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## The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy

Faraz Sanei

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# The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with its Geopolitical Realities

## ABSTRACT

*The signing of the "deal of the century" in Baku creating one of the first major Caspian energy consortiums between Azerbaijan and western oil companies signaled the beginning of a new era in world energy politics. The discovery of potentially huge oil and gas reserves in the newly-independent states of Azerbaijan, Kazakhstan, and Turkmenistan opened the door for western oil companies rushing to gain a competitive foothold in the new energy market. For Asia and the West this discovery provides a golden opportunity to ensure market stability through diversification of energy export routes. For the United States and its political allies, however, the Caspian region holds the key to the realization of a long-term strategic agenda. By establishing its presence in the region, Washington could: 1) weaken the influence of the Persian Gulf states and prevent the Organization of Petroleum Exporting Countries (OPEC) from monopolizing the production and distribution of world energy reserves; 2) create a controlled environment ensuring that the flow of petro-dollars will lead to political and economic reform in Central Asia and the Caucasus; and 3) undermine the historical dominance of the Russian Federation and the Islamic Republic of Iran not only in the Caspian Sea region but in Eurasia and Central Asia.*

*The political and economic changes brought about by the collapse of the Soviet Union and the reemergence of the Caspian region as a focal point of geopolitical importance have broad implications for the new government in Tehran. On the one hand Iran clearly finds itself in a tough and unfamiliar neighborhood. It seems to have lost the game of political and cultural influence over the newly-independent states to Turkey, which claims common ethnic and linguistic bonds with its Turkic brethren in the east. It has failed to play the religious*

card effectively—both *Kazakhstan and Turkmenistan and even Shi'ite Azerbaijan* have looked to secular Turkey as the model of governance and reform. On the economic front the discovery of vast reserves in the Caspian has done little to increase the prospects for Iran's share of the world hydrocarbon market—relatively small oil and gas capacity has been found in the deep waters off Iran's coastline. Finally, Washington has actively engaged in a political and economic campaign to isolate Iran by allying itself with Turkey and the newly-independent states and continues to discourage the establishment of economic relations with Tehran. In this regard the imposition of unilateral trade sanctions on Tehran, the most important of which seeks to disrupt the country's economy by discouraging foreign involvement in the development of its oil and gas sector, have far-reaching legal implications for Iran's involvement in the Caspian energy scene.

Iran's geopolitical situation, however, affords it the distinct advantage of being the only land-bridge route linking the Caspian Sea to the oil-rich Persian Gulf. The importance of this cannot be overemphasized because the key to unlocking the Caspian's wealth lies in finding sustainable export routes that will carry the land-locked states' oil and gas to the open seas. Iran represents one of the shortest and arguably the most efficient routes not only because of its location but because of its advanced transportation and infrastructural capacity. Therefore, Iran's ability to take advantage of its position in the region will largely determine whether it will be able to frustrate the ultimate policy agenda of Washington. More importantly, it will ensure Iran increased participation in the world's oil and gas market and allow it to use the Caspian Sea as a springboard to strengthen its own regional and international policy goals.

It is in this context that the legal implications of energy exploration, production, and transportation in the Caspian Sea will be discussed. This study will seek to address competing notions of a Caspian Sea legal regime as they relate to Iran's geopolitical interests. In this sense the study is not simply an analysis of the status of such ownership rights in the Caspian, a subject that has been enthusiastically addressed by several legal scholars. Rather, it is a multi-faceted approach to exploring Iran's legal options regarding the establishment of such a regime given Tehran's political and economic interests and advantages in the region.

The author's main argument is that although legal issues surrounding the "Great Game" in the Caspian often take a back seat to geopolitical diplomacy between the major participants,

*Tehran must effectively incorporate international legal arguments into a far-sighted diplomatic strategy aiming to develop and bolster its transportation and distribution role in the Caspian region. Until now Tehran's ineffective and misguided use of legal strategies has only weakened its bid to retain legitimacy in the region. This is so because Tehran has sought only to force a "legal veto" on any offshore development in the Caspian Sea that could potentially endanger its geopolitical interests in the region. Instead Tehran should employ a two-pronged legal strategy that aims to secure its traditional interests in the region while ensuring that any formation of a legal regime defining ownership rights in the Caspian will ultimately accommodate its competitive advantage in the transportation sector.*

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## I. INTRODUCTION

Until the last decade or so the issue of a Caspian Sea legal regime received little to no attention in the scholarship of the international legal community.<sup>1</sup> In fact the term "legal regime" was rarely ever used in reference to the world's largest inland body of water.<sup>2</sup> This seems rather odd given the historical and economic importance of the Caspian Sea to the two states that controlled its waters until the collapse of the Soviet Union in 1991.<sup>3</sup> A rough historical survey of the region in the last century or so, however, reveals that after the battle for empire in Central Asia between Great Britain and Russia was settled in favor of the former, the region slowly entered a period of relative isolation that was eventually capped off with the consolidation of the Soviet Union.<sup>4</sup> For more than fifty years the Caspian's remote and landlocked location ensured the

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1. In preparation for this study the author had a general discussion with Professor Jonathan Charney, an expert on the laws of the sea at Vanderbilt University Law School. Professor Charney referred to the legal status of the Caspian Sea as the "black hole" of international law, emphasizing the surprising lack of in-depth legal scholarship regarding rules governing legal relationships between the lake's littoral states. This characterization was corroborated by the scant availability of published legal analysis regarding the legal status of the Caspian Sea.

2. A review of texts and periodicals (herein cited) addressing the status of the Caspian prior to 1991 revealed no sources using this term. All pre-1991 sources used refer to the status of the Caspian within the context of the Soviet-Iranian Bilateral Treaties. For a discussion of the Soviet-Iranian Bilateral Treaties, see *infra* Part IV.

3. See, e.g., David Aubrey, *The Caspian Environment Programme Gets Underway*, Panel Discussion, Held Oct. 30, 1998, at [http://www.sipa.columbia.edu/RESOURCES/CASPIAN/env\\_p12.html](http://www.sipa.columbia.edu/RESOURCES/CASPIAN/env_p12.html) (copy on file with the *Vanderbilt Journal of Transnational Law*). The Caspian has especially been important for the communities (approximately eleven million inhabitants are distributed around the Caspian shoreline today) that abut its shores and have for years depended upon its resource-rich waters for sustenance, and for the overall economic prosperity of the littoral states that managed to monopolize its commercial trade routes. *Id.* The Sea is also home to the famous Caspian sturgeon from which an overwhelming majority of the world's most expensive and sought after beluga caviar is extracted. See *infra* notes 56-60 and accompanying text (providing a description of the environmental problems that plague the world's largest inland body of water, including pollution and over-fishing, which have contributed to a dramatic decline in the Caspian's sturgeon population).

4. The Nineteenth Century battle for empire between England and Russia in Central Asia is often referred to as the "Great Game." Stuart Parrot, *Central Asia: Powers Replay Great Game*, RADIO FREE EUROPE-RADIO LIBERTY, Feb. 3, 1998, at <http://www.rferl.org/nca/features/1998/02/F.RU.980203143840.html> (copy on file with the *Vanderbilt Journal of Transnational Law*). Central Asia was seen as a strategic geopolitical region linking Far East trade routes to the Middle East and Europe. See *id.*

Soviet Union's (and to a lesser extent Iran's) hegemony over the lake's resources and navigational systems.<sup>5</sup>

All that has changed with the interplay of two significant events in the last decade: the collapse of the Soviet empire and the discovery of vast oil and gas deposits in the three new succession states bordering the Caspian Sea.<sup>6</sup> In 1991 Azerbaijan, Kazakhstan, and Turkmenistan entered the international community as fledgling states desperate for foreign capital and integration into the world economy after years of domination under a closed political and economic system.<sup>7</sup> Soon thereafter, the discovery of rich hydrocarbon

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5. See Graham Fuller, *Geopolitical Dynamics of the Caspian Region*, at <http://ourworld.compuserve.com/homepages/usazerb/322.htm> (last visited on Feb. 5, 2000) (copy on file with the *Vanderbilt Journal of Transnational Law*) (referring to Russia and Iran's geopolitical importance to the Caspian region).

6. Although 1989 is the year associated with *perestroika* and the collapse of the Communist system in Russia, the Soviet Union, a conglomerate of Socialist Republics retaining distinct ethno-linguistic identities separate from Russia, formally disintegrated in 1991. See generally ANATOLY M. KHAZANOV, *AFTER THE USSR, ETHNICITY, NATIONALISM, AND POLITICS IN THE COMMONWEALTH OF INDEPENDENT STATES* 3-51 (1995). From 1989-1990 Latvia, Lithuania, Estonia, Moldova, Ukraine, Belarus, Kazakhstan, Uzbekistan, Kyrgyzstan, Tajikistan, Turkmenistan, Azerbaijan, Armenia, and Georgia all declared their sovereignty. See GRAHAM SMITH, *THE POST-SOVIET STATES* 39 (1999). The remaining republics were held together by the Russian Federation which exists to this day and includes the troubled non-Russian Caucasus republic of Chechnya. See KHAZANOV, *supra* at 39-48. Three of the newly-independent states (NIS), Azerbaijan, Kazakhstan, and Turkmenistan became Caspian littoral states. See *ATLAS OF THE WORLD* 89 (Oxford 5th ed. 1997) (1978). Azerbaijan lies in the Caucasus and is bordered by the Islamic Republic of Iran to the south, Armenia to the west, Georgia to the northwest, the Russian Federation to the north, and the Caspian Sea to the east. See *id.* Kazakhstan is the largest of the former Soviet Republics in terms of square mileage, and lies to the south of the Russian Federation, north of Turkmenistan, Kyrgyzstan, and Uzbekistan, and west of China and the Far East. See *id.* at 56. See also generally J. Robert Brown, Jr., *Culture, Chaos and Capitalism: Privatization in Kazakhstan*, 19 U. PA. J. INT'L ECON. L. 909 (1998), for an informative overview of Kazakhstan's struggles for economic reform and liberalization. Turkmenistan is the most southerly situated littoral state. See *ATLAS OF THE WORLD*, *supra*, at 56. It borders Iran to the north, Afghanistan to the northeast, and Kazakhstan and Uzbekistan to the south. See *id.* For purposes of this study the other significant Central Asian state is Uzbekistan, which is not a Caspian littoral state but like its southern neighbor, Turkmenistan, contains significant natural gas reserves. See UNITED STATES ENERGY INFORMATION ADMINISTRATION, *CASPIAN SEA REGION*, *infra* note 41 (outlining the United States Energy Information Administration (USEIA) estimates that Uzbekistan's total gas reserves (including proven and possible reserves) are anywhere between 109-123 Tcf.) The other two Central Asian NIS are Tajikistan and Kyrgyzstan. With regards to the "discovery" of oil and gas reserves in the region, the findings are in reality a re-discovery since the existence of deposits has been known for centuries. See *infra* notes 148-57 and accompanying text.

7. See generally TOURAJ ATABAKI & JOHN O'KANE, *POST-SOVIET CENTRAL ASIA* (1988). For a comparative analysis of the differing privatization efforts of the newly-independent Central Asian states and their struggle to attract foreign capital, see generally Philip M. Nichols, *Creating a Market Along the Silk Road: A Comparison of Privatization Techniques in Central Asia*, 29 N.Y.U. J. INT'L L. & POL. 299 (1997).

deposits on their land and offshore territories provided them with a golden opportunity to secure desperately sought foreign financial assistance.<sup>8</sup> As for the traditional littoral powers of Russia and Persia,<sup>9</sup> it is perhaps an irony of history that they have largely been left out in the cold with respect to Caspian hydrocarbon wealth within their immediate shorelines.<sup>10</sup> They now find themselves locked in the middle of a schizophrenic policy aimed at courting the new states while simultaneously preventing those same states from taking any unilateral actions that would compromise their influence in the Caspian.<sup>11</sup> With the entry of foreign corporations backed by Western strategic and political interests,<sup>12</sup> Russia and Iran are struggling to adjust to the new regional circumstances, with command over regional policies the immediate goal and ultimate control over international oil and gas markets the long-term prize.<sup>13</sup>

At the center of this diplomatic struggle for regional supremacy is the legal status of the Caspian Sea and its ramifications for the prospects of ownership and mining rights over the Sea's oil and gas resources.<sup>14</sup> If, however, the uncertain atmosphere regarding ownership rights defines the legal battleground upon which the littoral states have pursued their diplomacy, the practical problem of transporting the oil and gas to world markets presents the ultimate geopolitical challenge.<sup>15</sup> Here, the Russian Federation and the

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8. Hugh Pope, *US Report Says Caspian Oil Deposits Might be Twice as Large as Expected*, WALL ST. J., April 30, 1997, at A10. See, e.g., SMITH, *supra* note 6, at 157-211, for an overview of the NIS' dire economic circumstances at the outset of independence.

9. In 1935 the Persian government, then under the rule of Reza Shah, the founder of the Pahlavi dynasty (and the father of Mohammad Reza Shah, who was overthrown as a result of the Islamic Revolution in 1979), officially changed the country's name to Iran. DONALD N. WILBER, *REZA SHAH: THE RESURRECTION AND RECONSTRUCTION OF IRAN* 162 (1975).

10. In comparison to the three NIS littoral states no significant oil and gas reserves have been found off the Russian and Iranian Caspian coastlines. See *infra* notes 41-46 and accompanying text.

11. See *infra* Parts II, III, for an analysis of the geopolitical posturing of Russia and Iran vis-à-vis the NIS and the littoral states' inconsistent attempts to validate their political positions through legal means; see also *infra* Part II.C, for an analysis of the geopolitical battle for the construction of pipelines in the Caspian region.

12. See generally Jean-Christophe Peuch, *Caspian Sea Oil: The Role of Private Corporations*, FLETCHER FORUM OF WORLD AFF., Fall 1998, 22-Fall FLFWA 27 (explaining the political and financial role of private corporations in the development of the Caspian region's oil and gas industry).

13. See Hugh Pope, *Great Game II: Oil Companies Rush Into the Caucasus to Tap the Caspian*, WALL ST. J., Apr. 25, 1997, at A1, for good a review of the geopolitics of the Caspian oil rush and the entrance of western corporations into the region.

14. See Margaret McQuaile, *Question Looming Above All: Who is Caspian's Owner?*, 73 PLATT'S OILGRAM NEWS 38, Feb. 24, 1995, 1995 WL 8133653.

15. See Michael Lelyveld, *Russia: Moscow's New Caspian Policy?*, RADIO FREE EUROPE-RADIO LIBERTY, Apr. 7, 1998, at <http://www.rferl.org/nca/features/1998/04/F.RU.980407123639> (copy on file with the *Vanderbilt Journal of Transnational Law*)

Islamic Republic of Iran retain a potentially significant measure of influence over the newly-independent states (NIS).<sup>16</sup> While Russia's vast territory stretches from the Sea of Okhotsk and the Bering Sea in the Pacific to the Black and Baltic Seas in the West and Iran occupies the largest coastline of any Persian Gulf state, the NIS are essentially landlocked and have no access to the open seas.<sup>17</sup> This is a significant competitive and market disadvantage for these cash-starved economies, and one that they and the West must overcome if the potentials of the Caspian are to be fully realized and diversification of energy sources ultimately achieved.<sup>18</sup> It is in this way that the battle lines over legal delimitation of the Caspian have been supplanted by the more immediate concern for sustainable export routes to lucrative energy markets.<sup>19</sup>

Given the above background, the impetus for this study comes from the surprising realization that there is little in-depth legal analysis regarding the status of the Caspian in international scholarship.<sup>20</sup> Sound analysis regarding the important legal issues surrounding exploitation of Caspian resources has often been clouded by political posturing and questionable reasoning.<sup>21</sup> In this sense, analysis has often operated in a vacuum where legal stakes have been reduced to seemingly abstract debates about what legal models or regimes must govern relations between the littoral states in the

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(arguing that there are significant economic and political advantages to maintaining control of oil and gas pipelines under the current international pipeline arrangements). The economic advantages include, but are not limited to, the collection of transit fees for the flow of oil and gas passing through a nation's territory. *See id.* Political advantages include, but are not limited to, overall control over the flow of the oil and gas itself. *See id.* Indeed, without pipelines the right to develop Caspian resources is largely an academic concern. *Id.* For an introductory overview of the international legal implications of the Caspian Sea and its ramifications for pipeline geopolitics, see generally Constantinos Papadopoulos, *International Law and Pipeline Geopolitics in the Caspian Sea*, 36 TEXAS J. BUS. L. 1 (1999).

16. *See, e.g.,* Robert D. Kaplan, *The Great Game Isn't Over*, WALL ST. J., Nov. 24, 1999, at A5.

17. *See* ATLAS OF THE WORLD, *supra* note 6, at 57.

18. *See* generally Amir Houshang Amini, *Iran's Standing in the Regional Geo-Economic Equation*, 2 IRAN COMMERCE 4 (Iran), Autumn 1997, <http://www.netiran.com/Htdocs/Clippings/Feconomy/971000XXFE07.html>, for a geopolitical explanation of why and how Iran can serve as an ideal strategic partner to the NIS.

19. *See supra* note 15 and accompanying text; Part II.C.

20. To be sure, this deficiency reflects the degree to which the region was truly closed and isolated to the outside world and the unanticipated frenzy of commercial and political interest that resulted once its doors were swung wide open and news of rich energy basins hit corporate ears. *See supra* notes 1-13 and accompanying text.

21. When issues have been addressed by scholars there has been an overwhelming tendency to address the legal status of the Caspian primarily in relation to offshore exploration and production rights without linking those rights to the equally important issue of pipeline diplomacy. *See, e.g., infra* note 22-23 and accompanying text.

Caspian region, or whether the Caspian should be characterized as a sea or a lake.<sup>22</sup> The opposite trend has also been prevalent—a tendency to discuss legal issues primarily within the context of geopolitical diplomacy.<sup>23</sup> As a result the validity of sound legal analysis has often been compromised, characterized merely as a capricious byproduct of political will. In short, there has been little effort to integrate legal and political analysis into a cohesive and comprehensive view assessing the role and value of legal diplomacy in the Caspian “Great Game.”

While this study recognizes the limits and pitfalls of legal analysis as a principal means of explaining diplomacy in the Caspian context (or any international arena), it will focus on a comprehensive approach to understanding the broad implications of Caspian energy issues. The over-arching theme of the study is that sound legal tactics can and should be effectively incorporated into the long-term geopolitical strategies of the littoral states involved. More specifically, Caspian legal issues will be analyzed from an Iranian perspective because this approach offers the extreme scenario of powerful geopolitical will (of the United States and its Caspian allies) pitted against economically viable and feasible solutions to Caspian energy issues (involving Iran).<sup>24</sup> In other words the pressure of American political diplomacy and policy in the Caspian offers the best test case for determining whether sound legal strategizing can be

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22. See, e.g., John Roberts, *Oil: The Caspian—Sea or Lake? That's a Billion Dollar Question*, INTER PRESS SERV., Feb. 27, 1995, 1995 WL 2259214; Thomas Land, *Caspian Nations Play for High Stakes*, LLOYD'S LIST INT'L, Sept. 6, 1996, 1996 WL 1184044. (This is just a sampling of the traditional one-dimensional approach to analysis of the Caspian oil and gas saga. Most of the sources incorporated in this study by the author fail to integrate the political, economic, and legal dimensions of the Caspian “Great Game.”) *But see* Bernard Oxman, *Caspian Sea or Lake? What Difference Does it Make?* 1 CASPIAN CROSSROADS 4, Winter 1996, <http://ourworld.compuserve.com/homepages/usazerb/141.htm> (criticizing such an approach).

23. See, e.g., generally OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION 99-290 (Michael P. Croissant & Bulent Aras eds., 1999) (providing a comprehensive analysis of the geopolitical aspects of the Caspian energy game which addresses the interests of the individual littoral states and other “external” states, including Turkey and the United States); Rosemarie Forsythe, *The Politics of Oil in the Caucasus and Central Asia: Prospects for Oil Exploitation and Export in the Caspian Basin*, 300 ADELPHI (1996) (providing an excellent geopolitical and economic analysis regarding various hydrocarbon production and transport issues); Abraham S. Becker, *Russia and Caspian Oil: Moscow Loses Control*, RAND (1998) (analyzing the Caspian oil and gas context from a Russian geopolitical perspective). The author notes, however, that several of the above listed studies include small sections on the legal status of the Caspian Sea. See, e.g., Cynthia M. Croissant & Michael P. Croissant, *The Legal Status of the Caspian Sea: Conflict and Compromise*, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION, *supra* at 21-42; Forsythe, *supra* at 29-31.

24. See *infra* Parts II.B.3, II.C.3.c, for an analysis of the Iran-Libya Sanction Act and other U.S. diplomatic efforts aimed at isolating Tehran [from the Caspian hydrocarbon scene] and preventing development of its oil and gas sector.

effectively integrated with diplomatic gamesmanship in an attempt to safeguard Iran's vital domestic and regional interests in the Caspian. In this context the Study will address Iran's role at the intersection of three dynamics—the Caspian Sea legal regime, the battle for Main Export Routes (MERs), and balance of power diplomacy—while also paying close attention to U.S. efforts aimed at preventing Tehran's involvement in the Caspian through the use of unilateral economic sanctions. The Study will use Iran as an example to argue that pipeline diplomacy should not and cannot be separated from legal issues regarding Caspian Sea ownership rights. The policy ramifications of such a position warrant Tehran to successfully reconcile legal and political strategies into a cohesive policy that will trigger its competitive advantage in the transportation and distribution of Caspian energy to world markets.

## II. THE GEOPOLITICS OF THE CASPIAN

### A. *Setting Up the Game Board*

#### 1. The Geography and Geology of the Caspian

The Caspian Sea is a unique body of water with characteristics that have prevented accurate geological and legal classification.<sup>25</sup> The body of water has been called a lake, an enclosed sea, a closed sea, and an inland sea.<sup>26</sup> Regardless of the label, the Caspian Sea is the largest inland body of water in the world and is approximately the size of Japan.<sup>27</sup> It covers an area of about 400,000 square kilometers with a depth of about 1,000 meters.<sup>28</sup>

The Caspian can be divided into three zones on the basis of depth and water currents.<sup>29</sup> The northern zone constitutes twenty-eight percent of the total area and has an average depth of 6.2 meters.<sup>30</sup> The water flow is clockwise.<sup>31</sup> The middle zone constitutes thirty-six

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25. Kamyar Mehdiyoun, *International Law and the Dispute Over Ownership of Oil and Gas Resources in the Caspian Sea 2* (Aug. 3, 1999) (unpublished manuscript, on file with the *Vanderbilt Journal of Transnational Law*).

26. *Id.*

27. *Id.* at 1.

28. Andrei Ivanov & Judith Perera, *CIS-Environment: Resource-Rich Caspian Sea Continues to Rise*, INTER PRESS SERV., Aug. 28, 1995, 1995 WL 1013390.

29. Hossein Kaazempour Ardabili, *The Caspian Sea: Resources, Legal Status, Future*, 1 ECON. & ENERGY QTLY. 2 (Iran), Spring 1997, <http://new.netiran.com/Htdocs/Clippings/Economy/970300XXFE01.html>.

30. *Id.*

31. *Id.*

percent of the total area and has an average depth of 176 meters.<sup>32</sup> The southern zone accounts for the remaining thirty-six percent of the surface area and averages 325 meters in depth.<sup>33</sup> Furthermore, an underwater ridge divides the Sea into two halves of which the shallower north is almost salt-free.<sup>34</sup> In this sense, the Sea is comparable in size, depth, and salinity to many semi-enclosed marine areas.<sup>35</sup> It lacks any direct outlet to the open seas and is linked to the Black and Baltic Seas through the Volga river and a series of canals and other waterways.<sup>36</sup> In geological terms, Soviet and Russian lawyers have expressed some doubt as to whether the Caspian has a continental shelf, or whether the sea floor may be viewed merely as a depression on the continental land mass.<sup>37</sup>

Prior to 1991 *de facto* division of coastlines between the Soviet Union and Iran resulted in approximately an eighty percent control of the Caspian coastline by the former.<sup>38</sup> After the breakup of the Soviet Union the two traditional littoral states of the Soviet Union and Iran were joined by Azerbaijan, Kazakhstan, and Turkmenistan, causing a significant change in the distribution of the Caspian coastline.<sup>39</sup> The current share of the coastline between the five littoral states is roughly as follows: Russia: 18.5%; Kazakhstan: 30.8%; Turkmenistan: 16.8%; Azerbaijan: 15.2%; and Iran: 18.7%.<sup>40</sup>

Though the south Caspian is the deepest part of the Sea its southwestern and northeastern shores have yielded the most productive hydrocarbon reserves.<sup>41</sup> The Sea's approximately 700-mile

32. *Id.*

33. *Id.*

34. Ivanov & Perera, *supra* note 28.

35. *Id.*

36. Mehdiyoun, *supra* note 25, at 1.

37. *Id.* at 1-2.

38. This figure is an approximation reached by reference to the present distribution of coastlines and the historical *de facto* delimitation between Russia and Iran pursuant to a comprehensive boundary treaty in 1954, designating the port of Astara as the common boundary on the west and the port of Hosseingholi as the one on the east. See *infra* notes 505, 661-65 and accompanying text. For further analysis of the legal effects of *de facto* boundary delimitation between the Soviet Union and Iran in the Caspian Sea, see Parts IV.A.3, IV.B.2.

39. See ATLAS OF THE WORLD, *supra* note 6, at 56.

40. Mehdiyoun, *supra* note 25, at 1.

41. See generally UNITED STATES ENERGY INFORMATION ADMINISTRATION, CASPIAN SEA REGION (1998), at <http://www.eia.doe.gov/emeu/cabs/caspfull.html> (copy on file with the *Vanderbilt Journal of Transnational Law*). The USEIA estimates that Azerbaijan's total oil reserves (including proven and possible reserves) amount to approximately 36-45 billion barrels (BBL) (proven: 3.6-12.5 BBL; possible: 32 BBL), while its total gas reserves amount to approximately 46 Tcf (proven: 11 Tcf; possible 35 Tcf). *Id.* Kazakhstan's total oil reserves amount to 102-110 BBL (proven: 10.0-17.6 BBL; possible: 92 BBL), and its total gas reserves amount to 141-171 Tcf (proven: 53-83 Tcf; possible: 88 Tcf). *Id.* Turkmenistan's total oil reserves amount to 82 BBL (proven: 1.7 BBL; possible: 80), and its total gas reserves 257-314 Tcf (proven: 98-155

length contains an average of six separate hydrocarbon basins.<sup>42</sup> The most promising oil-producing area is in the south Caspian along a narrow structural zone extending across the Caspian from Azerbaijan's Aspheron Peninsula to western Turkmenistan's Peri-Balkhan region.<sup>43</sup> Currently most of Azerbaijan's oil resources are located offshore, as are about thirty to forty percent of the total oil resources of Kazakhstan and Turkmenistan.<sup>44</sup> No significant oil and gas discoveries have been made off the Iranian coastline which represents the deepest and most treacherous coastline of any littoral state.<sup>45</sup> The Russian coastline has also proven relatively unproductive in yielding significant oil and gas deposits.<sup>46</sup>

According to the United States Energy Information Administration (USEIA) proven oil reserves for the entire Caspian Sea region are estimated at sixteen to thirty-two billion barrels, comparable to those of the United States (twenty-two billion barrels) and the North Sea (seventeen billion barrels).<sup>47</sup> Natural gas reserves are even larger, accounting for almost sixty-six percent of the reserves in the region.<sup>48</sup> Proven gas reserves are estimated at around 236-337 trillion cubic feet (Tcf).<sup>49</sup> The USEIA also estimates that the region's possible oil reserves could yield another 163 billion barrels of oil, while possible gas reserves could top the 328 Tcf mark.<sup>50</sup>

Although there is ongoing dispute regarding the true capacity of Caspian hydrocarbon reserves,<sup>51</sup> most believe that the region's

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Tcf; possible: 159 Tcf). *Id.* Russia's total oil reserves amount to 17 BBL (proven: 2.7 BBL; possible: 14 BBL). *Id.* Finally, Iran's total oil reserves amount to 15 BBL (proven: .1 BBL; possible: 15 BBL), while its proven gas reserves amount to 11 Tcf (proven: 0 Tcf; possible: 11 Tcf). *Id.*

42. *Id.*

43. Mehdiyoun, *supra* note 25, at 1.

44. UNITED STATES ENERGY INFORMATION ADMINISTRATION, CASPIAN SEA REGION, *supra* note 41.

45. *See id.*

46. *See id.*

47. *Id.*

48. *Id.* The USEIA estimates that possible gas reserves are as large as the Caspian's proven gas reserves and could yield another 328 Tcf. *Id.* Based upon proven gas reserves, Kazakhstan, Turkmenistan, and Uzbekistan each rank among the world's twenty largest natural gas holders. *Id.*

49. *Id.*

50. *Id.*

51. Although the "opening" of the Caspian region was greeted with enthusiastic frenzy by international corporate powers and optimistic estimates regarding the Sea's hydrocarbon capacity, the region's true potential has always been questioned by critics. *See, e.g.,* Amy Jaffe & Robert Manning, *The Myth of the Caspian 'Great Game': The Real Geopolitics of Energy*, 40 SURVIVAL 4, Jan. 1, 1998, 1998 WL 19220807; *see also* Steven Greenlee, *Caspian Oil: Gold Mine or Tar Pit*, 14 WORLD & I 12, Dec. 1, 1999, 1999 WL 11151520 (providing a background for recent discoveries in Caspian oil and the resulting "pipeline manias" while arguing that a dark economic cloud regarding the



potential could lead to a significant diversification of the world's energy market.<sup>52</sup> At the conservative end of the spectrum the above estimates would place the Caspian region's productivity below the Persian Gulf and Siberia, but establish it as a serious competitor to North Sea production.<sup>53</sup> If optimistic evaluations of total hydrocarbon reserves prove sustainable, however, the Caspian would seriously rival the production capacity of the rich Persian Gulf basins.<sup>54</sup> Other than the Caspian's rich mineral resources the Sea contains a rich sturgeon stock which accounts for approximately ninety-five percent of the world's caviar market.<sup>55</sup>

Environmental pollution and degradation resulting from years of Soviet mining and waste disposal policies, however, continually threaten the fragile ecosystem of the Caspian.<sup>56</sup> The pollution is worst in the southern Caspian, off the coast of Baku, around the Aspheron Peninsula, and south into Iranian waters.<sup>57</sup> Flow of waste and pollution from Kazakhstan and Russia *via* the Volga and other tributaries has affected Iran's Caspian shores most heavily,

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region's real hydrocarbon capacity and geopolitical instability will needlessly lead to American involvement and conflict in the region).

52. Most importantly the Clinton Administration was a zealous advocate of private corporate involvement in the development of the Caspian hydrocarbon market, although the corporations themselves have been more hesitant. *See infra* Part II.B; see also *U.S. Interests in the Caspian Sea Region: Hearing Before the S. Foreign Relations Subcomm. on International Economic Policy and Trade, infra* notes 139, 144, for an example of the Administration's policy goals regarding the Caspian region. This hesitancy is a product of several factors including doubt as to the real hydrocarbon potential of the region, political barriers and sanctions imposed by the U.S. government, and most importantly economic viability concerns regarding the construction of the Main Export Routes (MERs) themselves. *See, e.g.,* Demirmen, *infra* note 417.

53. UNITED STATES ENERGY INFORMATION ADMINISTRATION, CASPIAN SEA REGION, *supra* note 41.

54. *Id.*

55. Dilip Hiro, *Iran-CIS States: Battle for Resources of the Caspian Sea*, INTER PRESS SERV., Nov. 13, 1996, 1996 WL 13589060.

56. For a general synopsis of environmental concerns regarding the oil rush in the Caspian, see Danielle Knight, *Environment-Finance: Fears of Eco-Disaster in Caspian Sea*, INTER PRESS SERV., Feb. 4, 1999, 1999 WL 5946864; see also *infra* Part VI.C (analyzing the prospects for Iran's effective use of a legal-environmental strategy to block unilateral exploitation of oil and gas resources in the Caspian); see also generally Levent Hekimoglu, *Caspian Oil and the Environment: Curse or Cure?* in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION, *supra* note 23, at 83-98 (providing an analysis of environmental issues regarding the Caspian Sea region).

57. Hekimoglu, *supra* note 56, at 85. As the southernmost littoral state of the Caspian, Iran is affected more than any other state when pollutants come downstream and into the Iranian coastline. Nader Entessar, *Iran: Geopolitical Challenges and the Caspian Region*, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION, *supra* note 23, at 168. According to Iranian sources Azerbaijan alone is responsible for dumping 75,000 tons of waste per year into the Caspian from its oil and related industries. *Id.* The volume of waste per year will undoubtedly increase as Azerbaijan's oil production enters a new stage of development. *Id.*

prompting environmentalists to declare pollution levels there to be sixteen times that of normal.<sup>58</sup> The economic byproduct of such damage has been a substantial reduction in the sturgeon stock and a continuing decrease in Caspian caviar profits.<sup>59</sup> A mysterious rise in the level of the Sea has also raised concerns regarding massive environmental damage resulting from flooding.<sup>60</sup>

## 2. The Caspian Players and the New Geopolitical Landscape: Redefining Relations Between the NIS and the "External Powers"

The official collapse of the Soviet Union in 1991 and the subsequent creation of the Commonwealth of Independent States (CIS) caused a regional power vacuum, with major "external powers" including Iran, Turkey, and the United States, seeking to exert political, economic, and cultural influence over the new vulnerable states.<sup>61</sup> The power vacuum sent all these regional players into a frenzy, each searching to gain a foothold in the internal affairs of their "client states."<sup>62</sup>

### a. "Mother Russia" and Regional Hegemony

According to Andrei Shoumikhin Russia's relationship with the NIS can still be characterized by the tradition of *velikoderzhavie*, a foreign policy strategy relying heavily on ultranationalist justifications to ensure that Russia maintains its traditional spheres

58. Laurent Maillard, *Iran, Russia Seek to Control Caspian Riches*, AGENCE FRANCE-PRESSE, Oct. 23, 1995, 1995 WL 7871921.

59. Mary Castille, *Caspian Sturgeon Stock Dwindles*, THE ENVIRONMENTALIST, Aug. 23, 1995, at 12; see also Hiro, *supra* note 55.

60. Hiro, *supra* note 55. The Caspian is rising an average of fourteen to fifteen centimeters a year. Ivanov & Perera, *supra* note 28.

61. See generally Paul Starobin, *The New Great Game*, NATIONAL J., Mar. 13, 1999, 1999 WL 8102236 (outlining the stakes for U.S. and Western involvement in the new "Great Game"). The Commonwealth of Independent States (CIS) is a community of independent nations established by a treaty signed at Minsk on December 8, 1991, by the heads of state of Russia, Belarus, and the Ukraine. COLUMBIA ENCYCLOPEDIA 611 (5th ed. 1998); see also *infra* Part IV.B, for analysis of the legal effect of the Almaty Declaration on the NIS. The headquarters of the CIS is in Minsk. *Id.* Between December eighth and twenty-first the three original signatories were joined by Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Uzbekistan, and Turkmenistan. *Id.* The CIS was conceived as the successor to the Union of Soviet Socialist Republics (USSR) in its role of coordinating the foreign and economic policies of the member nations. *Id.* The primary duties of the CIS were understood to be the prevention of inter-republican warfare, the mediation of disputes over the disposition of the former Soviet Union's military forces, and the promotion of trade. *Id.*

62. The important non-NIS regional players are Russia, Turkey, and Iran, with the United States representing a key fourth actor. See *infra* Parts II.A.2.a-d.

of influence over the Caucasus and Central Asia.<sup>63</sup> The need to assert its dominance over the Caspian was never more urgent than in the early 1990s when an economically and politically weak Moscow sought to salvage what was left of its Soviet hegemony over the region.<sup>64</sup> Despite the changed circumstances, however, dependence on foreign trade, military reliance, and political association with NIS party elites have continued to ensure that "Mother Russia" will play a vital role in the NIS' post-independence life.<sup>65</sup>

On the economic front Russia has an established pipeline infrastructure in place that allows for relatively safe and cost-effective transportation of hydrocarbons out of the Caspian basin.<sup>66</sup> Also, heavy oil extracting equipment needed for offshore production may be delivered locally only through inland Russian waterways.<sup>67</sup> On the diplomatic and political front Russia possesses the ability to play a central role in the management of regional conflicts.<sup>68</sup> In short, Russia has the option of using various economic and political strategies—from withdrawing raw material supplies to manipulating regional conflicts—in order to pressure littoral states into favorable concessions.<sup>69</sup>

The introduction of new geopolitical concerns in the Caspian region has greatly affected Russia's long-term strategy for the region.<sup>70</sup> More importantly Russia's wider regional policy is

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63. Andrei Shoumikhin, *Russia: Developing Cooperation on the Caspian*, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION, *supra* note 23, at 136.

64. See generally *id.* at 136-39.

65. See generally ROBERT V. BARYLSKI, U.S.-AZERBAIJAN COUNCIL, THE CASPIAN OIL REGIME: MILITARY DIMENSIONS, at <http://ourworld.compuserve.com/homepages/usazerb/122.htm> (last visited Feb. 12, 2000) (copy on file with the *Vanderbilt Journal of Transnational Law*). Most of the current leaders of the NIS were once members of the Communist Party under the Soviet system and the prospects of political and economic liberalization did not, and have not yet opened the systems to a western-style form of governance. See SMITH, *supra* note 6, at 101-27 (outlining the structural challenges and limits to democracy in the Former Soviet Union (FSU) states). In addition, Russia still retains military influence in the region, staging its troops in most NIS states with Azerbaijan standing out as a notable exception. See BARYLSKI, *supra*; see also John R. Lepingwell, *New States and Old Soldiers: Civil-Military Relations in the Former Soviet Union*, in THE SUCCESSOR STATES TO THE USSR 65-67 (John W. Blaney ed., 1995).

66. Shoumikhin, *supra* note 63, at 143; see also *infra* Parts II.B.2, II.C.2, II.C.3.a (analyzing the NIS' reliance on Russia's geostrategic position regarding the transportation of oil and gas out of the Caspian region).

67. Shoumikhin, *supra* note 63, at 143.

68. *Id.* at 137-38.

69. President Yeltsin and other Russian officials have used a number of formulations to articulate Russia's "special responsibility" to the former Soviet Caucasian and Central Asian states. Forsythe, *supra* note 23, at 14. The impact of such aggressive policies has been felt in Georgia, Nagorno-Karabakh, Azerbaijan, and Kazakhstan. *Id.* at 14-15.

70. *Id.* at 14.

inextricably bound to its interest in Caspian oil.<sup>71</sup> Russia's current geopolitical diplomacy in the region is characterized by two contradictory schools of thought.<sup>72</sup> The first has been espoused by Foreign Minister Yevgeny Primakov who interprets Russian policy within a traditional balance-of-power framework.<sup>73</sup> This group views oil as a central instrument in maintaining geopolitical hegemony in the region and warns against the creation of new Western joint ventures.<sup>74</sup> From this perspective the development of oil is a zero-sum game rather than a cooperative effort from which all regional players may benefit.<sup>75</sup>

The second school of thought has been supported by Prime Minister Chernomyrdin and other oil-industry officials who welcome Western participation in the development of Caspian oil and gas as a means of ensuring access to capital and advanced technology.<sup>76</sup> More specifically, this group has aggressively lobbied to include Russia in several joint ventures with the NIS and Western corporations.<sup>77</sup> Inclusion rather than exclusion is seen as the only way to ensure that Russia's political and economic interests in the region are met.<sup>78</sup> Needless to say that tension between these schools of thought has often led to a contradictory and fragmented Russian foreign policy in the region.<sup>79</sup>

#### b. Tehran vs. Ankara: The Battle for Political and Cultural Hegemony in the Caspian

The game for political influence also involved regional players Turkey and Iran, each struggling to counter Russian advances and neutralize the efforts of the other in the region.<sup>80</sup> With the United States closely monitoring developments while lending financial and

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71. *Id.*

72. *Id.* at 15; see also *infra* notes 542-46 and accompanying text (discussing the long-running bureaucratic dispute between the Foreign Ministry and the Ministry of Fuel and Power and Russian oil industry officials regarding the proper Russian response to the NIS' unilateral exploitation of Caspian oil and gas resources).

73. Shoumikhin, *supra* note 63, at 144.

74. *Id.* at 15-16.

75. *Id.* at 16.

76. See *infra* notes 542-46 and accompanying text.

77. See *id.*

78. See *id.*

79. Forsythe, *supra* note 23, at 13; see also *infra* notes 542-46 and accompanying text, for an analysis of the legal ramifications of Moscow's schizophrenic geopolitical diplomacy regarding Caspian oil and gas development.

80. See Anthony Hyman, *Central Asia and the Middle East: The Emerging Links, in CENTRAL ASIA AND THE CAUCUSES AFTER THE SOVIET UNION: DOMESTIC AND INTERNATIONAL DYNAMICS* 252-59 (Mohiaddin Mesbahi ed., 1994) (analyzing the political, economic, and cultural links between Central Asia and the Middle East, and more particularly, the competition for regional influence between Iran and Turkey).

diplomatic support to its strategic North Atlantic Treaty Organization (NATO) ally Turkey, the region saw a steady balance shift in favor of Ankara and away from Tehran.

The reasons for this are historical and strategic. The demise of the Soviet empire has given Turkey an opportunity to renew its historical ties and increase its regional influence.<sup>81</sup> With the exception of Tajikistan, all the newly-independent Central Asian states have strong ethno-linguistic ties to their Turkic brethren in the West.<sup>82</sup> In the Caucuses, Azerbaijan also shares a common historical bond with Turkey, while Georgia and Armenia seek to reinvigorate Christian ideals in lands that have been dominated by Islamic and Communist tendencies for centuries.<sup>83</sup> For these countries secular Turkey is the more suitable model for political and economic reform and meaningful integration into the international community.<sup>84</sup>

More importantly for Ankara, Turkey is committed to a close relationship with the Caspian littoral states, especially Azerbaijan, for political and economic reasons.<sup>85</sup> Turkey has concluded a number of political, military, and economic agreements with Caspian littoral

81. Forsythe, *supra* note 23, at 21.

82. See Muriel Atkin, *Tajiks and the Persian World*, in CENTRAL ASIA IN HISTORICAL PERSPECTIVE 127-43 (Beatrice F. Manz ed., 1994) (analyzing the unique ethnic and cultural identity of the Tajiks in a primarily Turkic Central Asia). Although the southern Caucuses and most of Central Asia were originally settled by Indo-Iranian tribes and the area was controlled for centuries by successive Persian empires, a steady flow of migration from Turko-Mongolian tribes originating in north-eastern Asia slowly displaced the earlier peoples. See Beatrice Manz, Historical Background, in CENTRAL ASIA IN HISTORICAL PERSPECTIVE, *supra* at 5-7. Turkish, Azeri, Kazakh, Kyrgyz, Uzbek, and Turkmen are all Turkic languages categorized under the Altaic family. SUMMER INSTITUTE OF LINGUISTICS INTERNATIONAL, Ethnologue—13th Edition, at <http://www.sil.org/ethnologue/families/Altaic.html> (last visited Feb. 19, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*). Tajiki, however, is mutually intelligible with Persian and belongs to the Iranian sub-family of languages. *Id.*, at <http://www.sil.org/ethnologue/families/Indo-European.html>.

83. Georgians are ethnically and culturally distinct from their Turkic neighbors. See Henry R. Huttenbach, *Chaos in Post-Soviet Caucasia, Crossroads of Empires: In Search of a U.S. Foreign Policy*, in THE SUCCESSOR STATES TO THE USSR, *supra* note 65, at 225. Their language is part of the Caucasian family group. SUMMER INSTITUTE OF LINGUISTICS INTERNATIONAL, *supra* note 82, at <http://www.sil.org/ethnologue/families/South-Caucasian.html>. Armenians are also ethnically distinct from all their neighbors, sharing no common linguistic bonds with either Georgians or Azeris. See Huttenbach, *supra* at 232-33; see also SUMMER INSTITUTE OF LINGUISTICS INTERNATIONAL, at <http://www.sil.org/ethnologue/languages/Armenian.html>. Both countries practice a form of Christian Orthodoxy, while Azerbaijan is primarily Shi'ite Muslim. See Huttenbach, *supra* at 225-39.

84. Hyman, *supra* note 80, at 254. Although Turkey is a Muslim nation it embarked on a path of secularism and westernization inspired by the autocrat Mustafa Kemal Ataturk in the 1920s. Gavin D. Brockett, *Collective Action and the Turkish Revolution: Towards a Framework for the Social History of the Ataturk Era, 1923-38*, in TURKEY BEFORE AND AFTER ATATURK 47-61 (Sylvia Kedouri ed., 1999) (outlining the Islamic reaction to Ataturk's secular legislation).

85. Forsythe, *supra* note 23, at 21.

states since 1991.<sup>86</sup> On the economic front Turkey is particularly keen on ensuring that an MER runs from Azerbaijan through Turkey.<sup>87</sup> The existence of a pipeline through Turkey is important for several reasons: 1) it satisfies Turkey's increasing need for energy imports,<sup>88</sup> 2) it brings in substantial benefits in terms of income (*via* transit fees) and jobs,<sup>89</sup> and 3) it allows Turkey to avoid increased tanker traffic in the Bosphorus Straits by directing the flow of oil to a terminal in the Mediterranean.<sup>90</sup>

### c. Iran's Regional Aspirations

According to Rosemarie Forsythe Iran's specific regional goals include political influence, profitable economic and commercial relations, the spread of religious ideology, procurement of former Soviet weaponry, and the acquisition of nuclear expertise and materials.<sup>91</sup> On a more profound level, however, Iran is interested in taking on the mantle of regional leader.<sup>92</sup> Since 1991 Iranian officials have continuously talked of a "revival of the silk route" which would establish transportation links between Central Asia and the Caucasus and the Persian Gulf.<sup>93</sup> In February 1992 Iran hosted a meeting of the Economic Cooperation Organization (ECO) to discuss Caspian issues, particularly those related to oil and gas development.<sup>94</sup> At Iran's suggestion, the Organization decided to set up a Caspian Cooperation Organization (CCO) with its headquarters in Tehran.<sup>95</sup> Thus far, however, not much has been done in the way of multilateral and institutional Caspian cooperation.<sup>96</sup>

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86. *Id.*

87. *See infra* Part II.C.3.b; *see also infra* note 142 and accompanying text.

88. *See infra* Part II.C.3.

89. *Id.*

90. *Id.*; *see also infra* notes 400 and accompanying text, for an explanation of Turkey's environmental concerns regarding the Bosphorus Straits; *see, e.g., infra* note 142, for discussion of Turkey's interests regarding the running of an MER through its territory and its related preference for pipeline routes terminating at its Mediterranean instead of its Black Sea ports.

91. Forsythe, *supra* note 23, at 23; *see also generally* A. Ehteshami, *Iran and Central Asia: Responding to Regional Change*, in *SECURITY POLITICS IN THE COMMONWEALTH OF INDEPENDENT STATES* 87-103 (Mehdi Mozaffari ed., 1997), for an analysis of Iran's changing geopolitical concerns after the collapse of the Soviet Union.

92. Ehteshami, *supra* note 91.

93. *Id.* at 24.

94. *Id.* at 25.

95. *Id.*

96. *See infra* Parts III.A, VI.C.2, for an analysis of the reasons why Caspian multilateral cooperation and negotiation have been slow to take shape and the prospects for Iran's successful use of a legal strategy that forces the NIS and other regional players to strongly consider multilateral action.

In the face of slow multilateral negotiation and cooperation, Tehran has begrudgingly realized that it must take up bilateral diplomacy with the Caspian littoral states.<sup>97</sup> From Tehran's perspective the situation with Azerbaijan<sup>98</sup> is perhaps the most important regional relationship and one that will continue to have important ramifications for Iran's role in the Caspian energy game. Relations between the two countries have, however, been strained from the get-go.<sup>99</sup> Today Azerbaijan presents the most formidable NIS challenge to Iran's regional and security policies.<sup>100</sup> Baku's main complaints against Tehran include the latter's support of Islamic opposition groups in Azerbaijan and declarations that Azerbaijan has always been a part of Persia and should therefore be integrated into Iranian territory.<sup>101</sup> To make matters worse, Iran's open financial

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97. See *infra* Parts III.B.5, VI, for an analysis of the political and economic reasons behind Iran's pursuit of bilateral cooperation with the littoral states over development of oil and gas resources despite its continuing insistence that all exploitation of the Sea's resources should be based on unanimous, multilateral cooperation.

98. For an informative political, economic, and social analysis of the state of affairs in Azerbaijan (especially within the Caspian oil and gas context), see Alec Rasizade, *Azerbaijan, the U.S., and Oil Prospects on the Caspian Sea*, 16 J. THIRD WORLD STUDIES 1, Apr. 1, 1999, 1999 WL 16174007.

99. See Katz, *infra* note 135 (explaining the reasons behind the Russian-Iranian alliance against Azerbaijan). While Azerbaijan is the only Shi'ite-majority nation of the former Soviet Republics it has consciously sought to avoid religious links with Tehran. See *id.* To a certain extent this reflects the degree to which secularization under the Soviet system infiltrated all levels of Azeri society, from politics to culture. Greenlee, *supra* note 51. The more contentious issue between the two states, however, revolves around Iran's significant Azeri minority which accounts for approximately twenty million of the nation's sixty-five million-plus population. Yuri N. Zinin & Alexei V. Maleshenko, *Azerbaijan, in CENTRAL ASIA AND THE CAUCUSES AFTER THE SOVIET UNION: DOMESTIC AND INTERNATIONAL DYNAMICS*, *supra* note 80, at 112. After Azerbaijan gained its independence Azerbaijani nationalists and officials frequently called for the creation of a greater Azerbaijan which would include Iran's northern Azeri-dominated states. Mehdi Mozaffari, *The CIS' Southern Belt: A New Security System, in SECURITY POLITICS IN THE COMMONWEALTH OF INDEPENDENT STATES*, *supra* note 91, at 32 n.16. This has seriously concerned Tehran. *Id.*; see also Entessar, *supra* note 57, at 160-68 (outlining the closely intertwined history of Iran and Azerbaijan and analyzing ultranationalist Azeri calls for the "unification of northern and southern [Iranian] Azerbaijan").

100. See Entessar, *supra* note 57, at 160.

101. Mesbahi, *Russia and the Geopolitics of the Muslim South, in CENTRAL ASIA AND THE CAUCUSES AFTER THE SOVIET UNION: DOMESTIC AND INTERNATIONAL DYNAMICS*, *supra* note 80, at 301; see also Entessar, *supra* note 57, at 167 (explaining that a number of Iranian parliament deputies representing the Iranian-Azeri provinces issued a joint resolution asking for the annexation of the Republic of Azerbaijan to Iran); *id.* at 167 (explaining that current President Aliyev's administration accused Iran of backing the opposition Islamic parties in the October 1998 presidential elections). See also generally text of Gulistan Pact, *infra* note 594 (providing the legal basis for Russia's annexation of northern Azerbaijani territories that had long been a part of the Persian empire); Treaty of Turkmenchai, *infra* note 597 (providing the legal

and military support of Armenian separatists during the conflict in the Nagorno-Karabakh enclave has done more to damage relations between the two neighbors than any other disagreement since 1991.<sup>102</sup> Tehran, in turn, blames Baku for inciting nationalist Azeri fervor across the borders and calling for the creation of a greater Azerbaijan,<sup>103</sup> ignoring the Islamic (Shi'ite) interests of the Azeri people,<sup>104</sup> and allying itself too closely with Israel and the United States.<sup>105</sup> More specifically, Tehran fears that Azerbaijan's increasing alliance with the United States and Israel will lead to more than just American corporate involvement in the Caspian basin.<sup>106</sup> The real fear is that the Caspian will eventually become another security nightmare for Iran—that it will become another Persian Gulf.<sup>107</sup>

Iran's relations with Kazakhstan are more cordial than with Azerbaijan.<sup>108</sup> For the most part, however, Kazakhstan has no doubt looked primarily to Turkey and the West as a model of political reform and governance.<sup>109</sup> In order to decrease its dependency on Russia, Kazakhstan has attracted Western capital for the

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basis for Russia's annexation of northern Azerbaijani territories that had long been a part of the Persian empire).

102. Nagorno-Karabakh is a contested Armenian enclave within Azeri territory. Yuri N. Zinin & Alexei V. Maleshenko, *supra* note 99, at 99. After 1991 Armenians living under Azeri rule began an armed secessionist movement that turned into all-out war. *Id.* at 107. Iran and Armenia allied to help the secessionists secure an unstable foothold in the enclave but fighting has continued to this day despite a Russian-mediated cease-fire in May 1994. *Id.* at 112-13. The instability in the Caucasus seriously jeopardizes any pipeline routes through Azerbaijan and Armenia and onwards to Turkey's Mediterranean coast. See discussion *infra* Parts II.C.2, II.C.3.b.

103. In June 1992 the Azerbaijani Popular Front's Abulfaz Elchibey was elected president of Azerbaijan. Entessar, *supra* note 57, at 164. Almost immediately, Elchibey openly accused Tehran of "neglecting the interests of the Azeris" in Iran and called for the "unification of northern and southern [Iranian] Azerbaijan." *Id.* at 165. Elchibey also called for the overthrow of the Islamic Republic and extolled the virtues of "Pan-Turkism." *Id.*

104. *Id.* at 165. Tehran strongly objected to the exclusion of Islam as Azerbaijan's official religion in the 1995 draft constitution. *Id.* Around the same time massive demonstrations began in Tabriz and other major Azeri cities in Iran. *Id.* The demonstrators called for a show of Islamic unity amongst all Azeris and accused "communist infiltrators" of being responsible for drafting the "anti-Islamic" constitution. *Id.*

105. *Id.* at 167.

106. *Id.*

107. See *id.*

108. See generally Stuart Parrot, *Central Asia: Iran Builds Regional Bridges*, RADIO FREE EUROPE-RADIO LIBERTY, Nov. 10, 1997, at <http://www.rferl.org/nca/features/1997/11/F.RU.971110161320.html> (copy on file with the *Vanderbilt Journal of Transnational Law*), for an explanation of Iran's attempt to build friendly relations with its Central Asian neighbors and convince them to prevent Western corporate and political powers from gaining a foothold in the region.

