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## Sources of Negotiating Power in the Caspian Sea

The Caspian Sea, the largest inland body of water on Earth (371,000 square kilometers, 1,100 km long), contains a wealth of natural resources, especially fish and hydrocarbons. To the original two littoral states bordering on the sea—Iran and Russia—three more were added through their independence from the former Soviet Union in 1991—Azerbaijan, Kazakhstan, and Turkmenistan. In 1921 and 1940, the Soviet Union and Iran signed bilateral agreements directing the use and development of the Caspian, but not the allocation of the sea's resources or its boundaries. After the dissolution of the Soviet Union, the presence of the

three new independent states increased the complexities of Caspian governance. A summit of the heads of state of the five littoral countries in April 2002 failed to produce an agreement on the status of the sea. "The main difference of opinions among the five littoral countries lies in the uneven distribution of potential oil and natural gas riches in the region" ([www.eia.doe.gov](http://www.eia.doe.gov)).

On the basis of parity, a principle of distributive justice, the littoral states should hold the sea's resources in common, with each receiving an equal share (one-fifth) of the sea's wealth. On the basis of equity or priority, two other principles of distributive justice,

## From the PIN Steering Committee

In this issue of *PINPoints*, the Steering Committee of the Processes of International Negotiation (PIN) Network presents some thoughts on the Caspian Sea as a negotiation dilemma. The Committee will present these papers during its January 2003 Road Show in Tehran. This venue will be used to discuss international negotiation processes in general, and those concerning the Caspian in particular, with students at the Iranian School of International Relations. PIN members will also hold sessions at several other institutions in Iran, and will hold working meetings of their own in Isfahan.

The question at the root of the Caspian Sea issue—whether that body of water should be considered a sea or lake—will have to be answered. Its designation as one or the other will have major consequences for the stakeholders involved. This question of international law is still unanswered because of the different

interests of the bordering countries: Russia, Iran, Kazakhstan, Azerbaijan, and Turkmenistan. A recent conference on the issue failed to reach any solutions. Bilateral negotiations are in progress, but they will not suffice to solve the main question of the status of the Caspian and may actually complicate matters further.

The complexity of the Caspian situation is greatly increased by the multi-issue, multi-player nature of the problem. It concerns issues as diverse as natural resources in the seabed (oil, gas) and in the water (caviar!), transport (shipping, pipelines), the environment (pollution), and national territory and security.

The situation is further complicated by the involvement of a number of players, including the direct involvement of the five bordering countries, which dearly need the sea's resources, and the indirect involvement of at least four state actors (the USA, the EU, Turkey, and China), three public actors (the Organisation for Security and Cooperation in Europe, the Commonwealth of Independent States, and the Shanghai Cooperation Organisation),

as well as a multitude of private actors (e.g., oil companies).

There are, then, many problems—but also many options—for negotiated solutions. PIN's goal is not to provide the solutions themselves; rather, it strives to diagnose the problem and pinpoint the different roads to possible agreements. PIN concentrates on identifying the most effective processes of negotiation; it is up to the stakeholders to choose among them. Some suggestions are made here, including a proposal that combines rules and regulations in such a way that a sea-lake regime might form the basis for further negotiations, to be put in the context of a Caspian Cooperation Convention. But more will come out of the January Road Show, where staff and students will debate these ideas with the members of the PIN Steering Committee.

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the share of the sea held by each state is established by norms of international law and varies according to length of shoreline, with the sea being divided into five unequal national sectors (Zartman et al., 1996). Between these positions, and variations of them, a final agreement will be the subject of either negotiation or court arbitration, whichever is accepted by the parties. To move a party from one position to another by negotiation (the means discussed here), the benefiting party must compensate the sacrificing party through compromise, compensation, or reframing. The outcome of negotiation depends on the sources of power of the parties, in which power is seen not as force, but as “an action by one party intended to produce movement by another” (Zartman and Rubin, 2001:8). The discussion here considers the issues at stake and the sources of power that would enter into producing a decision.

### Legal Issues

The legal issues involved include the following ([www.eia.doe.gov](http://www.eia.doe.gov)):

- The need to decide if a new legal convention is necessary or if treaties signed between the former Soviet Union and Iran in 1921 and 1940 are still in force and how they would govern current development rights.
- The need to develop a legal framework to resolve environmental and biological issues. Several countries have opposed the laying of proposed trans-Caspian oil and gas pipelines on environmental grounds.
- The need to decide if the Caspian is a body of water covered by the Law of the Sea Convention (LSC) or is a lake. If the LSC applies, full maritime boundaries of the five states bordering on the Caspian would be established based on an equidistant division of the sea and undersea resources into national sectors. If the LSC does not apply, the Caspian and its resources could be developed jointly as a “condominium.”

### Ecological Issues

The Caspian Sea is ecologically rich, with considerable biodiversity that is being threatened because of runoff

from nuclear power plants, air pollution, and oil refineries. Not only does this place a significant responsibility on the littoral states, but it also potentially exposes them to pressure from nongovernmental organizations and intergovernmental organizations ([www.caspianenvironment.org](http://www.caspianenvironment.org)).

The Caspian Sea is home to the world’s largest sturgeon population, a source of caviar. The economic importance of the region’s caviar industry has united the littoral states in their concern over the environmental risks of oil and gas development in the Caspian Sea region ([www.eia.doe.gov/emeu/cabs/caspenv.html](http://www.eia.doe.gov/emeu/cabs/caspenv.html)). Thus, in May 1998, after several regional environmental agreements were signed following the Soviet collapse, the Caspian Sea littoral states established the Caspian Environment Program (CEP) in Baku, Azerbaijan, to coordinate the protection and management of the Caspian environment and its resources by the Caspian states.

Another issue is the trans-Caspian pipeline. Russia and Iran have stated their opposition to the laying of trans-Caspian pipelines until a legal framework is established to govern environmental and biological issues, and to establish legal responsibility for safe use of the Caspian Sea. Russia has suggested that the CEP should keep tight control over the implementation of all projects that might lead to ecological deterioration in the Caspian.

### Natural Resource and Economic Issues

The Sea holds 6 currently separately identified hydrocarbon basins and 17 oil fields.

### Country Positions

*Azerbaijan* has agreed to the “modified median principle” with Russia and Kazakhstan. It favors division of the Caspian Sea and its seabed, water surface, and air space into national sectors.

*Iran* holds the most isolated position among the five littoral states, maintaining that the Caspian Sea and its resources should be divided into equal sectors or according to the “condominium” principle. It insists that

its 1921 and 1940 bilateral treaties with the Soviet Union should be the basis for any decision until they are replaced by a new consensual regime.

*Kazakhstan* has agreed to the “modified median principle” with Russia and Azerbaijan. It favors division of the shelf and territorial and international waters, while leaving the main part of the sea for common use.

*Russia* has agreed to the “modified median principle” with Kazakhstan and Azerbaijan. It is against the division of the sea into sectors.

*Turkmenistan* has agreed to the principle, but not the method, of division. It favors division of the seabed and water surface with the condition that a 20-mile zone is kept for free navigation.

The *USA* has placed a heavy emphasis on the Caspian issues because of energy and security considerations. Central to both these issues is the development and transportation of Caspian energy to the outside world, which necessitates development of an east–west transportation infrastructure independent of Russia and Iran. The Clinton administration pursued a policy of expanding commercial and foreign policy interests in the Caspian by involving US business, and the Bush administration has continued this policy.

### Sources of Negotiating Power

The following sources of negotiating power are ranked as follows: 1= most power, 5 = least power.

- *Actual shoreline*: (1) Kazakhstan; (2) Russia; (3) Turkmenistan; (4) Azerbaijan; (5) Iran.
- *Smoothed shoreline*: (1) Kazakhstan; (2) Russia; (3) Iran; (4) Turkmenistan/Azerbaijan.
- *Control of sea granted by international law if LSC is applied*: (1) Kazakhstan (3 agreements: Azerbaijan, Russia, Turkmenistan); (2) Russia, Azerbaijan (2 agreements each: with each other and Kazakhstan); (3) Turkmenistan (1 agreement: Kazakhstan); (4) Iran (0 agreements).
- *Naval Strength*: (1) Russia; (2) Kazakhstan; (3) Azerbaijan; (4) Turkmenistan; (5) Iran.

- *International Political Position:* (1) (USA); (2) Russia/Iran; (3) Azerbaijan/Kazakhstan/Turkmenistan.

