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# Journal of Eurasian Studies

journal homepage: [www.elsevier.com/locate/euras](http://www.elsevier.com/locate/euras)

## Is the Caspian Sea a sea; and why does it matter?

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### ARTICLE INFO

#### Article history:

Received 2 February 2010

Accepted 7 April 2010

### ABSTRACT

With the dissolution of the Soviet Union, the Caspian Sea and its natural resources became a source of contention for Russia, Iran, Azerbaijan, Kazakhstan, and Turkmenistan. The underlying issue is paradoxical in light of its misleading simplicity – is the Caspian a sea or a lake? Throughout the article, we present proof that this question does matter and the answer should be given in the near future unless the world wishes to witness a cascade of conflicts. Even though the establishment of an international legal regime would place the region within the purview of UNCLOS and the international rule of law, thus ensuring safety and stability, the littoral states have pursued their own economic and political interests, resulting in a plethora of competing legal positions. As we evaluate the main points of disagreement and their respective impact on the status quo, the history of the region plays a prominent role. Consequently, the bordering countries choose to adhere to prevailing methods of dealing with issues of similar complexity: power competition over the resources of small states, negotiation and power politics instead of international rule of law, and protection that disguises coercion. Will the littoral states ever abandon the temptation of hostile geopolitical games and embark on a process of peaceful, open negotiations? This article seeks to help resolve this dilemma while analysing the failure of public international law to amend the situation, the legal chaos reigning in the region arising from the need to exploit the resources and construct pipelines to export them, and how the post-Soviet sphere has experienced a weakening of public international law as its doors open to the global petroleum market.

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Is the Caspian Sea a sea? No question could seem sillier. The Caspian has been called a sea since its discovery and first description in ancient times. The bordering states – Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan – call it a sea in their respective languages. The United Nations Group of Experts on Geographical Names recognizes the

body as a sea.<sup>1</sup> Its waters are salty, more so to the south than to the north.

Yet the Caspian Sea has some unique features that make its identity problematic. It is an inland sea that can only be accessed through Russia's Volga River and the canals

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<sup>1</sup> Note, though, that the UNGEGN follows the principle that “the owner decides” in standardizing place names: “The goal of the United Nations is to establish usable and consistent written forms of toponyms and their applications throughout the world. This depends heavily on the official use of names within each country. The Group of Experts defines national geographical names standardization as the standardization of geographical names within the area of a national entity, such as a State” (UNGEEN, 2006, 10). Thus it is of little help in instances of disputed sovereignty.

connecting it to the Black Sea, the Baltic Sea and the Sea of Azov. It is supplied by freshwater sources and has no salt-water connection to the open seas of the world. The determinations of the U.N. Group of Experts on Geographical Names have no legal status. In fact, a series of bi-lateral treaties between the Soviet Union and Iran identified the Caspian Sea as a lake, the resources of which should be divided equally between them.<sup>2</sup> If the Caspian Sea is in fact a large salty lake under the jurisdiction of its littoral states, or of Russia and Iran alone, then the United Nations and international law have no jurisdiction over its waters. The seemingly silly question – is the Caspian Sea a sea? – takes on great import.

Of practical interest is access to and exploitation of the vast resources of the Caspian. Until recently the primary resources of interest were the rich fish stocks of the sea, including the sturgeon and its valuable caviar. In recent years, overfishing and the discovery of vast petroleum deposits have eclipsed the fisheries and made international oil exploitation the paramount issue. If the Caspian is an inland sea, its waters and resources are regulated by the United Nations Convention on the Seas (hereinafter UNCLOS), open to all the littoral states, and accessible to these states and the great multinational petroleum corporations. If the Caspian is just a lake, its waters and resources should be divided by the littoral states, and are not open to the international community. Moreover, if the Soviet–Iranian treaties are still in force, then Russia (as successor state to the Soviet Union) and Iran are masters of its waters, a solution that few other states would care to accept. Unclear provisions in the UNCLOS and the *Vienna Convention on Succession of States in respect of Treaties (1980)* (hereinafter Vienna, 1980) provide no answers to these questions. Thus the question – is the Caspian Sea a sea? – points to an even larger issue than those raised by the oil. We must ask, almost two decades after the dissolution of the Soviet Union and the creation of the newly independent states, whether international law has extended its reach into the interior of the former Soviet Union.

## 1. Framing the issues

The unmistakable conclusion from recent negotiations and debates over exploitation of the Caspian is that the interior of the former Soviet Union does not function as a fully international space, and that it functions more as an “informal” empire outside of the United Nation regimes of public international law.<sup>3</sup> In fact the status of the Caspian Sea since 1991 indicates that this trend has become increasingly pronounced since the year 2000. If the newly independent states of the former Soviet Union were more inclined to assert their membership in the international

community from independence until 2000, and to adhere to principles of public international law in their relations, a variety of pressures have moved them in the opposite direction more recently. Membership in the international community and adherence to international legal norms carries with it obligations that the newly independent states might not wish to accept – human rights law being a salient example – and public international law is frustratingly unclear precisely where it should provide answers to the Caspian Sea issue. As the potential for petroleum exploitation became urgent in the years after 2000, the need for a clear-cut solution that benefited the littoral states became pressing. Thus the states turned to methods based on the traditional tools of geopolitical power – diplomacy, negotiation, self-interest and mutual advantage – and away from the principles of public international law. On one hand, this has only exacerbated the trend for the states bordering the Caspian to step away from international legal regimes, a trend encouraged by their increasingly authoritarian nature. On the other hand, it has allowed the states to seek solutions under which the littoral states can share sovereignty over the Caspian and divide its resources among themselves.

The division of the Caspian, with large economic benefits at stake, has not necessarily been amicable, and the diminution of the role of public international law has given greater roles to the principles of power and self-interest. What we propose to do in the remainder of this article is to show how and why public international law has failed to provide solutions to the most pressing issues; what the interests and legal positions of the primary littoral states are; and how the urgency of exploiting the resources of the Caspian and constructing pipelines to export them have lead to irresolvable wrangling and a rush to grab the resources. In the end we seek to show that the entry onto the global petroleum market has, paradoxically, led to a weakening of public international law in the post-Soviet space.

## 2. United Nations Law of the Sea (UNCLOS)

International waters are governed by the United Nations Law of the Sea (UNCLOS), the international agreement that resulted from the third United Nations Conference on the Law of the Sea (*Law of the Sea, 1983*). The convention defines the rights and responsibilities of nations in their use of the world's oceans, and establishes guidelines for the division and exploitation of ocean resources, protection of the environment, and management of marine natural resources. The Convention was signed in 1982 and came into force in 1994. 158 countries and the European Community have joined in the Convention. Most of the provisions of UNCLOS are regarded as a codification of customary international law, and are thus binding on all nations, even those that have not signed or ratified it (*Nordquist, 1995, 173–174*).

UNCLOS is public international law, and falls under the jurisdiction of international courts and arbitrational bodies. In its Preamble, it states that “the area of the seabed and ocean floor and the subsoil thereof, *beyond the limits of national jurisdiction*, as well as its resources, are the

<sup>2</sup> See *Treaty of Friendship (1922, 405–407)* (Articles 7 & 11); and the *Soviet-Iranian Trade and Navigation Agreement (1940, 419)*; Butler (1971, 101–103), explains the legal regime governing the Caspian during the Soviet period.

<sup>3</sup> On the notion of “informal empire” as it arose in connection with the British Empire, see Gallagher and Robinson (1953).

common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States". (emphasis added) All other international waters, i.e. waters bordering on more than one state, are governed by *admiralty law*, the often distinct body of law that is a combination of domestic maritime law and international law governing the relationships between private entities operating vessels on the oceans. Admiralty law falls under the jurisdiction of domestic courts. Thus the debate over the status of the Caspian Sea can be distilled to the question of whether it falls under UNCLOS or the collective admiralty laws of the littoral, or bordering states. If the answer is the latter, then these states are free to come to mutual agreements over the use and exploitation of the Caspian without regard to the "benefit of mankind as a whole"; or if they cannot come to agreement, then each state is free to create its own admiralty laws and regulations, even if those rules conflict with the laws of other littoral states.

