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THE CASPIAN DISPUTE: IS A DOCTRINAL ANALYSIS TOO LATE OR CAN WE TURN BACK THE HANDS OF TIME?

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I. INTRODUCTION

Almost a decade and a half have passed since the breakup of the Soviet Union, but its effects have left the unsettled state of the Caspian a regional problem that is yet to be resolved.¹ That problem has been aggravated by the resulting international implications, in particular for the countries interested in exploiting untapped mineral resources in the area.² The Caspian market also exports one of the most expensive foods in the world, Beluga caviar, not to mention the fact that it is home to billions of tons of oil and natural gas, making it the world's third largest depository of hydrocarbon reserves.³ To this day, however, a legal regime over the Caspian region does not exist, making it unclear how such resources should be distributed amongst the littoral states.⁴

This Note examines the effects of the post-Soviet split on the process of establishing a new legal system regulating the Caspian for all littoral states. This analysis accounts for both the prior legal

* J.D. candidate New York Law School, 2004; B.A. University of British Columbia, May 2000. The author would like to thank his father, Khosrow Afshar, for the idea. The author also thanks Professors Sydney Cone and Barry Dubner for their helpful comments. Finally, if not for the love and support of family, there would have been no paper for me to write here at New York Law School.

1. See Kamyar Mehdiyoun, *Ownership of Oil and Gas Resources in the Caspian Sea*, 94 AM. J. INT'L. L. 179, 179 (2000) (stating that the aftermath of the breakup of the Soviet Union has left the legal status of the Caspian Sea as one of the most contentious international problems facing the region).

2. See Yolbars A. Kepbanov, *The New Legal Status of the Caspian Sea is the Basis of Regional Operation and Stability*, 2 J. INT'L AFF. 4 (1998), available at <http://www.mfa.gov.tr/grupa/percept/ii4/II4-2.htm>. (last visited Nov. 14, 2002).

3. Arthur P. Mizzi, *Caspian Sea Oil, Turmoil, and Caviar: Can they Provide a Basis for an Economic Union of the Caspian States?*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 483, 483 (1996).

4. *Id.* at 484. (stating that although limited progress was made in a 1993 meeting held in Astrakhan, Russia, where the Caspian coastal states agreed "in principle" to define territorial blocks by a median-line method, no formal agreement has been recognized by the littoral states).

regime (which only regulated Iran and the Soviet Union) and the rights necessitated by the creation of the newly independent states. Part II of this Note discusses the historical legal status governing the Caspian region followed by the collapse of the Soviet Union and the resulting effect on the regulation of the Caspian. Part III describes the difficulties inherent in achieving mutual cooperation between the littoral states. These difficulties are analyzed by focusing on the special problem of uneven distribution of Caspian resources. Focus is placed on factors that caused this problem, including the unique characteristics of the Caspian in relation to the isolated position of Iran, which historically relied on Treaties it observed with what is now Russia. Part IV argues that cooperation can exist only under a new legal regime that accounts for and reverses the inequities that are already present in the Caspian region. These inequities are in part the result of unilateral exploitation of resources by the littoral states.⁵ To this day, these states have not mutually agreed upon set boundaries in the Caspian.⁶ Part V concludes that a better and more equitable administration of the Caspian involves a regime utilizing a flexible approach. This regime incorporates leasing arrangements into the current oil consortium projects operating in disputed areas of the Caspian region. Only then can all the littoral states agree on some method of division in the Caspian region.

II. THE HISTORICAL STATUS OF THE CASPIAN AND THE LEGAL CONSEQUENCES THAT FOLLOWED

A. *The Kingdom of Persia & The Russian Socialist Federal Soviet Republic*

At the beginning of the nineteenth century, wars between the declining Kingdom of Persia (now the Islamic Republic of Iran) and tsarist Russia were predominant in the Caucasus, where the lat-

5. Iu. Merzliakov, *International Affairs: A Russian Journal, Legal Status of the Caspian*, COLUMBIA INTERNATIONAL AFFAIRS ONLINE (MAR. 1999), available at http://www.ciaonet.org/olj/iarj_99mei01.html (last visited Apr. 5, 2003) ("The majority of the Caspian problems are caused by a lack of clarity of its legal status . . . Until Azerbaijan started developing marine oil fields and signed agreements on product sharing with foreign oil companies talks about the legal status of the Caspian Sea was of a theoretical nature. American corporations dominated the newly-formed consortiums.").

6. *Id.*

ter was driving its territorial limits southward.⁷ Consequently, Persia's defeat resulted in two treaties that established borders and defined naval shipping rights in the Caspian.⁸

It was not until February 26, 1921, that the Treaty of Friendship between Persia and the Russian Socialist Federal Soviet Republic was signed in Moscow.⁹ This treaty established equal rights of free navigation between the Soviet Union and Iran over what it referred to as *their* Caspian Sea.¹⁰ The labeling of the Caspian as a "sea" subsequently became a challenged contention and the legal ramifications in characterizing the Caspian with any definiteness as to its geological classification sparked scholarly debates.¹¹ Aside from this collateral issue, the Treaty of Friendship did not speak to any country's territorial sovereignty over the Caspian, but was evidence of improving Soviet-Iranian relations.¹²

The 1940 Convention on Commerce and Navigation between Iran and the U.S.S.R. differed in that it reaffirmed a previously established 10 mile fishing zone¹³ and allowed certain co-equal activi-

7. Mehdiyou, *supra* note 1, at 180.

8. *Id.*

9. Treaty of Friendship, Feb. 26, 1921, Persia-Russ. SFSR, 9 L.N.T.S. 401 [hereinafter Treaty of Friendship].

10. *Id.* art.11.

11. Barry Hart Dubner, *The Caspian: Is it a Lake, a Sea or an Ocean and does it really matter? The danger of utilizing unilateral approaches to resolving regional / international issues*, 18 DICK. J. INT'L. L. 253, 260 (2000) (Stating that the Caspian has been considered an inland sea, a major lake and also a relict marine basin. Classification of the Caspian "body of water" is a source of tension and dispute between the littoral states. The author argues that the focus of such debates by each state is centered on the dichotomous concern for the consequent division of resources and protection of "rights" in the Caspian. This concern stems from the classification of the Caspian as a "lake," necessarily requiring multilateral agreement on how Caspian resources are exploited, and classification as an "inland" or "enclosed" sea, which would provide for territorial limits and open exploitation beyond those limits.).