109. See generally Vladimir Babak, *Kazakhstan: Big Politics Around Big Oil, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION*, *supra* note 23, at 193-98.



exploitation of its natural resources.<sup>110</sup> The main factor that affected Kazakhstan's decision to look to the West was the availability of investment capital and a strong desire to diversify its financial sources.<sup>111</sup> Today, U.S. and European investments in Kazakhstan's oil and gas sector account for the majority of foreign investment in Caspian energy ventures.<sup>112</sup>

Though Astana has placed high priority on attracting U.S. and western capital investment for oil and gas production it has also recognized the importance of establishing practical and viable means of transporting its oil and gas to the open seas *via* pipelines.<sup>113</sup> For this Astana has looked to both Russia and Iran. As for its relations with Tehran, the geographic and cultural distance between Kazakhstan and Iran has ironically allowed them to establish a rather cooperative relationship based on economic ties.<sup>114</sup> Kazakhstan has tempered outright bias with rational policy-making, recognizing the advantages of establishing cordial and productive relations with Iran.<sup>115</sup> Since 1992 Iranian and Kazakh officials have continued to develop trade and cultural links.<sup>116</sup> On the economic front the two countries have signed a series of oil swap deals whereby Iran receives Kazakh oil *via* its Caspian ports and transfers an equal amount of its crude oil from its Persian Gulf terminals.<sup>117</sup>

As for Iranian-Turkmen relations, Ashqabad has displayed a more willing lean toward warm relations with [Moscow and]

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110. *Id.* at 194.

111. *Id.*

112. *Id.*

113. *Id.* at 198-205 (providing a general outline of Kazakhstan's pipeline diplomacy strategy which looks to all countries, including ones that may not be politically acceptable to the United States, as a possible means of solving its transportation problems).

114. See, e.g., *infra* note 115, for examples of economic cooperation between the two countries; Part III.B.2, for Kazakhstan's more moderate position (in light of Tehran's legal arguments) on the legal status of the Caspian Sea.

115. For an example of Kazakhstan's more balanced approach *via* Iran, see *Iran Calls for Agreement on Division of Caspian Reserves*, DOW JONES ENERGY SERV., May 9, 1998, 5/9/98 DJTES. Kazakhstan and Iran have agreed that a proposed pipeline through Iran would be commercially viable. *Id.*; see also Jean-Michel Cadiot, *Caspian Sea at Center of Iran, Kazakhstan Call for Closer Ties*, AGENCE FRANCE-PRESSE, Oct. 6, 1999, 1999 WL 25119409. In 1999 Iran and Kazakhstan engaged in bilateral talks regarding the legal status of the Caspian. *Id.* They agreed to foster cooperation in the development of oil and gas in the Caspian region and reaffirmed a 1996 agreement providing for oil swaps between the two nations. *Id.* They called on Turkmenistan to join them in the construction of an oil pipeline through Iran linking Central Asia to international markets. *Id.*; see also *infra* Parts II.C.2.b, II.C.3.c (analyzing Kazakhstan and Turkmenistan's considerations regarding the option of running pipelines through Iranian territory).

116. Entessar, *supra* note 57, at 160.

117. *Id.*; see also *infra* Part II.C.2.b, for a more in-depth explanation of Iran's oil swap arrangements with the NIS.

Tehran.<sup>118</sup> There are several reasons for Ashqabad's close relations with Tehran. First, there are no major security and political problems between the two nations.<sup>119</sup> This has allowed both nations to establish extensive communication and transportation links with each other.<sup>120</sup> Also, Ashqabad sees Iran as an authoritative regional power, a means of economic aid, and a way to integrate itself into the world economy.<sup>121</sup>

Second, Iran and Turkmenistan have undertaken several major Caspian hydrocarbon projects, especially with regard to transportation of natural gas.<sup>122</sup> In fact, Iran may well be considered Turkmenistan's most important economic partner, accounting for over fifty-two percent of all Turkmen oil exports in 1997.<sup>123</sup> In short, Turkmenistan looks favorably on the fact that Iran has not only helped it enter the world gas market but has offered it a means to end its dependence on the Russian transport of Turkmen gas.<sup>124</sup>

On a third and related point the Iranian-Turkmen relationship is indirectly affected by the strain in Turkmen-Russian relations—the former was the most neglected and isolated republic within the Soviet system.<sup>125</sup> More specifically, Turkmenistan realizes the advantages of cooperating with Iran and establishing a potentially lucrative market with a gas heavyweight other than Russia.<sup>126</sup> Iran represents an ideal partner and the opportunity to create a regional gas cartel rivaling that of Russia.<sup>127</sup>

Fourth, unlike Azerbaijan and Kazakhstan, Turkmenistan was more politically, economically, and culturally isolated from the West.<sup>128</sup> For example, the United States consciously distanced itself

118. See *Country Profile Turkmenistan 1999/2000*, Aug. 12, 1999, 1999 WL 25862519.

119. Entessar, *supra* note 57, at 158.

120. *Id.*

121. Vladimir Mesamed, *Turkmenistan: Oil, Gas, and Caspian Politics, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION*, *supra* note 23, at 211.

122. See *id.*; see also *infra* Part VI.B.3, for analysis of the prospects of an Iranian-Turkmen Caspian gas cartel.

123. Mesamed, *supra* note 121, at 211.

124. *Id.*; see also *infra* notes 264-71 and accompanying text, for a discussion of Ashqabad's conflicts with Moscow regarding export of its gas *via* Russian pipelines.

125. See generally Mesamed, *supra* note 121.

126. See Stuart Parrot, *Central Asia: Iran's Energy Plans Could Aid Exports*, RADIO FREE EUROPE-RADIO LIBERTY, Nov. 11, 1997, at <http://www.rferl.org/ncal/features/1997/11/F.RU.971111141010.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

127. See *id.*; *supra* Part VI.B.3.

128. In part this cultural isolation is a result of the continuing significance of tribal relations in the social and political culture of Turkmenistan. For a study of the intricacies of tribal culture, see, e.g., Andrei G. Nedvetsky, *Turkmenistan, in CENTRAL ASIA AND THE CAUCUSES AFTER THE SOVIET UNION: DOMESTIC AND INTERNATIONAL DYNAMICS*, *supra* note 80, at 191-95; KHAZANOV, *supra* note 6, at 125.

from Ashqabad for several years due to its alleged violations of human rights.<sup>129</sup> This has changed in recent years as Washington has slowly recognized the serious potential for cooperation with Turkmenistan in diverse spheres, especially with regard to the regional gas market.<sup>130</sup> Also, the United States hopes that increasingly warm relations between it and Ashqabad will convince the latter that cooperation with Iran is harmful to its long-term interests.<sup>131</sup>

Last but not least there is the religious dimension, coupled with Washington's security concerns due to the region's high potential for instability.<sup>132</sup> The Bush and Clinton administrations expressed concern regarding what some have termed the "Green Peril"—an expansion of Islamic fundamentalism propagated by Iran's "desire" to export its revolutionary zeal to Muslim communities beyond its borders.<sup>133</sup> The presence of nuclear and military arsenal in Kazakhstan and other former republics also worried Washington, especially in light of the prevailing view concerning Iran's sponsoring of international terrorism and arsenal-building.<sup>134</sup>

129. Mesamed, *supra* note 121, at 210.

130. *Id.*

131. *Id.* at 210-11.

132. See generally Ehteshami, *supra* note 91, at 87-103.

133. Given the power vacuum created in Central Asia and the fact that all the relevant states are Islamic, the United States and Russia were both worried that Iran would incite religious zeal as a backlash against years of Communist rule in the countries. See KHAZANOV, *supra* note 6, at 130. The brand of political Islam introduced by Khomeini after the Islamic Revolution of 1979 was particularly worrisome for Washington, who had experienced firsthand the wrath of fundamentalist Shi'ism supported by Tehran in Lebanon via the Hezbollah and other anti-U.S.-Israeli factions. Breffni O'Rourke, *Iran: President Khatami Begins Mideast Tour In Syria*, RADIO FREE EUROPE-RADIO LIBERTY, May 13, 1999 at <http://www.rferl.org/ncf/features/1999/05/F.RU.990513132406.html> (copy on file with the *Vanderbilt Journal of Transnational Law*). Within the Caspian context, some scholars have pointed to Iran's participation in the Economic Cooperation Organization (ECO), a body founded in 1964 (by Iran, Pakistan, and Turkey) to promote regional cooperation, as a possible means by which Tehran could seek to export its brand of Islamic fundamentalism to the NIS. Entessar, *supra* note 57, at 157 (explaining that "after the disintegration of the Soviet Union, Iran encouraged the Muslim republics of the Soviet Union to join the ECO in order to create an 'Islamic common market.'"). The success of such an ambitious project, however, remains highly suspect under current conditions. *Id.*

134. See, e.g., Steven E. Miller, *Proliferation Dangers in the Former Soviet Union*, in THE SUCCESSOR STATES TO THE USSR, *supra* note 65, at 17-29, for a short review of the unstable political and military situation in the FSU states and the potential for nuclear "leakages" to countries such as Iran. For example, the U.S. Congress passed the Iranian Non-Proliferation Bill aimed primarily at Russia on March 14, 2000, whom Washington accuses of supplying Tehran with nuclear arsenal. *Clinton OKs Linking Russia Aid, Iran Sanctions*, LOS ANGELES TIMES, Mar. 15, 2000, at A11. The bill authorizes the President to impose economic sanctions on any country or entity the Administration deems has violated the sanctions. *Id.*

The failure of Iran to significantly manipulate religious motives and tensions in the NIS, however, signaled the extent to which the NIS governments placed economic and financial interests at the forefront of their policy agendas, looking instead to non-Russian secular powers such as Turkey and the United States.<sup>135</sup> Although Kazakhstan and Turkmenistan are officially Muslim nations, years of secular Soviet rule and a continuing emphasis on tribal associations have relegated Islam to a secondary if not tertiary role in society.<sup>136</sup> Even Shi'ite Azerbaijan kept a distance from Iran's Islamic policies, with President Aliyev often playing up the danger of Islamic fundamentalism when dealing with the United States and western allies.<sup>137</sup> This has angered Iranian authorities who consider Baku's "anti-religious" policies detrimental to the interests of the two Shi'ite nations.<sup>138</sup>

d. The United States: Washington's Geopolitical Interests in the Caspian

Finally, there is the United States.<sup>139</sup> For the United States and its political allies the Caspian region holds the key to the realization

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135. Many commentators have argued, however, that such was not so much a result of Tehran's failure to play the religious card but of its realization that *realpolitik* and long-term balance of power diplomacy was more to its advantage than an outward appeal to religious fundamentalism. See, e.g., Charles Clover & Guy Dinmore, *A Relationship Based on Shared Enmities*, FIN. TIMES, Mar. 12, 2001, at 15, for a strategic analysis of Iranian President Khatami's recent visit to Moscow in order to discuss military cooperation and the status of the Caspian Sea; see also BBC Online, *Analysis: Iran and Russia Forge Closer Links*, Mar. 13, 2001, at [http://news.bbc.co.uk/1/hi/english/world/middle\\_east/newsid\\_1218000/1218159.stm](http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_1218000/1218159.stm) (copy on file with the *Vanderbilt Journal of Transnational Law*) (discussing Khatami's recent visit to Moscow (dubbed the "Moscow Summit") and the two countries' strategic alliance despite seemingly conflicting regional and international interests). Nowhere is this more evident than in Iran's involvement in the Nagorno-Karabakh dispute between Azerbaijan and Armenia, its increasing diplomatic alliance with secular Russia, and its vital role in attempting to broker peace between warring Islamic and Communist factions in Tajikistan in favor of the latter. Mark N. Katz, *An Emerging Russian-Iranian Alliance?*, 1 CASPIAN CROSSROADS 4, Winter 1996, <http://ourworld.compuserve.com/homepages/usazerb/145.htm>. For a *realpolitik* analysis of the emerging Russian-Iranian security and arms relationship and its ramifications for U.S. energy diplomacy in the Caspian, see Andrew Borowiec, *Black Gold Fuels Caspian Competition: Iran-Moscow Link Seen Squeezing U.S. Out Of Untapped Riches Race*, WASH. TIMES, Mar. 28, 2001, at A15.

136. But see Zahid I. Munavvoarov, *Uzbekistan*, in CENTRAL ASIA AND THE CAUCUSES AFTER THE SOVIET UNION: DOMESTIC AND INTERNATIONAL DYNAMICS, *supra* note 80, at 139-40 (arguing that years of secular Soviet rule have not erased Islam from the Central Asian memory).

137. See *supra* note 133 and accompanying text.

138. Entessar, *supra* note 57, at 165.

139. For a review of the Clinton Administration's official policy stance regarding the Caspian, see *U.S. Interests in the Caspian Sea Region: Hearing Before the S.*

of a long-term strategic agenda.<sup>140</sup> By establishing its presence in the region, Washington could: 1) weaken the influence of the Persian Gulf states and the Organization of Petroleum Exporting Countries (OPEC) from monopolizing the production and distribution of world energy reserves; 2) create a controlled environment ensuring that the flow of petro-dollars will lead to political and economic reform in Central Asia and the Caucuses; and 3) undermine the historical dominance of the Russian Federation and Islamic Republic of Iran not only in the Caspian Sea region, but in Eurasia and Central Asia.<sup>141</sup> Washington seeks to achieve these goals by allying itself with Turkey and ensuring that Ankara gains control of the Caspian energy market by funneling pipelines through its territory and into the Mediterranean Sea.<sup>142</sup>

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*Foreign Relations Subcomm. on International Economic Policy and Trade*, (1997) [hereinafter *Hearings*] (statement of Stuart E. Eizenstat, Ambassador, Under Secretary for Economic and Business Affairs), 1997 WL 14152431. In testimony in front of the Senate Foreign Relations Committee's Subcommittee on International Economic Policy, Export and Trade Promotion, Ambassador Eizenstat outlined five main foreign policy interests in the Caspian region. *Id.* They include: 1) the independence and sovereignty of the NIS and their democratic and market development; 2) promotion of regional conflict resolution; 3) the increase and diversification of world energy supplies; 4) continued support for U.S. companies; and 5) continued pressure on the Iranian regime to change its unacceptable practices. *Id.* Eizenstat stressed that U.S. interests in the region are not concentrated on establishing a regional sphere of influence, although he did underscore the need to strengthen strategic alliances with Turkey and even Russia. *Id.* Eizenstat also referred to a list of measures aimed at implementing U.S. policy interests in the region. *Id.*; see also Sherman W. Garnett, *The United States and the Caspian Basin*, in *THE NEW CENTRAL ASIA: IN SEARCH OF STABILITY* 21-38 (The Trilateral Commission ed., 2000) (providing an outline of the policy objectives and goals of the United States in the Caspian region). But see Michael Reynolds, *Central Asia is No Game*, *WALL ST. J. EUR.*, Jan. 25, 2000, at 14, for a critique of U.S. involvement in the Caspian and the perils of potential geopolitical confrontation with Russian interests in the region.

140. See *Transcript of White House Background Briefing on Caspian Sea Diplomacy, Baku-Ceyhan Pipeline*, (White House Background Briefing, Nov. 17, 1999), 1999 WL 22283700.

141. *Id.*

142. *Id.* Turkey is an extremely important geopolitical and military ally to the United States. See generally Bulent Aras & George Foster, *Turkey: Looking for Light at the End of the Caspian Pipeline*, in *OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION*, *supra* note 23, at 241-43. The symbiotic aspect of the relationship is particularly important in the Caspian context. See *id.* The United States, through Ankara, is able to wield substantial diplomatic and political influence over Azerbaijan and the other Central Asian republics. *Id.* at 142. On the other end Ankara is heavily reliant on the United States to throw its financial and economic support behind plans to bolster the Turkish economy, primarily with regard to the energy market. *Id.* Turkey is expected to become increasingly dependent on fuel imports in the coming decades. *Id.* Development of new production and pipeline routes in the Caspian is extremely important to Ankara because the prospects of becoming increasingly dependent on Russian and Iranian imports may compromise Turkey's national security and jeopardize its geostrategic importance as a NATO ally. *Id.*

Until the oil rush opened the door to private corporations flooding the Central Asian and Caucasian energy market the United States had made relatively modest strides in developing its relations with the NIS.<sup>143</sup> With the collapse of the Soviet system, however, American companies rushed to the region,<sup>144</sup> and with the discovery of oil in Azerbaijan and the latter's overwhelming desire to shake off Russian influence and woo foreign investment, the United States officially entered a new era of U.S.-Azeri relations.<sup>145</sup> As a result of the increasingly strong ties between Washington and Baku the above power dynamic in the Caspian has led to a *de facto* balance of power game between the United States, Turkey, and Azerbaijan on the one hand, and Russia, Armenia, and Iran on the other, with the latter three engaged in a loose tripartite alliance aimed at countering American and Turkish advances.<sup>146</sup>

### B. *The Energy Variable: Modifying the Rules of the Game*

The discovery of huge oil and gas reserves in the Caspian basin and the realization that the region could potentially play an increasingly significant role in world energy politics has drastically altered the geopolitical landscape of the region.<sup>147</sup> Most importantly, the "energy variable" has introduced two new concepts into the geopolitical vernacular of the Caspian: 1) power defined as a *direct*

143. U.S. involvement in the region has exploded since 1994-95. Stephen J. Blank, *The United States: Washington's New Frontier in the Transcaspian*, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION, *supra* note 23, at 251.

144. See, e.g., *U.S. Interests in the Caspian Sea Region: Hearing Before the S. Foreign Relations Subcomm. on International Economic Policy and Trade*, (1997) [hereinafter *Hearings I*] (statement of Charles J. Pitman, Chairman and President, Amoco Eurasia Petroleum Company), 1997 WL 14152432. This document outlines the testimony of Charles J. Pitman, Chairman and President of Amoco Eurasia Petroleum Company, before the Senate Foreign Relations Subcommittee on International Economic Policy and Trade. *Id.* Pitman applauded the Clinton Administration's attempts to provide a forum in which U.S. corporations could voice their interests and concerns regarding the potential for direct foreign investment in the Caspian region. *Id.*

145. But see Elshan Alekberov, *Despite Political Obstacles, Energy Work Progresses Around Caspian Sea*, 96 OIL & GAS J. 24, June 15, 1998, 1998 WL 11540919 (pointing out that the U.S. Congress, under pressure from strong Armenian lobbying groups in Washington, passed the Freedom Support Act of 1992, Section 907 of which prohibits direct financial aid to and involvement with Azerbaijan). Given the increasing warming of relations between Washington and Baku, however, many senators and private corporate interests have argued that the law unduly burdens direct U.S. involvement in Azerbaijan's oil and gas sector, thus harming vital American interests. E.g., *Hearings I*, *supra* note 144; see also S. Frederick Starr, *Power Failure: American Policy in the Caspian*, NAT'L J., Mar. 1, 1997, 1997 WL 1912115571.

146. Alekberov, *supra* note 145. The Treaty of Friendship, Cooperation, and Mutual Security between Armenia and Russia signed in Moscow on August 29, 1997, entails arming Armenia and giving Russia an outpost in the region. *Id.*

147. See generally *supra* Part II.A; *infra* Part II.B.

result of ownership and production rights over hydrocarbon resources in the region, and 2) power defined as an *indirect* byproduct of such ownership rights—or the power to control the transportation of such resources. Note the degree to which the two are inextricably linked. More specifically, however, without the ability to transport their oil and gas to the open seas, the NIS' ownership of oil and gas deposits in and around the Caspian Sea is essentially meaningless.

## 1. Setting the Stage: Major Political, Economic, and Legal Events in Caspian Oil and Gas Development

### a. Pre-1991 History

In many ways the Caspian oil and gas frenzy of the 1990s is a rediscovery of sorts.<sup>148</sup> Although the availability of proven reserves in the region had been recognized for years exploration and development in the Sea has never reached levels seen in other regions such as the Persian Gulf, the North Sea, and Siberia.<sup>149</sup>

Today the stagnant and unrealized potential of the Caspian as an energy hotbed monopolized by the Soviet Union and Iran has instead given way to a dynamic new environment wherein the NIS, hungry for foreign investment and capital, are seeking to free themselves from the legal and political constraints imposed upon them during the Soviet era.<sup>150</sup> And the West is more than eager to play a role.

Historically Iran's involvement in Caspian oil and gas development has been minimal.<sup>151</sup> Soviet and Russian involvement, however, as uneven and inefficient as it may have been, did succeed in building an operative oil and gas industry in both Kazakhstan and Azerbaijan.<sup>152</sup> Baku has always been the center of Soviet oil and gas policies if not exploration in the Caspian and its proven and potential reserves are perhaps the richest and most economically accessible in the region.<sup>153</sup> Indeed Azerbaijan is the oldest known oil-producing region in the world—oil production began in Baku in the nineteenth

148. See generally Ardabili, *supra* note 29, for a general overview of oil and gas development history in the Caspian and the present legal status of the lake; Bulent Gokay, *History of Oil Development in the Caspian Basin*, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION, *supra* note 23, at 3-19; Forsythe, *supra* note 23, at 9-12; CYNTHIA CROISSANT, AZERBAIJAN, OIL AND GEOPOLITICS 19-23 (1998).

149. See *infra* notes 157, 312 and accompanying text.

150. See generally CENTRAL ASIA AND THE CAUCUSES AFTER THE SOVIET UNION: DOMESTIC AND INTERNATIONAL DYNAMICS, *supra* note 80.

151. *Id.* at 151.

152. See generally David Knott, *Caspian Sea Activity Picking Up Off Former Soviet Union Republics*, 93 OIL & GAS J., Jan. 30, 1995, 1995 WL 7943059.

153. *Id.*

and early twentieth century.<sup>154</sup> The majority of the oil fields were located in the Aspheron Peninsula, but heavy drilling and usage prompted the Soviets to start extracting oil in the Azeri "sector" of the Caspian Sea in the late 1940s.<sup>155</sup> It peaked in the 1940s when it accounted for 71.6% of the Soviet Union's total production.<sup>156</sup> By the 1960s and 1970s, however, the Soviets had refocused their energy resources to Siberia.<sup>157</sup>

Before the collapse of the Soviet Union Azerbaijan experienced a "new oil boom."<sup>158</sup> In the late 1980s the rich Chirag, Azeri, and Guneshli oil deposits located in the Caspian Sea bed off Baku began to receive great attention from foreign corporations.<sup>159</sup> In 1991 the Azeri government issued a decree soliciting bids for the exploitation of the three fields.<sup>160</sup> Several American and European firms won the tenders for the fields.<sup>161</sup> A new era of Caspian energy development had begun.

#### b. Post-1991 History

The discovery of huge oil and gas deposits off the Azeri coastline coupled with the collapse of the Soviet empire sparked a whole new level of interest from Western and Asian governments and corporate interests in the Caspian region.<sup>162</sup> The political and economic opening of the Caucasus and Central Asia further allowed these corporate and political interests to conduct new research and feasibility studies to determine whether development of the

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154. A.A. Narimanov Ibrahim Palaz, *Oil History, Potential Converge in Azerbaijan*, 93 OIL & GAS J., May 22, 1995, 1995 WL 7944165. In fact half of the world's oil was being produced in Azerbaijan at that time. *Id.* Drilling of the first oil well in the Bibi-Eibat area of the Aspheron Peninsula was initiated by a Russian engineer in 1848. *Id.* In 1913 Azerbaijan produced eighty-three percent of all oil in the countries that later belonged to the Soviet Union. *Id.* During World War II Nazi military strategy included a march to the Caspian and seizure of Baku's vast oil and gas reserves. Yagmur Kochumov, *Issues of International Law and Politics in the Caspian in the Context of the Turkmenistan-Azerbaijan Discussion of Fuel Transport*, at <http://ourworld.compuserve.com/homepages/usazerb/422.htm> (last visited on Feb. 5, 2000) (copy on file with the *Vanderbilt Journal of Transnational Law*).

155. Nasib Nassibli, *Azerbaijan: Oil and Politics in the Country's Future*, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION, *supra* note 23, at 102.

156. *Id.* at 103.

157. *Id.* at 104; *see also* James Markham, *Caspian Oil and Blood*, NATIONAL GEOGRAPHIC, June 1999, at 33.

158. Nassibli, *supra* note 155, at 104.

159. *Id.*

160. *Id.*

161. *Id.* These firms included Amoco, Unocal, McDermott, and a British Petroleum-Statoil alliance, who bid for the Azeri field. *Id.* At the time Pennzoil and Ramco were negotiating for the Guneshi field, and British Petroleum-Statoil was bidding for Chirag. *Id.*

162. *See supra* notes 12, 13, and 20 and accompanying text.



hydrocarbon basins was economically profitable and financially viable.<sup>163</sup> With the signing of the "Contract of the Century" creating one of the first major Caspian joint-ventures between an NIS and Western corporations, the new oil and gas frenzy had officially begun.<sup>164</sup>

The following section will provide a rough outline of the major events that directly or indirectly affected Caspian Sea oil and gas development in rough chronological order:<sup>165</sup>

- With the advent of a new era in Caspian politics, the five littoral states slowly began to address issues regarding management and control of the Caspian Sea.<sup>166</sup>
- In April 1993 Kazakhstan signed a major deal with Chevron worth \$20 billion over forty years to develop the huge Tengiz oil-field on the north-eastern shore of the Caspian.<sup>167</sup> Russia did not raise any concerns over the signing of that agreement, quite possibly because the field was not located miles offshore and because the Russian government was already under negotiations with the Kazakhs to ensure that the oil from the field would ultimately be exported *via* Russian pipelines to

163. See generally Peuch, *supra* note 12.

164. The "Contract of the Century" refers to the creation of the Azerbaijan International Oil Consortium, or AIOC, in 1994. Nassibli, *supra* note 155, at 108; see also *infra* note 171.

165. The list will also deal with aspects of U.S. sanctions against Iran and will explore the legal ramifications of the sanctions policy within a Caspian context in subsequent sections. See *infra* Part II.B.3.

166. As early as 1992 the five littoral states proposed to establish a joint company or "bloc" called the Caspian Economic Community (CEC) in order to coordinate energy exploration and distribution projects in the Caspian Sea. *Caspian States are Forming Joint E&P Company*, 38 APS REV. OIL MARKET TRENDS, March 2, 1992, 1992 WL 2691899. The same year saw Iran hosting a convention of the Organization for Cooperation Among Caspian States which envisaged the development of relations between neighbors on shipping links, joint use of the Caspian's resources, and adoption of measures promoting ecological security. Mesamed, *supra* note 121, at 9. Iran was interested in establishing such multilateral cooperation primarily for geopolitical reasons. *Id.*

167. See UNITED STATES ENERGY INFORMATION ADMINISTRATION, CASPIAN SEA REGION, *supra* note 41. The TengizChevroil (TCO) consortium between Chevron and Kazakhstan was the first significant East-West Caspian oil consortium. See Forsythe, *supra* note 23, at 37-39. It went into operation in April 1993. *Id.* at 37. At \$20 billion it is one of the largest single investments by a U.S. firm in the former Soviet Union. *Id.* Chevron began negotiating the deal in 1990 before the collapse of the Soviet Union. *Id.* The Tengiz oil field is the largest oil discovery since the 1970s, with proven oil reserves of six to nine billion barrels. *Id.* According to the provisions of the TengizChevroil joint venture the field is to be developed over a forty-year period. *Id.* In April 1996 Mobil announced that it would purchase a twenty-five percent share of TengizChevroil. *Id.* at 38.

the Black Sea port of Novorossiysk.<sup>168</sup> As a result the Caspian Pipeline consortium (CPC) was created.<sup>169</sup> The CPC involves the governments of Russia, Azerbaijan, Kazakhstan, and Oman, and proposes to carry oil from the Tengiz field to the Russian Black Sea port of Novorossiysk.<sup>170</sup>

- o The major turning point in Caspian oil and gas development during the post-Soviet era occurred on September 20, 1994, when the State Oil Company of Azerbaijan (SOCAR) signed an \$8 billion, thirty-year contract with several foreign companies to create the Azerbaijan International Oil Consortium (AIOC) in a move to develop the Azeri, Chirag, and Guneshli fields, located seventy to eighty miles off Azerbaijan's coastline.<sup>171</sup>

168. Forsythe, *supra* note 23, at 38. On March 17, 1993, the Russian government signed an agreement with Chevron and Kazakhstan to allow TengizChevroil to export 65,000 barrels per day, with a future increase of up to 130,000 barrels per day. *Id.* at 38. Up to early 1996, however, Russia had not even allowed TengizChevroil to consistently export the 65,000 barrels per day pursuant to the agreement. *Id.*; see also *infra* Part II.C.2.a.

169. *Meeting Expected on Caspian Rights*, 74 PLATT'S OILGRAM NEWS, Apr. 30 1996, 1996 WL 8705710 (volume and number unavailable online); see also *infra* Part II.C, for an analysis of the MERs including the Caspian Pipeline Consortium (CPC). The CPC was formed by Russia, Kazakhstan, and Oman in 1992. Forsythe, *supra* note 23, at 49. The aim of the consortium was to build a pipeline that would transport oil from the Caspian region to the Black Sea. *Id.* From 1992 to late 1994 the CPC tried to persuade Chevron to provide most of the financing for a twenty-five percent non-decision-making equity share. *Id.* The company was expected to assume the risk of throughput guarantees regardless of whether it shipped the oil. *Id.* Chevron refused the terms and the progress stalled due to lack of adequate financing. *Id.* Meanwhile the members put forth several different restructuring measures, all of which failed. *Id.* at 50. Finally on April 27 of that year, the following restructuring was settled upon: Russia: 24.0%; Kazakhstan: 19.0%; Oman: 7.0%; Chevron: 15.0%; LUKoil (Russia): 12.5%; Mobil: 7.5%; Rosneft (Russia): 7.5%; Agip SpA (Italy): 2.0%; British Gas (UK): 2.0%; Oryx (United States): 1.75%; Munaigaz (Kazakhstan): 1.75%. *Id.* at 51.

170. *Id.*

171. Forsythe, *supra* note 23, at 39. In 1991 a number of foreign companies, including Amoco, British Petroleum, and Unocal began negotiating with Azerbaijan to develop the Azeri, Chirag, and Guneshli fields. *Id.*; *supra* notes 160-61 and accompanying text. In October 1993 the companies signed a new development protocol for the fields. Forsythe, *supra* note 23, at 39. In April 1994 State Oil Company of Azerbaijan (SOCAR) officially informed the partner consortium companies that the Russian oil company LUKoil had purchased a ten percent stake in the consortium. *Id.* After several more months of bargaining, the final project deal, worth an estimated \$8 billion in capital investments was signed on September 20, 1994. Shares in the consortium, according to the agreement at the time of signing, included: SOCAR: 20.0%; British Petroleum (UK): 17.13%; Amoco: 17.01%; LUKoil (Russia): 10.0%; Pennzoil: 9.82%; Unocal: 9.52%; Statoil (Norway): 8.56%; McDermott: 2.45%; Ramco (Scotland): 2.08%; Delta-Nimir (Saudi Arabia): 1.68%; and TPAO (Turkey): 1.75%. *Id.* at 39-40. In December 1994 the consortium established the AIOC to oversee the project's day-to-day operations. *Id.* at 41. The USEIA estimates that total reserves in these three fields are three to five billion barrels. See UNITED STATES ENERGY

- In a strategic move the government of Iran quickly decided to get its foot in the door by signing on for a five percent share of the AIOC development project.<sup>172</sup> On the same day as the signing of the accord Russian Foreign Ministry spokesman Grigori Karasin officially disputed the right of any Caspian nation to make unilateral developments in the region.<sup>173</sup> Russia couched its diplomatic concern on legal grounds, contending that all mineral resources of the Caspian outside of a narrow twelve-mile limit should be the joint property of all littoral states.<sup>174</sup> Until that time Russia had voiced little concern regarding offshore oil development in the Caspian.<sup>175</sup>
- In early 1995 there were signs from U.S. officials that Iran's participation in the AIOC would cause serious problems for the consortium and present the possibility that the United States would block multilateral financing of the project.<sup>176</sup> In late February a U.S. State Department official voiced his concern over Iran's proposed participation by explaining that while U.S. law does not bar U.S. firms from doing business in Iran it places limits on certain transactions, particularly those that might grant military benefits for Iran.<sup>177</sup>
- In March 1995 a \$1 billion oil and gas field development between Conoco and Iran for its South Pars field in the Persian Gulf came under fire from Senator Alfonse D'Amato of New York, who promptly called for an outright ban on foreign investment and trade with Iran's oil and gas sector.<sup>178</sup> Baku began to feel the pressure.<sup>179</sup> Several days later the

INFORMATION ADMINISTRATION, CASPIAN SEA REGION, *supra* note 41. A SOCAR representative voiced the importance of the signing by claiming that the prospects for energy development in Azerbaijan will be centered on the development of these three fields for the next twenty to thirty years. John Roberts, *Russia-Iran: Regional Neighbors Find Caspian a Stormy Sea*, INTER PRESS SERV., May 18, 1995, 1995 WL 2261158.

172. Natalia Borisova, *U.S. Members of Caspian Consortium Get News of Unwelcome Guest—Iran*, 44 OIL DAILY, Nov. 15, 1994, 1994 WL 12782175.

173. *Id.*; see also *infra* note 404 and accompanying text.

174. Borisova, *supra* note 172.

175. *Caspian Sea Legal Move*, EAST EUR. MARKETS, Oct. 28, 1994, 1994 WL 11290113; see also *infra* Part III.B.4, for an analysis of the Russian legal strategy and perspective regarding ownership rights in the Caspian.

176. Margaret McQuaile, *U.S. Official Pans Iran Pipeline Route: But Caspian Role Stance Finessed*, 73 PLATT'S OILGRAM NEWS 39, Feb. 27, 1995, 1995 WL 8133683.

177. *Id.*

178. *The U.S. Government is Targeting Petroleum Projects in its Efforts to Keep Iran Ostracized in the World Community*, 93 OIL & GAS J. 11, Mar. 13, 1995, 1995 WL 7943567.

179. Iran countered by threatening to block early oil swaps from Azerbaijan to its northern refineries in exchange for crude oil from its Persian Gulf terminals, a way

United States choked off Iran's Caspian energy plan on two fronts: the AIOC rejected Iran's proposed bid to enter the consortium<sup>180</sup> and President Clinton announced a ban to prevent U.S. firms from contracting to produce oil in Iran—a move that forced Conoco to pull out of the South Pars project.<sup>181</sup> Iran called the move illegal and promptly joined Russia in its stance that AIOC's unilateral exploitation of Caspian oil and gas was illegal under the current legal regime of the Caspian Sea.<sup>182</sup>

- On May 18, 1995, Russian President Boris Yeltsin spoke out on the issue of the legal regime of the Caspian by asserting that the Sea is a special inner sea and could not be divided.<sup>183</sup> Yeltsin explicitly referred to oil and gas interests as falling within the scope of the common ownership.<sup>184</sup> As Azeri and Kazakh insistence on developing their mutual sectors of the Caspian Sea free from Russian involvement increased, the Iranian government submitted a proposal for an international convention to govern the Sea.<sup>185</sup> The convention called for collective sharing of the Caspian's resources ruling out any *de jure* partition.<sup>186</sup>
- On October 30, 1995, Iran and Russia signed a joint declaration opposing any unilateral action to develop the Caspian's resources despite LUKoil's ten percent stake in the

of ensuring early flow of oil to international markets without having to address the more serious concerns regarding pipeline construction. Margaret McQuaile, *Iran on Caspian: If No Equity, No Swaps*, 73 PLATT'S OILGRAM NEWS 72, Apr. 13, 1995, 1995 WL 8134461; see also *infra* Part II.C.2.b, for an analysis of the oil swap arrangement.

180. James Meek, *Oil Fuels Debate on Whether Sea is Ocean or Lake*, GUARDIAN, May 31, 1995, at 10.

181. *Id.*; see also *infra* notes 290-93 and accompanying text.

182. James M. Dorsey, *Sea of Troubles: Consortium Sees Break in Disputes Clouding Caspian Oil Pipeline*, WALL ST. J. EUR., Apr. 26, 1995, at 1. Iranian Deputy Foreign Minister Abbas Maliki was quoted by reporters as saying that the treaties signed by Iran and the Soviet Union in 1921 and 1940 were still in effect and indicated that Iran was now thinking of accepting Moscow's view that the water and underwater resources of the Caspian should be considered the common property of all the littoral states. *Id.*; see also *infra* Part III.B.5, for Iran's use of the "legal veto" strategy.

183. Daniel Sneider, *US, Russia Vie for Rich Oil Fields in Caspian Sea*, CHRIST. SCI. MON., June 8, 1995, at 6.

184. *Id.*; see also *infra* Parts III, V.A.2, for an analysis of the Russian legal position and the condominium theory of ownership.

185. Andrei Ivanov, *Iran Calls for Caspian Convention*, OIL & GAS J., May 28, 1995, 1995 WL 8423121 (volume and number unavailable online).

186. A top Iranian official, however, divulged the real reasons behind Iran's recent partnership with Russia and a sudden concern for the fragile Caspian ecosystem by explaining that "Iran had no reason to facilitate the projects of countries which do not border the Caspian, especially when itself is excluded." *Id.*

AIOC.<sup>187</sup> Several months later, in an international conference on oil and gas development, President Heydar Aliyev of Azerbaijan rebutted earlier Russian assertions and made it clear that Azerbaijan regarded the area being developed by the AIOC as part of an Azeri “sector” of the Caspian.<sup>188</sup>

- Meanwhile Iran sought out new ways to frustrate U.S. policy and enter the Caspian oil and gas game. In several international conferences hosted by Iran the National Iranian Oil Company (NIOC) officially declared its desire to participate in the Caspian energy scene by playing a role in the transportation or export sector.<sup>189</sup> Azerbaijan, who continued to feel uncomfortable totally excluding Iran from joint-venture projects in its claimed sector began the difficult task of finding an all-European consortium for the NIOC to work with in order to appease its southern neighbor.<sup>190</sup> In early June 1996 Iran and SOCAR signed the Shah Deniz contract worth \$4 billion in which a privately-run Iranian company has a ten percent stake.<sup>191</sup> The conciliatory measure forced Iran to again distance itself from the Moscow’s legal position regarding common ownership of the Sea’s resources.<sup>192</sup>
- On October 9, 1995, the AIOC officially decided to support a two-pipeline system for transport of its “early oil.”<sup>193</sup> Azeri officials caved into Russian demands that Azeri oil take the “northern route” to Novorossiysk but continued to focus on a

187. *Russia, Iran Call for Cooperation Over Caspian Oil*, DOW JONES INT’L NEWS, Oct. 30, 1995, 10/30/95 DJINS. The Russian company LUKoil signed a joint venture contract with SOCAR to develop several gas fields off the Azeri coastline. *Id.* LUKoil is officially a member of the AIOC Consortium. *Id.*; see also *supra* note 171 and accompanying text.

188. Margaret McQuaile, *Caspian Status at Center of Baku Talks*, 73 PLATT’S OILGRAM NEWS 100, May 24, 1995, 1995 WL 8135204.

189. Iran has identified some forty prospective structures in the southern Caspian and is drilling a well at Merdat from a rig leased from Azerbaijan. Roger Robinson, *Iran Puts Up Caspian Tenders*, OIL & GAS J., Jan. 12, 1996, 1996 WL 8523488 (volume and number unavailable online).

190. *Iran Looks to Deepen Interest in Azeri Projects*, 74 PLATT’S OILGRAM NEWS, June 25, 1996, 1996 WL 8706349; see also *Caspian Sea Attractive But Controversial*, PETROLEUM ECON., Jan. 1, 1996, 1996 WL 9803387 (volume and number unavailable online).

191. *Iran Looks to Deepen Interests in Azeri Projects*, *supra* note 190.

192. *Azeris Brush Off Russian Proposal On Caspian Split*, 74 PLATT’S OILGRAM NEWS 161, Aug. 20, 1996, 1996 WL 8707200.

193. Laurent Ruseckas, *Which Way Will Azerbaijan’s Oil Flow? The Pipeline Debate Continues*, 1 CASPIAN CROSSROADS 3, Summer-Fall 1995, at <http://ourworld.compuserve.com/homepages/usazerb/136.htm> (copy on file with the *Vanderbilt Journal of Transnational Law*); see *infra* Part II.C.2, II.3.a-b, for in-depth analysis of the “northern,” “western,” and “early oil” pipeline routes.

more desirable plan drawn up by Turkish and American policy architects that the MER pipeline ultimately go from Baku to Ceyhan, a Turkish Mediterranean port.<sup>194</sup> The Baku-Supsa line to the Georgian Black Sea coast was thus chosen as the second "early oil" route.<sup>195</sup>

- In March 1996 U.S. Senate Banking Committee head Senator Alfonse D'Amato called on President Bill Clinton and UN Secretary General Boutros Boutros Ghali to bring a halt to a UN-backed feasibility study for a possible international gas pipeline that would supply Europe and East Asia *via* Iran.<sup>196</sup> In August 1996 President Clinton signed the Iran-Libya Sanctions Act (ILSA) into law.<sup>197</sup> The bill threatened sanctions against any company, domestic or foreign, which invests more than \$20 million annually in Iran's oil and gas sectors.<sup>198</sup>
- In April 1996 Boris Yeltsin and Kazakh President Nursultan Nazarbayev signed a declaration reinforcing the concept of multilateral action by the littoral states regarding development of offshore fields.<sup>199</sup> The declaration also included the official signing of a new agreement for the CPC which would cost an estimated \$1.5 billion.<sup>200</sup>
- On November 13, 1996, Russia, Iran, and Turkmenistan agreed to cooperate on splitting the oil resources of the Caspian Sea.<sup>201</sup> A signed memorandum indicated the three states' willingness to found a joint company to develop the mineral resources of the Sea on an equal basis.<sup>202</sup> Azerbaijan and Kazakhstan did not sign the memorandum.<sup>203</sup> In the meeting Russia also unveiled a new plan on the regime of the

194. Ruseckas, *supra* note 193; see also *infra* Parts II.C.3.a-b, for an analysis of the Baku-Ceyhan MER.

195. Ruseckas, *supra* note 193.

196. *Iran-Europe-Asia-US/Politics: Iran Gas Under New US Fire*, INT. GAS REP., Mar. 15, 1996, 1996 WL 8731372.

197. See *infra* Part II.B.3 (analyzing the ILSA).

198. See *id.*

199. Babak, *supra* note 109, at 192. The declaration stated that "the new legal status of the Caspian must be agreed through consensus between the pre-Caspian states. No one has the right to decide the Caspian's status unilaterally . . . . Kazakhstan and Russia agree . . . on the following principles: the Caspian states . . . will respect the UN decision requiring them to respect sovereignty, territorial integrity, political independence and the equal sovereignty, without the use of force or threatening the use of force." *Id.*

200. *Id.*

201. Hiro, *supra* note 55.

202. *Id.*

203. *Id.*

Caspian whereby the littoral states would retain a forty-five mile economic zone beyond which all the resources of the Sea would be developed under joint ownership.<sup>204</sup> Under the plan most Kazakh and Turkmen offshore oil fields would lie within the forty-five mile zone, while the oil-rich Azeri fields would not.<sup>205</sup> The Russians also proposed the creation of joint-stock companies in order to develop the Sea's common waters and suggested the development of a "double-tender system" giving the five nations first claim in any future oil and gas contracts.<sup>206</sup> This proposal represented the largest Russian concession made to date on the legal status of the Caspian.

- On December 6, 1996, the final CPC agreement was signed in Moscow.<sup>207</sup>
- In August 1997 President Yeltsin annulled the most recent offshore deal with Azerbaijan over the Kaipaz field on the basis that the median line dividing the Caspian placed the field within Turkmenistan's sector; Ashqabad also questioned the legal right of Azerbaijan to develop the Azeri and Chirag deposits.<sup>208</sup>
- In October 1997 France's Total agreed to undertake a \$2 billion development of the giant South Pars oil field off Iran's

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204. Jane Upperton, Arif Usseinov, & Margaret McQuaile, *Two Key Caspian States Reject Plan to Govern Sea*, 74 PLATT'S OILGRAM NEWS 223, Nov. 15, 1996, 1996 WL 13193868. This proposal was dubbed the "doughnut proposal." See *infra* Parts III.B.4, V.B.2, for specific legal models similar to the Russian "doughnut proposal" and an analysis of the proposal itself.

205. Paul Globe, *Russia: Analysis From Washington—The Caspian Between Sea and Lake*, Nov. 18, 1996, at <http://www.nsu.nsk.su/filf/icons/english/econ/caspian.htm> (copy on file with the *Vanderbilt Journal of Transnational Law*).

206. Patrick Crow, *Competition for the Caspian*, 94 OIL & GAS J. 49, Dec. 2, 1996, 1996 WL 8288738.

207. *Caspian Consortium Gets Final Accord for Oil Pipeline to be Ready Early '99*, 47 APS REV. OIL MARKET TRENDS 22, Dec. 2, 1996, 1996 WL 8937338. The agreement set the CPC's ownership structure and allowed the ten members to buy fifty percent of the consortium. *Id.* The ten companies involved in the planning purchase of fifty percent in the CPC included Chevron and Arco which accounted for the largest stakes in the consortium. *Id.*; see also *supra* note 169 and accompanying text (outlining the original ownership structure of the CPC).

208. Mesamed, *supra* note 121, at 214. President Niyazov of Turkmenistan declared that "everyone must respect this median line" which has been established by Azerbaijani, Kazakh, and Russian experts. *Id.* A maritime expert at the Foreign Ministry's Legal Department was not aware of the Russian-Azeri deal until after the signing. *Id.* The Minister reacted furiously when he discovered the details of the deal and promptly declared any Russian participation in the contract "illegal." *Id.* For details on the long-running dispute between Azerbaijan and Turkmenistan regarding the Kaipaz-Serdar fields, see *infra* notes 523-27 and accompanying text.

Persian Gulf coast.<sup>209</sup> The deal raised concerns that the contract would violate the ILSA.<sup>210</sup>

- In October 1997 the United States questioned statements made by Turkmenistan about a proposal to export gas to Turkey *via* a pipeline going across northern Iran.<sup>211</sup> The proposed agreement was said to be \$1.6 billion and would run 3,200 km.<sup>212</sup> In November 1997 U.S. Undersecretary of State Stuart Eizenstat noted that the Turkey deal to import gas from Turkmenistan through Iran would not violate the ILSA but rejected the notion that pipelines running through Iran were acceptable to the U.S. administration.<sup>213</sup> The project was Iran's biggest international energy project since the 1979 revolution and would run 3,200 km on the eastern side of the Caspian Sea.<sup>214</sup>
- On November 8, 1997, the Chirag field produced its first oil; Iran protested in a letter to UN Secretary General Kofi Annan.<sup>215</sup>
- In late 1997 Iran and Turkmenistan unveiled a gas swap program that would start the export of Turkmen gas directly to Iran by December *via* a new 200 km pipeline from its Korpedzhe gas field to Kurt-Kui in northeast Iran.<sup>216</sup> The

209. *Total's Iran Deal Sparks Row with U.S.*, 95 OIL & GAS J. 40, Oct. 6, 1997, 1997 WL 9575713.

210. *Id.* Earlier, Total took over the Sirri field after Conoco was forced to pull out pursuant to the Executive Order signed by President Clinton barring U.S. investment in Iran's oil and gas sector. *Id.*

211. Sonia Winter, *Turkmenistan: U.S. Questions Gas Pipeline Via Iran*, RADIO FREE EUROPE-RADIO LIBERTY, Oct. 16, 1997, at <http://www.rferl.org/nca/features/1997/10/F.RU.971016135301.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

212. *Id.*

213. Patrick Crow, *Caspian Questions (US May Lose Out on Caspian Sea Offshore Oil)*, 95 OIL & GAS J. 44, Nov. 3, 1997, 1997 WL 9576042.

214. *Id.*; see also *infra* note 458-62 (analyzing the Iran-Turkmenistan-Turkey gas pipeline project).

215. *Iran Protests Azerbaijan's Unilateral Exploitation of Caspian Sea*, AGENCE FRANCE-PRESSE, Nov. 13, 1997, 1997 WL 13433398. Iran sent a protest letter to UN Secretary-General Kofi Annan arguing that Azerbaijan's "claim of sovereignty and unilateral exploitation of the resources is contrary to the agreements reached between bordering countries and the legal status for the Caspian . . . . [Iran] express[es] [its] deep objection to the move by the government of Azerbaijan [and] . . . deem[s] it in contradiction of a friendship pact between Iran and the former Soviet Union in 1921 and a commercial agreement in 1940. The government of Iran reserves the right to any action in the future to protect its inalienable rights to the sea." *Id.*

216. Stuart Parrot, *Iran: New Gas Pipeline Boosts Regional Ambitions*, RADIO FREE EUROPE-RADIO LIBERTY, Jan. 6, 1998, at <http://www.rferl.org/nca/features/1998/01/F.RU.980106134821.html> (copy on file with the *Vanderbilt Journal of*



project would be largely funded by Iran and would cost an estimated \$190 million.<sup>217</sup> The gas swap began in January 1998 and represented the first stage in the ambitious trans-Iranian 3,200 km pipeline to Turkey.<sup>218</sup>

- U.S. officials unveiled the first phases of a Turkmen Trans-Caspian Pipeline (TCP) plan.<sup>219</sup> The plan, along with the proposed Baku-Ceyhan MER, was put at the top of the U.S. policy agenda for the region.<sup>220</sup> Both Iran and Russia lodged official protests against such a project based primarily on environmental grounds.<sup>221</sup>
- In July 1998 Russia and Azerbaijan signed a protocol on the legal status of the Caspian.<sup>222</sup> In it Russia displayed a more willing acceptance of sectoral division using the median line although it continued to insist that the Caspian's waters should be owned in common.<sup>223</sup>
- In April 1998 the \$2.8 billion deal between Turkmenistan and the United States for the TCP was signed in Washington.<sup>224</sup>

*Transnational Law*). For more in-depth analysis of Iran's oil and gas swap initiatives, see *infra* Part II.C.2.b.

217. *Id.*

218. *Id.*; see also *supra* notes 211-14; *infra* notes 458-62.

219. Margaret McQuaile, *Turkmen Pipeline US' Ramsay: Only 2 Years Needed for Construction*, 75 PLATT'S OILGRAM NEWS 225, Nov. 19, 1997, 1997 WL 8881892; see also *Pipeline Under the Caspian to Transport Turkmen Gas Is Continuing to Gain Favor*, 75 PLATT'S OILGRAM NEWS 225, Nov. 19, 1997, 1997 WL 8112522; David B. Ottaway & Dan Morgan, *U.S. Backs Non-Iranian, 'Eurasian' Corridor West for Caspian Sea Oil*, WASH. POST, Nov. 20, 1997, at A37; *infra* Part II.C.3.b, for analysis of the TCP as a possible option for a trans-Caspian "western route."

220. The timing of the announcement is largely seen as a reaction against the threat of Iran and Turkmenistan swapping gas *via* an Iranian pipeline that would eventually link both nations' gas resources to Turkey. *Id.*

221. *Russia and Iran are Against the Construction of Trans-Caspian Pipelines*, RUSSIAN ECON. NEWS, Dec. 10, 1999, 1999 WL 5893465; see also *infra* Part VI.C.3.c, for the possibility of Iran employing an environmental strategy to force multilateral cooperation on Caspian oil and gas issues.

222. *Russia Signs Caspian Pact with Kazakhstan*, WALL ST. J. EUR., July 7, 1998, at 2.

223. See *id.* The agreement only mentions division of the "seabed." *Id.*; see also *infra* Part III.B.4 (analyzing the possible veto effects of the Russian "doughnut proposal").

224. *Iran Voices Opposition to Turkmen-U.S. Oil Deal*, DEUTSCHE PRESSE-AGENTUR, Apr. 26, 1998, 4/26/98 DCHPA. The pipeline would be 1,200 km long and would travel across the length of the Caspian and alongside the seabed. *Id.* Amoco, Bechtel, and General Electric comprised the international joint-venture. *Id.* Iran quickly denounced the agreement citing environmental and legal concerns as the primary factors for its official stance. *Id.*

- In May 1998 the Clinton Administration decided not to impose sanctions on the South Pars Total deal.<sup>225</sup>
- Russia changed its attitude on sectoral division in the Caspian by reaching an agreement to divide the northern part of the seabed between itself and Kazakhstan.<sup>226</sup> In July of 1998 Yeltsin and Nazarbayev signed the landmark accord in Moscow dividing the northern sector of the oil-rich Caspian among themselves.<sup>227</sup> Moscow, however, officially declared that the waters were still joined in common.<sup>228</sup> Iran rejected the legal legitimacy of the bilateral deal.<sup>229</sup>
- Feeling isolated by the recent political and legal maneuvering of Moscow Iran also appeared to shift to a bilateral approach to solving legal disputes in the Caspian.<sup>230</sup> For the first time Foreign Minister Kamal Kharrazi declared that both the

225. Gerald Karey, *Iran Sanctions Deal Won't Better Chances for US Firms*, 76 PLATT'S OILGRAM NEWS 96, May 20, 1998, 1998 WL 9828114; see also *U.S. Waives Sanctions on South Pars Field*, 96 OIL & GAS J. 21, May 25, 1998, 1998 WL 11540391. Stuart E. Eizenstat, a key figure in U.S. sanctions policy validated the sanctions against Iran by arguing that any trans-Iranian pipeline route would frustrate global energy policies aimed at: 1) preventing any Caspian country from monopolizing regional hydrocarbon transportation, 2) ensuring that Caspian production diversifies worldwide energy supplies, and 3) avoiding shipping congestion in the Bosphorus Straits through Istanbul. *Sanctions Decisions on South Pars Imminent*, OIL & GAS J., Apr. 13, 1998, 1998 WL 27193575 (volume and number unavailable online). Eizenstat remarked that "an Iranian route for Caspian oil 'makes no sense' because it would add volumes having to pass through the Strait of Hormuz between the Persian Gulf and Arabian Sea and thus wouldn't diversify worldwide energy sources." *Id.* He also argued against a pipeline route through Russia ending at the Black Sea ports of Georgia or Russia by asserting that increased tanker traffic at the Bosphorus Straits would invite a cataclysmic environmental disaster. *Id.*; see also Sonia Winter, *Russia: U.S. Leans Away from Sanctions on Iran Deals*, RADIO FREE EUROPE-RADIO LIBERTY, May 15, 1998, at <http://www.rferl.org/nca/features/1998/05/F.RU.980515121831.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

226. Jane Upperton, *Russia, Kazakhstan Said in Agreement on Caspian Sea*, 76 PLATT'S OILGRAM NEWS 69, Apr. 13, 1998, 1998 WL 9827600.

227. Ron Synovitz, *Russia/Kazakhstan: Yeltsin, Nazarbayev Ink Accord on Caspian Oil Rights*, RADIO FREE EUROPE-RADIO LIBERTY, July 6, 1998, at <http://www.refr.org/nca/features/1998/07/F.RU.980706133055.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

228. *Id.*

229. *Iran Against Russian-Kazakh Agreement on Caspian Sea Legal Status*, DEUTSCHE PRESSE-AGENTUR, July 7, 1998, 7/7/98 DCHPA; see also *infra* Parts III.B.5, VI.C, for a description and criticism of Iran's "legal veto" strategy, respectively.

