

PROBLEM OF SETTLEMENT OF NATIONAL INTERESTS IN THE CASPIAN REGION (INTERNATIONAL LEGAL ASPECT)

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The Caspian Sea is a shared natural resource, i.e., it is under jurisdiction of several states. A special topicality of solving the problem of the legal status of the Caspian Sea is connected with the emergence of three new subjects of international law. As a result of the disintegration of the USSR the new independent Caspian Sea littoral states — Azerbaijan, Kazakhstan and Turkmenistan have emerged, each of which has its national interest in the Caspian region.

According to S. Kushkumbaev, an original hierarchy of the issues connected with the Caspian region which have bilateral, multilateral, regional and global aspects is being built.¹

At the Second summit of the Caspian littoral states in Teheran on October 16, 2007, in which Russia, Azerbaijan, Iran, Kazakhstan and Turkmenistan took part, the Final Declaration was adopted and signed by the above countries. The Declaration of the summit of the Caspian littoral states is based on principles of cooperation, territorial integrity and sovereign equality of states, non-use of force or threat thereof. The RF President's assistant S. Prikhodko speaking of the Declaration stated that it is: a «very serious and useful document which will help to promote the solving of the Caspian Sea problems. The most important thing, that there are rule-proclaiming positions there from which it is possible to move further».² The Caspian Sea is declared a demilitarized zone, «The parties state that the Caspian Sea should be used exclusively for peaceful purposes and that all issues in the Caspian region will be resolved by the Caspian littoral states by peaceful means». Moreover, the parties «stress that under no circumstances they will allow for their territories to be used by other states for aggression and other military actions against any of the parties».

The document underlined, that all five Caspian states have agreed that the development of a comprehensive legal status of the Caspian

¹ *Kushkumbaev S.* The Caspian Sea at the crossroads of geopolitical interests: oil, policy, security // Caspian. Kazakhstan. Official publication of KIOGE. 1999. P. 18.

² www.narodinfo.ru/news/34179.html

Sea and the adoption — as soon as possible — of the convention on the legal status of the Caspian Sea for this purpose is the most important task. The convention, as the basic document on the legal status of the Caspian Sea, should govern the issues of the implementation of the jurisdiction of the Caspian littoral states the Caspian Sea.

The Declaration specifies that among the activities which the Caspian states carry out and intend to carry out in the Caspian Sea there are the following: environmental protection and use of biological and mineral resources of the Caspian Sea, navigation. At this the Declaration points out to the necessity of considering the available arrangements between the Caspian states and to create favorable conditions for ensuring sovereign rights of the Caspian littoral states in the Caspian Sea. Besides, the parties have agreed to continue agreeing the issue of establishing zones of agreed width and water area in the Caspian Sea as well as the corresponding legal regimes.

The area of national interests of the Caspian littoral states includes a number of various problems. Among them the following problems may be singled out: environmental protection, territorial delimitation, and security of the region, hydrometeorology, and the use of natural resources (including production of hydrocarbons), fishing, navigation and realization of other economic activities. For the legal regulation and reconciliation of these interests, it is desirable that a major part of inter-relations in the specified areas is settled under a multilateral treaty between the Caspian littoral states.

The provisions concerning environmental protection of the Caspian Sea system occupy a special place in the Declaration. The Declaration is based on a number of major principles of the international environmental law. The document consolidates *inter alia* the following principles:

1. The principle of environmental protection for the benefit of the present and future generations. This principle has been provided by such international legal documents, as: the Stockholm declaration of principles of 1972, Final Act of the CSCE of 1975, the UN Convention on the law of the sea of 1982, and Declaration of principles of Rio de Janeiro of 1992. The Declaration of the summit of the Caspian littoral states underlines: «Recognizing their responsibility to the present and future generations for the preservation of the Caspian Sea and the integrity of its ecosystem, the parties stress the importance of expanding cooperation in solving environmental problems, including coordination of national environmental actions and cooperation with international environmental organizations in order to form a regional system of protect-

ing and preserving biological variety, rational use and replenishment of its biological resources». The specified principle has also been fixed in the earlier international legal act concerning the legal status of the Caspian Sea, i.e. the «Agreement between the Russian Federation and Republic of Kazakhstan on the delimitation of the sea-bed of the Northern part of the Caspian Sea with a view of realization of sovereign rights on exploitation of natural resources» of 1998. According to the preamble of the specified Agreement the Parties recognize «their responsibility before the present and future generations for preservation of the Caspian Sea and integrity of its unique ecosystem».

2. Principle of the international environmental cooperation. This principle is also fixed in the Stockholm declaration of principles of 1972. According to the Final Declaration, the Caspian states «acknowledge that the state of the Caspian Sea environment, its population of sturgeon require urgent joint efforts to prevent undesirable environmental consequences. To this end, the parties — as a priority — continue forming the necessary contractual and legal basis for regional environmental cooperation on the basis of the convention for the legal status of the Caspian Sea». As it is indicated in the opinion of the World commission on environment and development, the essence of this principle consists in the fact that the states for the purpose of preservation of the environment:

- work out plans in case of force major which can cause transboundary environmental disturbances;
- provide the corresponding information to interested states;
- co-operate with interested states, in case of occurrence of emergency situations.

By means of this principle, states both prevent environment damage and liquidate consequences of such damage.

3. The principle of prevention of transboundary damage. The damage is considered transboundary when an activity which results in such damage is carried out in the territory of one state, and the damage is caused in the territory of another state or in an international territory outside the jurisdiction or control of the state which is carrying out the specified activity.

The activity causing transboundary damage may include the use of air and sea space, industrial activity, exploitation of sea-bed resources, maritime transportation and others.

