

## ON THE APPLICABILITY OF THE *UTI POSSIDETIS JURIS* PRINCIPLE DURING DELIMITATION OF THE CASPIAN SEA AMONG THE LITTORAL STATES

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### *Introduction*

One of the Caspian region's most problematic issues is determining the legal status of the Caspian Sea. The status of the Caspian Sea was first enforced in two agreements entered between Russia and Iran in 1921 and 1940. But the collapse of the U.S.S.R. and, as a result, the appearance of newly independent states on the Caspian coast (Azerbaijan, Kazakhstan, and Turkmenistan) led to a change in the existing legal, as well as political, positions in the region. This was partially reflected in U.N. documents.<sup>1</sup> The regime established as early as Soviet times no longer met the interests of the littoral states, particularly with respect to use of the economic resources of the Caspian's seabed and its contiguous waters, which made re-examination of the issue obligatory.

At present, the countries of the region are divided on this issue, upholding two radically opposing viewpoints.

<sup>1</sup> See: P. Tavernier, *Le statut juridique de la mer Caspienne: mer ou lac? La pratique des États vue à travers les docu-*

Iran's position, and to some extent Russia's, is based on the fact that the Caspian Sea is a lake, the legal status of which was defined by the agreements of 1921 and 1940 which should be considered valid until new agreements are entered on this issue (the condominium thesis). However, the new littoral states (Azerbaijan, Kazakhstan, and to a lesser extent Turkmenistan) refer to the legal mechanisms of territorial inheritance of the states based on the so-called *uti possidetis, ita possideatis* principle (as you possess, so may you possess), that is, the principle of succession of territories and boundaries.<sup>2</sup> It enforces the state's right to inherit the administrative borders they held at the time the colonial or totalitarian predecessor state collapsed.

In this article, we shall try to offer a legal analysis of the two above-mentioned positions, as well as examine the applicability of the *uti possidetis juris* principle to the littoral states.

*ments publiés par les Nations Unies, 1999, available at [http://www.ridi.org/adi/199910a1.htm#n2#n2], 11 February, 2007.*

<sup>2</sup> *Ibid.*, § 14.

### The Legal Status of the Caspian Sea: Past and Present

First it would be expedient to take a closer look at several basic geographical parameters of the Caspian Sea. It is located between 36°34 and 47°13 N and 44°18 and 52°24 E. It is divided into three

main basins: the first is the Northern Caspian with a depth of less than 100 meters and is part of the Volga Plain; the Middle Caspian, the so-called small Caucasian Depression, between 40° and 44° latitude, where the depth varies from 500 to 800 meters; and the Southern Caspian with a depth that reaches 1,000 meters. Due to the coastline vagaries, which depend on the changes in sea level, the area of the sea's surface fluctuates from between 380,000 to 430,000 sq. km. The average width amounts to 200 nautical miles, apart from the northern zone, which is more than 300 miles. The main activities in the sea are fishing and oil and gas production. The Caspian Sea serves as a direct communication network for some of the littoral states. For example, it is linked to the Black Sea by the Volga-Don Canal and to the Baltic via the Volga-Baltic Canal.<sup>3</sup>

Most researchers in the international law of the sea believe that from the legal viewpoint the Caspian is a lake and not a sea. For example, renowned French specialist in this sphere, Gilbert Gidel, believes that for the status of such water areas to be regulated by the international law of the sea, they must be freely and naturally connected with each other all over the globe. In so doing, the salt water basin called the Caspian Sea may be an entity of international relations since its coast is shared by several political regimes; however, it is not automatically governed by the regulations of the international law of the sea since it is not connected to the oceans.<sup>4</sup>

At the same time, the historical and, to a greater extent, oceanographic aspects, as well as the salt water composition and type of fauna and flora of the Caspian, reinforce the viewpoint of those experts who claim that this body of water is a sea.<sup>5</sup> Gilbert Gidel had the following to say about this: "...International law may only be applied by the tacit consent or a formal agreement among the littoral states which are essentially the only possessors of the right to dispose of these waters."<sup>6</sup>

The practice of delimitation in bodies of water shows that in the past it has been based on the consideration of common interests, which requires joint participation among the states involved in the use of mineral and fish resources, or carried out in compliance with the principle of fair division of their use. In the latter case, delimitation was carried out on the basis of a so-called equidistant median line. In so doing, the littoral states were to observe precautionary measures in order to protect each other's interests. Such an agreement could also include provisions that permitted only the littoral states to engage in free shipping, as well as provisions on establishing international cooperation in the border zones.