Public international law is unclear as to two important questions: first, whether UNCLOS governs the Caspian Sea; and second, whether some of the former Soviet states are bound by UNCLOS. Part IV, Section I, Articles 86–89 of UNCLOS declare that the high seas are open to all states, coastal or land-locked, that no state can claim sovereignty over any part of the high seas, and that all states enjoy freedom of navigation and overflight, the freedom to lay submarine cables and pipelines, subject to certain responsibilities, the freedom to construct artificial islands and other installations (read oil rigs here); and the freedom of fishing, subject to conditions. Article 95 states that warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State; violation of this immunity constitutes an act of war. Article 88 states that the high seas shall be reserved for peaceful purposes, a stipulation that clearly does not apply to times of war. Were any waters of the Caspian classified as high seas, the prospects would be truly chilling for the littoral states, most glaringly for the Russian Federation and Iran. The high seas provisions of UNCLOS could then be invoked to conjure visions of western oil rights, fishing boats and even warships patrolling their once sovereign internal waters.

Unfortunately, UNCLOS offers no definition of the high seas, only definitions of what they are not. Article 86 states that high seas include "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State". These zones excluded from the high seas provisions allow for full or partial sovereignty of the coastal states, including the right to exploit the resources of the seabed and fishing rights. International shipping has the right of free passage beyond the twelve-mile zone of territorial waters, and is still subject to state regulations in four specified areas (pollution, taxation, customs, and immigration) in the adjacent twelve-mile contiguous zone. Beyond that, the coastal states reserve full and exclusive rights of economic exploitation of the waters and seabed reserves in a two-hundred mile exclusive economic zone (EEZ) extending from their shorelines, or

"base lines" in the language of the treaty; and further exclusive rights to exploit the mineral and non-living material in the subsoil of the continental shelf extending beyond the EEZ, limited to a zone extending 350 miles from their base lines. Importantly for the land-locked Caspian states, Part VII, Article 90 of UNCLOS provides that "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas".<sup>4</sup>

If the Caspian is a sea subject to UNCLOS, the collective exclusive economic zones of the littoral states encompass its entire surface and seabed. The Caspian Sea has a surface area of approximately 370,000–425,000 square kilometers, depending on estimates and changing sea levels from evaporation and inflow of water; its north to south length is approximately 1200 km, and its east–west width does not exceed 250 km. Its average depth is 184 m, with a maximum depth of 1025 m. The UNCLOS rules for division of EEZs when these zones overlap, as they do in the Caspian, provide distinct advantages for Azerbaijan, and a disadvantage for Iran. If the Caspian was divided according to UNCLOS, some of its largest oil and gas deposits would be situated in the Azerbaijani zone (Mehdiyoun, 2000) Additionally, these deposits are located in relatively shallow portions of the Caspian, allowing for easy offshore drilling. This is an important factor since the hydrocarbon reserves of Azerbaijan exceed four billion tons, including the country into the list the biggest oil regions of the world. Secondly, Azerbaijan has placed exploitation of these oil fields at the top of its agenda by portraying them as the foundation of its future prosperity. As former president Heydar Aliyev mentioned in one of his speeches, "The availability of the significant oil and gas reserves in Azerbaijan is the fortune of our people and the major factor in the development of the country for the welfare of the people and their present and future" (Heydar Aliyev Foundation, 2007). Aliyev was the one who infused life into the oil industry of the republic after coming to presidency in 1993. Nostalgia for the times when Azerbaijan occupied first place in world production and processing of oil, accounting for 50% of the global oil production, as well as the fact that it supplied 75% of Soviet oil during the Second World War, making a great contribution to the victory over fascism, made the possession of a sector of the Caspian an integral part of the new Azerbaijani national identity. It is no surprise that in the 1990s the country argued adamantly in favor of applying UNCLOS to the Caspian Sea, thus aiming to speed up the development of oil projects off its coast (Sanei, 2001, 788). UNCLOS would provide for division of the water and seabed into national sectors roughly proportional to the length of each littoral state's coastline, with Azerbaijan getting 20.7% of the Caspian (Dunlap, 2004, 121). The only state that supported Azerbaijan's initiative was Kazakhstan, whose motivation was the same.

The issue is further complicated by the inclusion of Part IX of UNCLOS, which defines and regulates enclosed or

<sup>4</sup> For a Soviet-era defense of the right of free access for land-locked states, written before the former Soviet republics fell into this category, see Golytsin (1978, 29–45).

semi-enclosed seas. Article 122 of UNCLOS defines a “enclosed or semi-enclosed sea” as a “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”. What the definition does not tell us is whether a body of water can be both semi-enclosed sea and high seas, and which if any of the other zonal provisions apply to semi-enclosed seas. The convention does not define what a “narrow outlet” might mean, and whether it must be a natural geographic feature or can be a system of rivers and connecting canals such as the Volga-Don Canal system, which connects the Caspian to the Black Sea, the Baltic Sea and the Sea of Azov.

Article 123 of UNCLOS paradoxically creates international law for semi-enclosed seas and then cedes jurisdiction over them to the littoral states. Its weak provisions mandate that the bordering states “*should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention*” (emphasis added), providing no framework for that cooperation, no organizational structure for the cooperation, no jurisdiction over the question of whether a body of water is a lake or sea. Neither does it address the relationship of maritime (international) and admiralty (domestic) law on these waters. In many ways, Articles 122 and 123 so confuse the issue that they might even be worse than excluding such bodies from the UNCLOS. They create one more issue for dispute between states, creating also a dual system of adjudication, domestic and international, that has international law determine what a semi-enclosed sea is, but leaves all other questions to the admiralty law of the bordering states.

One question sorely in need of clear rules and adjudication procedures is the right of passage to semi-enclosed seas. If the Caspian is in fact a sea that includes waters navigable by international shipping, how will those ships reach the Caspian? And for land-locked states such as Azerbaijan, Kazakhstan and Turkmenistan, how can they ship any resources that they have harvested from the Caspian to customers around the world? Since the Caspian lacks a direct outlet to the ocean, and is linked to the Black and Baltic Seas through the Volga and a series of canals and other rivers, is Russia obliged to allow the land-locked states to navigate its internal waters? And if it is, is it also obliged to allow the ships of all foreign states to navigate its rivers to reach Caspian resources they have purchased from the land-locked states? If so, the mere thought of Russia having to allow possible “Trojan horses” to cruise through its territory would be unpleasant indeed.

Of particular relevance are the right of free access provisions of Part X, which apply only to land-locked states. Article 125 provides that “(1) Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by *all means of transport*. (2) The terms and modalities for exercising freedom of transit *shall be agreed* between the land-locked States and transit States

concerned *through bi-lateral, subregional or regional agreements*. (3) Transit States, in the exercise of their *full sovereignty over their territory*, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States *shall in no way infringe their legitimate interests*”.<sup>5</sup> The underscored passages of this article should highlight how contradictory the rights and privileges it grants are. The article creates an international obligation, but it mandates bi-lateral or multi-lateral solutions, and provides few guidelines for what those solutions should entail. It implies that coastal states should sacrifice some sovereign control of their territory and ports to land-locked states, but acknowledges the full sovereignty of coastal states over their territory, and does not expect them to infringe on their own *legitimate* rights – without defining which rights are legitimate. Combined with the weak obligation that coastal states of semi-enclosed seas “*should cooperate*” in Article 123, the international obligation embodied by UNCLOS can be distilled to imply that Russia should allow Azerbaijan, Turkmenistan and Kazakhstan to transport the resources they harvest from the Caspian over Russian land or internal waters, but that this falls entirely within Russian discretion. As for the prospect of the warships of other nations steaming up Russian rivers and canals to reach the Caspian, this is nowhere foreseen in the UNCLOS framework.

Does Azerbaijan have a right under UNCLOS to use Russian waterways to bring pipeline construction ships to the Caspian Sea? And does it have the right to invite Western companies to do the same? Surely this is an issue of grave concern to Russian authorities. Russia currently operates as if it has no international obligation to allow foreign ships access to the Caspian along its waterways, but that it may offer access when this is in its interests. The controlling domestic law, the Russian Inland Waterways Act, was passed under Stalin in 1936, when the Caspian Sea fell almost entirely within the Soviet Union. Article 5 of the Act declares categorically that “*Passage on the internal waters of Russia under a foreign flag is forbidden*”. The assertion of sovereignty over its inland waters is entirely within the framework of public international law; the categorical exclusion of all transit passage is not. Russia has therefore moved to strengthen its legal control over its rivers and canals, but has allowed other states limited access for passage to the Caspian. In 1994, the Yeltsin government imposed specific restrictions

<sup>5</sup> *Emphasis added*. In its commentaries to the first UNCLOS (1958), the International Law Commission left the all-important issue of access to ports unanswered: “The Commission considered the case of areas of the sea situated off the junction of two or more adjacent States, where the exercise of rights in the contiguous zone by one State would not leave any free access to the ports of another State except through that zone. The Commission, recognizing that in such cases the exercise of rights in the contiguous zone by one State may unjustifiably obstruct traffic to or from a port of another State, considered that in the case referred to it would be necessary for the two States to conclude a prior agreement on the exercise of rights in the contiguous zone. In view of the exceptional nature of the case, however, the Commission did not consider it necessary to include a formal rule to this effect” *International Law Commission (1956, 295)*.

on foreign vessels navigating the Volga-Don Canal (Pike, 2007).