The activity causing transboundary damage can be carried out within the territorial jurisdiction of a state, outside of the state jurisdiction, on a site jointly used by states, in an international territory.

The activity causing transboundary damage can be divided into two principal forms:

The activity infringing norms of international law.

Lawful activity which, in turn, can:

- cause damage unexpectedly, due to unpredicted events;
- cause damage as a result of its routine realization.

International legal liability arises according to these forms of activity. In the first case it is liability for an offence, and in the second it is liability for damage caused by the activity not forbidden by international law.

The Declaration underlines: «The parties confirm the principle of the Caspian littoral states' responsibility for damage caused to the environment of the Caspian and to each other as a result of the use of the Caspian Sea and the development of its resources». Thus, we see the consolidation of the above principle in the Declaration provisions. In our opinion the consolidation of the principle of prevention of transboundary damage clearly testifies to the intention of the Caspian littoral states to arrange their mutual relations most effectively. The problem of causing of transboundary damage to the environment is one of the most topical and unsolvable problems arising in international relations.

The intention to provide in the base Convention on the legal status of the Caspian Sea norms on prevention of transboundary damage testifies to a progressive insight of the Caspian states of the problem under consideration. The principle of prevention of transboundary damage is fixed in such international legal documents as the draft Principles adopted by UNEP (United Nations Environment Program) in 1978, Convention on long-range transboundary air pollution of 1979, Convention on environmental impact assessment in a transboundary context of 1991, Convention on protection and use of transboundary watercourses and international lakes of 1992, the Convention on transboundary effects of industrial accidents of 1992.

Essentially, the principle provides that states should avoid and minimize negative effects of development of a shared natural resource which the Caspian Sea is.

The prevention principle might have two meanings.

The prevention *ex ante* is a prevention of a possible accident. The prevention *ex post* is a prevention of effects of the already occurred accident.

The main objective of measures which should be adopted by states is the prevention *ex ante*. Prevention *ex post* is a secondary purpose to which the states should aspire if the damage all the same has been

caused. The majority of conventions consider the prevention in the meaning *ex post*.

Measures for damage prevention should be adopted by operators, i.e. those who directly carry out the activity connected with a risk of causing damage. Here one can trace a connection between the principle of prevention of transboundary damage and the «polluter pays» principle which also makes the operator responsible. The «polluter pays» principle was for the first time formulated by the Organization of economic co-operation and development (OECD) in 1972. In the publication «Guiding principles concerning international economic aspects of environment policies» the OECD Council gave the following characteristic to this principle: «This principle provides that the polluter should bear the expenses of carrying out pollution prevention and control measures decided by public authorities to ensure that the environment is in an accepted state».³

The economic purpose of the «polluter pays» principle consists in the internationalization of covering the expenses connected with environmental pollution. In 1989, in the OECD recommendation the sphere of action of the «polluter pays» principle has been expanded. Besides cases of a permanent pollution caused by continuous activities, cases of a casual pollution have been also covered.

The very definition of the term “polluter” is an important and difficult issue. Depending on this term it is defined, who should pay directly for the caused damage. The Council of the European community in the recommendation of November 7, 1974 defined the “polluter” as «any subject, expressly or by implication causing damage to environment or creating conditions promoting causing of such damage».⁴ However in practice this definition does not always allow to define precisely, who the polluter is. For a more detailed analysis of this concept N.R. Malysheva offers the following options:

The person in whose property, possession, control, storage etc. the polluting substance was before it caused pollution;

The person possessing the ground area (structure), whence pollution results;

The holder of the permission to operate the polluting installation;

The person who managed or control the installation from which the polluting substance originates if it causes pollution;

³ Gaines S.E. The Polluter-pays Principle: From Economic Equity to Environmental Ethos // International JOURNAL. Texas, 1991. Vol. 26. P. 15.

⁴ Draft report of the International law commission on the work of its fifty third session. A/CN.4/L.607/Add.1. Geneva, 2001. P. 49. (in Russian).

The person who has caused pollution or authorized (admitted) the activity, resulting in pollution;

The manufacturer of the equipment whose failure has led to pollution (liability for manufactured products or liability of the designer).⁵

The «polluter pays» principle is most actively developed and applied in the European Union. In all six programs of environmental activity of the European Community⁶ the «polluter pays» principle occupies the leading place: prevention, decrease and whenever possible liquidation of pollution and environmental impact are proclaimed among the priority purposes; expenses due to prevention and liquidation of environmental impact as the general rule are assigned on polluter. The specified principle is contained in the Framework Convention for the protection of the marine environment of the Caspian Sea of 2003; according to art. 5 of the Convention: «In their actions to achieve the objective of this Convention and to implement its provisions, the Contracting Parties shall be guided by “the polluter pays” principle, by virtue of which the polluter bears the costs of pollution including its prevention, control and reduction of the pollution of the marine environment of the Caspian Sea».

At the same time the responsibility for prevention of transboundary damage can be assigned to the state by another state. And that state, as a recourse action, can make responsible the operator according to norms of the domestic legislation.

According to Rashid Gaissin, one of the reasons for conclusion of a uniform international treaty on the legal regime of the Caspian Sea is the ecological one which consists in the possibility of an «effective ensuring of environmental security only through joint efforts. The major problem here is the prevention of consequences of rising of the sea level and preservation of biological resources in the process of development of mineral resources».⁷

According to the official representative the MFA of the RF Michael Kamynin, «it is high time for taking joint efforts for preservation of biological resources of the Caspian sea. After all, the coastal countries are so to say personally responsible for rescuing of the unique sturgeon population which further existence is under threat. Thereupon the priority of the

⁵ *Malysheva N.R.* Harmonization of environmental legislation in Europe. Kiev, 1996. P. 30. (in Russian).