### Negotiating Strategies

Many of the sources of power (shoreline, oil and gas reserves, etc.) are relatively unchangeable. The only power source that in any way approximates the distribution of formal equal (parity) status is membership in an international organization, where formal equal status and equalizing rules of procedure tend to help the weak and exert an equalizing influence. However, many international organizations (e.g., the Commonwealth of Independent States, CIS) tend to be dominated by a strong member, and most (e.g., the Organization for Security and Co-operation in Europe) are characterized by coalitions among members rather than individual member equality. Thus, while states as members of the international community or members of an international organization may have equal exercise of a veto power if the decision rules so provide, states' blocking power depends on the ability of other states in the particular arena to do without them. In the Caspian Sea, any state can veto an agreement requiring unanimity, but the continuity and past imperial history of the northern four (former Soviet) states give them the greatest ability to consort and act without the southern fifth. The 1921 and 1940 treaties established a consensual (equal veto) regime, but it is not clear whether that decision rule still holds. Thus, another source of power is legal, relating particularly to the consensus requirement and the standing of the Russian bilateral agreements, and ultimately to the threat of arbitration by the International Court of Justice (ICJ).

The most manipulable sources of power between the north and south poles of the sea (Russia and Iran, respectively) are the alliances of the two parties with others inside and outside the region. Iran's global and regional isolation is self-reinforcing. Russia has been able to reinforce its bargaining position with global and regional alliances through a gradual coalition-building strategy that

strengthens its negotiation power. There remains a small area of flexibility opened by bilateral conflicts, where each party has its allies, both strengthening and limiting its coalition-building possibilities in regard to the Caspian. Some conflicts touch directly on disputed claims within the sea: Iran–Azerbaijan (Alborz/Araz–Alov-Sharg) and Turkmenistan–Azerbaijan (Serdar/Kyapaz, Azeri/Khazar–Chirag/Osman) (submitted to the ICJ). Others concern land border relations: Iran–Azerbaijan (Azeri irredenta), or distant post-imperial relations (Turkmenistan–CIS). In this light, Turkmenistan is the weakest link in the Russian coalition, although its proximity to Iran could also raise potential border conflicts.

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## PIN Group Road Shows: Pepperdine and Tehran

The PIN Group conducted its latest Road Show in October 2002 before an audience of 50 graduate and undergraduate students and faculty at an afternoon session at Pepperdine University in Malibu, California. Group members each gave a 15-minute presentation, followed by questions from the audience; the session closed with a further discussion hour. Dr Gunnar Sjöstedt introduced the general topic of negotiation and then presented a talk on risk and negotiation, showing the special problems that arise in handling risk as a subject of negotiation. Ambassador Franz Cede spoke on negotiation and international law, focusing in particular on the effects of law on negotiations and of negotiations on the formation of "soft law." Dr Rudolf Avenhaus introduced the analysis of negotiation as strategic choice, showing the use of game theory to portray the consequences of choice, with the strategy used in Kosovo in 1999 as an example. Director Paul Meerts discussed negotiating European union, explaining how the structure of the European

Union affected the conduct of European negotiations and how the process of negotiation built the structure of the Union. Dr I. William Zartman presented an analysis of international regimes as negotiations, showing that regimes should be understood as recursive negotiations rather than as international legislation requiring compliance. The Group was joined in its presentations by Dr Robert Lloyd of Pepperdine, who analyzed the Beagle Channel mediation by the Vatican to illustrate the effects of internal process and external events on the resolution of the conflict between Argentina and Chile. In the days that followed, the PIN Group held its October meeting on the Pepperdine campus.

At the invitation of the Iranian School of International Relations, the PIN Steering Committee will present its work at a Road Show in Tehran in January 2003. The conference will focus on the Caspian Sea as an issue in international negotiation. Papers written on the topic can be found in this issue of *PINPoints*.

I. William Zartman

## Caspian Chess: Conflict or Cooperation?

Chess is a noble Persian game. In German, chess is called *Schach*, because of the central, though not the most powerful, figure—the king or *Sjah*. Negotiation is often compared to chess. It has an opening game, a mid-game, and an end game. Indeed, the metaphor is a good one. It is important, however, to keep certain things in mind, such as culture. In different cultures the game of negotiation is played in different ways. The North Americans and West Europeans prefer a short opening game, a short mid-game of give and take, and a short end game of decision making. The Iranians, Turks, and Arabs love an extensive opening session to explore as many options as possible, as well as an intensive phase of haggling. For them, the give-and-take episode is similar to playing games or sports. The competition of getting the best out of a deal is as valuable—and sometimes more valuable—than the outcome. From this angle, processes are often seen as being as important as outcomes. East Asians perceive negotiation chess in yet another way. The Japanese often do not like the mid-games and prefer to play an extensive opening game, if possible directly followed by the finale. The Chinese, however, see the game as an integral part of a whole series. The moment one game is over, they will immediately continue with a second one. In other words, the outcome of a negotiation is a stepping-stone to another process and not a final “deal is a deal,” as the Americans would prefer. More importantly, the Chinese, who also claim to be the inventors of chess, prefer to play a number of matches at the same time.

If we regard the negotiations on the status and the exploration of the Caspian Sea as a chess game, then we must see it as a game in which all the countries involved have to play simultaneously. Iran, for example, will have to play with each of the countries that sit around the Caspian “chessboard”: Russia, Azerbaijan, Turkmenistan, and Kazakhstan. At the same time, these

countries will be playing games with one another. But this is not all: Iran will have to play with at least four other opponents lurking behind the board with substantial stakes in the games to be played: the United States (USA), Turkey, China, and the European Union (EU). Let us now turn to the chessboard, then to an examination of the players and their stakes, and finally to the processes that might develop in order to move from the present lose–lose situation to a win–win one.

### The Board

Is the Caspian a sea or a lake? Or is it a sea-lake? The countries bordering on the Caspian Sea do not agree on its legal status. There is not yet enough common ground to accept it as either a sea or a lake. As a sea, the territorial waters would be limited, thus those countries with a long shoreline would likely feel that the sea regime would be contrary to their needs and interests. As a sea, the Caspian could still be divided as far as the water bed is concerned, but the use of the water itself would be under a collective regime. This means that most of the oil wells could be exploited through a continental shelf partition, while the fisheries (caviar!) could be regulated through a quota system. If the Caspian were considered to be a lake, then, in the view of some analysts, the countries could take their share of the spoils and no communal zone would remain. However, other analysts are of the opinion that a lake regime would, on the contrary, work much more in favor of collective water management. It has also been argued that a new regime should be developed.

The sea-lake conception could be introduced as a solution to the problem of the status of the Caspian Sea. The Caspian would then be partitioned (according to the Russian/Kazakhstani proposals), but its resources would be shared equally: one-fifth for each of the littoral states (in conformity with the Iranian proposals). Those inland waters that are surrounded by more than one subject of international law and that go beyond a certain volume, giving them the characteristics of open waters, should get a regime where ownership

and cooperation are mixed in a balanced way. The sea-lake would then be owned by all surrounding states, which would divide it up according to their coastlines, but their rights to these territorial waters would be limited by a collective regime responsible for regulating the exploitation of the water and water bed, protecting the environment, etc.

### The Players

Who is involved? Who are the movers and shakers? There are five different types of players on this multi-dimensional chessboard: the littoral states, other states with direct stakes, alliances of states that are active in the region, international organizations, and private companies. As has been said, the littoral states cannot yet negotiate an agreement on the status of the Caspian. This hampers the exploration and exploitation of oil reserves in and around the Caspian. Pipelines cannot be drawn over the seabed, some oil fields cannot be exploited or foreign companies are hesitant to do so, fishery rights are unclear, and pollution cannot be tackled in an effective way. At the outset, Russia and Iran were in favor of the sea option, while Azerbaijan, Turkmenistan, and Kazakhstan preferred the lake solution. However, the roles have been reversed: Russia and Kazakhstan now seem to be allied in pushing for a solution that suits the interests of both states. Turkmenistan and Azerbaijan are quarreling about the delimitation of their respective zones. And Iran maintains its vision that the Caspian is a sea and that a strong regime should manage the collective interests of the littoral states.

The situation is more complicated, however. There have been several attempts to come to partial collective solutions, like the protection and use of the Caspian’s biological resources, but the best agreement that could be reached was consensus minus one. In April 2002, a multilateral meeting on the Caspian problem in Turkmenistan failed to come to an overall solution. These kinds of failures lead to bilateral agreements to move matters ahead at least on an ad hoc basis, like that between Iran and Turkmenistan to swap oil. For Russia and Iran, the stakes are

not only economic, but also geopolitical. Both countries are trying to regain or gain influence in the Caspian region, which includes the Transcaucasus (Georgia, Armenia, and Azerbaijan), on the one hand, and the Transcaspian (Kazakhstan, Turkmenistan, and Uzbekistan, as far as oil and gas are concerned), on the other.