Control over shipping on the Volga-Don Canal is a vital matter of sovereignty and security for the Russian Federation; and evading the ambiguous obligations of international law would give it great leverage in the arena of geo-petroleum politics. Not only would it be able to hinder or even halt tanker traffic from the Caspian oil fields to the open seas; if the Caspian Sea is in fact not a sea under international law, Russia would be able to impede construction of oil pipelines from the oil fields to the west. We must recognize that Russian leaders are acting not only according to the dictates of contemporary petroleum politics; there are deeply historical barriers to relinquishing full sovereignty over the territories and cities that link the Caspian to the Black Sea. The westernmost port of the Volga-Don system is Rostov-na-Donu. The canal joins the Volga near Volgograd (Stalingrad), a city whose strategic importance Russians will never be forget. The easternmost port of the canal system, 400 km downstream from Volgograd, is Astrakhan, near where the Volga enters the Caspian.

Until recently the issue of allowing western oil tankers down the canal system was mooted by the system's ruinous condition.<sup>6</sup> The infrastructure of the canal ports dates from Soviet times. On the Black Sea, the leading ports are located mostly in the present Ukraine, and their cargo facilities are increasingly obsolete and running far below capacity. Their facilities lack modern equipment to handle specialized cargoes. Although the Volga-Don ports can handle modern container traffic, container-handling facilities are rare on the Black Sea. While the construction of a pipe line across the Caspian and through non-Russian territory would seem to negate this as an issue, ships still need access to the Caspian to construct and maintain the pipeline. Use of the internal Russian canal system for oil and gas transport is also obstructed by weather conditions and the shallowness of the canals. Deep-drafting oil tankers and heavy-equipment transports cannot navigate the shallow channels of the canal system, on which only smaller vessels – typically 5000 ton vessels – can be used. Furthermore, the Volga-Don Canal closes to commercial traffic in early November and does not reopen until April. Since this is the season of primary energy demand in Western Europe, the need for another avenue for energy transport becomes obvious. Recently though, changes in Russian transport regulations and the privatization of the region's port facilities are making them better able to compete for foreign customers and investors (Sweeney & Nowek, 1998). The private operators of the ports have significant incentive to open their facilities to Azerbaijan and its friends. While Russian vessels pay \$5000–\$6000 for passage along the waterways, an Azerbaijani vessel must pay at least \$20,000–\$25,000 for passage along the internal waters of Russia (Pike, 2007). To meet Russian requirements on transit by foreign-flagged carriers, U.S. exporters used an Azeri-flagged vessel operated by Azerbaijan's Caspian Shipping Company, which the Russian authorities permitted to use its inland waterways

(Sweeney & Nowek, 1998). The U.S. and Azerbaijan have even figured out how to provide naval military support to Azerbaijan on the Caspian waters. In 2003, a former Coast Guard cutter Point Brower was “dedicated” to Azerbaijan by the U.S. This was in fact the third such ship given to Azerbaijan, which piloted it to the Caspian across the Black Sea and Sea of Azov, through the Volga Don canal to the Caspian Sea, and then to Baku (Pike, 2007).

Many of these outstanding issues could be resolved by adjudication from an international body outside the control of the Caspian states. The first United Nations *Law of the Sea* (1958) provided for the maritime disputes to be decided by the International Court of Justice. The present UNCLOS, created in 1982, formed an International Tribunal for the Law of the Sea, a United Nations body with specific expertise in sea law. Article 286 of UNCLOS empowers the Tribunal to issue binding rulings in cases where the parties cannot arbitrate or settle their differences; and Article 287 gives parties the option of choosing their preferred means of settling disputes. Although UNCLOS is binding on all states as customary international law, the dispute resolution provisions, which were newly created by UNCLOS, do not have the status of customary law, and are not binding (see Treves, 2007). In fact, they are not necessarily binding on signatory parties, if those parties have upon signing deposited a declaration exempting themselves from the dispute resolution mechanisms of UNCLOS. Thus, customary law obliges all nations to behave within the law of the sea, but not to accept the arbitrational provisions, or to cede jurisdiction of its admiralty courts to international courts.

When the Soviet Union ratified the treaty in December, 1982, it appended a declaration that includes the following:

The Union of Soviet Socialist Republics declares that, in accordance with article 298 of the Convention, it does not accept the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes concerning military activities, or disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. (UNCLOS, “Declarations”)

When the new Russian Federation ratified the UNCLOS in 1997, it issued a similar declaration, stating in part that “... it does not accept the procedures, provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction ...”(Treves, 2007). The Islamic Republic of Iran issued similar declarations that exempted it from the dispute resolution mechanisms of UNCLOS. It declined to “pronounce on the choice of procedures pursuant to articles 287 and 298”, and furthermore issued a declaration concerning the status of enclosed and semi-

<sup>6</sup> The following information is drawn from Sweeney and Nowek (1998).

enclosed maritime regions, the right to adopt admiralty laws concerning the rights of innocent passage for foreign warships, and stated that the right of access to and from the sea and freedom of transit of Land-locked States was “derived from mutual agreement of States concerned based on the principle of reciprocity” (Treves, 2007). When the Republic of Belarus re-ratified the UNCLOS in 2006, it also declared itself not bound by decisions for the consideration of disputes; as did Ukraine in 1999.

The sum result of these declarations, particularly those of the Russian Republic and Islamic Republic of Iran, was to accept the customary rules that were codified in the UNCLOS; to reserve judgment on its innovative dispute resolution mechanisms; and to leave most of the highly contentious territorial issues concerning the Caspian Sea outside the jurisdiction of any international judicial or arbitral body. Furthermore, Russia and Iran reserved their sovereign power to create admiralty law, either by domestic legislation or by bi-lateral treaty-making between themselves or multi-lateral treaties with the other Caspian states. Despite all the UNCLOS provisions that would seem to regulate the status of the Caspian Sea, UNCLOS did nothing to clarify or settle issues of sovereignty over the Caspian resources.

And what about the other Caspian states: Azerbaijan, Kazakhstan and Turkmenistan? Are they parties to the UNCLOS as a result of the Soviet ratification of UNCLOS, and are they bound – or protected – by its provisions? Remember that the Russian Federation, Belarus and Ukraine ratified the treaty, or rather re-ratified the treaty, after the dissolution of the Soviet Union in 1991. It is unclear whether the other Caspian states need to or not. The controlling document here is the [Vienna Convention on Succession of States in respect of Treaties \(1980\)](#), an international convention that did not come into effect until 1996, and has only twenty-two signatory states, none of them states concerned with the Caspian Sea or its resources.<sup>7</sup> Even had these states signed Vienna 1980, it is unclear whether they would need to accede to UNCLOS after the dissolution of the Soviet Union. Russia, Ukraine and Belarus acceded to UNCLOS after independence because they had been putatively “sovereign” prior to 1991: Ukraine and Belarus as UN members; Russia as the successor state to the Soviet Union. Upon accession, all three registered declarations that they do not accept Article 298 obligatory dispute resolution. But as to the newly independent states of Azerbaijan, Kazakhstan and Turkmenistan, it is unclear whether they are bound by the Soviet ratification of UNCLOS. Under Vienna 1980, newly-independent states are generally not bound to maintain treaty obligations put into force by their predecessors’ treaties in their respective territories (Damrosch, Henkin, Murphy, & Smit, 2009, 56; Sanei, 2001, 784). This rule came into being as a means to protect former colonial states

from the obligations imposed on them during their status as colonial territories. Ironically, acting in its presumed role as protector of the colonized peoples of the world, the Soviet Union had insisted on insertion of this clause into the treaty during its negotiation (U.N. Official Records, 1978, 105–106). The presumption against continuance of legal obligations is often referred to as the “clean slate rule”. Moreover, according to the International Law Commission, “the fundamental rule to be laid down for bi-lateral 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 predecessor State’s treaty” (Damrosch et al., 2009, 538). A newly-independent state has the right of option to be a party to such treaties, but not an obligation. The newly independent states point to the clean slate doctrine to assert that since the states had not been involved in the decision-making process, there is no continuance of legal obligations (Sanei, 2001, 784). Yet, as noted by other scholars, the Almaty Declaration of 1991, in which all the newly-independent states “explicitly agreed to recognize the validity of all international treaties and agreements signed under the Soviet Union and honor their binding effect on subsequent state actions,” would seem to obviate this question and oblige all successor states to conform to the international obligations accepted by the Soviet Union, including UNCLOS – and the treaty obligations created by the Soviet–Iranian Caspian pacts (Croissant & Aras, 1999, 25; see also Protocol to the Agreement Establishing the Commonwealth of Independent States).