230. Nina Kamran, *Iran Stand to Badly Loose [sic] in Caspian Sea by Russia-Kazakhstan Deal*, IRAN PRESS SERV., July 8, 1998, at <http://www.iran-press-service.com/articles/caspian.html> (copy on file with the *Vanderbilt Journal of Transnational Law*) (criticizing Tehran's "blindfold reliance" on support from Moscow with regards to a legal stance on the Caspian); see also *Turkmenistan, Iran To Set Up Caspian Status Working Group*, DOW JONES ENERGY SERV., Aug. 13, 1998, 10/14/97 DJTES.

seabed and the waters should be divided equally among all littoral states.<sup>231</sup>

- Dutch Shell and British Lasmo signed a \$19.8 billion deal with NIOC to explore the Caspian.<sup>232</sup> The deal appeared to pass the legal obstacles imposed by the ILSA.<sup>233</sup> Azerbaijan protested claiming that the exploration is taking place in its “sector” of the Sea.<sup>234</sup>
- Russia enters the gas pipeline race by aggressively pursuing the so-called Blue Stream Project which will carry Turkmen gas under the Black Sea and into Turkey.<sup>235</sup>
- The TCP project receives a significant boost in August 1999 when Dutch Shell buys a fifty percent share of the project.<sup>236</sup>
- Iran awards Alborz 1, 2, 3 and 4 fields in the Caspian to Towse’s Petro Iran Company.<sup>237</sup>
- Azerbaijan enters the gas race by announcing that it has found new gas resources in the Shah-Deniz field.<sup>238</sup>

231. By an “equal and fair division” Iran means that each littoral state should have a twenty percent share of the seabed and its waters. *Iran’s Foreign Minister Calls for Caspian Convention*, DOW JONES INT’L NEWS, Aug. 14, 1998, 8/14/98 DJINS.

232. *Iran Signs Deal With Two European Companies Over Caspian Oil*, DEUTSCHE PRESSE-AGENTUR, Dec. 14, 1998, 12/14/98 DCHPA.

233. *Id.*

234. *Iran Rejects Azerbaijan’s Protest Over Oil Contract*, DEUTSCHE PRESSE-AGENTUR, Dec. 16, 1998, 12/16/98 DCHPA; see also Michael Lelyveld, *Azerbaijan/Iran: Oil Feud Flares in Tough Economic Times*, RADIO FREE EUROPE-RADIO LIBERTY, Dec. 21, 1998, at <http://www.rferl.org/nca/features/1998/12/F.RU.981221163315.html> (copy on file with the *Vanderbilt Journal of Transnational Law*). A press release from the Azeri Foreign Ministry read: “Azerbaijan believes that the unilateral, unjustified act by Iran undermines positive tendencies noted in talks over the Caspian’s status and could negatively affect the spirit of cooperation in the region.” *Iran to Explore Disputed Caspian Area*, OIL & GAS J., Dec. 21, 1998, 1998 WL 11542736 (volume and number unavailable online). Iran’s Foreign Ministry responded by stating that the charge had no legal basis. *Id.*

235. The consortium is represented by Gazprom and Italian ENI. *Russia Steps Up Pressure in Caspian*, DOW JONES INT. NEWS, Oct. 16, 1998, 1998 WL 11349228. For more in-depth analysis of the Russian Blue Stream Project as a competitor to the TCP, see *infra* Part II.C.3.b.

236. Hugh Pope, *Shell, Turkmenistan Sign Alliance for Pipeline Project*, WALL ST. J. EUR., Aug. 9, 1999, at 4. Shell, however, says that despite the move it will continue to be involved in feasibility studies for a trans-Iranian gas route. *Id.*

237. Sarah Lloyd, *Iran Assigns Rights to Disputed Caspian Sea Block to Local Company*, 77 PLATT’S OILGRAM NEWS 171, Sept. 7, 1999, 1999 WL 12180770.

238. Hugh Pope, *Azerbaijan, After Reports of Gas Find, Says it Plans to be ‘a Major Exporter’*, WALL ST. J., June 23, 1999, at A23.

- After years of doubt and hesitation regarding the economic viability of the Baku-Ceyhan MER, BP-Amoco, lead operator of the AIOC, decides to endorse the project.<sup>239</sup>
- On November 18, 1999, three important documents were signed outlining the prospects for exporting Caspian oil and gas through the Eurasian corridor.<sup>240</sup> The Istanbul Declaration specifies: 1) backing for the Baku-Ceyhan MER; 2) a memorandum of mutual understanding which specifies the development of Azeri gas projects and backing for the export of Azeri gas to Turkish and international markets;<sup>241</sup> and 3) an intergovernmental declaration on the TCP between Turkmenistan, Azerbaijan, Georgia, and Turkey.<sup>242</sup>
- On November 14th despite the threat of sanctions, Shell signed an agreement with the NIOC to redevelop the Soroosh

239. Michael Lelyveld, *Azerbaijan: Caspian Sea Pipeline Gets Major Backing*, RADIO FREE EUROPE-RADIO LIBERTY, Oct. 20, 1999, at <http://www.rferl.org/ncal/features/1999/10/F.RU.991020134216.html> (last visited Mar. 26, 2001) (copy on file with *Vanderbilt Journal of Transnational Law*). For more than a year BP Amoco representatives stood firm in the face of U.S. government pressure supporting the Baku-Ceyhan pipeline, arguing that the AIOC volumes would not justify building a line to carry one million barrels of oil per day. *Id.* Instead BP Amoco had argued that plans to expand the existing Baku-Supsa pipeline (carrying "early oil") would be more economically feasible. Robert Perkins, Cathy Landry & Arif Useinov, *BP Amoco Says it Backs Baku-Ceyhan Pipeline*, 77 PLATT'S OILGRAM NEWS 202, Oct. 20, 1999, 1999 WL 12181468.

240. *Documents on Baku-Ceyhan Pipeline*, WORLD NEWS CONNECTION, Nov. 19, 1999, 1999 WL 26465435. The three agreements included the following proposals: 1) Azerbaijan, Georgia, and Turkey will sign an agreement offering promises of financial support plus a legal framework for the project; 2) the same three countries and Turkmenistan will sign an agreement guaranteeing transport of gas from Turkmenistan to Turkey; and 3) Turkey will agree to cover cost overruns associated with the construction of the pipeline inside its borders. *Id.*; see also Nancy Mathis & David Ivanovich, *With Agreements in Sight, Clinton Cheers Caspian Pipelines*, HOUS. CHRON., Nov. 17, 1999, at 1. Russia immediately voiced its concern that U.S. support for the agreements took advantage of Russia's weakened state in an attempt to control the region's oil reserves. *Id.* For a general explanation of Iranian criticism of the Baku-Ceyhan agreements, see *Iran Says U.S.-Azeri Oil Accord is Illegal*, DEUTCHE PRESSE-AGENTUR, May 1, 1999, 5/1/99 DCHPA; *Iran Says Caspian Sea Oil Contracts Lack Legitimacy*, DOW JONES ENERGY SERV., May 1, 1999, 5/1/99 DJTES. Analysts were also quick to point out that the agreements failed to address many significant issues making the plan economically and legally viable. See, e.g., Margaret McQuaile, *For Baku-Ceyhan Line, Istanbul Ceremony Just a Start*, 77 PLATT'S OILGRAM NEWS 228, Nov. 29, 1999, 1999 WL 12182113. These include the lack of transit agreements, ownership structures, and specific plans regarding MER routes. *Id.*

241. *Documents on Baku-Ceyhan Pipeline*, *supra* note 240. This document was signed between Azerbaijan, Georgia, and Turkey. *Id.*

242. *Id.* The TCP Declaration is a framework document that will provide the basis for negotiating the actual legal package for the gas pipeline. See generally Mathis & Ivanovich, *supra* note 240.

and Norooz oil fields in the Persian Gulf worth an estimated \$800 million.<sup>243</sup>

- In late 1999 Azerbaijan continued to change the dynamics of the regional gas market race by claiming it had discovered huge gas deposits in the offshore Aspheron field, perhaps five times greater than Shah Deniz field found earlier that year.<sup>244</sup>
- In late December 1999 Iran threatened Turkey with gas penalties under a 1996 agreement to purchase but decided to delay.<sup>245</sup> The availability of Iranian capacity to sell the agreed quantities surprised all, leading to conjecture that the move was a political counter-attack against competing MERs seeking to dominate the lucrative Turkish gas market.<sup>246</sup>
- Bickering among Azerbaijan, Georgia, and Turkmenistan delays construction of the TCP and Baku-Ceyhan lines, as Washington grows impatient with the slow pace of progress.<sup>247</sup> Viability concerns continue to plague realization of the project.<sup>248</sup>

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243. David Knott, *Iran Deal for Shell*, 97 OIL & GAS J. 47, Nov. 22, 1999, 1999 WL 29184879.

244. Michael Lelyveld, *Azerbaijan: New Gas Discovery Gives Baku Added Weight*, RADIO FREE EUROPE-RADIO LIBERTY, Dec. 29, 1999, at <http://www.rferl.org/nca/features/1999/12/f.ru.991229165033.html> (last visited Mar. 28, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*).

245. Michael Lelyveld, *Iran: Turkey Seeks to Avoid Gas Penalties*, RADIO FREE EUROPE-RADIO LIBERTY, Dec. 30, 1999, at <http://www.rferl.org/nca/features/1999/12/f.ru.991230155145.html> (last visited Mar. 28, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*).

246. *Iran, Turkey Agree to Delay in Gas Deliveries*, AGENCE FRANCE-PRESSE, Jan. 12, 2000, at <http://www.rferl.org/nca/features/2000/01/F.RU000127/43848> (last visited Mar. 28, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*).

247. Michael Lelyveld, *Caspian: Slow Progress On Pipelines Raises Concerns*, RADIO FREE EUROPE-RADIO LIBERTY, Jan. 27, 2000, at <http://www.rferl.org/nca/features/2000/01/F.RU000127143848.html> (last visited Mar. 28, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*). With more recent gas finds off the Azeri coast, Baku has demanded that it also contribute to gas being carried through the TCP. Michael Lelyveld, *Azerbaijan: Caspian Region Faces Fuel Shortages*, RADIO FREE EUROPE-RADIO LIBERTY, Feb. 3, 2000, at <http://www.rferl.org/nca/features/2000/02/F.RU.000203143229.html> (last visited Mar. 28, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*). This, alongside the long-running dispute regarding demarcation of the median line between Azerbaijan and Turkmenistan in the Caspian, has seriously hampered plans for continuation of the TCP. *Id.*

248. David Ignatius, Editorial, *U.S. Pipeline Strategy in Trouble*, SUN-SENTINEL (Ft. Lauderdale), Jan. 28, 2000, at 27A.

## 2. The NIS: The Search to Reduce Russian Reliance<sup>249</sup>

In order to decrease their economic dependency on "Mother Russia," the NIS have looked both to regional and "external players."<sup>250</sup> As noted above, the important regional players are Turkey and Iran.<sup>251</sup> The most important and active "external player" is the United States.<sup>252</sup> It is important to realize, however, that the NIS' desire to establish links with Turkey and Iran is in many ways independent of their desire to foster ties with Washington. Turkey and Iran offer the NIS a geoeconomic solution to a geoeconomic problem: practical and arguably efficient pipeline routes that will transport their oil and gas to world markets.<sup>253</sup> On the other hand a political and economic alliance with the United States addresses wholly different needs—the NIS realize that they require the political and financial support of the United States and Europe to ensure that such costly projects are realized.<sup>254</sup> Despite this conceptual dichotomy, however, the U.S. administration has aggressively attempted to link geoeconomic concerns with geopolitical ones, forcing the NIS to reconcile seemingly conflicting interests.<sup>255</sup>

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249. For an informative editorial analysis of Russia's geopolitical interests in the Caspian region especially with regard to the oil and gas market, see Mortimer B. Zuckerman, Editorial, *The Big Game Gets Bigger—Russia Will Gain Wealth and Influence if it Controls Caspian Sea Oil*, U.S. NEWS & WORLD REP., May 10, 1999, 1999 WL 8432767; see also *Azeris Brush off Russian Proposal on Caspian Split*, *supra* note 192 (explaining the NIS' need to diminish their economic dependence on Russia).

250. See Forsythe, *supra* note 23, at 13-17 (outlining the significant geopolitical and geoeconomic control that Moscow still exercises over the Caspian region and the NIS' attempts to break free from this dependency).

251. *Id.* at 13; see also *supra* Parts II.A.2.b-c.

252. Forsythe, *supra* note 23, at 7; see also *supra* Part II.A.2.d.

253. See *infra* Parts II.C.1-2, II.C.3.b-c, for analysis of the NIS transportation puzzle, regional pipeline plans, and the interplay between geopolitics and geoeconomics, and Iran and Turkey's roles in the Caspian pipeline game.

254. See, e.g., Forsythe, *supra* note 23, at 37-43 (outlining some of the largest current joint-venture projects (the Kazakhstan-Chevron joint venture known as TengizChevroil; the Azerbaijani offshore oil project consortium, the Azerbaijani Karabakh field in the Caspian, Kazakhstan's Karachaganak oil and gas field, and a set of projects in Kazakhstan's offshore area), all of which involve direct and indirect U.S. corporate participation); see also generally Peuch, *supra* note 12 (discussing the role of U.S. and other private corporations in the Caspian region).

255. The most telling example of the United States' efforts to link the geoeconomic and geopolitical games is its use of unilateral trade sanctions against Iran. See *infra* Part II.B.3, for an in-depth analysis of the ILSA, the centerpiece of the U.S. sanctions regime against Tehran. Trade sanctions are an attempt to render cooperation and participation with Iran, which arguably offers the most practical and efficient geoeconomic solutions to the region's transportation problems, a geopolitical impracticality. See *id.*; see also *infra* Part II.C.3.c (discussing and analyzing the advantages of a "southern route" MER through Iranian territory).

Russia's territory offers the longest-used oil and gas transportation infrastructure system in the region, although neglect and hard economic times have rendered many of the lines obsolete and technologically deficient.<sup>256</sup> Kazakhstan and Turkmenistan are more dependent on Russian transportation than Azerbaijan because of their isolated location on the eastern coast of the Caspian.<sup>257</sup> Though Russia has made some gains in convincing both states to use the northern corridor through its territory to transport their oil and gas to Western markets, both countries have placed export diversification on the top of their agendas.<sup>258</sup>

One of the paradoxes of the Soviet era was the fact that Kazakhstan, although extremely rich in hydrocarbon resources, was considerably dependent on oil and gas imports from Russia and other NIS.<sup>259</sup> In addition almost half of the country's oil refineries were dependent on Russia's supply of raw oil for refining.<sup>260</sup> As a result of the economic crisis that plagued Russia and the NIS after the collapse of the Soviet Union, however, oil and gas imports to Kazakhstan were disrupted and there was a sharp decline in the Kazakh refineries' oil production.<sup>261</sup>

With the discovery of huge oil and gas reserves situated on Kazakhstan's Caspian shores Astana justifiably saw an opportunity not only to free itself of Russian imports for domestic consumption, but also to become a viable competitor to Russian oil exports.<sup>262</sup> In order to decrease its dependency on Russian imports, however, Kazakhstan must not only find sustainable pipeline routes that link its western oil and gas fields to the open seas, but it must also build pipelines to handle a massive transfer of oil from its western shores to its eastern inlands for domestic consumption.<sup>263</sup>

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256. For an informative synopsis of the problems associated with the CIS' dependence on aging Soviet pipeline networks, see *C.I.S. Struggles to Solve Problems in Pipeline System*, OIL & GAS J. 29, May 3, 1993, 1993 WL 2987103 (volume unavailable online). More than 98 percent of CIS crude oil moves by pipeline. *Id.* The total length of crude oil and products pipelines in the CIS is 56,000 miles. *Id.* The CIS gas supply network involves 200 gas and condensate fields and 140,000 miles of main gas pipelines. *Id.*

257. *See generally id.*

258. *See id.*

259. Babak, *supra* note 109, at 184-85.

260. *Id.* at 185.

261. *Id.*

262. *Id.* (explaining that the huge discovery of oil and gas reserves in Kazakhstan, together with the possibility of Kazakhstan becoming a major competitor to Russia as an exporter of oil in the next ten to twenty years, has created a very complicated relationship resulting in elements of mutual competition and cooperation between the two).

263. *Id.*; *see also infra* notes 341-54 (highlighting Azerbaijan and Kazakhstan's needs for an effective export diversification agenda).

A survey of Turkmen dependence on Russian export routes also brings the need for an export diversification agenda to light.<sup>264</sup> During the Soviet era Turkmenistan depended heavily on Moscow to transport its gas through the Russian pipeline system.<sup>265</sup> Russia, however, consistently engaged in the practice of re-routing Turkmen gas to poorer Eastern European republics such as the Ukraine in an attempt to gain a market advantage for its own gas, which it sent off to more lucrative markets in Western Europe.<sup>266</sup> As a result Turkmenistan faced diminishing economic returns on its gas forcing it to stop export to the Ukraine when the latter defaulted on payments.<sup>267</sup> The feud has been ongoing, with Gazprom,<sup>268</sup> the Russian conglomerate that controls the network system, threatening to cut-off Turkmen supplies when it wants to force concessions out of Ashqabad.<sup>269</sup> Kazakhstan has experienced similar problems with Transneft,<sup>270</sup> the state-managed corporation who masterminds oil pipeline distribution throughout the Federation.<sup>271</sup>

For Azerbaijan the establishment and success of an independent oil and gas industry serves a different purpose than it does for Kazakhstan and Turkmenistan. As mentioned previously, even after the decline of oil and gas production off Baku Azerbaijan managed to maintain a somewhat independent and unique role in the region's

264. *C.I.S. Struggles to Solve Problems in Pipeline System*, *supra* note 256. Gas transportation in the FSU is controlled by Gazprom, successor to the Soviet Ministry of Gas. *Id.* Gazprom is a semi-independent state-run corporation made up of twenty-two regional pipeline operators in Russia and the republics. It reports its activities to the Russian Ministry of Fuel and Energy. *Id.* Gazprom has controlled the other end of Turkmenistan's biggest gas pipeline to eastern Europe for decades. Jennifer DeLay, *The Caspian Pipeline Tangle: A Steel Web of Confusion*, in *OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION*, *supra* note 23, at 69.

265. *See C.I.S. Struggles to Solve Problems in Pipeline System*, *supra* note 256.

266. DeLay, *supra* note 264, at 74. Ashqabad is extremely dissatisfied with Moscow's refusal to ship Turkmen gas beyond the CIS borders because its members are often unable to pay for the imported gas. *Id.* at 69. In the spring of 1997 Gazprom retaliated against Ashqabad's demands by putting a total freeze on shipments of Turkmen gas. *Id.* The freeze severely hampered the Turkmen economy, especially because it coincided with a disastrous cotton harvest. *Id.*; *see also infra* note 269 (explaining that cotton is one of Turkmenistan's major exports).

267. Sharon Behn, *Pipeline Under the Caspian to Transport Turkmen Gas is Continuing to Gain Favor*, 75 *PLATT'S OILGRAM NEWS* 225, Nov. 19, 1997, 1997 WL 8881891.

268. *See supra* note 264 and accompanying text.

269. *C.I.S. Struggles to Solve Problems In Pipeline System*, *supra* note 256. Seventy percent of Turkmenistan's economy is gas and cotton. *Id.* The Russian squeeze on Turkmen gas exports caused a thirty percent drop in the country's GDP from 1993-95. *Id.*; *see also supra* note 266 and accompanying text.

270. Oil transportation in the FSU and CIS is controlled by Transneft, which also reports to the Russian Ministry of Fuel and Energy. *C.I.S. Struggles to Solve Problems In Pipeline System*, *supra* note 256. Transneft is made up of seventeen regional pipeline operators in Russia and the republics. *Id.*

271. *Id.*



energy needs.<sup>272</sup> As a result Azerbaijan was not dependent on Russian and other NIS imports to meet domestic consumption demands during the Soviet era.<sup>273</sup> Instead, the collapse of the Soviet structure meant that Baku could finally take control of the management, production, and distribution of its own hydrocarbon basins.<sup>274</sup> Most importantly it meant that Baku could now exercise full control over the allocation of revenue generated from these exports.<sup>275</sup>

Like its Kazakh and Turkmen counterparts Azerbaijan is also a land-locked NIS with no access to the open seas.<sup>276</sup> Unlike the former two, however, Azerbaijan's geographic position on the Caspian's western shores allows it the more feasible option of bypassing Russian [and Iranian] territory altogether.<sup>277</sup>

### 3. The Iran Factor: The Iran-Libya Sanctions Act Within a Caspian Context

Recent elections in Iran have slowly changed simplistic attitudes towards Iran as an autocratic and incapable member of the international community of nations.<sup>278</sup> In fact today's Iran is arguably the most stable nation in the Caspian region.<sup>279</sup> Although the Islamic Revolution of 1979, the ensuing eight-year war with neighboring Iraq, and international isolation have done much to disrupt the economic stability of Iran the country has managed to keep its head above water both politically and economically.<sup>280</sup> All this would suggest that the NIS, despite potential and existing political differences of outlook with their southern neighbor, have

272. See *supra* Part II.B.1.a.

273. See *id.*

274. For a history of Russian and Soviet control over Azerbaijan's hydrocarbon resources and industry, see Gokay, *supra* note 148, at 6-16. For a comprehensive outline of the current developments in Azeri oil exploitation and management, see CROISSANT, *supra* note 148, at 23-33.

275. Croissant & Croissant, *supra* note 23, at 30.

276. See ATLAS OF THE WORLD, *supra* note 6 and accompanying text.

277. See *id.*; see also generally *infra* Part II.C.3.

278. John Fulmer, *World Has Eyes on Iranian Elections*, N.Y. TIMES, Feb. 3, 2000, at A8.

279. The Caucasus are arguably the most unstable region in the Caspian area. See Bhamy V. Shenoy, S. Gurcam Gulen, & Michelle M. Foss, *Caspian Oil Export Choices Clouded by Geopolitics, Project Economics*, OIL & GAS J., Apr. 19 1999, 1999 WL 9723464 (volume and number unavailable online). Russia and Chechnya continue to have problems, the Azerbaijani-Armenian conflict may have been temporarily resolved but tensions run high, and Georgia has ongoing problems with secessionist movements in its Abkhazia and South Ossetia regions. *Id.*

280. The country has managed to survive primarily because of European and Asian dependence on its oil and gas exports, which account for more than eighty percent of its hard currency. See UNITED STATES ENERGY INFORMATION ADMINISTRATION, CASPIAN SEA REGION, *supra* note 41.

much to gain from a strategic partnership with Iran's NIOC and National Iranian Gas Company (NIGC).<sup>281</sup> More importantly the partnership could address the two major concerns of the NIS: distribution of their oil and gas to world markets and freedom from Russian monopoly. There are, however, several political and legal hurdles that must be overcome before such an association is realized.

In 1996 President Clinton signed the Iran-Libya Sanctions Act (ILSA) into law.<sup>282</sup> In many ways the ILSA is the centerpiece of American foreign policy against post-revolutionary Iran.<sup>283</sup> The bill, sponsored by former Senator Alfonse D'Amato of New York, seeks to isolate Tehran by imposing stringent sanctions on any company, domestic or foreign, that invests at least \$20 million in Iran's oil and gas sector.<sup>284</sup> The law received a cold reception from U.S. giants such as Amoco and Exxon and met adamant opposition from Europe and Japan who challenged the legality of the ILSA's extraterritorial

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281. For a discussion of the National Iranian Oil Company (NIOC) and the National Iranian Gas Company (NIGC) and their management of the country's oil and gas sector, see Ghorban, *infra* note 968; see also *infra* Part VI.B, for an analysis of the prospects for Iranian-NIS cooperation in the Caspian oil and gas market.

282. Iran-Libya Sanctions Act of 1996, Pub. L. No. 104-073. For an online review of the text of the Iran-Libya Sanctions Act, see U.S. DEPT OF STATE, U.S. POLICY TOWARDS IRAN: IRAN AND LIBYA SANCTIONS ACT OF 1996 (PL 104-073), <http://usinfo.state.gov/regional/nea/gulfsec/irnsanc.htm>. For an in-depth legal analysis of the Iran-Libya Sanctions Act, see generally Lucien J. Dhooze, *Meddling with the Mullahs: An Analysis of the Iran and Libya Sanctions Act of 1996*, 27 DENV. J. INT'L L. & POLY 1 (1998). The ILSA requires the President to impose at least two of the following six sanctions upon any company believed to have made a prohibited investment: 1) deny U.S. Export-Import Bank assistance for exports to the sanctioned company; 2) deny specific licenses or other specific permission for the export of controlled goods or technology to the sanctioned company; 3) prohibit U.S. financial institutions from making loans or providing credits to any sanctioned company totaling more than \$10 million in any 12-month period; 4) prohibit any sanctioned company that is a financial institution from being designated as a primary dealer in U.S. government debt instruments or from serving as a repository for U.S. government funds; 5) prohibit U.S. government procurement from the sanctioned company; and 6) restrict imports into the United States with respect to the sanctioned person, in accordance with the International Emergency Economic Powers Act. Fred Reinke & Mark Kantor, Esqs., *Iran and Libya Sanctions Act: Response to Iranian Gas Deal May Affect Future Investments*, MIDDLE EAST EXEC. REP., Sept. 1997, 20 No. MEEEXREP 9. The Act allows for the possibility of a waiver if the President determines that it is important to the national interest. *Id.* Within thirty days of making such a determination the President must submit a report to Congress that provides a detailed rationale for the determination, including: 1) a description of the conduct giving rise to the sanctions; 2) an explanation of U.S. efforts to secure the cooperation of those governments with jurisdictions over the company subject to sanctions to terminate its activity or impose penalties; 3) an estimate of the significance of the sanctionable activity to the development of the Iranian or Libyan petroleum industries; and 4) a statement as to the response of the U.S. government if the sanctioned company continues to violate the law. *Id.*

283. Dhooze, *supra* note 282, at 2.

284. *Id.* at 33.

application as a violation of GATT rules.<sup>285</sup> While the legality of the ILSA's extraterritoriality has been the subject of much legal and scholarly debate, its debilitating effect particularly on U.S. oil and gas involvement with Iran is evident.<sup>286</sup> The law has no doubt been more successful in thwarting U.S. firms from directly dealing with the NIOC than it has in restricting the mobility of foreign firms, a reality that is readily pointed to by U.S. companies losing a competitive advantage to their European and Asian counterparts.<sup>287</sup>

The impetus for the sanctions occurred in 1995 when Iran attempted to revitalize its oil and gas sector by relaxing legal impediments to direct foreign investment.<sup>288</sup> The policy reforms convinced Conoco to help the NIOC develop the rich South Pars gas field in the Persian Gulf.<sup>289</sup> In the wake of Conoco's announcement American politicians began a campaign spearheaded by Senator D'Amato to prevent Conoco's involvement in the project.<sup>290</sup> The move convinced President Clinton to issue Executive Order 12957 prohibiting U.S. involvement with petroleum development in Iran.<sup>291</sup> Several weeks later Conoco pulled out of the deal and Dutch Shell moved in.<sup>292</sup> Subsequent to these developments the ILSA was signed into law and Executive Order 12959 signaled the official implementation of Congressional will against Tehran.<sup>293</sup>

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285. *Id.* at 5; see also Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 279 (1998); Stuart Parrot, *Iran: Why it Holds the Potential to Divide the West*, RADIO FREE EUROPE-RADIO LIBERTY, Nov. 10, 1997, at <http://www.rferl.org/nca/features/1997/11/F.RU.9711110121845.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

286. Manouchehr Takin, *Effects of U.S. Sanctions on Iranian and Caspian Petroleum Industries: Can the World Do Without Iran, Iraq, Libya?* MIDDLE EAST EXEC. REP., Dec. 1997, 20 No. 12 MEEEXREP 19 (analyzing U.S. firms' reactions to the administration's threat of sanctions against Conoco).

287. For a general overview of Iran's success at courting foreign investment in its oil and gas sector after the imposition of the ILSA, see *Iran's bid to Lure Oil Investment Succeeding Despite U.S. Sanctions*, OIL & GAS J., Apr. 5, 1999, 1999 WL 9723378 (volume and number unavailable online); see also Patrick Crow, *U.S. Petroleum Firms Hit Hard by Washington's Unilateral Sanctions*, 95 OIL & GAS J. 18, May 5, 1997, 1997 WL 9574572.

288. See *infra* notes 970-74 and accompanying text (discussing Iran's use of the "buyback system" designed to increase foreign direct investment in the country's oil and gas sector while abiding by the Islamic Republic's constitutional restrictions prohibiting foreign control of the sector).

289. See *id.*

290. Raj Bhala, *Fighting Bad Guys with International Law*, 31 U.C. DAVIS L. REV. 1, 13 (1997); see also *supra* note 178 and accompanying text.

291. Bhala, *supra* note 290, at 13.

292. Meek, *supra* note 180, at 10. Total later moved in and overtook the development of the Sirri oil field in 1995 under a seventy-thirty partnership agreement with Indonesia's Petronas. *Total's Iran Deal Sparks Row with U.S.*, *supra* note 209.

293. *Total's Iran Deal Sparks Row with U.S.*, *supra* note 209.

The next significant step came in 1997 when a consortium headed by France's Total reached an agreement with the NIOC to develop the Sirri fields in the Persian Gulf.<sup>294</sup> The move represented international snubbing of the United States' extraterritorial application of unilateral sanctions, a feature of the ILSA that the European Union particularly despised.<sup>295</sup> It also placed the State and Treasury Departments in a difficult position: a waiver in the face of the first real test case for sanctions would convince the world that the ILSA lacked legitimacy and that its threats were hollow.<sup>296</sup> Imposition of sanctions, however, would severely antagonize the EU and set the United States on a political and economic collision course with free trade interests.<sup>297</sup> Finally after months of diplomacy, allegations, and speculation, Secretary of State Madelaine Albright announced the administration's decision to waive sanctions against Total in the interests of national policy and international cooperation.<sup>298</sup>

There are increasing signs that the Total waiver has severely weakened the United States' credibility with regard to implementation of sanctions.<sup>299</sup> Other international companies such as British Petroleum-Amoco have followed Total's example and signed multi-million dollar deals to further develop Iran's other oil and gas fields in the Persian Gulf.<sup>300</sup> Even American firms have sought permits from the Treasury Department to facilitate Iranian oil deals within the Caspian context.<sup>301</sup> The Clinton Administration already sent several signals that it interpreted the ILSA so as to allow such deals as long as American companies did not directly deal within Iranian territory.<sup>302</sup> Other nations, namely the NIS and

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294. *Id.* The consortium included Total which held a forty percent stake, Russia's state-owned Gazprom which owned a thirty percent stake, and Indonesia's state-owned Petronas which owned a thirty percent stake. *Id.* The consortium signed a "buyback" contract with the NIOC covering Phase two and three of the development of the South Pars offshore gas field. *Id.*

295. *Id.* The French government denounced the U.S. stance and the EU quickly followed suit arguing that sanctions against Total were "illegal and unacceptable." *Id.* EU representatives also opposed the ILSA because they claimed that its extraterritorial effects violated international law. *Id.*; see also *U.S. Waives Sanctions on South Pars Field*, *supra* note 225.

296. See *U.S. Waives Sanctions on South Pars Field*, *supra* note 225

297. *Id.*

298. *Id.*

299. See *id.*

300. See *id.*

301. Karey, *supra* note 225. Though U.S. companies cannot invest in Iran as a result of the ILSA and various Executive Orders there is an exemption for companies seeking to swap Iranian crude oil for Caspian product if the deal is approved by the Treasury Department. *Id.* Mobil, for example, has already requested approval for a proposed. See *infra* note 305 and accompanying text. Its request was denied. *Id.*

302. Karey, *supra* note 225.

Turkey, have also ignored the threat of sanctions by signing notable oil, gas, and pipeline deals with the NIOC.<sup>303</sup>

So far the ILSA has also directly impacted Iranian involvement in Caspian oil and gas development, and its ramifications may be far-reaching.<sup>304</sup> For example, a recent request by Mobil to swap Turkmen gas *via* Iran was rejected from the Treasury Department's Office of Foreign Asset Control.<sup>305</sup> Also, in October 1997 the United States questioned statements made by Turkmenistan about a proposal to export gas to Turkey *via* a pipeline running across northern Iran.<sup>306</sup> The proposed agreement was said to be worth \$1.6 billion and would run 3,200 km.<sup>307</sup> In November 1997 U.S. Undersecretary of State Stuart Eizenstat noted that the Turkey deal to import gas from Turkmenistan through Iran would not violate the ILSA but rejected the notion that pipelines running through Iran were acceptable to the U.S. Administration.<sup>308</sup> The project was Iran's biggest international energy project since the 1979 revolution, and would run on the eastern side of the Caspian Sea.<sup>309</sup>

The Caspian region's new economic and strategic importance call for more hands-on involvement by U.S. firms seeking to enter into joint-ventures for lucrative pipeline and drilling projects with the littoral states.<sup>310</sup> In this sense the Caspian oil and gas boom and the new era of worldwide energy development it has ushered in has perhaps, more than any other recent geoeconomic phenomenon, called into question the viability of U.S. trade policy vis-à-vis Iran. The long-term resolution of this issue is more important than its

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303. For example, Turkey signed a thirty-five year agreement to buy gas from Iran. See Lelyveld, *supra* note 245; see also *supra* notes 245-46 and accompanying text. But see *infra* Part II.C.3.c (explaining that [both Iran and] the NIS primarily look at oil swaps instead of massive pipeline projects through Iranian territory in order to solve the region's short term transportation problems).

304. Manouchehr Takin, *U.S. Sanctions Against Oil Giants at Odds With its Caspian Policy*, 95 OIL & GAS J. 41, Oct. 13, 1997, 1997 WL 9575869; see also John H. Lichtblau, *U.S. Caspian Area Foreign Policy in Conflict With Resource Plans*, 95 OIL & GAS J. 31, Aug. 11, 1997, 1997 WL 9575650. The articles argue that U.S. sanctions on Iran will not only prevent full U.S. involvement in the Caspian Sea oil and gas trade but they will also affect the overall development and pace of economic reform in the region. *Id.* Indeed, many American oil executives strongly believe that the best export route for Caspian oil is Iran. Stephen Kinzer, *Oil Wealth of the Caspian Fuels a New 'Great Game,'* PITT. POST-GAZETTE, Feb. 1, 1999, at A1; see also *infra* Part II.C.3.c (analyzing the negative impacts of U.S. sanctions policy on the NIS and Turkey, both of whom refuse to wholly ignore Washington's warnings regarding investment in Iran's oil and gas sector); *infra* note 357 and accompanying text.

305. Patrick Crow, *Diplomatic Dancing*, OIL & GAS J., May 10, 1999, 1999 WL 9723792 (volume and number unavailable online).

306. See *supra* note 211 and accompanying text.

307. See *supra* note 212 and accompanying text.

308. See *supra* note 213 and accompanying text.

309. See *supra* note 214 and accompanying text.

310. See generally *infra* Part II.C.

immediate legal effects would suggest. For Iran success of its legal arguments regarding division of the Caspian's resources could restore its regional integrity and economic viability not only in the transport sector but eventually in the mining and exploration sector. These successes could present it with an opportunity to seriously undermine the viability of the ILSA and other economic sanctions leveled against it by the United States. As will be seen later, however, Tehran has yet to effectively incorporate legal strategies regarding Caspian legal issues in order to seriously challenge the validity and soundness of the ILSA.

C. *Pipeline Diplomacy: The Real Battle for Main Export Routes (MERs)*

1. Pipelines: The Interplay of Geopolitics and Geoeconomics

Oil producers in the Caspian had no need to worry about pipeline routes as long as Soviet central planning survived.<sup>311</sup> What pipeline investments and construction did exist during the Soviet era focused on Siberia—the whole pipeline network of the USSR was designed to channel Siberian oil westward to the big refineries and industrial centers of Western Russia and onward toward hard currency markets in Europe.<sup>312</sup> Most of the oil and gas from Azerbaijan, Kazakhstan, and Turkmenistan was transported along limited distances, refined, and used for consumption within the USSR.<sup>313</sup>

At the outset of independence the condition, capacity, and configuration of the existing Russian-controlled pipelines out of the region were inadequate for the significant increase in oil volumes being generated by the NIS after independence.<sup>314</sup> The urgent need to alleviate some of the financial and economic pressures confronting the NIS, however, forced them to entertain the possibility of using existing Russian pipelines linking the NIS to the Black and Baltic Seas.<sup>315</sup> Moscow has taken full advantage of its regional hegemony and competitive advantage in pipeline capacity and has further used

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311. Delay, *supra* note 264, at 43.

312. *Id.*

313. *Id.*

314. Forsythe, *supra* note 23, at 44.

315. See *infra* Parts II.C.2.a, II.C.3 (outlining the Russian geopolitical and geoeconomic advantages over the NIS and Moscow's successful strategy to ensure that the NIS continue to rely on Russian export routes).

its leverage to force the NIS to expand existing pipelines and upgrade them to MER status.<sup>316</sup>

For the NIS it is painfully clear that sustainable economic success ultimately requires the construction of new MERs that would link them to the most lucrative world energy markets.<sup>317</sup> More importantly, the NIS and Western powers quickly realized that a monopoly of transit rights by any one country over these MERs would allow it enormous political and economic leverage.<sup>318</sup> The political consequences of such a monopoly include the option of cutting off or rerouting pipelines in order to force concessions out of the vulnerable NIS; the economic consequences mean that the NIS and oil corporations would be forced to pay exorbitant tariffs to the transit country.<sup>319</sup> Export diversification is the only solution to this monopoly problem.<sup>320</sup>

Within this context the NIS pipeline strategy thus required the following three-step process: 1) dependence on existing Russian and perhaps Iranian pipeline networks and other means of traditional and innovative transport (including tanker shipments and oil swaps) to meet the NIS' immediate export demands;<sup>321</sup> 2) expansion, modification, and construction of "early oil" pipelines linking the NIS to the open seas and allowing the throughput of medium volumes of oil and gas;<sup>322</sup> and 3) construction of MERs establishing permanent export routes to strategic markets, including Europe (*via* the Black or the Mediterranean seas), South Asia (*via* the Persian Gulf and the Arabian Sea or pipelines to Pakistan and India), and East Asia (*via* MERs linking Central Asia to China).<sup>323</sup>

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316. See *id.*; see, e.g., *infra* notes 324-40, 385-405 (discussing Moscow's pressure tactics on the NIS in order to force them to accept "early oil" and MER lines through Russian territory).

317. DeLay, *supra* note 264, at 75. Pipelines have become a "necessary evil" for the NIS because existing export pipe, rail, and barge routes are overtaxed, inconvenient, and unreliable. *Id.* MERs appear to be the only economical means of transferring Caspian crude to export markets. *Id.*

318. Forsythe, *supra* note 23, at 44.

319. DeLay, *supra* note 264, at 75-76.

320. See Forsythe, *supra* note 23, at 44.

321. See *infra* Part II.C.2, *infra* Part II.C.3.a (discussing the NIS' reliance on "early oil" export options [involving Russia and Iran] such as small to medium-volume pipelines, oil swaps, and use of MERs primarily through Russian territory).

322. See *infra* Part II.C.2.a.

323. See *infra* Part II.C.3.

## 2. "Early Oil" Export Options

### a. Small to Medium-Volume Pipelines

Both Azerbaijan and Kazakhstan are looking forward to the completion of long-term export plans which include multi-billion dollar projects.<sup>324</sup> The most advanced of these MER projects is the \$20 billion TengizChevroil joint venture, which is presently exporting 40,000 to 65,000 barrels per day (bpd) through the Russian pipeline system.<sup>325</sup> Although the project is capable of exporting over 90,000 bpd, Moscow has limited the amount allotted for reasons of political and commercial leverage.<sup>326</sup> Thus the project is looking for short term routes to absorb its present excess production of 30,000 to 50,000 bpd.<sup>327</sup>

According to the terms of the AIOC agreement which came into force on December 12, 1994, the companies have agreed to export "early oil" starting at about 40,000 bpd and projected to increase to 80,000 to 100,000 bpd in two years.<sup>328</sup> From the beginning the AIOC set its eyes on the construction of an "early oil" route that would bypass Russian territory and pass through Georgia to the Black Sea port of Supsa.<sup>329</sup> The AIOC had always been wary about sending oil through Russia.<sup>330</sup> Most members of the consortium were fully aware of Baku's reluctance to let Moscow play a key role in oil transport.<sup>331</sup> It seemed, however, that Azerbaijan had few options available to it at the time.<sup>332</sup> With a Russian pipeline connecting Baku to the Black Sea port of Novorossiysk already in place Moscow began to pressure Azerbaijan and the AIOC to use this "northern route" for its "early oil" exports.<sup>333</sup> On October 9, 1995, the AIOC officially decided to support a two-pipeline system for transport of its "early oil."<sup>334</sup> The Baku-Novorossiysk route, however, ran through some 153 kilometers of Chechen territory.<sup>335</sup> With the north Caucasus republic embroiled in

324. Forsythe, *supra* note 23, at 44.

325. *Id.*; see also *supra* note 167 (outlining the specifications of the TengizChevroil project).

326. *Id.*

327. *Id.*

328. *Id.*

329. See DeLay, *supra* note 264, at 47.

330. *Id.* at 49.

331. *Id.*; see also *supra* Part II.B.2 (analyzing Azerbaijan's reliance on Russian pipeline systems and the need for export diversification).

332. *Id.* Other than the Baku-Novorossiysk pipeline, no other complete trunks existed. *Id.*

333. *Id.*

334. See *supra* notes 193-95 and accompanying text.

335. DeLay, *supra* note 264, at 49.



a brutal war of secession against Moscow, the Baku-Novorossiysk pipeline sustained continuous damage from both sides.<sup>336</sup> On August 31, 1996, Moscow admitted that the pipeline had sustained too much damage and suspended all operations pending further negotiations with the Chechen authorities.<sup>337</sup>

In August 1997, Transneft, Russia's state-run oil pipeline operator, signed a series of transport agreements with Grozny covering repair of the punctured sections of the pipeline, the safety of repair workers, and the security of oil transports.<sup>338</sup> After months of negotiations and squabbling the pipeline was patched up on schedule—before the start of commercial production from the Chirag site on November 8, 1997.<sup>339</sup> Continuing delays and problems with the Chechens over transit fees plagued the line until mid-1998 when oil flows stabilized and Azerbaijan finally established its first oil export link to world energy markets.<sup>340</sup>

The Baku-Supsa "early oil" project that Azeri officials had looked to with such admiration also experienced numerous geopolitical, financial, and logistical problems.<sup>341</sup> The logistical problems were obvious: unlike the Baku-Novorossiysk line, the Supsa line had not yet been built.<sup>342</sup> The project required the construction of 985 kilometers of pipeline from Baku to Supsa, building and rebuilding of all the pumping stations needed along the route, and the construction of a high capacity oil export terminal at Supsa.<sup>343</sup> The geopolitical problems were highlighted by the fact that the pipeline was to pass through four areas of ethnic tension in the unstable Caucasus.<sup>344</sup> Finally, in March 1998, AIOC officials admitted that the line could not possibly be finished on time and that the project required an

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336. *Id.* at 49-50. Both sides dealt heavy blows to the Chechen oil sector during the war of secession. *Id.* at 49. The oil-refining facilities in Grozny were repeatedly set on fire, guerrillas blew up a number of pipelines, and numerous holes were punched throughout the line in order to steal the oil. *Id.*

337. *Id.*

338. *Id.* at 50.

339. *Id.*

340. *Id.* at 50-51. *But see* DeLay, *supra* note 264, at 73 (explaining that the Baku-Novorossiysk "early oil" route is currently virtually inoperative).

341. *Id.* at 51-54.

342. *Id.* at 52.

343. *Id.* at 52-53.

344. *Id.* at 52. In Azerbaijan the pipeline passes close to the *de facto* border of Nagorno-Karabakh. *Id.*; *see also supra* note 102 and accompanying text (discussing the Nagorno-Karabakh dispute). In Georgia it passes near the frontier of South Ossetia and then passes near the *de facto* border between Georgia and the breakaway region of Abkhazia. DeLay, *supra* note 264, at 52; *see also supra* note 279 (discussing the Georgia-South Ossetia-Abkhazia disputes). Finally, the pipeline terminates within the boundaries of Ajaria, an autonomous republic within Georgia which has reached a tense diplomatic standoff with Tbsili. DeLay, *supra* note 264, at 52.

additional \$275 million.<sup>345</sup> Since then, however, the line has been carrying approximately 115,000 bpd and its success has prompted some AIOC managers to view the pipeline as the primary "early oil" export conduit.<sup>346</sup>

For Kazakh officials export diversification was not always at the top of their agenda.<sup>347</sup> With the signing of the initial CPC documents in 1993 many Kazakh officials believed that one MER would satisfy the country's export needs.<sup>348</sup> This attitude, however, quickly changed.<sup>349</sup> In April 1998 Minister of Energy, Industry, and Trade Murat Murtazayev was quoted as saying that no less than six possible MERs were under consideration, despite certain political and logistical constraints.<sup>350</sup> In the meantime, however, Astana needed to rely on an "early oil" pipeline that would carry existing volumes of oil produced off its western Caspian shores.<sup>351</sup> Like Baku, Astana had to rely on Russia: the only functioning export pipeline ran from Atyrau on the Caspian Sea across the Russian border to Orsk in the southern Urals and onto the hub of Samara on the Volga River.<sup>352</sup> And like Baku, Astana experienced the same delay tactics employed by Transneft with the Supsa line.<sup>353</sup> These problems included delays, renegeing on transport negotiation promises, limiting the flow of Kazakh oil, and forcing unreasonable concessions out of Astana.<sup>354</sup>

Both Azerbaijan and Kazakhstan have at one time or another seriously considered "early oil" pipeline arrangements with Iran.<sup>355</sup> The construction of such pipelines, it was thought, would eventually lead to the construction of MERs to the Persian Gulf if political and economic conditions with Tehran improved.<sup>356</sup> Given the legal

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345. DeLay, *supra* note 264, at 53.

346. *Id.* at 73.

347. *Id.* at 58

348. *Id.*

349. *Id.*

350. *Id.* The Minister identified six pipeline routes being seriously considered by Astana: 1) the Atyrau-Samara pipeline, 2) the Tengiz-Novorossiysk CPC pipeline to the Black Sea, 3) the Transcaspian pipeline, 4) the China pipeline, 5) the Iran pipeline, and 6) the Trans-Central-Asia pipeline through Afghanistan. *Id.* For in-depth analysis of several of these pipeline routes, see *infra* Part II.C.3.

351. Forsythe, *supra* note 23, at 44.

352. DeLay, *supra* note 264, at 58-59. See *id.* at 58-60, for a complete analysis of the Atyrau-Orsk-Samara pipeline and the reasons why it failed to satisfy Astana's export ambitions.

353. See *id.*

354. *Id.* To date the Atyrau-Orsk-Samara line has carried only a fraction of Kazakhstan's current production capacity. *Id.* For example, Transneft has been extremely stingy with granting TengizChevroil quota shipments through the line. *Id.* When it has granted such quotas, it has severely restricted the flow of consortium oil to a pitiful one million metric tons. *Id.*

355. Forsythe, *supra* note 23, at 46.

356. *Id.*

impediments imposed by the Washington *via* the ILSA, however, Baku and Astana have decided not to rile up U.S. officials and have begrudgingly held off on any formal negotiations with Tehran over MER construction.<sup>357</sup>

## b. Oil Swaps

For the NIS the oil swap option presents a more simple and innovative way of exporting oil and gas to world energy markets because it does not encounter the same political, economic, and logistical problems associated with the construction of pipelines.<sup>358</sup> For the same reasons the oil swap model allows countries with well-established oil and gas sectors, like Iran, to simultaneously participate in the Caspian energy game and also offer practical solutions to the NIS' transportation problems.<sup>359</sup>

The oil swap plan works as follows: the NIS deliver their oil to Iran's Caspian shores.<sup>360</sup> This could be done either *via* the construction of short and cheap pipeline networks or through shipping across Caspian waters.<sup>361</sup> There a transfer of title between the NIS and Iran allows the former to sell its oil to Iran.<sup>362</sup> Existing and planned pipelines within the Iranian territory then pump the Caspian crude to northern refineries situated in Tabriz and Tehran, allowing for the ultimate distribution of refined oil to urban and industrial centers in the region; an equal amount of Iranian crude oil is then exported out of the country's Persian Gulf terminals.<sup>363</sup>

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357. See generally DeLay, *supra* note 264, at 57 (discussing Baku's reluctance to view Iran as a major transportation partner); *id.* at 64-66 (discussing Astana's reluctance to do the same).

358. See *infra* notes 360-63 and accompanying text, for a description of the oil swap model; see also *supra* notes 318-19, for an explanation of the political and economic disadvantages of pipelines regimes.

359. See *infra* notes 364-74 (analyzing Iran's role as a transporter of NIS oil and gas through the oil swap model).

360. For example, Tehran has courted Kazakhstan with a plan to ship up to two million tons of oil to northern Iran annually in exchange for the same amount of Iranian oil to be collected at ports in the Persian Gulf. *Iran's Foreign Minister Calls for Caspian Convention*, *supra* note 231. Implementation of the plan requires Iran to build a pipeline with a capacity of 350,000 bpd linking its Caspian port of Neka with the Persian Gulf. *Id.*

361. See *id.*

362. See *id.*

363. *Id.* The flow of existing pipelines that currently carry Persian Gulf oil to northern Iranian refineries can be reversed with minor alterations. *Id.* There have been delays and difficulties with the program because Caspian crude oil is chemically different and represents some problems for Iranian refineries in northern Iran. *Id.* In this way, the swap mechanism ultimately works by importing Caspian oil for local use in Iran's northern refineries while an equal amount of Iranian crude is exported in the south through Persian Gulf terminals. *Id.*

In this way an oil swap program would substantially reduce reliance on a pipeline transport system because it does not require bilateral or multilateral cooperation between several states regarding management of a pipeline regime.<sup>364</sup> Instead the NIS gain instant market access and force the burden of transportation and profit-bearing to shift to Iran.<sup>365</sup>

The advantages of the oil swap model represent one of many solutions to the transport of early NIS oil to world markets where Iran may play a significant planning role.<sup>366</sup> Already, several of the NIS have seriously entertained the option and are using Iran's infrastructure to implement "early oil" swaps.<sup>367</sup> There are, however, political and diplomatic barriers that must be overcome. First, there are the external restraints: although Washington has displayed an uneasy acquiescence to such plans because they are technically beyond the scope of the ILSA, its hardball stance against any Iranian solutions to Caspian energy issues continues to stall NIS attempts to jump into such arrangements.<sup>368</sup> Also, the pipeline craze is still very much a part of Caspian diplomacy.<sup>369</sup> The United States and Turkey have downplayed the importance of oil swaps, Russia has scarcely referred to it in its Caspian energy policies, and the NIS have not adequately evaluated its advantages.<sup>370</sup>

Second, the main barrier to use of the oil swap option is Iran itself.<sup>371</sup> Tehran has not fully taken advantage of this option because it has been lured by the promise of bigger and better opportunities in the Caspian oil market.<sup>372</sup> Though the construction of the Neka-Rey pipeline transporting NIS crude from its Caspian shores to refineries in Tehran has begun implementation has taken much longer than

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364. See, e.g., Rob Sobhani, *The Role of Iran in Early Caspian Oil*, CASPIAN ENERGY ISSUES, Winter 1996, at 13; see also generally Sergei Vinogradov, *Cross-Border Pipelines in International Law*, 14 NAT. RESOURCES & ENV'T 75 (1999), for an overview of international legal regimes dealing with pipelines and energy transport.

365. See Sobhani, *supra* note 364, at 14.

366. Iran may use the oil swap model as a springboard to strengthen its potential as an MER for Caspian oil and gas. See generally *infra* Part VI (outlining Iran's regional energy goals and advancing policy recommendations that will satisfy these goals).

367. *Id.*

368. Meek, *supra* note 180, at 10.

369. See, e.g., DeLay, *supra* note 264, at 41-81 (outlining the ins and outs of the Caspian "pipeline tangle").

370. See *supra* Parts II.C.2.a-b.

371. Narsi Ghorban, *Neka-Rey Pipeline: Boosting Economic Integration of Caspian States*, 21 IRAN TODAY 211 (Iran), May-June 1998, at <http://www.netiran.com/Htdocs/Clippings/Feconomy/980501XXFE01.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

372. *Id.*

expected.<sup>373</sup> This delay may be a reflection of hard economic times and government inefficiency, but it also represents a larger problem plaguing Iranian authorities regarding the country's proper role in the Caspian energy market.<sup>374</sup>

At present Iran has focused on the first phase of the long term oil swap programs: the construction of a pipeline from Neka to Tehran and Tabriz in order to facilitate oil swaps with Kazakhstan and Turkmenistan.<sup>375</sup> The first phase will allow swapped oil from the Neka-Rey pipeline to reach Tehran and Tabriz oil refineries, where approximately 350,000 bpd of swapped petroleum will be processed.<sup>376</sup> In the second phase, arrangements to transfer a further 460,000 bpd of petroleum from the Caspian to Arak and Isfahan refineries will be made.<sup>377</sup> Finally, in phase three of the swap program the new and existing pipelines will be upgraded so that approximately 810,000 bpd may be transferred directly from Neka to southern terminals in the Persian Gulf.<sup>378</sup> Meanwhile, Iran has already participated in several oil swaps with Kazakhstan and Turkmenistan *via* tanker shipments.<sup>379</sup>

### 3. MERs and the Caspian Transportation Grid

There are now more than twenty proposed Caspian pipelines in competition, many of which are vying for the distinguished honor of ultimately serving as an MER to world energy markets in Europe and Asia.<sup>380</sup> The maze of existing and proposed pipeline networks falls within three major categories: the "northern route," the "western

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373. *Iran's Foreign Minister Calls for Caspian Convention*, *supra* note 231. Oil swaps with Kazakhstan have so far occurred *via* tanker shipment and railway access. *Id.* Turkmenistan is already supplying Iran with gas but plans are still underway to build a trans-Iranian pipeline linking Turkmenistan's gas to Turkey. Ben Patridge, *Central Asia: Iran Invites Funding for Major Caspian Oil Pipeline*, RADIO FREE EUROPE-RADIO LIBERTY, June 1, 1998, at <http://www.rferl.org/nca/features/1998/06/F.RU.980601133203.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

374. *Cadiot*, *supra* note 115.

