Drilling for Black Gold: The Demarcation for Hydrocarbon Resources in the Caspian Sea

Ziyad Ziyadzade

Follow this and additional works at: https://chicagounbound.uchicago.edu/cjil

Part of the Law Commons

Recommended Citation
Available at: https://chicagounbound.uchicago.edu/cjil/vol16/iss1/12

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in Chicago Journal of International Law by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Drilling for Black Gold: The Demarcation of Hydrocarbon Resources in the Caspian Sea
Ziyad Ziyadzade*

Abstract

This Comment examines the division of oil and natural gas reserves in the Caspian Sea through the legal prism supplied by the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses. So far, the academic literature concerned with equitable apportionment of the Caspian’s hydrocarbon resources has attempted to tackle this issue through two generally accepted legal regimes. The first, commonly identified as the Law of the Sea, classifies the Caspian as a “sea” and divides the resources therein according to a strict, treaty-based framework, which produces an outcome disadvantageous to some of the littoral states. The second regime, customary international law, which identifies the Caspian as a “lake,” relies on an antiquated water-law principle and depends too much on the bilateral and unilateral initiatives of the littoral states as a means of resolving disputes. As this Comment demonstrates, both regimes have been ineffective in producing workable results or curbing the self-interested behavior of the littoral states. As such, instead of employing the two aforementioned legal regimes, this Comment explores the Caspian question using a novel legal framework that provides for a clear dispute-resolution mechanism and strikes a middle ground as to the individual states’ ownership rights in the Caspian Sea.

Table of Contents

I. Introduction............................................................................................................. 314
II. Geographical and Historical Background of the Caspian ............................ 315
A. Geography............................................................................................................. 315

---

* J.D. Candidate, 2016, The University of Chicago Law School. The author would like to thank the Chicago Journal of International Law, Professor Aziz Huq, and Professor Daniel Abebe for all their help and invaluable input.
B. History

1. The pre-Soviet and Soviet periods: Tsarist Russia and the Bolshevik Revolution

2. The post-Soviet period: a flurry of unilateral activity

III. Existing Proposals: The Law of the Sea and Customary International Law


A. Threshold Question of Applicability

B. Core Provisions

C. Applying the Watercourse Convention to the Caspian

V. Conclusion
I. INTRODUCTION

The Caspian Sea is the largest inland body of water in the world, "approximately the same length as the Great Lakes of North America" and "approximately the size of Japan." It contains plentiful oil and natural gas reserves, something explorer Marco Polo highlighted 700 years ago when "he wrote of 'a fountain from which oil springs in great abundance.'" As of 2013, the Caspian Sea was estimated to contain 48 billion barrels of oil and 292 trillion cubic feet of natural gas. It is also of geopolitical import to the U.S., as the division of the Caspian's borders implicates Iran's and Russia's energy and political interests. Given the rich natural resources as well as the lack of any clear territorial delineation, the Caspian littoral states have long disputed ownership over certain offshore resources contained within the Sea. For example, the Wikileaks cables show that in November of 2009, the Iranian government moved its new Alborz-Iran oilrig towards territorial waters disputed between Azerbaijan and Iran. As such, establishing clear demarcations within the Caspian Sea is all the more imperative to ensure equitable access to offshore hydrocarbon resources as well as peaceful and cooperative resolution of conflicts and disputes that have arisen between the littoral states.

So far, the academic literature has primarily focused on identifying the geographical status of the Caspian Sea and inferring the applicable legal regime based on that identification. However, as this Comment will demonstrate, this approach has largely been ineffective and too open-ended, thus unable to produce a clear and coherent result. Instead, this Comment will analyze the Caspian question through a different legal prism: the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (the Watercourse Convention). Section II will provide a brief geographical and historical background on the Caspian Sea, by charting the progression of the littoral states' respective positions and highlighting pertinent agreements and events. Section III will address the existing legal regimes that have been applied in the Caspian context, namely the law of the sea and

1 David N. Griffiths, What's in a Name? The Legal Regime in the Caspian Sea (or Lake), 23 OCEAN Y.B. 161, 163 (2009).
2 Kamyar Mehdiyoun, Ownership of Oil and Gas Resources in the Caspian Sea, 91 AM. J. INT'L L. 179, 179 (2000).
4 See Section II.A, infra.
5 Iran, Azerbaijan In Tense Caspian Standoff, Cables Show, EURASIANET.ORG (Oct. 4, 2011), http://www.eurasianet.org/node/64268.
6 See Section III, infra.
customary international law governing lakes, and conclude that neither one is likely to solve the long-standing disagreements. Next, Section IV will argue that the Watercourse Convention provides a useful and easily applicable framework for resolving current and future territorial disputes in the Caspian, a mechanism that the present legal framework lacks. In addition, the Watercourse Convention contains within it principles which do not depend on the kind of rigid geographical classification of the Caspian Sea that otherwise leads to biased and unworkable results.