The USA, the EU, Turkey, and China are involved, as are other potential players like Pakistan, India, Japan, and Saudi Arabia. For the USA and the EU, the involvement is strongly linked with the position of oil companies needed in the exploration and exploitation of the mineral resources. American (Exxon, Mobil, Chevron), British (BP, Shell), French (Elf-totalfina), Italian (ENI), and Norwegian (Statoil) companies have a stake here, though the prospects are more futuristic than realistic, notwithstanding the large proven oil reserves. For the USA, however, geopolitical concerns are dominant. They concern the US wish to curtail both Russian and Iranian influence. Turkey has an interest in pipelines that will avoid both Russian and Iranian territory and end up at the Turkish Mediterranean coast (Ceyhan), thereby also avoiding oil shipments through the vulnerable Bosphorus. China has an interest in pipelines going east instead of west, and both Turkey and China have geopolitical considerations concerning the Turkic states in Central Asia. International organizations like the World Bank and the International Monetary Fund (IMF) are players as well, as are alliances like the Commonwealth of Independent States, the Shanghai Cooperation Organization (SCO), the GUUAM group (Georgia, Ukraine, Uzbekistan, Azerbaijan, and Moldova), the Organization for Security and Co-operation in Europe, the Organisation of the Islamic Conference, and the North Atlantic Treaty Organization through its Partnership for Peace Program and its efforts to fight terrorism.

The Caspian situation involves an enormous, non-transparent network of negotiation processes, both bilateral and multilateral. It amounts to playing chess on a multitude of levels in a multitude of settings. What can be said

about this from the perspective of international negotiation processes? First, the sheer number of players and issues involved (mineral and biological resources, geopolitics, pollution, and terrorism) creates a multitude of opportunities. Second, this multitude will have to be organized in a certain way. Structuring is necessary to channel negotiation processes leading up to certain outcomes. On the one hand, the Caspian problem is beset by opposing interests and is therefore a recipe for distributive bargaining: negotiations that are polarized by nature, that have a tendency to end up nowhere or in a win-lose outcome. On the other hand, it is clear that the actors in the game cannot do without one another. No one country is strong enough to impose its will on the others. The result of the present situation will be a hurting stalemate for all. This in itself is an incentive for substantial negotiations. The disadvantage of so many crosscutting cleavages can be used to come to integrative bargaining: a situation where all sides win more than they lose. However, to get into an integrative negotiation situation regarding the Caspian, certain steps have to be taken. To take these steps, certain incentives will have to be present as well. Let us take a look at a possible scenario.

Institutions often support forward-looking, problem-solving integrative outcomes. Therefore, a first step, initiated because of the hurting stalemate at the moment, could be the creation of a Caspian Cooperation Convention (CCC, even in French!) between the five littoral states. It would be much better if other interested "states"—like the USA, the EU, and Turkey—could be involved, but this is only a dream at the moment. As long as there is no substantial US-Iranian rapprochement, the extension of the CCC is not likely at all. This is really a pity, as the cleavage between the USA and Iran gives the Russian Federation the possibility to use its dominant position; this in turn makes equal negotiations on the Caspian difficult, but not impossible. To compensate for the impossibility of a widened CCC, a group of observing partners should be

created. One might think of representatives of the OSCE and the SCO, thereby indirectly involving the USA and the People's Republic of China. Other observers could be representatives of oil companies, the IMF, and the World Bank.

The first step taken by the Caspian Cooperation Convention "Plus" (CCC+) should be a proposal for a sea-lake regulation. Further agreements can be worked out as soon as an agreement on a balanced definition of the status of the Caspian has been reached. The CCC should remain the dominant regulatory body of Caspian questions and should therefore be well organized. Bilateral and partial agreements should be made under the auspices of the CCC. Decisions will probably be made by consensus. Deciding by qualified majority voting would be much more effective, but the chances for this are extremely slim. To diminish the likelihood of stalemates, a strong secretariat is an absolute necessity. The United Nations (UN) could be given a role here, and a special envoy of the secretary-general of the UN could serve as—at least—the first secretary-general of the CCC.

However, as has been said, not only the littoral states, but also the other states and organizations involved should get their act together. It is also in their national and global interest to start real substantive negotiations on the status and exploitation of the Caspian. In the long run, instability in the heart of Eurasia is bad for all the states involved. To make a long story short, the creation of a CCC is a necessary step in creating a balanced international negotiation process on the future of the Caspian. However, negotiations between Russia and Iran, Iran and the USA, and the USA and Russia would be instrumental in the establishment of a CCC. Such negotiations would reduce the number of chess games to a manageable number, but we have to fear that world politics will not permit a trilateral game as a prelude to a pentagame. So the pentagame will have to be played between Russia, Iran, Kazakhstan, Azerbaijan, and Turkmenistan. It is in their interest to play the game: no game, no outcome. These

countries then should try to involve interested outsiders through the international organizations in which they are represented. But who will take the initiative—the UN, a neutral country, a country indirectly or directly involved? This question is vital to both the start and the final outcome. It should be an actor with enough at stake to take the trouble of pushing the project forward, but that is not seen as a threat by the potential partners. International organizations could take the lead but, unhappily, they are often too divided and too weak to be successful. A country should be the initiator.

The country that should draft the text of a sea-lake treaty and that should take the initiative of creating a CCC+ is, in our opinion, the Islamic Republic of Iran, for four reasons: (1) it takes a more or less neutral stand in the struggles between the four CIS littoral states; (2) the initiative would show its goodwill concerning the interests of countries outside the Caspian whose support is needed for indirect participation by the OSCE, the IMF, and the World Bank; (3) as it is not the party with the most interests involved, it cannot be seen as a threat by the others and can therefore act as a semi-impartial broker; and (4) the action would further integrate Iran into global networks that would fortify its international position in the longer run. The Islamic Republic, with its high-level experts and its well-organized civil service, can easily live up to this task, provided it perceives its interests as being at stake, recognizes the effectiveness of the proposed strategy to create an institutionalized framework for multilateral negotiations, and—last but not least—has the political will to take such an initiative. And if the littoral states still cannot agree on proposals to define the status of the Caspian, then an agreement to disagree will be the solution: all claims are frozen, but every state is allowed to use and exploit the Caspian within the rules and regulations agreed upon. Article 4 of the Treaty on Antarctica is a precedent that could be used as an alternative solution if the Caspian Sea-Lake Treaty is not yet an option.

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### International Conference to Be Held in Paris: "Transversalité de la négociation"

An international conference on negotiation will be held in Paris on 11–12 December 2003. The conference is being organized by the French PIN group and Negocia, a French business school belonging to the Paris Chamber of Commerce.

**Main topic:** Universality of negotiation—cutting across domains, disciplines, approaches, cultures, conceptualization, and practice

An audience of 400 researchers and practitioners is expected. The language of the conference will be French, with simultaneous translation into English. A publication in French and another in English taking stock of the most significant contributions on research and practice will follow.

A call for papers will be issued in January 2003.

Information can be obtained from Dorothee Tokic (transnego@negocia.fr)

Guy Olivier Faure

## Negotiation Power in the Caspian Sea Council

With a surface of 371,000 square kilometers, the Caspian Sea is the largest inland body of water on Earth. It contains very rich fishing grounds and huge oil and natural gas reserves (20 billion barrels of oil proven). The Caspian Sea is bordered by five independent states: Russia, Kazakhstan, Turkmenistan, Iran, and Azerbaijan. These states are represented in the Caspian Sea Council, which is supposed to deal with all transboundary problems in the area, such as resource distribution, the handling of ecological problems, etc.

What should the Council's seat distribution be in order to reflect the states' appropriate shares of ownership, rights, and responsibility, and what is the resulting power of a Council member? Several proposals have been made in the past, none of which has been successful because there is no generally accepted allocation of water surface or volume to the bordering states. Here, a simple proposal is presented and the resulting negotiation power of the states in the Council is analyzed with the help of the so-called Shapley value.

Let us assume that the Council consists of 100 seats. We propose that each state

**Table 1. Coastal lengths, Caspian Sea Council seat distribution, and normalized Shapley values.**

State	Real length of coast (km)	Smoothed length (km)	Fraction of seats	Shapley value ( $q = 0.5$ )
Russia	1,109	548	19	0.30
Kazakhstan	2,074	922	32	0.30
Turkmenistan	1,084	461	16	0.133
Iran	490	490	16	0.133
Azerbaijan	737	461	17	0.133

be allotted a number of seats proportional to the length of its coast. However, in some parts the coastline is very irregular and in others (e.g., in the south) it is very smooth; thus, we use smoothed coastlines, since we think that the number of seats should not depend on the detailed shape of the coast. Of course, the smoothing procedure may lead to heated discussions among the border states. In *Table 1*, the actual and smoothed length of the coasts are presented along with the resulting seat distribution in the Council.