375. *Entessar*, *supra* note 57, at 171.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* In May 1996 President Nazarbayev of Kazakhstan and President Rafsanjani of Iran signed an agreement calling for regular oil swap deals between the two countries. *Id.* at 172. In January 1997 Kazakhstan shipped 500,000 barrels of oil to northern Iran in exchange for an equal volume of Iranian oil shipped out of Persian Gulf terminals. *Id.* In the first full year of the agreement (1997) the two countries swapped more than 70,000 tons of oil. *Id.*

380. UNITED STATES ENERGY INFORMATION ADMINISTRATION, CASPIAN SEA REGION, *supra* note 41.

route," and the "southern route."<sup>381</sup> U.S. Caspian policy has strongly supported the "western route" through Turkey and into the Mediterranean, while "northern route" plans through Russia and to the Black Sea have been tolerated.<sup>382</sup> The "southern route" through Iran, however, was strongly discouraged by the Clinton Administration.<sup>383</sup> Given the dependence of the NIS and the overall potential of the region in meeting world energy needs it is understandable why Russia, Turkey, Iran, and the United States have placed pipeline diplomacy at the top of their regional and international agendas. In the absence of comprehensive legal arrangements and regimes dealing with transportation security guarantees regarding oil flow and price stabilization, control of the MERs means the power to absorb significant transit fees and more importantly, the potential to gain valuable geopolitical leverage by threatening the world's energy supply.<sup>384</sup>

a. Russia and the "Northern Route"

For its part Russia has taken the MER game very seriously.<sup>385</sup> Although U.S. officials continually downplay Russian concerns regarding the regional balance of power, political experts agree that Moscow continues to see the Caspian region as its backyard and U.S. involvement as a threat to its regional interests.<sup>386</sup> It is this tension that forced Russia to strike first in the pipeline competition, securing the first MER through its territory and onto the Black Sea terminal at Novorossiysk.<sup>387</sup> The TengizChevroil joint-venture and the CPC

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381. See, e.g., Entessar, *supra* note 57, at 172-75, for use of this terminology when referring to existing and proposed MERs in the Caspian region.

382. See, e.g., *id.* at 173 (discussing the strong U.S. support for the "western route").

383. The Clinton Administration's Special Advisor to the Caspian region, John Wolf, has continuously traveled to the NIS attempting to convince them to bypass any Iranian pipeline routes transporting their oil to world markets. Amelia Taron, *U.S. on Mission to Deter Iranian Routes*, OIL & GAS J., Oct. 31, 1997, at 1997 WL 8916325; see also Sonia Winter, *Central Asia/Caucuses: A Mission to Deter Iranian Connections*, RADIO FREE EUROPE-RADIO LIBERTY, Nov. 11, 1997, at <http://www.rferl.org/ncal/features/1997/11/F.RU.971111133334.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

384. See generally Vinogradov, *supra* note 364; see also Shenoy et al., *supra* note 279.

385. See *supra* Part II.C.2.a (analyzing Russia's insistence that an "early oil" route run from the NIS to the Black Sea port of Novorossiysk, setting up the foundation for the expansion of the line to an MER at a later date); see also *infra* note 404 and accompanying text (providing the heavy-handed remarks of several Russian officials regarding the importance of export routes running through Russian territory).

386. *Id.*; see also *supra* Part II.A.2.a (providing a general outline of Russia's geopolitical regional concerns); see also generally Becker, *supra* note 23.

387. See generally *supra* notes 168-70 (setting forth the details of the Russian involvement in the creation of the CPC).

that was created to transport Kazakh oil to world markets represents the first significant draw of blood in the pipeline frenzy.<sup>388</sup>

In April 2001 CPC construction finally ended and the region's first MER delivered Kazakh oil at the Novorossiysk terminal.<sup>389</sup> The journey, however, has been anything but easy, causing Astana to seriously consider other MER options *via* "western routes" (across the Caspian Sea), "southern routes" (*via* Iranian territory), and "eastern routes" (toward China).<sup>390</sup> Also, despite the relative success of the CPC as the first completed MER many of Astana's regional transportation concerns remain unaddressed. First, Kazakhstan realizes that its isolated geographic location renders it highly vulnerable to dependence on Russia for oil and gas transport—the CPC and other "northern route" projects only deepen Kazakhstan's dependence on Transneft and Russian diplomatic manipulation.<sup>391</sup> Second, the line passes through the troubled north Caucasus regions posing many of the same problems experienced by the AIOC's northern "early oil" option.<sup>392</sup> Third, a transportation model based solely on a "western route" ignores the fact that most of the Kazakh population lives in the country's northern and eastern territories.<sup>393</sup> If domestic consumption demands increase in the future Kazakhstan must be prepared to siphon significant hydrocarbon resources eastward.<sup>394</sup> Finally, a single route strategy connecting Kazakhstan's western oil fields to the Black Sea neglects to efficiently serve growing energy needs in South and East Asia.<sup>395</sup> For all these reasons export diversification requires that Kazakhstan seriously consider other transport options in the near future.

#### b. Turkey and the "Western Routes"

The immediate focus of Washington's pipeline dreams is the construction of an MER linking Azerbaijan to Turkey, and its

388. *See id.*

389. Press Release, Chevron, Caspian Pipeline Reaches Another Milestone (March 26, 2001), at <http://www.chevron.com/newsvs/pressrel/2001/2001-03-26.shtml> (copy on file with the *Vanderbilt Journal of Transnational Law*).

390. *See, e.g., supra* note 350 and accompanying text (outlining Astana's export diversification agenda).

391. The Russian government was slow to hand over key assets and grant needed licenses to the CPC so that the Tengiz-Novorossiysk pipeline would begin operations. DeLay, *supra* note 264, at 61. The governments of the Russian regions through which the pipeline was to pass raised numerous objections on environmental and property grounds. *Id.* The delays have cost the CPC substantial time and money. *Id.* Current estimates predict that the final price tag for the project will go beyond \$3.5 billion, nearly \$2.3 billion more than originally thought. *Id.*

392. *See supra* notes 335-40, 44 and accompanying text.

393. Babak, *supra* note 109, at 192.

394. *See id.* at 193.

395. *Id.* at 192.

brainchild is the Baku-Ceyhan pipeline (BCP).<sup>396</sup> The BCP would run from Baku, through Supsa in Georgia, and onto the Mediterranean port of Ceyhan in Turkey.<sup>397</sup> The route represents the centerpiece of a larger Caspian east-west transport axis.<sup>398</sup> Washington's ambitious hopes are that this axis will ultimately include Kazakh and Turkmen oil and gas as well, requiring these eastern littoral states to construct lines that will either cross the Caspian Sea or pass around it and into Turkey.<sup>399</sup>

Since 1991 Azerbaijan has been entertaining several other options for MERs transporting its oil and gas while Russia has continually pressed for a "northern route" that would run through the troubled northern Caucasus and meet the CPC line at the Novorossiysk terminal.<sup>400</sup> The need for a short-term solution, however, required the construction of "early oil" pipelines that would allow some sale of Azeri oil until the MERs were built.<sup>401</sup> The United States and Turkey pushed for an "early oil" route to the Georgian Black Sea port of Supsa, arguing that the line would represent the first stage of the Baku-Ceyhan MER.<sup>402</sup> Russia also argued that an existing pipeline from Baku to Novorossiysk could be updated to ensure increased throughput capacity for the "early oil."<sup>403</sup> Feeling the pressure Baku finally decided to entertain a two-route "early oil" policy to appease both camps and keep its options open.<sup>404</sup> Russian

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396. President Clinton & President Demirel of Turkey, Remarks by President and President Demirel at Meeting of the Turkish Business Council, (Nov. 17, 1999), 1999 WL 24368512.

397. DeLay, *supra* note 264, at 454-56.

398. *See id.* The axis is also sometimes referred to as the "Eurasian transportation corridor." Entessar, *supra* note 57, at 172.

399. Although both Kazakhstan and Turkmenistan have agreed in principle to add their hydrocarbon supplies to the Baku-Ceyhan line in order to ensure feasibility of the project, there is some political doubt as to whether they will come through. *See id.*

400. Ben Partridge, *Azerbaijan: Report Says Baku Pipeline to Play Key Role in Future Geopolitics*, RADIO FREE EUROPE-RADIO LIBERTY, July 31, 1998, at <http://www.rferl.org/ncal/features/1998/07/F.RU.980731125156.html> (copy on file with the *Vanderbilt Journal of Transnational Law*). Turkey is against any route that ends up in the Black Sea and requires tanker transport to the Mediterranean because it argues that increased tanker traffic flow in the Dardanelles and Bosphorus straits has created ultra-hazardous environmental concerns for the region. *Id.* Under the Montreaux Convention of 1937 Turkey is required to allow navigation through the straits. *Id.* The Baku-Ceyhan pipeline would bypass this problem because it links Caspian gas directly to the Mediterranean. *Id.*

401. "Early oil" is the term used to describe the transport of NIS oil or gas before the construction of MERs. *See, e.g.*, DeLay, *supra* note 264, at 49. The capacity of the pipelines will be minimal, and most probably the volume of oil produced will be small because production levels will not reach maximum capacity for a few years. *See id.*; *see also supra* Part II.C.2.a.

402. *See supra* Part II.C.2.a.

403. *See id.*

404. Upon news that Azerbaijan planned to construct an MER pipeline that would bypass Russian territory, Russian Foreign Ministry spokesman Grigory Karasin



aggressiveness once again demonstrated the degree to which Moscow was serious about the role that MERs would play in securing its regional interests.<sup>405</sup> In February 1999 contractors finished work on the western end of the pipeline and by April 17 the Baku-Supsa line loaded its first shipment of "early oil" at the Black Sea terminal.<sup>406</sup>

The pipeline, as mentioned above, primarily serves the interests of Turkey and the United States.<sup>407</sup> These interest include the following: 1) a BCP would terminate at a site that was already the terminus for another major pipeline and that was already equipped with high-capacity terminal and tanker loading facilities;<sup>408</sup> 2) Azerbaijan favored the idea of exporting oil with the help of the Georgians, who had become close allies, and the Turks, with whom the Azeris share ethnic ties;<sup>409</sup> 3) Turkey pushed for an MER termination point at Ceyhan instead of one at the Black Sea because gas delivered at the former would not have to be shipped across the Black Sea and through the Bosphorus Straits in order to reach its markets;<sup>410</sup> 4) the BCP would pass primarily through Turkish territory—Ankara would thus gain an economic windfall because the pipeline would mean the collection of transit fees and the generation of jobs;<sup>411</sup> 5) the NIS oil traveling through the pipeline would meet Turkey's growing energy demands;<sup>412</sup> and 6) control over the pipeline would be in the hands of American and NATO allies.<sup>413</sup>

While the BCP may arguably be the most politically expedient solution to U.S. and Turkish geopolitical interests, it is not the most economically feasible.<sup>414</sup> The costs associated with the project are

released a statement asserting that Russia would not recognize the signing of the contract creating the AIOC, and that "unilateral actions, especially on resources and the Caspian Sea, contradict international law and risk damaging the ecological system of the sea." Nassibli, *supra* note 155, at 111. The strongest objection to the Baku-Ceyhan MER came from Valter Shonia, the Russian ambassador to Azerbaijan: "We have had 200 years of cooperation with Azerbaijan . . . . Russia is interested in cooperation with the West over Azerbaijan but if there are some attempts to unseat Russia, there will be unpleasant consequences." *Id.*; see also *supra* notes 173-75 and accompanying text.

405. The two-route "early oil" strategy is more of a Russian victory than thought because Russian troops have substantial presence in Georgia, which is continually struggling against secessionist tendencies in Abkhazia and Southern Ossetia. BARYLSKI, *supra* note 65. In reality, therefore, Russia would gain some control over both the Novorossiysk and Supsa lines. *See id.*

406. DeLay, *supra* note 264, at 73.

407. *See infra* notes 408-13 and accompanying text.

408. DeLay, *supra* note 264, at 54.

409. *Id.* at 54-55.

410. *Id.* at 55.

411. Parrot, *supra* note 216.

412. *See id.*

413. *See supra* note 142 and accompanying text.

414. *See, e.g.,* Joe Soligo & Barnes Ronald, *Baku-Ceyhan Pipeline: Bad Economics, Bad Politics, Bad Idea*, OIL & GAS J., Oct. 26, 1998, 1998 WL 11542379

mammoth.<sup>415</sup> The terrain and distance it must cross is difficult.<sup>416</sup> Questions regarding viability of the pipeline in terms of profitability still plague the AIOC.<sup>417</sup> In short, private financial and commercial interests of the big oil corporations involved in the joint-ventures continue to question the wisdom of constructing the line.<sup>418</sup> Furthermore, rivalries between Azerbaijan, Georgia, and Turkey regarding the proportion of throughput capacity, transit fees, and other financial concerns continue to plague the project.<sup>419</sup>

The situation for control over gas transport is a similar replay of Russian and American grandstanding in the region. Here the focus of American policy is Turkmenistan which many believe contains the world's fourth largest gas reserves.<sup>420</sup> Turkey figures heavily into the equation because of its geostrategic position and because it presents a lucrative import market for international gas exporters.<sup>421</sup> Like

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(volume and number unavailable). *But see* Bhamy Shenoy, S. Gurcan Gulen & Michelle Michot Foss, *Analysis Suggests Economic Viability of Trans-Caspian Sea Gas Line*, 97 OIL & GAS J. 46, Nov. 15, 1999, 1999 WL 29184965.

415. Soligo et al., *supra* note 414. American and European oil companies generally oppose the Baku-Ceyhan pipeline due to its high costs. Nassibli, *supra* note 155. Instead they prefer an Iranian route which would cost approximately \$1.3 billion. *Id.* In May 1999 Turkish energy Undersecretary Yardakul Yigitguden declared that Ankara believed the cost of the project to run from \$2.65 billion to \$2.7 billion, rather than the \$2.4 billion originally estimated. DeLay, *supra* note 264, at 74.

416. DeLay, *supra* note 264, at 74.

417. Ferruh Demirmen, *Despite Recent Gains in Momentum, Prospects for the Baku-Ceyhan Caspian Oil Export Line Remain Doubtful*, 97 OIL & GAS J. 46, Nov. 15, 1999, 1999 WL 29184757. Viability concerns deal with projections regarding the economic returns of the MERs, or the degree to which profits will offset costs. *Id.* The concerns are two-fold: 1) whether world oil prices will sustain the weight of the project; and 2) whether throughput volume, or the actual amount of production that will be transported through the pipelines, will be sufficient to offset the sizeable production costs associated with the projects. *Id.* More specifically, world oil prices steadily declined throughout 1998 and were averaging about \$12 per barrel at the end of the year. DeLay, *supra* note 246, at 73. Azerbaijani oil is not profitable unless prices top the \$12 per-barrel mark. *Id.* This forced the AIOC to cut expenses any way it could. *See id.* In late 1998 and early 1999 the consortium managers drafted major cost-cutting programs and pushed back the start date of the main oil development program to 2003. *Id.* They also declared that under no circumstances were they willing to commit to a pipeline that would cost \$3.7 billion or more. *Id.*

418. Hugh Pope, *American Firms Win Pipeline Project; U.S. Aid Believed Vital to Caspian Job*, WALL ST. J., Feb. 16, 1999, 1999 WL-WSJ 5440660. Without massive U.S. and corporate financial involvement the Baku-Ceyhan project is totally impracticable. *Id.* *But see* DeLay, *supra* note 246, at 73 (explaining that as of May 1999 the AIOC had backed away from making any formal decisions regarding an MER due to worries that the project was simply not economical).

419. DeLay, *supra* note 264, at 56.

420. *See* UNITED STATES ENERGY INFORMATION ADMINISTRATION, CASPIAN SEA REGION, *supra* note 41. Russia and Iran are the first and second largest gas producers in the world, respectively. *See id.*

421. During the Soviet era, Turkey was the biggest buyer of Russian gas. Parrot, *supra* note 126. The break-up of the Soviet Union allows Ankara to diversify its gas base by adding Turkmenistan and even Azerbaijan to its import list. *See id.*

Kazakhstan, Turkmenistan is in a difficult position because it too is located on the eastern side of the Caspian and is, therefore, essentially land-locked.<sup>422</sup> Any westward pipeline route from Turkmenistan would either have to bypass Russian territory, cross Caspian waters, or go through Iran.<sup>423</sup> For its part, Russia has already courted Ashqabad with its own MER dubbed "Blue Stream," designed to carry Turkmen gas through Kazakhstan, into Russia, under the Black Sea, and into Turkey.<sup>424</sup> Despite the great logistical problems associated with underwater pipeline laying in the Black Sea the project has already begun construction and will probably export Turkmen gas to Turkey well before the proposed Trans-Caspian pipeline.<sup>425</sup>

President Niyazov has dedicated much time and energy to establishing new gas export routes after relations soured with Gazprom, the state-run body responsible for the transport of gas throughout Russia.<sup>426</sup> With Ashqabad in desperate need for foreign capital, a trans-Caspian westward route into Turkey began to gain momentum despite the logistical and financial difficulties involved.<sup>427</sup> Like the BCP, the TCP would pass through the territories of Azerbaijan, Georgia, and Turkey.<sup>428</sup> The same political and economic windfalls that would accrue to these countries and the United States from the BCP would also accrue to them *via* this trans-Caspian

Iran also seeks Turkey as a customer for its gas. Lelyveld, *supra* note 245; *see also* Iran, Turkey Agree to Delay in Gas Deliveries, *supra* note 246; Part II.C.3.c (analyzing proposed gas pipeline construction projects linking Turkmenistan and Iran to Turkey).

422. *See* ATLAS OF THE WORLD, *supra* note 6, at 56.

423. In other words, Turkmenistan must either rely on a "northern route" through Kazakhstan and Russia, a "western [Trans-Caspian] route," or a "southern [Iranian] route." *See id.*

424. Robert Lyle, *Caspian: View Differ on Viability of Oil Pipelines*, RADIO FREE EUROPE-RADIO LIBERTY, Mar. 4, 1999, at <http://www.rferl.org/nca/features/1999/03/F.RU.990304125619.html> (copy on file with the *Vanderbilt Journal of Transnational Law*). The project, however, faces serious technical difficulties because of the depth of the Black Sea. *Id.*

425. *Id.*; *see infra* notes 427-34 (discussing the details of Turkmenistan's Trans-Caspian pipeline project).

426. DeLay, *supra* note 264, at 69; *see also supra* notes 265-69 and accompanying text (discussing the Turkmen-Russian gas pipeline dispute).

427. The political problems involved are the following: both Moscow and Tehran officially object to any trans-Caspian route based primarily on environmental concerns, although geopolitical interests are their primary motives. *Iran Voices Opposition to Turkmen-U.S. Oil Deal*, *supra* note 224. The long-standing legal dispute between Azerbaijan and Turkmenistan over delimitation of their sectors has also delayed the construction of the TCP. *See* Ignatius, *supra* note 248, at 27A. To add to the problems, Azerbaijan has recently threatened to add its own significant flow of gas to the line, displacing previously projected Turkmen volumes and competing for access to the Turkish market. Pope, *supra* note 238, at A23; *see also* Lelyveld, *supra* note 244. The economic problems largely regard the financial viability of the project. Demirmen, *supra* note 417.

428. *See supra* notes 402-04 and accompanying text.

“western route.”<sup>429</sup> The problems associated with this project, arguably the most expensive and ambitious of all proposed Caspian MERs, include: 1) vociferous Russian and Iranian objection to any pipeline crossing the Caspian Sea floor on environmental grounds;<sup>430</sup> 2) the logistics of constructing an underwater pipeline across the Caspian;<sup>431</sup> 3) the unresolved legal status of the Caspian Sea, especially with regard to the dispute between Azerbaijan and Turkmenistan regarding delimitation of their “sectors,”<sup>432</sup> 4) the huge costs associated with such a project;<sup>433</sup> and 5) dealing with geopolitical instability associated with any trans-Caucasus route.<sup>434</sup>

Finally, with respect to Caspian legal issues, it is important to note that arguments asserting that the unresolved legal status of the Caspian Sea requires unanimous multilateral consent with respect to any development projects are most valid when dealing with any pipeline project attempting to cross Caspian waters.<sup>435</sup> This is so because such a transit route inevitably touches upon the rights and concerns of *all* littoral states involved, whether these rights involve ownership, transportation, or environmental issues.

To date work on the TCP gas pipeline has been very slow.<sup>436</sup> Moreover, a legal dispute between Baku and Ashqabad regarding delimitation of their “sectors” of the Caspian has all but stalled any progress on plans to begin construction of the TCP.<sup>437</sup> To make matters worse the constant political and legal wavering of Ashqabad on key related issues, including the legal status of the Caspian Sea, has substantially reduced investment confidence in an already risky pipeline venture.<sup>438</sup>

### c. Iran and the “Southern Route”

Then there is the Iran factor.<sup>439</sup> Iran’s geostrategic position straddling the oil-rich Persian Gulf and the Caspian Sea and its

429. See *supra* notes 407-13 and accompanying text.

430. *Iran Voices Opposition to Turkmen-U.S. Oil Deal*, *supra* note 224.

431. See *id.*

432. See generally *infra* Parts III, IV, V, for legal analysis of the status of the Caspian Sea.

433. See, e.g., Shenoy et al., *supra* note 279.

434. See *id.*

435. See *Iran Voices Opposition to Turkmen-U.S. Oil Deal*, *supra* note 224.

436. DeLay, *supra* note 264, at 74.

437. *Id.*

438. DeLay, *supra* note 264, at 72.

439. See Fuller, *supra* note 5. Graham Fuller states:

Any elementary look at the map will show that Iran sits astride this region and really is in the center of it. You can’t get from East to West, or West to East without being extremely ingenious in your transportation to avoid traveling through Iran itself. From my point of view American policy is highly

advanced infrastructural and transport capacities (not to mention its relatively stable political environment, especially when compared to the Caucasus and Central Asia) represent a competitive advantage over Turkish and Russian export routes.<sup>440</sup> Political scholars, policy architects, and international oil companies have all argued that the "southern route" represents the most cost-efficient means of exporting Caspian oil and gas to world markets.<sup>441</sup> With the prospect of eastern export routes through Afghanistan or Pakistan remaining highly improbable at the present,<sup>442</sup> the Persian Gulf route presents the added benefit of geographic proximity to South and East Asian markets where analysts predict demand for oil and gas will outstrip Western demand in years to come.<sup>443</sup>

Tehran's approach to solving Caspian transportation issues has been piecemeal primarily because of the political barriers to the laying of pipelines across Iranian territory and because of Iran's slow entrance into the Caspian pipeline game.<sup>444</sup> Iran realizes, however, that its strategic position affords it the luxury of avoiding major MER construction projects because its present infrastructural capacity<sup>445</sup> and location allow it to satisfy NIS needs through a combination of oil swap and pipeline upgrade programs.<sup>446</sup> By enhancing the capacity

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unrealistic towards Iran, and is increasingly under challenge . . . . [I]f Iran is not a part of the future energy picture it will be virtually impossible to deal in this region without it. The people who are trying to bring oil in and out of the region know it, the Azeris know it, and Baku, Turkmenistan and Kazakhstan despite their suspicions about Iran, also understand that their policies are greatly complicated by US policy.

*Id.*

440. See Stuart Parrot, *Iran: Tehran's Foreign Policy Looks in All Directions*, RADIO FREE EUROPE-RADIO LIBERTY, Nov. 10, 1998, at <http://www.rferl.org/ncal/features/1997/11/F.RU.971110121412.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

441. Kinzer, *supra* note 304, at A1; see also Entessar, *supra* note 57, at 174 (explaining that the "southern route" through Iran is the preferred option for many oil companies). There are already numerous pipelines and port facilities in Iran that can easily carry shipments of Caspian energy to the Persian Gulf. *Id.* Also, Turkmen gas fields are already linked to Iran and Azeri oil fields can be easily connected to oil refineries in Iran. *Id.* This route also has the added benefit of being able to bypass the congested Strait of Hormuz by routing the pipelines to the Iranian port of Jask instead. *Id.*

442. See *infra* notes 463-78 and accompanying text.

443. Babak, *supra* note 109, at 202.

444. Parrot, *supra* note 440 (explaining how Iran is looking to alternate means of contributing to the Caspian's energy transport policy, including the expansion of its already existing gas pipeline network and facilitating oil swaps).

445. DeLay, *supra* note 264, at 64 (explaining that Iran's current pipeline infrastructure is more reliable than that of Russia).

446. See *infra* Part VI, for a discussion of Iran's ability to link its geopolitical interests with its legal interests in order to trigger its competitive advantage in the Caspian transportation sector.

of existing pipelines and extending the length of other ones Iran has the ability to purchase NIS oil and gas directly, then recover costs by selling its own oil and gas *via* Persian Gulf terminals.<sup>447</sup>

The oil swap model, however, cannot be the long-term solution to NIS transportation problems if Caspian production levels meet projected estimates within the next several years.<sup>448</sup> By then the high volume of Caspian oil and gas will not be accommodated by simple pipeline enhancements.<sup>449</sup> Assuming that political barriers to pipeline construction across Iranian territory are eventually overcome, however, Iran also represents the most cost-efficient and viable MER.<sup>450</sup> Construction costs will still be cheaper than competing MER projects because the plan would simply require reversing the oil that already flows through the existing network of pipelines that currently run from northern and central refineries in Tabriz, Tehran, and Isfahan to the Persian Gulf.<sup>451</sup>

While Azerbaijan (and to a lesser extent Kazakhstan) has not seriously entertained the possibility of MER pipelines through Iran both have engaged in talks discussing the possibility of oil and gas swaps as an early option for distributing their resources to world markets.<sup>452</sup> Current pipelines (and plans) in Iran include the ambitious expansion of pipelines connecting Turkmen gas to Iran, which will eventually be linked to Turkey,<sup>453</sup> and the construction of several more pipelines extending an already existing network of lines further north into the Caspian Sea.<sup>454</sup> In short, Iran could represent

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447. See *supra* notes 360-63 and accompanying text (explaining the intricacies of the oil swap model). As mentioned before, under this arrangement the Iranian side would take delivery of Caspian oil, send it to Tehran or Tabriz for processing and distribution, and then make an equivalent amount of crude available in the producer's name at the Kharg Island terminal in the Persian Gulf. DeLay, *supra* note 264, at 65.

448. DeLay, *supra* note 264, at 65.

449. *Id.*

450. *Id.* at 66.

451. *Id.*

452. But see *Azerbaijan Will Consider Oil Exports via Armenia and Iran*, 5 ALEXANDER'S GAS & OIL CONNECTIONS 1, Jan. 25, 2000, at <http://www.gasandoil.com/goc/news/ntc00462.htm> (copy on file with the *Vanderbilt Journal of Transnational Law*). In the early 1990s Azerbaijan seriously entertained Iran's proposals to carry its "early oil" through Iranian pipelines. *Azerbaijan Planning PL To Divert its Oil to Black Sea Via Iran, Turkey*, 69 PLATT'S OILGRAM NEWS 248, Dec. 27, 1991, 1991 WL 2445161. See also Babak, *supra* note 109, at 201 (explaining that the Kazakhs have visited Tehran on several occasions and consider Iran to be one of their major partners in the Near East, and that officials consider the issue of transporting Kazakh oil through Iran to be a main topic of bilateral negotiations between the two nations).

453. Dutch-Shell has already begun feasibility studies regarding linking Turkmen and Iranian gas lines to Turkey. See *Azeris Brush Off Russian Proposal on Caspian Split*, *supra* note 192.

454. This includes the Neka-Rey pipeline that will link the Caspian port of Rey to the town of Neka situated just north of the Tehran oil refinery. *Iran's Foreign Minister Calls for Caspian Convention*, *supra* note 231.

“a bustling transport hub and the center of gravity of the world oil industry.”<sup>455</sup>

Yet the interest shown in Iranian pipeline plans does not exactly match the NIS’ ambitions of becoming world-class energy exporters.<sup>456</sup> Tehran has proven much more willing to discuss swaps than pipelines because they offer it a fast and easy way to meet its northern urban consumption demand and thrust it into the Caspian export market.<sup>457</sup>

Finally, Turkmenistan has already started cooperating with Iran on the possibility of constructing several gas lines across the latter’s territory.<sup>458</sup> One gas pipeline to Iran has already opened—the 190 km link between Korpeje and Kord-Kuy, built at a cost of \$190 million, was commissioned in December 1997.<sup>459</sup> President Niyazov hopes that a much longer pipeline stretching 3,200 km or more from Dauletabad field and crossing all of Turkey as well as northwestern Iran will also be built.<sup>460</sup> He would also like to see some of the country’s oil pass through Iran and into the Persian Gulf.<sup>461</sup> Several European and American companies, including Mobil, have already asked Washington for permission to conduct such swaps.<sup>462</sup>

#### d. The “Eastern Routes”

The NIS have flirted with several export options that would make use of an “eastern route” serving either South Asia through Afghanistan, Pakistan, or India, or East Asia *via* China.<sup>463</sup> The advantages of such an MER are numerous. For one, demand in these regions is predicted to outstrip demand in the West in the near

455. DeLay, *supra* note 264, at 64.

456. *Id.* at 65.

457. *Id.* In other words swaps could help keep Iran’s big cities supplied with natural gas, make Kazakhstan and other NIS dependent on Iranian markets and transport routes, and raise Iran’s profile in the Persian Gulf. *Id.*

458. *Id.* at 71.

459. *Id.* For Iran the construction of the Kord-Kuy pipeline linking it with Turkmenistan is so important that it funded some eighty-five percent of the \$200 million project with the understanding that Turkmenistan would repay its share by supplying undetermined volumes of free natural gas to Iran for three years. *Id.* at 172.

460. *Id.* at 71. In 1996 Turkey and Iran signed a \$20 billion agreement for the purchase of natural gas through Iran. *Id.* at 171. Turkey signed the deal despite U.S. pressure to abandon the project. *Id.* at 172. Turkey has also announced that it plans to construct a 188-mile pipeline linking the Iranian border with the Turkish city of Erzerum. *Id.* This section will later be connected to a 623-mile Erzerum-Ankara pipeline that will ultimately allow Turkmen and Iranian gas to reach the Turkish capital. *Id.*

461. *Id.*

462. *Id.* at 72.

463. See, e.g., *supra* note 350 and accompanying text (outlining Kazakhstan’s consideration of the “eastern route” option).

future.<sup>464</sup> These largely untapped markets present the NIS with a long-term, forward-looking export base that promises to be as lucrative, if not more lucrative than the relatively saturated western energy markets.<sup>465</sup> Like their counterparts, however, these MER projects are not devoid of serious political and economic problems.<sup>466</sup> More specifically with regard to the South Asian "eastern routes," Afghanistan remains a wholly impracticable option because of persistent war, and constant tensions between Pakistan and India continue to hamper efforts to serve the Asian subcontinent.<sup>467</sup> Here again, the NIS, India, and Pakistan have looked to the possibility of Iran serving as a transit country.<sup>468</sup> Though negotiations and talks regarding such an "eastern route" through Iran are underway, no major progress has yet been made.<sup>469</sup>

Finally, there has been ongoing talk about the prospect of constructing a pipeline from Kazakhstan to East Asia.<sup>470</sup> China's National Petroleum Corporation (CNPC) began conducting feasibility studies for an ambitious pipeline plan that would transport Kazakh oil to China.<sup>471</sup> Some 600 km of the pipeline worth \$300 million were already in place as of spring 1998.<sup>472</sup> Once the line is finished it will be able to carry twenty million metric tons of oil per year.<sup>473</sup> If the pipeline is completed it will be the longest oil transport link in the world.<sup>474</sup> Despite the potential benefits of such a pipeline, however, there are major problems that must be dealt with.<sup>475</sup> The pipeline is expected to terminate in China's Xinjiang province, a poor region with an Uighur population that has had long-standing ethnic and religious complaints against Beijing.<sup>476</sup> Political problems aside, pipeline construction has never been undertaken on such a vast scale.<sup>477</sup> The CNPC will be "lucky indeed if its ambitious pipeline project does not encounter . . . financial and technical problems on a grand scale."<sup>478</sup>

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464. Babak, *supra* note 109, at 202.

465. *See id.*

466. DeLay, *supra* note 264, at 67.

467. *Id.*

468. *Id.*

469. *See id.*

470. DeLay, *supra* note 264, at 67.

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.* at 68.

476. *Id.*

477. *Id.*

478. *Id.*



## III. THE CLOUDY LEGAL DIMENSION OF CASPIAN GEOPOLITICS

A. *The Big Picture*

Although the official position of the littoral states with respect to the applicable law governing a legal regime for the Caspian's resources has often been inconsistent and fickle each state has attempted to strengthen its geopolitical position by referring to an applicable legal model or regime.<sup>479</sup> A Special Working Group (SWG) involving key diplomats of the five littoral states has met on and off for the past several years in order to hammer out a convention on the regime of the Sea.<sup>480</sup> A legal center coordinating the group of the SWG has also been set up in Baku.<sup>481</sup> So far, however, an effective multilateral legal approach has been sacrificed in place of bilateral agreements between the states, ostensibly creating a multitude of interim legal relationships.<sup>482</sup>

On April 5, 1994, the legal status of the Caspian Sea received international attention for the first time when the UK ambassador to Russia received a confidential note from Moscow challenging Azerbaijan's position on the status of the Sea.<sup>483</sup> Pursuant to this event the five littoral states met in Moscow in October of 1994 to further discuss regional cooperation regarding exploitation of the Caspian's resources.<sup>484</sup> The Russians staunchly warned against unilateral action taken by any of the littoral states.<sup>485</sup> A year later then President Yeltsin of Russia rejected any notions that the Sea may be divided amongst the littoral states.<sup>486</sup> Finally, in November

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479. See, e.g., *Turkmenistan Details Caspian License Round*, 95 OIL & GAS J. 39, Sept. 29, 1997, 1997 WL 9575817; *infra* Part III.B (outlining the individual legal positions of the littoral states).

480. *Iran's Foreign Minister Calls for Caspian Convention*, *supra* note 231.

481. See *id.*

482. See, e.g., Margaret McQuaile, *Iran, Kazakhstan Pact Sets Caspian Sea Work Rights*, 74 PLATT'S OILGRAM NEWS 96, May 16, 1996, 1996 WL 8705495 (explaining an Iranian-Kazakh declaration recognizing each littoral state's right to exploit its Caspian mineral resources); Babak, *supra* note 109, at 188-93 (analyzing legal diplomacy between Russia and Kazakhstan and the ultimate execution of a bilateral agreement on division of the northern Caspian between the two littoral states).

483. Nassibli, *supra* note 155, at 112. Russia directed the protest at the United Kingdom because of the latter's participation in the AIOC and because Moscow was concerned about the entry of Western oil corporations into the Caspian basin. See *id.*

484. *Id.* at 112. A representative of the Russian FM declared that the legal status of the Sea was determined by the Turkmenchai Treaty signed between Russia and Persian in 1828. *Id.*; see also *infra* Part IV.A.1, for an analysis of the Turkmenchai Treaty and other Soviet-Iranian Treaties.

485. Nassibli, *supra* note 155, at 112.

486. *Id.* Yeltsin declared: "The Caspian Sea is a specific sea, an internal sea. It cannot be divided among the littoral states. All Caspian states have to work out joint programs for the development of biological, gas, and oil treasures of the Caspian Sea."

1996 Ashqabad hosted yet another conference on the legal status of the Sea.<sup>487</sup> The Azeris strongly advocated division of the Sea into national sectors, relying on a 1970 Soviet decision to divide the Sea into four agreeable parts.<sup>488</sup> They also declared that from a geographical point of view the Caspian is a sea, not a lake.<sup>489</sup> The Kazakhs also agreed with this proposal.<sup>490</sup> The Russians retreated from their earlier position rejecting any sectoral division and instead submitted a compromise solution calling for a dual or "split regime" distinguishing between the surface waters and the subsoil resources of the Sea.<sup>491</sup>

Despite these multilateral efforts, however, the littoral states have so far approached exploration and exploitation issues in the Caspian in a seemingly practical manner—they have assumed that notwithstanding legal agreements validating condominium principles allowing at least some areas of the Sea to be joined in common, they are free to exercise sovereignty over their coastline and offshore waters.<sup>492</sup> The more contentious outgrowth of such a policy, however, has been the NIS' practice (especially Azerbaijan) of *unilaterally* exploiting oil and gas resources based on the theory that

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*Id.* According to Nassibli, however, Yeltsin's remarks rely on the Soviet-Iranian Treaties of 1921 and 1940 and are ill-founded because the treaties do not discuss mineral reserves. *See id.*

487. *Id.* at 113.

488. *Id.* Further, Nassibli suggests that the Soviets actually divided the Sea into two zones, one Soviet and the other Iranian. *See id.* at 112. *But see* discussion *infra* Parts IV.B-C (rejecting the legal validity of administrative boundary delimitation during the Soviet era).

489. Nassibli, *supra* note 155, at 112.

490. *Id.* More specifically the Kazakhs declared that while the territorial waters and fishing zones of the Sea may be used in common, the seabed should be divided into national sectors. *Id.*

491. *Id.* According to this proposal the first forty-five offshore miles of the Caspian should be treated as territorial (meaning that both the waters and the subsoil resources would be the exclusive property of the adjoining littoral state), and the remaining part of the Sea (surface and sub-surface) should be viewed as common property. *Id.*; see also *infra* Part III.B.4, for a more in-depth analysis of the Russian "doughnut proposal;" *infra* Part V.B.2, for in-depth analysis of several "split regime" models.

492. Azerbaijan, for example, isn't waiting on a regional solution. *Russia and Iran Continue to Press for Cooperative, Multinational Development of Caspian Sea Oil and Gas*, 94 OIL & GAS J. 11, Mar. 11, 1996, 1996 WL 8286887. It went forth with Production Sharing Agreements (PSAs) and consortium arrangements for the Azeri-Chirag-Guneshli and Karabakh sites as early as 1995. *Id.* Similarly, even Russia and Iran, who have been most adamant regarding unilateral exploration and production activities in the Caspian, have begun development of their Caspian oil fields off its shores so they do not fall behind in the production race. *Iran's First Oil Platform in Caspian Sea Starts Operation*, AGENCE FRANCE-PRESSE, Feb. 24, 1996, 1996 WL 3810426; see also Babak, *supra* note 109, at 188-93 (explaining Russia's latest concession regarding the advantages of engaging in bilateral agreements with the NIS).

administrative boundaries imposed upon the Sea during the Soviet era are still applicable.<sup>493</sup> Though this rough and ready approach seems to be a practical solution there is no definite consensus among the littoral states on the specific boundaries upon which *de facto* delimitation should occur.<sup>494</sup>

If the extension of Soviet era administrative boundaries is the default rule governing NIS relations in the Caspian, then bilateral agreements between littoral states represent temporary attempts to smooth out the inconsistencies and inefficiencies of such rules in the wake of a more comprehensive and permanent agreement involving all littoral states. Indeed the pattern of recent diplomatic developments seems to suggest such a piecemeal and non-comprehensive approach to the resolution of legal issues regarding ownership rights.<sup>495</sup> All the littoral states, including Russia and Iran, have entered into joint venture and contractual agreements with domestic and foreign companies for on and offshore development.<sup>496</sup> Several littoral states have entered into bilateral agreements dividing their areas into "national sectors" and others are continually pursuing this path of negotiation.<sup>497</sup> Furthermore, the United States firmly believes that sectoral division of the Sea is in the interest of all parties involved.<sup>498</sup>

Finally, there is some doubt as to whether the murky legal status of the Caspian has and will dissuade foreign involvement.<sup>499</sup> Although all littoral states outwardly agree on the principle of unanimous consent and multilateralism regarding a comprehensive regime governing relations in the Caspian, several have claimed that the lack of such a regime should not obstruct advancement of oil and gas projects.<sup>500</sup> The record seems to verify this trend.<sup>501</sup> In short, the present record of state practice and legal maneuvering has not led to the development of any consistent legal understanding regarding

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493. See *supra* note 488 and accompanying text. But see generally *infra* Part IV.B, for a legal analysis of the effect of Soviet boundary delimitation between Azerbaijan, Kazakhstan, Turkmenistan, and itself.

494. See, e.g., the dispute between Azerbaijan and Turkmenistan over where the Soviet administrative delimitation lines exactly lie. Mesamed, *supra* note 121, at 215.

495. See generally *supra* Part II.B.1; see also *infra* Part III.B.

496. See generally *supra* Part II.B.1.

497. *Id.*

498. Croissant & Croissant, *supra* note 23, at 34. This is not surprising given the geopolitical interests of the United States in the Caspian region. See *supra* Part II.A.2.d.

499. See, e.g., *Hearings I*, *supra* note 144. Pitman, Chairman and President of Amoco Eurasia Petroleum Company, introduced testimony that suggested that the murky legal status of the Caspian is deterring foreign corporate involvement in the region. *Id.*

500. See generally *supra* Part II.B.1.

501. Azerbaijan's several multi-billion dollar Caspian deals attests to this. See *id.*

littoral relations in the Caspian. Additionally the legal posturing of the states has done little to clear up the status picture though this is not surprising considering the varying and conflicting geopolitical interests of the littoral states.

### B. *Legal Diplomacy: The Individual State Positions*

#### 1. Azerbaijan: The Radical Advocate

The most adamant and consistent state has been Azerbaijan, which from the beginning insisted that the Third UN Convention on the Laws of the Sea (UNCLOS) recognizing the existence of territorial seas and exclusive economic zones should apply to the Caspian.<sup>502</sup> This position is not surprising when one realizes that more than eighty percent of Azerbaijan's current energy production comes from offshore fields.<sup>503</sup> For Azerbaijan, therefore, the stakes are huge: common ownership of the Sea and its resources effectively means the loss of control and a threat to the very well-being and independence of the country.<sup>504</sup>

The official Azeri position is: 1) that the seabed must be divided on the bases of the equidistance or median line principle; 2) the Soviet-Iranian Treaties of 1921 and 1940 are inapplicable to mining rights and regulate only fishing and navigation routes; 3) the Soviet Union divided the Caspian into Iranian and Soviet zones by drawing a boundary line across the Sea between Astara and Hosseingholi and further dividing the Soviet sector among Azerbaijan, Russia, Kazakhstan, and Turkmenistan; and 4) the Azerbaijani *Majlis* (or Parliament) and the Constitution have codified the principle of sovereignty over the Azerbaijani sector of the Caspian.<sup>505</sup>

Given the competitive advantage of Azerbaijan vis-à-vis other littoral states in the oil and gas race it is understandable why Baku has been the most aggressive advocate of sectoral division of the Caspian.<sup>506</sup> The United States, while officially claiming that the status of the Sea should be resolved based on mutual consent of all parties, is in general agreement with the Azeri position.<sup>507</sup> In short,

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502. See *id.* For an in-depth legal analysis of the Third UN Convention on the Laws of the Sea (UNCLOS), see *infra* Part V.A.1.

503. Croissant & Croissant, *supra* note 23, at 30.

504. See *id.* at 30-31.

505. David Starr, *Azerbaijan Asserts Legal Rights over Caspian*, 23 OIL & GAS J. 45, Nov. 11, 1994, 1994 WL 8522981. For information regarding delimitation based on the equidistance and median line principles, see *infra* 782-804 and accompanying text.

506. See *id.*

507. Nassibli, *supra* note 155, at 113 (explaining that Baku's success at resisting Russian pressure regarding the legal status of the Caspian is due in large part to U.S.

Azerbaijan has not budged from its original position that only sectoral division of the Sea based on the UNCLOS may define the legal status of the Caspian Sea.

## 2. Kazakhstan: Flexibility and Finesse

Kazakhstan is the second most consistent party arguing for general application of the UNCLOS, but its position is distinguished from Baku's in that it has pursued diplomatic compromise in order to ensure that its legal right to exploit its "sector" of the Caspian remains in tact.<sup>508</sup> The official Kazakh position may be summarized as follows: 1) the Caspian is a sea and thus falls under the UNCLOS regime; 2) littoral state borders should include territorial waters extending twelve miles offshore; 3) the rest of the Sea must be divided into EEZs.<sup>509</sup> Like Azerbaijan, Kazakhstan referred to Moscow's 1970 decision to administratively divide the Caspian among the Soviet republics in order to bolster its position regarding delimitation.<sup>510</sup> Based on this median-line division administered by the Soviet Ministry of Oil Industry, Kazakhstan would receive the most beneficial conditions—approximately 113,000 square km of the Caspian surface.<sup>511</sup>

Despite this official stance, however, Kazakhstan has pursued a more nuanced diplomatic approach because of its relations with Russia. Kazakhstan has taken a very careful position on the status of

support for sectoral division). Also, Baku has sought to undermine Russia's legal position regarding common ownership of Caspian resources by tightening pollution standards in its own "sector" of the Sea. Croissant & Croissant, *supra* note 23, at 31. This strategy is important because Russia [and Iran] rely on environmental arguments to bolster their position that the Sea should be owned in common. *Id.*; see also *infra* Part VI.C.3.c, for discussion of the validity of the environmental strategy as a means of securing Iran's interests in the region.

508. Mary Patterson, *Kazakhstan Looks to Iran for Caspian Outlet*, 44 OIL & GAS J. 213, Aug. 12, 1996, 1996 WL 9112543.

509. Babak, *supra* note 109, at 183. In 1996 Deputy Foreign Minister Vyacheslav Gizatov of Kazakhstan summarized Astana's position advocating sectoral division: "[W]e took into consideration not only international standards . . . , but also a practice formed decades ago by the USSR and Iran on the Caspian, where these countries drilled for oil totally independently and without mutual consultations." *Id.* at 184; see also *infra* notes 754-58 (discussing the EEZ under the UNCLOS). But see *infra* Part IV.A.3, for a critique of this view.

510. Babak, *supra* note 109, at 184. The Kazakhs further argued that since by mutual agreement of the ex-Soviet republics the administrative borders of the Soviet era were recognized as international borders, the same should apply in the case of the Caspian. *Id.* But see discussion *infra* Part IV.B. They also referred to the Constitution of the USSR which formally recognized the Republics as sovereign states with independent rights to their natural resources. Babak, *supra* note 109, at 184.

511. Babak, *supra* note 109, at 184. The division resulted in the following share of the Caspian: 1) Kazakhstan: 113,000 square km; 2) Azerbaijan: 78,000 square km; 3) Turkmenistan: 79,000 square km; and 4) Russia: 64,000 square km. *Id.*

the Caspian because it does not want to escalate conflict with Moscow.<sup>512</sup> In this regard, Astana has followed a delicate policy of diplomacy aimed simultaneously at appeasing Moscow while also strengthening its position regarding ultimate sectoral division of the Sea.<sup>513</sup> President Nazarbayev has managed to successfully satisfy both diplomatic goals by ensuring that Russia participates in Kazakh joint-ventures and by executing several mutual declarations that allow it to exploit hydrocarbon basins located in its "national sectors."<sup>514</sup> After a fair bit of diplomatic dancing, Astana was finally successful in reaching a bilateral side-agreement with Moscow regarding partition of the northern Caspian seabed on July 1998.<sup>515</sup>

### 3. Turkmenistan: Playing the Waiting Game

Turkmenistan's legal position on the Caspian is difficult to assess.<sup>516</sup> In October 1993 it was the first littoral state to pass a law that declared its jurisdiction over a twelve-mile territorial sea.<sup>517</sup> Since then Ashqabad has continuously switched views and alliances, leaving an inconsistent trail of legal arguments in its path.<sup>518</sup> In part

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512. *Id.* at 187.

513. *See* Babak, *supra* note 109, at 188-90. According to Babak Astana employed a "strategy of tactical concessions" to realize its ultimate goals on sectoral division of the Sea. *Id.* at 188. It did so by employing a two-pronged strategy that assured Moscow that Kazakhstan would not neglect the former's Caspian interest and would work toward joint cooperation on all regional issues while also keeping Moscow on notice that it would unilaterally exploit resources in its "sector" if push came to shove. *See id.* at 188-89.

514. *Id.* at 189, 191. Russia signed several mutual declarations with Kazakhstan which ultimately led to the signing of the agreement to subdivide the northern Caspian seabed. *Id.* at 189-90. With each passing declaration Astana adjusted Moscow's position so that it would ultimately be forced to accept the idea of sectoral division. *See id.* In 1996 Moscow seemingly agreed with the principal that each littoral state had a right to exploit the resources under its "national sector" but maintained that the surface waters should be used in common. *Id.* at 189. Moscow officialized this position in the 1996 meeting of the littoral states' foreign affairs ministers in Ashqabad by drawing up the forty-five mile "doughnut proposal." *Id.* at 189-90. Both Kazakhstan and Azerbaijan, however, rejected the proposal because they realized that the legal effects of the proposal would actually give Moscow substantial veto powers over oil and gas development in the Sea. *Id.* at 190.

515. *Id.* at 192. The agreement divided the seabed but left the water surface and the fish resources part of common property. *Id.* In return Astana pledged to prevent other countries from constructing pipelines on the bottom of the Caspian without the consent of all five littoral states. *Id.*; *see also* Upperton, *supra* note 226.

516. *See* generally Mesamed, *supra* note 121, at 213-19, for an analysis of Ashqabad's confusing legal diplomacy regarding the status of the Caspian Sea.

517. *Id.* at 210. Legally this was a significant move because it indirectly recognized the Caspian as a sea instead of a lake. *Id.*

518. *See, e.g., Turkmenistan—Background of Caspian Disputes*, 51 APS REV. OIL MKT. TRENDS 10, Sept. 7, 1998, 1998 WL 9526571. In February 1997 Turkmenistan and Kazakhstan signed a statement calling for a division of the Caspian based on Soviet era divisions until the littoral states agreed on a new legal regime. *Id.*

Ashqabad's waffling on the legal status of the Caspian may have had to do with the fact that unlike Azerbaijan and Kazakhstan, Turkmenistan has no urgent economic incentive to define the legal status of the Caspian because its priority is the development of its gas reserves, not its oil reserves.<sup>519</sup>

In November 1995 Turkmenistan proclaimed the Caspian to be a unique body of water to which all littoral states should have access.<sup>520</sup> A year later Ashqabad seemed to move closer to the Azeri and Kazakh positions calling for sectoral division of the Sea.<sup>521</sup> In 1997 Niyazov assured Moscow and Tehran that until consensus on a legal regime for the Caspian is reached Turkmenistan would abide by the provisions of the Soviet-Iranian Treaties.<sup>522</sup>

Despite the generally ambivalent stance Ashqabad has taken on the legal status of the Caspian, however, two events have forced it to take a more vocal stand on the issue. The first event that caused Ashqabad to reconsider its ambivalent views on the legal status of the Caspian occurred in the summer of 1997 when Azerbaijan executed a joint venture agreement with Russia over the development of the disputed Kaipaz-Serdar oil field.<sup>523</sup> Baku had already rejected Ashqabad's earlier claims that part of the Azeri and all of the Chirag offshore fields actually fell within Turkmenistan's "sector" of the Sea; it followed suit here as well.<sup>524</sup> This time Turkmen authorities threatened to take their case to the United Nations or the International Court of Justice.<sup>525</sup> They insisted that both the Azeris and the Russians invalidate the development agreement over the Kaipaz-Serdar field and hold off on any further agreements until the

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519. Turkmenistan did not inherit much of an oil industry from the Soviet era—its huge natural gas reserves are substantially larger than its oil reserves. DeLay, *supra* note 264, at 68. Ashqabad, however, has not totally neglected development of Turkmenistan's oil resources. *Id.* at 69. In the early to mid-1990s it enacted a comprehensive petroleum law and signed a number of on and offshore exploration and development contracts with foreign companies. *Id.* There is a lot of work to be done in this field, however. *Id.* As of mid-1998 Turkmenistan had not yet begun preliminary work on any oil export pipeline projects. *Id.*

520. Mesamed, *supra* note 121, at 215-16. As a result the Turkmen temporarily adopted the idea of mutual or common ownership. *Id.* at 216.

521. *Id.* at 216 (pointing out that at the conference Russia and Iran (the "Big Two") formed an alliance against Turkmenistan, Azerbaijan, and Kazakhstan (the "Tripartite Union"), with the latter three advocating sectoral division of the Sea).

522. *Id.* at 217.

523. *Id.* at 214. In July 1997 an agreement valuing approximately \$2 billion was signed between the Russian companies LUKoil and Rosneft and SOCAR regarding the exploitation of the Kaipaz oil deposit, known in Turkmen documents as Serdar. *Id.*

524. *Id.* at 215.

525. Croissant & Croissant, *supra* note 23, at 34. At the request of Ashqabad an interim group of experts from the American law firm of Hogan & Hartson independently concluded that, pursuant to a median-line division of the Sea into sectors, the Kaipaz-Serdar field actually fell into the Turkmen sector. Mesamed, *supra* note 121, at 215.

legal status of the Caspian is resolved.<sup>526</sup> In July 1997 the Russians gave into Ashqabad's demands and backed out of the development agreement.<sup>527</sup>

The second event involved the late-developing relationship between Ashqabad and Washington regarding the possibility of constructing a trans-Caspian gas line.<sup>528</sup> By 1998 it seemed that President Niyazov had become convinced that sectoral division of the Caspian promised the best economic future for Turkmenistan.<sup>529</sup> In part he was convinced of the utility of delimitation because of agreements signed with major American oil companies for the construction of the TCP.<sup>530</sup> It was clear that if Ashqabad wanted to ally itself with Washington in order to tap into a trans-Caspian MER for its gas, the seabed must be divided into "national sectors" to allow Turkmenistan and Azerbaijan to lay pipelines across their respective seafloors.<sup>531</sup> This is so because sectoral division provides the most stable and predictable legal environment that preserves corporate confidence in the legal validity of ambitious projects such as the TCP.<sup>532</sup>

The Turkmen-U.S. rapprochement regarding the construction of the TCP has, more than any other diplomatic maneuver taken on by Niyazov, caused a rift between the legal views of Tehran and Russia on the one hand, and Ashqabad on the other.<sup>533</sup> Prior to U.S. overtures enticing Turkmenistan to consider a "western route" for its gas Ashqabad desired close ties with Russia [and Iran] and its views were generally thought to be in line with theirs.<sup>534</sup> Though Turkmenistan's Niyazov has shown his official support more than once for a Russian-Iranian conception of the Caspian, Russia and Iran could no longer rely on Turkmenistan after 1998.<sup>535</sup>

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526. Croissant & Croissant, *supra* note 23, at 34. In a joint communiqué adopted by Moscow and Ashqabad before the former officially decided to back out of the development agreement, it was said that "until the determination of a new status for the Caspian, the issue of activities on the sea must be realized and strictly brought into line with earlier treaties signed between the USSR and Iran on the basis of consensus and a refusal to accept a kind of unilateral solution." Mesamed, *supra* note 121, at 215.

527. Mesamed, *supra* note 121, at 214-15.

528. *Id.* at 217-18.

529. *Id.* at 217.

530. *Id.* Washington also pledged to earmark \$750,000 to Ashqabad for the carrying out of a feasibility study on regional pipelines. *Id.* at 217-18.

531. See *supra* note 435 and accompanying text (explaining that sectoral division provides the most stable legal environment for the construction of a trans-Caspian pipeline).