If all this seems needlessly confusing, it highlights the seeming absence of settled international law within the internal borders of the former Soviet Union almost twenty years after its dissolution. A plethora of conflicting international laws and treaties, and the absence of an international court with jurisdiction to determine the status of the Caspian Sea, leaves the bordering states at will to assert their conflicting treaty rights. Each of the positions of the various states explicated below can be legitimately asserted to have a basis in either international law, treaty obligations, or domestic law. Without any neutral forum to settle these questions, states are left to use the traditional tools of diplomatic negotiation and power politics to assert the most advantageous interpretation for themselves.

### 3. Iran and the Soviet–Iran treaties

The Islamic Republic of Iran argues that it is a mistake to think of the Caspian region as a *res nullius* – that is, “an object of law belonging to no state and thus open to unilateral appropriation or occupation by the first comer or taker”, rejecting the view that the dissolution of the U.S.S.R. created a legal vacuum as absurd (Mirfendereski, 1999, 246). Moreover, it has rejected the proposal of the other littoral states that the Caspian might be classified as a geographic sea and insists that it is an inland lake and that the international law of the sea is not applicable to it. One of the major reasons for such a radical view is the country’s concern about the possible presence of the U.S. navy in the region, since Azerbaijan has shown interest in seeing it in the Caspian (Namazi & Farzin, 2004, 238). Iran’s legal

<sup>7</sup> Vienna Convention on Succession of States in Respect of Treaties (1980) for the current status of the treaty, see U.N. Treaty Repository at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg\\_no=XXIII-2&chapter=23&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=XXIII-2&chapter=23&lang=en).

stance is heavily built upon the historical legacy of the treaties that it signed with the U.S.S.R. These treaties allow Iran to assert rights to the Caspian resources greater than those provided by UNCLOS, and to deny freedom of the seas or the right of innocent passage on the Caspian to any non-littoral state. On 26 February 1921 the Russian Socialist Federal Republic and Persia (after 1935, Iran) entered into a Treaty of Friendship that provided Persia with some rights to the Caspian (Folger, 2003, 534). Article 11 of the treaty granted free shipping to both states, thus allowing Iran to have both cargo ships and warships on the sea waters. Moreover, a series of complementary treaties that followed after 1921 granted Persia increased rights to navigation and fishing. The 1940 Treaty of Commerce and Navigation specified an exclusive right of fishing for the distance of ten nautical miles from the coasts of each state (Nick, 2005, 597). As a result, all the treaties were based on a number of premises, most importantly that the Caspian is closed to all but Iranian and Soviet shipping, that both parties have equal access to the Sea and equal treatment on its waters, and that any decisions affecting the Sea and its resources must be made jointly by them. One should take note that at the time the treaties were signed the issue of exploitation of the seabed and subsoil resources did not yet exist. Consequently, there are no articles in the treaties regarding that issue.

Much of the current legal dispute regarding the Caspian focuses on the Soviet–Iranian treaties. Iran asserts their continuing validity despite the dissolution of the Soviet Union (Ghafouri, 2008, 86). This view has caused quite a commotion among the successor states for a number of reasons. First of all, argues Iran, there is no legal justification for the littoral states to contest the 1921 and 1940 Iran–U.S.S.R. treaties since the countries embraced them as a matter of general international law of state-succession (Vienna, 1980). Secondly, the fact that on 21 December 1991, Azerbaijan, Kazakhstan, and Turkmenistan, among others, acceded to the Minsk Agreement and signed onto the Almaty Declaration obligating them “to undertake their international commitments according to the treaties and agreements signed by the U.S.S.R.”<sup>8</sup> Thus, in the Iranian assessment of treaty law, the break-up of the Soviet Union did not affect the legal or factual reality of the Iran–U.S.S.R. treaties.

Regardless of one’s reading of the purview of the relevant article of the Almaty Declaration, the Iranian argument contains premises that might prove to be its Achilles’ heel. As Dunlap notes, “[f]irst, it gives great weight to general Soviet–Iranian treaties that make little mention of the Caspian, and are completely silent about division or ownership of the seabed”. Considering that the primary concern of the littoral states is the division of the seabed and the resources in it, the treaties appear to be useless. “Second, [Iran] argues for a common ownership regime of

the Caspian’s resources when in fact such a regime is not explicit in the treaties. Such a common ownership regime would, therefore, have to be inferred, but neither the Soviet Union nor Iran treated the Caspian as joint property during the Soviet era. Third, the Soviets engaged in oil extraction activities outside the ten-mile exclusive fishing zone stipulated in the treaty, with no objection from Iran. Some have suggested that Iran’s silence about *de facto* divisions during the Soviet era should preclude it from raising objections to national divisions today. Finally, Iran has refused to recognize the continued validity of the 1921 and 1940 treaties in other areas they govern, such as security” (Dunlap, 2004, 125). However, despite all the weaknesses of Iran’s position one cannot deny the *de jure* existence of the 1921 and 1940 treaties. Although the littoral states around the Caspian may feel free to lay claims of exclusive jurisdiction over some sectors, “the legality of such claims may be tested by Iran as a matter of international law” (Amirahmadi, 1999, 246). The lack of a systematic approach to the issue of competing sovereign rights of the littoral states, and the absence of an international adjudicative body with jurisdiction, is doomed to result in chaos, with an armed conflict lurking in the wings.

Another important factor that has increased the tension between Iran, Russia and the other littoral states is the turbulence of the relations between them going back to the nineteenth century, when Russia fought two wars with Persia for access to the Persian Gulf. The resulting treaties (the 1813 Treaty of Golestan and the 1828 Treaty of Turkmanchai) clearly reflected the fact that Russia was the victor in both wars, dictating unfavorable terms on Persia (Namazi & Farzin, 2004, 231). For instance, only the winner was entitled to have warships on the Caspian. When the Bolsheviks came to power in 1917, they commenced a radical transformation of Russia’s imperialist policies. To improve its relationship with Persia–Iran, Russia signed the 1921 and 1940 treaties. Leaping forward to the era immediately after the dissolution of the Soviet Union, Russia and Iran became allies, defending common ownership as a legal regime for the Caspian. For instance, in 1996 Moscow and Tehran worked together to convince the other states that the Caspian was just a large lake, and all the bordering states needed the consent of the others to extract resources from its bed (Mamedov, 2001, 237). Common ownership was strongly advocated by both states.

Understanding Azerbaijan’s stance in the dispute requires going back to some major events in the country’s complicated history. First, at the end of the Russo–Persian War 1826–1828, the Turkmanchai Treaty divided Azerbaijan into northern and southern parts between the two parties, placing both sectors under a long period of imperial rule. A large part of the Azeri homeland still lies within Iran and is home to a significant diaspora. As a repercussion of this historical legacy, when Azerbaijan obtained independence after the dissolution of the Soviet Union, it felt extremely threatened by its powerful neighbors and felt the urge to form alliances with the U.S., Turkey and Georgia in order to preserve its fragile independence, to safeguard its security and to ensure its economic independence. Another sore spot that has influenced the initial position of Azerbaijan is the Nagorno–Karabakh conflict, which revealed strong

<sup>8</sup> See Protocol to the Agreement Establishing the Commonwealth of Independent States (1991), Agreement on Strategic Forces, Article 2. It seems clear that the commitment to “to observe the international treaties of the former U.S.S.R.” concerns only treaties on ballistic missiles and reduction of armed forces; but for the Iranian view, see Namazi & Farzin, 2004, 237, 2.

Russian support for Armenia. The aforementioned events led to the emergence of the geopolitical “triangle Moscow-Yerevan-Tehran” in the early nineties which significantly enhanced the security dilemma felt by Azerbaijan (Nassibli, 2004, 158).