What negotiation power results for a single state from this seat distribution? Let us assume that a quorum  $q$  (e.g.,  $q = 0.5$ ) must be present for decisions to be made by the Council. Then the Shapley value (named after the American mathematician Lloyd Shapley, who invented it in 1952) measures the power of a single state on the basis of the possibilities that

exist for each state to be a necessary member of a coalition. (It should be mentioned that Shapley gave an axiomatic justification of his measure as well.)

In *Table 1*, the distribution of the normalized Shapley values is given for a quorum  $q = 0.5$ . Of course, this distribution of Shapley values depends on the smoothing procedure as well as on the quorum. Looking at a map of the Caspian Sea and realizing that the two northern states get 60% and the three southern ones get 40% of the Shapley values—that is, of the power—the results conform to common sense, but the issue here is not the concrete distribution but rather the approach.

It is our intention to present these ideas at the forthcoming PIN Steering Committee's Road Show in Tehran, planned for January 2003.

Rudolf Avenhaus

## Regime Building: A Strategy for the Caspian Puzzle

It would be fortunate if the complex political problems pertaining to the Caspian Sea could be solved with a "quick, smart fix." This is, however, unlikely, and other approaches have to be looked for. One alternative is *regime building* involving all of the important stakeholders. This long-term strategy might tackle the various Caspian issues in somewhat different ways, but still within the same overarching context of a Caspian regime. Another advantage is that binding commitments regarding the distribution of values pertaining to, say, fish catches or concessions to drill for oil on the seabed can be reached gradually and with a combination of different diplomatic approaches, such as law making in formal treaties, the construction of common objectives for the stakeholders through continuous consultations, the gradual building of a consensual

knowledge of the issues concerned, or learning by doing.

### The Background: The Call for a Caspian Sea-Lake Regime

The Caspian Sea represents a highly complicated diplomatic puzzle with large values at stake and a considerable number of assertive actors involved.<sup>1</sup> At the heart of the puzzle is the dominant distributive question of how the territorial waters of the Caspian Sea and the seabed below should be distributed among the countries bordering on this sea—or lake, depending on the legal outlook. One could argue that the Caspian puzzle is basically a territorial conflict and should be treated as such. If the territorial disputes concerning the Caspian Sea could only be handled properly, the whole Caspian puzzle would probably be solved in the process.

This is not easily done, however. *Territory* is a highly politically sensitive subject, and as an issue on the negotiation table, it tends to produce perceptions of zero-sum games among the parties involved: "I will lose what you gain." Furthermore, on closer look the territorial question represents an "umbrella" for a number of underlying critical issues, of which the most important pertain to sovereignty, prosperity, and security. Each of these sub-issues stands as a formidable negotiation problem in its own right.

*Sovereignty* can be defined in different ways but can be understood as the legal control by a national government over a certain territory, be it land, sea, lake, or inland waterway. In a general discussion lacking all the legal details, sovereignty can be compared to ownership by an individual or a company. Usually, ownership (and sovereignty) is manifested by some

sort of functional use. The owner of a farm is typically a farmer who uses his legal control of a piece of land to bring in harvests to provide himself and his family with an income. However, ownership, or sovereignty, does not necessarily require actual use. Ownership, like sovereignty, may have an essentially symbolic value for the owner or the sovereign. In principle, actors other than the sovereign may use a certain territory even as the sovereign retains his or her sovereignty.

The use of territory (e.g., for fishing or the extraction of oil from the seabed) may bring *prosperity*. Ultimately, prosperity in this meaning is conditioned by sovereignty over the territory that is used to generate economic gains. However, the right to use the territory can be transferred from the sovereign to some other actor while the sovereign retains his or her sovereignty. For example, a government may give a concession to a foreign company to drill for oil on the seabed. Or a government may enter into an accord with other governments about fishing regulations in which maximum quotas are stipulated in order to preserve a species.

If the sovereignty of a territory is threatened by some other nation, the sovereign experiences a *security* problem. The security threat is enhanced if the sovereign considers that the piece of territory that is immediately threatened serves as a protective barrier to other and larger areas in the heartland of the country concerned. Ultimately, national security pertains to the survival of a nation, and therefore security threats may have to be countered by military means. Intensive security conflicts tend to generate war between the nations involved. However, there are also what may be called functional security issues, which do not necessarily pertain to the integrity and survival of a nation, but which concern the autonomy of decision making in an important sector of the economy or the society. For example, a government may experience an economic security threat if the management of the national economy, or an important sector of it, becomes increasingly controlled by the environment outside the country concerned.

A tenable solution to the Caspian territorial dispute would have important implications for how the underlying issues concerning sovereignty, prosperity, and security are coped with. In theory, an agreement on the distribution of

territory in the Caspian Sea that is fully acceptable to all parties would include accords on sovereignty, prosperity, and security. However, this reasoning begs the question of how a solid and tenable agreement on the distribution of territory in the Caspian Sea can be attained. In a negotiation focusing only on the distribution of territory in the Caspian Sea, the issues of sovereignty, prosperity, and security would still affect and sometimes condition how individual parties perform in the negotiations—what aims they pursue and what strategies they use to attain these objectives. A main drawback of focusing exclusively on the territorial issue in the formal agenda for a Caspian Sea negotiation would be that the underlying issues of sovereignty, prosperity, and security would be veiled and difficult to understand and assess. Different stakeholders would have different levels of concern about each of the sub-issues. For example, only those countries with a sea-front on the Caspian Sea can be expected to be concerned with the issue of sovereignty. Other actors on the Caspian scene, such as the international oil companies, are primarily concerned with prosperity and the economic gains from extracting oil and gas from the Caspian's seabed. Still other distant actors such as Turkey, China, and the USA have security interests in the Caspian Sea. Many of the actors concerned with the Caspian Sea have mixed interests. It is difficult for analysts and stakeholders to gain an accurate overview of the configuration of party interests and still more cumbersome for them to bring conflicting and joint interests together into an agreement acceptable to all, and hence tenable in the long term.

In another conference paper presented in this issue of *PINPoints*, Paul Meerts suggests that a feasible strategy for coping with the Caspian puzzle is to build up a Caspian regime, perhaps called the Caspian Cooperation Convention (or CCC). An international regime could bring together different topics like fishing, sailing, oil extraction, transboundary environmental risks, and national security, but still permit separate treatment of individual issues. Likewise, a regime might also be flexible with regard to membership and participation. It is, for instance, possible to let external actors—states, international organizations, or businesses—be associated with a group of core countries, such as the Caspian

littoral nations. A fully developed regime may represent a satisfactory solution to the Caspian puzzle. Thus, designing scenarios describing the possible structure of a Caspian regime—who the members are, what its goals and tasks are, what issues will be covered, and what institutions will exist for decision making and regime management—is a meaningful and important task.

Another perspective explored in this paper signals that *regime building* as a negotiation approach is different from scenarios describing the construction of a possible regime conceived of as a desired negotiation outcome. Both approaches are useful in the Caspian puzzle. The “construction-of-a-regime” approach strives to describe what a regime is and what it can do. Regime building represents a method of international problem solving, particularly when parties are confronted with complex and politically sensitive problems that are hard to handle in a single negotiation session. Regime building is a substitute for straightforward international treaty making when that approach to international regulation is not feasible.

### Regime Building as a Strategy of Conflict Prevention

International regimes do not appear completed *deus ex machina* from a single round of successful negotiation, but are usually the result of recurrent negotiations. The international trade regime under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) is a good example; it has been extended to new issues and new members and has been reinforced by means of a series of negotiation rounds since its creation in 1948.

*Regime building* is the process by which an international regime is constructed in a stepwise manner. Thus, the regime itself may also be conceived of as a process. To use the possibilities of regime building in a particular situation—for example, to cope with the Caspian puzzle—it is necessary to understand analytically the anatomy of an international regime: how it functions and what results it may produce with regard to conflict resolution and collective problem solving in a negotiation.

In the literature, a standard definition of an international regime was provided by Stephen Krasner almost 20 years ago. Basically, a regime can be understood as



a sort of international regulatory machinery through which national governments can influence developments in a particular issue area or geographical area like the Barents Sea, the Baltic Sea, the Mediterranean Sea, and possibly also the Caspian Sea. For the casual observer the existence of a regime usually manifests itself as an international convention, or several interlinked conventions, and associated organizational machinery. Hence, there is typically an international secretariat with the task of managing and supervising the regime as well as other institutions in which the member states can supervise the secretariat and work out new agreements to develop the regime further.

