

## Bilateral Delimitation of the Caspian Sea and the Exclusion of Third Parties

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### Abstract

This article discusses the position of the littoral States of the body of water known as the Caspian Sea (hereinafter ‘the Caspian’), particularly on the basis of their numerous bilateral treaties and unilateral statements of action, with respect to the legal status and *sui generis* regimes of the Caspian. It is argued that these States have excluded the possibility that the Caspian be equated for legal purposes to a sea, but they have, nonetheless, employed legal formulae borrowed from the international law of the sea in order to delimit their respective maritime zones and other entitlements. The ambit of these rights is sketchy and they do not conclusively cover the entirety of inter-State relations in the Caspian. There is an urgent need for the adoption of a multilateral convention in order to remedy these gaps, if for no other reason than for the sake of investor confidence and the avoidance of future disputes.

### Keywords

Caspian Sea; bilateralism; delimitation; Kazakhstan; pipelines

### The Legal Status and Legal Regimes of the Caspian Sea

Much emphasis in the legal literature is placed on the question whether the body of water known as the Caspian Sea (hereinafter ‘the Caspian’) should best be classified as a ‘sea’, and therefore regulated by the regime established by the 1982 UN Convention on the Law of the Sea (LOS),<sup>∞</sup> or whether instead it should be classified as an ‘enclosed lake’ and thus be subject to the regime of

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<sup>∞</sup> United Nations Convention on the Law of the Sea (done at Montego Bay), 10 December 1982, in force 16 November 1994, 21 *ILM* 261 (1982).

international freshwater resources.<sup>1</sup> The five littoral States (i.e., Azerbaijan, Iran, Kazakhstan, Russia and Turkmenistan), despite their public assertions as to a future definitive binding conclusion to the legal status of the Caspian,<sup>2</sup> have so far only concerned themselves with the determination of appropriate legal regimes\* so as to satisfy their immediate and short-term political needs and objectives.

The two concepts (i.e., 'legal status' and 'legal regimes') are very different and a brief terminological analysis is warranted at this stage. 'Legal status' refers to a process whereby the status of the Caspian as a geo-morphological entity is definitively determined (whether as a sea, a lake, internal waters, other), as are also the precise boundary relationships between the littoral States. Both of these processes are complementary and inseparable. The determination of a particular legal status involves a holistic process, from which other entitlements and obligations implicitly or explicitly flow; yet it is clear that in respect of a specific object or geographical area, only one legal status can exist, even if that status is not recognised by all States, or is otherwise resisted. Conversely, any discussion of legal regimes presupposes that in respect of a particular object or geographical area one or more State entities are free to modify, amend or abrogate existing legal relationships without necessarily modifying the legal status of the object or the geographical area. In this manner, the institution of a new legal regime may produce legal effects applicable not only between the relevant States, but also to third parties. Whether and to what degree these third parties may disagree with or oppose wholesale the establishment of bilateral or multi-lateral legal regimes that produce effects against their interests and from which they are excluded are governed by general international law and the terms of the 1969 Vienna Convention on the Law of Treaties, which is considered in a subsequent section of this article. The 1969 Vienna Convention generally considers treaty provisions of this nature as inoperable.

The legal regimes of the Caspian may be numerous, depending on the multilateral needs and demands of the littoral States. Hence, concerns over the environment may lead, and have indeed done so, in the establishment of

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<sup>1</sup> See C.P.R. Romano, 'The Caspian and International Law: Like Oil and Water?' in: W. Ascher, N. Mirovitskaya (eds.), *The Caspian Sea: A Quest for Environmental Security* (Kluwer International Law, the Hague, 2001) 145; S. Vinogradov, P. Wouters, 'The Caspian Sea: Current Legal Problems' (1995) 55 *ZAORV* 604. Three of the Caspian littoral States, namely Kazakhstan, Turkmenistan and Azerbaijan, are not parties to the LOSC.

<sup>2</sup> Such a desire was reiterated strongly in the Tehran Declaration on the Caspian of 17 October 2007. See <<http://www.tehrantimes.com/NCms/2007.asp?code=155078>>.