The status of the Caspian Sea is still undetermined and unrecognized by the littoral states and by the international community as a whole.<sup>7</sup>

## The Age of the Russian Empire

On 13 February, 1729, the Russian Empire and Iran signed the Treaty of Resht, which regulated their relations in the Caspian. It demarcated and ceded to Russia some Persian territories, and provided for freedom of commerce and navigation on the Caspian and the Araks and Kura rivers.

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<sup>3</sup> See: D. Allonsius, *Le régime juridique de la mer Caspienne. Problèmes actuels de droit international public*, L.G.D.J., Paris, 1997.

<sup>4</sup> See: G. Gidel, *Le droit international public de la mer*. Tome I. Chateauroux: Etablissements Mellottée, 1932, p. 40.

<sup>5</sup> See: E. Franckx, "Maritime Delimitation in the Caspian Sea: Legal Issues," *China Oceans Law Review 2006*, No. 1, p. 2.

<sup>6</sup> G. Gidel, *op. cit.*, p. 48.

<sup>7</sup> See: R. Meese, "La Mer Caspienne: Quelques problèmes actuels," *Note d'actualité*, RGDIP 1999/2, p. 5, available at [<http://members.aol.com/Rmeese75/Caspiennefinal.htm>], 11 February, 2007.

The rise in the Russian Empire's economic and military might in the 17th century disrupted the balance between these Caspian nations. After nine years of uninterrupted wars, Russia gained control over Northern Persia. In compliance with the treaties of Gulistan and Turkmanchai signed in 1813 and 1828, Russia retained the exclusive right to navigation of its military fleet in the Caspian. The Treaty of Turkmanchai determined the land boundaries between the two countries, as well as the ownership of several disputed islands in the Caspian. It also granted both Russia and Iran equal rights of navigation of their commercial fleets and reiterated Russia's earlier right to sail its military fleet in the Caspian Sea.<sup>8</sup>

## The Age of Azerbaijan's Independence (1918-1920)

When examining the historical context of this problem, some authors tend to overlook the period of independence of the Azerbaijani Democratic Republic (ADR) in 1918-1920. In 1920, it was occupied by Soviet Russia and after 1922, when the Soviet Union was formed, the second colonial period began.

From this it can be concluded that during its albeit short existence at the beginning of the 20th century, the ADR, in compliance with the *uti possidetis juris* principle, took advantage of its right to possess the sea and land territories defined by the previous boundaries between the Russian Empire and Iran established by a decision of the 1881 border commission (the Russian-Iranian boundary in the Caspian joined the end points of the land borders of the Russian Empire [later the Soviet Union] and Iran contiguous to the sea, that is, in the city of Astara from the eastern and in Gasan-Kuli from the western part of the sea).<sup>9</sup>

We will remind you that this principle was first applied during the decolonization of Central and South America. For example, the states that formed there after decolonization adopted the administrative boundaries (i.e. the boundaries of the vice kingdoms and provinces) that previously existed between the Spanish colonies. For South America these were the boundaries established in 1810, and for Central America the boundaries of 1821.<sup>10</sup>

The *uti possidetis* principle, which was later also applied to the African countries, referred to land borders. But its legal sphere also includes islands, seas, and, what is most interesting, internal water bodies and lakes.<sup>11</sup> For example, this principle was first used to determine maritime boundaries in the decision of the Hague court regarding the Guinea against Guinea Bissau case of 1985 (delimitation in the Sea of Alcatraz), as well as in the court decision regarding the Salvador against Honduras case of 1992 (delimitation in the mouth of the Goascoran River).<sup>12</sup>

<sup>8</sup> See: E. Franckx, A. Razavi, "The Problem of Delimitation in the Caspian Sea," in: *Proc. of Int. Symposium on the Problems of Regional Seas, 12-14 May, 2001, Istanbul-Turkey*, p. 2.

<sup>9</sup> See: R. Meese, *op. cit.*

<sup>10</sup> See: J. Salmon, *Droit des Gens*. Tome II. Édition partiellement revue par E. David, Bruxelles: Presses Universitaires de Belgique, 20ème édition, 2006-2007, p. 256.

<sup>11</sup> See: Nguyen Hong Thao et Préface de Laurent Luccini, *Le Vietnam et ses différends maritimes dans la mer de Bien Dong (Mer de Chine Méridionale)*, Paris: Editions A. Pedone, 2004.