12. See Treaty of Friendship, *supra* note 9 (a prelude to the Treaty reads "THE PERSIAN GOVERNMENT of the one part, and the RUSSIAN SOCIALIST FEDERAL SOVIET REPUBLIC of the other part, desiring to establish relations of friendship and fraternity between the two nations, have decided to engage in negotiations for this purpose . . .").

13. Treaty of Establishment, Commerce and Navigation, with Final Protocols and Annex, Aug. 25, 1935, Iran - U.S.S.R., Art. 15, 176 L.N.T.S. 301, 317 [hereinafter Treaty of Establishment] (Article 14 states that throughout the Caspian "Sea" there shall be only vessels belonging to the 2 contracting parties, namely, the Union of Soviet Socialist Republics or Iran).

ties such as fishing beyond that zone.¹⁴ The right under that treaty to share equally in Caspian fishing activities is viewed today as remote historical evidence for condominium rights.¹⁵ It was a substantial right Iran relied on because the Caspian and its inflowing rivers have always been a valuable fishery resource, home to ninety percent of the world's sturgeon.¹⁶

In addition to the abovementioned treaties, an exchange of diplomatic notes dated March 25, 1940, again referred to the Caspian as a Soviet-Iranian "sea", but there is controversy as to what exactly was meant by this characterization.¹⁷ The characterization of the Caspian as a lake, sea or an ocean has been considered by some to be determinative of the legal status over the Caspian,¹⁸ based on either an application of international law or adherence to prior Soviet-Iranian treaties as abovementioned.¹⁹ However, as this contention has been subject to heated debate since the break-up of the Soviet Union,²⁰ the labeling game itself has been labeled as an ineffective step towards resolution of this dispute.²¹

14. Treaty of Commerce and Navigation, Mar. 25, 1940, Iran – U.S.S.R., 144 BRIT. & FOREIGN ST. PAPERS 419 (1940-42) [hereinafter Treaty of Commerce].

15. Eric W. Sievers, *The Caspian, Regional Seas, and the Case for a Cultural Study of Law*, 13 GEO. INT'L ENVL. L. REV. 361, 371 (2001) (stating that although the history of the Caspian offers remote evidence for condominium rights, it does provide support for community management by *only* the littoral states).

16. Sergei Vinogradov, *Transboundary of the water resources in the former Soviet Union: Between conflict and cooperation*, 36 NAT. RESOURCES J. 393, 396-97 (1996).

17. Treaty of Establishment, Commerce & Navigation, with Final Protocols and Annex, *supra* note 13, at 329.

18. See Sievers, *supra* note 15, at 370 (2001) (stating that although many international legal scholars have focused on the "central legal question" of whether to label the Caspian as a sea or a lake, this is a political and not a legal question).

19. Dubner, *supra* note 11, at 281 (stating that the classification debate is more than academic and centers on dividing the resources and protecting other rights. The Russians, Iranians, and Turkmen have classified the Caspian as a lake thereby holding that beyond a limited territorial boundary all littoral states must agree on exploitation of Caspian resources. The Azerbaijanis and Kazaks, on the other hand, have favored the Caspian as an inland sea, thereby holding that the Caspian should be treated like other enclosed seas, with territorial limits and the resources beyond open for exploitation.).

20. Sievers, *supra* note 15.

21. Dubner, *supra* note 11, at 281 (stating that an approach of attempting to label the Caspian as a sea or lake may be irrelevant because an alternate framework set forth in the Convention and by the International Court of Justice could work as effective precedent to resolution in this area).

B. *The Collapse of the Soviet Union*

The collapse of the Soviet Union in 1991 created uncertainty in the ownership and management of Caspian resources.²² Instead of the previous joint-usage of the Caspian by only two countries, the post-Soviet split saw the Caspian resources divided amongst five independent states, namely, Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan.²³ Each state now had a competing interest to fulfill, and the newly independent states of Azerbaijan, Kazakhstan, and Turkmenistan had the additional burden and interest of overseeing their evolving economic structures so that they could remain independent.²⁴ With newly independent countries bordering the Caspian coastline and sharing the region's resources, both Russia and Iran lost control over what they previously viewed as their "sea."²⁵ In times when oil played an increasingly important role in gaining independence from the west, Iran could no longer rely on tradition to maintain its rights in the Caspian.²⁶ The Treaties only spoke to fishing and naval rights, and clearly the powers that be in Iran were aware that these natural resources, though bountiful, were not all the Caspian had to offer anymore.²⁷

III. CASPIAN INEQUITIES

Conflict between the littoral states over the legal framework governing the use and development of the Caspian is in part a

22. Merzliakov, *supra* note 5.

23. *Id.*

24. *Id.* (stating that the newly independent states were concerned with their dependence on Russia. The author argued for a procedural system creating a legal regime for the area to stabilize the region from the repercussions of the various unilateral claims of ownership that came about from this concern.).

25. Treaty of Establishment, *supra* note 13.

26. See *The Caspian Sea - The History & Legal Background*, NO. 4, Vol. 59, July 22, 2002 INTERNATIONAL LAW NEWSLETTERS ("After the collapse of the Soviet Union in late 1991, Russia began to be less of a geo-political player in the Caspian region. Gradually, the five littoral nations of the Caspian became free to develop their oil as they saw fit.").

26 M.S. Nourian, *Negareshhay-e motafavet dar barey-e rezhim-e hogugy-e daryay-e khazar* [Alternative Viewpoints on the Caspian's Legal Regime], *MAJALLEH*, summer 1996, at 112.