II. GEOGRAPHICAL AND HISTORICAL BACKGROUND OF THE CASPIAN

A. Geography

The Caspian, consisting of 393,000 square kilometers of water, is bordered by five states: Azerbaijan, Iran, Turkmenistan, Russia, and Kazakhstan. Kazakhstan stretches along 30.8% of the coastline, Iran 18.7%, Russia 18.5%, Turkmenistan 16.8%, and Azerbaijan 15.2%. The Caspian lacks any direct outlet to an ocean, and it is only linked to the Black and Baltic Seas via the Volga River (and various tributaries). In addition to housing sturgeon—the source of around 90% of the world’s caviar market—the Caspian also contains oil and natural gas reserves. The United States Energy Information Administration (the EIA) estimates that “48 billion barrels of oil and 292 trillion cubic feet of natural gas [are contained] in proved and probable reserves in the wider Caspian basins area, both from onshore and offshore fields.” Most of these reserves are offshore or concentrated around the northern coast, with the majority of oil reserves located in the northern part of the Caspian and the largest quantity of natural gas reserves in its southern sector.

---

7 See Griffiths, supra note 1, at 163.
8 Mehdiyoun, supra note 2, at 179.
9 See id.
10 See Griffiths, supra note 1, at 163–64; see also United States Energy Information Administration [hereinafter EIA], Caspian Sea Region, at 8 (Aug. 26, 2013), available at http://www.eia.gov/countries/analysisbriefs/Caspian_Sea/caspian_sea.pdf (“The area has significant oil and natural gas reserves from both offshore deposits in the Caspian Sea itself and onshore fields in the Caspian basin.”).
11 EIA, supra note 10, at 8; see also, Griffiths, supra note 1, at 164 (“Much of this resource is below the seabed, which is why defining the maritime legal regime has become so contentious.”).
12 See EIA, supra note 10, at 8 (“41% of total Caspian crude oil and lease condensate (19.6 billion bbl) and 36% of natural gas (106 Tcf) exists in offshore fields.”).
13 See id. The EIA reckons that an extra 16.6 billion bbl of oil (35%) and 130 Tcf of natural gas (45%) are found onshore within 100 miles of the coast, and that 12 billion bbl of oil and 56 Tcf...
In terms of actual oil production, the Caspian basin produced around 3.4% of the world’s supply of crude oil in 2012—that is, an average of 2.6 million bbl/d (barrels per day) of crude and lease condensate. Although Kazakhstan’s onshore oil fields used to be the largest contributor to the region’s oil production, Azerbaijan’s offshore production has become increasingly important, mainly because of the development of its Azeri-Chirag-Guneshli field group from 2006 to 2008. Albeit less important to the economies of the littoral states, natural gas production is prominent in the region as well. Here, Azerbaijan and Kazakhstan are the primary actors: the former’s production occurs mainly offshore while the latter’s comes from its onshore fields. In turn, only 12% of Turkmenistan’s natural gas production comes from the Caspian Sea, whereas Iran and Russia, in addition to Uzbekistan, “have virtually no production in the Caspian area.” That said, the EIA suggests that future growth in the Caspian’s hydrocarbon production will come not from oil, but from the region’s natural gas reserves, in large part due to their “significant and dispersed nature.”

B. History

To fully understand the gradual progression of the five littoral states’ claims regarding their respective ownership rights in the Caspian Sea, in addition to unearthing the primary motivating force behind those arguments, a brief background summarizing important historical events and salient geopolitical changes surrounding the Caspian is warranted. Accordingly, this subsection will focus on three distinct periods in the Caspian Sea’s history: the pre-Soviet period, the Soviet period, and the post-Soviet period. As this subsection will demonstrate, the littoral states have, to this day, maintained largely divergent positions with respect to the delineation of hydrocarbon resources within the Caspian, a situation that can be explained by one simple factor: access to oil.

of gas are located onshore in the Caspian Sea basins, mainly in Azerbaijan, Kazakhstan, and Turkmenistan. Id.