532. See *id.*

533. Mesamed, *supra* note 121, at 218; see also *supra* notes 420-38 and accompanying text (discussing Iranian and Russian objections to any trans-Caspian pipeline route).

534. Mesamed, *supra* note 121, at 213.

535. *Id.*



In some ways the above events highlight Ashqabad's acceptance of the sectoral division approach. In other ways, however, they seem to reinforce Ashqabad's more conservative approach calling for multilateral consensus on the legal regime of the Caspian and rejecting unilateral exploitation of the Sea's subsoil resources. Above all they reveal the extent to which Turkmenistan (and the other littoral state's) legal diplomacy is inextricably tied to changing geopolitical motives and interest.

#### 4. Russia: The Strategic Mastermind

Russia has always viewed the Caspian as a unique body of water and has thus attached a "special rights" status to development of its natural resources.<sup>536</sup> Legally, Moscow corroborated this stance in two ways. First it based its argument on the theory that the continuing validity of the Soviet-Iranian Treaties of 1921 and 1940 required joint utilization of the Sea's resources.<sup>537</sup> This argument essentially sought to link the prospect of hydrocarbon ownership rights to the management of other Caspian resources, particularly the environment, thus highlighting the need for joint cooperation on all fronts.<sup>538</sup> Next, Russian legal arguments centered on the fact that the UNCLOS was not applicable to the Caspian Sea because it is essentially a landlocked lake.<sup>539</sup> Thus, Moscow argued that all

536. For analysis of the Moscow's establishment of a legal regime *via* the Soviet-Iranian Treaties, see *infra* Part IV; see also *infra* Parts IV.A.2-3, for Moscow's interpretation of the Soviet-Iranian Treaties, especially its view of the Caspian as a "closed sea."

537. *Validity of Treaties at Heart of Legal Disputes Over Caspian Sea Rights*, 94 OIL & GAS J. 1, Jan. 1, 1996, 1996 WL 8286280. The article also outlines Iran's agreement with Russia that the Caspian is a lake with a "condominium" legal regime pursuant to the Soviet-Iranian Treaties. *Id.* M. A. Mohaved, an Iranian legal consultant, argues that in a legal conference in Tehran the NIS extended applicability of the FSUs treaties when they signed the Almaty Declaration. *Id.* Mohaved claims that the signing of this declaration means that the breakup of the FSU could have no effect on either the factual or the legal realities concerning the Caspian. *Id.* W.E. Butler, an international lawyer and professor of comparative law, questions this legal analysis: "The existing Soviet-Iranian bilateral treaty regime is, at best, fragile since apparently only two of the Caspian Sea coastal states—Russia and Iran—unequivocally recognize the treaties." *Id.* Butler also argues that if the bilateral treaty regime has collapsed it is unclear that the 1982 UNCLOS of the Sea applies, although it could help the countries construct a new legal regime. *Id.*; see also generally *infra* Parts IV-V, for an in-depth legal analysis of the effect of the Soviet-Iranian Treaties and a consideration of the different legal regime models available to the littoral states.

538. According to Cynthia and Michael Croissant, the official argument of Russia [and Iran] in favor of joint sovereignty of the Caspian is that the latter is necessary to protect the Sea's ecosystem from the rapid development of offshore oil and gas deposits. Croissant & Croissant, *supra* note 23, at 27. The real reasons for their adoption of a common ownership principle, however, are geopolitical. *Id.* at 28.

539. Clive Schofield & Martin Pratt, *Claims to the Caspian Sea*, 1996 JANE'S INTELL. REV. 75, Feb. 1, 1996, 1996 WL 9483534. This view was embodied in a

resources should be governed by a condominium system allowing equal access to all littoral states.<sup>540</sup>

Moscow, the original champion of the condominium theory, has in recent years drastically changed its position on the status of the Caspian.<sup>541</sup> The shifting Russian legal strategy is a result of several internal and external dynamics motivating Russia to seriously reconsider its policies in the Caspian.<sup>542</sup> The internal dispute is primarily a bureaucratic turf battle between the Russian Foreign Ministry and the Ministry of Fuel and Power.<sup>543</sup> The former is gravely concerned about Russia's decreasing geopolitical influence in the Caspian region and the Caucasus and therefore sees legal strategy as a means of blocking any foreign advancement and participation in the region.<sup>544</sup> The latter has a more subtle legal approach: allied with the powerful LUKoil, it proposes to adapt to changing circumstances, realizing that a one-dimensional "legal veto" strategy will not only fail to prevent foreign involvement in the Caspian but may also cost Russia valuable profits and a say in how

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Russian memorandum, dated October 5, 1994, to the United Nations, in which Russia emphasized that the law of the sea could not apply to the Caspian since it has no natural connection with other seas. *Id.* Russia also maintained that the Soviet era treaties with Iran remained in force as the existing legal regime for the Caspian. *Id.*; see also Laurent Maillard, *Iran, Russia Seek to Control Caspian Riches*, AGENCE FRANCE-PRESSE, Oct. 23, 1995, 1995 WL 7871921; BUTLER, *infra* note 583, at 116-33 (discussing generally Moscow's view on the special legal regimes that control "closed seas"—the Caspian being included in the latter category); Croissant & Croissant, *supra* note 23, at 27-30 (analyzing the real geopolitical reasons for Russia's insistence that the Caspian is a "lake").

540. *But see* Schofield & Pratt, *supra* note 539. Schofield and Pratt argue that a close reading of Part IX of the 1982 UNCLOS which deals with "enclosed or semi-enclosed seas" reveals that Russia's argument (above) may be faulty. *Id.* Article 122 defines an enclosed or semi-enclosed sea as: "a gulf, basin or sea surrounded by two or more states and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states." *Id.* The authors argue that the Caspian arguably qualifies under the second requirement. *Id.* For more in-depth analysis of the UNCLOS provisions and the condominium concept, see *infra* Parts V.A.1-2. For a rejection of this interpretation of Article 122, see *infra* notes 774-78 and accompanying text.

541. The change has been gradual, with the turning point being Moscow's "doughnut" compromise proposal and the consolidation being the execution of the bilateral agreement on division of the northern Caspian with Kazakhstan. See Upperton, *supra* note 226. For a more in-depth discussion of legal models similar to the Russian "doughnut compromise," see *infra* Part V.

542. See *supra* notes 70-79 and accompanying text.

543. See, e.g., John Helmer, *Central Asia: Uncertain Currents in Caspian Oil Game*, RADIO FREE EUROPE-RADIO LIBERTY, Oct. 1, 1997, at <http://www.rferl.org/ncal/features/1997/10/F.RU.971001135025.html> (copy on file with the *Vanderbilt Journal of Transnational Law*) (commenting on the Russian Foreign Ministry's embarrassment at not having been informed of Russian participation [via LUKoil] in the consortium to develop the contested Kaipaz-Serdar field in dispute between Azerbaijan and Turkmenistan).

544. See *id.*

the legal status will be resolved.<sup>545</sup> Though the Foreign Ministry forced Russian oil companies to back out of a joint-venture with Azerbaijan, the tension between it and Ministry of Fuel and Power has not been fully resolved.<sup>546</sup>

On November 12, 1996, Russia officially signaled its willingness to consider sectoral division of the Sea by proposing to recognize a legal regime that allowed an exclusive forty-five nautical mile (NM) economic zone for all littoral states.<sup>547</sup> Moscow also expressed willingness to consider national jurisdiction of the Sea beyond the forty-five mile limit where drilling had already begun.<sup>548</sup> According to the proposal, however, all other surface and subsurface areas of the Sea would be commonly owned and managed through the establishment of joint-stock companies of the five littoral states.<sup>549</sup> Also, the proposal included a "double-tender" system giving the littoral states first bids to all development fields in the Caspian ahead of non-littoral actors.<sup>550</sup> Essentially this system would allow any one of the littoral states to veto the entry and involvement of outside national or corporate powers into the area.<sup>551</sup>

In February 1998 Russian Foreign Ministry Special Envoy Feliks Kovalev made the surprising announcement that Russia was ready to carry out a "fair division of the Caspian seabed," and by July of the same year Russia signed an agreement with Kazakhstan dividing the northern part of the Caspian.<sup>552</sup> In the face of Iranian concerns that Russia was quickly abandoning its original stance on multilateral consensus and common ownership, Moscow denied that the Kazakh agreement created a "special status" for the northern part of the Caspian.<sup>553</sup> Yet after 1998 Russia continued to make official

545. See *id.* This also addresses the external realization: that Moscow cannot stop foreign involvement—it should instead get its own foot in the door. See *id.* According to Cynthia and Michael Croissant Moscow's ultimate change in accepting some form of sectoral division for the Sea was brought about because it realized that it could not stop *de facto* delimitation. Croissant & Croissant, *supra* note 23, at 34. The only question was how the division would be formalized *de jure*. *Id.*

546. Croissant & Croissant, *supra* note 23, at 34.

547. *Id.*; see also *supra* note 514 and accompanying text; *infra* Part V.B.2, for application of dual or "split regime" principles such as the one proposed by Russia.

548. *Id.* at 34-35.

549. *Id.*

550. *Id.*

551. See *supra* note 514 and accompanying text (discussing Azerbaijan and Kazakhstan's rejection of the forty-five mile "doughnut proposal" because they realized that the joint-stock and "double-tender" rules would only reinforce, not reject, a common ownership principle).

552. Croissant & Croissant, *supra* note 23, at 35; see also *supra* note 515 and accompanying text.

553. Croissant & Croissant, *supra* note 23, at 35.

statements seriously undermining its earlier position rejecting any sectoral division of the Caspian.<sup>554</sup>

Many have argued that Russia's involvement in Caspian joint-ventures has also weakened the validity of its original legal position.<sup>555</sup> The present Russian legal position, however, though a significant departure from previous proposals on division of seabed, is not as revolutionary a paradigm shift as once thought. Russia still contends that beyond a narrow territorial and an exclusive economic rights zone (including fishing) the waters are to be joined in common.<sup>556</sup> In other words, any acquiescence regarding sectoral division only applies to a limited area of the seabed.<sup>557</sup> Therefore, such a dual-regime "compromise" may still pose a serious challenge to the ownership rights of all littoral states because it would effectively give Russia [and Iran] legal veto power over any development beyond the exclusive zone.<sup>558</sup> This challenge is particularly apparent in light of Russia's strong commercial and naval presence in Caspian waters.<sup>559</sup>

##### 5. Iran: The "Legal Veto"

Iran's legal stance is tempered by several geopolitical and economic realities.<sup>560</sup> First is the realization that due to its relatively

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554. *Id.* at 36.

555. *But see id.* at 36-37.

556. *Id.* at 36-37; John Helmer, *Kazakhstan/Russia: Caspian Oil Disputes Linger*, RADIO FREE EUROPE-RADIO LIBERTY, May 13, 1998, at <http://www.rferl.org/nca/features/1998/05/F.RU.980513132231.html> (copy on file with the *Vanderbilt Journal of Transnational Law*); see also Merhat Saripzhan, *Central Asia: New Developments in Russian Caspian Policy*, RADIO FREE EUROPE-RADIO LIBERTY, Apr. 17, 1998, at <http://www.rferl.org/nca/features/1998/04/F.RU.980417111243.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

557. *Id.*

558. See *infra* Part V, for further analysis of the practical and legal effects of such a dual or "split regime" proposal. It seems that subsequent to the Russian turnaround Iran has been left out in the cold, but this is not the case because Russia's "doughnut compromise" seeks to retain substantial control over surface waters. *Id.* This may effectively render the legal right of the NIS to mine the seabed practically void. *Id.*

559. Croissant & Croissant, *supra* note 23, at 37. According to one Russian analyst, Moscow is attempting to maintain optimum conditions for commercial operations in the strategically important region by promoting joint control over the surface waters. *Id.* Such control would not only facilitate free trade and preservation of natural resources but would also allow Russia to intimidate its neighbors because of the size and strength of its naval presence in the area. *Id.*

560. See, e.g., Houshang Ta'leh, *The Caspian Sea and the Violated Interests of Iran*, 91 J. POL., SOC. ISSUES, ECON. & SCI. 91 (Iran), July-Aug. 1998, at <http://www.netiran.com/Htdocs/Clippings/FEconomy/980722XXFE02.html> (copy on file with the *Vanderbilt Journal of Transnational Law*) (explaining why Iran has taken the most obstinate stance regarding delimitation of the Caspian and why it should step up its "mild protests" to ensure that its rights are protected).

small Caspian coastline sectoral division based on the equidistance and median line principles would give Iran a small piece of the Caspian pie.<sup>561</sup> Second is the discovery that Iran's shores do not appear to hold significant hydrocarbon reserves.<sup>562</sup> Third, even if Caspian production off Iran's shores were to be profitable Tehran concedes that it lacks the funds to allocate significant resources away from its Persian Gulf production agenda.<sup>563</sup> Last but not least, Iran does not want the Caspian to become another Persian Gulf—it fears that an open door policy especially with regard to American corporations means that direct American involvement in Caspian affairs is not far away.<sup>564</sup> In Tehran's eyes this is a direct challenge to Iran's sovereignty in the region.<sup>565</sup>

Based on these conditions the Foreign Ministry has generally followed the Russian lead in using a "legal veto" strategy regarding Caspian development.<sup>566</sup> Tehran's basic default position is as follows: 1) any unilateral action regarding mining and exploration of Caspian oil and gas must cease until a comprehensive legal regime is set up;<sup>567</sup> 2) all unilateral joint-venture contracts are invalid pursuant to international law;<sup>568</sup> 3) the Caspian Sea and its resources should be controlled by a legal regime pursuant to Soviet-Iranian bilateral treaties which dictate a "condominium" theory of joint ownership;<sup>569</sup> 4) development of a legal regime must be reached *via* unanimity and multilateral negotiation and not bilateral efforts;<sup>570</sup> and 5) in the alternative, the surface and seabed should be divided equally between the five littoral states, with each state holding a twenty percent share.<sup>571</sup>

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561. *Iran Opposes Any Trans-Caspian Pipelines*, DOW JONES INT'L NEWS, Mar. 11, 1999, 1999 WL 11284153.

562. *Id.*

563. *Id.*

564. Michael Lelyveld, *Caucasus: U.S. Military Presence in Caspian Appears Inevitable*, RADIO FREE EUROPE-RADIO LIBERTY, Feb. 4, 1999, at <http://www.rferl.org/nca/features/1999/02/F.R.U.990204132233.html> (copy on file with the *Vanderbilt Journal of Transnational Law*) (explaining that Azerbaijan's alliance with the United States may eventually lead to American military involvement in the Caspian).

565. *See id.*

566. *Id.* Throughout the remaining parts of the study, the author will often refer to the term "legal veto" as a littoral state's attempt to invalidate what it deems to be unacceptable ownership and development of Caspian oil and gas reserves based solely on legal principles. These principles may include general principles of international law, customary international law, and treaty law.

567. *Iran Protests Azerbaijan's Unilateral Exploitation of Caspian Sea*, *supra* note 215.

568. *Id.*; see also *supra* note 215 and accompanying text.

569. *Id.*

570. *Id.*

571. *Consensus on the Caspian Sea*, Sept. 2, 1998, at <http://ftp.eurasia.org.ru/english/september/Eng0106.html> (copy on file with the *Vanderbilt Journal of Transnational Law*); see also *Kazakh FM Hails Iran's Stance on Caspian Status*,

In 1998 after the Russian-Kazakh agreement to divide the northern Caspian, Russian Deputy Foreign Minister Boris Postukhov traveled to Iran and reassured officials there that Moscow "still recognized the validity of the 1921 and 1940 treaties with Iran . . . [and it] would continue to do so until a new legal regime for the landlocked body of water is devised."<sup>572</sup> The two countries, however, also issued a joint statement supporting equal partition of the seabed although they did not agree on how such delimitation should take place.<sup>573</sup>

Indeed, where Iran has failed to officially acknowledge acceptance of some form of sectoral division, its actions indicate, like Russia and Turkmenistan, *de facto* recognition of the validity of interim bilateral agreements between the littoral states dividing up portions of the Sea among themselves.<sup>574</sup> In late 1997 Iran announced that it would soon open its sector of the Sea to development by international oil companies.<sup>575</sup> In 1998 it announced that Anglo-Dutch Shell and British Lasmco had signed a major deal to develop oil and gas exploration in Iran's "sector."<sup>576</sup> After the deal, however, Azerbaijan issued a strong statement claiming that Iran's actions were illegal because the proposed oil and gas fields fell within Azerbaijan's "sector" of the Sea.<sup>577</sup> To spite Baku Iran rejected the contention and sarcastically reminded Azeri officials that the confusion was the result of the failure of the littoral states to reach multilateral consensus on an acceptable legal regime for the Caspian.<sup>578</sup>

According to several legal commentators, Iran (and Russia's) change of position from an original condominium approach represents the triumph of politics over legal diplomacy.<sup>579</sup> It is important to note, however, that both Russian and Iranian views still challenge a blind application of the UNCLOS to the Caspian. They both seek to

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WORLD NEWS CONN., Nov. 6, 1999, 1999 WL 26459002 (explaining that although Iran had previously advocated the joint development of the Caspian, it is now considering the possibility of dividing the sea and its floor into equal national sectors).

572. Entessar, *supra* note 57, at 169.

573. *Id.*

574. *Id.*

575. *Id.*

576. *Id.*

577. *Id.*

578. *Id.*

579. In fact, some analysts have argued that the claims based on condominium principles are legally unreasonable if not impractical. See, e.g., Caglett, *infra* note 584; see also Oxman, *supra* note 22. Others have said that although these arguments may be legally sound, the change in Russian and [Iranian] positions represents the ultimate triumph of pressure politics and regional balance of power: "supporters of the condominium lost the battle not in the courtroom, but in the boardroom of domestic and international politics." Mehdiyoun, *supra* note 25, at 14.

restrict pure sectoral sovereignty in order to increase their control over regional energy issues—one by claiming joint sovereignty over the waters of the Caspian, the other by rejecting the equidistance principle of delimitation altogether. In this context their new diplomatic positions are far from diplomatic surrender and their legal and practical effects may not be as divergent as once thought.<sup>580</sup> They do, however, reflect the inherent tension between Moscow and Tehran and the degree to which their geopolitical interests diverge.<sup>581</sup>

The practical and legal effects of Russian and Iranian legal diplomacy on the status of the Caspian have not, as it has been argued by some, severely undermined the legitimacy of arguments that the Caspian is a unique body of water and that unilateral exploitation of its resources may violate international legal norms. The pattern of increasing bilateral agreements among the littoral states and Iran and Russia's seeming acceptance of some form of delimitation, however, suggest that a strict application of common ownership principles is probably not a realistic option. Viewed within this context, Iran needs to develop a more far-sighted legal strategy to ensure that its geopolitical interests in the region are safeguarded.<sup>582</sup> In a changing legal and geopolitical regional environment Tehran's blind adherence to a "legal veto" strategy officially rejecting the validity of most if not all oil and gas development projects initiated by the NIS has done little to promote its long-term interests in the region.

#### IV. WAS THERE EVER A SOVIET-IRANIAN REGIME?

##### A. *The Soviet-Iranian Treaties*

Few legal scholars dispute the fact that prior to 1991 the only body of applicable law regarding the status of the Caspian was a

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580. See Michael Lelyveld, *Iran: Claim to Share of Caspian Oil Renewed*, RADIO FREE EUROPE-RADIO LIBERTY, June 29, 1999, at <http://www.rferl.org/nca/features/1999/06/F.RU.990629125537.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

581. See Jamshid Momtaz, *Iran's Views on Caspian Administration*, 21 IRAN TODAY; ECONOMIC MAGAZINE 47-48 (Iran), May-June 1998, at <http://www.netiran.com/Htdocs/Clippings/Fplitics/980501XXFP01.html> (copy on file with the *Vanderbilt Journal of Transnational Law*), for an overview of Iran's legal position regarding the Caspian. More specifically, Momtaz warns that Iran must not blindly follow the fickle Russian "legal veto" stance because it is not in its interests. See *id.*

582. See *infra* Part VI.C (proposing and outlining a new legal-diplomatic strategy which will better protect the geopolitical and geoeconomic interests of Tehran in the Caspian region).

series of treaties and agreements signed between Russia and Iran.<sup>583</sup> Therefore it is critical to analyze the legal effect of the treaties prior to 1991. If the prior legal status of the Caspian is indeed inadequate given changed circumstances in the region, the *absence* of any formal legal consensus on the creation of a new regime means that the *only* operative body of law in the Caspian is the series of Soviet-Iranian bilateral agreements (Soviet-Iranian Treaties) signed decades ago. Yet there has been very little serious legal thought given to the effect of these Treaties because their relevance has been limited only to their potential role in creating a new legal regime that better accommodates changing geopolitical circumstances.<sup>584</sup> This approach detracts from the legal consequences of the debate for a legal regime in so far as it fails to recognize that, in the least, the Treaties may offer *default rules* restricting certain actions by littoral states.<sup>585</sup> In this sense, this section seeks to determine the extent to which these Treaties and agreements define and restrict legal relationships between the present littoral states.

There is little literature that actually refers to the Treaties as establishing any sort of a comprehensive regime outside a limited set of legal rules defining military and commercial relations between the Soviet Union and Iran.<sup>586</sup> As a result many scholars have automatically dismissed the legal validity of the Treaties as entirely inapplicable to defining ownership rights to subsoil resources, including oil and gas.<sup>587</sup> Some have argued even further, positing that other than the 1940 Treaty which specifically defined and reconfirmed the principle of littoral exclusivity with respect to

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583. In 1971 before the collapse of the Soviet Union, William Butler declared: "the regime of the Caspian is governed by Soviet-Iranian Treaties and agreements and by the domestic legislation of each state. General norms of international law relating to the high seas . . . and to research and exploitation of the natural resources of the high seas do not apply to the Caspian." WILLIAM E. BUTLER, *THE SOVIET UNION AND THE LAW OF THE SEA* 101 (1971).

584. See, e.g., Brice M. Caglett, *Ownership of Seabed and Subsoil Resources in the Caspian Sea Under the Rules of International Law*, 1 *CASPIAN CROSSROADS* 3, Fall 1995, at <http://ourworld.compuserve.com/homepages/usazerb/131.htm> (copy on file with the *Vanderbilt Journal of Transnational Law*). Although both Russia and Iran have repeatedly argued that unilateral NIS action in the Caspian violates the only valid rules of international law governing littoral activity in the region, most legal scholars note that the treaties deal with limited issues and cannot be of help in determining the ultimate shape of a legal regime. *Id.*

585. "Default rules" are distinguished from a legal regime in so far as the former only offers a limited legal guideline restricting state action, instead of a comprehensive arrangement establishing a complex set of interrelationships. The Soviet-Iranian Treaties, while not constituting a legal regime, may arguably satisfy the characterization of "default rules."

586. None of the sources cited herein refer to the Soviet-Iranian Treaties as establishing a legal regime. *But see Validity of Treaties at Heart of Legal Disputes Over Caspian Sea Rights*, *supra* note 537 (comments of Professor Butler).

587. See, e.g., *id.*, *supra* note 537 (comments of Professor Butler).



Caspian naval presence and navigation, no other legal relationships (including that of common ownership) actually exist between the two signatories.<sup>588</sup> The question thus becomes: 1) what was the nature and scope of the Soviet-Iranian Treaties; 2) how did Soviet and Iranian legal scholars and politicians interpret the effects of the provisions on the legal status of the Caspian; and 3) did actual state practice and *opinio juris*<sup>589</sup> of the states involved invalidate the *de jure* effect of the Treaties and establish a different set of *de facto* legal parameters?<sup>590</sup>

After answering the above questions the broader aim of this section is to determine the current validity and applicability of the Soviet-Iranian Treaties in light of the collapse of the Soviet Union and the establishment of the CIS. In other words it is necessary to establish whether any aspect of the Treaties applies to define the current legal relationships among the littoral states, and if so, whether the Treaties operate to *restrict* the [unilateral] actions of individual littoral states in the energy exploitation context.<sup>591</sup>

## 1. Nature and Scope of the Soviet-Iranian Treaties Concerning the Caspian Sea

Until 1991 the status of the Caspian region and the Sea itself was shaped by the history of regional politics between the empires of Tsarist Russia and Persia.<sup>592</sup> Following the successive defeats of Qajar Persia to Russia during the Nineteenth Century the two empires signed a series of treaties that established territorial boundaries and regulated navigation and military positioning, often in favor of Russia.<sup>593</sup> In 1813 the two empires were signatories to the

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588. Kochumov, *supra* note 154.

589. *Opinio juris* refers to actual state practice and interpretation of written laws. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 56 (3d ed. 1993). Under the rules of international law the legal effect of written law can actually be changed if the parties involved engage in a repeated pattern of practice that would suggest a different interpretation of the laws. *Id.*; see also *infra* Part IV.A.3 (providing more in-depth analysis of the legal requirements for establishment of *opinio juris*).

590. This refers to customary international law. See *infra* notes 638-43 and accompanying text.

591. See, e.g., Olbars A. Kepbanov, *The New Legal Status of the Caspian Sea is the Basis of Regional Co-Operation and Stability*, PERCEPTIONS J. OF INT'L AFF., Dec. 1997, at <http://www.mfa.gov.tr/gupa/percept/ii4/ii4-2.htm> (copy on file with the *Vanderbilt Journal of Transnational Law*) (arguing that the Soviet-Iranian Treaties do not exist any more as subjects of international law with the emergence of the NIS).

592. See generally Kochumov, *supra* note 154.

593. See generally Behnaz Assadi-Kiya, *A Glance at the Legal Status of the Caspian Sea*, KAYHAN EVENING DAILY (Iran), May 16, 1995, at <http://www2.prestel.co.uk/eman/IRAN17.HTM> (copy on file with the *Vanderbilt Journal of Transnational Law*) (outlining shipping, fishing, and general legal rights between Russia and Iran in the Caspian). A review of Iran's activities in the Caspian Sea during the decades prior to the collapse of the

Gulistan Treaty.<sup>594</sup> Article 5 of the treaty stipulated that "except for the Russian State, no other state may have a military flag on the Caspian Sea."<sup>595</sup> Persia, however, was allowed to retain commercial shipping rights.<sup>596</sup> Article 8 of the Turkmenchai Treaty of 1828 reaffirmed the exclusive right of Russian naval presence in the Caspian.<sup>597</sup>

The legal and territorial standing of Persia vis-à-vis Russia improved after the Revolution of 1917 when the Russian Soviet Federated Socialist Republic (RSFSR) and Persia concluded a friendship treaty in 1921 (1921 Treaty) which granted the parties equal rights of free navigation "under their own flags."<sup>598</sup> In 1935 and 1940 the two countries executed two more treaties attempting to further define shipping operations in the Caspian.<sup>599</sup>

The 1940 Treaty on Trade and Navigation (1940 Treaty), however, represents the most detailed and comprehensive set of rules regarding legal relations between the two states in the Caspian.<sup>600</sup> First, the Treaty reserved a ten-mile fishing zone for each state adjacent its coast and for its own flag vessels.<sup>601</sup> Second, Article 13

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Soviet Union reveals that it was not able to exercise its rights fully and was often subject to Russian political and economic hegemony in the region. *Id.*

594. See Treaty of Peace and Perpetual Friendship, Oct. 12, 1813, Russ.-Persia, 62 Consol. T.S. 435 [hereinafter Gulistan Treaty], [applicable sections] reprinted in Assadi-Kiya, *supra* note 593.

595. *Id.* art. 5.

596. *Id.*

597. See Treaty of Peace and Friendship, Feb. 21, 1828, Russ.-Persia, ch. 8, 78 Consol. T.S. 105 [hereinafter Turkmenchai Treaty], reprinted in Assadi-Kiya, *supra* note 593. Chapter 8 reads: "Iran's commercial ships, as before, could navigate the Caspian and sail to the Russian shores . . ." *Id.* As to warships, however, it mentioned that only ships bearing Russian flags could journey into the Caspian. *Id.*

598. Soviet-Persian Treaty of Friendship, Feb. 26, 1921, RSFSR-Persia, ch. 11, 12 L.N.T.S. 381, reprinted in Assadi-Kiya, *supra* note 593 [hereinafter 1921 Treaty]. Chapter 11 reads: "Both countries, as of the time of the signing of the treaty, have the right of free navigation in the Caspian Sea under their own flags." *Id.* Chapter 7 of the Treaty reads: "In case of the presence in the Iranian naval force, of citizens of a third government and who use their presence to pursue hostile purposes against the USSR, the Soviet government has a legitimate right to ask the Iranian government to discharge such harmful elements." *Id.* ch. 7.

599. The rules governing shipping operations in the Caspian were specified in bilateral treaties in August 1935 and March 1940. Assadi-Kiya, *supra* note 593 [hereinafter 1940 Treaty].

600. Treaty on Trade and Navigation, Mar. 25, 1940, U.S.S.R.-Iran, 68 L.N.T.S. 222, [applicable sections] reprinted in Assadi-Kiya, *supra* note 593 [hereinafter 1940 Treaty].

601. The only zone that was specified as a legal limit in the Caspian Sea on the basis of the commercial and navigational agreement was a ten-mile coastal zone. *Id.*, ch. 12, art. 14. Article 14 of the twelfth chapter stated:

Any one of the contracting parties has earmarked for its own ships an area for fishing in its territorial waters to a limit of 10 nautical miles, and preserve[s]

reemphasized earlier notions of Caspian exclusivity by declaring that only the ships of the two littoral states belonging to their citizens and trading agencies were authorized to navigate the Sea.<sup>602</sup> Notes attached to the 1935 and 1940 treaties reinforced this notion of exclusivity by declaring that the Caspian "is regarded by the two Governments as a Soviet and Iranian sea."<sup>603</sup>

As can be seen from the significant provisions of the above Treaties, the intent of the parties was to define the status of relations between the signatories primarily with respect to commercial and military access.<sup>604</sup> None of the Treaties referred to delimitation or partition of the Sea except as relevant to exclusive fishing rights. No boundary issues relating to the Caspian were ever defined. Likewise, commercial provisions did not cover mining rights or subsurface economic rights and were not amended even after significant oil discoveries and production activities took place off the Azeri coast during the early 1900s.<sup>605</sup>

The inadequacy of the Treaties especially in light of changed circumstances after 1991 prompted many scholars addressing the legal issues of the Caspian to dismiss the limiting effect of these Treaties on unilateral exploitation of sub-soil resources, and more importantly, any notion that the Sea was owned in common by both

this right for itself that the import of the fishes caught by the crews of the ships navigating under its flag, are subject to special discounts and benefits.

*Id.* In practice, while Iran was limited to its ten-mile fishing zone the Soviets often fished beyond their territorial zone and within the zone of common ownership. Assadi-Kiya, *supra* note 593.

602. Assadi-Kiya, *supra* note 593. On the basis of Article 13 the two countries agreed that only the ships of these two littoral states or vessels belonging to their citizens and trading agencies would be allowed to navigate across the Caspian. *Id.* According to Assadi-Kiya, the existing treaties and agreements between the Soviet Union and Iran emphasized *common ownership* of the Sea because there had been no notification about the demarcation of maritime boundaries. *Id.* In line with this argument, William Butler asserts that "there are no territorial waters in the Caspian, only the 10-mile fishing zone." BUTLER, *supra* note 583, at 101. *But see* Croissant & Croissant, *supra* note 23, at 25 (asserting that Russia's claim regarding the validity of the Soviet-Iranian Treaties (especially the 1940 Treaty) is shaky because the language only implies that the Caspian should not be divided between the two littoral states—"in no place is it spelled out *explicitly* that the sea was to be treated as a common body of water . . .") (emphasis added).

603. Assadi-Kiya, *supra* note 593. The legal framework of cooperation between the Soviet Union and Iran was further addressed in a number of contracts including The Agreement on Economic and Technical Cooperation of July 1963 and the 1971 Scientific and Technical Agreement. *Id.* A third Soviet-Iranian conference on marine cooperation in 1971 sought to address common port and sea problems regarding navigation and commercial traffic. *Id.*

604. *See generally* 1921 Treaty, *supra* note 598; 1940 Treaty, *supra* note 600.

605. *See generally* 1921 Treaty, *supra* note 598; 1940 Treaty, *supra* note 600.

littoral states.<sup>606</sup> According to some the only applicable treaty with respect to the Caspian's legal regime is the 1940 Treaty which specifically dealt with technical delimitation issues, albeit in limited scope.<sup>607</sup> All other agreements and pacts between the Soviet Union and Iran have tangential and indirect legal effects on the status of the Caspian Sea and at best define the parties' intent to cooperate and clarify their commercial and military relationship in the Caucasus and Central Asia.<sup>608</sup> Other scholars downplay even the importance of the 1940 agreement, asserting instead that the Treaty merely intended to reflect the parties' understanding that no third states have any rights (including navigation) in the Caspian Sea.<sup>609</sup>

Regardless of the continuing legal debate about the overall comprehensiveness of the Treaties, certain legal principles may be drawn out from both the text and language of the bilateral agreements *and* from the absence of other significant provisions more clearly defining legal rights between the two states.<sup>610</sup> First, the texts of the Treaties clearly establish exclusive navigational, economic, and military rights for both states. Second, the 1940 Treaty clearly establishes an exclusive ten-mile territorial or fishing zone for both states adjacent to their coastlines. It does not, however, further delimit the exact boundaries of these coastlines.<sup>611</sup> Also, there is no textual restriction on fishing rights beyond the ten-mile zone suggesting common ownership of the Sea's resources in that area.<sup>612</sup> Third, the Treaties do not address any other economic issues beyond commercial fishing and navigation; there is no mention of the exploitation of the Sea's hydrocarbon resources.<sup>613</sup> Last but not least, the Treaties do not delimit the surface and seabed beyond the ten-mile territorial zones, either for purposes of boundary delimitation or the establishment of exclusive economic zones.<sup>614</sup>

The absence of significant provisions addressing delimitation and economic rights between the two littoral prevents a clear and precise understanding of the legal status of the Caspian pursuant to the signing of the Treaties. More specifically, the interplay of the two significant legal effects of the Treaties (on navigational and fishing

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606. See, e.g., Caglett, *supra* note 584 (arguing that fishing regimes are very different than mining regimes).

607. *Id.*

608. *Id.*

609. *Id.*

610. Note that any textual analysis of the Treaties relying on the absence of particular provisions arguably establishes a series of *implicit rights* between the two littoral states.

611. See generally 1940 Treaty, *supra* note 600.

612. See *id.*

613. See 1921 Treaty, *supra* note 598; 1940 Treaty, *supra* note 600; Assadi-Kiya, *supra* note 593.

614. See *supra* note 611-13 and accompanying text.

exclusivity issues) begs the question whether the waters of the Caspian extending beyond the ten-mile zone were indeed truly owned in common as a matter of law. In other words, does the absence of delimitation rules taken together with the general exclusivity principles referred to above set up a default presumption that joint ownership existed at the time of the signing of the Treaties and up until the collapse of the Soviet empire?

## 2. Municipal Interpretations of Treaty Law<sup>615</sup>

International legal jurists are often forced to look beyond the text of treaties and agreements in order to fill significant gaps in the treaties and find the true intent of the signatories.<sup>616</sup> In this regard, jurists may turn to official government or juridical evidence offered independent of the treaties themselves to further support or weaken a *prima facie* interpretation of their provisions. Within this context, the development of Soviet legal doctrine on the laws of the sea and the Soviet Union and Iran's interpretation of the Treaties pursuant to national implementing legislation may be particularly helpful.

### a. The Soviet Legal Doctrine of the "Closed Sea" and the "Continental Shelf"

There is considerable evidence that Soviet jurists officially viewed the legal regime of the Caspian as that of a "closed sea."<sup>617</sup> The Russo-Soviet doctrine of the "closed sea" is a highly controversial one that aims to limit commercial and military activities in certain bodies of water only to the nationals of the littoral states.<sup>618</sup> The characterization of the Caspian Sea as a "closed sea" is important for the following reason: if Soviet legal jurists interpreted the Soviet-Iranian Treaty provisions as codifications of the "closed sea" doctrine and Soviet exercise of sovereignty over the Sea reinforced such a view, proponents of the condominium theory could legally argue that exclusivity precludes any *de facto* delimitation arrangement that would prevent Soviet or Iranian exercise of sovereignty beyond a ten-

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615. This section deals primarily with *de jure* legal and legislative interpretations of the status of the Caspian Sea by both the Soviet Union and Iran. For a more detailed analysis of the political and economic practices of the littoral states as evidence of their *de facto* interpretations of the legal status of the Sea, see *infra* Parts IV.A.3-B.

616. See generally HENKIN ET AL., *supra* note 589, at 51-148 (discussing sources and evidence of international law other than treaties).

617. BUTLER, *supra* note 583, at 121, 124-25.

618. *Id.* at 132.

mile fishing zone.<sup>619</sup> This limitation would effectively require adoption of some form of a condominium regime.<sup>620</sup>

The "closed sea" principle, however, was highly contested by the West, which successfully barred its inclusion in the draft 1958 Geneva Convention on the High Seas.<sup>621</sup> Though the validity of the "closed sea" doctrine is in dispute and its practical applications suspect, there is no doubt that Soviet law officially recognized the Caspian and Aral seas (both of which were completely landlocked) as "closed seas."<sup>622</sup> The Caspian Sea, however, attained a unique "special treaty regime" status under Soviet law because it was also regulated by the series of Soviet-Iranian Treaties outlined above.<sup>623</sup> More importantly it would seem that Article 13 of the 1940 Treaty effectively incorporated this legal doctrine into the official status of the Caspian Sea in so far as it granted the two littoral states exclusive economic and navigational rights to the Sea's resources.<sup>624</sup>

The other significant effect of Soviet legal theory regarding the Caspian Sea regime concerned views of the Continental Shelf.<sup>625</sup> The Soviet-Iranian Treaties governing the regime of the Caspian do not explicitly refer to the Continental Shelf.<sup>626</sup> Indeed, geologically speaking, the Caspian Sea may simply be viewed as a depression in

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619. *See id.*

620. *See id.*

621. GARY KNIGHT & HUNGDAH CHIU, *THE INTERNATIONAL LAW OF THE SEA: CASES, DOCUMENTS, & READINGS* 325-26 (1991). At the 1958 UN Conference on the Law of the Sea, Romania and the Ukraine proposed an addition to Article 1 of the Convention on the High Seas providing that "for certain seas a special regime of navigation may be established for historical reasons or by virtue of international agreements." *Id.* The subsequently withdrew their proposed amendment and the "closed sea" doctrine was never integrated into the Convention's language. *Id.* In short, the "closed sea" doctrine has found little favor in international law. BUTLER, *supra* note 583, at 131. For a review of the text of the Convention, see the Geneva Convention on the High Seas, 13 U.S.T. 2312, 450 U.N.T.S. 82. Some would argue that analysis of the effect of the "closed sea" doctrine is a moot point because the principle never gained international acceptance and was thus never elevated to the level of customary international law. *See infra* Part IV.A.3 (outlining the legal requirements for the establishment of customary international law). The author's reference to the "closed sea" principle thus serves not as an argument for its legal validity and direct applicability to the Caspian Sea context but for its potential value as tangential evidence offered to support or weaken the notion of common ownership between the Soviet Union and Iran. *See infra.*

622. BUTLER, *supra* note 583, at 124-25.

623. *See id.*

624. *See* Assadi-Kiya, *supra* note 593 and accompanying text. In addition, Butler points out that the Caspian was effectively relegated to the status of a "closed sea" as far back as the Nineteenth Century since under the treaties of Gulistan and Turkmenchai, Persia ceded exclusive rights of dominion over the Caspian to Russia. BUTLER, *supra* note 583, at 119.

625. *See generally* BUTLER, *supra* note 583, at 134-51.

626. *See* 1921 Treaty, *supra* note 598; 1940 Treaty, *supra* note 600.

the continental land mass.<sup>627</sup> As William Butler points out, however, at least one Soviet international law manual has observed that "the resources of the continental shelf also belong to each Party [USSR and Iran] within the limits of its respective area of the sea."<sup>628</sup>

The interplay between the Soviet-Iranian Treaties and the Soviet doctrines of the "closed sea" and the "continental shelf" create a vague and seemingly contradictory legal picture for the Caspian Sea. On the one hand, the Soviet-Iranian Treaties bolster the notion of exclusivity between Russia and Iran and arguably create an *implicit* common ownership status beyond the ten-mile territorial zone. The doctrine of the "closed sea" further supports the notion of exclusivity and taken together with the "special regime status" of the Treaties strengthens the view that a common ownership understanding existed between the Soviet Union and Iran.<sup>629</sup> On the other hand, the Soviets' reference to the possible existence of a continental shelf (and its delimitation) seems to offer evidence that, in the least, challenges or undermines a common ownership understanding between the littoral states.<sup>630</sup>

#### b. Iranian National Legislation

It appears that Iran's municipal law also recognized the Caspian as a "closed sea."<sup>631</sup> The Iranian Law of May 19, 1949, on the Exploration and Exploitation of the Continental Shelf effectively asserted national jurisdiction over the natural resources of the seabed and subsoil of the continental shelf in the Persian Gulf and the Gulf of Oman.<sup>632</sup> The law, however, was silent on continental shelf delimitation in the Caspian Sea.<sup>633</sup> Six years later a note was added to Article 2 of the law which read in its entirety: "As regards to the Caspian Sea, the rules of international law relating to closed seas are

627. BUTLER, *supra* note 583, at 136.

628. *Id.*

629. *See supra* notes 617-18 and accompanying text. The fact that Soviet government officials acknowledged that the legal status of the Caspian was dictated by the "closed sea" doctrine *and* the Soviet-Iranian Treaties provides further evidence that they officially recognized that only the Soviet Union and Iran had exclusive control of the Sea and its resources. *See id.*

630. *See supra* note 627 and accompanying text. Usually, under international law, an acknowledgement of the existence of a continental shelf signals the parties' intent to implement some form of sectoral division. *See infra* notes 738-46 (providing a description and analysis of differing delimitation strategies regarding the continental shelf under the UNCLOS model).

631. CHARLES G. MACDONALD, *IRAN, SAUDI ARABIA & THE LAW OF THE SEA: POLITICAL INTERACTION & LEGAL DEVELOPMENT IN THE PERSIAN GULF* 160 (1980).

632. *Id.*

633. *Id.* at 162

applicable."<sup>634</sup> In light of the contested nature of the doctrine the intent of the Iranian legislature is not clear.<sup>635</sup>

With respect to the continental shelf, however, it is noteworthy that Iranian lawmakers recognized that the terms of the Soviet-Iranian Treaty of 1940 were inapplicable to the delimitation of the continental shelf and subsoil resources of the Caspian.<sup>636</sup> Thus, the legislation neither mentions the 1940 Treaty nor applies the common ownership principle.<sup>637</sup>

### 3. Custom, State Practice, and the *Opinio Juris*

Article 38 of the Statute of the International Court of Justice recognizes international custom, as evidence of a general practice accepted as law, to be a legitimate source of international law.<sup>638</sup> According to this article the definition of custom comprises two distinct elements: 1) general state practice, and 2) its acceptance as law.<sup>639</sup> The definition has not, however, settled the debate regarding the parameters of custom as a source of international law—many highly controversial questions remain regarding the exact meaning of these two elements.<sup>640</sup> What is clear is that consistent state practice may elevate to the level of customary international law if such practice is generally followed by the international community *and* the latter accepts such practice as law.<sup>641</sup> This second requirement of subjective acceptance or recognition of the practice as law is defined as the *opinio juris*.<sup>642</sup> Finally, a state may exclude itself from the binding effects of customary law if it "persistently objects" to the customary practice while the law is still in a state of development.<sup>643</sup>

The above analysis is applicable to the Caspian context in the following manner: despite the *de jure* effect of the Soviet-Iranian Treaties, state practice and political realities severely restricted Iranian commercial and military prowess in the Caspian for almost

634. *Id.*

635. *Id.*

636. *Id.*

637. *Id.*

638. STATUTE OF THE I.C.J., art. 38(b), reprinted in HENKIN ET AL., *supra* note 589, at 51; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 102(1)(a),(2) [hereinafter THIRD RESTATEMENT], reprinted in HENKIN ET AL., *supra* note 589, at 51.

639. HENKIN ET AL., *supra* note 589, at 55.

640. *Id.* at 55-57. These questions include, but are not limited to: 1) what constitutes state practice?, 2) how much practice is required?, 3) how much time is required?, 4) how much consistency is required?, and 5) what evidence is required for *opinion juris*, the requirement that practice be accepted as law? See generally *id.*

641. See generally *id.* at 54-86.

642. *Id.* at 78-86.

643. See THIRD RESTATEMENT, *supra* note 638, § 102 cmt. b; see also HENKIN ET AL., *supra* note 589, at 88.



seventy years.<sup>644</sup> More importantly, the Soviet Union never consulted Iran nor offered any compensation based on the proceeds of oil and gas exploration taking place off Baku and other Caspian areas managed under the *de facto* [exclusive] control of Moscow.<sup>645</sup> Iranian commentators point out that the reason behind Iran's acquiescence to these unilateral Soviet actions, which may have breached any existing "common sea" principles pursuant to the Treaties, was Iran's reluctance to antagonize its powerful northern neighbor by lodging diplomatic protest.<sup>646</sup> In short, the history of unilateral Soviet action and Iranian acquiescence would seem to weaken the effect of any arguments by Iran that the Sea is in fact held in common.<sup>647</sup>

Implicit in the argument that state practice actually invalidates the Treaties' principle of joint ownership, however, is the assumption that consistent practice by the Soviet Union and its satellite Caspian republics in their "sectors" of the Sea elevated the principle of sectoral division to the level of customary law. This argument is flawed for several reasons. First it is highly improbable that the Soviet Union's consistent practice of unilateral exploitation of hydrocarbon basins in the Caspian rises to the level of customary law because neither of the two elements required to establish custom are satisfied. Activities in the Caspian can hardly be characterized as "general state practice" on an international level.<sup>648</sup> Even on a more regional level this argument is hardly valid.<sup>649</sup> Also, there is no evidence of *opinio juris*—that either the Soviet Union or Iran ever accepted these unilateral activities as defining the legal status of relations between them.<sup>650</sup> Second, the argument assumes that a failure of notification or consent regarding unilateral actions outside of the ten-mile exclusive fishing zone actually violates the principle of common ownership. Though it is true that Iran cannot be deemed a "persistent objector" to unilateral Soviet activities under international law, it is equally probable that it was not required to object, or better yet, felt that no objection was necessary since the Treaty provisions had not been violated.<sup>651</sup>

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644. Russian naval and military supremacy meant that Iranian navigational sovereignty over the seas was severely restricted to a narrow zone close to its southern shores while Russian naval presence covered almost all corners of the sea. See Assadi-Kiya, *supra* note 593.

645. See *id.*

646. See *id.*

647. See *id.*

648. See HENKIN ET AL., *supra* note 598, at 55.

649. See *id.*; see also e.g., *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, for a general understanding of regional customary law and the legal requirements that need to be proven in order to establish its operation.

650. See Assadi-Kiya, *supra* note 593.

651. See HENKIN ET AL., *supra* note 598, at 88-90.

In short, under a customary law argument seeking to invalidate the notion of common ownership of the Caspian Sea, the burden of proof clearly lies with those seeking to prove that the *de jure* effect of the Soviet-Iranian Treaties was vitiated or altered by subsequent action or inaction on the part of the Soviet Union and Iran.<sup>652</sup> This is a tough burden of proof to overcome since advocates of the argument will have to prove that Iran's silence indicated subjective acknowledgment that unilateral Soviet action elevated to the level of customary law.<sup>653</sup> At best proponents of delimitation may point to equitable principles of international law, including estoppel, to prove that Iran's silence during the Soviet era amounted to an implicit acknowledgment that the legal status of the Caspian had changed from common ownership to that of sectoral division.<sup>654</sup>

### B. Caspian Boundaries and the Legal Effects of State Succession

The collapse of the Soviet Union has prompted proponents of sectoral division to mount a more credible challenge directed at the legal validity of the Soviet-Iranian Treaties. The legal challenge operates primarily on two fronts. First, proponents of sectoral division advance the argument that although official delimitation of the Caspian Sea did not occur during the Soviet era, the Soviet Union and Iran practically divided the Caspian pursuant to several boundary and aerial agreements consistent with state practice. These proponents further argue that in practice, the Soviet government divided the Sea between Russia and the NIS, allocating specific sectors of the Sea to be managed and operated by Baku, Almaty, and Ashqabad. Second, proponents of sectoral division question the continuing validity of the Soviet-Iranian Treaties, especially in light of the fundamental change in the geopolitical

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652. See, e.g., Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, [applicable sections] reprinted in HENKIN ET AL., *supra* note 598, at 82-85 (providing the standard legal procedure for placing the original burden of proof on the party arguing for the existence of customary international law). On a related but important point, simple violation of the rules of international law, even under repeated circumstances, does not, in and of itself, invalidate the rules' applicability and *de jure* effect on concerned states. See *International Law Commission Report*, [1966] II Yb.I.L.C. 169, 253-55, reprinted in HENKIN ET AL., *supra* note 598, at 507:

The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty to suspend the performance of its own obligations under the treaty . . . [A] Breach of a treaty, however serious, does not *ipso facto* put an end to the treaty . . . (emphases added).

653. See *supra* notes 640-42 and accompanying text.

654. See Caglett, *supra* note 584 (advancing such an estoppel argument).

environment and a significant redistribution [and reorganization] of Caspian boundaries. This challenge directly calls into question the validity of the Soviet-Iranian Treaties pursuant to the succession and independence of the NIS from the Soviet Union.

### 1. Caspian Sea Boundaries: Internal Administrative Delimitation or International Borders?

Under Article 5 of the Treaty Establishing the Commonwealth of Independent States (CIS Treaty)<sup>655</sup> and the preamble of the Almaty Declaration,<sup>656</sup> the signatories recognized the principles of respect for the territorial integrity and inviolability of the borders existing within the Commonwealth.<sup>657</sup> According to this requirement, the legally established administrative territorial division among the former Soviet republics officially acquired the status of international borders after independence.<sup>658</sup> Article 5, however, only refers to the land boundaries of the NIS—it does not refer to division of the Caspian Sea.<sup>659</sup> In fact, such delimitation never officially occurred, either among the Soviet republics, or between the Soviet Union and Iran.<sup>660</sup>

With respect to Soviet-Iranian delimitation or partition of the Caspian, the NIS often refer to a boundary treaty executed by the two littoral states in 1956 establishing a land boundary on both sides of the Caspian.<sup>661</sup> The boundary delimitation designated the port of Astara as the common boundary on the west and the port of

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655. Agreement Establishing the Commonwealth of Independent States, Dec. 8, 1991, 31 I.L.M. 143, 144 (hereinafter CIS Treaty). This agreement technically dissolved the Soviet Union. *Id.* at 143. The governments of Russia, Belarus, and the Ukraine then established the CIS. *Id.* On December 21, 1991, a protocol was attached to the above agreement that allowed Azerbaijan, Armenia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan to join the CIS. *See* Protocol to the Agreement Establishing the Commonwealth of Independent States, Dec. 21, 1991, 31 I.L.M. at 147. Georgia later joined the CIS in December 1993. HENKIN ET AL., *supra* note 589, at 540. Another agreement executed on the same day acknowledged the CIS members' rights to apply for UN membership, although Russia, Belarus, and the Ukraine had already attained membership status. *See generally* Decision by the Council of Heads of State of the Commonwealth of Independent States, Dec. 21, 1991, 31 I.L.M. at 151. Finally, on June 22, 1993, the CIS member-states adopted an official CIS Charter. *See* Commonwealth of Independent States: Charter, June 22, 1993, 34 I.L.M. 1279 (1995).

656. Almaty Declaration, Dec. 21, 1991, pmbl., 31 I.L.M. 148 [hereinafter Almaty Declaration].

657. CIS Treaty, *supra* note 655, art.5, at 144; *see also* Kochumov, *supra* note 154.

658. Kochumov, *supra* note 154.

659. *See id.*; *see also* Mesamed, *supra* note 121, at 209.

660. Kochumov, *supra* note 154.

661. *Id.*

Hosseingholi as the one on the east.<sup>662</sup> The treaty was silent on demarcation of the Sea itself.<sup>663</sup> In 1964, however, a Soviet-Iranian aerial agreement for determination of flight information zones established the traditional line of demarcation between the two countries by extending an imaginary line across the southern Caspian based on the Astara-Hosseingholi delimitation.<sup>664</sup> Both Azerbaijan and Kazakhstan have produced maps and documents showing that such a Soviet administrative division was indeed officially recognized.<sup>665</sup>

While the notion of boundary delimitation between the Soviet Union and Iran under their bilateral treaties is directly relevant to the topic at hand, the relationship between the Soviet Republics (now the NIS) and Iran may also bear some light on the weight of legal arguments for and against a specific legal regime for the Caspian. In this respect, it is important to analyze the legal obligations of the NIS to each other and ultimately to Iran, particularly with respect to continuing legal obligations after state succession and state practice regarding the administration of internal boundaries and the latter's effect on the formalization of international boundaries after disintegration.

As early as 1920 the Soviet Ministry of Oil Industry arbitrarily partitioned the waters of the Caspian between the five littoral republics.<sup>666</sup> In 1970, however, the Ministry of Oil Industry executed a more comprehensive delimitation based on an approximation of the median line separating the four republics into *de facto* "national sectors."<sup>667</sup> According to some legal scholars, however, such division took on a symbolic rather than realistic character and had no practical significance for the economic life of the post-Soviet republics.<sup>668</sup> Yet state practice indicates that both before and after the dissolution of the Soviet Union, the Republics consistently adopted the practice and custom of observing the internal administrative boundary lines in the Caspian Sea.<sup>669</sup> In recognition of the legal validity of state practice in observing the *de facto* boundary lines to the waters of the Caspian, President Heydar Aliyev of Azerbaijan proclaimed that the Sea "was divided into sectors, each

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662. Shoumikhin, *supra* note 63, at 132. This line, however, was never formally agreed upon by inter-governmental agreement. *Id.*

663. *Id.*

664. *Id.*

665. Babak, *supra* note 109, at 185.

666. As early as the 1920s the Ministry of Oil Industry of the USSR had arbitrarily divided the Soviet zone of the Caspian between Russia, Azerbaijan, Kazakhstan, and Turkmenistan. Shoumikhin, *supra* note 63, at 132.