27. Sievers, *supra* note 15, at 364 (stating that oil is not the only "black gold" of the Caspian. although the turn of the century brought half of the world's oil from fields off Azerbaijan's coast, caviar is really the "black gold" of the Caspian, being the traditional source of economic wealth from this region).

product of the uneven distribution of potential oil and natural gas in the region.²⁸ The absence of agreed territorial lines is viewed as one of the largest impediments to a more rapid development of the Caspian basin's hydrocarbon reserves.²⁹ A recent summit of the five countries' leaders in April of 2002 failed to produce an agreement on even the most basic principles to be applied toward a resolution.³⁰

At present, Iran is maintaining the most isolated position on the division of the Caspian, holding that littoral states should either (1) use the Sea in common, or (2) divide the floor and water basin into equal shares.³¹ Naturally, Iran prefers the first approach, whereby the littoral states would use the Caspian by consensus, however impracticable this may be.³² Under Iran's second approach of equal division, each country would have a 20% share of the Caspian floor and surface.³³

It is important to note that progress towards a mutually agreeable resolution is hindered by the U.S. Iran Libya Sanctions Act

28. Caspian Sea Region: Legal Issues July 2002 available at <http://www.eia.doe.gov/emeu/cabs/casplaw.html> (last visited Nov. 1, 2003) [hereinafter Caspian Law Document].

29. Freshfields Bruckhaus Deringer, *Dispute Resolution in the Caspian region: What foreign investors and governments need to know* (June, 2002), available at <http://www.freshfields.com/practice/disputeresolution/publications/pdfs/5109.pdf> (last visited Sept. 23, 2003) (see page 9 of the article where it states that Russia has signed bilateral agreements with Azerbaijan and Kazakhstan to divide the Caspian seabed into national sectors, but Iran continues to press for equal division of the entire seabed while Turkmenistan seems to favor a compromise).

30. *Id.*

31. See <http://www.eia.doe.gov/emeu/cabs/iran.html> [hereinafter EIA Document] (last visited Nov. 1, 2003).

32. *Id.* (Usage by consensus is commonly referred to as the "condominium" approach. Under such an approach, the development and exploitation of the Caspian would be a joint effort by all five littoral states. The Iranians suggest that all work undertaken in the Caspian should be suspended until the legal status of the Caspian is determined, but this is highly unlikely given the development of oil pipeline consortiums and other projects that have already attracted foreign investment and interest. The condominium approach is thus regarded as less likely.).

33. *Id.* (Kazakhstan, Azerbaijan, and Russia have agreed on an equidistant method of division, whereby Iran would receive 12-13% of the Caspian floor and surface due to its smaller shoreline in relation to the rest of the riparian states. Kazakhstan and Azerbaijan oppose Iran's 20% proposal stating that it does not correspond to historical tradition. Consequently, on May 20, 2002, Iran and Azerbaijan failed to reach an agreement on the Caspian division.).

(hereinafter referred to as the "I.L.S.A.").³⁴ These unilateral economic sanctions against Iran are a product of U.S. law, rather than a multilateral organization like the United Nations, and stand as a considerable obstacle to oil companies who look to the region as a potential site for low-cost oil production and development.³⁵ Under this act, Washington is said to be working hard to ensure that its favored routes of oil transport are carried via Azerbaijan's pipelines at the expense of more expeditious and cost-effective trans-Iranian routes. This further isolates Iran in its claimed validity in certain ownership rights over the Caspian region.³⁶

The United States concedes that such past policies may have hurt Iran.³⁷ From Iran's standpoint, however, it is only in recent times that the impact of the I.L.S.A. has significantly hindered its economic growth.³⁸ This is especially so when what is at stake in the Caspian becomes compounded by the synergistic effect of the I.L.S.A. on Iran's ability to negotiate for a favorable resolution in the area.³⁹ It would be far too simplistic, however, to place the en-

34. Upon President Clinton's tightened sanctions on Iran, Congress followed with legislation of its own. See Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (Mar. 17, 1995); see also The Iran Libya Sanctions Act (ILSA) of 1996, Pub. L. No. 104-172, 110 Stat. 541 (1996), reprinted in 50 U.S.C.A. § 1701 (West Supp. 1999) [hereinafter ILSA].

35. Symposium, *Energy and international Law: Development, Litigation, and Regulation*, 36 TEX INT'L L.J. 1, 16 (2001) [hereinafter Energy Symposium].

36. Richard Mably, *British-Iranian Ties Ease Path for UK Oil Firms* (Sept. 25, 1998), available at <http://www.flyingfish.org.uk/articles/rushdie/98-09-25re.htm> (last visited Nov. 1, 2003) [hereinafter Flyfish UK] (quoting Simon Williams: "The Americans are more committed to controlling the pipeline route than holding back development of Iranian hydrocarbons.").

37. Energy Symposium, *supra* note 35, 21-22. (arguing that there is no easy fix for U.S.-Iranian relations but pointing to Secretary of State Madeline Albright's historic speech admitting that past U.S. policies and decisions may have hurt Iran).

38. See M. McCary, *End Run on Sanctions (A Case Study on Contemporary Energy Investment in Iran)*, 12 FLA. J. INT'L 263, 287-93 (1998) (Stating that U.S.-Iranian sanctions have generally had only a limited legal impact. Although federal regulations prohibit companies under U.S. jurisdiction from entering into major Iranian energy contracts, corporate tenacity in America keeps a foot in the door. Thus, corporations use special tactics to combat unilateral sanctions laid out by the U.S. government. Under this perspective, the author argues that U.S. corporate activity demonstrates a three-fold strategy against the sanctions by way of (1) continuing dialogue for future Iranian investment relations – which is not prohibited by U.S. sanctions, (2) limited investment and planning, and (3) merger and partnership agreements.).