\* Insofar as these legal regimes involve declarations and bilateral agreements cited in this article that are unavailable in English, these are on file in their original language(s) with this author.

a multilateral convention that protects the Caspian's potentially fragile ecosystem.<sup>3</sup> Concerns over the exploration and ownership of natural resources and the laying of submarine pipelines have equally given rise to distinct bilateral hydrocarbon and pipeline regimes, or a lack thereof in respect of several actors. Such regimes are independent of one another and to some degree reflect the States' inability to reach agreement on the Caspian's legal status as a whole.

There is no doubt among legal commentators and the littoral States themselves that the Caspian is not a sea for all legal purposes. This conclusion is drawn not only from the fact that it has no access to another sea or the ocean,<sup>4</sup> other than through a complex maze of internal waterways, but also from the fact that the littoral States have never treated it as a sea in conducting their mutual affairs. One would think that the international rules determining the legal status of a water body would be premised on objective criteria, and that as a corollary the littoral States would not be able to impose their own legal classification upon the family of nations, particularly on an issue that is of grave importance to the entirety of the international community and which is regulated under universal international law. In reality, however, the Caspian States have managed to avert an objective legal classification on account of the former USSR's political power and control of the region during the Cold War and the lack of commercial interest from other countries up to and during that time by which to challenge the Caspian's legal status.

The situation has now changed because western companies in Kazakhstan (and elsewhere), pump its oil reserves and those same companies wish to transfer hydrocarbon deposits through pipelines running under the Caspian, rather than through mainland Russia. At the time of writing, however, no pipelines traverse the Caspian;<sup>5</sup> it is simply dotted with offshore oil and gas

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<sup>3</sup> The 2003 Framework Convention for the Protection of the Marine Environment of the Caspian Sea [Teheran Convention], 4 November 2003, in force 12 August 2006, 44 ILM 1 (2005). See B. Janusz, 'The Framework Convention for the Protection of the Marine Environment of the Caspian Sea' (2005) 4 *Chinese JIL* 257.

<sup>4</sup> LOSC Art. 122.

<sup>5</sup> A proposal for a new gas pipeline running under the Caspian is the Trans-Caspian Gas Pipeline, which is sponsored by the government of Turkmenistan with the aim of transporting gas from Turkmenistan and Kazakhstan to Eastern Europe by circumventing Russia and Iran. Both Iran and Russia have vociferously objected to this project on environmental grounds. The Caspian Pipeline Consortium (CPC) is composed of Russian interests and circumvents the Caspian altogether. Moreover, the recent ravenous Chinese appetite for oil, coupled with the very limited reserves of their own, has also forced China to turn to imports from their central Asian counterparts. As a result of several buy-outs, the Chinese were instrumental in setting up the Kazakhstan-China Oil Pipeline, which does not traverse the body of the Caspian

sites, some of whose ownership is being disputed because of the indeterminate nature of the Caspian's delimitation. Were the financial interests of the littoral States, as well as those of third parties, to be resolved absent agreement on the legal status of this water body, no country would complain, as their financial pursuits would be equally served. Thus, the achievement of desired regimes has the potential of rendering redundant a multilateral agreement on legal status.

The adoption of a broad legal status may also result in the granting of explicit or implicit entitlements to non-littoral States. Thus, were the littoral States to agree that the Caspian is a sea for international legal purposes, they would have to delineate their respective territorial and other waters—and retain sovereignty thereover or sovereign rights thereto—and allow the “high seas” of the Caspian to be open to all States, as well as the seabed thereunder.<sup>6</sup> In all maritime zones extensive rights of navigation, among others, would also need to be recognised. The current legal status—that is equivalent to a trans-boundary lake—necessarily excludes any entitlement for non-littoral States, by equating the water body to internal waters, over which the coastal States retain absolute sovereignty. Although it is clear that the littoral States would prefer the latter legal status (i.e., a lake),<sup>7</sup> this is not without its share of problems, because the States concerned must agree among themselves all matters relating to boundary delimitation, resource allocation and other legal regimes. Let us now examine whether they have achieved any results through their bilateral and multilateral relations.