14 Id. at 11 (“Around 35% of that came from offshore fields in the Caspian Sea, with the rest produced in onshore fields in the Caspian basins.”).

15 See id.

16 See id. at 14.

17 See id. (noting that “Azerbaijan and Kazakhstan contain the majority of oil resources in the Caspian basins”).

18 Id.

19 Id. Perhaps this conclusion is even more warranted in light of the recent drop in global oil prices. See, for example, The Economist explains: Why the oil price is falling, ECONOMIST (Dec. 8, 2014), http://www.economist.com/blogs/economist-explains/2014/12/economist-explains-4.
1. The pre-Soviet and Soviet periods: Tsarist Russia and the Bolshevist Revolution.

Since in the eighteenth century, only two states shared control over the Caspian region—Tsarist Russia and Iran (the then-declining kingdom of Persia).20 Beginning in the nineteenth century, Russia engaged in a series of wars with Persia, prompted by the former’s desire “to expand its territory southward.”21 All of these wars ended with the signing of treaties that, in general, “fixed the Russo-Persian land borders [and] regulated shipping rights in the Caspian.”22 The Golestan Treaty, which was signed by Tsarist Russia and the Persian Empire in 1813, “barred Iran from deploying its naval forces in the Caspian.”23 The Turkmenchay Treaty, signed in 1828, imposed similar limitations with respect to the “Persian naval presence on the Caspian.”24

This regime underwent a transformation after the Bolshevist Revolution of 1917.25 Worried about the possibility of additional foreign intervention, especially following the three-year civil war between the Bolshevists (the Reds) and the counter-revolutionary nationalists (the Whites), Lenin’s Communist government made an effort to “normalize relations” with Iran “and [to] encourage exclusion of foreign presence.”26 The 1921 Treaty of Friendship (the 1921 Treaty), signed between Iran and the Soviet Union, reestablished the naval rights that the 1828 Turkmenchay Treaty previously denied to Iran.27 The 1935 Treaty of Establishment, Commerce and Navigation afforded each party “the right to fish in its coastal waters up to a limit of ten nautical miles.”28 The 1940

20 See Griffiths, supra note 1, at 164.
21 Mehdiyoun, supra note 2, at 180.
22 Id. See also Griffiths, supra note 1, at 164 (noting three main treaties: Rasht (1729), Golestan (1813), and Turkmenchay (1828)).
23 Mehdiyoun, supra note 2, at 180.
24 Griffiths, supra note 1, at 164; see Mehdiyoun, supra note 2, at 180.
25 See Mehdiyoun, supra note 2, at 180.
26 Griffiths, supra note 1, at 164.
27 See id. (noting that the 1921 Treaty “addressed Russia’s concern about foreigners by prohibiting foreign forces, foreign military transit, or even officers and crew from ‘third powers’ aboard Persian ships”); BAHMAN AGHAI DIBA, THE CASPIAN SEA IN THE TWENTY-FIRST CENTURY 19 (2003) (“According to Article 11 of the 1921 Treaty, both sides should equally share the privileges of navigation in all parts of the Caspian Sea, and there was no restraint placed upon their nationals’ vessels.”); See also Cesare P. R. Romano, The Caspian and International Law: Like Oil and Water?, in THE CASPIAN SEA: A QUEST FOR ENVIRONMENTAL SECURITY 147 (William Ascher & Natalia Mirovitskaya eds., 2000) (“As one of the ideological tenets of the early revolution was the forsaking of imperialism and colonialism, [the 1921 Treaty] declar[ed] null and void the treaties of Gulistan and Turkomanchai.”).
Treaty Regarding Trade and Navigation (the 1940 Treaty) reaffirmed these equal navigational rights by requiring each party to treat the commercial vessels of the other as its own. The 1940 Treaty also included provisions from the 1921 Treaty that excluded foreign nationals from the Caspian.