39. Jean-Christophe Peuch, *Caspian: Dispute highlights poor state of Azerbaijani-Iranian Ties* (August 9, 2001) available at <http://www.rferl.org/nca/features/2001/08/09082001122320.asp> (last visited Nov. 1, 2003) (describing an incident in July, 2001,

tire blame for Iran's ineffective position in the Caspian dispute on the debilitating effects of the extraterritorial application of unilateral sanctions under the I.L.S.A. .⁴⁰

The Iranian Foreign Ministry has been criticized for being far too passive to the point of endangering its own country's interests.⁴¹ Considering that is not surprising Iran was reassured, perhaps foolishly, by Russia's position that all coastal states were bound by the Soviet-Iranian Treaties, which, according to it, provided for joint utilization because they were successor states and inherited treaty obligations of the former unitary state.⁴² This position, however, is effectively undercut because of two principles. Firstly, the newly independent states (Azerbaijan, Kazakhstan and Turkmenistan) are considered "new" successor states that succeeded to the territory of a currently nonexistent state, but without succeeding to its rights and obligations.⁴³ Secondly, Russia is the only successor state that has succeeded to the territory of a currently nonexistent state with the added benefits and burdens of its former rights and obligations.⁴⁴

From Russia's viewpoint, it could benefit considerably from either sharing the Caspian with Iran alone, or with Iran and the

where an Iranian warship threatened to fire on an oil exploration vessel operated by BP-Amoco 150km southeast of the port of Baku, thereby forcing the vessel to return to shore. "Tehran's unexpected show of force against its northern neighbor could also be a side effect of Washington's efforts to convince countries, including Azerbaijan, to limit ties with Iran.").

40. See Faraz Sanei, *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*, 34 VAND. J. TRANSNAT'L L. 681, at 730 (2001) (stating that threatened sanctions by the United States under the Iran Libya Sanctions Act, whose extraterritorial application has been legally challenged as a violation of GATT, though successful in thwarting U.S. companies, has been criticized and subsequently ignored by foreign firms).

41. Dr. Houshang Ta'leh, *The Caspian Sea and the Violated Rights of Iran*, J. ON POL., SOC. ISSUES, ECON. & SCI., No. 91, at 65 (arguing that the Iranian Foreign Ministry's continuing "passive" stand "increasingly endangers the country's interests, in a region where through the ages has shared a common ancestry, a common history, a common culture, and consequently, a common fate with the Iranian nation"), available at <http://www.netiran.com/clippings.html> (last visited Jan. 30, 2004).

42. Mehdiyoun, *supra* note 1, at 185-86 (outlining Russia's 1991 - 1999 position as evidence in the collective signing by the littoral states of the Alma Ata Declaration, Dec. 21, 1991, 31 ILM 148 (1992)).

43. Mizzi, *supra* note 3, at 488.

44. *Id.*

newly independent states.⁴⁵ This is because the newly independent states would be reliant on Russia to some extent to ensure their successful ventures in the Caspian region.⁴⁶ Indeed, both Russia and Azerbaijan recently signed an agreement dividing their share of the Caspian, bypassing Iran and Turkmenistan.⁴⁷

A similar agreement was signed between Russia and Kazakhstan earlier in May of 2002.⁴⁸ The United States, being concerned over Russia's considerable influence in forming such agreements, recently warned Russia, urging it to rethink recent plans of changing the legal status of a huge oil link from Kazakhstan to Russia's Black Sea port. The oil link, established by the Caspian Pipeline Consortium, is a U.S.-backed private oil link on the territory of the former Soviet Union.⁴⁹

Unlike the newly independent states, Iran was relegated to the most awkward of situations where it would be bound on one hand to former agreements it had made with the Soviet Union⁵⁰ and on the other hand faced with the fact that many parts of these historical agreements were jeopardized by the disintegration of the Soviet Union.⁵¹ Iran's strange role in being required to negotiate with its historically powerful northern neighbor and its newly independent neighbors, each on a separate footing, make it understandable as to

45. Sabrina Tavernise, *World Business Briefing, Europe: Russia: Oil Exploration*, N.Y. TIMES, Feb. 11, 2003, at W1 (stating that Russian oil producer Lukoil, together with the national oil and gas company of Kazakhstan, were beginning exploration in the Kazakhstan Kazmunaigez site. That site, located close to the center of the Caspian, is estimated to contain recoverable reserves of over 700 million barrels in oil).

46. *Id.* (stating that Lukoil has already acquired stakes in 3 projects in Kazakhstan, including the TengizChevroil site which "is the largest oil development project in the former Soviet Union including Russia.").

47. Steven Lee Myers, *World Briefing / Europe: Russia: Carving up the Caspian*, N.Y. TIMES, Sept. 24, 2002, at A1 (stating that Iran and Turkmenistan have argued for a broader multilateral agreement dividing the Caspian's resources where Iran insists on equal division amongst the five nations but Russia, Azerbaijan and Kazakhstan argue that the division should be based on the length of shorelines. Shoreline length division would leave Iran and Turkmenistan smaller shares than the rest of the littoral states).

48. *Id.*

49. See <http://www.forbes.com/markets/newswire/2002/11/20/rtr800488.html> (last visited Nov. 20, 2002) ("The U.S.-backed CPC pipeline was built in 2001 and became the first private oil link on the territory of the former Soviet Union. It is currently shipping some 250,000 barrels per day (bpd) to world markets.").

50. Mizzi, *supra* note 3, at 488-89.

51. *Id.*

why it may have been forced into the precarious position of being "passive" in its previous negotiations, rather than voicing its reason to competing interests.⁵²

Russian private corporations were also isolated when western oil companies began to embark on lucrative collaborations with the newly independent states.⁵³ Consequently, many Russian oil producers were absent from the Caspian region.⁵⁴ Former advisor to President Mikhail Gorbachev, Andronik Migranyan, referred to this as the "threefold defeat" of Russia, which included (1) a failure to strengthen political forces in Azerbaijan that looked to Russia, (2) the downgrading of Russia's official position as to the legal uncertainty over the status of the Caspian when only its biggest oil producer would participate in the Azerbaijan super projects, and (3) the impossibility of preventing the arrival of the western companies.⁵⁵

To some extent, Russia and Iran were similarly affected by the emergence of the newly independent states in the Caspian.⁵⁶ However, some argue that the volume of oil production within Russia

52. See Michael Lelyveld, *Iran / Azerbaijan: U.S. rejects military involvement in Caspian dispute*, (Mar. 15, 2002), available at <http://www.rferl.org/nca/features/2002/03/15032002113328.asp> (Describing the disputed territory of the Alov oil-field between Iran and Azerbaijan. The article poses an interesting question as to what would happen if Russia's LUKoil acquired a share of the Alov venture from Socar, Azerbaijan's state oil company. The article inquired into whether Russia's investment would either silence Iran, whom had sent gun ships into the area earlier, or raise further tensions making a Caspian settlement even more remote. The article concluded by quoting a western official who stated that "the presence of Russia in the southern Caspian would be seen as strengthening Azerbaijan in its dealings with Iran.").