In Krasner's more abstract, analytical terms, a regime is a configuration of what he refers to as "norms, principles, rules and procedures, around which actor expectations converge."<sup>2</sup> All four regime elements have the potential to influence the policy performance of the regime's members, which is implied by the formulation "around which actor expectations converge" in the regime definition. However, the point of making a distinction between the regime elements is that they influence member performance in quite different ways. Regime elements are also built up and developed in somewhat different kinds of actor interaction. These distinctions are highly important to note for practitioners wanting to use regime building as a strategy for problem solving or the resolution or prevention of conflict.

*Rules* are precise policy prescriptions formulated in a binding convention that may have the form and status of international law. Often, regimes with binding rules have some mechanism for supervising and sometimes also sanctioning noncompliance. Rules have a structural character, as they will have the same meaning and prescriptive function until they are modified by means of new formal, binding decisions by the members of the regime. In a Caspian Sea regime, formal rules could, for instance, prescribe how the sea—or lake—territory is to be controlled by the key members of the regime, the five littoral countries.

If rules can be compared to formal international law, *regime norms* are similar to what international lawyers call "soft law." Norms also contain policy prescriptions, but of a less formal and binding character than rules. It is not possible to check the compliance with

norms the same way that compliance with rules can be supervised. First, there is generally only a weak legal foundation for such compliance control, as norms do not have the form of a precise binding commitment that rules have. Second, norms are typically more general in nature and form, and in this sense are more diffuse than binding rules. For example, one may imagine that the norm that "oil spills should be avoided because they cause environmental destruction" could be developed in a sea or lake regime, and even be mentioned in the general part of a convention text. *Rules* concerning oil spills would have a quite different form. They would contain a specific definition of what oil spills are and would specify in detail exactly what measures the members of the regime should undertake to avoid them.

*Principles* represent an epistemic component of a regime, a dynamic body of consensual knowledge about the issues covered by the regime. For example, principles concerning oil spills in a sea regime would contain generally accepted knowledge and current information about how and why oil spills occur, what damaging effects they produce, and what measures can be undertaken to avoid oil spills and how to deal with such disasters should they occur. Like norms, principles are not likely to be described comprehensively in a convention text. One reason is the dynamic character of consensual knowledge, which is likely to change gradually over time. However, the general introduction to regime conventions (the preamble) often contains direct or indirect references to relevant bodies of consensual knowledge.

*Procedures* pertain to the institutions that are set up to manage a regime and give instructions as to how these bodies should function. For example, some procedural rules may define the tasks of the regime secretariat. Other procedures may pertain to how the regime members should make joint decisions.

### The Function of Regime Elements

When assessments are made of international regimes and their political significance, regime rules are usually highlighted, especially by analysts with a legal outlook. Rules are international law, or something very similar. This prioritization of rules in regime assessments is, hence, fully warranted, as this category of regime element requires greater

discipline by regime members than both norms and principles. Rules are legally binding commitments made by the members of the regime; norms and principles are not binding to the same degree.

The implementation of the policy prescriptions expressed in regime rules is typically both relatively more transparent and more predictable than other regime elements. Rule compliance is fairly transparent. The rate of rule compliance is often taken as a measure of the effectiveness of the whole regime to which the rules pertain. If rule compliance is high and extensive, the regime in question can be considered to be strong and successful. If rule compliance is low and scarce, the regime can be considered to be weak and unsuccessful.

However, too narrow a focus on rules will risk overshadowing a full understanding of the functioning of the regime as a whole, which is strongly dependent on the functioning of regime norms and principles, as well as procedures. In fact, the development of norms, principles, and procedures represents the critical difference between treaty making and regime building. In turn, a fundamental difference needs to be noted between procedures, on the one hand, and norms and principles, on the other hand. Procedures do not steer the performance of regime members in the issue areas covered by the regime directly, as, for example, fishing quotas or regulations concerning oil spills do. Procedures function exclusively *within* the institutions of the regime itself. Their main contribution is to facilitate interparty communication and to increase the cost-effectiveness of these interparty exchanges. If there is little trust between some of the parties, well-designed regime procedures may represent a necessary condition for meaningful exchanges between them.

In contrast, if effective, norms and principles have a more direct impact on the policy performance of regime members than do procedures. A distinction can be made between two different impact models. According to one model, the significant policy impact of norms and procedures is indirect, expressing itself as support for the regime rules. For example, assume that regime rules have been established in a Caspian regime concerning sea pollution and other associated environmental problems. In the regime scenario, compliance with the rules is dependent on the existence of

norms and principles. The latter contain, or refer to, critical consensual knowledge about the problem of sea pollution: its sources, how it is produced, its negative consequences, and how to either avoid, adapt to, or abate it. Norms give guidance to action. In the example, they represent an acknowledged common understanding of the need to reduce and ultimately eliminate pollution in the Caspian Sea. This norm is supported by the building up of the consensual knowledge concerning sea pollution, which will become contained in regime principles. The stronger the norms and principles are, the stronger their support of *rule* compliance is likely to be.

Norms and principles can also have a direct impact on the performance of regime members and their policy choices without rules serving as an intermediary but necessary means of application. The working methods and functions of the Organisation for Economic Co-operation and Development (OECD) are a powerful illustration. The OECD is an extremely productive organization, in which extensive intergovernmental consultations and negotiations take place continuously. The organization has undoubtedly been useful for its member states in the industrialized world and has had a considerable impact on their policy performance. However, formal regime rules have represented only a small part of the output of the OECD. With the help of its large and highly competent secretariat, the OECD has primarily produced norms and principles pertaining to the many issue areas covered by the organization's working agenda. In its large number of committees and working parties, and with critical contributions from the secretariat, the OECD has continuously cumulated, aggregated, distributed, and sometimes created frontline knowledge and information about current policy issues. This ongoing communication process has produced a number of important effects with an impact on the policy processes and governmental deliberations going on in the member countries:

- Governments have been supported in their domestic policy analyses. Costs have been reduced and individual governments have been given access to a much larger basis of issue knowledge than would have been attainable in a separate national study of the issues concerned.
- Each government has attained an understanding of the perceptions held,

assessments made, and policy instruments used by other governments in a particular issue area.

- An "automatic" policy harmonization has taken place between many member countries as the result of the buildup of an advanced consensual knowledge concerning particular policy issues.
- Bargaining for regime rules has been considerably facilitated by the existence of qualified joint consensual knowledge and previous policy harmonization.<sup>3</sup>

Regime norms reflect beliefs held in common by the members of the regime. These beliefs may have an ideological or doctrinal character; for example, "conflicts should be solved by peaceful means" or "human rights should be respected in all countries." Norms may, however, also pertain to specific and limited issue areas, like that of biological diversity: "as many different species as possible should be permitted to survive"; "in the long run, broad biological diversity will be of great importance for humankind." In the context of a regime, norms may be somewhat unclear with regard to their precise meaning but still increasingly come to function as fundamental regime objectives giving general guidance to national policy makers indicating the same policy direction in all or many member countries.

### The Creation and Development of Regime Elements

To become effective and have an impact, regime elements have to be acknowledged by the regime members. Such acknowledgment may differ considerably depending on the type of regime element, whether rules, norms, principles, or procedures. This may complicate the regime-building process and make analysis cumbersome, but it also implies opportunities for the parties involved in a complex situation like the Caspian puzzle.

*Rules* are the product of treaty-making negotiations. The dynamics of the process is characterized by the exchange of concessions. Parties are very cautious about making the final commitments that would finalize an agreement and are very concerned with what they take to be a fair exchange with other parties. If the agreement is meant to have the form of a convention text, the final stage of the negotiation has the character of "editing diplomacy," with each word of the draft text carefully scrutinized.

In contrast, *principles* are established by interparty consultation and negotiation that can be characterized as a type of collective learning process. Learning is gradual and more or less continuous over time. The input into collective learning comes from various sources: the exchange of knowledge and information between regime partners, the aggregation of knowledge from these exchanges, input from other international organizations, the results of commissioned studies undertaken by the regime secretariat, and, often, contributions from the international scientific community. The construction of consensual knowledge as a basis for regime principles does not, however, occur essentially randomly or incidentally. Knowledge underpinning regime principles is "consensual" because it has in some way or other been accepted by consensus by the regime members. One may imagine situations in a regime-building process where the consensus decision on knowledge is entirely tacit. However, consensual knowledge is usually registered, documented, and generally acknowledged and accepted by the regime members. Acceptance of consensual knowledge, and hence regime principles, can, however, be accomplished differently from the acceptance of regime rules. When knowledge is built up in a regime-building process, acceptance pertains to complete scientific or other reports (or packages of such reports) and their main conclusions. It is not necessary to accept every single word in the documentation of emerging consensual knowledge, as is inevitable when draft texts for regime rules are considered for final decision.