⁶ *Vylegzhanina E.E.* New tendencies in the development of the liability institute in the European environmental law // Moscow magazine of international law, 2003. № 4. P. 161. (in Russian).

⁷ <http://www.oil-equip.ru/ngv/5/precedent/prec.html>

prompt conclusion of a corresponding agreement on preservation and use of biological resources of the Caspian sea is obvious».⁸

According to Professor Gavrilov who spoke at the conference «Problems of the Caspian Sea: new approaches» held on October 24, 2007: «The Caspian sea is a unique object from the geological point of view. The Caspian Sea is a source of more than 130 sturgeon species. Today the Caspian waters become soiled as a result of oil and gas production. Some areas of the Caspian Sea are in the state of biological catastrophe. The basic sources of pollution are: natural infiltration of hydrocarbons from the subsoil; uncontrollable volley oil emissions; gas emissions because of burning of accompanying gas; river and rain drains from the adjoining land; dumping of radioactive waste and sludge; poaching».

The Caspian Sea is a closed reservoir; therefore its regenerative processes go much more slowly, than in the high seas.

In 2003, as it was already mentioned, the Caspian littoral states signed Framework Convention for the protection of the marine environment of the Caspian Sea. The Convention has come into force for all state parties, including Russia. The document is based on the principles of cooperation, prevention of environmental pollution, precaution, «polluter pays» and exchange of information. According to art. 9 of the Convention «The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Caspian Sea from vessels and shall co-operate in the development of protocols and agreements to the Convention prescribing agreed measures, procedures and standards to that effect, taking into account relevant international standards».⁹ According to the UN Secretary General assistant and UNEP chief executive director Achim Steiner «the fragile environment of the Caspian sea is extremely vulnerable because of oil and gas production in the region». The Convention parties also plan to sign a protocol to the Convention entitled «On biological diversity».

Rashid Gaissin specifies that in the course of the shelf delimitation the responsibility of the littoral states increases, there appears a possibility of formation of a mechanism of compensation for damage caused as a result of exploitation of sea deposits, and punishment of guilty persons.¹⁰ Thus, the necessity to provide in the treaty on the legal status of Caspian Sea the responsibility of the state parties both for offences, and for damage caused by an activity not forbidden by international law, is obvious.

⁸ http://www.rian.ru/m_kamynin/20071015/83981542.html

⁹ <http://www.rian.ru>

¹⁰ <http://www.oil-equip.ru/ngv/5/precedent/prec.html>

The Report of the of International law Commission to the UN General Assembly in 1973 underlined the difference between these two kinds of responsibility and pointed out to the necessity to consider those concepts independently from each other. Today the Commission works out two corresponding drafts of the articles.

If the state proves, that it has taken all possible measures to prevent impact of the damage caused it can be relieved from responsibility for the offence, but in any case it will be obliged to compensate the caused damage. That is, the liability for damage caused by the activity not forbidden by international law, will be all the same assigned to the state.

The International Court of Justice even before the Commission terminated its work on the draft article on responsibility of states for offences had adopted a number of draft provisions and applied them in the course of decision making.

In December 2001, the UN General Assembly adopted the resolution to which the document entitled «Responsibility of States for Internationally Wrongful Acts» was attached as annex. Articles of that document have been taken into consideration and offered «to the attention of the governments, not mentioning at that the issue of their future adoption or another appropriate measure». The governments characterized the submitted draft as the most important one ever carried out by the Commission. Professor Lukashuk called the adoption of that resolution the inauguration of a new stage in international law development. The new stage in this case is characterized by formation of the law of international responsibility as a separate branch of international law and, the most important thing, of the codification of the given branch. The importance of this process consists in the fact that the law of international responsibility is without exaggeration a basic branch of international law without which a due functioning of the latter as a system becomes baseless.¹¹

As to the second kind of responsibility, the responsibility for damage caused by lawful activity, is called the responsibility without fault, strict, objective, compensatory liability. As a matter of fact, these concepts are very close. The UN General Assembly session in 2000 adopted the resolution in which the General Assembly expressed its gratitude to the UN International law commission for the work done on the topic « International responsibility for harmful consequences of the actions which are forbidden by international law (prevention of trans-

¹¹ Lukashuk I.I. The law of international responsibility. M, 2004. P. 5.

boundary damage)» and asked the Commission to continue work on the draft, having started as the first step with the issue of prevention of transboundary damage as a result of hazardous activities.¹²

For the concept of responsibility for damage caused by a lawful activity, of a great value is the concept of risk. This concept as well as the concept of the «polluter pays» principle has been formulated by OECD.

The risk means bringing by a person into environment of substances and energy, leading to such destructive consequences which create threat to human health, cause damage to live resources and ecosystems and create obstacles for lawful uses of environment.

The UN International law commission has come to conclusion, that there is no sense to make an exhaustive list of dangerous activities for two reasons. First, there exist in the world more than 60000 chemical substances, and it is impossible to know all consequences of their application. Secondly, some substances, for example, water, are not dangerous; however in some cases they can cause damage (for example, when a dam breaks).

The risk is a basic component of hazardous activities, a degree of risk of damage occurrence and size of such damage determine the danger of this or that activity.

The activity connected with a risk of causing damage can be divided into two categories:

1) The activity inherent with risk. Such activity leads to a higher risk of causing damage. In this case damage has not come yet, but a probability of its occurrence is great.

2) The activity inherent with harmful consequences. Such activity causes damage as a result of its normal, usual realization. In this case consequences in the form of damage have already occurred or are occurring. At this the occurrence of such consequences is not unexpected; it can be expected in advance, even prior to the beginning of the realization of such activity.