53. See Jean-Christophe Peuch, *The Privatization of International Affairs: Caspian Sea Oil: The role of private corporations*, 22 FLETCHER F. WORLD AFF. 27, at 28 (1998).

54. See *id.* (arguing that Russia missed an opportunity whereby it allowed the United States to take the lead in exploiting the Caspian in its collaborative efforts with Azerbaijan).

55. *Id.* at 28 (stating that Russia's role was weakened in its influence over the Caspian region).

56. *Id.* at 28-31 (Stating that the newly independent state of Azerbaijan holds a key position due to its advanced economic relations with Western Europe and the United States. American oil corporations showed interest in vast hydrocarbon reserves in the Caspian immediately after the Soviet collapse. But Russia, like Iran, was not keen to allow the newly independent states to freely engage in business with these corporations. Because "Russia's private business still has to abide by what the Kremlin considers to be its strategic interests or '*raison d'Etat*'", and that policy may have "already bore some fruits by frightening foreign investors.").

far exceeds what the country could receive from participating in the development of the Caspian deposits in the Azerbaijan sector.⁵⁷ Accordingly, it comes as no surprise why Azerbaijan is more important to Russia as a market rather than as an oil well.⁵⁸ The advantages of Russia's "market theory" on Azerbaijan become even more evident when one considers that the Caspian is landlocked. Because the oil is worth more when it reaches world markets, *exporters*, rather than producers, have as much if not more influence in the Caspian dispute.⁵⁹ Thus, as Iran is further isolated in Caspian negotiations due to a U.S. containment policy and exporter compliance with the I.L.S.A., the error becomes evident in the idea that Iran's past silence concerning Soviet oil operations somehow estopps it from raising valid objections to similar operations by successor states.⁶⁰

Though it is true that treaties established between Persia and the Soviet Union are silent as to mining rights, this is only because of the inadequacy in mining technology at the time the treaties were enacted.⁶¹ Even though serious oil exploitation in the Caspian dates back to the 1850s, it was not until the 1980s that modern technology made it apparent that deeper fields in the Caspian would be lucrative investment projects once the oil became accessible.⁶² The intent of Iran and Russia to use these Caspian resources on a shared basis can be inferred from repeated references in the treaties to the Caspian as a "Soviet-Iranian" sea.⁶³ Therefore, at least to some extent, there is textual support for Iran's position in the Caspian dispute.⁶⁴

One of the most persuasive reasons for creating a legal regime for the Caspian modeled after a regional approach in the general geographic area is that there will be more accountability for the

57. *Id.* at 30.

58. *Id.* at 30.

59. *Id.* at 29.

60. Mehdiyoun, *supra* note 1, 188-89 (arguing that in 1949 the Soviet Union engaged in intensive oil operations in the Caspian without acquiring consent from Iran and that Iran only aired its concerns as to oil pollution in the Caspian, but not as to the operations *per se*).

61. Nourian, *supra* note 26, at 105, 111.

62. *Id.* at 112.

63. *Id.*

64. *Id.*

environmental issues affecting the people living in the region.⁶⁵ To this end, it is important that a multilateral rather than a unilateral approach be adopted for purposes of dispute-resolution in this area.⁶⁶ However, the potentially sizeable damage to the region resulting from exploitation of Caspian resources⁶⁷ is not the only point of contention for favoring a legal regime that focuses on a regional approach.⁶⁸ Cooperation between all littoral states is required for a successful legal status that would bring stability to the area.⁶⁹

There are generally three broad approaches to resolving the Caspian dispute.⁷⁰ The first approach, as discussed above, favors Iran's position of condominium.⁷¹ The second approach applies the norms of international law, namely the United Nations Convention on the Law of the Seas (1982).⁷² This approach relies on classification of the Caspian as either an inland lake, in which case the Law of the Seas would not apply, or as an "enclosed or semi-en-

65. Dubner *supra* note 11, at 289.

66. *Id.* at 289.

67. *Id.* at 289-91.

68. See Vinogradov, *supra* note 16 (Stating that the majority of Soviet republics participate in the Commonwealth of Independent States (CIS), which is a loose organization that is not able to impose obligatory decisions or ensure unified policy in sensitive areas like the Caspian. Nonetheless, the author stresses that the CIS Charter, established just after the Soviet split, serves as a foundation for cooperation between the CIS members in different areas, including protection of the environment. The article goes on to say that the "framework" character of the Charter does not contain specific rules regarding management and cooperation of shared natural resources and thus the newly independent states created an institutional infrastructure consisting of the Interstate Ecological Council (IEC) and Interstate Ecological Fund (IEF) to work to that end. At the first session, the IEC considered critical environmental issues and defined a list of priority areas for future ecological cooperation, but too little had been done within the framework of IEC which was ill-suited to deal with issues of *shared natural resource utilization and management*. Instead of cooperation, the article acknowledged "a marked trend towards a more limited, subregional or bilateral approach with regard to transboundary water resources.").

69. *Id.*

70. Sanei, *supra* note 40, at 787, 801 and 806 (indicating the three "competing macro-models" to be the (1) third United Nations Convention on the Laws of the Seas (2) condominium and (3) Unique Caspian and the tailor made approach).

71. *Id.* at 802 (stating that "[t]he principle of *res communis* or condominium may be thought of as a doctrinal outgrowth of the commonage principle of the laws of the sea").