<sup>12</sup> See: *Collection of Decisions of 1992 of the International Hague Court—C.I.J., Affaire El Salvador/Honduras*, fond, 11 Septembre 1992, Recueil 1992, p. 558, par. 333, p. 559, par. 385, p. 598, par. 400; R.G.D.I.P., 1985, § 40, p. 503, la sentence arbitrale du 14 février 1985 dans l'affaire de la Délimitation de la frontière maritime Guinée/ Guinée Bissau.

## The Soviet Age

According to the Moscow Treaty of 26 February, 1921 between Iran and Soviet Russia, the latter declared the conventions and treaties signed between the czarist regime and Iran null and void. At the same time, a decision was made to retain the Russian-Persian boundaries (both land and sea) established by the decision of the 1881 commission.

It was precisely during re-examination of the Moscow Treaty that experts first became extremely interested in the legal status of the Caspian Sea. The third article of this treaty reads: "Talks at the highest level led to the boundary determined by the border commission of 1881 being accepted by both sides, that is, by Russia and Iran, as the maritime boundary between the two states. This boundary must be protected and be inviolable." Here we are talking specifically about the Astara–Gasankuli boundary.

The treaties On Commerce, Navigation, and Regulation and On Commerce and Navigation signed in 1940 also confirmed that the Caspian Sea belonged to the Soviet Union and Iran.

Between 1921 and 1991, the Soviet Union and Iran regarded the Caspian as a lake, the legal status of which was regulated by the above-mentioned agreements, as well as by the internal legislation of these countries. Correspondingly, its resources were recognized as the exclusive property of these countries.

## The Collapse of the Soviet Union and Formation of New States

After the collapse of the Soviet Union in 1991, the number of Caspian states increased from two to five (Azerbaijan, Kazakhstan, Iran, Russia, and Turkmenistan). Russia and Iran recognized the existence of the community of littoral states as the basis for present and future legal settlement of the Caspian question. At that time, they adhered to the condominium principle, recognizing the legality of all the treaties signed between them prior to the signing of new ones.

Russia's position was clearly set forth in a letter by Russian Permanent Representative to the U.N. and now Russian Minister of Foreign Affairs Sergey Lavrov to the Secretary General of 1994, which was published as a United Nations document: "The Caspian Sea lacks a natural link to the world's ocean and seas and is thus a land-locked body of water. The norms of international maritime law, particularly those pertaining to a territorial sea, exclusive economic zone and continental shelf, are not applicable to it. There is thus no basis for unilateral claims relating to the establishment of zones of this type in the Caspian or for the introduction of elements of their regimes..."<sup>13</sup> It should be noted, however, that the geopolitical and economic processes in the region had made radical adjustments to this position by the end of the 1990s.

Azerbaijan, Kazakhstan, and Turkmenistan note in their letters to the U.N.<sup>14</sup> that the Russian-Iranian agreements do not apply to them, but that a qualified interpretation of these agreements could

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<sup>13</sup> Letter from Permanent Representative of the Russian Federation at the United Nations of 5 October, 1994 to the Secretary General. Numbered A/ 49 / 475, available at [<http://daccessdds.un.org/doc/UNDOC/GEN/N94/386/79/PDF/N9438679.pdf?OpenElement>].

<sup>14</sup> Letter from Kazakhstan and Turkmenistan to the U.N. numbered A/52/93 of 17 March, 1997, available at [<http://daccessdds.un.org/doc/UNDOC/GEN/N97/072/44/PDF/N9707244.pdf?OpenElement>]; also letter from Kazakhstan numbered A/52/424 of 3 October, 1997, available at [<http://daccessdds.un.org/doc/UNDOC/GEN/N97/262/63/PDF/N9726263.pdf?OpenElement>], etc.

be adopted. The position of these countries is based on the right of the states to territorial succession based on the principle of continuity of territorial inheritance—*uti possidetis*. This was followed by intensive talks at the bilateral and multilateral levels during which many documents were signed,<sup>15</sup> which however did not lead to establishing a balanced legal regime in the Caspian basin.