The most activities carried out in the Caspian region (especially in the field of production and transportation of hydrocarbons), concern the specified categories. Therefore, in our opinion, experience of the UN International law commission in the course of solving the problem of responsibility for transboundary damage caused by lawful activity, is of great importance and should be used for prevention of the Caspian Sea

¹² Official records of the General Assembly, fifty second session. A/52/10. Geneva, 2000. P. 168. (in Russian).

pollution. The expediency of inclusion of corresponding norms in the treaty on the legal status of the Caspian Sea raises no doubts.

It would be desirable to underline as a positive and progressive fact that the Caspian littoral states did not want to co-ordinate the solving of environmental protection issues with other pressing questions of the legal status of the Caspian Sea (territorial delimitation, security). It is proved also by the provisions of the Framework Convention for the Protection of the Marine Environment of the Caspian Sea of 2003 which art. 37 underlines: «Nothing in this Convention shall be interpreted as to prejudge the outcome of the negotiations on the final legal status of the Caspian Sea». On the one hand, such approach testifies to the understanding of impossibility to postpone the solution of questions of the Caspian Sea environmental protection. However, on the other hand, a prompt solution of the issues which, at first sight, are not connected directly with the environment will also positively influence the Caspian Sea environmental protection as it will give a chance to realize in practice the measures for the protection of the marine environment of the Caspian Sea, provided by the Framework convention.

One of most difficultly soluble issues of the problematic under consideration is the issue of the territorial delimitation of the Caspian Sea. Each of the Caspian littoral state offers its concept proceeding from its own national interest. As a result the search for a conciliatory solution is proceeding up till now. All the same, sometimes the Caspian littoral states manage to come to coordinate their views. Thus, for example, Russia and Iran adhere to the position according to which third countries which do not have an exit to the Caspian Sea should not be allowed the right of a free access to the specified reservoir. Before the meeting in Teheran the official representative the MFA of Russia Michael Kamynin stated that it was necessary «not to grant the right of passage in/from or within the Caspian Sea for vessels flying the flag of states which are not the parties to the Convention».¹³ The above position has found its reflexion in the Declaration: according to par. 5 and 7, «The parties state that only the littoral states have sovereign rights as regards the Caspian Sea and its resources. The parties agree that before the new legal status of the Caspian Sea is defined, the regimes of navigation, fishing and seafaring exclusively under the national flags of the Caspian littoral states ... should apply in this zone». According to the leading expert of the analytical centre «Glory of Russia» A. Kurtov, «Iran does not have the big necessity for developing new deposits — it

¹³ <http://www.regnum.ru>

actually “chokes with oil» from the Persian gulf deposits which besides are successfully located nearby to the mastered ways of their transportation to the external world and are provided with an appropriate infrastructure. Iran does not have big free currency reserves which it could invest in the development of the Caspian deposits, and Tehran would not obviously like to see near its borders western oil campaigns». ¹⁴ The president of Azerbaijan Ilham Aliyev in his speech at the summit of the Caspian littoral countries in Tehran proposed «to divide fifty-fifty the water area of the Caspian sea». He supported the idea that «the Caspian Sea is a debate sea, and not a dispute sea, the sea of the peace and cooperation in the development of trade, in disarmament». I. Aliyev also stated that the Caspian Sea should become a region of stability. ¹⁵ In 1998, the Russian Federation and Kazakhstan signed the Agreement on delimitation of the sea-bed of the northern part of the Caspian Sea with a view of realization of sovereign rights over exploitation of natural resources. The Russian Federation ratified this Agreement in 2003. In 2002 Russia and Kazakhstan signed the Protocol to that Agreement which established the legal regime of the sea-bed of the northern part of the Caspian Sea. According to art. 1 of the above Agreement «The sea-bed of the northern part of the Caspian sea and its subsoil, at preservation in the common using of the water surface, including provision of freedom of the navigation, co-coordinated norms of fishery and environmental protection, are divided between the Parties along the median line modified on the basis of a principle of justice and agreement of the Parties. The modified median line is based on a basis of equitable distance from the co-coordinated base lines; it includes sites which are not equidistant from base lines and are determined taking into account islands, geological structures, and also taking into account other special circumstances and incurred geological costs». According to art. 2 of the Agreement «the Parties realize their sovereign rights for the purpose of exploration, exploitation and management of the sea-bed and subsoil resources of the Northern Caspian sea within the limits of their parts of the sea-bed up to the dividing line». The Protocol to the Agreement provides the application of the laws of the Russian Federation or Republic Kazakhstan to the development of this or that deposit in the Caspian Sea. Thus, «the modified median line» which delimitates the sea-bed of the Northern part of the Caspian Sea, is not a boarder between Russia and Kazakhstan. The above mentioned Agreement and Protocol provide

¹⁴ http://www.nasled.ru/prensa/obozrev/N04_00/04_08.htm

¹⁵ <http://news.made.ru/economics/news181317.html>

that the Parties realize «the sovereign rights» for the purpose of exploration, exploitation and management of the sea-bed and subsoil resources of the Northern Caspian Sea within the limits of their parts. It is not a question of extending the sovereignty of the states over the specified parts. The detailed description in the Protocol of the situation as to the legislation of what state will regulate the exploitation of resources in the Northern Caspian Sea also confirms that the sovereignty of the contracting parties does not extend over their respective parts of the sea-bed. These circumstances confirm, that delimitation of the Northern Caspian Sea does not result in establishing borders between Russia and Kazakhstan; it serves only for realization of the sovereign rights of the use of natural resources of the mentioned states.