667. Kochumov, *supra* note 154.

668. Mesamed, *supra* note 121, at 109.

669. See Kochumov, *supra* note 154.

of which belongs to a particular Caspian country.”<sup>670</sup> In addition, both Baku and Almaty have produced Soviet government maps corroborating the existence of such delimitation and each has relied on the Soviet Constitution which formally recognized the Republics as sovereign states with the right to independently use their natural resources on the land and water territory belonging to them.<sup>671</sup>

The foregoing arguments, although seemingly persuasive, are nonetheless flawed for several reasons. First, any delimitation of the Sea that occurred between and among the Soviet Republics was solely and directly a result of central administrative decisions carried out primarily by the Soviet Ministry of Oil Industry pursuant to the Union’s constitutional laws.<sup>672</sup> Despite the practice of conformity with internal administrative boundaries and their application within the Caspian Sea context, state practice and recognition of *de facto* boundaries never rose to the level of Soviet law because the sectoral division was often implemented by sector ministries which were limited in their jurisdiction.<sup>673</sup> In other words, there was never formal recognition and implementation of boundary demarcation under Soviet agencies—they were only authorized to exercise functional jurisdiction over internal boundary decisions, thereby making their actions binding only on the territory of all Soviet Republics.<sup>674</sup> Second, according to Soviet law, the continental shelf and ownership of its resources was the property of the USSR, not any of its constitutive republics.<sup>675</sup> In support of this contention, Russian legal scholars point to the fact that the shelf could not be developed without the permission of competent Soviet authorities.<sup>676</sup> The Caspian’s oil fields were, therefore, owned and administered by oil producing enterprises, institutions, and organizations subordinate to the central government of the USSR.<sup>677</sup> Third, these internal and external administrative boundaries were not in fact recognized by Iran and cannot therefore operate to limit its sovereignty over the Caspian’s water and resources.<sup>678</sup>

All this would strongly suggest that under international legal principles, the Caspian partition was solely administrative in nature and did not divide the Sea either between the Soviet Union and Iran or the NIS republics. More importantly, however, the internal administrative divisions among the Republics are legally inapplicable

670. *Id.*

671. Babak, *supra* note 109, at 184.

672. *See* Kochumov, *supra* note 154.

673. *Id.*

674. *See id.*

675. *Id.*; *see also supra* notes 625-28 and accompanying text.

676. Kochumov, *supra* note 154.

677. *Id.*

678. *See id.*

to Iran and were never officially acknowledged by either it nor the Soviet Union—its operation was limited to the management functions of the Soviet central government under Soviet constitutional and administrative law. As such, the internal divisions were rendered legally obsolete and constitutionally void with the collapse of the USSR.

## 2. Are the NIS Bound by Soviet Era Treaty Obligations?

### a. The International Juridical Personalities of the NIS [Republics] during the Soviet Era

To better understand the Soviet Republics, juridical personalities under the USSR and international law it is important to briefly lay out the political arrangements within the Soviet Union. Under Article 60 of the 1936 Soviet Constitution the parliaments of the RSFSR, the Turkmen SSR, the Azerbaijan SSR, and the Kazakh SSR had the right to establish their own representations in international organizations.<sup>679</sup> After 1944 the federal Constitution was amended so that the USSR had the right to establish a common procedure for foreign relations but allowed each Republic to exchange diplomatic and consular representatives.<sup>680</sup> A simultaneous reorganization occurred in the Soviet Ministry of Foreign Affairs that allowed each Republic to advance its individual foreign policy interests within a joint cooperative arrangement.<sup>681</sup> Finally, under Article 80 of the 1977 Soviet Constitution, each republic was granted increased foreign policy powers allowing them the right to directly participate in international organizations and administer relations with foreign states.<sup>682</sup>

With respect to the continuing validity of the Soviet-Iranian Treaties after the collapse of the Soviet Union, analysis may be divided into three main parts: 1) whether under international law and the Soviet constitutional structure the NIS Republics had legal capacity to enter into or ratify foreign policy treaties; 2) whether a fundamental change in circumstances has rendered the legal status of the Caspian prior to 1991 obsolete; and 3) whether the Treaties were either terminated or suspended as a result of state succession.<sup>683</sup>

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679. Kochumov, *supra* note 154.

680. *Id.*

681. *Id.*

682. *Id.*

683. State succession generally refers to the fact of replacement of one state by another in the responsibility for the international relations of territory. HENKIN ET AL., *supra* note 598, at 530-43. Succession may occur either as a result of simple

## b. Capacity to Enter into Treaties Under International Law

The Vienna Convention on the Law of Treaties (VCOLT)<sup>684</sup> is the principal authoritative source of the law of international treaties.<sup>685</sup> Under this Convention every state possesses treaty-making capacity only so far as it is a sovereign, and parties that are not full sovereigns may only become parties to treaties they are competent to conclude pursuant to domestic or constitutional law.<sup>686</sup> In practice, it is difficult to apply a hard and fast rule to determine whether a state qualifies as a sovereign since the answer depends heavily upon the factual specificities of each case.<sup>687</sup> It is noteworthy, however, that there are many examples of component states in federal unions which have the capacity to enter into foreign agreements with other international entities, although this practice is often dependent on the constitutional law of the unions concerned.<sup>688</sup> Another approach acknowledges a political subdivision's foreign treaty capacity upon the latter's exercise of such a power, pursuant to consent by the dominant entity.<sup>689</sup>

## c. The Principle of *Rebus Sic Stantibus*

Under Article 62 of the VCOLT the principle of *rebus sic stantibus* or fundamental change of circumstances may suspend or terminate an international treaty obligation.<sup>690</sup> Upon a cursory look

replacement of one state by another, the formation of a newly-independent state, or the union and separation of states. *Id.*

684. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCOLT]. The Convention is regarded in large part declaratory of existing law, and on that basis it has been invoked and applied by tribunals and by states even prior to its entry into force and in regard to nonparties as well as parties. HENKIN ET AL., *supra* note 598, at 416-17. Some of its provisions have gone beyond existing law or have altered previously established rules. *Id.* These provisions are generally characterized as "progressive development." *Id.* Also, many states tend to refer to all of the provisions of the Convention as an authoritative source of law, thus gradually transforming even its innovative features into customary law through application. *Id.*

685. HENKIN ET AL., *supra* note 598, at 416.

686. OPPENHEIM'S INTERNATIONAL LAW 1217-20 (Jennings & Watts, eds., 9th ed. 1992), reprinted in HENKIN ET AL., *supra* note 598, at 431.

687. *Id.*

688. See HENKIN ET AL., *supra* note 598, at 433-34.

689. Lissitzyn, *Efforts to Codify or Restate the Law of Treaties*, 62 COLUM. L. REV. 1166, 1183-84 (1962), reprinted in HENKIN ET AL., *supra* note 598, at 435. *But see First Report on the Law of Treaties*, 2 [1962] Yb.I.L.C. 27, 37, reprinted in HENKIN ET AL., *supra* note 598, at 435 (rejecting such a notion).

690. VCOLT, *supra* note 684, art. 62, [applicable provisions] reprinted in HENKIN ET AL., *supra* note 598, at 517-18. For an application of this principle, see generally Fisheries Jurisdiction Case (U.K. v. Ice.), 1973 I.C.J. 3.

the doctrine seems to favorably support the NIS' position regarding the invalidity of the Soviet era Treaties.<sup>691</sup> A more in-depth analysis of the five conditions that must be met before this clause is triggered, however, reveals several problems with such a position.

First, and perhaps most importantly, Article 62 does not apply to settlements of a territorial nature, including boundary arrangements.<sup>692</sup> This places the NIS in a "catch-22" situation: if they argue that the Soviet practice of *de facto* delimitation of the Caspian and partition of the Sea between the Soviet Union and Iran qualified as *de jure* boundary settlements they would undermine their chances of success under this theory.<sup>693</sup> Second, there is a plausible argument that although the geopolitical nature of the Caspian Sea has fundamentally changed, the continuing validity of the Treaties does not *legally* affect the parties' ownership rights.<sup>694</sup> On a third and related point, it may be argued that the unforeseeability requirement is weak within the context of littoral ownership rights despite the discovery of huge oil and gas finds, particularly off the Azeri coast.<sup>695</sup> This is so because all parties were aware of the existence of rich hydrocarbon basins in the Caspian since the early Nineteenth Century—continuing *de facto* operation of the Treaties would not preclude the NIS Republics from continuing to exploit the Sea's resources within their "national sectors."<sup>696</sup> Last but not least, the relative precarious status of the *rebus sic stantibus* principle in international law and the massive complexity of legal issues and

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691. The five conditions which must be met under Article 62 before a fundamental change of circumstances can be invoked as a ground for termination include: 1) a change of fundamental character; 2) an unforeseeable change; 3) a change the circumstances of which must have been an essential basis of the consent to be bound by the treaty; 4) a change which radically transformed the extent of the parties' obligations; and 5) the obligations in question are still to be performed under the treaty. HENKIN ET AL., *supra* note 598, at 517-18. The collapse of the Soviet Union and the resulting geopolitical change seems to facially satisfy the first, second, third, and fifth conditions. *See id.*

692. HENKIN ET AL., *supra* note 598, at 518; *see also infra* note 694 and accompanying text.

693. *See id.*

694. Of course on a practical political level Iran recognizes that the collapse of the Soviet Union allows it the ability to more effectively exercise its sovereignty rights, particularly against the NIS. In this sense, therefore, the disintegration of the USSR does, in fact, significantly or fundamentally change the parties' ownership rights to oil and gas deposits in the Caspian. Furthermore, Iran may have a tough time advancing this argument because it runs contrary to its long term interest unless it can advance the nuanced argument that the Treaties' provisions allowed flexibility during the Soviet era when it looked the other way but allow it to more fully exercise its rights now.

695. *See supra* Part II.B.1.a. Note, however, that this argument is stronger if applied to the disintegration of the Soviet Union, an event which very few if any international experts would have predicted.

696. *See generally supra* Part II.B.1.a.



conundrums surrounding the collapse of the Soviet empire probably preclude its use by any international legal tribunal in the future.<sup>697</sup> In conclusion, despite the changed circumstances (particularly with respect to improved technology and increased Caspian hydrocarbon potential and capacity), the new conditions were not of such a nature as to render obligations under the Treaties invalid.

#### d. The Effects of State Succession on the Soviet-Iranian Treaties

Under the Vienna Convention on Succession of States in Respect of Treaties (VCSST)<sup>698</sup> and the Restatement (Third) of Foreign Relations, newly-independent states are generally not bound or obligated to maintain in force their predecessors' treaties in their respective territories.<sup>699</sup> This presumption against continuance of legal obligations is often referred to as the "clean slate rule."<sup>700</sup> Moreover, according to the International Law Commission, "the fundamental rule to be laid down for bilateral treaties appears to be that their continuance in force after independence is a matter of agreement . . . between the newly-independent State and the other State party to the predecessor State's treaty."<sup>701</sup> As such, the newly-independent state is under no obligation to be bound by the former treaty—it only has the *right of option* to be a party to that treaty if it so chooses.<sup>702</sup> (Again, territorial treaties are excepted from the international rules invalidating treaties based on state succession. Territorial treaties touch on matters as diverse as international boundaries, rights of transit on international waterways, the use of international rivers, and demilitarization of particular localities.)<sup>703</sup>

There is, however, another line of precedent recognized under the VCSST that distinguishes between separating states and states gaining independence from colonial powers.<sup>704</sup> This line covers cases where a part or parts of the territory of a state separate to form one

697. *See id.*

698. Vienna Convention on the Succession of States in Respect of Treaties, opened for signature Aug. 23, 1978, U.N. Doc. A/Conf.80/31 (1978) [hereinafter VCSST]. Like the VCOLT, this Convention is in large part intended to codify customary international law. HENKIN ET AL., *supra* note 589, at 533.

699. *See generally* HENKIN ET AL., *supra* note 589, at 532-33. *See also* THIRD RESTATEMENT, *supra* note 638, § 210, reprinted in HENKIN ET AL., *supra* note 589, at 533.

700. HENKIN ET AL. *supra* note 589, at 537-38.

701. *Id.* at 538.

702. *Id.*

703. *See International Law Commission Report*, [1974] II (I) Yb.I.L.C. 157, 196, 201, 206 [hereinafter 1974 ILC Report], reprinted in HENKIN ET AL., *supra* note 589, at 533-34.

704. HENKIN ET AL., *supra* note 589, at 539; *see also* 1974 ILC Report, *supra* note 703, at 157, 260, 265, reprinted in HENKIN ET AL., *supra* note 542-43.

or more independent states.<sup>705</sup> For separating states the principle of treaty continuity is the default rule.<sup>706</sup>

Considerable debate surrounds the issue of whether the NIS qualify as newly-independent states or separating states under international law.<sup>707</sup> Proponents of the former view assert that none of the former Soviet Republics were actually self-governing; the "clean slate rule" would, therefore, apply.<sup>708</sup> The alternative view is that although state power in the USSR was concentrated in the Communist Party and Russia was dominant, the other Republics were not excluded from having a say in the policies of the central government.<sup>709</sup> Such a theory finds support in the actual political organization of the Republics within the Soviet system, particularly within the context of foreign policy.<sup>710</sup> Also several of the newly-independent states, including Belarus and the Ukraine, were actual members of the United Nations prior to their integration into the USSR, and their functional capacity was no different than that of the NIS.<sup>711</sup> Finally, the "clean state rule" is generally applied to newly-independent former colonies—the NIS cannot be characterized as such.<sup>712</sup>

e. The Almaty Declaration and the NIS' Exercise of the "Right of Option"

Any presumption against the continuity of international obligations of the NIS is severely restricted as a result of the Almaty Declaration of 1991.<sup>713</sup> Under that agreement Russia and the NIS *explicitly* agreed that the latter would recognize the validity of all international treaties and agreements signed under the Soviet Union and honor their binding effect on subsequent state action and

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705. 1974 ILC Report, *supra* note 703, at 253-58, reprinted in HENKIN ET AL., *supra* note 540, at 540-41.

706. See HENKIN ET AL., *supra* note 589, at 539.

707. See *id.*; see also generally Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT'L & COMP. L. REV. 581, 691-92 (1992).

708. *Id.*

709. *Id.*

710. See *supra* Part IV.B.2.a.

711. Bunn & Rhineland, *Who Inherited the Former Soviet Union's Obligations Under Arms Control Treaties with the United States?* Memorandum to the Committee on Foreign Relations (Mar. 10, 1992), reprinted in HENKIN ET AL., *supra* note 589, at 1042-43 (analyzing the legal effects of state succession on U.S.-Soviet arms treaties).

712. *Id.* Furthermore, the VCSSRT recognizes an exception to this continuity rule in cases where the object and purpose of the treaty would be frustrated by continuing legal obligations. Bunn & Rhineland, *supra* note 711, reprinted in HENKIN ET AL., *supra* note 589, at 1043. Such is not the case here. See *id.*

713. See generally Almaty Declaration, *supra* note 656, at 148-49.

diplomacy.<sup>714</sup> As such they can be deemed to have exercised their "right of option" to accede to the legal effect of the Soviet-Iranian Treaties, regardless of whether they were released of such obligations under the VCSSRT.<sup>715</sup> Therefore, there is a strong argument that even if the NIS did not sign the Soviet-Iranian Treaties, they are bound by the Treaties' provisions *via* the provisions of the Almaty Declaration.<sup>716</sup>

### C. Viewing the Treaties as a Set of Interim Default Rules

There are several conclusions that may be reached as a result of the foregoing legal analysis regarding the Soviet-Iranian Treaties. First, the Soviet-Iranian Treaties are still valid law with respect to *all* Caspian littoral states. Under the Almaty Declaration of 1991 the NIS agreed to abide by all Soviet era treaties. Second, the Soviet-Iranian Treaties cannot be characterized as a legal *regime*, because they do not *substantively* address the unique issues surrounding hydrocarbon ownership rights. Third, the Treaties may, however, impose a set of interim default rules (or legal parameters) upon the littoral states that may *indirectly* prohibit unilateral annexation of ownership rights in the Sea. Fourth, even though the Treaties never discussed common ownership of hydrocarbon resources, a condominium regime did in fact apply to the Sea for the purposes of fishing and navigation. Fifth, the Treaties never delimited the Caspian Sea into Soviet and Iranian sectors and any internal administrative decisions to divide the Caspian waters among the Soviet Republics never rose to the status of international or treaty law. Sixth, municipal interpretation of treaty law corroborates the contracting parties' understanding that the Caspian was a "closed sea" and therefore fell under a unique legal status. Last but not least, state practice does not invalidate the legal effect of common ownership imposed upon the Sea's waters. Whatever the Iranian reasons for neglecting to protest the Soviet Union's seemingly unilateral exploitation of hydrocarbon resources off Baku, an *objective* interpretation of Iranian silence would suggest that for the purposes of legal effect, Tehran simply did not view the unilateral actions as violative of the Treaties' common ownership principle.

All this would strongly suggest that while the Soviet-Iranian Treaties may not be viewed as a legal regime because of the fundamental change in political and economic circumstances, they do continue to serve as a legal set of prohibitive rules upon the littoral states. As such, from a purely legal perspective, unilateral

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714. Almaty Declaration, *supra* note 656, at 149.

715. See *supra* notes 698-702 and accompanying text.

716. Croissant & Croissant, *supra* note 23, at 25.

exploitation of oil and gas resources in the Caspian Sea may well violate international law depending on the nature and scope of the action. Furthermore, the more intrusive the unilateral actions become, the stronger the presumption that international law has been violated.

## V. LEGAL REGIME MODELS AND ENERGY RIGHTS

### A. *The Competing Macro-Models*

So far legal analysis of the current status of the Caspian Sea has focused solely on the nature and effect of the Soviet-Iranian Treaties. More specifically, this study has sought to address the issue of whether, in the absence of a comprehensive legal regime defining territorial relations between the Caspian littoral states, there are nonetheless a set of legal parameters that limit or prohibit certain [unilateral] activities by the littoral states. The conclusion reached strongly suggests that in the least, there are a set of legal limitations operative today—the legal effect of the Treaties, though not establishing a legal regime *per se*, may very well prevent any littoral state from taking unilateral action to declare any part of the Caspian Sea and its waters as part of its “national sector.”

The legal effect of the Treaties as prohibitive default rules does not, however, address the more pressing concern of what the future legal regime of the Caspian Sea may look like. Surely, all states, including Russia and Iran, agree that the littoral states must reach consensus on a new comprehensive set of legal rules that will accommodate the changed geopolitical circumstances in the region. More importantly, they realize that the nature of any proposed legal regime for the Caspian Sea bears *directly* on the littoral states’ ability to exercise ownership rights over the Sea’s hydrocarbon resources. The question then becomes: what legal models must the littoral states employ in order to construct a new legal regime for the Caspian? Should they simply import an existing macro-model such as the United Nations Convention on the Laws of the Sea, or does the unique status of the Caspian require new and innovative approaches to solving the legal regime puzzle?

## 1. The Third United Nations Convention on the Laws of the Sea (UNCLOS)

### a. The Legal Effects of the UNCLOS

With Azerbaijan and Kazakhstan taking the lead in declaring that the Caspian's legal status should be governed by the UNCLOS,<sup>717</sup> it becomes necessary to briefly address the major relevant features of this body of law, especially as they pertain to the Caspian Sea. Before that, however, it is necessary to briefly outline the current legal effect of this body of law.

The law of the sea was primarily customary law until it was codified by the International Law Commission in a series of United Nations Conferences on the Law of the Seas, culminating in the final Draft Convention of the third conference.<sup>718</sup> The codification of these laws represented a gradual shift from a *mare liberum* notion of the seas, highlighting the sea as a natural resource enjoyed by all, to derogations from commonage principles focusing on the exclusive rights of coastal states in exercising certain types of jurisdiction over waters adjacent to their shores.<sup>719</sup> The shift away from commonage principles was prompted by the noticeable absence of an agreement

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717. After many sessions in the period 1972-82 the United Nations Conference on the Law of the Sea adopted a convention on April 30, 1982. IAN BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 129 (Ian Brownlie ed., 4th ed. 1995). The convention represents the most ambitious scheme of codification and progressive development of international law ever attempted. *Id.* For a list of signatures, ratifications, accessions and successions, see *Law of the Sea Bulletin*, UN Division for Ocean Affairs & the Law of the Sea Office of Legal Affairs, No. 25 (June 1994), at 7; see also *supra* Parts III.B.1-2, for the positions of Azerbaijan and Kazakhstan on the applicability of the UNCLOS to the legal status of the Caspian Sea.

718. HENKIN ET AL., *supra* note 589, at 1232. For the complete text of the treaty, see U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 33 I.L.M. 1309 (entered into force Nov. 16, 1994) [hereinafter Convention]. HENKIN ET AL., *supra* note 589, at 1232. The first UN Conference on the Law of the Sea was convened in Geneva in 1958. The meeting resulted in the adoption of four conventions on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, 516 U.N.T.S. 205, the High Seas, 13 U.S.T. 2312, 450 U.N.T.S. 82, the Continental Shelf, 15 U.S.T. 471, 499 U.N.T.S. 311, and the Fishing and Conservation of the Living Resources of the High Seas, 17 U.S.T. 138, 559 U.N.T.S. 285. As of January 1993 the Convention on the High Seas had fifty-seven parties, the Territorial Sea Convention had forty-five parties, the Continental Shelf Convention had fifty-three parties, and the Fishing and Conservation Convention had thirty-six parties. HENKIN ET AL., *supra* note 589, at 1232. The conventions are considered to be a codification of customary international law and are therefore binding on states that have not ratified them. *Id.* The Convention has also contributed to the development of international law. *Id.* A second Conference on the Law of the Sea convened in 1960 for the sole purpose of reaching consensus on the breadth of the territorial sea. *Id.* It did not, however, succeed. *Id.*

719. *Id.* at 1231.

among the international community regarding the ownership of the seabed and subsoil resources.<sup>720</sup>

There is some confusion regarding the legal applicability of the UNCLOS as an international body of law especially in light of the failure of key states to ratify the treaty.<sup>721</sup> Most notably, the United States refused to ratify the treaty because it objected to certain provisions limiting a state's rights to deep seabed mining.<sup>722</sup> In 1983, however, President Reagan acknowledged the legal applicability of virtually all the treaty provisions except those relating to deep seabed mining of the UNCLOS as a codification of customary international law.<sup>723</sup> Although this view has been questioned if not challenged by some nations, many international law scholars agree that many of the UNCLOS provisions duplicate provisions of the 1958 Conventions, and many others are clearly established as customary law of the sea.<sup>724</sup>

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720. *Id.* Other factors, namely the recognition that coastal states had special interests in controlling their shores, helped identify and establish the different degrees of controlling jurisdiction enjoyed by coastal states over their offshore waters. *Id.* at 1232.

721. HENKIN ET AL., *supra* note 589, at 1233.

722. *Id.* at 1232-33. The Conference on the Law of the Sea began in 1973 and after eight years of negotiation it produced the Draft Convention on the Law of the Sea. *Id.* at 1232. The Draft Convention was considered virtually complete until the Reagan administration proposed a number of changes to Part IX of the treaty relating to deep seabed mining rights. *Id.* The proposals were rejected and the final draft was approved on April 30, 1982, by a vote of 130 states in favor, four against, and seven abstentions. *Id.*; *see also infra* notes 764-68 and accompanying text (analyzing the UNCLOS' limitations on deep seabed mining).

723. *Id.* at 1233. The President did so by express and tacit agreement when he exercised the United States' legal right to establish a 200-mile exclusive economic zone (EEZ) pursuant to the UNCLOS, while simultaneously proclaiming that the United States effectively agrees with the substantive provisions of the UNCLOS. *Id.* at 1233-34.

724. *Id.* Some developing states rejected the United States' contention that parts of the treaty reflect agreed customary international law while others do not if [the United States] decides to opt out of them. *Id.* They advanced a "package deal" notion of the UNCLOS, arguing that they had agreed to provisions favorable to developed nations (including the United States) in order to achieve agreement on provisions they desired, particularly the regime for deep seabed mining. *Id.* They argued, therefore, that some sections cannot be treated as customary international law unless the *entire* treaty is recognized as such. *Id.* Despite this view, however, the Restatement (Third), Part V, concludes that while the UNCLOS is not the law of the United States, many of its provisions closely follow the 1958 Conventions to which the United States is a party and which largely restate customary international law. THIRD RESTATEMENT, *supra* note 638, § 102, Report's Note 2, *reprinted in* HENKIN ET AL., *supra* note 589, at 1234. It also acknowledges that other provisions of the UNCLOS have become customary international law since that time, thus binding all nations apart from the Convention itself. *Id.* Last but not least, the Restatement identifies certain principles of the UNCLOS that may be deemed customary law because they "were adopted without any objections," and others that have not risen to the status of customary law because they have not been expressly or tacitly agreed upon. *Id.* § 514,

## b. The Basic Principles of the UNCLOS

The controlling foundation of the UNCLOS is the idea of delimitation.<sup>725</sup> Delimitation is the legal science of dividing sea territory between neighboring coastal states that share common waters, especially if they are geographically positioned adjacent or opposite of each other.<sup>726</sup> Delimitation, however, also creates varying degrees of control for individual coastal states—the further one travels from the littoral states' coastline the less jurisdictional control the state can exercise over the waters and subsurface resources.<sup>727</sup> As such, the UNCLOS is important in so far as it codified a process of development in the customary international law of the seas that generally confirmed the authority of the coastal states over certain coastal zones, but introduced a specific delimitation regime that recognized differing jurisdictional zones in different coastal zones.<sup>728</sup>

Important zones of national jurisdiction under an UNCLOS regime include the territorial sea, the continental shelf, and the EEZ.<sup>729</sup> Article 2 of the UNCLOS grants full sovereignty of coastal states to an adjacent area (called the territorial sea) which includes complete control over air space and the seabed (including subsoil resources).<sup>730</sup> Article 3 further defines the breadth of such a territory as being limited to twelve nautical miles.<sup>731</sup>

The territorial sea also encompasses the concept of an adjacent "buffer zone"—called the contiguous zone.<sup>732</sup> According to Article 33

Reporters' Note 4, cmt. b. Those principles that have been elevated to the status of customary law include, but are not limited to, the provisions concerning the territorial seas and the EEZs. *See id.* In the *Gulf of Maine Case*, the Chamber of the International Court of Justice echoed the Restatement's sentiments regarding the UNCLOS' effects as customary international law. HENKIN ET AL., *supra* note 589, at 1234.

725. See generally HENKIN ET AL., *supra* note 589, at 1238-97, for a comprehensive legal survey of the concepts of delimitation embedded in the UNCLOS. *See also* Caglett, *supra* note 584; Oxman, *supra* note 22.

726. Caglett, *supra* note 584.

727. *See, e.g.*, THIRD RESTATEMENT, *supra* note 638, § 511, cmt. a, *reprinted in* HENKIN ET AL., *supra* note 589, at 1238-39.

728. *See id.*

729. HENKIN ET AL., *supra* note 589, at 1238.

730. Convention, *supra* note 718, art. 2, *reprinted in* HENKIN ET AL., *supra* note 589, at 1240.

731. Convention, *supra* note 718, art. 3, *reprinted in* HENKIN ET AL., *supra* note 589, at 1243. Although states had commonly recognized their right to exercise sovereignty over a territorial sea pursuant to customary international law and state practice, the UNCLOS finally laid to rest the long-standing controversy on the breadth of the territorial sea which remained unresolved after the 1958 Geneva Convention and the 1960 Second UN Conference on the Law of the Sea. For an in-depth explanation of the technical principles of delimitation of the territorial seas, see Convention, *supra* note 718, arts. 5-7, 11, 14.

732. HENKIN ET AL., *supra* note 589, at 1266.

a state may "prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territorial sea."<sup>733</sup> The coastal state may do this by exercising its right of "hot pursuit," a pursuit which may be undertaken when the competent authorities of a coastal state have good reason to believe that the ship has violated the laws and regulations of the state.<sup>734</sup> The contiguous zone allows for an extra twelve-mile cushion, bringing the total width of the territorial sea to twenty-four nautical miles from the coastline.<sup>735</sup>

As per the continental shelf, Article 76 of the UNCLOS defines the shelf as "the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin . . ."<sup>736</sup> The shelf includes the seabed and subsoil of the shelf, but specifically excludes the "deep ocean floor with its oceanic ridges or the subsoil thereof."<sup>737</sup>

The practical exercise of delimitation of the continental shelf between states with opposite or adjacent coasts has continued to plague the international community even after the adoption of the UNCLOS.<sup>738</sup> The international community first addressed the legal ramifications of delimitation in a series of important cases before the International Court Justice (ICJ) dubbed the *North Sea Continental Shelf Cases*.<sup>739</sup> In those cases the ICJ denied Denmark and the Netherlands' contention that the Geneva Convention on the Continental Shelf had elevated the principle of equidistance regarding delimitation of the shelf to the status of customary international law, binding nations that were not parties to the Convention.<sup>740</sup> The Court further held that the overriding consideration in delimitation was equity, defined loosely as maritime space that was proportional to the length of relative coastlines.<sup>741</sup> In effect, the ICJ's decision underscored the fact that neither the

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733. Convention, *supra* note 718, art. 33, *reprinted in* HENKIN ET AL., *supra* note 589, at 1267-68.

734. Convention, *supra* note 718, art. 111, *reprinted in* HENKIN ET AL., *supra* note 589, at 1273.

735. Convention, *supra* note 718, art. 33, *reprinted in* HENKIN ET AL., *supra* note 589, at 1267-68.

736. Convention, *supra* note 718, art. 76, *reprinted in* HENKIN ET AL., *supra* note 589, at 1279. Article 76 also states that the continental shelf may extend to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. *Id.*

737. *Id.*

738. *See generally* HENKIN ET AL., *supra* note 589, at 1280-86.

739. *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 29).

740. *Id.* at 38, 80, *reprinted in* HENKIN ET AL., *supra* note 589, at 1281.

741. *Id.* at 53, *reprinted in* HENKIN ET AL., *supra* note 589, at 1281.



equidistance principle or any other delimitation principle was obligatory.<sup>742</sup>

Indeed, this notion is incorporated in Article 83 of the UNCLOS which does not refer to the equidistance rule but instead calls on party members to decide delimitation pursuant to international law and equity.<sup>743</sup> Article 83's departure from the equidistance rule enunciated in the 1958 Geneva Convention represented the inability of states to achieve an acceptable legal formula for maritime boundary delimitation between continental shelves.<sup>744</sup> In the *Continental Shelf Case* between Libya and Tunisia, for example, the ICJ relied on equitable principles to divide the shelf but gave no clear guidelines as to the applicable operating principles to be used.<sup>745</sup> Similarly in the *Gulf of Maine Case*, the Chamber seemed to abandon any quest for equitable principles.<sup>746</sup>

Finally with respect to the continental shelf, Articles 77 and 78 further define the rights of coastal states to their respective continental shelves.<sup>747</sup> Coastal states have exclusive rights of exploration and exploitation of natural resources.<sup>748</sup> Natural resources are defined as mineral and other non-living resources of the seabed and subsoil, and living organisms.<sup>749</sup>

The last important delimitation zone under the UNCLOS is the EEZ.<sup>750</sup> The notion of the EEZ finds support long before its indoctrination in the UNCLOS.<sup>751</sup> States claimed exceptions to the rule of *mare liberum* primarily to exploit fishing grounds and declare

742. The ICJ further opined that: 1) delimitation is to be effected by agreement and in accordance with equitable principles in such a way as to leave each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea without encroaching on the prolongation of the land territory of the other Party; 2) if the above delimitation leaves the Parties' areas to overlap, they are to be divided in agreed proportions, or failing agreement, equally unless they decide to adopt a regime of joint jurisdiction over the overlapping area; 3) during negotiations, the Parties should take into account the general configuration of the coasts as well as unusual features. *Id.*

743. Convention, *supra* note 718, art. 83, reprinted in HENKIN ET AL., *supra* note 589, at 1282-83.

744. HENKIN ET AL., *supra* note 589, at 1283.

745. See *Continental Shelf (Libya v. Tunis)*, 1978 I.C.J. 13.

746. See *Gulf of Maine (U.S. v. Can.)*, 1984 I.C.J. 246.

747. Convention, *supra* note 718, arts. 77-78, reprinted in HENKIN ET AL., *supra* note 589, at 1287.

748. Convention, *supra* note 718, art. 77, reprinted in HENKIN ET AL., *supra* note 589, at 1287.

749. *Id.* The Article states that "the natural resources referred to in this Part consist of the mineral and other non-living resources of the sea-bed and subsoil together with the living organisms belonging to sedentary species . . ." *Id.*

750. See generally Convention, *supra* note 718, arts. 55-73 (outlining the major provisions of the EEZ under the UNCLOS).

751. HENKIN ET AL., *supra* note 589, at 1288.

national fishing zones.<sup>752</sup> The push for incorporation of these principles during UNCLOS came primarily from coastal states that had little continental shelf margins and asked for compensation in the form of rights over the deep seabed extending miles from their shores.<sup>753</sup>

Article 55 of the UNCLOS defines the specific legal regime of the EEZ as an area beyond and adjacent to the territorial sea.<sup>754</sup> Article 56 further defines the rights, jurisdiction, and duties of the coastal state in such a zone, allowing coastal states the right to explore, exploit, conserve, and manage living and non-living natural resources of the seabed and subsoil (including "production of energy from the water").<sup>755</sup> Article 57 promulgates that the breadth of the EEZ shall not extend beyond 200 miles of the territorial sea.<sup>756</sup> Article 58, however, specifically allows all states, whether coastal or landlocked, to enjoy navigation, overflight, laying of submarine cables, and pipelines.<sup>757</sup> Furthermore, international legal scholars note that Article 74 of the UNCLOS addressing delimitation of the EEZ between states with opposite or adjacent coasts is identical with Article 83 dealing with delimitation of the continental shelf and presents many of the same problems associated with the latter.<sup>758</sup>

Beyond these zones of national jurisdiction the principle of commonage has retained its historical and legal significance in the regime of the high seas.<sup>759</sup> The high seas are open to all states,

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752. *Id.* In 1974 the ICJ decided the *Fisheries Jurisdiction Case*, (U.K v. Ice.), 1974 I.C.J. 3, wherein the Court acknowledged an increased and widespread acceptance of preferential fishing rights for coastal states but noted that such rights were not absolute where non-coastal states had established historic claims to fish in particular waters. HENKIN ET AL., *supra* note 589, at 1289. The ICJ thus concluded that Iceland could not unilaterally exclude the United Kingdom from its historic fishing grounds, prompting both to resolve their dispute *via* negotiation. *Id.*

753. HENKIN ET AL., *supra* note 589, at 1288-89.

754. Convention, *supra* note 718, art. 55, reprinted in HENKIN ET AL., *supra* note 589, at 1292.

755. Convention, *supra* note 718, art. 56, reprinted in HENKIN ET AL., *supra* note 589, at 1292-93.

756. Convention, *supra* note 718, art. 57, reprinted in HENKIN ET AL., *supra* note 589, at 1293.

757. Convention, *supra* note 718, art. 58, reprinted in HENKIN ET AL., *supra* note 589, at 1293. The text of the Article reads in part: "In the exclusive economic zone, all States, whether coastal or land-locked, enjoy . . . the freedoms referred to in article 87 of navigation and overflight and of the *laying of submarine cables and pipelines*, and other internationally lawful uses of the sea . . . (emphasis added)."

758. See Convention, *supra* note 718, art. 74.

759. See Convention, *supra* note 718, art. 86, reprinted in HENKIN ET AL., *supra* note 589, at 1297, for a definition of the "high seas" which excludes the territorial sea, the EEZ, and a state's internal and archipelagic waters. *But see* HENKIN ET AL., *supra* note 589, at 1297 (explaining that under the UNCLOS, the extent of the high seas is reduced by further concessions to coastal states including the widening of the territorial sea, the special status of the EEZ, and the establishment of additional rights

whether coastal or landlocked.<sup>760</sup> The rights and privileges enjoyed by both coastal and landlocked states in the high seas include freedom of navigation, overflight, the laying of submarine cables and pipelines, fishing, and scientific research.<sup>761</sup> Articles 88 through 90 further solidify the principle of commonage and freedom of the high seas by reserving the latter for "peaceful purposes," prohibiting any state from exercising sovereignty over any part of the high seas, and allowing all states the right of free navigation, respectively.<sup>762</sup>

The UNCLOS high seas regime does, however, impose certain limitations on the basic principle of commonage and freedom.<sup>763</sup> For the purposes of this study, the regime specifically covers the issue of deep seabed mining beyond the 200-mile national jurisdiction.<sup>764</sup> In 1969 the international community's decision to impose a moratorium on exploitation of deep seabed resources set the tone for the notion that the high seas should not be governed by a *laissez-faire* regime, as favored by technologically advanced nations.<sup>765</sup> Later in 1970 the UN General Assembly passed a Declaration of Principles governing the seabed and the ocean floor (including its subsoil resources).<sup>766</sup> The resolution declared the seabed and ocean floor beyond national jurisdiction to be the "common heritage of mankind," and prohibited appropriation or any exercise of sovereignty by any state over these areas.<sup>767</sup> The resolution also established that exploitation and exploration of deep seabed resources (including acquisition of rights over such areas) shall be exercised only in conformity with the provisions of an acceptable international regime to be established in the future.<sup>768</sup>

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for coastal states allowing them to set up special-purpose zones, continental shelf jurisdiction, and new regimes for pollution control and scientific research).

760. Convention, *supra* note 718, art. 87, *reprinted in* HENKIN ET AL., *supra* note 589, at 1297-98.

761. *Id.* at 1298.

762. Convention, *supra* note 718, arts. 88-89, *reprinted in* HENKIN ET AL., *supra* note 589, at 1298.

763. *See generally* HENKIN ET AL., *supra* note 589, at 1299-1306.

764. *See, e.g.,* Convention, *supra* note 718, arts. 136-40, *reprinted in* HENKIN ET AL., *supra* note 589, at 1315-16. The regime also limits the right to fish on the high seas. HENKIN ET AL., *supra* note 589, at 1317. Article 116 provides the general right to fish on the high seas. Convention, *supra* note 718, art. 116, *reprinted in* HENKIN ET AL., *supra* note 589, at 1317. Articles 117-18, however, impose a duty on all states to take measures (including inter-state cooperation) to ensure conservation of the living resources of the high seas. Convention, *supra* note 718, arts. 117-18, *reprinted in* HENKIN ET AL., *supra* note 589, at 1317-18.

765. *Moratorium on Exploitation of Resources of the Deep Sea-Bed*, G.A. Res. 2574D (XXIV) (1969), *reprinted in* HENKIN ET AL., *supra* note 589, at 1310.

766. *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction*, G.A. Res. 2794 (XXV) (1970), *reprinted in* HENKIN ET AL., *supra* note 589, at 1310-11.

767. *Id.*

768. *Id.*

Under the UNCLOS the UN position prohibiting limitless use of the high seas, particularly with respect to the deep seabed, is legally codified.<sup>769</sup> Article 136 declares the deep seabed to be the "common heritage of mankind."<sup>770</sup> Article 137 further prohibits sovereignty and appropriation of the deep seabed but allows alienation of its resources subject to the rules, regulations, and procedures of the soon to be established International Sea-Bed Authority (Authority).<sup>771</sup> Last but not least, Article 139 addresses the responsibility of all states and other bodies in ensuring that their activities adhere to the rules of the UNCLOS and customary international law, and assigns liability for damages resulting from unlawful action in the area.<sup>772</sup> Article 140 reemphasizes the need for activities in the area to be carried out for the "benefit of mankind," and calls on the Authority to provide for the "equitable sharing of financial and other economic benefits derived from activities in the Area . . . on a non-discriminatory basis . . ."<sup>773</sup>

### c. Applicability of the UNCLOS to the Caspian Sea

Having laid out the general provisions of the UNCLOS as a possible macro-model for the Caspian Sea, it becomes important to address the question of whether and to what extent this regime binds, authorizes, or encourages the littoral states of the Caspian to adopt

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769. See Convention, *supra* note 718, arts. 136-40, reprinted in HENKIN ET AL., *supra* note 589, at 1315-16. The years after the UN Resolutions and before the UNCLOS saw a multitude of states, including the United States, enacting "interim" national legislation authorizing nationals to mine the deep seabed beyond the national jurisdiction zones. HENKIN ET AL., *supra* note 589, at 1312-13. For an example of U.S. legislation effecting such rights, see Deep Seabed Hard Mineral Resources Act, Pub. L. No. 96-283, 94 Stat. 553 (1980). These unilateral laws were challenged by the Group of 77 primarily on legal grounds reflected in the majority vote on the Moratorium Resolution. HENKIN ET AL., *supra* note 589, at 1313. While the developed states essentially sought an international licensing system monitored by an intergovernmental authority dominated by states with high capital resources, the developing Group of 77 states wished to establish an International Sea-Bed Authority organized principally on the basis of majority rule. *Id.* After a series of compromises leading up to the 1982 UNCLOS the developing nations were successful in retaining the prohibitive character of the Convention regarding deep seabed mining. See *id.* at 1313-14. The Reagan Administration thus rejected signing the Convention primarily because of the moratorium on deep seabed mining. *Id.* at 1314.

770. Convention, *supra* note 718, art. 136, reprinted in HENKIN ET AL., *supra* note 589, at 1315.

771. Convention, *supra* note 718, art. 137, reprinted in HENKIN ET AL., *supra* note 589, at 1315-16.

772. Convention, *supra* note 718, art. 139, reprinted in HENKIN ET AL., *supra* note 589, at 1316.

773. Convention, *supra* note 718, art. 140, reprinted in HENKIN ET AL., *supra* note 589, at 1316. It is interesting to note that the Article also defines "benefit of mankind" in relation to the "interests and needs of developing States and of peoples who have not attained full independence or other self-governing status . . ."

its provisions, in part or in whole. Based on a strictly technical application of the UNCLOS to the Caspian Sea, it is important to note that the UNCLOS is only applicable to seas and oceans pursuant to Articles 1 & 2 establishing its jurisdictional capacity.<sup>774</sup> The geological, functional, and legal history of the Caspian would arguably place it outside the purview of such a regime.<sup>775</sup> Although Part IX of the Convention extends applicability of the UNCLOS to "Enclosed or Semi-Enclosed Seas," Article 122 defines the above terms as to exclude bodies of water that have no outlet to "another sea or the ocean."<sup>776</sup> Again, the Caspian's landlocked geology would seem to exclude it from the UNCLOS characterization of an enclosed or semi-enclosed sea.<sup>777</sup> In this regard, therefore, the Caspian Sea's current legal status may presumably be regarded as analogous to that of a lake.<sup>778</sup>

Next there is the question of legal obligation to the treaties pursuant to the international rules of treaty law. None of the littoral states are parties to the UNCLOS,<sup>779</sup> although the Soviet Union is a party to the 1958 Continental Shelf Convention which authorizes application of the equidistance principle regarding the continental shelf in the absence of agreed upon delimitation.<sup>780</sup> The applicability of the 1958 Convention to the Caspian Sea is, however, suspect

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774. Convention, *supra* note 718, arts. 1-2. The law of the sea recognizes that "internal waters," which include rivers and lakes, are subject to the full sovereignty of littoral states. Oxman, *supra* note 22; see also *infra* Part V.A.3 (discussing the future applicability of the International Law Commission's Draft Convention on Non-Navigational Uses of International Watercourses). Traditionally the right to regulate activities in rivers and lakes bordered by more than one state has been secured through agreement by the littoral states and may be subject to special legal regimes designed to accommodate the states' navigational, non-navigational, and environmental interests. Oxman, *supra* note 22.

775. See *supra* Parts II.A.1, III, IV.

776. Caglett, *supra* note 584. Oxman further contends that none of the classic definitions of the "semi-enclosed sea" apply to the Caspian Sea perfectly, since it is considered neither a judicial or historic bay. *Id.* Therefore, unlike semi-enclosed marine seas of comparable size, the Caspian is subject in its entirety to the sovereignty of its littoral states. *Id.*

777. See *supra* Part II.A.1. Some legal theorists argue that Article 122's language actually covers the Caspian Sea because it [also] defines a "semi-enclosed" or "enclosed sea" as an area "consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states." See *supra* note 540 and accompanying text. This interpretation, however, is highly suspect because although there are a fair number of lakes bordered by more than one state, they are not the specific object of generally accepted codification under international law. Oxman, *supra* note 22.

778. Oxman, *supra* note 22; see also *supra* Part IV.C (arguing that the current legal status of the Caspian, though not constituting a legal regime *per se*, operates as an interim set of default rules restricting certain unilateral actions by littoral states).

779. Neither the Soviet Union, the NIS, nor Iran have ratified the 1982 UNCLOS. Caglett, *supra* note 584, n.12.

780. Caglett, *supra* note 584.

because there is no geological consensus on whether the Sea contains a continental shelf or merely a continental depression.<sup>781</sup>

Even if the UNCLOS is not applicable to the Caspian Sea directly as a matter of treaty law, its provisions may still bind the littoral states because they have elevated to customary or general principles of international law.<sup>782</sup> There is considerable commentary regarding the applicability of at least some of the regime's principles regardless of treaty law, including the general principle of delimitation of seas based on principles of equity.<sup>783</sup> Indeed, as stated before, the UNCLOS itself strongly suggests that although delimitation *via* equidistance is not required by the littoral states, division based on equity is nonetheless required as a matter of customary law.<sup>784</sup> This line of argument asserts that the littoral states are bound by the Convention's specific delimitation principles.<sup>785</sup> The real question, however, is whether the strong legal presumption for delimitation overrides the Convention's explicit and implicit language to directly bind the littoral states to the UNCLOS regime model. The answer would seem to be no—customary international law cannot erase the basic fact that the UNCLOS is probably not applicable to the Caspian Sea because the latter does not fall under the definition of enclosed, semi-enclosed, or open seas as set out in Articles 1, 2, and 122.<sup>786</sup> In other words, although the legal solutions and delimitation techniques employed in such a macro-model are always available to all states wishing to establish a multilateral legal regime, the Convention's rules do not apply to lakes, bays, and other hydro-geological features as a matter of law.<sup>787</sup>

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781. See *supra* note 37 and accompanying text.

782. See generally HENKIN ET AL., *supra* note 589, at 54-94, 104-19 (analyzing customary and general international law as legitimate sources of international law). International law, however, recognizes the possibility that a state actor may exclude itself from the binding effects of customary law principles if it persistently objects to the practice of other states continuously adhering to the provisions of the law in question. HENKIN ET AL., *supra* note 589, at 69, 88-90. Therefore, to the extent that Soviet jurists developed their own body of law—including the doctrine of the “closed sea”—and officially applied it to the laws of the sea generally and the Caspian Sea specifically, there is a valid argument that the Soviet Union (and perhaps Iran) may qualify as persistent objectors to the custom of delimiting closed seas, including the Caspian. See *supra* Parts IV.A.2-3.

783. Caglett, *supra* note 584.

784. See *supra* note 728 and accompanying text.

785. See *id.*

786. But see *supra* note 540 and accompanying text (advancing a reading of Article 122 that arguably places the Caspian Sea within the purview of the UNCLOS).

787. See Oxman, *supra* note 22 (arguing that while the laws of the sea are *not* directly applicable to the Caspian Sea situation, the principles of UNCLOS may be helpful in drawing up a legal regime for the Caspian); see also Caglett, *supra* note 584 (arguing that the reason why the law of the sea is not directly applicable the Caspian Sea in its entirety is that the freedom of navigation, a “cardinal principle of the law of the seas,” is not applicable to the Caspian). But see *id.* (asserting that despite the

At best, the regime is a highly persuasive model that should be implemented in the Caspian because it is the most applicable model available. At worst, it represents a regime that does not accommodate the historical and practical realities of the parties and bears no legal weight on their decision to adopt a specific legal regime.

Putting aside the technical issue of whether the UNCLOS applies to the Caspian Sea as a matter of law, it is nonetheless important to analyze the legal effects of delimitation on the rights and practices of the littoral states were the UNCLOS provisions applied to the Sea.<sup>788</sup> This is so because even if the UNCLOS does not apply to the Caspian Sea as a matter of international law, it may still present the best legal regime model for the Caspian.<sup>789</sup> In other words, the basic principle of delimitation may still be the most practical and equitable solution even if the Caspian is characterized purely as a landlocked lake.<sup>790</sup>

As noted above the UNCLOS does not require *de jure* application of the equidistance principle, but instead calls for delimitation based on principles of equity and proportionality.<sup>791</sup> Indeed, the strongest proponents for application of the UNCLOS do not advance a straightforward application of the equidistance principle to the Caspian Sea.<sup>792</sup> The Convention's flexibility regarding delimitation allows for the general application of delimitation principles while ensuring that reservations be made for peculiarities concerning the unique geological and historical characteristics of the Caspian Sea.<sup>793</sup> It is important to note, however, that such an approach is essentially

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direct inapplicability of the UNCLOS to the Caspian Sea there is no reason why certain provisions, including delimitation rules regarding the seabed and subsoil resources, should not be applied to the Caspian context).

788. Oxman contends there is no persuasive evidence that a position favoring delimitation under the UNCLOS or condominium use under a *res communis* regime is decisively affected by the question of whether the area's legal status is that of a sea or a lake. Oxman, *supra* note 22. Oxman believes that the specific geography and history of the Caspian are more likely to be dispositive of the legal status issue. *Id.*

789. Both Caglett and Oxman adopt this general argument. *See supra* notes 787-88 and accompanying text.

790. *See infra* Part V.A.2 (analyzing the possible inadequacies of the condominium regime model as applicable to the Caspian Sea). According to Caglett, while states bordering lakes and inland seas are free to agree to any boundary delimitation arrangements they wish, the overwhelming majority of treaties that delimit lake and inland sea boundaries have adopted the median-equidistance line, occasionally modified to take account of historic or other special circumstances. Caglett, *supra* note 584. This is so because delimitation by equidistance has the "obvious virtue of fairness and equity." *Id.*

791. *See supra* notes 741-43 and accompanying text.

792. *See, e.g.,* Oxman, *supra* note 22; Caglett, *supra* note 584.

793. *See supra* notes 741-43 and accompanying text.

UNCLOS-based even if it represents a modified application of the UNCLOS' delimitation principles.<sup>794</sup>

An example of [a practical]<sup>795</sup> delimitation approach taking into account a multitude of legal, geological, and historical factors is the UNCLOS-based model advanced by Brice Caglett.<sup>796</sup> Caglett's model takes into account several delimitation tools<sup>797</sup> and the general principle of equity and proportionality as required by the UNCLOS.<sup>798</sup> Caglett posits that a hypothetical international tribunal assigned the task of delimiting the Caspian will approach the matter by drawing equidistance lines between all littoral states, regarding such lines as the tentative boundaries.<sup>799</sup> The court will examine the tentative boundaries from the standpoint of equity and proportionality.<sup>800</sup> It will conduct this study by first determining the

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794. Indeed, Caglett flatly contends that under international law the natural resources of the Caspian seabed and subsoil should be divided in accordance with equidistance lines with some minor modifications taken into account. Caglett, *supra* note 584.

795. Caglett concedes that the history of the Caspian establishes special historic rights, titles, and *de facto* boundaries that require modification of a straightforward equidistance delimitation, but asserts that the general equidistance model can accommodate these peculiarities by allowing the littoral states to enter into negotiations to establish more flexible boundary lines that satisfy their unique needs. *Id.* More specifically, Caglett points out that in the former USSR each Soviet Republic was allocated a sector of the sea to administer, and that the NIS have up to now respected these *de facto* delimitations. *Id.* After drawing the boundary lines pursuant to a straightforward application of the equidistance principle, Caglett contends that a hypothetical court would adjust the lines to ensure that "boundaries exist with reference to these historic and traditional administrative areas of responsibility; that the administrative internal boundaries were 'transformed into international frontiers' on the dissolution of the USSR, and that those boundaries should be respected pursuant to established precedents and the principles of acquiescence and estoppel." *Id.* *But see* discussion *supra* Part III (rejecting the validity of such an argument).

796. *See id.*

797. Other than the equidistance principle, international law cases have historically referred to two other methods of delimitation. See, e.g., Arbitration Tribunal for the Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau, 25 I.L.M. 252 (1986); Gulf of Maine Case, 1984 I.C.J. at 246. These two other methods are primarily considered for delimitation between adjacent states. Caglett, *supra* note 584. They include the drawing of lines perpendicular to the general direction of the coast and the bisection of an angle formed by the coastline of the two states. *Id.* Where the contesting states are opposite rather than adjacent, however, and where the lengths of their coastlines are not grossly disproportionate to each other, equidistance remains the preferred method of delimitation. *Id.*

798. *See supra* notes 741-43 and accompanying text.

799. Caglett, *supra* note 584. Caglett asserts that the court would regard the equidistance line drawn down the middle of the Sea as having a strong presumption of validity. *Id.* The court would also note that an application of the equidistance line to adjacent boundaries would yield virtually identical results to an application of the perpendicular and angle bisector approaches. *Id.*

800. *Id.* The paramount requirement for the proportionality test is that there should be a reasonable degree of proportionality between the lengths of the relative coasts of the state parties (measured by general directional lines) and the quantity of



lengths of the coastlines it considers relevant and then deciding what maritime space to assign to each coastline.<sup>801</sup> Next the court will calculate how much of the relevant maritime space is assigned to each party by the proposed boundaries it is considering.<sup>802</sup> The measurement will produce the following results: Azerbaijan: 21,999.0 nautical square miles of coastline (nsm), 20.7 percent of total Caspian Sea (percent); Iran: 15,470.7 nsm, 14.6 percent; Kazakhstan: 31,706.9 nsm, 29.9 percent; Russia: 16,560.0 nsm, 15.6 percent; Turkmenistan: 20,379.8 nsm, 19.2 percent.<sup>803</sup> Finally, it will compare the ratios between the two pairs of figures (lengths of coastlines and maritime space assigned) and determine whether an adequate degree of proportionality exists.<sup>804</sup>

So given the above outline, what can we expect the legal regime of the Caspian to look like if the UNCLOS model were applied? Straightforward application of the UNCLOS model to the Caspian establishes navigational and other freedoms and rights that may be exercised by all states, including non-littoral ones.<sup>805</sup> An example of such a regime is the Persian Gulf, a semi-enclosed marine sea where all states enjoy freedom of navigation, overflight, related rights in the EEZ beyond the territorial sea, the right of transit passage through the territorial sea, and the right of innocent passage within the territorial sea.<sup>806</sup> Such an application, however, is highly unrealistic given the geographic and geopolitical history of the Caspian.<sup>807</sup>

Instead, application of the UNCLOS to the Caspian context is most significant because of the legal relationship it imposes *among*

maritime space assigned to those states. *Id.* Proportionality need not be precise. *Id.* nn. 40-41.

801. Caglett, *supra* note 584. When the coastlines of the littoral states are measured according to general directional lines, the results are as follows: Azerbaijan: 259.1 nautical miles (nm), 15.2 percent of total coastline (percent); Iran: 319.1 nm, 18.7 percent; Kazakhstan: 526.4 nm, 30.8 percent; Russia: 315.0 nm, 18.5 percent; Turkmenistan: 285.4 nm, 16.8 percent. *Id.* tbl.1.

802. *Id.*

803. *Id.* tbl.2.

