished and the Draft Caspian Status Convention will come in force, the national regulations concerning the law of the sea aspects of the Caspian Sea will have to be adapted directly to that Convention. This does not mean the significance of coastal States' national legislation on the use of the Caspian Sea and its resources, and its protection will be put into question. Quite the contrary: awareness of the importance of national legal solutions and their complexity, which cannot be fully analyzed within this book, encourages only local reference to the existing provisions, with the intention to avoid only cursory presentation of the complex national legal regulations.

Analysis on the legal status and regime of the Caspian Sea presented in this publication covers a period ending on 30 Mar 2014.

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