The Russia — Azerbaijan Agreement on delimitation of the adjacent areas of the Caspian sea-bed of September 23, 2002; the tripartite Agreement between Russia, Azerbaijan and Kazakhstan on the meeting-point of delimitation lines of the adjacent areas of the Caspian sea-bed of May 14, 2003, were also signed. On the basis of the above documents Russia, Azerbaijan and Kazakhstan carry out exploration and exploitation of natural resources in the Northern part of the Caspian Sea. Unfortunately, similar treaties concerning the southern part of the Caspian Sea between Azerbaijan, Iran and Turkmenistan have not been concluded yet. According to the representative the MFA of the RF M. Kamynin, it prevents solving the issue of the use of natural resources in the entire Caspian Sea and impedes the five-sided coordination of corresponding provisions of the Convention on the legal status of the Caspian Sea as a whole. Iran which possesses 13 % of the coast line of the Caspian Sea, insists on the equal division of the Caspian sea-bed (20 % per each of the five Caspian littoral states). But Russia, Kazakhstan and Azerbaijan are against this proposal. They have entered into agreements among themselves which give them control over 64 % of the Northern part of the sea; they have drawn equidistant lines from their coasts in the Caspian Sea and de facto use the sea-bed as their national sectors. The surface and water column are in common use. Iran does not recognize these arrangements. The position of the former Turkmen leadership was close to the Iranian position.¹⁶ Russia is against the creation of excessive barriers in the Caspian Sea when determining its status and favors the situation when the major part of the Sea would remain in common use of the Caspian littoral states, the RF President stated at the summit of the Caspian littoral states in Tehran. «We sincerely aspire

¹⁶ <http://www.rosbalt.ru>

that the Caspian Sea does not separate, but unite, connects all of us, and we are convinced: the Caspian Sea space should not be entirely covered by boarder lines, sectors and exclusive zones. The smaller part of the water area they will occupy, the bigger part of the water column and surface will remain in common use of the Caspian littoral states, the better «, — he said. As to economic activities on the sea-bed, in subsoil it can be carried out within the limits of the national zones of the use of natural resources. Their limits in the Northern Caspian Sea are already established, the RF President noted. «We believe that the interested parties will find a balanced and mutually acceptable decision for the Southern Caspian Sea as well. At this one may not wait for the working out of the convention on the legal status in order to conclude an agreement on delimitation of the sea-bed for the purpose of the use of natural resources; it is possible to involve the five party format «, — the RF President said.¹⁷

This problem has a political, legal as well as geological aspect. In spite of the fact that the term «shelf» is often used in relation to the Caspian Sea, many experts (politicians, lawyers, geologists) consider, that in the Caspian Sea there is no continental shelf. It means, that norms of international and domestic law determining the legal status and regime of economic activities on the continental shelf cannot regulate the relations arising in connection with the exploitation of the area called «continental shelf» of the Caspian Sea. Thus, the deputy head of the MFA of the RF V. Kalyuzhny stated: «We consider, that there is no continental shelf in the Caspian Sea. It is a unique reservoir which requires a special legal regime. The Astana position differs from the Moscow position. Kazakhstan in its law has designated the 12 miles zone. Though Astana has explained that the concept «continental shelf» has only an internal orientation and does not contradict the international agreements, including the Russian-Kazakhstan agreement on delimitation of the sea-bed of the Northern part of the Caspian Sea. Besides, in its law Astana has fixed that international agreements prevail over the domestic legislation».¹⁸ Candidate of juridical sciences, Professor P.V. Savaskov, doctor of geological sciences Professor V. P. Gavrillov also specified at the conference held on October 24, 2007, devoted to problems of Caspian Sea, that the Caspian Sea has no continental shelf. According to Rashid Gaissin the use of mineral resources of the Caspian

¹⁷ www.rian.ru

¹⁸ Vremya Novostey, 2002. №178. Sept. 27. (in Russian).

shelf belongs to the most disputable blocks of questions.¹⁹ He underlines, that need to delimitate the sea-bed of the Caspian Sea is quite demonstrable in the legal sense, and its realization is the most effective way for carrying out of successful exploitation of mineral resources and protection of the regional environment.²⁰ However further he specifies, that «the legal regime of the Caspian sea continental shelf outside the territorial waters (12 nautical miles) would most likely include not the full property right but exclusive “sovereign rights” for the purpose of exploration and exploitation of natural resources of the continental shelf according to the norms of international law (par. 1 article 77 of the UN Convention on the law of the sea of 1982)».²¹ However if it will be recognized, that from the legal, and geological point of view there is no continental shelf in the Caspian Sea, the reference to the norms of the UN Convention on the law of the sea concerning the continental shelf will be unfounded.

A. Kurtov writes that the UN Convention on the law of 1982 contains definitions of the high, semi-closed and closed sea. The Caspian Sea does not fall under these definitions, and it is natural, that it belongs to lakes — closed reservoirs which do not have any connection with the world ocean either directly or through other seas and passages though from the time immemorial the name «sea» was attaché to it. However, the recognition of the Caspian Sea as a lake does not mean, that there are no legislative grounds for its delimitation in sectors. Even on the contrary, the international law knows the concept of an international frontier lake which makes quite possible a delimitation of such reservoir in sectors. However in the case of the Caspian Sea of importance are not only and not so much references to the UN Convention on the law of the sea of 1982 and Geneva Convention on the continental shelf of 1958, as references to the agreements between Russia (USSR) and Iran in which the status of the Caspian Sea was determined. From the point of view of international law these treaties are the primary sources of the international status of the Caspian Sea.²²

Iranian experts and the MFA of the RF note, that the available legal documents concerning the Caspian Sea testify that provisions of the Convention on the law of the sea of 1982 do not apply to that midland reservoir.