## Applicability of the *Uti Possidetis* Principle to the Newly Independent Caspian States

So, according to the indicated principle “*uti possidetis, ita possideatis*” (as you possess, so may you possess, that is, succession, continuity of the right to territorial property),<sup>16</sup> the colonial borders must be respected and preserved even after new states acquire their independence. In the classical interpretation it applies to the demarcation of land borders. Later, this principle was also applied to other spheres, such as islands and seas.<sup>17</sup> But the most interesting thing is that the principle was also later successfully applied to internal waterways and lakes, such as the Caspian.<sup>18</sup>

We will note that in contrast to most of the classical situations, the appearance of new states after decolonization is usually a disruptive rather than smooth process with respect to inheriting the obligations adopted by the predecessor state. In other words, in this situation, the principle of discontinuation sooner predominates, or the so-called “*tabula rasa*” principle. This means that the successor state is not the successor of the predecessor state since the latter continues to legally exist, that is, the successor state must begin everything from scratch. Nor does the successor state hold responsibility for treaties signed by the predecessor state, apart from those that it accepts of its own accord.<sup>19</sup>

As of today, the *uti possidetis juris* principle is based on a solid legal foundation. The applicability of this principle and of colonial law is determined by the situation that has developed at the time the colonial state collapses. “International law, and correspondingly the *uti possidetis* principle, is applied to the new state from the moment of its formation as a state and does not have an inverse effect. The *uti possidetis* principle freezes the territorial status, just as a clock stops time from moving forward.”<sup>20</sup> In other words, the countries that have become independent establish their borders on the

<sup>15</sup> The Agreement on the Division of the Contiguous Areas of the Caspian Sea Signed between Azerbaijan and Russia on 23 September, 2002; The Agreement on the Division of the Ground of the Caspian Sea signed between Azerbaijan and Kazakhstan on 29 November, 2001 and the Protocol of 27 February, 2003 Applied to It; The Agreement on the Division of the North Part of the Caspian Sea Signed between Russia and Kazakhstan on 6 July, 1998 for the Application of the Sovereign Rights in the Utilization of the Ground of the Sea and the Protocol of 13 May, 2002 Applied to It; The Agreement on the Intersection Point of the Division of the Contiguous Areas of the Caspian Sea Signed between Azerbaijan, Kazakhstan and Russia on 14 May, 2003; The Framework Convention on the Environmental Protection of the Caspian Sea Signed in Tehran on 4 November, 2003; The First Meeting of the Caspian States on the Development of the Draft Protocol on the Protection of the Caspian Sea from the Pollution from the Onshore Establishments and Activities of the Framework Convention on the Environmental Protection of the Caspian Sea was Held in Ashgabat on 24-25 January, 2005, available at [<http://www.cpf-az.org/cgi-bin/e-cms>].

<sup>16</sup> Nguyen Hong Thao et Préface de Laurent Luccini, op. cit., p. 162.

<sup>17</sup> See: *Collection of Decisions of 1992 of the International Hague Court—C.I.J., Affaire El Salvador/Honduras*, fond, 11 septembre 1992, Recueil 1992, p. 558, par. 333, p. 559, par. 385, p. 598, par. 400.

<sup>18</sup> See, for example: Nguyen Hong Thao, op. cit.

<sup>19</sup> See: J. Salmon, op. cit., p. 347.

<sup>20</sup> *Collection of Decisions of the International Hague Court of 1986—C.I.J., Affaire du différend frontalier Burkina Faso/Mali*, fond, 22 décembre 1986, Recueil 1986, p. 568, par. 30.

basis of those that existed at the time the colonial state collapsed. Moreover, the “*uti possidetis* principle is not a ‘panacea from all ills,’ applicable in all circumstances that develop on the border line.”<sup>21</sup> It does not exclude changes in boundaries in those places where they were undefined or in those cases when both sides are in agreement. We will note that the application of *uti possidetis* should correspond to general principles based on the fact that a legal event should be viewed through the prism of the legal regime in effect at the time the event occurred.<sup>22</sup> In other words, *uti possidetis* should be interpreted within the framework of intertemporal law (*le droit intertemporel.—Fr.*), that is, the correct interpretation of administrative colonial acts, for example, should be adhered to.

As noted, signing of the Moscow Treaty of 1921 between Iran and the R.S.F.S.R. led to the set of agreements and conventions signed during the czarist age being declared null and void. All the same, the sides reached a mutual agreement on retaining the boundaries (both land and sea) established in 1881. The Treaty on Commerce and Navigation signed between the two countries on 25 March, 1940 in Tehran did not even mention borders. This document envisaged the right to transit of those commodities that crossed Iran or Russia and were intended for third countries, as well as the right to navigation of the military and commercial fleets of both countries. In addition, these countries pledged to prohibit use of the sea by third states and their subjects. So a maritime boundary between the Soviet Union and Iran has always existed. And this is the boundary Azerbaijan and Turkmenistan inherited in 1991 on the basis of sectoral delimitation.