### **The Advent of Bilateralism**

The Caspian was, until the dissolution of the USSR, bordered by two countries, Iran and Russia, whose inter-relations were governed by bilateral treaties. Two early agreements, the latter abrogating the former, the 1813 Golestan Treaty<sup>8</sup> and the 1828 Turkomanchai Treaty,<sup>9</sup> ultimately permitted the retention of only a Russian naval force in the Caspian (Arts. 5 and 8 of the Golestan

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either. See A. Seck, ‘Pipelines from Central Asia and the Transcaucasus: A Maze of Alternatives’, in: G.H. Blake, M.A. Pratt and C.H. Schofield (eds.) *Boundaries and Energy: Problems and Prospects* (Kluwer International Law, the Hague, London, Boston, 1998) 169–215.

<sup>6</sup> In accordance with LOSC Part XI.

<sup>7</sup> A Declaration was adopted in 2007 by all littoral States, whose Point 7 stipulates that vessels which do not fly the flag of one of the Caspian States would be excluded from entering Caspian waters.

<sup>8</sup> 62 CTS 435.

<sup>9</sup> 78 CTS 105.

and Turkomanchai Treaties, respectively), while granting commercial and other private navigation rights to both States. These bilateral agreements are not outside the realm of the development of the international law of the sea at the time, nor do they constitute exceptions to it. Indeed, the customary development of the law of the sea until the early part of the twentieth century was squarely premised both on bilateral agreements and the force of unilateral acts, given the absence of any multilateral instrument until 1958.

A 1921 Treaty of Friendship and Navigation between Persia (now Iran) and Russia<sup>10</sup> abrogated the Turkomanchai Treaty of 1828 between the two countries, reinstating Persia's right to maintain a naval force, albeit without any mention of demarcation. Furthermore, under a subsequent 1935 Treaty of Establishment, Commerce and Navigation, each party reserved "to vessels flying its own flag the right to fish in its coastal waters up to a limit of ten nautical miles".<sup>11</sup> This 10-nautical-mile fishing regime was once again reaffirmed in a 1940 Treaty of Commerce and Navigation.<sup>12</sup> Besides this feature, however, none of these agreements made any reference to maritime delimitation or seabed mining. Such a reference was also absent from a 1954 USSR-Iran Agreement Concerning the Settlement of Frontier and Financial Questions,<sup>13</sup> which merely determined the land border between the two countries. Although this "shared use" or "common sea" principle is evident from the aforementioned USSR-Iran treaties,<sup>14</sup> in practice, the USSR for many years carried out exploitation of the Caspian in the area of Azerbaijan in excess of 10 nautical miles from the coast without ever offering any of its proceeds to Iran or in any way involving Iran in its operations.<sup>15</sup>

The problems associated with the absence of a precise delimitation became apparent with the dissolution of the USSR in 1991. Russia and Iran had—in relative terms—the least amount of coastal access to the Caspian and were farther from its rich oil deposits than the other littoral States, in particular Kazakhstan and Azerbaijan. Each State, therefore, naturally sought to establish a regime that would best serve its interests. The first problem was the succession of the new independent States to the USSR-Persian treaties on the

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<sup>10</sup> 9 LNTS 383.

<sup>11</sup> 176 LNTS 301.

<sup>12</sup> 144 BFSP (1940–42) 419.

<sup>13</sup> 451 UNTS 250.

<sup>14</sup> Iranian scholars generally take the view that, from the period between 1922 to 1991, the USSR had not accepted that the Caspian was a condominium between itself and the USSR. See K.A. Hosseyn, 'Legal Regime of Caspian Sea: Development of Sources and Energetic Roots' (1997) 1 *Amu-Darya Iranian Journal on the Study of Central Asia* 17.

<sup>15</sup> B.M. Clagett, 'Ownership of Seabed and Subsoil Resources in the Caspian Sea under the Rules of International Law' (1995) 1 *Caspian Crossroads Magazine* 1 at 2.

Caspian. Although this problem was overcome by the Alma Ata Declaration of 21 December 1991,<sup>16</sup> according to which succeeding States agreed to honour the treaties ratified by the former USSR subject to their own constitutional arrangements, these early Caspian treaties were silent on the Caspian's own legal status and delimitation. Thus, the only elements succeeded to were the right to commercial navigation, 10-nautical-mile coastal fishing and presumably the right to military navigation. In any event, the main concern is not whether Russia and Iran could legally demand that the new republics be prevented from gaining access to the Caspian, because the latter are naturally entitled to this, given their proximity to the coastline and their succession to the relevant treaties.