*Norms* can be expected to be at the center stage when a new regime is established or when an existing regime is significantly changed. Parties negotiate about what norms should be brought into the regime to give it general direction. Often the ruling norms are expressed, or referred to, in the preamble to the convention text defining the regime. Still, parties often find it easier to agree on norms driving a regime than on rules that could be considered to represent logical deductions from the driving norms. One explanation is that rules are detailed and legally binding policy prescriptions that, in principle, should always be respected, whereas norms should be understood as guiding principles that one should always strive to achieve—like ideals.

Hence, one function of norms is to serve as a guiding force for the whole regime. However, norms may also be created in the context of a regime-building process that goes on for years and decades. For example, norms may materialize as “collective conclusions” among regime members from the development of consensual knowledge. For instance, the development of consensual knowledge about fish depletion in a sea—or lake—may lead to the construction of a norm prescribing that coordinated international regulation (e.g., stipulations about maximum catches and fishing quotas) is warranted as a necessary means of preserving a fish species, or to promote biological diversity more generally. The emergence of such norms may come to represent the political motive force that is necessary to successfully conclude rule negotiations for the purpose of introducing the necessary international regulation (e.g., stipulating maximum catches and fishing quotas). However, another contingency is that all, or several, of the countries concerned begin to undertake various “voluntary” domestic measures to reduce the catches of those species whose existence is threatened. Such informal, incomplete, and unpredictable (for others) measures may in reality be much more effective than formal international regulation (regime rules) with watertight compliance supervision for the simple reason that they can begin to be implemented much earlier.

*Procedures* are to some extent produced in the same way as regime rules, in a treaty-making process when the regime was originally created or when it is radically changed. Such procedural rules may, for instance, prescribe that a secretariat be set up and identify what its functions are going to be, or stipulate how regime members are going to make joint decisions (e.g., by vote or consensus). Procedures are, however, also institutionalized good practices that are largely the result of “learning by doing.” For example, formal and informal procedural rules for making decisions in the institutions of a regime may vary considerably.

### The Multiple Functions of International Regime Building

International regimes can be regarded as institutionalized conditions for the performance of governments and other actors that have been established by the regime members. Hence, one could argue

that at any given moment a regime has a structural character, although the regime is also dynamic and changes over time in response to the instructions from the regime member. Regime building is the process in which these instructions are given vouched in various kinds of intermember agreements, formal and explicit or informal and veiled. To complete its ultimate task—completing a regime—the regime-building process performs a variety of functions, each of which may have value in its own right:

#### *Task-oriented regime functions*

- *Value (re-)distribution.* In the Caspian puzzle this regime function might be employed in the pivotal issue area of territorial distribution, but also regarding related, more limited issues concerning, for example, oil concessions or fishing quotas. This part of the regime-building process would have the character of traditional state-to-state diplomatic negotiation.
- *International regulations to cope with joint problems.* Regulations may be directly related to the distributive issues, such as the issue of fishing quotas. In this example, the magnitude of the quotas given to the different shore states is dependent on the total quantity of fish in the Caspian Sea. The higher the quantity, the larger the fishing quotas for all. Therefore, any quota schedule may need a regulation determining maximum permitted total catches in the Caspian Sea as seen from a long-term perspective. A joint problem for the shore states is to determine how large the total stock of fish species actually is, how this quantity is likely to develop over time, and how the relationship should be determined between total fish stock and maximum total fish catches in a given period of time. To be meaningful, these questions cannot be answered by means of power-conditioned interstate bargaining only. The problem will not be solved satisfactorily without the construction of a consensual knowledge of the issues concerned as a support to the distributive negotiation.
- *Monitoring of rule compliance.* Some individual states, as well as some business firms and nongovernmental organizations (NGOs), have the capacity to monitor rule compliance outside their own borders or own organization. However, such individual monitoring

systems are likely to be incomplete and lack sufficient information about at least a few other actors. In the Caspian Sea situation, the capacity for individual monitoring is likely to be highly asymmetrically distributed among the actors involved, primarily the shore states. Thus, for some parties, an international approach is the only viable option for an effective monitoring system. Generally speaking, a joint system for monitoring rule compliance will have considerable advantages for all parties involved: lower costs and more extensive and reliable information about compliance and compliance failure than an individual scheme is likely to produce. The joint system may also produce a common standard that is useful in case of intermember disputes concerning rule compliance.

- *Joint supervision of problem areas.* Joint supervision of a problem area by shore states or regime partners generally may be warranted even in the absence of rules to comply with. An example would be a system for joint supervision of oil fields or fishing activities.
- *Joint ventures.* The shore states, and perhaps the regime members in a wider sense, may have an interest in cooperating in economic or political joint ventures concerning, for instance, policies toward the international oil companies or the management of pipeline systems used for the transport of oil and gas.

#### *Actor-oriented regime functions*

- *Redistribution of knowledge and information among regime members.* In many negotiations, parties are asymmetrically informed about key issues, which may contribute to giving the favored parties leverage when dealing with the others. Problem solving and cooperation may, however, be hampered. There, redistribution of knowledge and information as part of the regime-building process may have a favorable long-term effect on the search for viable agreements.
- *Collective learning; development of consensual knowledge.* This function of the regime helps to produce regime principles, but it also gives important support to almost all the other regime-building functions.
- *Building and reinforcing interparty understanding.* A nation or organization's attitude toward, or position on,

an issue is often conditioned by domestic circumstances that are misinterpreted by or unknown to other actors. An ongoing regime-building process may bring such factors to the surface, thereby increasing the understanding one party has of another party.

- *Building and reinforcing trust.* Lack of trust between two or more parties may represent a critical obstacle for joint problem solving or agreement concerning rules, norms, or knowledge (principles). Lack of trust may pertain to both intentions (“she will not honor her promises”) and failing capacity (“he has good intentions, but is he really able to live up to his promises?”). Interparty communication in an ongoing regime-building process may contribute to change and improve the perception and image parties have of other parties, or some of them, so that trust is built.
- *Building and reinforcing complex interdependence.* When the parties to a regime build up joint norms and principles, they will perceive growing common sunk costs in the institutions

and other regime accomplishments. Thereby, webs of complex interdependence between regime members will emerge or become reinforced.

- *Construction of common interests and joint objectives.* In a “quick-fix” negotiation the parties will have to identify common interests and define joint objectives early in the process; otherwise, the risk is considerable that the negotiation will fail. In contrast, in a regime-building process common interests and joint objectives will appear gradually, and partly as a result of the working of other regime functions.

### Questions

- Is the regime-building approach applicable to the Caspian puzzle? In what ways is it applicable? In what ways is it not applicable?
- If a regime-building process is started for the purpose of constructing a Caspian regime, what stakeholders (governments, international organizations, business firms) should be invited, and on what terms?

- Would the regime-building approach be more useful for some parties than others? If such asymmetry can be expected, who would be favored and who would not, and why?
- What issues should be brought into the scope of the regime-building process?
- What strategy should an individual country employ when engaging in a regime-building process concerning the Caspian puzzle?

Gunnar Sjöstedt

### Notes

<sup>1</sup> See “Caspian chess: Conflict or cooperation?” by Paul Meerts in this issue.

<sup>2</sup> Krasner, S., 1986, *International Regimes*, Cornell University Press, Ithaca, NY, USA.

<sup>3</sup> Trade issues are an instructive example. Negotiation on binding trade rules did not take place in the OECD itself, but in other organizations, notably the GATT/WTO. However, when new trade issues were introduced into the GATT/WTO agenda (e.g., services trade in the Uruguay Round) the OECD countries brought with them into GATT/WTO an almost finished single negotiation text.

## Legal Aspects of the Caspian Sea Issue

At the outset, I would like to draw attention to the excellent contribution on sources of negotiating power in the Caspian Sea on the US Department of Energy’s Energy Information Administration Web site: [www.eia.doe.gov/emeu/cabs/caspian.html](http://www.eia.doe.gov/emeu/cabs/caspian.html). The following observations draw on many of the findings published on this Web site and try to develop them further with regard to the legal issues involved.

A negotiated settlement of the status of the Caspian Sea, with its large reserves of undeveloped oil and natural gas, poses a number of complex questions concerning international law. Before the dissolution of the Soviet Union in December 1991, only two states bordered on the Caspian Sea: Iran and the Soviet Union. In 1921 and 1940, these two states concluded two treaties on the legal status of the Caspian. Neither treaty established seabed boundaries or discussed oil and natural gas exploration. As a consequence of the collapse of the Soviet Union and the ensuing cases of state succession, there are now five states bordering the Caspian Sea: Iran, Russia, Azerbaijan, Kazakhstan, and Turkmenistan.