72. United Nations Convention on the Law of the Sea, U.N. Doc. A/conf.62/122, Oct.7, 1982, U.N. Sales No. E. 83. V5., 21 ILM 1282 [hereinafter Convention].

closed sea,” which would make the Law of the Seas applicable,⁷³ thereby establishing full maritime boundaries for the five littoral states based on an equidistant division of the sea and undersea resources into national sectors.⁷⁴ A third approach is most flexible on its face in that it presumes that the Caspian’s geological characteristics make it such a unique body of water that non-traditional approaches should be used to create a fresh legal mechanism in the Caspian.⁷⁵ Such an approach, referred to by one author as involving the “unique Caspian and the tailor-made model,” provides for several possibilities.⁷⁶

73. *Id.* Convention, art. 122. Article 122 states, as follows:

PART IX

ENCLOSED OR SEMI-ENCLOSED SEAS

ARTICLE 122

Definition for the purposes of this Convention, “enclosed or semi-enclosed sea” means 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. Convention, art. 122

74. *But see* William Constantinos Papadopoulos, *International Law & Pipeline Geopolitics in the Caspian Sea*, 36 TEX. J. BUS. L. 1, 5-7 (1999) (Stating that the United Nations Convention on the Law of the Seas, hereinafter UNCLOS III, does not clarify whether the Caspian, an inland body of water, is an enclosed “sea” because of the rivers that flow into the Caspian. For a “sea” to come under the definition of UNCLOS III, it is required that it be connected to another sea or the ocean by a narrow “outlet.” Thus, UNCLOS III does not specify whether multiple rivers are considered an “outlet” and the Caspian does not readily lend itself to the articles application.).

75. *See* Yolbars A. Kepbanov, *The New legal status of the Caspian Sea is the basis of regional operation and stability* Perceptions J. INT’L AFF. (1998) <http://www.mfa.gov.tr/grupa/percept/ii4/II4-2.htm> (last visited October 12, 2002) (arguing that since the unique characteristics of the Caspian cannot be regulated by the existing international legal norms and practices, one may hardly speak about the application of both norms of international sea law and international practice of dividing frontier lakes).

76. Sanei, *supra* note 40, at 806-821 (conceptualizing a “legal spectrum of regime models” that could govern the Caspian including:

Model 1: No sovereignty over waters and seabed; No commonage area

Model 2: No sovereignty over waters and seabed; Commonage area

Model 3: No sovereignty over waters and full sovereignty over seabed; Commonage area

Model 4: No sovereignty over waters and partial sovereignty over seabed; Commonage area

Model 5: Partial sovereignty over waters and no sovereignty over seabed; Commonage area

Model 6: Full sovereignty over waters and no sovereignty over seabed; No commonage area

The first approach to a resolution incorporating the principle of *res communis* in the Caspian immediately manifests its problems because there is little incentive for many of the littoral states to go along given their respective shares of coastline in relation to their ability to exploit those areas, not to mention the areas they have already-begun to exploit.⁷⁷ Furthermore, there is little case law supporting condominium regime use and some argue that Iran's thirty-year silence and lack of consent to the Soviet exploitation of Caspian oil and gas off the coast of what is now Azerbaijan's city of Baku⁷⁸ weakens the argument that Iran and the Soviet Union "intended" common usage of the Caspian.⁷⁹

The second approach of equidistant division under the United Nations Convention on the Law of the Seas fails for reasons already mentioned; namely, that classification of the Caspian is subject to different interpretations.⁸⁰ Moreover, the littoral states have wholly disregarded the potential applicability of the Law of the Sea to the Caspian, as evident by their attempts to increase their maritime borders at the expense of their neighbors.⁸¹ Countering a successful application of this approach to the Caspian seabed, Kazakhstan, Turkmenistan and Azerbaijan agreed in principle on an equidistant-line division, but differed amongst themselves as to how that

Model 7: More sovereignty over waters than seabed; commonage area

Model 8: Full sovereignty over waters and partial sovereignty over seabed; No commonage area

Model 9: Less sovereignty over waters and than seabed; Commonage area

Model 10: Partial sovereignty over waters and full sovereignty over seabed; No commonage area

Model 11: Equal sovereignty over waters and seabed; Commonage area

Model 12: Full sovereignty over waters and seabed; No commonage area.).

77. *Id.* at 800-04 (Stating that the coastlines are roughly: Azerbaijan 15.2%, Iran: 18.7%, Kazakhstan 30.8%, Russia 18.5% and Turkmenistan 16.8%. Prior to 1991, de facto division of coastlines between the Soviet Union and Iran was 80% and 20% respectively. The break up of the Soviet resulted in a significant change in the distribution of the Caspian).

78. Lelyveld, *supra* note 52.

79. Sanei, *supra* note 40, at 804 (stating that Russia and Iran base legitimacy of the condominium approach on (1) the Soviet- Iranian Treaties and (2) historical, geographical and environmental characteristics of the Caspian).

80. *Id.* at 796 (stating that the provisions of the Law of Seas is applicable only to seas and oceans pursuant to Article 1 and 2 of that Convention which defines such jurisdictional capacity. thus, a strict application of that doctrine to determine the Caspian's legal status would presume the Caspian to be analogous to a lake).

81. Papadopoulos, *supra* note 74, at 10.

line should be drawn.⁸² It becomes apparent that a pure application of the Law of the Sea simply cannot resolve the dispute.⁸³ If there must be an answer, it lies in the flexibility of the third approach.

The Deputy Foreign Minister of Turkmenistan, Yolbars A. Kepbanov, had stated early on that Turkmenistan understands the "great economic interests" of its neighbors in exploiting the Caspian's natural resources, but that this exploitation should yield to mutual cooperation so that there is no detriment to other littoral states.⁸⁴

To date, all countries have continued to embark on various projects in the Caspian region. However, Deputy Foreign Minister Kepbanov made an interesting proposal that offers insight into solving the problem of balancing cooperation amongst the littoral states in light of unilateral actions exploiting Caspian resources. According to Deputy Foreign Minister Kepbanov, it is well understood that certain littoral states have exploited various sites along the Caspian and that these sites could not simply be handed over, even if there had been an accepted usage of the Caspian under a legally binding agreement.⁸⁵ Thus, he proposed that Turkmenistan, for one, could take into account the fact that Azerbaijan had already begun working in various fields that may be in Turkmenistan's jurisdiction and agree on a long-term leasing arrangement.⁸⁶ Kepbanov understood that such devices were necessary to bring back a legal system to the Caspian.⁸⁷

The use of leasing arrangements in the Caspian is not an entirely foreign concept.⁸⁸ During the industrial age, where the Cas-

82. Mehdiyoun, *supra* note 1, at 187.

83. See Sanei, *supra* note 40.

84. See Kepbanov *supra* note 2; See also Mehdiyoun, *supra* note 1, at 187 (stating that Turkmenistan understands and is not against Azerbaijan who has begun extensive work to exploit fields in the Caspian by creating an international consortium, but wants Azerbaijan to recognize the jurisdiction of Turkmenistan over certain oil fields).