So we can conclude that the delimitation of administrative and territorial boundaries established in the Caspian in 1970 by a decision of the U.S.S.R. Ministry of the Petroleum Industry according to the median line principle based on the method of equidistance and forming the corresponding sectors of the sea for the littoral states—Kazakhstan, Azerbaijan, Russia, and Turkmenistan—shows the legality of applying the *uti possidetis* principle to the U.S.S.R. successor states and even Iran, due to the tacit consent of the latter. We will remind you that Iran has never objected to the median line principle the Soviet Union officially offered it in 1970.

The practice of Soviet-Iranian relations in the Caspian after division of its northern sector according to the median line principle in 1970 clearly shows that these countries were happy with the existing situation, had no objections and disputes, and cooperated very closely with each other right up to the collapse of the Soviet Union.

Even after decolonization, all the successor states accepted the previous administrative and territorial boundaries established according to the median line principle. This conclusion can be drawn on the basis of the Joint Communiqué of 27 February, 1997, in which Kazakhstan and Turkmenistan declared that until a corresponding convention on the status of the Caspian Sea is entered, they will accept administrative and territorial division of the boundaries according to the median line principle.<sup>23</sup> Azerbaijan also suggested that, in the meantime, exclusive zones be created in the Caspian for each of the littoral states, and that the space beyond these zones be considered common property.

On 6 July, 1998, keeping in mind that the existing legal status of the Caspian does not meet the emerging needs and does not allow for precise regulation of relations among the littoral states, the Russian Federation and Kazakhstan signed a treaty on division of the seabed in the northern sector in order to fully realize their rights to use of its mineral resources. *This treaty on division was the first to recognize the demand of one of the newly formed independent states to part of the Caspian Sea, with respect to which it can be concluded that from this time on the thesis of equal division of all the Caspian’s resources (which was referred to in the Soviet-Iranian agreements) among the littoral states*

<sup>21</sup> M.G. Kohen, *L’uti possidetis revisitée: l’arrêt du 11 septembre 1992 dans l’affaire El Salvador/Honduras*, RGDIP, 1993, p. 942.

<sup>22</sup> See: *International Law Reports*, 1951, p. 161 et s. ICLQ, 1952, p. 247.

<sup>23</sup> See: Letter from Kazakhstan and Turkmenistan A/52/93 (of 17 March, 1997), sheet of documents distributed in the U.N.

*can by right be considered invalid.* It clearly distinguished between issues relating to dividing the Caspian's subsoil and to determining its legal status.

According to this treaty, the bed of the northern part of the Caspian and its subsoil shall be divided among the sides in compliance with the median line principle, which with the mutual consent of all sides was modified on the basis of equidistance. Joint use of the surface waters guarantees the freedom of navigation, adherence to fishing regulations, and protection of the maritime environment.<sup>24</sup> The document clarifies several technical specifications for drawing the modified median line, for example, depending on the water level in the Caspian. It also envisages those cases when the modified median line crosses potential deposits, as well as cooperation in developing export oil pipelines and the use of river routes. Its conclusion notes that questions relating to free navigation of the sea's waters and flights over it, the laying and use of cables and underwater pipelines, as well as all other means of use of the Caspian Sea, will be regulated by bilateral and multilateral treaties between and among the littoral states based on the Convention on the Legal Status of the Caspian, when such is adopted.

### *Conclusion*

At present, the sovereign rights of the littoral Caspian states are still undetermined, which not only hinders use of the Caspian's natural resources and the subsequent economic development of the littoral states, but could also cause acute regional conflicts.

The actual activity of the Caspian states over the past 20 years, as well as the fact that the condominium thesis Iran insists on is no longer the best alternative for resolving issues not regulated by historical agreements,<sup>25</sup> make it possible to conclude that the *uti possidetis juris* principle can legitimately be applied to sectoral division of the sea.

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<sup>24</sup> See: *Documents d'actualité internationale* n° 19. 1<sup>er</sup> octobre 1998, pp. 746-747.

<sup>25</sup> See: E. Franckx, *op. cit.*, p. 37.