The competing interests underlie the desires of the littoral States to exploit the Caspian's rich resources. In March 1997, Turkmenistan and Kazakhstan reached an Agreement on a sectoral division of the Caspian through the use of equidistant lines. In the following year, Azerbaijan and Turkmenistan reached a basic understanding on division of the seabed, again through the drawing of equidistant lines.<sup>17</sup> Bilateral seabed agreements were later adopted on 29 November 2001 and 27 February 2003 between Kazakhstan and Azerbaijan, and on 14 May 2003 between the latter two and Russia. These States agreed on the junction point of the demarcation lines of the Caspian's seabed.<sup>18</sup> Moreover, Kazakhstan and Russia signed an agreement on delimitation of the depth of the north part of the Caspian Sea in July 1998. Kazakhstan and Azerbaijan signed an agreement on delimitation of the depth of the Caspian Sea and a protocol to the agreement on 29 November 2001 and 27 February 2003, respectively. An agreement on the border depth of the Caspian Sea was signed between Kazakhstan, Russia and Azerbaijan on 14 May 2003. These agreements relate almost exclusively to delimitation and it is natural that the littoral States have resorted to further bilateral or multilateral agreements, in order to settle other issues, such as the protection of the marine environment.<sup>19</sup> Although the Teheran Convention envisages a collaborative procedure between

<sup>16</sup> 31 ILM 148 (1992).

<sup>17</sup> K. Mehdiyoun, 'Ownership of Oil and Gas Resources in the Caspian' (2000) *Am J Intl L* 178 at 187–188.

<sup>18</sup> 'Caspian Littoral States Agree to Disagree' (21 June 2007), *News Central Asia*, available at: <<http://www.newscentralasia.net/print/52.html>>.

<sup>19</sup> See, e.g., the Teheran Convention, *op. cit.*, *supra* note 3. Art 22 of this Convention establishes a Conference of Parties that is responsible for enhancing it with new protocols and for monitoring. Four protocols have been adopted by September 2010. All five Caspian littoral States are parties. See also the website of the Caspian Environmental Program, available at: <<http://www.caspianenvironment.org/newsite/index.htm>>.

the littoral States in cases of accidents or polluting incidents, fortunately no accidents have been reported from offshore wells or pipelines.<sup>20</sup>

It must be noted, however, that although the use of equidistant lines was agreed, no agreement was reached on how such lines were to be drawn. On 6 July 1998 Russia and Kazakhstan agreed to a bilateral division of the northern part of the Caspian seabed on the basis of an equidistant line.<sup>21</sup> This bilateral Agreement was nonetheless confined only to delimitation of the seabed, whereas the waters of the Caspian were deemed to be common property among all littoral States.<sup>22</sup> All other matters were to be regulated jointly, and the conclusion of sectoral agreements to delimit zones for border, custom and sanitary controls were also envisaged. Moreover, the same terms were incorporated in a Declaration on the Principles of Cooperation in the Caspian Sea between Azerbaijan and Russia, adopted in January 2001. Yet, in March 2001, Iran and Russia signed a Joint Declaration, in which they declared that neither of them would recognise bilateral boundary agreements until all five nations reach a common agreement.<sup>23</sup> In 2003 Kazakhstan and Russia adopted a further Agreement on the Caspian, by agreeing on the joint development of oil and gas deposits situated on the border of their respective sectors.<sup>24</sup>

Iran has not embarked on any bilateral agreements, perhaps because no other littoral State is inclined to share its view that each State should receive an equal portion of the Caspian, regardless of coastal size;<sup>25</sup> this is of course advantageous for Iran because it possesses the smallest coastline among its other littoral counterparts. This position is acutely antithetical to that of the other littoral States. Kazakhstan has consistently held that each Caspian State possesses an independent unilateral entitlement to explore mineral resources in its territorial waters and exclusive economic zone, that exclusive fishing zones should be established and that landlocked Caspian States should have access to the Caspian through Russian waterways on the basis of distinct

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<sup>20</sup> For a thorough analysis of relevant issues, see C.C. Joyner, K.Z. Walters, 'The Caspian Conundrum: Reflections on the Interplay between Law, the Environment and Geopolitics' (2006) 21 *IJMCL* 173.