85. See Kepbanov *supra* note 2.

86. *Id.*

87. *Id.*

88. *The Columbia Caspian Project: Oil and Environment Security in the Black and Caspian Seas* (Oct. 20, 1998) available at http://www.sipa.columbia.edu/RESOURCES/CASPIAN/env_p11.html (last visited April 2, 2003) (stating that the result of these leasing arrangements were a "spectacular boom" giving rise to the city of Baku as its visible monument – the fastest growing metropolitan center in the Russian Empire. The au-

pian was under exclusive control of tsarist Russia, the government leased oil-producing land to the highest bidder.⁸⁹ However, to fully understand the implications and necessity of leasing arrangements in the Caspian now, we must begin with the premise that there has been extensive American involvement in the Caspian region ever since the Soviet collapse.⁹⁰ For example, in September of 1994, the Azerbaijan International Oil Consortium signed an \$8 billion dollar, thirty-year contract to develop several promising oil fields in the Caspian.⁹¹ During that year, Azerbaijani President Aliiev had offered Iran a stake in this multibillion dollar international project, but later revoked the offer because of U.S. pressure to exclude Iran from the deal.⁹² Given the level of foreign participation that has already accumulated in the Caspian region, it is impossible to have a legal status that is *purely* determined by property division without focusing on certain rights that have been acquired over time by acquiescence in the region, rather than by express delegation and cooperation between the littoral states.⁹³

thor next asks a question that still remains, "which market should be primary for the Baku oil: Russia or the wide world?").

89. *Id.*

90. Sanei, *supra* note 40, at 708 (stating that "the United States and its political allies" hold the Caspian region as "the key to the realization of a long-term strategic agenda").

91. Papadopoulos, *supra* note 74, at 20, 23 (Stating that there has been increased participation of American oil companies in Caspian ventures that has led foreign policy in America to favor certain export routes over others. This led to American corporate involvement in the Azeri, Chirag, and Guneshli fields with the Azerbaijan International Oil Consortium. The U.S. has avoided Russian and Iranian territory and promoted other routes including the Baku-Supsa "western early oil" pipeline.).

92. See Peuch, *supra* note 39 (Stating that Iran had since accused Baku of being a "tool of Washington and its regional allies in Turkey and Israel." The article quoted Azerbaijan expert with the Moscow News, Sanobar Shermatova, who stated that Azerbaijan's decision to evict Iran from the deal marked a turning point in bilateral relations. "The problem is that Iran is quite isolated on the international arena. This is first of all due to its bad relations with the United States.").

93. Mizzi, *supra* note 3, at 495-96 (The article outlines what is referred to as the "Tragedy of the Commons": The littoral states share common resources that are the source of resource management problems and, at the same time, the potential basis for an economic agreement for common management. Azerbaijan, Kazakhstan and Turkmenistan share proprietary claims to common petroleum reserves and share the need to use petroleum export systems. Russia and Iran claim historical rights to the caviar and fisheries. In both situations, there is competition for a limited common resource that results in accelerated exploitation with no incentive for efficient management.

The Caspian is no longer a "sea" shared by two countries, nor a body of water under a legal regime possessed by five countries, but a cauldron of resources that is being exploited by an appreciable number of private corporations and countries throughout the world. A pure application of the rigid first and second approaches outlined above simply will not work. They simply do not account for the fact that there has been a drastic shift in the Caspian region's distribution of resources.⁹⁴

We further realize that the treaty history between Iran and the former Soviet Union speak mostly to navigation and fishing rights, and therefore cannot form the sole basis to a resolution in the area.⁹⁵ Nonetheless, in the quest to resolve the legal status of the Caspian, a fair, if not mutually agreeable, solution for all entities may be established if we incorporate a hybrid of either the first or second approaches above, but only in the context of the more flexible third approach.

IV. INCORPORATING LEASING ARRANGEMENTS

The introduction of a complex scheme of leasing arrangements into the dispute involving current Caspian projects is perhaps the only way to effectuate a flexible approach a multi-lateral resolution that will take into account years of unilateral exploitation.⁹⁶ The application of such a resolution benefits from hindsight to create a legal regime by and for the littoral states, which have been effected by over a decade of unilateral exploitation. The Caspian region's legal status is *sui generis* and ultimately hinges on the persisting differences in negotiating positions between the littoral states, rather than on obligations arising under any treaty or law.⁹⁷

Many of the arguments outlining differences in negotiating positions, even the less popular position of Iran, are subject to analysis that can contribute to a thorough examination and awareness of

Thus, the problem of the "tragedy of the commons" compliments the principle of transaction costs and holdouts in communal property ownership.).

94. See *id.*

95. Treaty of Commerce, *supra* note 14.

96. See Merzliakov, *supra* note 5.

97. Sievers, *supra* note 15, at 371-72 (stating that even if obligations did arise under the United Nations Convention on the Law of the Seas, only Russia had ratified such a position).

the current dispute in the Caspian region. Thus, to better establish economic consequences that give rise to differences between each littoral state's position, the most important task becomes establishing a comprehensive review of all projects currently undertaken in the Caspian, as well as all proposed projects. This would allow the appraisal of net worth on each current project used to exploit the Caspian.⁹⁸ Already the Caspian Environment Programme (CEP), developed in 1995, has built on more than a decade of meetings by policy makers and may even house the proper framework for this information in its Programme Coordination Unit and Caspian Regional Thematic Centers.⁹⁹