¹⁹ <http://www.oil-equip.ru/ngv/5/precedent/prec.html>

²⁰ Ibid.

²¹ Ibid.

²² http://www.nasled.ru/pressa/obozrev/N04_00/04_08.htm

At the same time, on December 14, 1998, in Tehran the agreement between the National Iranian oil company (NIOC) and the oil companies — English-Dutch «Shell» and Dutch «Lasmo» on joint geologist-geophysical exploration on the Iranian continental shelf in the Caspian Sea was signed.

Thus, the questions of the availability of the continental shelf in the Caspian Sea and of the norms of the international and internal law which should be applied to settlement of the specified relations remain opened. It is obvious that owing to the specificities of the Caspian Sea an individual approach taking into account these specificities and national interests of all Caspian littoral states is needed.

Regional security

Among the contemporary areas of cooperation, the RF President singled out the ensuring of security and stability in the Caspian region, at this, in the widest meaning of the word — «safety of navigation, protection of oil and gas production installations, and also the common struggle against the international terrorism and extremism».²³ In his opinion, there are already here concrete initiatives deserving a close attention. «I mean the Kazakhstan draft Pact on stability and Iranian agreement on trust and stability measures. I should tell also about the Russian proposal on the creation of a joint naval group of operative interaction «Casfor», — the president said.²⁴

The initiative to create in the Caspian Sea a special grouping consisting of Navies of the states of the region «Casfor» was supported by the former Minister of Defense of the Russian Federation S. Ivanov and the commander-in-chief of the Navy fleet of Russia admiral V. Massorin. According to admiral V. Massorin, «today actually all the Caspian littoral states face the problem of ensuring security on the sea as many vessels navigating here are engaged, at the best, in the illegal fishing, and sometimes in trafficking and transportation of drugs, weapon intended for gangster groupings, and other illegal cargoes».²⁵ The Russian military consider that «Casfor» will by no means be directed against any concrete state. The grouping will help to organize the counteraction to the criminal structures professing the ideology of terror. The participation in «Casfor» assumes both joint actions on the sea, and exchange of information, working through the interaction, creation

²³ www.rian.ru

²⁴ http://www.nasled.ru/prensa/obozrev/N04_00/04_08.htm

²⁵ *Kurtov A.* On the Caspian Sea the military correct diplomats' errors // <http://www.centrasia.ru>

of coordination centers, the control of the coastal zone, navigation.²⁶ According to the head of the International centre for Caspian studies (ICCS) Abbas Maleki, «for successful operation of the project» Casfor» it is necessary at first to determine the legal status of the Caspian Sea.²⁷ If the Sea is divided between the five littoral countries, then Iran will cease to border on Russia and the creation of a joint military grouping loses sense for it». «If the major part of the Sea will remain in common use of the Caspian littoral states, then Teheran will support the creation of «Casfor» for the purpose of struggling against terrorism, narcotraffic, contraband, and also of carrying out of salvage operations on the Caspian Sea», — A. Maleki added.²⁸ Besides, according to the expert, security issues in the Caspian region should be dealt with exclusively by the littoral countries (Iran, Russia, Azerbaijan, Kazakhstan and Turkmenistan) without any involvement of foreign states, including the USA and Europe. The cooperation in the security sphere is possible within the limits of the Shanghai cooperation organization (SCO), the Organization of economic cooperation and structures of the CIS, Maleki considers. He called into question a practical realization of the American project «Caspian guard», presuming the protection against terrorists of transport communications of oil production installation. «Americans understand, that they cannot easily interfere into the Caspian Sea affairs, considering, that the Caspian sea region is strategic for Russia and other littoral countries. The history shows, that, since 1992, the USA have not managed to reach appreciable successes in its policy on the Caspian Sea direction», — ICCS head said.

However, military objects created by the USA have already emerged on the Caspian Sea coast. The most recent example is the radar station in Astar, Azerbaijan. The military base in Atyrau (Kazakhstan) was built with the financial participation of the US Defense department. In the end of summer of 2005 the USA announced its intention to start realization of a new program called «The Initiative to protect the Caspian Sea». It is supposed, that the US government will allocate 130 mln. US dollars for patrolling the Caspian Sea and protection of borders of Caspian littoral states. According to the American military, for the time being the given program will be focused on Azerbaijan and Kazakhstan, but it can be expanded the next years. In the named republics

²⁶ Ibid.

²⁷ www.rian.ru

²⁸ Ibid.

the Pentagon plans to construct command-staff centers, and also centers for carrying out air and sea intelligence operations.²⁹

The President of Kazakhstan Nursultan Nazarbaev suggested to limit naval activity on the Caspian Sea. «Demilitarization is the most preferable variant, — he said speaking in Teheran at the second summit of the Caspian littoral states, having noticed however that there was also another idea, namely the five party control on the Caspian Sea. — We propose to limit naval activity by the issues assigned to the boundary naval services».³⁰ As it was specified earlier, the Declaration of the summit of the Caspian littoral states of 2007 has assigned to the Caspian Sea the status of a demilitarized zone. However it is obvious, that issues of military, ecological and other kinds of security require a legal solution and can be resolved in a five party international treaty concluded between the Caspian littoral states.