<sup>21</sup> See Romano, *op. cit.*, *supra* note 1 at 145.

<sup>22</sup> See Letter dated 5 October 1994 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, UN Doc. A/49/475 (1994).

<sup>23</sup> M. Lelyveld, 'Caspian: Outlook Dims for Summit,' *Radio Free Europe* (15 May 2001).

<sup>24</sup> S. Grachev, 'Russian-Kazakh Agreement on Caspian Opens Opportunities for Investors,' (March 2003) 1 *OGEL*, available at: <[http://www.gasandoil.com/ogel/samples/freearicles/article\\_17.htm](http://www.gasandoil.com/ogel/samples/freearicles/article_17.htm)>.

<sup>25</sup> See 'the Position of the Islamic Republic of Iran concerning the legal regime of the Caspian Sea,' UN Doc A/52/324 (8 Sep. 1997).

bilateral agreements.<sup>26</sup> This line of reasoning assumes elements from both the international law of the sea regime (particularly the references to a territorial sea and an exclusive economic zone) and is at least consistent with Kazakhstan's 1997 Agreement with Russia delimiting their respective sectors through equidistant lines. This consistency is evident in a Joint Statement of 27 February 1997 between Kazakhstan and Turkmenistan, according to which the two States agreed to delimit their maritime borders on the basis of a line running through the middle of the sea, which itself is premised on the USSR's administrative delimitation of these two Republics' respective boundaries.<sup>27</sup> Although the parties do not generally recognise the applicability of the LOSC to the Caspian, the use of delimitation formulae found in this Convention reveals the lack of any common rules upon which the littoral States can delimit their boundaries and coastal entitlements. It is not only Kazakhstan that has relied on the delimitation rules of the LOSC, but also others, such as Azerbaijan, as a matter of practical necessity.<sup>28</sup>

From the maze of the agreements referred to above, a certain normative position is certainly discernible. Russia, Kazakhstan and Azerbaijan seem to be in agreement on exclusive sectoral delimitation as regards the northern part of the Caspian, which encompasses sovereignty over all resources on and below the surface waters and the seabed. The three States aim to adopt a trilateral agreement to solidify their bilateral practices. Despite this observation, numerous uncertainties still exist. Chief among these is whether Azeri and Kazakh vessels have access to the Volga river waterways on the basis of their bilateral agreements with Russia. In the opinion of this author the answer to this question is negative given that Russia has strenuously guarded its sovereignty over the Volga-Don Canal, which it may employ as a strategic bargaining tool in the near future. On the other hand, the legal status of the south Caspian is indeterminate. At the very least none of the three northern States can deny the availability of sectoral delimitation to Iran and Turkmenistan as a matter of estoppel.

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<sup>26</sup> 'The Position of Kazakhstan on the legal status of the Caspian Sea,' UN Doc A/52/424 (3 Oct. 1997).

<sup>27</sup> 'Joint statement on the questions related to the Caspian Sea,' signed by the President of Kazakhstan and the President of Turkmenistan in Almaty on February 27, 1997, UN Doc A/52/93 (17 March 1997).

<sup>28</sup> 'Statement by the Ministry of Foreign Affairs of the Republic of Azerbaijan,' (10 Dec. 1998), UN Doc A/53/741 (14 Dec. 1998).



## The Legal Effects of Bilateralism

As if the complex maze of bilateralism was not enough, some Caspian States adopted unilateral measures aimed at giving domestic effect to the dictates of their foreign policy. Turkmenistan, for example, promulgated a Law on State Borders in 1992, by which it claimed a territorial sea of 12 miles. It later issued offshore exploration licences in this maritime belt, as did Iran in 2000 and Azerbaijan prior to the Turkmen action. The Kazakh government invited investors to express declarations of interest in exploring the potential of the *Kashagan* offshore field, whose oil wealth is the primary motivation for the construction of the Kazakhstan-China Oil Pipeline.<sup>29</sup> Thus, in one form or another, all of the Caspian States have treated as an implicit entitlement the drawing of at least a territorial sea under the general rules of international law applicable to seas.