Next, an in-depth review of leasing arrangement possibilities must be analyzed with respect to current oil exploitation projects in disputed areas of the Caspian that are manifest to all parties.¹⁰⁰ Many projects may be operating in unquestioned sovereign territory.¹⁰¹ By stipulating to what these particular areas are, both short-term and long-term leasing arrangements between bordering countries can be reviewed with the ultimate goal of reaching a fair agreement subject to mutual cooperation by neighboring countries. The ultimate function of such arrangements is to provide a system that serves the interests of creating a legal regime over the Caspian re-

98. I will not use this note to go into the logistics of how net worth can be determined. It is enough to say that "net worth" is a complex definition as applied to current projects undertaken in the Caspian region and better left for more in depth analysis. It should be noted that the idea of sharing all revenue from current projects undertaken in the Caspian amongst the littoral states with a central regime was a concept first involved in Part XI of the 1982 Law of the Sea treaty. This idea was meant to apply to deep-sea development, but vetoed by Reagan Republicans; *see also* Michael Lelyveld, *Caspian: LUKoil Decision Unlikely To Affect Pipeline*, Radio Free Europe-Radio Liberty, available at <http://www.rferl.org/nca/features/2002/05/02052002085417.asp> (May 2, 2002) (stating that proponents and opponents of the Baku-Tibilisi Ceylan project use different figures to describe rate of returns in support of their decision to participate or decline. with respect to this project, the article describes a difference between using an "internal rate of return" and those measures yielding higher rates of 20% returns of "equity," also known as "net worth").

99. Sievers, *supra* note 15, at 374 (stating that the Caspian Regional Thematic Centers include Data and Information Systems and Legal, Regulatory, and Economic Instruments. the Caspian Environment Programme effort has an emphasis in regional cooperation, data management, environmental assessment and monitoring, and investment policy).

100. Lelyveld, *supra* note 52.

101. *Id.*

gion while allowing a compensating mechanism for countries that have had their rights violated by unilateral actions already taken in disputed areas by bordering states.

Finally, only after mapping out all current projects already undertaken in the Caspian and assessing leasing arrangements in the disputed sites between neighboring countries, proposed solutions such as the 20% equal-share application proposed by Iran, or the alternative equidistant division plan, can be reviewed and applied based on informed decisions.¹⁰² Thus, such proposals can be viewed objectively, but only after leasing arrangements account for current projects already undertaken in the Caspian region.

Once multilateral agreements were adopted, all operations in disputed areas of the Caspian region would be subject to a lease, but otherwise undisturbed. Of course, once a proposal for a legal regime was accepted by all littoral states, this would be binding and no one state could exploit resources outside its respective territorial limits without reaching an agreement with their neighboring state. This approach has the added benefit of bypassing the effects of unilateral sanctions that prevent Iran from participating in oil consortium projects.¹⁰³ Rather than being singled out and eliminated from these projects by its neighboring states because of western influence,¹⁰⁴ Iran can lease out its interest in the Caspian region.

Finally, it should be noted that incorporating leasing arrangements into the Caspian dispute also brings about an effective alternative to transaction costs that would otherwise be present in a communal rights system of division, Iran's more impracticable position on what the legal status of the Caspian should be.¹⁰⁵ Ulti-

102. Sanei, *supra* note 40, 804-05 (The author states 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 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 impracticability is magnified when the prospect of rich hydrocarbon reserves is introduced into the formula – one could imagine a situation where vague and undetermined ownership rights ultimately lead to chaos and possible military conflict." But, he then states that "[t]his does not [] mean that aspects of a condominium macro-model cannot effectively be incorporated into a new regime containing aspects of joint cooperation and management.").

103. McCary, *supra* note 38.

104. Flyfish UK, *supra* note 36.

105. EIA Document, *supra* note 31.

mately, a comprehensive scheme of leasing arrangements may be the only instrument capable of turning back the hands of time and placing all littoral states on an equal footing so to resolve the Caspian dispute.

V. CONCLUSION

The legal status of the Caspian has been a point of contention for over a decade now and the question still remains with almost as much uncertainty as it did before.¹⁰⁶ To date, many of the key issues have centered on debate in legal scholarship engendering the rigid choices of either (1) adhering to treaties signed by the former Soviet Union and Iran, or (2) choosing whether the Caspian is a body of water covered by the Law of the Sea Convention or governed by a "condominium approach."¹⁰⁷ Though there have been approaches that encompass less of a "brightline" methodology to resolving the Caspian dispute,¹⁰⁸ it is clear that few approaches, if any, offer mechanisms that reverse the great disservice to mutual cooperation that unilateral actions by the littoral states have created. Foreign influence ensures that certain littoral states remain isolated and ineffective in their influence over the Caspian region.¹⁰⁹ Yet, what remains clear is that there is no room for extra-territorial politics in the ultimate determination of what the legal status should be.¹¹⁰ Regional cooperation is still one of the only

106. See Caspian Law Document, *supra* note 28 (stating that the legal status of the Caspian has hindered, but not stopped, further development of the Sea's mineral resources).

107. *Id.*

108. *Id.* (acknowledging the need to develop a legal framework to resolve environmental and biological issues).

109. McCary, *supra* note 38.

110. It would be worthy at the time of writing this note to foreshadow what role the United States will play in light of "Operation Iraqi Freedom," but that is best left for other papers; *but see* Charles van der Leeuw, *Caspian ponders future amid anti-war sentiment*, Caspian Business News, available at <http://www.caspianbusinessnews.com/> (last visited Mar. 3, 2003) (Stating that the littoral states reacted differently to the bombing of Baghdad. Where one stray American missile was claimed to have hit an Iranian oil refinery, American sources hesitated to issue an apology. Instead, they stated that the matter would be investigated. Kazakhstan, however, continued to show firm support and commitment for the United States based on fundamental principles of "strategic partnership," in hopes of an equitable and mutually beneficial tie with that country.).

ways to bring back a legal regime to the Caspian.¹¹¹ With the proper framework for a legal system together with leasing arrangements serving as effective redistribution mechanisms, a flexible approach can be undertaken which will create a new legal regime for the Caspian over time, enforced by mutual agreement amongst all littoral states.

111. Dubner, *supra* note 11.