In addition, the 1954 Agreement Concerning the Settlement of the Frontier ascertained “[t]he location of the Soviet-Iranian land borders” that had previously “remained unsettled.” This comprehensive boundary treaty did not, however, delimit the parties’ respective sea boundaries, partly due to the fact that the previous 1940 Treaty “had established a condominium principle of free and equal navigation beyond the ten mile fishing limit.” Attempting to remedy this discrepancy, the Soviet Union in 1970 “conducted the internal administrative exercise of dividing the Caspian” along the hypothetical “Astara-Hosseinqoli line” as per the equidistance principle. While there were no legally defined borders between the two parties in the Caspian Sea, Iran came to treat the Caspian as part of the “Russian sphere of influence” and did not venture north of the imaginary equidistant line.

---

29 See AGHAI, supra note 27, at 20 (“[A]rticles 12 and 13 of the [1940 Treaty] underscore in detail both parties’ equal and shared rights of navigation in the Caspian Sea.”); Griffiths, supra note 1, at 165 (“There were only two exceptions: a ten-mile exclusive fishing zone off each coast, and commitment to cabotage for coastal trade (Article 12.”); Mehdiyoun, supra note 2, at 180 (“They reaffirmed the 10-mile fishing zone in the Treaty of Commerce and Navigation of March 25, 1940.”).

30 See AGHAI, supra note 27, at 21 (“In the letters annexed to the 1940 Treaty between Iran and the USSR, the Caspian Sea is repeatedly referred to as ‘the Soviet-Iranian Sea.’”); Griffiths, supra note 1, at 165; Mehdiyoun, supra note 2, at 180 (“Beyond the 10-mile zone, fishing was allowed only to Soviet and Iranian nationals.”).

31 Griffiths, supra note 1, at 165.

32 See Mehdiyoun, supra note 2, at 180–81.

33 Griffiths, supra note 1, at 165.

34 Id. (internal quotation marks omitted). The Soviet government arrived at the “Astara-Hosseinqoli” line by pinpointing the location of its land boundaries with Iran: on the west, Iran and the Azerbaijani Soviet Socialist Republic—part of the Soviet Union—met at the coastal town of Astara; on the east, Iran and the Turkmenistan Republic met near Hosseinqoli. Id.

35 In general, the equidistance principle postulates that the states’ maritime boundaries ought to be determined according to a median line that is equidistant from the neighboring states’ shores. See generally Nugzar Dundua, Delimitation of Maritime Boundaries Between Adjacent States, available at http://www.un.org/depts/los nippon/unnff_programme_home/fellows_pages/fellows_papers /dundua_0607_georgia.pdf.

36 See AGHAI, supra note 27, at 20 (noting that “[t]he two concerned countries had in no way delimited their sea borders in any legal manner”).

37 AGHAI, supra note 27, at 25; Griffiths, supra note 1, at 165–66 (explaining that Iran accepted that there were no territorial waters within the Caspian except for the ten-mile fishing limit).
The mutual understanding between the Soviet Union and Iran in regards to the exploitation of hydrocarbon resources was far less concrete. In practice, Iran did not actively participate in oil or natural gas production.\textsuperscript{38} One of its laws, passed in 1949, “effectively asserted [Iran’s] national jurisdiction over the natural resources of the seabed and subsoil of the continental shelf in the Persian Gulf and the Gulf of Oman,” but remained “silent” with respect to those located in the Caspian Sea.\textsuperscript{39} Further, “[t]here is no evidence that the Soviet Union ever consulted Iran on its Caspian oil operations.”\textsuperscript{40} However, as the following subsection demonstrates, this regime experienced a radical change in the face of the eventual breakup of the Soviet Union in 1991.\textsuperscript{41}


The 1991 breakup of the Soviet Union significantly complicated matters by “multipl[y]ing] existent competing interests.”\textsuperscript{42} On December 8, 1991, the founder states of the Soviet Union—the Soviet Socialist Republics of Belarus, Ukraine, and the Russian Federation—signed the Minsk Agreement, signifying the political end of the Soviet Union.\textsuperscript{43} These countries also established the Commonwealth of Independent States (the CIS), a regional organization designed to mitigate numerous problems regarding state succession,\textsuperscript{44} including

\textsuperscript{38} See AGHAI, supra note 27, at 25 (“The Iranian government did not have any active program for exploration and exploitation of oil and gas resources in the Caspian Sea, while in the Russian side, especially Azerbaijan, they have been exploiting the oil resources on a large scale for the last [fifty] years.”).