The Caspian Sea is a source of hydrocarbons. This fact also involves complexities in the search for a compromise in the course of determining by the Caspian littoral states of the legal status of the Caspian Sea. The Turkmenistan President Gurbanguly Berdymukhamedov has stated that unilateral actions on exploitation of oil deposits on the Caspian are inadmissible. «For Turkmenistan a practice of unilateral activities on the Caspian Sea, first of all, for the purpose of carrying out of oil prospecting works on the sites on which the parties have agreed upon, remains unacceptable», — he stated at the summit of heads of the Caspian littoral states in Teheran.³¹ Berdymukhamedov has underlined, that Turkmenistan strictly observes the generally recognized norms and principles of international law directed on respect of sovereignty and observance of justice in the relation with partners in the region. «The same attitude should be displayed to legitimate rights and interests of Turkmenistan», — he said.³² In terms of natural gas deposits, Iran occupies the second place in the world after Russia. First of all Russia, USA and Europe are interested in a legal settlement of relations with Iran in this area. Thus, S. Pravosudov, director of the institute of national energy, notes: «Europe expects to agree with Iran about acceding of that country to the Nabucco project. However the USA opposes that hoping to establish in Iran a friendly regime which will allow American

²⁹ To see more in detail: On the Caspian Sea the military correct diplomats' errors // <http://www.centrasia.ru>

³⁰ www.rian.ru

³¹ Ibid.

³² Ibid

companies to deliver the blue fuel to Europe.³³ The USA is interested in construction of a pipeline and delivery of oil from the Kazakhstan deposit Kashagan. Such variant would further allow filling of both the pipeline Baku-Tbilisi-Dzhejhan and the pipeline going through the Washington friendly territory of Georgia. At this, that and other oil can be pumped in the Ukrainian pipeline Odessa-Brody. Russia thereby will lose not only huge sums due for transit, but also its influence in the extensive region to the South of the borders.³⁴ In turn, Russia lobbies the construction of a gas pipeline Iran-Pakistan-India. However relations between the three countries remain difficult. Therefore there was an idea to make Russia a guarantor of the operation of that gas-main, and «Gazprom» — a company-operator. Simultaneously «Gazprom» carries on negotiations concerning participation in production projects in the territory of these states and creation of an infrastructure for selling gas». ³⁵ According to the Kazakhstan President N. Nazarbaev, it is necessary to develop conditions of transportation of energy resources. «Routes of lining of pipelines should be co-coordinated with the countries through which sites on the sea-bed they will pass », — the Kazakhstan President said.

A uniqueness of the Caspian Sea consists also in the fact that is the world richest source of sturgeon fishes. Beluga, sturgeon, stellate sturgeon, thorn fish and other species of sturgeon fishes have their habitat in the Caspian Sea. Unfortunately, as a result of anthropogenic impact on the ecosystem of the Caspian Sea, the sturgeon stock constantly decreases. «The species from which black caviar is produced, that is, sturgeon, are increasingly diminishing. Since 1991, the sturgeon stock in the Caspian basin has reduced by 3,5 times. From the point of view of any ecologist, it is a catastrophe», — the expert of the World wildlife fund (WWF) A.Vajsman reported. According to the FSUE (Federal state unitary enterprise) «CaspNIRH» director general G. Sudakov: «The highest number of these kinds of fishes has been registered in the late sixties of the last century. In particular, at that time the sturgeon stock reached 113, 2 million units, stellate sturgeon — 90 million units. However later the number of sturgeon started decreasing, at that the sharpest decrease was recorded after the disintegration of the Soviet Union. Now the scientists count in the Caspian Sea about 30 million

³³ Ibid.

³⁴ Kurtov A. On the Caspian Sea the military correct diplomats' errors // <http://www.centrasia.ru/>

³⁵ www.rian.ru/

units of sturgeon and no more than 20 million units of stellate sturgeon». G. Sudakov noted that the creation of the Uniform reproduction complex of the Caspian littoral states is directed on the preservation and increase of sturgeon stocks. It should be created in cooperation between the fish-breeding enterprises of various forms of ownership. Now in the Caspian basin over 20 sturgeon fish-breeding factories, including 10 — in Russia, 4 — in Azerbaijan, 2 — in Kazakhstan and 7 in Iran are in operation. Besides, according to Sudakov, it is necessary to create a uniform structure for protection of water biological resources instead of the existing today about 10 fish protection organizations belonging to different departments. It will improve coordination of efforts and will lower volumes of poaching catch which exceeds now 20 thousand tons. For the comparison, the official total catch of sturgeon by all Caspian littoral states accounts for 0, 6 thousand ton.³⁶ The President of Kazakhstan also considers it necessary to review quotas for fishing sturgeon in the Caspian Sea. «It is necessary to reconsider discriminative decisions as there are no longer two states — the USSR and Iran, and there are five independent states, Nursultan Nazarbaev said. Existing quotas for fishing sturgeon are as follows: Iran — 45%, Russia — 27% and the others three states — 28% — do not meet the today's realities . It is necessary to prepare «a scientific substantiation of the use of biological resources» and to solve this question «through signing of a corresponding five party agreement», he stressed. The President of Kazakhstan has also supported the creation of more fair conditions of fishing on the Caspian Sea. He said that Iran catches 45%, Russia — 25%, and the share of the remaining countries is 30%. «It is unfair», — he said.³⁷ The joint meeting of the heads of the Accounts chamber of the Russian Federation, the Accounts committee for the controlling of execution of the republican budget of the Republic of Kazakhstan and the Accounts chamber of the Azerbaijan Republic in March, 2007, discussed the outcome of the parallel reviewing of efficiency of the use of water biological resources of the Caspian Sea, and also the means directed on protection, preservation, restoration and rational use of sturgeon stock. The participants of the meeting considered as unsatisfactory the rates of work on realization of the Framework convention for the protection of the marine environment of the Caspian Sea. They also noted the necessity of finalize and sign an intergovernmental agreement on preservation and use of biological resources of the Caspian sea with

³⁶ <http://www.astrakhan.net>

³⁷ rian.ru

a view of formation of a legal basis of an interstate operation of the fish industry on the Caspian Sea, first of all in the sphere of protection, studying and reproduction of fish stocks.³⁸