Since Azerbaijan did not want to be seen as Russia's backyard any longer, it started to seek an economic and political foothold in the oil industry from the inception of its sovereignty in 1991. This circumstance made it crucial for the country to define the status of the Sea. The cornerstone of Azerbaijan's stance was its refusal to be bound by the 1921 and 1940 treaties. The Azeri authorities have heavily relied on the claim that according to the principle of *rebus sic stantibus* or the fundamental change of circumstances, which is codified in the 1969 Vienna Convention on the Law of Treaties under Article 62, and also the clean slate doctrine. According to the doctrines, particularly *rebus sic stantibus*, which is part of customary international law, the dissolution of the Soviet Union negated the 1921 and 1940 treaties between Iran and the U.S.S.R., and the Caspian Sea must be divided among the littoral states according to the rules of UNCLOS (Sanei, 2001, 783). Although this is a strong argument under international law, Azerbaijan asserts additional arguments against the Iranian claim. First, Azerbaijan points out that the 1921 and 1940 treaties are limited to shipping issues and have nothing to do with the seabed resources. Second, it notes that the long time exploitation of Caspian oil resources without Iranian objections. In fact, the Azeri oil fields have been exploited continuously since 1871, thus falling into the category of the oldest oil fields in the world (Sneider, 1993, 6; Aqayi, 2006, 39). Finally, to create a domestic legal foundation for its national sector, Azerbaijan unilaterally added article 11.2 to its 1995 Constitution: “Internal waters of the Azerbaijan Republic, the sector of the Caspian Sea (lake) belonging to the Azerbaijan Republic and air space over the Azerbaijan Republic are integral parts of the territory of the Azerbaijan Republic” (Constitution of the Azerbaijan Republic, 1995, 59). This follows the curious tendency for countries involved in territorial disputes to use their constitutions to stake sovereign claims. For instance, in the course of the South China Sea dispute, where six parties have competed for a region rich in oil resources, the Chinese enshrined their claims to certain parts of the area in their national law similarly to Azerbaijan (Duong, 2007, 1153).

#### 4. The Russian view and political tactics

The Russian view on the legal status of the Caspian Sea has been quite malleable since the break-down of the Soviet Union. While the newly independent states, driven by fear of their former ‘colonizer’, rushed to seek new alliances in order to consolidate their sovereignty and to boost their economies, Russia did not need Caspian oil so much due to the availability of hydrocarbon resources elsewhere (Antonenko, 2004, 244). In fact, Russia claimed to have proven reserves of 60 billion barrels, nearly all of which laid outside the Caspian region, mainly in Western Siberia (Joyner & Walters, 2006, 179). This allowed the country to retain its provoking attitude of a “hegemonic

superpower surrounded by hostility” for a substantial period of time (Peuch, 1998, 27). However, when it became clear that the federation's oil production had begun to fall after 1991, the ten billion barrels of proven oil reserves in the northern Caspian Sea triggered Russia's interest in the resources of the sea, often at the expense of geopolitical considerations (Bahgat, 2002, 274).

Russia's shifting position over the status of the Caspian owed to internal conflicts, specifically clashes between private oil companies' interests and the Ministry of Foreign Affairs, which never fully supported Russian oil companies that tried to establish businesses in the Caspian area. The constant tension between the Foreign Ministry and the Ministry of Fuel and Power stemmed from their diverging interests. As a result, in 1994, the Ministry of Foreign Affairs had to revive the discussion of the Caspian Sea's legal status when oil companies started to lead negotiations on their own, especially between Lukoil and Azerbaijan. The Ministry of Fuel and Power did not support any attempts to pressure Azerbaijan and Kazakhstan, whose good will was necessary for the budding business relationship. More than that, it supported the sovereign claims of the newly independent states to their respective national sectors, which would allow Russia to export its scientific and technological programs (Sanei, 2001, 761).

The divide within the Russian government became apparent in 1994 when Azerbaijan actively commenced negotiations on conditions for the so-called Contract of the Century with the West. Appalled by Azerbaijan's actions, the Russian Foreign Ministry sent a note to the British Embassy in Moscow expressing its disagreement by stating that “any steps by whichever Caspian state aimed at acquiring any kind of advantage with regard to the area and resources ... cannot be recognized ... [A]ny unilateral actions are devoid of legal basis.” (Mehdiyoun, 2000, 185) The Foreign Ministry followed Iran's line of reasoning by referring to the treaties of 1921 and 1940 and evoking the Almaty Declaration, thus adamantly opposing the Caspian countries that viewed the application of UNCLOS as a viable option. Such a firm stance could be explained by the Ministry's desire to restrict the new states' ambitions to establish contacts with the West. Moreover, the federation had not even been initially invited to participate in the negotiations of the Contract of the Century and joined in only in early 1994. Thus, paradoxically enough, while the Ministry of Foreign Affairs was threatening to disrupt all Azerbaijani operations in the Caspian due to their illegal nature, the Ministry of Fuel and Power was assisting Azerbaijan in those projects. Out of the two, the oil lobby proved to be more powerful in the Russian government, as Prime Minister Chernomyrdin met Azerbaijani President Aliyev and reaffirmed the federation's acceptance of the Contract of the Century (Mehdiyoun, 2000, 186).

For the Foreign Ministry's strategic plans in the early-mid nineties, oil was not an end, but merely a means to keep the former Soviet republics under its influence. In fact, its policies largely prevented the successful development of Russian private energy business in the Caspian basin. For instance, after Azerbaijan's active involvement in the negotiations of the Contract of the Century, Sergei Lavrov, permanent representative of the Russian Federation to the



United Nations, sent a letter to the Secretary General on October 5, 1994, clarifying the federation's stance regarding the legal regime of the Caspian Sea. Lavrov asserted that "...unilateral action in respect of the Caspian Sea is unlawful and will not be recognized by the Russian Federation, which reserves the right to take such measures as it deems necessary and whenever it deems appropriate, to restore the legal order and overcome the consequences of unilateral actions" (Aqayi, 2006, 91). Thus, in that period, foreign policy was reflecting concern about the former Soviet borders as a continuing zone of security (Sievers, 2001, 393). Even in early 1997, the Foreign Ministry issued a policy paper where it identified the top priorities in the country's international relations, especially "to consolidate Russia's role as a great power and one of the centers of the multi-polar world that is taking shape" and "to defend Russia's territorial integrity" (Peuch, 1998, 27).

On the other hand, in 1996, the Russian Foreign Ministry started to make concessions due to its helplessness in the face of the country's powerful oil companies. Its main proposal was to grant national sovereignty over the mineral resources within forty-five miles of each state's coast, with the middle area left for joint development. However, this harmony between the opposing parties in the Russian government revealed its ephemeral character when the Ministry of Natural Resources allowed Lukoil to develop a field in the northern Caspian without considering that the oil field stretched far beyond the forty-five-mile zone, and as a repercussion would trigger a conflict with Kazakhstan (Mehdiyoun, 2000, 186).

Generally, Russia's initial inability to reconcile all its interests was largely due to the lack of consensus on foreign-policy priorities among Russian political elites, the inability of the government to oversee and coordinate policies pursued by different agencies, and the growing power of economic lobbies. Its desire to preserve the exclusive character of its influence, its "informal empire" in the Caspian region, opposed any external involvement into the region. Thus, the first decade for Russia brought no progress in negotiating a new legal regime and defining the status of the Caspian. Contributing factors were the internal turmoil within the country fueled by chaotic privatization, the lack in expertise in the Foreign Ministry, and the Caspian states' eagerness to decrease their dependence on the federation. Additionally, the conflict in Chechnya hampered political and economic reforms and negatively affected the stability of Russia itself. By the end of Yeltsin's term, Russia's position in the Caspian was weak and full of contradictions. Even Iran deemed the federation as an important but unreliable ally (Antonenko, 2004, 247).

## 5. Condominium principle

In the absence of clear agreement about the status of the Caspian, or of any way to resolve the issue, the Iranians and Russians encouraged the other littoral states to accept the condominium principle of dividing it in the 1990s. This principle would have given Russia and particularly Iran greater advantages than they would enjoy under the application of the UNCLOS principles. Under international law, a condominium exists when two or more States

exercise joint sovereignty over a territory or a body of water. The condominium is used as a last resort when efforts to resolve territorial disputes through negotiation have failed, and is generally designed to be temporary in nature (Samuels, 2008, 728).