So far, the efforts by the littoral states to come to an agreement on the legal status of the Caspian Sea and its natural resources have failed. A summit meeting of the heads of state of the five littoral countries held in April 2002 was inconclusive. In the meantime, several states have chosen to sign bilateral agreements in an effort to solve the problem. However, it is obvious that a regime that is unacceptable to some of the littoral states will not satisfactorily resolve the legal problems in this oil-rich region. Finding a fair and just solution to the territorial issues involved turns out to be a particularly difficult task because of the uneven distribution of oil and gas resources in the Caspian Sea area. Territorial aspects constitute only one problem; the environmental dimension and the questions of transit rights for oil and gas pipelines are no less important. Therefore, a comprehensive approach needs to be taken that combines a settlement of the status question with solutions to the ecological and transit problems.

The following comments do not in any way pretend to provide an authoritative

legal answer to the intricate issues of the Caspian Sea region. Rather, they seek to expose and discuss, as briefly as possible, the key legal problems at stake. It is understood that the status of the Caspian Sea under public international law has a direct bearing on the contracts concluded on oil and gas exploration. These contracts between companies or states are governed by private law.

*Are the bilateral agreements on the legal status of the Caspian Sea that were concluded in 1921 and 1941 between the Soviet Union and Iran still in force?*

The rules of international law governing state succession with regard to treaties as codified in the Vienna Convention of 1978 give only a partial answer to this question. In principle, the Vienna Convention on state succession stipulates the continuity of treaty relations, except for the so-called “newly independent states,” that is, those states that in the early 1960s emerged from the process of decolonization. The riparian states of the Caspian Sea are not to be considered newly independent states in this sense. As a matter of fact, the recent cases of state succession in Europe seem

to indicate that, in practice, the successor states usually decide by mutual consent with their new partners which agreements concluded by the predecessor state they wish to keep in force between them. The absence of such an agreement on the legal force of the above-mentioned agreements of 1921 and 1940 leaves this question of the legal status open. The claim that the previous agreements are still in force may be buttressed by the principle of the continuity of treaty relations in cases of state succession as enshrined in the Vienna Convention. However, the case can be also made that this principle does not yet reflect universally accepted customary international law. Furthermore, to date not all five littoral states in question have ratified the Convention. Also, the recent practice of successor states reaching agreements with other states concerning which treaties concluded by the predecessor states they wish to keep in force seems to speak against an automatic application of the principle of continuity of treaty relations. On the other hand, an argument speaking in favor of the continued validity of the two treaties on the Caspian Sea can be based on the widely held view that treaties fixing borders or treaties governing territorial regimes remain untouched by state succession. Applying the latter opinion to the status of the Caspian Sea would uphold the view that the two treaties mentioned are still considered to be in force because they govern a territorial regime.

*Is the Caspian Sea a body of water covered by the Law of the Sea Convention (LSC) or is it a lake?*

The LSC establishes clear rules on the delimitation of the maritime zones and their different legal statuses. It provides for a special regime for each area of the ocean: the coastal sea, the straits, the contiguous zone, the continental shelf, the exclusive economic zone, the high seas, and the seabed. It goes without saying that it is impossible to apply the entire set of provisions of the LSC to the Caspian Sea. Applying some of the rules of the LSC to the Caspian Sea could be done by the mutual consent of all littoral states only on the understanding that the two bilateral treaties concluded by the Soviet Union and Iran would have to be considered obsolete. In applying, *mutatis mutandis*, some relevant principles and rules of the LSC to the Caspian Sea, full

maritime boundaries of the five littoral states bordering on the Caspian Sea would be established based on an equidistant division of the sea and undersea resources into national sectors. By common agreement, one might translate certain rules of the LSC to the Caspian Sea. Even though it is the largest inland saltwater body on Earth, given the geographic configuration of the Caspian Sea region, it appears far-fetched to put this lake under the LSC regime. If the Caspian Sea does not fall within the scope of application of the LSC, the question remains unanswered as to what legal regime should then determine its status. The author does not share the view expressed in the Energy Information Administration Web site that in the latter case the Caspian Sea and its resources would have to be developed jointly—a division referred to as the “condominium” approach. It turns out that the legal status of each inland lake situated at the border of two or more states has its own specific legal history. It is by no means cast in stone that the condominium approach applies to the Caspian Sea or to any inland lake that happens to be located between two or more states. On the contrary, inland lakes are usually divided up by the littoral states concerned. In the absence of any treaty recognized by all littoral states as being in force, we are left with the puzzling situation that under international law neither the LSC nor the customary rules on the legal status of inland lakes offer a precise solution to the tricky legal question of the international status of the Caspian Sea.

*What are the international rules with regard to the environment in the Caspian region?*

At present there is no legal framework designed to protect the sensitive ecosystem in the region. The lack of any such environmental arrangements has led several countries to oppose the laying of proposed trans-Caspian oil and gas pipelines on environmental grounds. There is certainly a need for a multilateral legal framework addressing the particular environmental challenges of oil exploration and fisheries in the Caspian Sea region. A solution to the status question will not resolve the region’s ecological problems. It is obvious that environmental problems do not stop at national borders.

*What are the legal positions of the littoral states?*

Four of the littoral states favor the division of the Caspian Sea. A partition of the Caspian Sea proposes dividing the seabed, the water surface, and the air-space into zones in which the respective states would exercise sovereign rights. Only Iran is also prepared to accept the legal concept of a condominium, with the implication that its resources would belong to all states as a common property and would have to be developed jointly. Azerbaijan, Russia, and Kazakhstan have agreed to divide the Caspian in accordance with the “modified median principle.” Iran, accepting the condominium approach as one possible solution, is also on record as favoring the division of the Caspian Sea into equal sectors as another alternative. This position would give Iran a greater share of the Caspian Sea than its comparatively small coastline would justify. Iran favors keeping in force the treaties it concluded with the Soviet Union in 1921 and 1940. Turkmenistan favors a division in principle but has not yet made up its mind on the method.

### Concluding Remarks

In view of the fact that all of the littoral states, including Iran, are ready to accept a division of the Caspian Sea, the legal concept of a condominium does not seem to be a promising scheme for redefining the legal status of this lake. One may thus proceed from the assumption that, in all likelihood, a final settlement of the status question will be based on some form of partition of the lake.

A solution to the legal status problem may best be found through international negotiations involving all littoral states. Such negotiations could be facilitated within an international institutional framework. They could be held, for instance, under the auspices of the United Nations. It is unlikely that the littoral states will resort to arbitration or to a judicial settlement of the territorial issue of the Caspian Sea. The outcome of a judicial decision by an international tribunal poses too many risks to the states concerned. Their interests seem to be better served by a negotiated settlement.

*Franz Cede*

## Negotiation for Setting up Joint Ventures in the Caspian Region: Lessons from the Chinese Experience

An essential way to promote economic cooperation among the various countries around the Caspian Sea is to set up joint ventures. This would also be a very effective means of developing the economy of the region by building up joint enterprises between companies that resort to high technologies, such as Western companies, and local enterprises that want to modernize their production and increase their activities for foreign as well as for domestic markets.

In the long run, such practical initiatives between economic actors with diverging interests can lead to better relations at a more global level. The joint venture enables the parties to go beyond their possible conflict of interest to devise a formula that combines the strong points of both parties in order to develop mutually beneficial activities.

China has made extensive use of this type of initiative, creating more than 400,000 joint ventures since the country opened its economy to foreign investments in 1978. This new approach has contributed to a considerable and sustained economic growth, averaging 10% a year for the past two decades.

Considering the future development of the Caspian region, it is most interesting and timely to analyze the Chinese case in order to draw lessons in terms of economic strategy at the government and enterprise levels. This is what the following study aims to achieve.

Joint ventures offer a wide range of cases illustrating negotiations under conditions of uncertainty within a complex network of constraints and an often highly influential cultural context. The joint venture is made up of two or more entities that are very different in organizational and cultural terms. On one side is the local company; often heavily bureaucratic, it is responsible for taking care of all the dimensions of the employees' lives. On the other side is the Western enterprise, which focuses on quality, performance, and financial effectiveness. The strategic interests of the parties are defended within a highly influential external setting, with a government and a public administration tending to intervene in business relations.

Several stages can be distinguished in the negotiation process, each related to a specific category of issues such as the basic policy of the future joint venture, the technical issues, and the financial and legal aspects. Among the many issues under discussion (over 150), 16 key issues have been identified as being crucial in the building-up of the agreement. A number of difficulties encountered by both parties during the negotiation can be scrutinized, such as hidden differences in objectives, obstacles due to non-overlapping perceptions, the lack of a managerial culture, conflicting values behind behaviors, and the decision-making process in a not totally free market economy. The duration of the negotiation, which can last several years, may allow the implementation of a learning process that will guarantee the stability of the agreement.