Thus, we can see that the exploration and exploitation of one natural resource a considerable damage is done to another natural resource. Thus, according to the director of the Caspian scientific research fisheries institute V. Ivanov, «the problem of protection of the Northern Caspian sea ecosystem from its possible degradation in the conditions of oil production is of a paramount importance».³⁹

In order to solve this complicated problem it is necessary to unite efforts of experts in various areas: ecology, fisheries, hydrocarbons production, legal regulation, policy and economy. Many experts consider that moratorium on fishing of sturgeon species and realization of hydrocarbons modern technology production, allowing causing the least damage to the environment or at least to reduce its impact to a minimum level can be an effective means. From the legal point of view the prompt conclusion of a multilateral treaty and implementation of its norms into the domestic legislation of all Caspian littoral states is necessary. Such treaty should be based on principles of due discretion, «polluter pays» and the concept of sustainable development. Besides, the treaty and also the domestic legislation should contain norms concerning liability for damage to such natural resources as fish stocks of the Caspian Sea, caused both as a result of an offence, and activities which have been not forbidden by the law. It is extremely undesirable to condition the solving of protection of sturgeon stocks by the solving of delimitation issues of the Caspian Sea. Otherwise, there can develop a situation when there will be no problem of quotas for fishing because there will be nothing to fish.

The need for the conclusion of a multilateral treaty determining the legal status of the Caspian Sea, regulating the realization of all economic activities in it, establishing a security regime and procedure of protection of the Caspian Sea environment, is obvious. It is obvious also that to find a compromise and co-ordinate interests of all Caspian littoral states is a challenge demanding taking actions in the most various directions. One of the ways of solving this problem is a search for mutually advantageous conditions for the parties. In other words, it is necessary to look for a solution of that problem also in the sphere of economic interests of the Caspian littoral states. The President of the

³⁸ <http://www.u-profy.ru/?l=ru&key=index&nid=26054>

³⁹ *Ivanov V., Katuni D.* One may, but carefully // Oil of Russia. 2001. № 5. (in Russia).

Russian Federation at the outcome press conference in Teheran following the Caspian summit stated: «We have agreed on an intensification of economic cooperation and have agreed with the proposal of the President of Iran to move towards the creation of a corresponding organization of an economic orientation. As the first step toward that target the parties have agreed to hold in Russia the next year an economic conference of the Caspian littoral states».⁴⁰

According to the head of the International centre for Caspian studies (ICCS) in Teheran Abbas Maleki, the stirring up of economic cooperation of the Caspian littoral states can accelerate the process of determination of the legal regime of the Caspian Sea. Thereupon, A. Maleki reminded, several years ago Teheran suggested creating an Organization of economic cooperation of the Caspian region countries, however that initiative has not been yet realized in practice. «Such organization could co-ordinate the cooperation of the five countries in sphere of fishery, monitoring of the environment, cargo transportation and production of hydrocarbons, the ICCS head considered.⁴¹ Professor V. M. Shumilov, speaking about the importance of economic integration of the states, specifies that «the balance of interests is gradually found, supranational interests prevail over. Their realization will demand a uniform political organizational consolidation».⁴² Today cooperation of the Caspian littoral states can be carried out within the limits of the already existing international organizations, such as CIS and SCO, however the creation of the organization for cooperation of the Caspian littoral countries will facilitate the conclusion of the five party treaty. Today all Caspian littoral states are «potential» participants of such a treaty. Obviously, all Caspian littoral states should be parties to the treaty on the legal status of the Caspian Sea. If we make use of the Professor I. I. Lukashuk's classification of potential parties to an international treaty, we will classify the Caspian littoral states as necessary, important and most interested parties.

The necessary participants are the states without which participation the treaty cannot be concluded or becomes senseless and cannot be realized. So, the necessary participants of a nonproliferation treaty are the nuclear powers, those of an outer space treaty are space powers. The legally necessary participants are the most interested states, i.e.

⁴⁰ www.rian.ru

⁴¹ <http://www.rusenergy.com>

⁴² *Shumilov V.M.* International economic law. Rostov-on-the Don, 2003. P. 201. (in Russian).

such states which problems are the basic subject of the treaty regulation. The important participants are the states on which participation the efficiency of the treaty depends. The importance of this category is quite often directly fixed in the treaty.⁴³ Thus, for an effective realization of the treaty on the legal status of the Caspian Sea the coordination of wills and interests of all Caspian littoral states is necessary. The declaration is the first international document of a universal character directed on settlement of the international legal status of the Caspian Sea. The President of Iran Ahmadinezhad said that the Declaration in general is the first document signed by the heads of the five Caspian littoral states for 15 years of negotiations on the new status of Caspian Sea.⁴⁴ The President of Kazakhstan N. Nazarbaev has also spoken in favor of a prompt conclusion of work on the draft Convention on the legal status of the Caspian Sea. Only the «formation of a legal base will allow effectively and collectively to co-operate on the Caspian Sea in all directions», — he stated.⁴⁵ It is presumed that later the Declaration provisions will be embodied in the Convention on the legal status of the Caspian Sea, open for participation of all Caspian littoral states and other interested states. According to par. 8 of the Declaration «The parties declare that the development of a comprehensive legal status of the Caspian Sea and the adoption — as soon as possible — of the convention on the legal status of the Caspian Sea for this purpose is the most important task».

⁴³ For more in detail see: *Lukashuk I.I.* Contemporary law of international treaties. M., 2004. V. 1. P. 164-167. (in Russian).

⁴⁴ <http://www.smi.ru/text/07/10/17/908061559.html>

⁴⁵ <http://www.rusenergy.com>