Iran's initial stance was to delimitate the Caspian according to the principle of *res communis*. Were the Caspian to be *res communis*, all Caspian states would have rights (either positive or "anti-commons") because the sea would then be common heritage to the littoral states. It could not, then, by definition, become part of the sovereignty of any state (Sievers, 2001, 362). Such categorization implies that the Caspian is a shared resource that legally cannot be privatized by any littoral state and has to remain an object of joint usage (Mamedov, 2001, 236). Even though Iran has made some concessions, in particular the agreement to divide the Sea into five equal sectors, it persistently contends that the 1921 and 1940 Soviet–Iranian treaties will remain in force until a new multi-lateral convention is agreed upon by all the five littoral states. This of course would provide Iran with a tremendous leverage in any negotiations, and little incentive to cede the privileges that it gained through the Soviet–Iranian treaties.

Politically, the co-joint principles of condominium and consensus would empower Iran in its opposition to the Western and U.S. powers in the region. Consequently, Iran pushed and continues to push for a legal regime that makes the Sea exclusive to the shipping of the littoral states. One should take note that Iran's position, like that of the other littoral states, has evolved over the past decade. If in the early 1990s the Islamic Republic insisted on the condominium approach to the management of the Caspian, today it is willing to accept a division, so long as its share is twenty percent (Mamedov, 2001, 244). This change is quite understandable given that Iran's share could not be compared to that of the other states if there were a proportionate division according to the length of its coastline under UNCLOS. Additionally, the transformation of Iran's stance can be interpreted as a result of Azerbaijan's adamant refusal to accept shared ownership and Russia's desire to improve its relationship with Kazakhstan and Azerbaijan, which left Iran without a single ally. Finally, it should be underlined that Tehran regards the militarization of the region as an issue much more important than its desire to receive a bigger 'slice' of the Sea. Iran ultimately came to accept the division of the Caspian into national sectors, which is detrimental to its interests, just to secure the exclusive right of shipping. Russia remained reluctant to accept the sectional division of the Caspian for a long time, giving in only in 1997–1998, awakened by the realization that it had been left behind in opportunities of oil transportation when Azerbaijan, Kazakhstan and Turkmenistan began to realize projects bypassing the federation. Hence, Russia was compelled to reject the principle of condominium (Mamedov, 2001, 243).

The signal event in the turn-about of the Russians was when Azerbaijan became the first country to assert sovereignty over a part of the Caspian by signing the "Contract of the Century" in Baku in 1994. The contract included thirteen leading oil companies (AMOCO, BP, McDermott, UNOCAL, SOCAR, LUKOIL, Statoil, Exxon, Turkish Petrol,

Pensoil, Itochu, Remco, Delta) from eight countries of the world (Azerbaijan, United States, Great Britain, Russia, Turkey, Norway, Japan and Saudi Arabia). Note the Russian participation in the contract, under the sponsorship of the Ministry of Fuel and Power. To date, nearly thirty companies from fourteen different countries participate in the development of Azerbaijani oil resources (Heydar Aliyev Foundation, 2007). The world's major companies have already invested over U.S. \$8 billion in exploration and development operations in the sectors of the Caspian that 'belong' to Kazakhstan and Azerbaijan, while more than U.S. \$100 billion are expected to be invested in the next 25–30 years (Nassibli, 2004, 158). The main allies of Azerbaijan in the mid-nineties were Kazakhstan (1995–1996) and Turkmenistan (1996) who followed the republic's recognition of the sectional delimitation of the Sea due to its benefits for their own economies.

## 6. Bi-lateralism and multi-lateralism

Faced with the loss of valuable petroleum resources and its virtual diplomatic monopoly on the territory of the former Soviet Union, Russia was compelled to adopt a new strategy of signing bi-lateral agreements with the newly independent states bordering the Caspian. The first Caspian-related bi-lateral agreement was signed between Russia and Kazakhstan on July 6, 1998, and its Protocol was adopted on 13 May 2002 (Ghafouri, 2008, 88). It became the first interstate agreement in the post-Soviet sphere that dealt with the division of the Sea's northern seabed. The change of leadership in the Kremlin intensified the move toward bi-lateralism. Vladimir Putin authorized and chaired a special meeting of the Russian Security Council on April 21, 2000 in order to reassess the Russian role in the Caspian region (Mamedov, 2001, 246). Putin undertook the task of reconciling the diverse national interests in the Sea. The meeting resulted in a dramatic shift of focus from the predominantly political considerations of the nineties toward economic interests. The old strategy of winning influence by political and military means was abandoned for a more pragmatic approach. The main Russian objectives identified during the meeting were the definition of the legal status of the Caspian Sea, remaining the key diplomat power in the region, and trying to achieve a five-party consensus through a system of bi-lateral agreements. Russia's proactive position has proved to be fairly efficient and it has significantly contributed to the amelioration of the federation's image in the eyes of the other littoral states, excluding of course Iran. Subsequently in August 2001, Putin held a series of bi-lateral meetings with most of the leaders of the former Soviet republics to discuss the division of the Caspian Sea (Folger, 2003, 545). The year 2002 was crucial in terms of the evolution of the legal regime in the Caspian since hostilities between Azerbaijan and Iran in 2001 moved Azerbaijan to strengthen its position in the Caspian and shore up ties to its Russian neighbor. Russia and Azerbaijan entered into a bi-lateral agreement in September 2002, under which both states agreed to delimitate the seabed into national sectors, based on the Soviet Union's administrative borders in 1970. In May 2003, Russia, Azerbaijan and Kazakhstan entered

into a trilateral agreement on the Caspian Sea division where they accepted the "modified median line" method of delimitation (Joyner & Walters, 2006, 190; Ghafouri, 2008, 88).

The new Russian strategy required a new legal approach to the Caspian. The bi-lateral agreements were based on a division of seabed resources along a median line equidistant from each country's shores, much in line with UNCLOS principles. According to this technique, the width of exclusive economic zones is resolved by drawing a median line parallel and equidistant from the coastlines of states that lie opposite one another. The length of the exclusive economic zone is calculated to run proportionally along a state's territorial coast, thus dividing the sea into separate sectors. The same method was applied in the 1958 Convention on the Continental Shelf to divide overlapping sections of the shelf between states with adjacent and opposite coastlines, and has since been applied in various international maritime boundary disputes, including a recent delineation of the Red Sea between Yemen and Eritrea (Joyner & Walters, 2006, 191). Thus, according to the modified median line method, Russia has 18.5% of the seabed; Kazakhstan receives 29%, Azerbaijan and Turkmenistan possess close to 19% each, thus leaving Iran with only 14% (Antonenko, 2004, 251).

While Russia moved closer to the Azerbaijani and Kazakhstani positions by accepting division of the seabed into proportional national sectors, it continued to insist on common management of the surface waters, preserving free navigation and common ecological standards for the littoral states (Antonenko, 2004, 250). This innovative approach is called the "common waters, divided bottom" principle. It secures each state's right to a sector of the Caspian seabed, while excluding rights for foreign shipping and allowing each littoral state to pursue its own security concerns. The Russian sponsorship of bi-lateral agreements brought significant benefits to Azerbaijan and Kazakhstan. It incorporated the UNCLOS concept most important to their interests – division of the seabed into proportional national sectors (Aqayi, 2006, 42). It provided a solution to the lack of a clear title to the Caspian Sea that had significantly obstructed the task of attracting foreign investment to Azerbaijan's energy projects (Mehdiyoun, 2000, 184). Kazakhstan has come to support the Russian process for similar reasons (Aqayi, 2006, 42).

At the moment, there is a general agreement among Russia, Azerbaijan, and Kazakhstan on both the principle and the method of dividing rights to the seabed and the oil beneath it. The array of bi-lateral treaties that has been signed by them covers the northern part of the sea, effectively dividing it into Russian, Azerbaijani, and Kazakhstani national sectors. It is important to note that Russia still considers a five-party consensus as the only legally acceptable mechanism for defining the final status of the Sea; what did change is the way of achieving that goal. Instead of radically defending its argument like Iran, Russia simply signed the bi-lateral treaties, thus adopting a step-by-step approach while also trying to settle disputes over offshore oilfields. Yet without a full consensus, the legal power of those treaties is not entirely clear since it depends on whether the old Soviet–Iranian treaties remain in force,

as Iran argues they do. If the 1921 and 1940 treaties dissolved along with the Soviet Union in 1991, or if they never effectively governed ownership of the Caspian, then the bilateral treaties should be governing law in the Caspian. On the other hand, if the old Soviet era treaties are still in force, Iran may have justice on its side.