What are we to make of all these bilateral agreements, the special regimes and the unilateral acts? Can they all be applicable simultaneously and how can problems be resolved when these are found to conflict with one another? Equally, what legal effects, if any, should these agreements have on States that are not parties thereto, irrespective of whether they are Caspian or other third States? To respond meaningfully to these questions we must be guided by certain undisputed principles of international law. The first is that formal agreements bind only those States that are parties to them, in accordance with Article 34 of the 1969 Vienna Convention on the Law of Treaties. Hence, third parties are not bound, unless they explicitly consent, or do so tacitly particularly through subsequent practice, by assenting to the obligations encompassed in such a treaty.<sup>30</sup> Second, unilateral acts are indeed legal acts and produce international legal effects for the acting State. Although other States are not bound by the unilateral acts of a particular country, failure to make their opposition known may be later deemed as acquiescence. Third, States cannot unilaterally alter their international frontiers or do so as a result of State succession, or restrict the original rights pertaining thereto.<sup>31</sup> Finally, States do not have the authority to abrogate as to themselves existing customary international law or *jus cogens* norms,<sup>32</sup> even by means of a new treaty.

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<sup>29</sup> See R. Gaishin, 'Regulation of Oil and Gas Transportation by Pipelines in Kazakhstan,' in: I. Bantekas, J. Paterson (eds.) *Oil and Gas Law in Kazakhstan: National and International Perspectives* (Kluwer International Law, the Hague, 2004), 312 *et seq.*

<sup>30</sup> Arts. 35 and 36, 1969 Vienna Convention, (1155 UNTS 331).

<sup>31</sup> Arts. 11 and 12, 1978 Vienna Convention on Succession of States, 23 August 1978, in force 6 November 1996, 1946 UNTS 3.

<sup>32</sup> Art. 53, 1969 Vienna Convention.

Amazingly, the bilateral treaties do not seem to be conflicting, for the sole reason that in practice all Caspian States accept the sectoral division of their maritime and seabed belts in accordance with an outer limit premised partly on the international law of the sea—although, as we have seen, Iran is reluctant to accept the full application of this principle, given that it possesses the smallest coastline. Although the drawing of maritime belts is inconsistent in terms of their outward limit, or as to whether in fact a contiguous or exclusive zone has been subject to a common understanding, or even on the method for drawing baselines, the five littoral States seem to agree that a 12-nautical-mile maximum delimitation is mutually acceptable. Similar, yet even less precise, consensus exists with respect to the seabed beneath each national territorial sea. Thus, although the bilateral treaties cannot bind third parties, they are all adhering to the same principle and give rise to a rule—of perhaps regional customary value—of territorial waters delimitation, abrogating thus any notion of condominium, initially supported by Iran. The Caspian is, therefore, treated as a *sui generis* sea for all legal purposes between the littoral States, and as a lake that is non-accessible to all non-Caspian States. Given the customary rule that borders are not susceptible to change by reason of State succession, it follows that the delimitation of the respective territorial seas is determined by reference to the administrative borders inherited following the dissolution of the USSR; the same logic, therefore, applies to the seaward extension of these borders to the Caspian water mass. All littoral States evidently respect in their bilateral agreements these boundaries to which they succeeded and they do not claim any rights in maritime zones falling within the territorial sea of their neighbours. Moreover, these States have already consented to free and unimpeded commercial navigation and all of them are responsible, jointly and severally, for the Caspian's environmental protection. It has also been established, on the basis of unilateral acts and bilateral treaties, that exploration of oil and gas reserves within declared territorial waters is permissible.

However, the following issues as to the legal status of the Caspian are unresolved. First, there is no consensus among the littoral States as to the mutual recognition of a contiguous zone or an exclusive fisheries (or economic) zone, despite the bilateral agreement between Russia and Kazakhstan. This bilateral agreement may be taken as a tacit understanding among all littoral States in the absence of any protest, but one needs to be cautious in making such a broad statement. The only certainty about a fishing regime is that contained in the USSR-Iran treaties of the twentieth century, which envisage a 10-nautical-mile exclusive fishing zone. In the absence of any conflicts or objections to the contrary, it may be presumed that beyond the 10-nautical-mile zone, all States

may fish freely, subject to Article 14 of the 2003 Teheran Convention and its Protocols, which militate against the depletion of marine life and damaging forms of fishing.