"Is it not wonderful to have friends come from distant lands?" asked Confucius. Nowadays, the reception given to distant friends by the Chinese negotiators may be perfectly consistent with such a philosophy, but if the foreigner is not classified as a "friend," he can expect more mixed reactions. In principle, the setting up of joint ventures implies a cooperative relationship; consequently, the chances of being considered a friend are rather high. But the many issues at stake and the conflicts of interest that stand out as landmarks during the negotiation process may lead one to feel that he or she has been classified otherwise.

Negotiating a joint venture contract is no more and no less than discussing the terms and conditions of living together. To do so, one must engage in an exploration process aimed at defining the scope of what is possible for the other and for oneself. The point is to establish a zone of agreement wide enough to leave some room for the satisfaction of both. This reconnaissance of the negotiation perimeter and of the available resources is essential for building a satisfactory and sustainable equilibrium.

The negotiation addresses the conception of what a joint venture is before considering its content and discussing

trade-offs and concessions. However, the topography of the negotiation's setting, the positioning of the teams in two lines facing each other at the negotiation table, organizes the interaction symbolically as conflictual and induces confrontation. Thus, the access to what is sometimes lyrically called "a marriage made in heaven," may lead the parties to discover that heaven is not populated only with angels.

The large number of issues to be negotiated and the immense task of exploration and research to reach a common understanding of the object (i.e., the joint venture) entail an extended negotiation. The duration varies tremendously according to circumstances, counterparts, and issues. The shortest unfold over not less than six months; the longest, over periods ranging from 8 to 10 years. In this case, the process encounters many interruptions and deadlocks that turn it into a succession of episodes separated by long intervals of inactivity.

Setting up a joint venture in China is a process that can stretch over several years, involving a full team of engineers, financial experts, lawyers, salespeople, and interpreters, all busy shuttling between China and the company headquarters. This highly complex process can be divided into four stages, each resting on a particular rationale:

- Preliminary investigation
- Business proposal
- Contract negotiation
- Implementation

The *preliminary investigation* concerns the initial approach to the Chinese market. The aim is to become more familiar with its specifics, to assess the market potentialities, to select an area, to develop a network of contacts with companies, public administrators, and influential people, and then to find a possible partner. This exploratory stage is mainly a phase for collecting information.

The *business proposal* phase includes an assessment of the compatibility of each party's objectives and common views on market strategy, the signing of a letter of intent, and a feasibility study.

The letter of intent aims at showing each party's commitment to carrying on with the process as far as possible. Its content is rather general and usually states business scope, markets, total investment, contribution from each party, basic joint venture terms, corporate control structure, production scale, origin of technology, and duration of the joint venture. The feasibility study is usually carried out jointly by the negotiating parties. The purpose is to assess the potential economic value of the joint venture, to present its production plan, and to clarify its operating conditions.

When the appropriate authorities have approved the feasibility study, the *contract negotiation* can take place. At this stage, all that is necessary for setting up and operating the joint venture is discussed, such as each party's rights and obligations and their respective contributions of capital, technology, know-how, and other resources. The negotiation also addresses issues concerning the management of the joint venture, its decision-making structure, its policy for personnel management, and the conditions of its termination. At this stage, issues such as trademarks and license fees and pricing of the future products for sale on the domestic and foreign markets are discussed. This phase is of a rather complex nature, for it deals with issues that require very different expertise, be it technical, financial, managerial, legal, etc.

As a Chinese saying observes, "a journey of a thousand *li* must begin with a single step." Thus, the negotiators enter into a concession-making phase in which the enthusiasm of the beginning associated with the satisfaction of creating gradually vanishes to the benefit of a logic of sharing efforts and costs, and making concessions. The Chinese resort to an indirect approach, never openly saying what they want, and this induces Westerners to assume that the Chinese side has a hidden agenda that has to be elucidated.

The last stage of the whole process of setting up the joint venture concerns the *implementation of the agreement*. One might think that the negotiations are now over, but this is usually not the case. At this stage, surprises crop up daily because, for instance, the business environment, the working conditions, or the supplies of the raw materials may

undergo unpredictable changes. It would be illusory to believe that one can simply rely on the written contract, and renegotiations feed what can be called an ongoing dynamic process.

The main characteristic that differentiates international negotiation from any other type of negotiation is the cultural dimension. A priori invisible, culture makes itself felt through the differences that become apparent when someone comes across another culture. One has to be a foreigner to formulate the query posed in his time by Montesquieu: "What is it to be a Persian?"

The interactions between two cultures elicit a whole set of phenomena that tend to complexify the negotiation and make it more difficult to manage. The cognitive aspects play an important part because the very conception of a negotiation varies from one culture to another. The perception of signals, communication, and the decoding of behaviors, especially in cultures where the indirect game prevails, are among the many obstacles to overcome. Finally, identity issues raised when the values central to a culture are challenged may take a prominent role, leading to costly deadlocks or even to a break-off of negotiations. Concerning more specifically the encounter between the Chinese and Western cultures, several dimensions tend to occupy a critical position through the consequences they generate. Among them are the cognitive aspects, the holistic approach compared with the analytical approach, the Sino-centric component, resorting to associative logic, indirect action, concerns about saving face, and finally the divergence in terms of values, particularly regarding what constitutes a fair agreement.

The joint venture negotiation is a complex, highly demanding performance carried out in a context unfamiliar to foreigners, one of whom expressed the difficulty of the task as follows: "Negotiating a joint venture in China is like crossing a frozen lake wearing ordinary shoes while the Chinese are spinning round all around you wearing ice skates."

If one considers only the negotiation process as such, rather than the content of the discussions, a very high number of variables is at play. In this very rich interaction, two logics combine and sometimes confront each other, those of hierarchical dependence and autonomy grappling. In the first, the negotiator

represents the interests of the parent enterprise to which he or she belongs. The interaction between both parties produces a strategic mix with a distributive dominance because the conflict of interests—for instance, in terms of respective contributions to the joint venture capital or in the distribution of future responsibilities—strongly influences the whole game. Because of its recurring character, this conflict strongly colors the entire relationship between the protagonists.

The second logic, that of autonomy grappling, comes into sight gradually, in proportion with the development of the negotiation process. Both parties' negotiators, through their durable interaction, set a specific sphere around the negotiation table where the joint venture's identity takes shape. The culture that is developed creates the conditions for implementing predominantly cooperative strategies. In fact, the negotiation sphere elicits common references and a mutual learning process, which facilitates the respective position adjustments and the coordination of the views toward the future.

It is this double movement that fundamentally characterizes the joint venture negotiation. Formally, it should be a cooperative interaction because the explicit objective is to join forces to attack the market. In reality, it develops in a rather competitive register, for the matter is to protect one's own interests in a relatively opaque game that, by its nature, invites caution. Further on, it evolves toward a situation where cooperation is dominant because of the common culture that has been gradually elaborated at the negotiation table.

At the end of any negotiation, the question of its evaluation remains. In the present case, how should the quality of a joint venture negotiation in China be assessed? What are the objective criteria that enable one to know if the final outcome is an optimal in the Pareto sense or if the parties have only reached a meager compromise? The negotiation must be conducted in such a way that it anticipates and prevents the difficulties that the joint venture could face. As a consequence, the evaluation can be postponed only until the time the joint venture is in operation. The performance of the new enterprise may be used as an economic indicator a posteriori.

However, the results of the joint venture depend upon many other factors, which intervene independently of the work of the negotiators. The degree of synergy between the various components of the joint venture may be viewed as a relevant indicator. It relates to the means of the enterprise and concerns social and cultural aspects of its management. Were we able to develop a common culture, to orient the energies together in the right direction? A Chinese saying bears witness to this preoccupation: "If a snake has nine tails, when the head moves, all the tails follow. If a snake has two heads, it cannot move forward a single inch."

The stability of the joint venture over time is a third indicator. Research has established a relation between the longevity of the joint venture and the

agreement characteristics. Has the agreement truly created value? Has it enabled the actors to translate into results the potential provided by the parents' enterprises? Has it substantially contributed to reducing risks of future conflicts?

Assessing this quest for a long-lasting balance that a joint venture negotiation might give consists not only in measuring objective results, but also in looking at essential qualitative dimensions. What about the real commitment of the parties to the project, their goodwill, the capacity of each to contribute to building a shared vision, to establish relations based on trust, to learn from each other? These are the issues to be clarified if one does not wish the joint venture to metamorphose into a "joint adventure."

Guy Olivier Faure

### PIN Books

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