It is important to note that the Russian legal justification for the common waters approach lies in classifying the Caspian Sea as an inland lake, the principle most dear to Iran. This approach excludes the Caspian from the rules of UNCLOS, and offers no access to non-littoral states (Sanei, 2001, 760). Russia relied on a number of historic examples in settling disputes over inland lakes, for instance the series of bi-lateral treaties between the United States and Canada that establish the legal status of the Great Lakes, or the establishment of the regime on Lake Constance by Germany, Austria and Switzerland (Folger, 2003, 551). In each case, the treaties were useful to define their lakes' borders, navigational rights and overflight provisions, and to establish a joint commission to oversee air and water quality issues. Of course, none of these waters were salt waters that were commonly referred to as seas. Thus, in the short term, the northern-state treaties can be characterized as beneficial for establishing sovereign rights within the Caspian region. Also, such conditions provide incentives for companies that are generally unwilling to invest much capital in a territory covered by no clear legal regime.

If we were to assess Russia's "divided bottom, common waters" approach, it could be concluded that the federation will likely be the biggest winner (Dunlap, 2004, 126). First, due to its proactive involvement in formulating and securing a legal regime in the Caspian, Russia will be considered a stabilizing force in the area. Second, division of the seabed into national sectors will help influential Russian oil companies pursue development of recently discovered reserves in the Russian sector. Finally, the "common waters" approach will give Moscow complete freedom to patrol the Caspian and fight 'crime and terrorism' as it deems necessary (Joyner & Walters, 2006, 207). In addition to being such a friendly neighbor, Russia has come forward as a mediator of the disputes that have arisen between Azerbaijan, Turkmenistan and Iran (Folger, 2003, 545). It has also been promoting the idea of a regional organization to oversee the affairs in the Caspian.

Despite Azerbaijan's caution in its negotiations with Russia, it came to accept the federation's solution as a guarantee of its sovereign rights to its sector, which is precisely its main objective. Undoubtedly, Azerbaijan would prefer a multi-lateral legal regime codifying the seabed boundaries, but given its interest in securing its rights sooner rather than later, and Iran's menacing aggression, a system of bi-lateral treaties may be the best solution for the country at this point of the dispute's development (Dunlap, 2004, 127). As a point of interest, in order to reinforce its independence from Russia in light of such a tight cooperation, Azerbaijan seeks the United States' full support due to its desire to block any involvement of Iran in the process of deciding when and how to develop the Caspian resources. Thus, in the process of defining the legal regime in the Caspian Sea, Azerbaijan seems to be balancing between two major powers, trying to

reinforce its claims to independence, while also seeking friendly cooperation in the region in order to ensure the successful development of its oil reserves.

Russia's proposal for resolving the Caspian's legal status is very likely to emerge as the defining legal framework for the sea. A major problem with this solution is that the proposed legal regime is overly dependent on the preservation of good relations among the littoral states in the geopolitical arena, thus making this approach similar to the Russian traditional dominating style of pursuing its pragmatic national interests in a disguised manner ("informal empire"). One can easily spot Russia's desire to maintain its veto power over underwater pipeline construction and to navigate its military ships throughout the Caspian region. There have been many concerns that Russia's approach is, in fact, a Trojan horse that would open the door to the country's unlimited military control of the area. Ironically enough, after the immense amount of time and money spent on the process of negotiation, the "divided bottom, common waters" approach is essentially a political solution to a legal problem (Bahgat, 2002, 290). It will help to develop cooperation and to get the oil flowing, but in the longer run a number of conflicts, possibly between Iran and Russia, may undermine the political foundation of the Russian plan. The bi-lateral approach also seems to split the region into opposing camps of winners and losers. The relationship between Russia, Iran and Turkmenistan has significantly deteriorated and the federation is no longer regarded as a fair mediator by those states. This has led to the rise in Iranian aggression since after Russia's "betrayal", it was left with a share of only 14% of the seabed. Consequently, Iran has rushed to support Turkmenistan's dissatisfaction with the status quo.

Although Iran recognizes the urgent necessity to formulate a new legal regime in the region in light of the collapse of the Soviet Union, it decisively condemns the bi-lateral treaties signed between Russia, and Azerbaijan and Kazakhstan (Mehdiyoun, 2000, 182). The negative implications of the Russian "divided bottom, common waters" approach have caused conflict and will likely continue to do so, since the strategy denies Iran key economic opportunities. The plan effectively excludes the Islamic Republic from any significant deposits of the Caspian's oil and gas. The fourteen percent share allocated to it contains the least proven oil and gas reserves and the deepest water. Tension will also escalate because the bi-lateral treaty-making by Russia, Azerbaijan, and Kazakhstan is rapidly closing off Iran's influence in the Caspian region. Iran, paradoxically, also fears instability in the region. Specifically, Iran's concerns about the tacit U.S. support for Russia's legal solution for the Caspian and the possibility of a large U.S. military presence on Iran's border will heighten feelings of isolation and insecurity in Tehran (Dunlap, 2004, 129). Thus, although Iran may win some concessions in a final agreement on the status of the Caspian, given the current situation, that scenario looks unlikely.

Since Iran argues that the Soviet-era treaties have not lost their validity, it has repeatedly suggested that Azerbaijan, Kazakhstan, and Turkmenistan should suspend their oil and gas producing activities in the Caspian until a new multi-lateral agreement is reached, and it has shown

little willingness to compromise. The confrontation exploded in 2001, when two British Petroleum (BP) oil research ships commenced operations based on an Azerbaijani contract in an area of the Caspian that would be within Iranian waters if Iran acquired a 20% share of the Sea. Importantly, prior to July 2001, it had generally been accepted that this area belonged to Azerbaijan and, moreover, Iran hadn't expressed any disagreement when Azerbaijan signed an array of oil contracts with international companies. However, in July 2001, an Iranian gunboat chased two BP survey ships from a disputed oil field (Ghafouri, 2008, 93). BP immediately suspended all activity under its contract with Azerbaijan in the disputed oil field. Both the United States and Russia adamantly criticized the Iranian action. The incident reinforced Iran's isolation, and the other Caspian states have overtly aligned themselves with Russia. Following the unsuccessful April 2002 Caspian Summit in Turkmenistan, at which Iran alone insisted on an equal division of the sea, President Putin decided to commence large scale military exercises on the Caspian in August 2002. Azerbaijan and Kazakhstan also took part in the exercises, but Iran was excluded (Dunlap, 2004, 124). It is important to realize that the Iran-Azerbaijan confrontation is a confirmation of how the murkiness of the present legal regime, or its absence, could be used to force concessions from the other Caspian states, and that the unresolved legal status of the Caspian Sea is a threat to the overall security in the region.

At this point one might start arguing that since negotiations have produced few tenable results, there is a need for some form of outside involvement to bring about a solution to the dispute. The refusal of all parties to the dispute to sign on to the UNCLOS dispute resolution clauses, and the refusal of some to even recognize the Caspian as a sea, means that there is no recognized international forum to resolve the issue. The need for mediation, though, is hampered by the fact that the United States stands out as the most influential power-broker in the region with the capacity to mediate, a contingency that the Iranians foremost, and the Russians, would not likely accept. During the 1990s, the United States began to push its involvement in the Caspian region by stating that the Caspian is a "region of its national strategic interests". (Rahr, 2001, 80; Folger, 2003, 548) The United States even discussed with Azeri President Heydar Aliyev the possibility of locating a U.S. military base in Azerbaijan. The Iranians see the West and the U.S. as backing Azerbaijan and Kazakhstan because oil companies have already invested heavily in the region. In particular, the U.S. has openly supported the Azerbaijani position of the median line division, which would provide the Azeri government with great oil resources that it could export to Western Europe, away from Iran and the Persian Gulf. In fact, the United States has been accused of pitting the littoral states against Iran. Consequently, despite the clear need for a third-party mediator, the United States is not the best choice because of its lack of neutrality.

## 7. Conclusion, by way of a pipeline

The seemingly irresolvable status of the Caspian Sea leads to a set of paradoxes that, yet more paradoxically,

have allowed for productive progress. One can conclude from the above that the Caspian is both a sea and a lake or neither a sea nor a lake. It is abundantly clear is that almost twenty years after the dissolution of the Soviet Union, the internal space of the former socialist mega-state does not function within international law, and that the tools of informal empire: protection that shades into coercion; negotiation and power politics instead of international rule of law; and great power competition over the resources of small and weak states; are the rule for the region.