As regards placing submerged oil and gas pipelines on the seabed of the Caspian, the attitude of the littoral States strongly suggests that they do not aspire to the regime of LOSC Article 87(1)(c), which provides a general freedom to lay pipelines beneath the high seas. The official Russian position is that an agreement among all littoral States is required for such an undertaking and equally the Iranians have long maintained that the regime of the 1940 bilateral treaty is still valid, which does require the consent of all littoral States.<sup>33</sup> This position is maintained by Russia and Iran and, although it is not shared by other former USSR republics, which had for some time discussed the design and implementation of the Trans-Caspian Pipeline with foreign investors but eventually had to pull the plug, it does not seem that they have any choice in the matter. There is moreover no agreement on a *sui generis* continental shelf regime between the coastal States and this will remain an open matter.

Moreover, a comprehensive agreement on maritime delimitation as regards adjacent coastlines does not exist. A comprehensive agreement of this nature would not generally be required, save for the fact that in the declarations and legal actions of the littoral States, comprehensive delimitation seems to be the preferred choice. With some exceptions, particularly the Kazakh-Russian bilateral agreement, where the delimitation of their adjacent coastlines is determined on the basis of the equidistance principle, this matter has not been resolved through bilateral agreement between the other littoral States. In all probability, a future agreement, or a string of further bilateral agreements, will provide for the widest possible application of the equidistance principle, but one can never be certain before this is incorporated in a binding instrument, particularly because in an era of energy insecurity and soaring prices, some of the most potent actors may eventually decide otherwise.

Although this study demonstrates the benefits of bilateralism, particularly where the littoral States are able to come to some sort of agreement on fundamental issues, this can turn out as a wholly negative exercise where the parties' negotiating position seeks to compensate for other issues. For example, until 1997 Turkmenistan had maintained an agreement with Azerbaijan on the drawing of equidistant lines, and the Azeri side had undertaken a number of offshore oil and gas investments on the basis of this express understanding.

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<sup>33</sup> S. Blagov, 'Russia Tries to Scuttle Proposed Trans-Caspian Pipeline' (28 March 2006) available at: <<http://www.eurasianet.org/departments/insight/articles/eav032806.shtml>>.

Yet, since 1997 the Turkmen side has altered its stance, disagreeing on the point from which the median line should be drawn, arguing that this should be consistent with the relevant rules under the LOSC.<sup>34</sup> The rationale for this change of stance is premised on a desire to assume ownership over any one—or all—of the three major offshore deposits currently controlled and exploited by the Azeris,<sup>35</sup> namely Chirag, Kapaz and Azeri. No doubt, this is contrary to a relative acquiescence by Turkmenistan in the *status quo ante* over time—despite the fact that no formal agreement had been reached. The Turkmen position is not untenable or unreasonable, but its isolationist politics until the mid-2000s left it out of Caspian geopolitics. It is now making efforts to make up for lost time against countries such as Kazakhstan and Azerbaijan that have received European, US and Russian backing since their independence and have set up formidable natural resources industries.

Finally, the position of third, non-Caspian, States is that they have no rights of navigation or of any other nature as regards the Caspian. Caspian States are adamant that not even third States that are land-locked have access to its “high seas”, unless express consent is granted. Even if the Caspian were to be classified as a sea by the littoral countries, third States would still be barred in practice from any navigational or other rights because their ships would need to traverse the internal waters of the littoral States, especially the Volga-Don canal of Russia, thus requiring their permission.

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<sup>34</sup> ‘Statement on Turkmenistan’s Position on Delimitation of Caspian Seabed and Resources’ (27 Jan 2005) available at: <<http://turkmeniya.tripod.com/turkmenistanlaws/id23.html>>.

<sup>35</sup> The Azeri government entered into an agreement with a BP-led consortium as far back as 1994 for the exploitation of some of these offshore wells. In 1997 the Azeri State Oil Company (SOCAR) signed a contract with the Russian companies Rosneft and Lukoil for the exploitation of the Kapaz site. Rosneft withdrew a year later because of Turkmen insistence on the legal status of the site.