804. *Id.* According to Caglett the comparative results of the above two tables strongly indicate that the tentative boundaries produce an acceptable degree of proportionality well within the range found satisfactory by the ICJ. *Id.*

805. Oxman, *supra* note 22.

806. Ironically, this "open door" policy is exactly what Russia, and particularly Iran, are trying to avoid. *See generally supra* Part II.A.2. Both states consider littoral exclusivity of the Caspian to be perhaps the most sacred feature of its current (and future) legal regime. *See, e.g., supra* Parts III.B.4-5. Thus, both would consider an "open door" policy a serious security breach and would vigorously reject any application of the UNCLOS model that would allow non-littoral states access to Caspian waters under any capacity. *See id.* As it is, Russia and Iran have begrudgingly accepted the reality that even a legal regime founded upon littoral exclusivity allows states like Azerbaijan and Kazakhstan to grant access to Western and American corporate interests. *See generally id.*

807. Oxman, *supra* note 22.

the littoral states, not *between* them and non-littoral states.<sup>808</sup> Under such a regime each of the five littoral states would retain full sovereignty over a twenty-four nautical mile territorial sea (including the contiguous zone). Each littoral state will have exclusive control of air space and subsoil resources within such a twenty-four mile buffer zone. Beyond the territorial sea, each littoral state will have an EEZ where they may exercise the right to explore, exploit, conserve, and manage living and non-living (or hydrocarbon) natural resources of the seabed and subsoil.<sup>809</sup> All littoral states, however, will enjoy the right of free navigation and overflight and the laying of submarine cables and pipelines.<sup>810</sup> Beyond the agreed upon EEZ, however, the principle of commonage would apply to the Caspian's waters.<sup>811</sup>

## 2. The Condominium

### a. *Res Communis*: The Elusive Macro-Model

Whereas the international legal community has comprehensively sought to address questions of sovereignty and jurisdiction regarding open seas and oceans, other bodies of water, including lakes, have been left untouched by the UNCLOS regime.<sup>812</sup> Perhaps neglect in this area reflects the geographic and political realities of fully enclosed bodies of water—it is easier to identify affected parties and economic interests in fully enclosed marine areas because the limits and boundaries of access are limited to the littoral states.<sup>813</sup> Therefore, regimes governing international lake boundaries have usually been dealt with through bilateral and multilateral

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808. In other words, even a straightforward application of the UNCLOS could not realistically apply the model's provisions regarding non-littoral access to the [Caspian Sea].

809. For a general outline of a possible delimitation of the Caspian, see *supra* notes 795-804 and accompanying text. Note that Caglett's model does not specifically refer to delimitation of the Caspian waters and seabed within an EEZ or continental shelf context. This is so because delimitation of the EEZ is a highly technical exercise, the analysis of which is beyond the scope of Caglett's model and this study. No mention of continental shelf delimitation is made in either Caglett's model or this study because there is uncertainty as to whether any of the littoral states actually have a continental shelf.

810. Convention, *supra* note 718, art. 58, *reprinted in* HENKIN ET AL., *supra* note 589, at 1293.

811. All the privileges and limitations applicable to the "high seas" would also apply to the Caspian. Most notably, a straightforward application of the UNCLOS would impose a moratorium on exploitation of seabed [hydrocarbon] resources in the "high seas." The author notes, however, that almost all proposed legal regimes based upon delimitation of Caspian waters and the seabed partition the *whole* Sea, leaving no commonage or "high sea" zones. See generally *infra* Part V.B.

812. See Oxman, *supra* note 22.

813. See Oxman, *supra* note 22.

agreements between concerned states.<sup>814</sup> Furthermore, the principle of exclusivity makes more practical and legal sense when applied to fully enclosed marine areas and "internal waters" than it does for open or semi-enclosed seas.<sup>815</sup>

Russian and Iranian legal claims regarding the existence of a *res communis* regime in the Caspian are primarily based on three factors: 1) the Soviet-Iranian Treaties of 1935 and 1940 (as discussed above); 2) the argument that the Caspian constitutes a single ecosystem requiring common environmental protection; and 3) general historical and practical considerations, and international case law and precedent.<sup>816</sup>

The principle of *res communis* or condominium may be thought of as a doctrinal outgrowth of the commonage principle of the laws of the sea.<sup>817</sup> According to international law scholars, however, the principle has rarely been drawn upon as a regime governing economic relations between lake littoral states.<sup>818</sup> Shared ownership of seabed resources finds very little support in international case law and state practice because states have usually relied on delimitation or partition in order to resolve legal disputes concerning lakes and semi-enclosed areas, though partition has often been accompanied by various degrees of cooperation and joint management.<sup>819</sup> Therefore, those arguing for condominium bear a substantial burden.<sup>820</sup> With respect to hydrocarbon and mineral deposits, partition is supported by overwhelming state practice, prompting one commentator to note that examples of common ownership of lakes and inland seas "do not . . . actually exist."<sup>821</sup>

Indeed there is very little case law actually supporting condominium regime use.<sup>822</sup> The only case advancing the notion of condominium use is the *Gulf of Fonseca Case*.<sup>823</sup> There, the ICJ

814. *Id.*

815. *See id.*

816. Caglett, *supra* note 584. Although Russia's diplomatic and legal strategy in recent years has lay doubt as to whether it officially regards the Sea as a condominium, Iran has, with some modifications, been the most consistent champion of such a regime. *See supra* Parts III.B.4-5; *infra* Part VI. Notably lacking from this list is a reference to well established international case law and precedence, although proponents of the *res communis* do point to some international case law for support of their position. *See, e.g., infra* notes 823-26 and accompanying text.

817. Oxman, *supra* note 22.

818. J.H.W. VERZIJL, 3 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 19 (1970).

819. Oxman, *supra* note 22.

820. *Id.*

821. VERZIJL, *supra* note 818, at 23.

822. *See Oxman, supra* note 22.

823. Land, Island and Maritime Frontier Dispute (El Sal. v. Hond., Nicar. intervening), 1992 I.C.J. 351 [hereinafter *Gulf of Fonseca Case*]. Situated in the Pacific

found that El Salvador, Honduras, and Nicaragua were each entitled to three-mile belt off their coastlines, beyond which the waters of the Gulf were to be shared in common.<sup>824</sup> The ICJ based its ruling on several factors unique to the situation at hand.<sup>825</sup> Most importantly, it seems that the ruling was motivated by the realization that division of the Gulf would create difficulties for at least one state in that it would prevent it from having a deep-water outlet to the sea.<sup>826</sup>

Proponents of the principle of condominium sometimes cite the regime governing Lake Constance in Germany in support of their argument.<sup>827</sup> Lake Constance, which is surrounded by Germany, Switzerland, and Austria, is subject to the 1867 Bergezin Treaty.<sup>828</sup> In 1920 when the German Federal Court, or *Reichsgericht* was presented with the question of the legal regime of the lake, it held that Lake Constance was to be divided based on equidistance boundaries.<sup>829</sup> The court held: "the view must be preferred according to which the middle line constitutes the frontier. The general rules of international law are against the theory of condominium."<sup>830</sup>

#### b. Applicability of the Condominium Model to the Caspian Sea

While the debate surrounding the applicability of the UNCLOS primarily involves the issue of whether a *future* Caspian legal regime should incorporate parts of the macro-model in whole or in part, the debate surrounding the applicability of a *res communis* model concerns not only its future characteristics, but also its *current* constitution.<sup>831</sup> As stated above, both Russia and Iran base their

Ocean, the Gulf of Fonseca is surrounded by three countries that were all previously part of the Spanish Empire. Mehdiyoun, *supra* note 25, at 12.

824. See generally *Gulf of Fonseca Case*, 1992 I.C.J. at 351.

825. Caglett, *supra* note 584. The *Gulf of Fonseca Case* is unique; the ICJ relied heavily on the fact that the Gulf had long been owned by a single state (the Spanish Empire) and, even after the three littoral states became independent, its waters were treated as common property among them. *Id.*; Mehdiyoun, *supra* note 25, at 12-13. In essence, the Court deemed the Gulf to be a historic bay, a rare legal classification in which coastal states have acquired title by prescription over a long period of time. Oxman, *supra* note 22; see also Convention, *supra* note 718, art. 10.

826. Caglett, *supra* note 584.

827. Mehdiyoun, *supra* note 25, at 11.

828. *Id.*

829. *Id.*

830. *Id.*

831. It is important to realize that the debates regarding the current and future legal status of the Caspian, though related, are independently significant issues. As already outlined, the debate regarding the *current* legal status of the Caspian largely concerns the continuing validity of the Soviet-Iranian Treaties. As was already argued in Part IV, *supra*, the Soviet-Iranian Treaties may be viewed as a general set of interim default rules imposing certain limitations on unilateral exploration and exploitation of Caspian resources. As such, they may not be characterized as legal regimes primarily

arguments regarding legitimacy of a condominium regime on two main factors: 1) that the condominium defines the current status of the Sea pursuant to the Soviet-Iranian Treaties, and 2) that any future regime should also be based on a condominium because the Sea's historical, geographic, and environmental characteristics warrant such an approach.

Though the validity of the Soviet-Iranian Treaties has already been addressed, further analysis in this regard is helpful. Several scholars have argued that the history of the littoral states' practice in the Caspian weakens the argument that the Soviet Union and Iran regarded the Caspian as a common sea.<sup>832</sup> As already mentioned in preceding sections, the Soviet Union exploited the Sea's oil and gas reserves off Baku's coast without acquiring the consent of Iran.<sup>833</sup> The reasons for Iran's thirty-year silence may well be understandable, but they may nonetheless estop it from rising legal and environmental concerns regarding unilateral action in the Caspian Sea.<sup>834</sup>

Further evidence suggests that despite the wording of the Soviet-Iranian Treaties actual Soviet practice adhered to the principle of sectoral division for the purposes of natural resource exploitation.<sup>835</sup> There is also evidence that the Soviet Union regarded the northern part of the Caspian as part of its sovereign territory.<sup>836</sup> Thus, a Soviet International law manual published in 1966 noted that "the resources of the continental shelf also belong to each Party [the USSR and Iran] within the limits of its respective area of the sea."<sup>837</sup> Furthermore, as discussed above, the Soviet Union administratively divided its portion of the Caspian among Azerbaijan, Russia, Kazakhstan, and Turkmenistan.<sup>838</sup> All this would seem to suggest that whatever the current legal and practical effects of the Soviet-Iranian Treaties may be, they cannot be characterized as having established a strict *res communis* regime in the Caspian.

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because they did not explicitly, adequately, or comprehensively address key issues regarding ownership and management of hydrocarbon resources in the Caspian. The debate regarding the *future* legal status of the Caspian, however, concerns the adoption of an appropriate and comprehensive legal regime. It is, therefore, a wholly separate matter which resolution is largely unrelated to determining the current legal status of the Caspian. Instead of concerning itself with the question of what the legal regime of the Caspian *is* as a *matter of law*, this debate focuses on what the most effective, practical, and ideal legal regime for the Caspian *should be*.

832. See, e.g., Mehdiyoun, *supra* note 25, at 13.

833. Palaz, *supra* note 154.

834. Oxman, *supra* note 22.

835. Mehdiyoun, *supra* note 25, at 13.

836. *Id.*

837. BUTLER, *supra* note 583, at 106.

838. See *supra* Part III.B.2.

The more significant issue, however, revolves around whether the condominium approach represents a more sound legal regime than partition or delimitation of the Sea in the future. Here, it is important to remember that condominium proponents have little in the way of international precedent on their side. Indeed, none of the unique peculiarities of the *Gulf of Fonseca Case* seem to exist in the Caspian Sea case.<sup>839</sup> The strongest arguments available to pure condominium proponents include: 1) the fact that the Caspian is, for all practical purposes, a landlocked lake and probably does not fall under the UNCLOS as a matter of law, 2) that the Sea has never been partitioned or delimited *de jure*, and 3) that environmental factors require common ownership.<sup>840</sup> None of these arguments, however, operates to convincingly bolster Russian and Iranian arguments that notwithstanding interim default rules, the Caspian's *future* legal regime *should* incorporate a pure condominium macro-model.<sup>841</sup>

Simply put, straightforward application of a pure condominium regime is simply impractical in the Caspian context because it allows joint ownership and management of both surface and subsurface (including seabed and subsoil) resources. This impracticality is magnified when the prospect of rich hydrocarbon reserves is introduced into the formula—one could easily imagine a situation where vague and undetermined ownership rights ultimately lead to chaos and possible military conflict. This does not, however, mean that aspects of a condominium macro-model cannot effectively be incorporated into a new regime containing aspects of joint cooperation and management.<sup>842</sup>

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839. See *supra* notes 823-26 and accompanying text.

840. See *supra* Parts III.B.4-5, IV.

841. All these arguments are unpersuasive if not unresponsive if the operative issue to be addressed is not what is the *current* legal status of the Caspian Sea, but what should the *future* legal regime of the Caspian look like. See *supra* note 774 and accompanying text. The first argument is unresponsive because regardless of whether the UNCLOS is applicable as a matter of law, it may still be the most effective and practical regime model available. *Id.* The second is unpersuasive because there is at least a legitimate argument that state practice, custom, and estoppel all operated to establish a *de facto* partition of the Caspian during the Soviet era. See *supra* Part IV.A.3. Finally, the third is unpersuasive for two reasons: 1) because the environmental argument is essentially a smokescreen utilized by Russian and Iranian foreign policy experts to hide the real geopolitical reasons behind their advancement of a condominium regime, and 2) because a it is not necessary to establish a pure condominium regime to ensure that environmental problems are adequately addressed. See *supra* note 538 and accompanying text. But see *infra* Part VI.C.3 for legitimacy of environmental arguments.

842. See *infra* Parts V.B.2, VI.B.

### 3. The Draft Convention on Non-Navigational Uses of International Watercourses<sup>843</sup>

There is a possible third macro-model that may have a significant impact on the future of legal relations in the Caspian Sea, particularly with respect to hydrocarbon ownership rights. The International Law Commission has been at work on the law of "internal waters," which includes rivers and lakes that have traditionally been subject to the sovereignty of the littoral states.<sup>844</sup> Furthermore, unlike the sea, rivers and lakes are subject to national sovereignty without regard to distance from shore, and their use for navigation or any other purpose is subject to exclusive authorization and control of the littoral states.<sup>845</sup> The applicability of this regime will depend on the pace of progress associated with it.

#### B. *The Unique Caspian and the Tailor-Made Model*

##### 1. Limiting the *De Jure* Effects of the Macro-Models

The debate concerning the status of the Caspian Sea often revolves around the littoral states' invoking the analysis of legal scholars as to whether such an arrangement is legally allowed by international law. This has created the illusion that the littoral states are obligated to restrict their options to the dichotomous world of the UNCLOS or its antithesis, the *res communis*. According to Professor Oxman, a leading expert on the international laws of the sea, however, there is no doubt that the littoral states are free to choose what model controls their legal relations in the Caspian.<sup>846</sup> In other words, reference to legal macro-models for a Caspian regime are merely attempts to legitimize the soundness of such options.

The unique status of the Caspian does not require the application of any one model, and any use of available regime models must be accommodated to account for the geological and geographical characteristics of the Sea. Most likely the contours of any future

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843. For a text of the draft articles, see generally *Report of the International Law Commission on the Work of its Forty-Sixth Session: Draft Articles on the Law of the Non-Navigational Uses of International Watercourses*, UN GAOR, 49th Sess., Supp. No. 10, at 199, UN Doc. A/49/10 (1994). The UN General Assembly decided to begin work on a convention on the matter in 1996. Oxman, *supra* note 22, n. 8. For an in-depth analysis of the draft convention, see generally Aaron Schwabach, *The United Nations Convention on the Law of Non-navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 31 TEXAS INT'L LAW J. 761 (1998).

844. See generally Schwabach, *supra* note 843.

845. *Id.*

846. Oxman, *supra* note 22.

Caspian legal regime will draw heavily from many sources, including the three major macro-models explained above, practical and historical considerations, and political and economic realities. The precise substance of such a regime, however, will depend upon the littoral states' effective use of legal diplomacy—their ability to substantiate legal arguments *via* geopolitical and geoeconomic posturing.

## 2. Toward a New Regime: Conceptualizing A Legal Spectrum of Regime Models<sup>847</sup>

Given the conclusion reached above that the littoral states are under no legal obligation to apply a pure UNCLOS or condominium model, it becomes necessary to evaluate the range of possibilities that the littoral states may entertain. Putting aside more technical questions regarding the exact science of delimitation,<sup>848</sup> the nature and character of a hypothetical Caspian Sea legal regime model is most simply illustrated by identifying three primary concerns and evaluating the interplay among them. The concerns include: 1) the degree of sovereignty,<sup>849</sup> if any, exercised by a littoral state over its share of the Caspian's waters (including surface and sub-surface rights); 2) the degree of sovereignty, if any, exercised by a littoral state over its share of the Caspian seabed (including all subsoil resources); and 3) the existence, if at all, of a commonage area either comparable to that of the UNCLOS "high seas" where limitations are placed on the exercise of sovereignty over the seabed and its resources, or analogous to a straightforward condominium zone. In essence, this exercise employs a simple regime spectrum model that explores the different numerical combinations that result when the

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847. The Legal Spectrum of Regime Models is a rough conceptual model developed primarily by the author. Essentially, the Spectrum Model employs a conceptual gradient seeking to import characteristics from both the UNCLOS and *res communis* macro-models outlined above. As such, this section will primarily use cross-reference citations where applicable and will only cite authority where the author has directly relied upon a source offered to prove the matter asserted in the text.

848. For a discussion of technical issue of allocation of a specific portion of the Caspian Sea (in terms of percentage of total area) to a littoral state including different delimitation techniques, see *supra* notes 796-804 and accompanying text.

849. Please note that the presence of the term "sovereignty" always signals the existence of a sectoral or delimitation arrangement. Therefore, "no sovereignty" means there is no delimitation, while "full sovereignty" means that the littoral state is granted complete control of its *full share* of the Sea's water or seabed pursuant to agreed upon delimitation principles. Also note that this spectrum does not take into account the actual percentage share afforded each littoral state should delimitation occur. That concerns a more technical issue that was touched upon in the above sections and is beyond the scope of this study.



ratios between water and seabed sovereignty are manipulated, taking into account the existence or absence of a commonage area.<sup>850</sup>

When all these factors are plugged into the spectrum, twelve possible regime models result.<sup>851</sup> Each model's characteristics will be analyzed, with particular attention being paid to the effect of each arrangement on a) navigation and commercial (including fishing) concerns, b) ownership of hydrocarbon and mineral resources, c) commercial transportation concerns (including the construction and management of pipelines), and d) environmental protection concerns. Note that each regime model advances a unique architectural design which automatically imposes a set of default parameters on all littoral states. The technical specification and final design of each regime model, however, will depend upon bilateral and multilateral negotiation and diplomacy between the littoral states. These specifications will include, among other things, the breadth and size of each zone of sovereignty and any existing commonage area. Also note that regardless of the regime model adopted, any trans-Caspian pipeline project would undoubtedly run into numerous legal [and practical] problems, although sectoral division probably accommodates such ambitious plans best because diplomatic difficulties may be solved *via* bilateral or multilateral transportation agreements.<sup>852</sup>

a. Model One: No Sovereignty Over Waters and Seabed; No Commonage Area

This regime model represents the condominium model in its purest and most extreme form. Under this regime model none of the five littoral states exercise any degree of sovereignty over any of the

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850. Another way of looking at this analytical approach is to conceptualize a model continuum exploring the range of possible regime models available to the littoral states. Here, two factors must be taken into account: 1) the tension between the common ownership (as exemplified by *res communis*) and the exclusive control (as embodied by the delimitation provisions of the UNCLOS) approach, and 2) the tension between a dual-regime system versus a unified regime system with respect to the seabed and its surrounding waters. A superimposition of the two approaches may reveal a conceptual model that places a uniform condominium approach at one end of the spectrum, and a uniform sectoral model at the other end.

851. A cursory look at most of the twelve regime models offered for analysis will reveal that most of them are either highly impractical or will be rejected by most if not all of the littoral states because they do not meet fundamental geopolitical and geoeconomical interests. They are, nonetheless, discussed and analyzed regardless of their impracticalities because the nuanced variations between and among them allow the reader to fully understand the practical consequences of the differing legal regime models on the littoral states' individual and collective interests.

852. See *supra* notes 420-38 and accompanying text (analyzing the difficulties associated with the process of such multilateral negotiations).

Caspian's water or seabed resources.<sup>853</sup> This is not to say, however, that each littoral state will not have the right to explore and exploit the Sea's surface and seabed. On the contrary, a pure condominium regime, while not recognizing *de jure* partition or delimitation of the Sea itself, grants all littoral states equal rights of access to all surface and subsurface areas of the Sea.<sup>854</sup> Individual littoral states may, pursuant to bilateral and multilateral negotiations and agreements, acquire limited title to certain navigational, communication, hydrocarbon, and transportation interests.<sup>855</sup>

From the perspective of navigation and commercial rights a pure condominium regime will largely have positive consequences. As a default rule, each littoral state will have the right to freely navigate any area of the Sea for commercial and non-commercial purposes.<sup>856</sup> Modifications may be made pursuant to bilateral and multilateral agreements addressing specific concerns, including military and naval security measures.<sup>857</sup> From a purely practical and management perspective, however, such a regime model will possibly lead to diplomatic friction and possible conflict.

The regime model's consequences for hydrocarbon and mineral ownership rights are largely negative since the seabed and its subsoil resources will be jointly owned by all littoral states. A pure condominium regime, however, will *not* necessarily preclude littoral states from exercising a certain degree of ownership over exploration and exploitation of the Sea's subsoil resources. These rights, however, will not receive the measure of ownership security guaranteed by sectoral division since at the most, a littoral state will exercise ownership rights over the *extraction* of the resources, not a particular portion of the Sea itself.<sup>858</sup> The acquisition of title over extraction rights will principally follow in one of two ways: either the

853. That is to say that none of the littoral states will be granted a "national sector" upon which it may exercise full sovereignty rights.

854. See generally *supra* Part V.A.2.

855. See *infra* notes 857-59 and accompanying text (describing the difference between outright ownership of the Sea's resources and acquisition of title to the *right to extract* such resources).

856. This freedom of the seas right is analogous to *mare liberum* notions—that the sea belongs to everyone and to no one—traditionally advocated by the renowned international legal scholar Hugo Grotius. HENKIN ET AL., *supra* note 589, at 1236.

857. Indeed such modifications and exceptions were made even during Grotius' time for times of war. *Id.*

858. Arguably, such an arrangement highlights the tension within any condominium regime—the fact that the waters and the seabed are jointly owned by all, but no individual littoral state has the right to own a particular area of the sea unilaterally. As a practical solution to such a legal conundrum it is highly likely that the states, through multilateral negotiation, will eventually allow some entity (whether public, private, or quasi-public) the right to extract the subsoil resources, but will not allow that entity to claim ownership of the seabed from which such extractions are made. See, e.g., *infra supra* note 859 and accompanying text.

littoral state will secure its rights through bilateral and multilateral negotiation with all other littoral states thus granting it limited rights to the seabed and its subsoil resources, or it will purchase an ownership share for its extraction rights from a joint-stock company in which all five littoral states own equal shares.<sup>859</sup> This is significant because this limited degree of ownership allows all other littoral states to exercise veto power over exploitation of the hydrocarbon basin in question should they object for any reason.<sup>860</sup>

Many of the same consequences affecting ownership rights also apply to transportation interests, especially with regard to the construction and management of pipelines carrying the Caspian's oil and gas to the open seas. Successful and effective management of pipelines requires a secure and stable legal environment that guarantees the uninhibited flow of oil and gas. This type of guarantee will undoubtedly only result if full ownership interests are clearly defined and exercised.

The pure condominium's effects on environmental interests will likely yield positive results.<sup>861</sup> This is especially true with respect to environmental concerns because solving the Caspian's unique environmental problems will require comprehensive management solutions and joint cooperative efforts on the part of all littoral states.<sup>862</sup>

In conclusion, however, the overall consequences of such a regime will have a detrimental impact on diplomacy in the Caspian Sea region because the model does not adequately address key economic and security questions regarding navigation, ownership of

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859. This arrangement represents a possible compromise and solution to the ownership problems presented by a pure *res communis* model. Notice that under either option, the drilling entity will only exercise limited ownership rights pursuant to temporal, territorial, production, and management limitations imposed upon it through multilateral agreement. In the first scenario, the exploiting entity will probably only acquire exclusive legal title to extraction rights, although it may, through multilateral consensus, acquire actual but temporary ownership of a sector of the seabed. Given the strict legal architecture of this model, however, the former possibility is more likely. In the second scenario, no ownership of the seabed is possible. Also, no exclusive right to extract resources is available—the entity must instead purchase a stake in a joint-stock company or consortium composed of private corporations, and most importantly, public interests as advanced by the five littoral states. The extracted oil will, therefore, be owned only in part by each participant, and a share of the proceeds will be distributed to it upon the sale of the oil in the international market.

860. This arrangement resembles the Russian "doughnut proposal," which allowed the littoral states' veto power by participating in joint-stock companies and by adhering to a strict double-tender system. See Babak, *supra* note 109, at 189-90.

861. *But see* Croissant & Croissant, *supra* note 23, at 27-28 (arguing that only sectoral division and absolute ownership rights will guarantee environmental security because it will be in the littoral states' self-interest to ensure adherence to environmental standards).

862. *See id.*

hydrocarbon resources, and transportation rights.<sup>863</sup> It is no surprise, therefore, that none of the littoral states have advanced such a radical proposal. Even under the seemingly lax Soviet-Iranian Treaties, *de facto* state practice suggests that neither the Soviet Union or Iran seriously viewed their relationship under a pure condominium regime model.<sup>864</sup>

b. Model Two: No Sovereignty Over Waters and Seabed; Commonage Area

This regime model will have the exact same effects and consequences on navigation, communication, transportation, fishing, and environmental interests as the previous model.<sup>865</sup> The only difference will be the creation of a commonage zone preferably located in the middle of the Caspian where drilling and exploitation subsoil resources is less likely to occur.<sup>866</sup> Like the UNCLOS "high seas" zone, the Caspian regime model equivalent will probably extend many surface and subsurface water benefits enjoyed throughout the pure condominium regime to the commonage area. The major exception, however, will likely be an imposed moratorium on most economic activities, including exploration and exploitation of hydrocarbon and mineral resources.<sup>867</sup> As such, the commonage area may be regarded as an economic-free zone dedicated to environmental and scientific research and cooperation among the littoral states.

The practicality of such a regime is unclear given the vast variety of interests that can be exercised throughout the rest of the condominium zones. It is highly improbable that any of the littoral states will advance a proposal based on such a regime model, primarily because many of the same economic and political shortcomings identified in the previous model will not be resolved with the introduction of a commonage area.

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863. Most importantly, this regime places a high burden of responsibility on states to engage in effective multilateral cooperation and agreement. This is unlikely to occur given the present political and economic situation in the Caspian region.

864. The 1940 Treaty, for example, allowed an exclusive ten-mile fishing zone. See generally Part IV.A.1.

865. See *supra* Part V.B.2.c.

866. The author has included the possibility of some form of commonage area because it is likely that any future Caspian legal regime will employ such an area to both to appease Russian and Iranian interests and to ensure multilateral cooperation in certain areas, particularly the environment.

867. See, e.g., *supra* notes 765-69 and accompanying text.

c. Model Three: No Sovereignty Over Waters and Full Sovereignty Over Seabed; No Commonage Area

Under this regime model each littoral state will be able to exercise complete sovereignty over its full share of the Caspian's seabed, while absolutely no sovereignty is available over the Sea's waters. In effect this means that each littoral state must forego the luxury of a coastal buffer zone similar to the UNCLOS' territorial and contiguous seas with respect to sovereignty over surface waters.

The consequences of such a regime model on navigation and commercial interests are similar to those outlined in Model One. This regime model will maximize free navigation to all parts of the Caspian but will do so at a potential [security] price. This is a price that the NIS (and perhaps even Iran) may not be able to afford given Russia's superior military, naval, and commercial capabilities in the region.<sup>868</sup> The regime model's effects on hydrocarbon ownership rights will be a relatively positive one. Full sectoral division of the seabed will maximize each littoral state's exercise of sovereignty over its share of the Caspian's oil and gas resources—a goal vigorously pursued by Azerbaijan and to a lesser extent Kazakhstan.<sup>869</sup> This aspect of the regime model also increases ownership security by clearly defining and delimiting national sectors, but only with respect to the seabed. Note, however, that full sectoral division may eventually lead to disputes as littoral states explore more productive hydrocarbon basins located further away from their shores.<sup>870</sup>

A more pressing concern with this regime model, however, involves the degree to which seabed sovereignty is dependent or reliant upon some measure of sovereignty over the surface waters. First there is the practical intimidation factor detailed above; Azerbaijan, for example, will constantly have to deal with commercial and non-commercial vessels owned and operated by Russia, Iran, and the other littoral states. Second, there is the legal factor—it is arguable that even if the Sea's waters are owned in common, any littoral state will be able to veto or at least make difficult the placement of oil drilling platforms and the like above the water, especially if such platforms are located further from the [Azeri]

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868. See, e.g., Babak, *supra* note 109, at 187-90 (explaining Kazakhstan and Azerbaijan's concerns with any proposal that would allow a Russian naval presence to interfere with their ownership rights of the Sea's seabed resources).

869. See *supra* Parts III.B.1-2.

870. See, e.g., *supra* notes 523-27 and accompanying text (describing the long-running ownership dispute between Azerbaijan and Turkmenistan over the Kaipaz-Serdar oil fields despite the two countries' full *de facto* delimitation of the Sea pursuant to administrative boundaries established during the Soviet era).

coast.<sup>871</sup> It is, therefore, unclear whether a littoral state can effectively exercise its seabed sovereignty if it lacks such powers over the waters located above the seabed.

Finally, pure sectoral division of the seabed has little dire effect for environmental rights and concerns. This is so because scientific management and cooperation can be well accommodated if all littoral states have access to the surface and sub-surface waters of the Sea.

This regime model will probably be rejected by all littoral states because it does not allow for even a limited coastal buffer zone for the individual littoral states. More likely than not, any regime model that does not recognize some measure of littoral sovereignty over the waters will be rejected by some if not all the parties.

#### d. Model Four: No Sovereignty Over Waters and Partial Sovereignty Over Seabed; Commonage Area

Like the previous regime model, this model does not allow any exercise of sovereignty over the Sea's waters. Partial sovereignty, however, will be exercised over the seabed extending from the littoral state's coastline to the area delineating the existence of a commonage zone.

The existence of a condominium over the Sea's waters maximizes navigation and communication interests for all the littoral states, but the same problems inherent with Models One through Three also apply here.<sup>872</sup> With respect to hydrocarbon ownership rights, sectoral division of the seabed is not as favorable as that proposed in Model 3 because of the existence of a commonage area. This may not be as much of a problem, however, if the commonage area is treated more like a condominium zone rather than a high seas zone imposing a moratorium on all deep sea drilling.<sup>873</sup> The same problems associated with the lack of sovereignty over surface waters and its potential practical and legal effects on subsoil exploitation rights also apply here. As for its impact on the environment such a regime would, like its previous variants, provide a suitable climate for scientific and management cooperation.

Notwithstanding contrary diplomatic assertions, the lack of any sovereign rights over surface waters will likely discourage both Russia and Iran from ever adopting such a regime model. The NIS would naturally be staunchly opposed to such a regime model.

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871. See, e.g., Babak, *supra* note 109, at 189-90 (describing similar consequences flowing from the adoption of the Russian "doughnut proposal)."

872. See *supra* Parts V.B.2.a-c.

873. Remember that under the Spectrum Model, the existence of a commonage area may either signal a zone analogous to the UNCLOS "high seas" or a zone incorporating features of the *res communis* macro-model. See *supra* Part V.B.2.

e. Model Five: Partial Sovereignty Over Waters and No Sovereignty Over Seabed; Commonage Area

Like Models One and Two, this model provides no sectoral division of the seabed, and like its counterparts, it is doomed to fail for that very reason. Unlike the first four models, however, this model actually delimits the waters of the Caspian up to the commonage zone.

Overall flexibility with regard to freedom of navigation and commercial rights is limited with this model because each littoral state is restricted to its assigned water-sector of the Sea. The model does, however, avoid the unstable legal environment evidenced in the first several models.<sup>874</sup> Depending on the breadth of each littoral state's sovereign water zone the area may be analogized to the territorial or contiguous seas of the UNCLOS model, although no simultaneous sovereign right of seabed exploitation may be exercised.<sup>875</sup> Exclusive fishing and other commercial activities solely limited to the Sea's waters may, however, be pursued under this arrangement.

Hydrocarbon ownership rights and interests, however, suffer greatly under this regime model. As in the condominium models, littoral states may exercise acquisition rights over any part of the Caspian seabed, but these rights are severely restricted due to the prospects of joint ownership and control by all littoral states in those same areas. That each littoral state has full sovereignty over certain areas abutting its coastlines is no consolation—without full ownership rights to the seabed itself, control and management of the surface waters means little to nothing.<sup>876</sup>

Transportation interests are moderately accounted for under this regime model although any legal arrangement prohibiting

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874. Up until now analysis has assumed that a *res communis* regime model prohibiting ownership of the Sea's waters has a *positive* impact on navigation rights because, in principle, it allows all littoral to navigate where they please. From an alternative [practical] viewpoint, however, this may be seen as a *negative* impact precisely for the same reason: a state has no exclusive right to deny any other state's ships from areas close to its coastline.

875. Note that a territorial zone under the UNCLOS allows full sovereignty over all areas of the Sea lying within such zones. See *supra* notes 730-35 and accompanying text.

876. This arrangement is essentially the flip situation to one where sovereignty may be exercised over the seabed but not the waters above. Note that both arrangements severely restrict or vitiate any right to explore and exploit seabed resources. But see *supra* notes 552-54 and accompanying text (outlining the effect of the July 1998 agreement between Astana and Moscow that presumably divided the northern Caspian seabed but not the waters above). Arguably, however, an arrangement allowing sovereignty only over the waters above is preferable because it comes with all the rights and privileges attaching to such an arrangement while *also* allowing the exercise of veto power over any entity seeking to exploit the seabed below.

sovereignty over the seabed jeopardizes the prospects of laying oil and gas pipelines over the seabed.<sup>877</sup> This is especially true if, as in this regime, littoral states have no guarantee of sovereignty even over offshore areas close to their coastlines.

Finally, any sectoral division of Caspian waters will have detrimental effects on environmental management and cooperation concerns. The degree of this negative impact will depend on many factors, including the breadth and size of the water-sovereignty zone (and alternately, the breadth and size of the commonage area) and the littoral state's ability to ensure that sovereignty will not prevent multilateral cooperation aimed at solving the region's ecological problems.

f. Model Six: Full Sovereignty Over Waters and No Sovereignty Over Seabed; No Commonage Area

This model will probably be unacceptable to the NIS because it does not provide for any sovereignty over the seabed. Despite any diplomatic gestures to the contrary, it will also be unacceptable to both Russia and Iran because it fully delimits the waters of the Caspian between all five states and provides for no commonage area.

g. Model Seven: More Sovereignty Over Waters than Seabed; Commonage Area

Model Seven has the peculiar effect of establishing zones whereby a littoral state may not exercise sovereignty over the seabed despite its ability to exercise sovereignty over the waters above.<sup>878</sup> In essence this model provides an extra navigational and commercial cushion beyond the littoral state's seabed zone of sovereignty. This zone also provides a security advantage for smaller littoral states like Azerbaijan and Turkmenistan who can ensure [legal] protection against Russian and Iranian incursion into their prized economic zones. Its practical effect, however, may be to limit future expansion of the seabed sovereignty zone beyond already established water sovereignty zones.<sup>879</sup> As such the NIS, particularly, may worry about the future implications and consequences of such a regime model.

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877. See generally *supra* notes 430-34 and accompanying text.

878. This effect is only "peculiar" in light of already existing regime models including the UNCLOS, since in theory the littoral states are free to set up whatever regime model they please. The reader, however, will find scant evidence of a sea or lake regime that allows sovereignty over the waters without extending such sovereignty to the seabed below. The opposite arrangement, however, is the hallmark of the EEZ under the UNCLOS. See *supra* notes 750-58 and accompanying text.

879. This limitation may be imposed upon the NIS, for example, because the regime model's default architecture automatically prohibits any arrangement where



As already touched upon, the regime model's overall effects on ownership rights are primarily positive, though its specific makeup will reveal more telling clues about the degree to which practical consequences may actually interfere with legal sovereignty rights. For example, a slight variant on this model may provide that all littoral states will have joint ownership access to seabed areas lying within a state's water-sovereignty zone but outside its exclusive seabed zone. For the practical reasons already discussed above, this result may be more preferable than a regime model inverting the ratio between sovereign waters and sovereign seabed.<sup>880</sup> For states like Azerbaijan, however, it will certainly not be a favorable arrangement because its ownership prospects over hydrocarbon fields located miles outside its coastal waters may be severely jeopardized.<sup>881</sup> Likewise, the unequal and inverted sovereignty ratio between waters and seabed may cause unforeseen problems for pipeline construction on the seabed.

The existence of a commonage area will surely bode well for environmental protection. The water-sovereignty buffer zone may, however, allow uncooperative littoral states to effectively block multilateral attempts to enter the area for the purposes of scientific research and study.

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seabed sovereignty either equals or surpasses water sovereignty. Therefore, the breadth and size of any littoral state's territorial sea (the zone upon which it can practice *both* water and seabed sovereignty) is dependent upon the breadth of the water sovereignty zone. The breadth of the latter, however, will be limited by the existence of a commonage area.

880. See *supra* note 876 and accompanying text. "Inverting the ratio" simply means altering the ratio between water sovereignty and seabed sovereignty. For example, we may have an arrangement where water sovereignty rights exceed seabed sovereignty. (Note that this arrangement establishes an exclusive territorial sea zone where sovereignty over both elements may be exercised, and a zone where only sovereignty over surface and subsurface waters may be exercised.) An arrangement producing an inverted ratio would do the exact opposite: instead, we have a regime model where seabed sovereignty exceeds water sovereignty, similarly creating an overlapping territorial sea zone. An example of the latter arrangement would result in a zone similar to the EEZ. See *supra* notes 750-58 and accompanying text. Finally, an arrangement where water sovereignty equals seabed sovereignty produces a 1:1 ratio. Full sectoral division of the Caspian would result if such a ratio were achieved (provided there is no commonage area). See *infra* Parts V.B.2.k-l.

881. Any arrangement that establishes such an inverted ratio between water and seabed sovereignty jeopardizes Azerbaijan's ownership prospects over a good percentage of its claimed hydrocarbon basins. See *supra* Part III.B.1. Also, unlike Russia and Iran, Azerbaijan does not have the navigational, commercial, and military resources to make use of the practical conundrum caused when a littoral zone has exploitation rights to the seabed but no sovereignty over the waters above. See *supra* note 876 and accompanying text.

h. Model Eight: Full Sovereignty Over Waters and Partial Sovereignty Over Seabed; No Commonage Area

An inverted sovereignty ratio is also the hallmark of this model, but unlike its Model Seven counterpart, this regime allows full sectoral division of the surface waters. As such it will probably be preferable to the NIS over Model Seven, but this “split regime” variant will no doubt cause the NIS some trepidation and alarm.<sup>882</sup> Overall, however, this regime model may even be preferred over any UNCLOS-related model that provides for an EEZ because the latter does not guarantee a minimal breadth for critical water sovereignty rights.<sup>883</sup> On the contrary, adoption of this regime model will guarantee the NIS *absolute* control over their share—this sovereignty may not be threatened or disturbed by negotiations seeking to alter the breadth of such a zone.

i. Model Nine: Less Sovereignty Over Waters than Seabed; Commonage Area

This regime model represents the essential architectural features of the UNCLOS.<sup>884</sup> It also highlights the important legal effects of unequal sovereignty ratio between water and seabed ownership rights. Though it creates a dual or “split regime” effect between surface waters and the seabed, unlike the previous model it *increases* the breadth of the seabed sovereignty zone relative to that of the water zone. This extension creates an area similar to the UNCLOS EEZ, where a littoral state may exercise economic control over the seabed and its resources but must nonetheless allow other littoral states to enjoy access to navigation, overflight, and the laying of submarine cables and pipelines.<sup>885</sup> It also establishes an overlapping zone of water and seabed sovereignty abutting the littoral state’s Caspian coastline that is analogous to the territorial sea. Finally, similar to the UNCLOS, there is a commonage area that may or may not impose a moratorium on seabed activities, but will undoubtedly retain certain condominium rights and features.

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882. A “split regime” occurs anytime one sovereign exercises exclusive control over one part of the sea, for example, the surface and subsurface waters, and [an]other sovereign[s] exercises control over another part, for example, the seabed located below the aforementioned waters. In essence, this dual or “split regime” creates a zone of mixed sovereignty.

883. Full water sovereignty rights means that the default architecture of this regime model prohibits any tinkering with the breadth of such a zone *after* technical delimitation—assignment of Caspian share—has occurred.

884. See *supra* Part V.A.1.

885. See *supra* note 757 and accompanying text.

The model's consequences for navigation, commercial activities, and ownership and transportation rights is largely discussed in the section analyzing the UNCLOS macro-model and its application to the Caspian context.<sup>886</sup> The more interesting analytical query for the international legal scholar is this: if Azerbaijan and Kazakhstan both insist that the UNCLOS apply to the legal status of the Caspian Sea, why have they both rejected proposals which seem to contain the underlying features of such a model?<sup>887</sup>

One readily available answer is that a "dual-regime" model opens up the possibility of manipulation by Russian and Iran regarding the breadth of sovereignty zones.<sup>888</sup> Understandably this is a highly risky proposition for the NIS. Another is that these states *implicitly* advance the argument that although the Sea should be treated as a sea for the purposes of delimitation, it should not be treated as such with regards to a strict application of the UNCLOS macro-model.<sup>889</sup> This is not a far-fetched argument since it has already been *explicitly* advanced by both Russia and Iran.

More to the point, however, is Baku and Astana's realization that any Caspian "split regime" will be fundamentally different than an UNCLOS EEZ provision operating in an open seas environment. There are several practical and legal reasons for this. First and perhaps most importantly, the Caspian is an isolated, landlocked body of water with no direct access to the open seas. Its unique geographic and geopolitical location in an area exclusively controlled by two littoral states simply reinforces the body of water's lake-like characteristics.<sup>890</sup> Second, the Sea has historically been controlled by

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886. See *supra* Part V.A.1.c.

887. This rejection can be *explicitly* evidenced by Azerbaijan and Kazakhstan's rejection of the "doughnut proposal" where Russia allowed a forty-five mile territorial sea zone to all littoral states but insisted that the rest of the waters and seabed should be joined in common. See *supra* notes 514, 551 and accompanying text. The rejection can also be *implicitly* evidenced by the fact that to date, Azerbaijan and to a lesser extent Kazakhstan have called for *full* sectoral division of the Caspian's waters and seabed, which does not accord fully with the commonage principles of the UNCLOS macro-model. See *supra* Parts III.B.1-2.

888. See *supra* note 514 and accompanying text.

889. This is a very plausible understanding of the Azeri legal position. Baku's argument that the UNCLOS should apply to the Caspian has always focused on the sectoral and delimitation aspects of such a model, though it has curiously ignored acknowledgement of its commonage features. See, e.g., *supra* Part III.B.1. Therefore, it is accurate to assert that Baku and Kazakhstan want the *spirit* of the UNCLOS to apply (calling for delimitation and sectoral division), but do not wish *strict* adherence to the substance of its provisions (calling for commonage zones). The result is a legal diplomatic agenda that seeks to establish *full* sectoral division of the Sea.

890. This is significant because to the extent that all sides of the debate rely upon the Caspian's characterization as a sea or a lake to bolster and legitimize their legal positions, the "lake supporters" seem to have a more convincing position: they have history, geography, and arguably custom on their side.

powerful and intimidating sovereigns with considerable economic, political, and military resources which make it difficult for the NIS to effectively appeal to international legal authority to ensure full compliance with any agreed upon legal regime.<sup>891</sup> Third, the legal history of the Sea has simply never accommodated the idea of delimitation as proposed by the UNCLOS.<sup>892</sup> Finally, there are fewer guarantees that the legal provisions of the UNCLOS can be effectively incorporated in the Caspian Sea context. In other words, the NIS realize that a simple superimposition of the UNCLOS model without stringent provisions ensuring full compliance with agreed upon legal principles will probably not adequately protect their ownership interests in the Caspian.<sup>893</sup> For all the foregoing reasons, a "split regime" arrangement such as this will probably not be an optimal choice for the NIS.

j. Model Ten: Partial Sovereignty Over Waters and Full Sovereignty Over Seabed; No Commonage Area

Azerbaijan and Kazakhstan will probably find this version of the UNCLOS model more to their liking. It's consequences and effects are similar to the previous model, with one major exception: there is no commonage area. In other words, each littoral state will be allowed to exercise full sovereignty over its share of the Caspian seabed, but a good portion of this sovereignty zone will lie beneath waters jointly and commonly owned by all the littoral states. Even in the absence of a commonage area allowing the NIS a greater share of the Caspian seabed, however, these states will still be highly wary of any delimitation resulting in a dual or "split regime."

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891. The isolated location of the Sea and the huge potential for conflict due to regional instability in the Caucuses and Central Asia renders any enforcement of an agreed upon legal regime very difficult, especially if such a regime is not supported by the Russians and the Iranians. See, e.g., Greenlee, *supra* note 51 (describing the tense geopolitical and military situation in the Caspian region).

892. In other words, regardless of the general acceptability of the provisions of the UNCLOS and given the above arguments with respect to the past and current validity of the Soviet-Iranian Treaties, strict adherence to an UNCLOS-based macro-model lacks legal inertia.

893. The concern here is that the unique geological, geopolitical, environmental, and historical characteristics of the Caspian truly set it outside the UNCLOS model, or in the alternative, that it is impossible to simply import and superimpose the features of the latter onto the Caspian context.

k. Model Eleven: Equal Sovereignty Over Waters and Seabed; Commonage Area

This regime model allows each littoral state to exercise full sovereignty over true "national sectors," limited only by the presence of a commonage area. As such, each littoral state may treat its national sector as a territorial sea analogous to that provided for in the UNCLOS. In its purest form, the littoral state may exercise fully exclusivity rights in this area.

The model's effects on navigation and commercial rights are positive for the same reasons outlined above. It is the regime model's consequences for oil and gas ownership rights, however, that make this model highly attractive to Azerbaijan and Kazakhstan. More specifically, the equal ratio parity between water and seabed sovereignty ensures that the practical and legal uncertainties encountered in other models are fully avoided.<sup>894</sup> Furthermore, it is in the interests of both these states that their national sectors extend as far out into the middle of the Caspian as possible, thus limiting the breadth of the commonage area. This is especially important for Azerbaijan because many of its hydrocarbon basins lie miles offshore.<sup>895</sup> The same could be said of the model's consequences for transportation rights.<sup>896</sup>

With respect to environmental concerns, any sectoral division of the Caspian's waters damages the prospects for multilateral cooperation and management of the Sea's resources. This is especially true where littoral state's attain true national sectors whereby they may exercise complete sovereignty over their share of the Sea. The regime model's commonage area feature may limit the dire consequences of such a regime model.

For Russia and Iran the adoption of such a model is highly unfavorable because it effectively bars them from access or veto power over the NIS' rich oil and gas. In order to minimize the

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894. In other words, the 1:1 ratio avoids the legal and practical problems associated with the dual or "split regime" arrangement.

895. See *supra* note 503 and accompanying text.

896. In the absence of comprehensive pipeline regimes and arrangements guaranteeing the uninhibited flow of oil and gas, the best any Caspian littoral state with rich oil and gas deposits close to its shores could hope for is an arrangement allowing a 1:1 water-seabed sovereignty. This is so because such an arrangement maximizes the state's exclusive control over its allocated share of the Caspian. Such sectoral division, however, does not solve the legal problems associated with a trans-Caspian pipeline. See *supra* notes 428-34. Littoral states wishing to implement such a construction project will still have to rely on multilateral and bilateral negotiation and diplomacy in order to guarantee safe passage of the oil and gas through multiple national sectors. See *generally id.* Also, they will have to deal with the existence of a commonage area that may or may not prohibit the laying of pipelines on the seabed.

detrimental effects of such a regime, Moscow and Tehran must engage in a two-pronged diplomatic strategy. First, they must exact bilateral or multilateral concessions out of the NIS so as to render their exercise of full sovereignty conditional upon the satisfaction of certain predetermined criteria.<sup>897</sup> Second, they must maximize the breadth of the commonage area through diplomatic hardball. Regarding the latter strategy, both states should seek to establish a commonage area that retains a truly condominium nature in case of future hydrocarbon discoveries in the middle of the Caspian.<sup>898</sup> For the foregoing reasons, Azerbaijan, Kazakhstan, and perhaps even Turkmenistan may view this regime model with some skepticism.

#### 1. Model Twelve: Full Sovereignty Over Waters and Seabed; No Commonage Area

A model providing full and equal sectoral division of the water and the seabed is the ideal arrangement for the NIS, especially Azerbaijan and Kazakhstan. Under this regime all littoral states are guaranteed maximization of sovereignty over their allocated share of the Caspian's water and seabed resources. The sovereignty zones essentially act as unconditional territorial seas where the rights of the sovereign may be interfered with only through negotiation or authorization. Furthermore, the practical and legal problems associated with a dual or "split regime" arrangement are nonexistent here. Thus it is fair to assume that Baku and Astana's ultimate goal is to ensure that the future legal regime of the Caspian will most closely resemble, if not duplicate, this model.

For Russia and Iran, this arrangement presents numerous problems regardless of whether they can successfully persuade the NIS to abandon delimitation based solely on equidistance principles,<sup>899</sup> although Iran has shown signs that it will accept a "fair

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897. For example, they may draw up side accords or agreements that restrict certain unilateral activities even inside the national sectors. Once the essential default architecture of the regime model is established, however, Russia and Iran will have a tough time forcing concessions out of the NIS (and each other) which unreasonably restrict the exercise of full ownership control. Their sovereignty-limiting proposals must be restricted to solving comprehensive regional problems and externalities that affect all littoral states. Examples of such problems are demilitarization and environmental safety standards.

898. A commonage area that strictly adheres to the UNCLOS "high seas" principle is not as desirable as a condominium commonage zone because it prevents Russia and Iran from maximizing their veto powers against the other littoral states.

899. The technical delimitation principle only changes the littoral states' percentage share or allocation of the Sea's resources. It does not change the fact the Sea will be fully partitioned, and that most likely, most of the productive hydrocarbon basins will still be located with the NIS' "national sectors."

and equal" partition of the Sea.<sup>900</sup> Straightforward delimitation into true "national sectors" almost guarantees that Russia and Iran will have little to no say in the future exploitation of the majority of the currently discovered hydrocarbon basins in the Caspian Sea. Furthermore, full delimitation does little to increase Moscow and Tehran's hydrocarbon resource base, since few productive basins have been discovered off their shorelines.<sup>901</sup>

Like other regime models permitting full sovereignty and delimitation of Caspian waters and the seabed, Model Twelve has potentially disastrous consequences for an already bleak environmental situation in the region.<sup>902</sup> Though most legal scholars and political analysts reject the legitimacy of Russian and Iranian insistence on a condominium regime that allows cooperative management of the Sea's environment and resources,<sup>903</sup> there is little question that sectoral division severely undermines an effective environmental protection agenda. This is, of course, not to say that joint and multilateral cooperation cannot occur under full delimitation, or that the parties may not establish an independently operative environmental regime. The prospects for such cooperation surely exist—but the NIS' desperate need for foreign capital and investment will no doubt relegate environmental concerns to an inferior position.

## VI. SYNTHESIS: ADAPTING IRAN'S LEGAL ARGUMENTS TO ITS REGIONAL INTERESTS

So far the geopolitical and geoeconomic interests of the littoral states have been largely analyzed separately from the abstract legal analysis surrounding the Caspian Sea legal regime. This section aims to integrate the two major lines of analysis into a cohesive agenda adapting legal arguments to regional interests. It will use Iran as the primary test case for developing the integrated agenda and will present a legal diplomacy strategy aimed at insuring that Tehran is not isolated from the regions oil and gas developments.

The section will generally proceed by first outlining Iran's geopolitical, economic, and security interests in the Caspian region. The analysis will then shift to focusing on Iran's specific energy

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900. See *supra* note 231 and accompanying text. An equal partition of the Caspian means that each littoral state would be allocated twenty percent of the Sea's resources. For more in-depth analysis of Iran's effective use of legal diplomacy regarding equal partition of the Caspian Sea, see *infra* Part VI.B.

901. See *supra* notes 41-46 and accompanying text..

902. This problem is amplified since the regime model does not provide a commonage area "safe haven."

903. See, e.g., *supra* note 538 and accompanying text.

interests in the Caspian basin. Finally, the last section will outline a general policy of legal diplomacy that Tehran should follow in order to ensure that its comprehensive regional interests are satisfied. This section will synthesize legal and non-legal analysis in such a way as to highlight the need for Iran to focus on its regional oil and gas transportation capacity. More specifically, it will call on Iran to abandon a "legal veto" strategy focused on preventing the exercise of ownership rights by other littoral states and instead link any development of a Caspian Sea legal regime to its interests in the transportation sector.

### A. Caspian Geopolitics and Iran's Diplomatic Interests

#### 1. National and Regional Security

Iran's geopolitical goals may best be understood by analyzing Tehran's foreign policy relations with its Caspian, Central Asian, and Eurasian neighbors on a strictly zero-sum context. As such Tehran's paramount concern may be defined as national and regional security, and its main threat the use of military force from either Russia or the United States.<sup>904</sup> On a practical level, Iranian officials realize the staging of Russian troops in most of the CIS means that Iran's northern Caspian frontier is essentially a permanent militarized zone.<sup>905</sup> Though Tehran harbors no ambitious military designs on any territories in the Caspian region, political and economic instability primarily in the Caucasus threaten to unnecessarily embroil Iran in a regional arms race and ultimately military conflict.<sup>906</sup>

Therefore, it is in Tehran's interest to play the role of peacemaker in the Caucasus and Central Asia, and to seek a diplomacy of appeasement with a powerful northern neighbor that still considers the area its backyard playground.<sup>907</sup> Thus far a diplomacy of appeasement has only led to Iran's participation in a loose security alliance between Tehran, Moscow, and Yerevan which

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904. See *supra* note 564 and accompanying text.