Yet to allow ourselves one more final paradox, this situation has worked to the advantage of the small states, Azerbaijan and Kazakhstan, to the hindrance of the Russian Federation, and to the distinct disadvantage of Iran. Azerbaijan, which initially insisted that the Caspian is a sea that must function under the UNCLOS, has profited by the Caspian's uncertain status as a lake on its surface, and a sea beneath. Russia has achieved some of its goals, foremost control of the surface waters, through this status, and it is rushing to catch up to Azerbaijan in its capacity to exploit petroleum resources. Iran, which insists that the Caspian is a lake which must be divided according to terms of the Soviet-Iran Treaties, finds itself excluded from both the seabed resources and most of the surface by the legal vacuum created by its intransigence. Yet ultimately, until the Caspian is brought fully under the umbrella of the international rule of law, these outcomes will remain imperiled by changing circumstances.

Azerbaijan has been able to tap into the rich oil fields that would be part of its EEZ under UNCLOS. It has done so under the protection of its bi-lateral treaties with Russia. But it must also transport those resources to wealthy western markets greedy for free-flowing oil and natural gas, and here it does not enjoy the patronage of Russia or the protection of UNCLOS. After the break-up of the Soviet Union, the newly independent states had no choice but to export oil through the old Soviet pipeline infrastructure, which ran over Russian territory, and whose nexuses were under Russian control. Since during the Soviet period the longest and most technically advanced pipelines were built to transport oil from Siberia to Western Russia and beyond, the infrastructure in the Caspian was poorly developed and designed for domestic purposes within the U.S.S.R. The old pipelines were not able to transport the increasing volume of oil produced by the newly independent states. Russia was initially able to exert hegemony over the resources of Azerbaijan, Kazakhstan and Turkmenistan through the old pipelines, thus preserving its leverage in the region by assuming full control of cutting off oil and gas flows, re-routing flows in order to force concessions, or by enforcing exorbitant tariffs on the transit countries. In an extreme instance, high-quality Azerbaijani oil pumped into the Baku-Novorossiisk pipeline was replaced by very poor quality Russian oil, causing disastrous export income losses for Azerbaijan (Sanei, 2001, 741). Russia for some time perceived any oil that does not go through the Novorossiisk system as a political failure preventing the expansion of its influence (Mizzi, 1996, 493). Thus the new states were anxious to start building new pipelines and establishing permanent markets outside the Caspian, especially considering that world oil powers, lured by

cheap oil and the Sea's strategic location, rushed to the Caspian region to stake out their political and economic interests.

The most important Caspian pipeline diplomatic issue in the last decade has been the Baku-Tbilisi-Ceyhan (BTC) pipeline project that started to gain momentum in the late nineties when, on 18 November 1999, Azerbaijan, Georgia, and Turkey signed an intergovernmental agreement in support of the pipeline. The project's purpose was to transport oil from the Caspian Sea to the West. The U.S. was one of the major supporters, seeking non-OPEC oil without having to deal with Russia. Its desire to diversify its energy supply and bolster the independence of the former Soviet states in the region has led the U.S. to become an overt supporter of multiple pipelines to transport Caspian oil to Western markets. The U.S. viewed the BTC pipeline as a logical channel to direct the newly independent states' desire to obtain control over their oil exports, boosting their economies in light of a soaring demand for oil, and strengthening their fragile sovereignty in the face of the Russian pipeline monopoly of Transneft (Cornell & Starr, 2005, 31). The BTC pipeline primarily sought to benefit Azerbaijan, Georgia, NATO's ally Turkey and the U.S. itself.

Russia initially resisted construction of the BTC pipeline and insisted on expanding the existing oil pipe system to the north. However, the active development of the project made Russia take it as a signal that the country's hegemony would not go unquestioned and sooner or later its imperial ambitions would have to be relinquished. It was left with no choice but to adjust its position, and give up its struggle to block the BTC pipeline (Dunlap, 2004, 122). By proposing the "divided bottom, shared waters" approach, Russia sought to preserve at least some degree of its declining control over the newly independent states. As mentioned before, the major reason for this concession was President Putin's new direction in the negotiation process that aimed to maximize Russia's share of economic wealth and diplomatic influence in the Caspian (Mamedov, 2001, 246). Moreover, Russian oil companies forced the Russian Foreign Ministry to neutralize its policies so that Russian companies could continue their own extraction activities in the Caspian.

Once opened in May 2005, the BTC pipeline became the largest export pipeline in the world, worth U.S.\$2.9 billion and spanning 1040 miles of rough terrain (Ghafouri, 2008, 93). In fact, in the process of planning the construction of the BTC pipeline, multinational companies agreed to choose a more environmentally harmful, expensive route as a result of the need to by-pass Russia, Iran and Armenia. Nevertheless, the corridor of this pipeline is considered to be strategically unique for the direct connection of oil fields in the land-locked Caspian Sea to deep-water ports in the Mediterranean, thus providing a greater capacity for access to markets. The implications for Europe are of tremendous importance in terms of attaining diversified access to energy supplies and having strategic access to the very heart of Central Eurasia. It explains why cooperation with NATO and the EU is located at the top of foreign policy priorities of the newly independent states. Since some EU member-states have been totally dependent on Russian gas and oil, particularly in Central, Eastern, and South-Eastern

Europe, they rejoice at the possibility of having another route for resources (Cornell & Starr, 2005, 28). Their position was made even firmer by the natural gas crisis of the winter of 2008–2009, when Russian pipelines across Ukrainian territory were cut off. The BTC pipeline fits perfectly into the set of major reforms planned in the European energy sector, seeking the establishment of a competitive market of multiple operators with the intention to have varied options of delivery routes. Such diversification of supply routes in Europe will force Russian monopolists to implement long-awaited reforms. Interestingly, the engine driving the construction of all those new routes is precisely the inflexible behavior of the Russian state monopolies, Gazprom and Transneft. Thus, Russia has been caught in its own trap.

The vacuum of international law that has allowed for a solution advantageous to the new independent states and for their western customers should not be too exuberantly celebrated. The circuitous route of the pipeline has already caused environmental damage in once rich landscapes, and the absence of an international regulation apparatus promises more in the future. The host countries of the pipeline cannot implement adequate regulation themselves. One should keep in mind that there is a distinct form of legal regime that governs such constructions. For the moment, there are two components comprising the BTC regulatory regime: the Inter-Governmental Agreement (IGA) between the three states involved, and an array of Host Government Agreements (HGAs) between the states and the BP-led oil consortium (Joyner & Walters, 2006, 167). Both have triggered a substantial wave of criticism, with HGAs being the main target, since they take precedence over domestic legislation and allow large oil interests to avoid standard legislative regimes for oil and gas exploitation and environmental protection (Waters, 2004, 405). Originally, such agreements were signed to reduce the risk of investing in an unstable region by insulating companies from inefficiency or corruption in government and the legal system. They cover many legal aspects from "no-nationalization" to extensive land and water rights for the consortium, and a pledge not to interfere with the operation of the pipeline. The agreements also require "monetary compensation" from the host governments if their actions hinder the project's "economic equilibrium" (Joyner & Walters, 2006, 168). Since it is explicitly said in the clause about the non-interference provision that the host government may not intervene on environmental or health and safety grounds except as an exceptional and temporary measure where the threat level is unreasonable, the HGAs have been perceived by many as threats to national sovereignty. The Turkish part of the pipeline has been called "a strip running the entire length of the country, where BP is the effective government" (Waters, 2004, 406).

These problems, and the instability that threatens both the exploitation of Caspian fuel resources and their shipment around the globe, will remain until the legal status of the Caspian is resolved. An international legal regime that classifies the Caspian as a sea, and places it within the purview of UNCLOS and the international rule of law, would provide the greatest and most permanent stability.

Unfortunately, the greater powers of the region, Russia and Iran, continue to insist, each for their own reasons, that the Caspian is a lake; and the lesser states have found that this legal uncertainty can work to their advantage now that the BTC pipeline is in place. The western powers which might exert diplomatic pressure to bring the internal space of the former Soviet Union within the international rule of law no longer have any advantage to do so, now that high-quality Azerbaijani oil is flowing through the pipeline. It will be a long time before any party will say with certainty whether the Caspian Sea is a sea, and a longer time before they recognize that it does indeed matter.

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