905. See Lepingwell, *supra* note 65, at 65-67.

906. See, e.g., Jean Christophe-Peuch, *Caspian: Dispute Highlights Poor State of Azerbaijani-Iranian Ties*, RADIO FREE EUROPE-RADIO LIBERTY, Aug. 9, 2001, at <http://www.rferl.org/nca/features/2001/08/09082001.asp> (copy on file with the *Vanderbilt Journal of Transnational Law*) (recounting a recent incident between an Iranian naval warship which allegedly violated Azeri "sector" of the Sea and threatened to fire upon an oil exploration vessel operated by BP Amoco, and several other incidents where Iranian fighters violated Azeri airspace allegedly to threaten Azerbaijan in the face of aggressive unilateral development of its offshore oil and gas basins).

907. See *supra* note 65 and accompanying text.



seeks to counter the political ambitions of Ankara, Baku, and Washington.<sup>908</sup> Though it is in Iran's security interest to continue "membership" in this loose tripartite alliance in order to appease Russian interests, Tehran must realize that its regional interests may significantly differ from those of Moscow.<sup>909</sup> More specifically, Tehran must clearly identify its own unique interests so that it does not blindly follow Russia down a path detrimental to its long-term interests in the region.<sup>910</sup>

Though less of a practical threat to Iranian security and territorial integrity, the threat of force from the United States is always a *political* reality for Tehran.<sup>911</sup> Such threats may indeed be exaggerated due to years of political mistrust and damaging diplomacy between the two former allies.<sup>912</sup> Yet the heavy presence of U.S. forces in the Persian Gulf region and Turkey means that Iran is essentially sandwiched between politically hostile forces to its south and west, and unstable and erratic military might to its north.

Placed in such a predicament, Iran's biggest fear is the direct or indirect involvement of U.S. military forces in the Caspian region.<sup>913</sup> The prospects for direct U.S. military involvement are not highly likely, and the threat of direct military incursion into Iranian territory from U.S. forces stationed throughout the region is rather slim, but the probability that Washington might use its forces there as leverage to ensure Iranian concessions in the Caspian region is not so far-fetched.<sup>914</sup> This scenario may be especially applicable where the U.S. acts either to safeguard its own interests by proxy through its NATO ally Turkey, or threatens the use of military force in order to protect a Caspian ally such as Azerbaijan.

Therefore, it is in Tehran's interest to stand firm against any hint of U.S. military involvement in the Caspian region. It can do this by continually affirming and reaffirming Russia and Iran's historical interests in the region primarily with regard to the exclusivity principle espoused by the Soviet-Iranian Treaties, by reminding the international community that the legal status of boundary disputes in the Caspian is a regional problem that requires regional solutions, and that the territorial integrity of the Caspian littoral states should in no way be violated or compromised by outside

908. See *supra* note 146 and accompanying text.

909. See *supra* note 135 and accompanying text.

910. See *id.*

911. See *supra* note 107 and accompanying text.

912. See generally JAMES A. BILL, *THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRANIAN RELATIONS* (1988) (chronicling the history of amicable political relations between the United States and the eventual souring of relations between the two nations after the Iranian revolution and the ensuing hostage crisis).

913. See *supra* note 107 and accompanying text.

914. See *id.*

military and diplomatic interference. In order to ensure minimization of outside interference by the United States and the West, Tehran can accomplish the above objectives by relying on its loose alliance with Moscow and by adopting the role of "whistleblower"—playing up the threat of U.S. military involvement in the region to Moscow and free-riding off Russia's own insecurities regarding an American presence in the region.

## 2. Cultural and Economic Cooperation

Iran's geopolitical interests with regard to the Caucuses and Central Asia are primarily cultural and economic in nature. As mentioned before, international political scientists severely exaggerated the consequences of a showdown between Ankara and Tehran for political influence in the region.<sup>915</sup> When one looks at the current political climate in Kazakhstan, Turkmenistan, Uzbekistan, Kyrgyzstan, and Tajikistan, there is little to suggest that either Iran or Turkey have significantly influenced the political culture in a noticeable way.<sup>916</sup> Instead, the countries are primarily ruled by former Communist leaders exercising tight control over political power—the collapse of communism has not clearly opened the gates to full democratic participation.<sup>917</sup> In short, the FSU Central Asian countries exhibit the continuing legacy of Soviet political culture rather than Iran's Islamic theocracy or Turkey's "progressive" secularism.<sup>918</sup>

All this is not to say that Tehran is not interested in fostering certain cultural and Islamic interests in the region. These interests, however, should have less to do with direct political influence and involvement in the Central Asian states' affairs than with nuanced inspirational support. Tehran already recognizes the futility of spreading its revolutionary zeal to the CIS—it's failure to officially support Islamic resurgence in the Caucuses, Uzbekistan, and Tajikistan proves that Tehran is more concerned with potential destabilizing political effects of such movements than with the fact that they are "Islamic" in nature.<sup>919</sup>

On the economic front, Tehran must not allow its national and regional security alliances to limit its flexibility in dealing with its unique economic interests. In other words, Tehran must realize that its economic interests call for regional involvement and integration, not entrenchment and isolation. This policy agenda is facilitated by

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915. See *supra* notes 80-90 and accompanying text.

916. See *generally id.*

917. See BARYLSKI, *supra* note 65.

918. See *supra* note 65 and accompanying text.

919. See *supra* note 135 and accompanying text.

the fact that, with the exception of Azerbaijan, Iran has no existing or potential security concerns with any of its Central Asian neighbors to the north and east.<sup>920</sup> It must convince the NIS and other Central Asian states that it is a worthy economic and trade partner, since its ability to tap into the Caspian and Central Asian economy not only increases its regional trading status but allows it to use its established economic relations to branch out further into South and East Asia.

A great organizational vehicle for the advancement of these cultural and economic interests in the region is the ECO, the CCO, and the CEC, already mentioned above.<sup>921</sup> The ECO allows Iran the opportunity to satisfy its regional goals in several different ways. First, it presents an effective means of linking Islamic culture to economic progress, thereby stripping the former of its threatening fundamentalist qualities.<sup>922</sup> This is important because it weakens Iran's international image as a supporter of fundamentalism and terrorism and undermines the United State's efforts at isolating Tehran, especially through the use of economic sanctions.<sup>923</sup> More significantly, however, it increases Tehran's credibility in the eyes of the NIS, whose leaders have staunchly promoted secularism, while simultaneously strengthening the countries' faith in more economically powerful Islamic societies. Second, it stresses Iran's desire to cooperate with Turkey and Pakistan, the other two founding members of the organization with whom Iran has historically had numerous political problems.<sup>924</sup> Third, it encourages the Central Asian states to look to Iran as a regional leader not only in the cultural sense, but also in the financial and economic sense. Finally, the ECO expansion allows Iran to use the Caspian region as a way to establish more meaningful economic and political links with Eurasia and South Asia.<sup>925</sup>

### 3. Unilateral Sanctions and the Threat of Regional Isolation

Iran's third major geopolitical interest is to counteract the threat of regional and international isolation as a result of the effects of U.S.

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920. See generally *supra* Part II.A.3.

921. See *supra* notes 94-95, 133 and accompanying text.

922. This is especially important because Iran's more reactionary brand of Shi'ite Islam as propagated by Khomeini has successfully separated itself from other more "mainstream" Islamic polities advanced by conservative Arab regimes in the Middle East. See *supra* notes 132-38 and accompanying text.

923. See *supra* Part II.B.3.

924. See Entessar, *supra* note 57 at 157.

925. See *id.*

economic sanctions, particularly the ILSA.<sup>926</sup> Here, Tehran should realize that the Caspian's unsolved transportation and pipeline conundrum presents it with a golden opportunity to seriously undermine the political and economic logic of the sanctions regime. This diplomatic strategy is a long-term one that requires Iranian officials to abandon excessive focus on ownership rights issues in the Caspian and instead focus on Iran's ability to satisfy regional and international energy *distribution* needs in the region.<sup>927</sup>

Iranian officials can satisfy this policy agenda by mounting an intensive public relations campaign aimed simultaneously at exposing the impracticality of the sanctions regime and highlighting Iran's important political and economic role in the region. Again, this policy agenda calls for active diplomatic and economic integration within the region, even if substantial economic and trade relations are not established for years to come. On a more specific level, Tehran must mount an official legal challenge to the imposition of such sanctions at the United Nations and various international trade bodies, echoing the EU and Japan's belief that the sanctions regime violates international trade law.<sup>928</sup> Second, Tehran must more aggressively sell itself to Astana and Ashqabad as a reliable political and economic partner who is sensitive to their unique regional needs. Third, Tehran must make more of an effort at establishing meaningful relations with Azerbaijan and Turkey. Turkey has already proven more than willing to look to Iran as a significant economic partner despite the threat of U.S. sanctions.<sup>929</sup> The same could follow with Baku if Tehran increases the pressure such that it will no longer be in Azerbaijan's political and economic interest to ignore Iran as a strategic partner in the region. Last but not least, Tehran must continue to rely on the international community, primarily Europe and Japan, to make its case for the illegality and impracticality of the U.S. sanctions regime.<sup>930</sup> Given Iran's potentially huge role in the Caspian transportation sector, Tehran must begin to stress the international community's growing need for more efficient means of distributing oil and gas to world markets, and Iran's role in satisfying such demands. Furthermore, Tehran must

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926. See generally *supra* Part II.B.3. Note that the general policy agenda outlined below does not solely call for head-on conflict with Washington. Iranian officials must also realize that their long-term interests require that some form of rapprochement be established with the United States, since Washington will no doubt continue to be a player in the Caspian and the Persian Gulf for years to come.

927. See generally *infra* Part VI.C.

928. See generally Bhala, *supra* note 285.

929. See, e.g., *supra* note 303 and accompanying text.

930. See *supra* note 285 and accompanying text.

also look to other areas such as South Asia, where consumption demands are increasing at a faster rate than in Europe.<sup>931</sup>

### B. *The Caspian and Iran's Energy Interests*

#### 1. The Caspian as Production Side-Show

An overriding reality that shapes Iranian Caspian policy is the realization that the Caspian will not and cannot compete with Persian Gulf oil production.<sup>932</sup> The country's limited resources simply cannot be diverted to the Caspian to compensate for the lack of Iranian involvement in regional energy production during the last century or so.<sup>933</sup> This is especially true given the lack of direct foreign investment and economic inefficiency that has plagued Iran in the last two decades.<sup>934</sup> In light of these limitations, however, Tehran must realize that the Caspian presents it with a unique opportunity: a means of meeting its own domestic energy needs while also establishing the foundation for it to play an even more instrumental role in meeting the world's energy distribution needs.

#### 2. Satisfying Short-Term Transportation Needs and Domestic Requirements

Due to its location, history, and existing infrastructural capacity, Iran represents the ideal agent for Caspian oil swap programs mentioned above.<sup>935</sup> More importantly for Tehran, oil swaps are a means of getting around the legal barriers of the ILSA and other economic sanctions prohibiting or limiting direct foreign involvement in Iran's oil and gas sector, while allowing an early test case for its transportation potential in the region.<sup>936</sup>

Implementation of the oil swap model represents an ideal solution addressing both Iran and the NIS' major energy concerns. As stated before, the landlocked NIS require a way to transport their oil to the open seas and world markets. Though planning of MER and

931. Babak, *supra* note 109, at 202.

932. See Mehdiyoun, *supra* note 25, at 6.

933. *Id.*

934. See generally BILL, *supra* note 912.

935. See *Tehran Proposes Regional Oil Talks: Central Asian, Transcaucasia Energy Links Sought*, PLATT'S OILGRAM NEWS, Aug. 25, 1992, 1992 WL 2464759. Iran has seriously sought to involve itself in the Caspian transportation market as early as the early 1990s. *Id.* See also Michael Lelyveld & Sarah Martin, *Caspian Sea: Some See Iran Oil Route Unlikely*, RADIO FREE EUROPE-RADIO LIBERTY, Jan. 13, 2000, at <http://www.rferl.org/nca/features/2000/01/F.RU.000113151422.html> (copy of file with the *Vanderbilt Journal of Transnational Law*).

936. Sobhani, *supra* note 364.

pipelines is a long-term and permanent solution to these problems, the countries' cash-starved economies cannot wait that long—most MERs are only in the planning stages, and feasibility concerns have continuously hampered the smooth execution of construction timetables. A more immediate and temporary solution is required.

Realizing its potential for filling the "transportation gap" plaguing Caspian Sea oil and gas projects, Iran has attempted to court NIS and use its competitive advantage as both a buyer and exporter of oil and gas.<sup>937</sup> For Tehran the plan is profitable because it allows it the ability not only to play a crucial role in the Caspian oil and gas industry, but also to relieve its own domestic energy needs in a more cost-efficient manner.<sup>938</sup> At present Iran's domestic energy consumption patterns require it to transport a significant amount of its Persian Gulf oil to the north of the country in order to meet the needs of heavily populated Tehran and other major urban centers.<sup>939</sup> Under the proposed oil swap models, Caspian oil could replace the need for diverted Persian Gulf oil to the north and allow Iran to increase its export capacity in its southern terminals.<sup>940</sup>

So far Tehran has attempted to sell its transportation viability by focusing less on selling itself as an oil swap business partner and more on trying to strong-arm the NIS into considering it as a southern MER.<sup>941</sup> This misguided diplomacy has led to a non-cohesive policy with undefined domestic and regional goals—a policy that is backward-looking instead of constructivist and forward-looking. Instead, Iran must identify the advantages of the oil swap option, pursue it as a means of distinguishing itself from other viable "early oil" solutions, and actively engage the NIS through diplomatic lobbying, cooperation, and log-rolling. Perhaps most importantly, Tehran must realize that its role as a solution to "early oil" transport problems will not end with the increasing viability of long-term solutions, because success of its programs could mean increased trust and ultimately reliance on an Iranian MER option in the future.

### 3. The Prospects for a Caspian Gas Cartel

An often overlooked or under-emphasized feature of Caspian hydrocarbon potential is its importance as a world gas deposit.<sup>942</sup>

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937. See *supra* Part II.C.3.c.

938. See *supra* notes 360-65, 375-79 and accompanying text.

939. See *id.*

940. See *id.*

941. See *supra* notes 371-74; Part II.C.3.c and accompanying text.

942. For a general overview of the importance of natural gas to the world market, see NATURAL GAS INFORMATION AND EDUCATIONAL RESOURCES, at <http://www.naturalgas.org/history.htm> (last visited Aug. 13, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*). Natural gas will continue to be the fastest

Russia, Iran, and Turkmenistan represent three of the top four gas producing nations in the world, although Russia and Iran's gas producing fields lie well outside the Caspian region.<sup>943</sup> The concentration of such production potential in one region is a source of significant concern and worry for Western and Asian industrialized nations dependent on gas imports, including the United States.<sup>944</sup>

So what are the prospects for economic and political cooperation between Tehran, Moscow, and Ashqabad on the gas front? A cursory look at the three nations' legal diplomatic history in the Caspian saga would lead to the illusory conclusion that state interests coincide.<sup>945</sup> Russia and Iran have usually been grouped together when discussion of legal arguments regarding delimitation of the Caspian is analyzed, but Russia's willingness to engage in bilateral compacts delimiting the Caspian and its willing flexibility regarding the legal status of the Sea suggest that Moscow and Tehran have differing long-term interests.<sup>946</sup> More significantly Moscow views Tehran as a regional competitor whose potential for resolving the regional transportation conundrum directly threatens Russia's ability to retain geopolitical and geoeconomic control over the NIS.<sup>947</sup>

growing primary energy source in the world for the foreseeable future. *Id.* at <http://www.naturalgas.org/product.htm>; see also Indian Ocean Rim Network, *Country Profile of Iran: Natural Resources: Oil, Natural Gas, Minerals, Forest and Land Use*, at <http://www.iornet.org/newiornet/iran3.htm> (last visited Aug. 13, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*) (outlining Iran's natural gas industry, its increasing reliance on natural gas for domestic consumption, and its enhanced capacity to export natural gas to the world market).

943. See UNITED STATES ENERGY INFORMATION ADMINISTRATION, CASPIAN SEA REGION, *supra* note 41.

944. *Sanctions Decisions on South Pars Imminent*, *supra* note 225. The political problems associated with resolving the collective action and cooperation dilemma, however, will likely prevent the organization and economic success of such a cartel for years to come. See Dag Harald Claes, *What do Theories of International Regimes Contribute to the Explanation of Cooperation (and Failure of Cooperation) Among Oil-Producing Countries*, at [http://www.arena.uio.no/publications/wp99\\_12.thm](http://www.arena.uio.no/publications/wp99_12.thm), Dec. 1999 (copy on file with the *Vanderbilt Journal of Transnational Law*). A cursory look at the history of OPEC may reveal challenges that a potential Caspian gas cartel may face. See *id.* In addition, unlike the world oil market, the market for gas presents different economic and financial limitations. See NATURAL GAS INFORMATION AND EDUCATIONAL RESOURCES, *supra* note 942, at <http://www.naturalgas.org/history.htm>. Despite the production and environmental advantages associated with cleaner burning natural gas, the market for gas is not nearly as lucrative as that for oil since most of the world's industries are dependent on older technology not yet adapted to using gas as a primary fuel and energy source. See *id.* at <http://www.naturalgas.org/envrion2.htm>. Furthermore, the race for pipeline dominance has added a new and more complex dimension to the problem of collective action. See *supra* Part II.C.

945. See generally *supra* Part III.

946. See *supra* note 135 and accompanying text (discussing the different interests of Moscow and Tehran).

947. See *id.*

Then there is the Turkmen factor. With the continuing competition and enmity between Russia and Turkmenistan regarding gas exports still an operative reality, it is likely that Ashqabad will view Tehran as a more reliable export partner.<sup>948</sup> Turkmenistan has already discussed plans with Iran regarding transportation of its gas to Turkey.<sup>949</sup> Of course the potential for competitive friction between the two is also a problem that must be overcome. Given Turkmenistan's skepticism regarding Russia, its location with respect to Iran, and the already existing cooperation between the two littoral states on other fronts, however, Ashqabad no doubt feels a natural pull towards economic partnership with Tehran.<sup>950</sup> The latter should take advantage of this reality. This is especially important in light of Turkmenistan's increasing significance to the United States and Turkey within the TCP context.<sup>951</sup>

Despite the conflicting interests between the three nations, however, it is highly unlikely that the underdeveloped and untapped Caspian gas market will be a regional force to be reckoned with if Tehran does not seek some assistance from Moscow. Without some level of understanding between Iran and Russia regarding the need to cooperate and coordinate the production and export of their natural gas, any attempt at a loose or potentially cohesive regional gas cartel will surely fail. Yet regardless of the practicality and sustainability of a true Caspian gas export cartel between Russia, Iran, and Turkmenistan, Tehran should take the diplomatic initiative to highlight the potential benefits of cooperation and coordination of gas export policies between the three nations. This undertaking is important for two reasons: first, it will open the door regional dialogue and negotiation regarding the importance of natural gas production and trade, and second it will allow Iran to use the Caspian as a springboard to further develop its natural gas production sector, increase dependence on gas for domestic consumption needs, and seek

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948. For an overview of Iran's gas potential within the context of production and transportation capacity, see *Huge Natural Gas Reserves Central to Capacity Work, Construction Plans in Iran*, OIL & GAS J., July 11, 1994, 1994 WL 2856610.

949. Increased involvement of Iran in a Caspian gas trade can also help it undergo a major revamping of its internal oil and gas management structure. See Ghorban, *infra* note 968. Although the NIOC has managed to keep the country's economy afloat through turbulent years of domestic instability and war, many believe that it is time for a major restructuring of the Iranian oil and gas sector. *Id.* Reform should address the following concerns: 1) downsizing of the over-bloated and inefficient NIOC conglomerate and opening the door to private domestic and foreign involvement in the oil and gas sector; 2) an increased role for the National Iranian Gas Company (NIGC), which up to now has played an insignificant part in the nation's gas energy policies; 3) an aggressive natural gas policy aimed at increasing reliance on domestic gas consumption in order to ensure continued efficiency in oil export capacity. *Id.*

950. See *supra* notes 264-71 and accompanying text.

951. See *supra* notes 219-21, 224 and accompanying text.



more profitable and efficient means for exporting its gas to world markets.

#### 4. Iran: A Regional Transportation Hub?

Iran's strategic position between the Caspian and the Persian Gulf places it right in the middle of the Caspian geopolitical game.<sup>952</sup> To be more exact, Iran represents a vital bridge or strategic pivot between the north-south and east-west energy transportation axes.<sup>953</sup> The possibilities that such a geographic advantage can open up for Tehran are limitless. The emergence of the Caspian as a heightened region of significance allows Iran the unique opportunity of thrusting itself in the middle of the "Great Game" and firmly integrating itself in the international energy scene.<sup>954</sup> More specifically Iran has the capacity to be viewed as a future transportation hub linking Far Eastern markets with Western European markets.<sup>955</sup> Indeed, Iran has already made agreements with India and Pakistan, but the realization of a more far-sighted policy may potentially allow Iran to serve as the conduit of Persian Gulf *and* Caspian oil and gas exports to Southeast Asia, China, and Japan.<sup>956</sup> The economic benefits to be reaped from such a role are significant enough, but the geopolitical ramifications of control over such land and tanker shipping routes are staggering—when linked with the realization that increasing energy demands in the Far East, especially China, Japan, and Southeast Asia will and soon outstrip those of the West, the Iranian transportation option becomes an increasingly potent asset.<sup>957</sup>

Then there is the more long-term pipeline solution with Iran as a viable MER route. Ambitious plans regarding looping of oil pipelines from Iran to China and the Asian subcontinent have already been discussed, and have predictably received raised eyebrows from Washington.<sup>958</sup> Of course, the immediate prospects for such plans are

952. Stuart Parrot, *Iran: Why it Holds the Potential to Divide the West*, RADIO FREE EUROPE-RADIO LIBERTY, Nov. 10, 1997, at <http://www.rferl.org/nca/features/1997/11/F.RU.971110121845.html> (copy on file with the *Vanderbilt Journal of Transnational Law*).

953. For the purposes of this section only, the east-west transportation axis specifically refers to Iran's ability to serve as a hub for the transport of oil and gas from the Persian Gulf and the Caspian Sea to Europe and Asia. Likewise the north-south transportation axis primarily refers to the potential for Iran to serve as a pipeline conduit to the rest of the world by linking its Persian Gulf facilities to its Caspian ones.

954. See Fuller, *supra* note 5; see also *supra* note 439 and accompanying text.

955. See *supra* Part II.C.3.c.

956. See, e.g., *Iran Defends Pakistan Choice for Gas Pipeline to India*, AGENCE FRANCE-PRESSE, Feb. 13, 2001, at <http://news.sawaal.com/14-Feb-2001/International/7.htm> (copy on file with the *Vanderbilt Journal of Transnational Law*).

957. See Babak, *supra* note 109, at 202.

958. Turkey is against any route that ends up in the Black Sea and requires tanker transport to the Mediterranean because it argues that increased tanker traffic

in serious doubt, since the treacherous terrain and political instability of the Asian interior makes implementation at this stage nearly impossible.<sup>959</sup> But the integration of Iran in the North-South and East-West transportation axes for NIS oil and gas is a move that makes economic sense if the political barriers to Tehran's involvement can be overcome.<sup>960</sup>

Moreover, Tehran has as much to do if not more with ensuring that its role as a regional transportation hub is fulfilled as Washington has in preventing its realization. The key to diplomacy for Tehran in this area is its capacity to understand that its potential role in the Caspian is a mixed blessing given the United States' and Europe's hopes that recent oil and gas finds would lead to a significant diversification of world energy supplies.<sup>961</sup> Legal and diplomatic lobbying by Tehran should thus involve a dual policy of showing the appropriate level of concern to Western and Asian markets regarding guarantees that Iran will do all it can to insure responsibility as a major energy transporter, while aggressively pursuing legal and diplomatic policies that will accommodate the above regional goals.

##### 5. The Caspian and Foreign Direct Investment in Iran's Oil and Gas Sector

Realizing its potential role as a major Caspian transportation partner will also help Iran to channel its efforts into securing more direct foreign investment in its oil and gas sector. To date, the pace of economic reform in Iran has been slow and inadequate.<sup>962</sup> With

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flow in the Dardanelles and Bosphorus straits has created ultra-hazardous environmental concerns for the region. *Id.* Under the Montreaux Convention of 1936, Turkey is required to allow navigation through the straits. *Id.* For the text of the Montreaux Convention of 1936, see Convention Concerning the Regime of the Straits, Nov. 9, 1936, 173 L.N.T.S. 213. The Montreaux Convention transferred the functions of a previously established international commission supervising the free transit of commercial vessels through the Bosphorus Straits to Turkey. HENKIN ET AL., *supra* note 589, at 1260. Thus, Turkey was required to continue free and unlimited navigation of merchant vessels but retained sovereignty over certain military and security matters. *Id.*

959. See Fuller, *supra* note 5.

960. See *id.*

961. This "mixed blessing" refers to the West's "ambivalence" toward new oil and gas discoveries in the Caspian—Western firms are eager to dive into the region to secure lucrative exploration and production agreements while the governments backing them are more cautious about the prospects of over-reliance on an area controlled in part by Russia and Iran. See, e.g., *Sanctions Decisions on South Pars Imminent*, *supra* note 225.

962. Under President Hashemi Rafsanjani, Iran slowly began a period of economic liberalization and market reform aimed at pulling the country out of its isolationist era during the turbulent years immediately following the Revolution. CIA-THE WORLD FACTBOOK 2000-IRAN, at <http://www.cia.gov/cia/publications/factbook/>

prospects for renewal of the ILSA and other economic sanctions against Iran from Washington a highly likely scenario, Tehran is extremely dependent on its ability to successfully encourage European and Asian investment in its oil and gas sector. This is especially true since natural resource exports still account for more than eighty-five percent of the country's annual exports, with a heavy reliance on oil and gas.<sup>963</sup>

Yet Iran's internal political and economic structure makes it difficult for foreign firms to freely invest in its energy sector.<sup>964</sup> After the ratification of the new Islamic Constitution legal barriers were put up in order to ensure that revolutionary Iran would fully control and manage its own energy sector.<sup>965</sup> The Iranian Constitution sought to remedy years of foreign domination of the country's oil and gas industry under British and American hegemony by outlawing investment relationships based on foreign control.<sup>966</sup> As a result concessions and foreign management of Iran's petroleum resources were rendered constitutionally illegal.<sup>967</sup> Foreign private involvement was practically phased out, with the state-run NIOC taking control of all aspects of the industry, from exploration, to

geos/ir.html#Econ (last visited Aug. 13, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*). The general sentiment for reform has continued after President Khatami's landslide election triumph in 1997 and the more recent parliamentary triumph of reformers over conservatives. *Id.*

963. CIA-THE WORLD FACTBOOK 2000-IRAN, *supra* note 962. Oil still accounts for nearly eighty percent of Iran's foreign exchange earnings. *Id.* For an informative macro-analysis of Iran's energy policies and their implication for Caspian oil and gas development, see also Manouchehr Takin, *Future Oil and Gas: Can Iran Deliver?*, 217 WORLD OIL 11, Nov. 1, 1996, 1996 WL 9739486. Takin points out that Iran must look to the future price of oil, future demand for its oil in the world market, the volume of oil produced, domestic consumption patterns versus volumes available for export, and revenue potential from exporting natural gas. *Id.*

964. See generally Indian Ocean Rim Network, *Country Profile of Iran: Regulations on Investment*, at <http://www.iornet.org/newiornet/iran10.htm> (last visited Aug. 13, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*) (providing a brief review of the general legal impediments to foreign investment in Iran (including a review of the Constitution, labor laws, tax laws, and corporate law) and arguing that although Iran's commercial laws are complex and have remained relatively unchanged since the 1950s, post-revolutionary zeal and anti-foreign sentiments have prevented Tehran from establishing a legal infrastructure conducive to foreign investment).

965. See ISLAMIC REPUBLIC OF IRAN CONST. art. 43, § 8 (calling for the "prevention of foreign economic domination over the country's economy"); art. 81 (providing that "the granting of concessions to foreigners for the formation of companies or institutions dealing with commerce, industry, agriculture, services or mineral extraction, is absolutely forbidden").

966. See Indian Ocean Rim Network, *supra* note 964.

967. *Id.*

production and distribution.<sup>968</sup> This has proved to be an extremely taxing and difficult task.<sup>969</sup>

In 1995, however, the novel "buyback" system passed the wary eyes of *Majlis*, allowing a way to circumvent the restrictive Iranian Constitution.<sup>970</sup> The "buyback" system allows foreign corporations to invest in Iran's oil and gas sector by pumping investment money into the hands of the NIOC.<sup>971</sup> The NIOC then directly manages the projects, with the foreign corporations retaining no control over the production and extraction of oil and gas.<sup>972</sup> The proceeds that flow from successful production efforts are in turn funneled back into the coffers of these foreign corporations.<sup>973</sup> Though this system may have lured large companies like France's *Total*, Italy's *ENI*, and *Royal Dutch Shell* to bid for and secure significant tenders put up by the NIOC, most experts agree that the measure is still too risky for many foreign oil corporations.<sup>974</sup>

Although the structure and nature of Iran's economic reform is beyond the scope of this study, a shift of focus on Iran's

968. Narsi Ghorban, *The Need for Restructuring Iran's Oil and Gas Industry*, 16 IRAN TODAY: ECONOMIC MAGAZINE (Iran), Sept. & Oct. 1997, <http://www.netiran.com/Htdocs/Clippings/Feconomy/971000XXFE05.html> (providing a helpful overview of Iran's inefficient management of its oil and gas sector). Ghorban argues that: 1) the Ministry of Petroleum must be separated from the NIOC, the NIGC, and the National petrochemical Company (NPC); 2) the division of labor between the NIOC and NIGC regarding Iran's gas policy must be reevaluated, and the country must develop a more flexible and up-to-date Gas Law; 3) the foreign-investment schemes and the buyback system must be revamped to further encourage direct foreign involvement in Iran's oil and gas sector; and 4) some aspects of the Iranian oil industry must be privatized. *Id.* See also Ali Tabataba'i, *Iran: The Need for Restructuring of the Oil And Gas Sector*, 34 HAMSAHRI (Iran), Dec. 12, 1997, <http://www.netiran.com/htdocs/clippings/feconomy/78432XXFE001.htm>.

969. See *supra* note 968 and accompanying text.

970. Indian Ocean Rim Network, *Country Profile of Iran: Regulations on Investment*. In November 1995 the *Majlis* passed the Law Concerning the Attraction and Protection of Foreign Investment in Iran that instituted the "buyback" system. Indian Ocean Rim Network, *Country Profile of Iran: Foreign Investment Legislation*, at <http://www.iornet.org/newiornet/iran19.htm> (last visited Aug. 13, 2001) (copy on file with the *Vanderbilt Journal of Transnational Law*). For an online version of the legislation's provisions, see *id.* The law allows foreign participation in a private enterprise as long as the level of participation does not exceed forty-nine percent. Indian Ocean Rim Network, *Country Profile of Iran: Regulations on Investment, supra*. Joint ventures with an Iranian government entity do not fall under the purview of the legislation. *Id.*

971. UNITED STATES ENERGY INFORMATION ADMINISTRATION, IRAN (Apr. 1999) <http://www.eia.doe.gov/emeu/cabs/iran.htm>. This website also provides a helpful overview of Iran's oil and gas potential, performance, and policies. See generally *id.* The buyback agreements are deemed constitutional because they are not seen as concessions but as service agreements. See Indian Ocean Rim Network, *Country Profile of Iran: Regulations on Investment, supra* note 970.

972. See *supra* note 971 and accompanying text.

973. *Id.*

974. See *id.*

transportation potential in the region could provide the impetus for renewed efforts at revamping the search for creative solutions to open up the system to foreign investment. For one thing, the prospect of Iran serving as a regional transportation hub is a major undertaking that will require foreign involvement. Such a transportation system would also demand the increased flow of direct foreign investment into the region in order to ensure the infrastructural, financial, and technological viability of regional pipeline projects. Iran will no doubt be the indirect if not direct beneficiary of these funds, which will lead to its further integration into the world economy and a more radical opening up of its foreign investment system.

*C. An Eye Towards Legal Diplomacy in the Caspian Sea:  
Abandoning the "Legal Veto" Strategy*

The identification of the above list of Iranian interests and the role of a shifting paradigm highlighting Iran's potential capacity as player in the regional and world energy market are important in determining the geopolitics of the region. But what does all this mean for the legal status of the Caspian Sea, and what strategies should Iran employ in order to ensure realization of its primary regional geopolitical and geoeconomic goals? The key to answering this question lies in understanding the often overlooked yet critical interrelationship between any comprehensive legal convention defining commercial and navigational rights in the Caspian Sea, and the littoral states' ability to solve the region's long-term transportation problems. More specifically, Tehran must adopt a far-sighted legal diplomacy approach aimed primarily at ensuring that any legal arrangements regarding ownership and production rights in the Caspian *maximize* its bargaining position vis-à-vis the NIS regarding the political and economic viability of Iran serving as a major transportation route. This will no doubt promise to be a difficult endeavor, especially given the country's less than stellar foreign relations record with Azerbaijan and its allies Turkey and the United States. Yet the potential for a well-balanced legal diplomatic approach seeking to ensure that Iran is not frozen out of the Caspian oil and gas frenzy surely exists.

1. Moving Beyond the Substantive Effects of the Soviet-Iranian Treaties

Tehran's legal diplomacy to date has left much to be desired. Essentially, the foundation and viability of its current diplomatic strategy depends wholly upon the continuing validity of the Soviet-

Iranian Treaties, which all littoral states, including Russia and Iran, expressly or impliedly acknowledge to be a relic of the past.<sup>975</sup> For Iran the "legal veto" strategy of blindly following Russia in disputing the validity of all NIS joint-venture programs seems to have backfired, or at the very least done little to affect NIS and corporate attitudes towards exploitation of the Seas resources.

Tehran's new legal approach must go back to basics. It must first develop its strategy with respect to an interim set of rules restricting littoral state activity in the Caspian.<sup>976</sup> It must also recognize that while legal strategy allows it to use a "legal veto" challenging certain radical aspects of unilateral littoral state activity which arguably violate surviving default rules established by the Soviet-Iranian Treaties, Tehran's one-dimensional use of such a strategy dilutes the *legal* validity and effect of the vetoes. More importantly, the "legal veto" strategy prevents Tehran from looking beyond the substantive effects of the Soviet-Iranian Treaties and instead focusing on how a future set of legal rules can most effectively benefit its long-term geopolitical and geoeconomic goals in the region.

## 2. Using Interim Default Rules to Force Multilateral Negotiation

Despite the fact that an over-reliance on the substantive effects of the Soviet-Iranian is a misguided regional policy, Tehran may nonetheless fall back on the limiting effect of the Treaties in the absence of an agreed upon comprehensive legal regime for the Caspian. As mentioned above, the Soviet-Iranian Treaties are at best a system of default rules that do little to define the substantive rights of the littoral states in the new geopolitical environment.<sup>977</sup> Iran, however, should exercise of the option of continually reminding Russia and the NIS that, in the least, the Treaties' exclusivity and common ownership principles currently operate to restrict any littoral state from engaging in action that is incompatible with the Treaties provisions.<sup>978</sup> Though as mentioned before the exact limiting effects of the Treaties are not determinable, Tehran must nevertheless play up their continuing validity as a set of default rules in order to highlight the legal legitimacy of its position and bolster its reputation as a law abiding member of the international community.

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975. That Iran impliedly acknowledges the long-term futility of relying on a strategy based on the legal effect of the Soviet-Iranian Treaties is evident from its continuing calls for a multilateral solution to the Caspian regime problem, its willingness to entertain an equitable division of the Sea pursuant to its historical rights, and its willingness to put up several Caspian on and offshore development basins up for international tender. *See generally supra* Parts III, V.

976. *See supra* Part IV.C.

977. *See id.*

978. *See id.*

Furthermore, it is at *least* arguable that a littoral state's unilateral declaration of exclusive ownership rights is offensive to the letter and spirit of the Treaties.<sup>979</sup> Tehran may also argue that the same is true for the series of bilateral agreements signed between the littoral states regarding *de facto* delimitation of the Caspian Sea.<sup>980</sup>

More important than the limiting legal effects of the Treaties is Tehran's ability to effectively use them as a bargaining chip to force multilateral negotiation. One of the biggest dangers Iran faces is the possibility that the series of bilateral agreements between the littoral states and the Soviet era delimitation boundaries have already replaced the Treaties as the *de facto* set of interim default rules.<sup>981</sup> In order to retain the current significance of the Treaties as default rules, Tehran should refrain from adopting them as its primary bargaining tool but should always refer to it in order to appeal to a multilateral solution to the Caspian Sea regime dispute. More specifically, Tehran should remind all littoral states that the need for a multilateral solution and cooperation is *legally required* both as a practical and a diplomatic matter.<sup>982</sup>

This strategy, though seemingly limited in scope, will do more than any "legal veto" has in putting the NIS on alert and perhaps slowing down the pace of unilateral development action in the Caspian. It will also re-shift the region's focus to the *legal* environment of Caspian—something that has been recently lost as both Iran and Russia have scrambled to protect their own geopolitical interests in the Caspian by engaging in unilateral and bilateral side agreements aimed at facilitating exploitation activities.<sup>983</sup> It also has the added benefit of sending a message to international corporations, reminding them that diplomacy in this area requires legal solutions

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979. *See id.*

980. *See supra* Part IV.B.

981. *See supra* Part III.A.

982. Tehran should carry out such a plan by continually issuing formal notices to the United Nations similar to the ones it has lodged in the past that address its specific desire that multilateralism should supplant unilateral and bilateral agreements. It should also rest its interpretation of any interim set of default rules on the idea of non-aggression championed by the United Nations by linking the notion of exclusivity to territorial integrity and security concerns. In other words, Iran should join Russia in making clear that any official U.S. or foreign presence in the Sea waters, whether civilian or military, is an express violation of the exclusionary principle of the Treaties.

Next, Iran must reconcile the contradictory unilateral action it has engaged in so far with the spirit of its legal strategy of calling for restraint. Notice that abandoning the "legal veto" will afford it the possibility of embracing the limited but contradictory policy it has actually engaged in so far. It can argue that it is precisely the unclear status of legal delimitation rules that has resulted in the feeding frenzy, which Iran must also participate in (though unwillingly) in order to ensure protection of its sovereignty and regional interests.

983. *See, e.g.,* Lloyd, *supra* note 237.

and that further action in the Caspian despite the absence of a legal regime may have long-term destabilizing effects upon foreign investments.<sup>984</sup> In short, the plan requires continuing notification of the United Nations on the status of progress on a comprehensive legal convention, lobbying of Moscow, subtle pressure on the NIS, and indirect legal reminders to corporate and private interests regarding the shaky legal status of the Caspian and its possible effects on regional investments.

In the meanwhile, Iran could facilitate the road toward multilateralism by adopting a leading role in reviving the organizational bodies erected to tackle the region's political, economic, and environmental concerns. These bodies include the SWGs, the ECO, the CCO, and other official intergovernmental meetings and conventions set up to discuss the Caspian.<sup>985</sup> Even if these meetings do not initially lead to consensus and agreement on the status of the Caspian, an increase in the frequency of such meetings further reinforces the need to rely solely on a multilateral means of resolving the status of the Sea.

### 3. Toward Legal Diplomacy at the Negotiating Table: Bargaining for an Appropriate Legal Regime

Next, Tehran must tackle the more difficult issue of negotiating for the *establishment* of a new legal regime. Here, Iran has been relatively consistent in voicing its concern that exploration and production must cease until a multilateral legal solution is imposed, but has done little in the way of actual lobbying and negotiating.<sup>986</sup> A more activist and constructivist strategy would do much to enhance Iran's reputation as a regionally responsible actor and further legitimize its legal arguments. More importantly, such a strategy would allow Tehran to adopt a forward-looking posture, focusing on participation and not isolation as the means by which its interests can be safeguarded.

Tehran should engage in multilateral bargaining with two overall goals in mind. First, Tehran should argue for the adoption of a legal regime that facilitates or triggers its competitive advantage over transportation of the region's oil and gas to world markets. Second, lobbying should be pursued with Iran's domestic and foreign interests in mind. These include: national and regional security concerns, cultural and economic integration, weakening of economic sanctions imposed by the United States, satisfying short-term regional transportation demands, working towards a regional gas

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984. See *supra* Part III.A.

985. See *supra* notes 94-95, 480-81, 921-22 and accompanying text.

986. See *supra* Parts VI.C.1-2.



cartel, increasing foreign direct investment, and establishing the foundations for a regional and global transportation hub linking world markets.<sup>987</sup>

For reasons that will become more apparent in the following sections, Iran's substantive strategy regarding the architecture of a new legal regime should point towards the adoption of a regime model that employs a split or "dual-regime." This requires Tehran to focus its legal diplomatic strategy on variants of regime models seven through ten as outlined in the previous section.<sup>988</sup> As a purely legal matter, the foregoing analysis suggests that regional history, the Caspian's geography, and case law may be drawn upon to support the adoption of a regime model that integrates elements of common ownership and delimitation.<sup>989</sup> As a diplomatic matter, a split or "dual regime" system offers a sensible political compromise between all the littoral states, and most importantly allows Tehran to satisfy its domestic and regional interests.<sup>990</sup> More specifically, Iran should use the NIS' calls for the application of the UNCLOS to the Caspian Sea to its advantage by highlighting the "dual-regime" elements inherent within the UNCLOS macro-model.<sup>991</sup>

Despite the above reasons, however, the NIS may validly counter for a plan calling for the adoption of a regime model which features either full sectoral division of the Sea or equal-ratio sectoral division allowing for a commonage area.<sup>992</sup> Such a strategy, though arguably not as sensitive to the history and geography of the Caspian Sea and certainly not as accommodating to Iranian interests, may nonetheless offer the most feasible resolution of the ownership and boundary dispute problem.<sup>993</sup> It is also a strategy that is well supported by international case law.<sup>994</sup> Regardless of the outcome of multilateral negotiations, the legal diplomatic battle lines will surely center on a fight between these two sets of regime models—all other models are wholly impractical for political and economic reasons.

#### a. Turning the Tables on Washington: Challenging the Validity of U.S. Sanctions

In the context of U.S.-Iran relations in the Caspian, any legal regime that employs elements of common ownership or a "dual-regime" structure could seriously hamper U.S. efforts aimed at

987. See generally *id.*

988. See *supra* Parts V.B.2.g-j.

989. See *supra* Parts IV-V.

990. See *supra* Parts VI.A-B.

991. See *supra* notes 887-93 and accompanying text.

992. See *supra* Parts IV-V.

993. See *supra* Parts V.B.2.k-l.

994. See *supra* Parts V.A.1-2.

preventing Iran's involvement in the region's oil and gas trade. Moreover, such a regime could potentially endanger American participation in any aspect of hydrocarbon exploitation on two fronts. First, as argued above, common ownership of the waters may limit or practically render any ownership of seabed resources in the affected area useless because Tehran could either voice its objection to undesirable foreign participation through a "legal veto" or act against such participation by threatening aggressive [military] action. Secondly, the regime would force the United States and the NIS to reexamine the practicality of the ILSA because a "dual-regime" would require some cooperation on the part of Tehran if smooth production and distribution of the Caspian's hydrocarbon wealth is to take place. Furthermore, such a regime structure would increase the likelihood that American corporations would be legally barred from working on certain projects if the latter substantially benefits Iran's oil and gas sector. In this sense, Tehran may turn the tables on the United States, using the ILSA as a means of forcing Washington to abandon plans for renewal of the sanctions.

**b. Linking Ownership Rights to Transportation Capacity: Triggering Iran's Competitive Advantage**

Iran's competitive advantage over the distribution and transportation of the Caspian's oil and gas to world markets is an extremely important asset for Tehran. This is so because regardless of the nature of a legal regime defining ownership rights in the Caspian Sea, Iran's territory and its infrastructural capacity render it the most effective agent for distribution of NIS oil and gas to world markets. The problem, however, lies in the fact that Tehran's misguided diplomacy and the United States' strong political desire to isolate Iran in the international arena have combined to make it difficult for Tehran to rely solely on its geoeconomic competitive advantage in the transportation sector. Therefore, Iran must either concede full sectoral division of the Sea's resources in which case it must shift its efforts to more aggressively integrating itself in the economy of the region through negotiation, log-rolling, and diplomatic overture to the NIS, or it must focus on intensive bargaining for the adoption of a "dual-regime" model. The latter is a better strategy because its success would allow Tehran to exercise direct and indirect ownership powers beyond just its allocated share of the Caspian.

In order to maximize its ability to take advantage of its competitive advantage in distribution and "force" the NIS to take a more serious look at construction of pipelines through Iranian territory to the Persian Gulf, Tehran should seek to increase its direct and indirect ownership share of the Sea's resources, its indirect ownership share of the Sea's resources, and its transportation

potential for the Sea's hydrocarbon resources.<sup>995</sup> Interestingly enough, it is more to Tehran's interest to seek an increase in its *indirect* ownership share of the Sea's resources than its direct ownership rights. There are two reasons for this. First, Iran's "share" of the Sea has not yielded significant hydrocarbon reserves so an increase in direct ownership rights does little to help Iran in the production sector.<sup>996</sup> Secondly, as already mentioned, Iran realizes that it lacks the funds and resources to allocate significant energy to its production capacity in the Caspian Sea.<sup>997</sup> To the extent that direct ownership rights are a cost and labor-intensive asset, Iran would gain little if anything from increasing its direct ownership share of the Caspian seabed.<sup>998</sup> Indirect ownership rights, particularly over the surface waters, however, may be exploited without substantial resource expenditure and allocation.<sup>999</sup> Since Iran's overall goal is to bargain for a legal regime that triggers and maximizes its competitive advantage for the transportation and distribution of oil and gas, indirect ownership rights flowing from a "dual-regime" arrangement present Tehran with a more valuable asset than direct ownership rights. With these goals in mind, Tehran's overall negotiating strategy should be three-fold: 1) it should endorse variants of regime models nine and ten; 2) it should endorse variants of regime models seven and eight; and 3) it should shift tactics to minimizing the effects of full sectoral division and focusing on selling itself as a reliable economic partner to the NIS, especially if the latter are successful in bargaining for variants of regime models eleven and twelve.<sup>1000</sup>

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995. Direct ownership rights refer to a littoral state's full sovereignty over an area of the Sea. A littoral state has full sovereignty rights when it has the legal power to exclude everyone and anyone from its allocated share of the Sea. Indirect ownership rights, on the other hand, refer either to intangible rights over a particular area of the Sea, (i.e. veto rights to limit or prohibit development of a certain area), or tangible rights resulting from condominium or common property rights. An example of indirect ownership rights would be any area affected by a split or "dual-regime" arrangement, or a commonage zone.

996. See *supra* note 45 and accompanying text.

997. See *supra* notes 932-34 and accompanying text.

998. In order to take full advantage of direct ownership rights over the Caspian seabed, a littoral state must have the resources and capability to drill for oil and gas or lure foreign investment to do the dirty work. Iran lacks that capability in both departments. See *generally supra* Part VI.B.5.

999. It costs little to exercise legal veto rights or monitor offshore oil and gas development through navigation.

1000. The above strategy does not take into account Tehran's option of first attempting to argue for a condominium regime or, in the alternative, an equal division of the Sea allowing each littoral state a twenty percent share. As noted above, however, it is highly unlikely that Tehran will actually negotiate to establish a new Caspian legal regime that adopts a condominium theory because the latter should primarily be used as a means to attack the legal validity of unilateral action and force multilateral negotiation. Also, the prospects for the adoption of such a regime are

Models seven and eight establish a "dual-regime" system where there is an unequal ratio parity between sovereignty exercised over the waters and seabed resources.<sup>1001</sup> As previously noted, these regime models allow the littoral states more sovereignty over their allocated share of the waters than they do for the seabed and subsoil resources.<sup>1002</sup> The legal effect of these regime models is to create a split zone within a littoral state's allocated share of the Sea: a zone abutting the littoral state's coast allows full sovereignty over the Sea's waters and seabed, and a second zone further from the coast only allows the state to exercise full sovereignty over its waters.<sup>1003</sup> The latter zone, therefore, essentially operates as a navigational buffer for the former zone. For Iran, this arrangement is favorable because it *indirectly* increases common ownership the Sea's *seabed* by all littoral states and minimizes the full sovereignty rights of the NIS over the seabed to a reduced area within their allocated share of the Sea. Depending on the breadth of the NIS' sovereignty zones over the seabed, however, these models may not be as favorable to Iran because they still allow the NIS to retain sovereignty over the waters beyond their seabed sovereignty zones.<sup>1004</sup> Also, note that it is to Iran's advantage to endorse model seven over model eight because the former allows for a commonage zone. Other than the environmental benefits that accrue to all littoral states from the presence of a commonage area, the latter is doubly beneficial to Iran because it severely undermines the interests of those seeking to construct a trans-Caspian pipeline along the seabed.<sup>1005</sup> In short, the "dual-regime" arrangement of these regime models and their allocation of indirect ownership rights in the form of condominium and veto powers increase Iran's bargaining power with respect to the NIS and force the latter to more seriously look to Iran as a major transportation partner.

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highly unlikely. With regard to the twenty percent share proposal, Tehran may bargain for such a regime but should keep in mind that it is not to its advantage to rely on any regime model that proposes full sectoral division, even if Iran's allocated share is equal to that of the other littoral states. Instead, Iran should argue for a twenty percent share of the Caspian seabed while proposing that the Caspian waters be held in common. Note that this arrangement is similar to regime models seven and eight.

1001. See *supra* Parts V.B.2.g-h.

1002. See *id.*

1003. See *id.*

1004. Given the geographic and historical peculiarities of the Caspian Sea, a "dual-regime" model that allows for indirect ownership rights over the seabed may not be as valuable an asset as one which allows indirect ownership rights to the waters above.

1005. See *supra* notes 426-35 (discussing the legal problems associated with the construction of the TCP).

Models nine and ten also establish a "dual-regime" arrangement, but the ratio between water and seabed sovereignty is inverted.<sup>1006</sup> Here, littoral states may exercise sovereignty over their full allocated share of the seabed but may not exercise the same over a portion of the waters above their EEZs.<sup>1007</sup> This arrangement increases Iran's *indirect* ownership rights to the *waters* above the NIS' EEZs. As such, it may be a more valuable asset than the indirect ownership rights accruing to Iran in the models seven and eight. More importantly, Iran may most effectively trigger its competitive advantage in the distribution and transportation sectors through these regime models because they increase Iran's ability to voice objection and perhaps block not only the development of offshore hydrocarbon projects, but the construction of MERs in and around the Caspian Sea. This increased involvement, in turn, will force the NIS to more seriously consider Iran as a strategic transportation partner. Again, it is to Iran's advantage to call for the establishment of a commonage area in the middle of the Sea.

As mentioned above, even without the adoption of a "dual-regime" structure for the Caspian, Iran arguably represents the most practical and efficient geoeconomic solution to the region's distribution problems. Therefore, if Tehran finds itself on the losing end of bargaining for a "dual-regime" model, it should minimize the effects of a full sectoral division regime by arguing for a commonage area and switching tactics to focus solely on lobbying the NIS to run pipelines through its territory. Essentially, Tehran should look to this strategy at all times, not only in the event that the above two proposals fail. This is so because with the exception of Azerbaijan, both Kazakhstan and Turkmenistan's oil and gas deposits are situated close to their shores.<sup>1008</sup> Therefore, regardless of the regime model chosen, Astana and Ashqabad will retain full sovereignty over a significant portion of their hydrocarbon assets. This reality should force Tehran to continuously pursue negotiation with the NIS focusing solely on the transportation and pipeline issue because the benefits flowing from a "dual-regime" model do not directly affect the NIS' onshore oil and gas basins.

### c. Playing the Environmental Card

Last but not least, Iran must pursue the issue of the environment. Development of international environmental law may allow Tehran some room to try out innovative legal maneuvering given the Soviet Union's disproportionate hand at pollution in the

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1006. See *supra* Parts V.B.2.i-j.

1007. See *id.*

1008. See *supra* note 44 and accompanying text.

Caspian.<sup>1009</sup> Although the specifics of international environmental law are beyond the scope of this study, evidence strongly suggests that pollution levels are disproportionately impacting the Iranian coastline.<sup>1010</sup> Furthermore, despite arguments that full sectoral division of the Sea's resources will more effectively foster environmental-friendly policies by the littoral states, Tehran should point to years of Soviet abuse and neglect of the region's environment and its disproportionately damaging impact on Iran's economic and environmental health as evidence that the Caspian presents a single and unique ecosystem.<sup>1011</sup> Given the above, Tehran's environmental strategy should be to: 1) remind all littoral states that environmental problems in and around the Sea require regional solutions, 2) take the lead in establishing multilateral organizations devoted to addressing environmental concerns, and 3) aggressively negotiate for some form of condominium or common ownership regime to monitor and solve the Sea's environmental problems. Furthermore, Iran should strive to separate its environmental concerns from its geopolitical and geoeconomic concerns regarding ownership and transportation rights in the Caspian in order to maximize the impact of its argument for some form of common ownership. Though the efficacy of an environmental strategy will no doubt be limited in impact as an independent legal strategy, its use with the legal tactics outlined in the previous sections will increase the likelihood that it will affect the nature and scope of a legal regime for the Caspian.<sup>1012</sup>

## VII. CONCLUSION: IS THE GAME OVER?

Some scholars believe that resolution of the dispute over ownership rights in the Caspian is a foregone conclusion—that sectoral division of the Sea will inevitably take place for political and practical reasons. Though it is true that the real dispute over the legal status of the Sea has largely shifted from whether the seabed should be divided to how such a division might be accomplished, this study has argued that there is ample room for the use of effective legal diplomacy to ensure that the architecture of a resulting regime accommodates Tehran's geopolitical and geoeconomic interest in the region.

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1009. See generally Barry Hart Dubner, *On the Interplay of International Law of the Sea and the Prevention of Maritime Pollution—How Far Can a State Proceed in Protecting Itself From Conflicting Norms in International Law*, 14 GEORGETOWN INT'L ENV. L. REV. 851 (1998).

1010. See *supra* notes 56-60 and accompanying text.

1011. See generally *id.*

1012. See, e.g., *supra* note 3 for a model of multilateral environmental cooperation between the littoral states.

Viewed within this context, this study has argued that the Soviet-Iranian Treaties allow Tehran room to argue that certain default rules exist that limit unilateral littoral activity in the Caspian; and that Tehran should adopt a "middle of the line" policy that stresses the need for multilateralism, rejects transparent diplomatic gestures, and abandons a "legal veto" approach thus ensuring the realization of its competitive advantage in the transportation sector. This more balanced legal-diplomatic strategy will force Tehran to focus its attention on long-term competitive advantages in the transportation sector and ultimately ensure that it is not isolated from the Caspian oil and gas game.

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\* J.D., 2001, Vanderbilt University Law School; B.A., University of California, Los Angeles. The author wishes to dedicate this work to a people whose warmth and humility continue to shape his identity, and the land that inspires him to dream.