\textsuperscript{39} Mehdiyoun, supra note 2, at 181. Although the intent of the Iranian legislature is unclear, one scholar has suggested that the Iranian lawmakers attempted to avoid sharing the Caspian with its more technologically superior neighbor, which is why they never mentioned the 1940 Treaty in the 1949 law and thus refused to apply its principles to divide the Caspian’s continental shelf and subsoil hydrocarbon resources. See id. (“According to the then [Iranian] deputy director of the Iranian Foreign Ministry’s Institute of Political and International Studies, the legislative intent was to distinguish the Caspian legal regime from those of other bodies of water.”).

\textsuperscript{40} Id. at 182. Although Iran viewed such Soviet behavior as a breach of the “common seas” principle embodied in the 1940 Treaty, it nevertheless did not raise any diplomatic objections for fear of “antagoniz[ing] its powerful northern neighbor.” Id.

\textsuperscript{41} See Section II.B.2., infra.


\textsuperscript{43} See id. at 247.

\textsuperscript{44} See id. See also 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, 697 (2001) (noting that the creation of the CIS “caused a regional power vacuum, with major ‘external powers’ including Iran, Turkey, and the United States, seeking to exert political, economic, and cultural influence over the new vulnerable states”). For a detailed account of the resultant “power vacuum” and its geopolitical implications, see id. at 697–710.
the question of “delimiting the boundaries of the new international subjects, as well as . . . of the predecessor State,” that is, the Russian Federation.\footnote{45}{See Gramola, \textit{supra} note 42, at 260.}

Instead of two, five states now surrounded the Caspian Sea (Iran and Russia, in addition to Azerbaijan, Kazakhstan, and Turkmenistan, the three former members of the Soviet Union). This multiplication of interests gave way to novel, more complicated geopolitical circumstances. Each state began assuming its own idiosyncratic position with respect to the Caspian, which in turn resulted in the formation of two main politico-ideological camps.\footnote{46}{See Griffiths, \textit{supra} note 1, at 166.} On the one hand, Russia and Iran agreed to maintain the “condominium regime” established by the prior Soviet-Iranian treaties.\footnote{47}{See Andrei Volodin, \textit{The International Politics of Energy in the Caspian Sea Basin: Russia, Turkey and the Pipeline Project}, in \textit{THE CASPIAN SEA: A QUEST FOR ENVIRONMENTAL SECURITY} 139 (William Ascher & Natalia Mirovitskaya eds., 2000) (“According to the condominium regime, only a costal strip [twenty-five] meters in depth belongs to the neighboring territory, and main water resources are administered by general consent.”). \textit{See also} Romano, \textit{supra} note 27, at 149 (claiming that “the condominium thesis has gradually lost credibility as all Caspian states, Russia included, since the break-up of the USSR have done very little to behave as actual joint-owners”) (emphasis in original).} On the other hand, Azerbaijan, Kazakhstan, and Turkmenistan all claimed that the Caspian ought to have been divided, or “partitioned,” among the five littoral states\footnote{48}{See Romano, \textit{supra} note 27, at 149; Griffiths, \textit{supra} note 1, at 166.} and questioned the legitimacy of the past Soviet-Iranian treaties under the 1978 Vienna Convention on Succession of States in Respect of Treaties.\footnote{49}{Vienna Convention on Succession of States, Aug. 23, 1978, 1946 U.N.T.S. 3. Under the Vienna Convention, the common rule is that treaties signed by predecessor states bind newly independent states. However, there is an important exception in Article 34, paragraph 2, which provides that the rule does not apply “if the states concerned otherwise agree; or it appears from the treaty or is otherwise established that the application of the treaty would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.” \textit{Id.} art. 34, \S 2(a)-(b).} The formation of these two ideological camps notwithstanding, what ensued was “a confusing panorama of unilateral initiatives, shifting alliances, and consequent disputes.”\footnote{50}{Griffiths, \textit{supra} note 1, at 166; \textit{see also} EIA, \textit{supra} note 10, at 5 (“Because the countries could not agree unanimously on the Caspian’s legal status, the coastal countries operate[d] in a mix of unilateral and bilateral actions, based on differing economic and political interests.”).} The following paragraphs will evaluate and explore in greater detail the littoral states’ evolving arguments vis-à-vis their respective ownership rights within the Caspian Sea.
After the breakup of the Soviet Union, the Russian Federation assumed the USSR's position as its legitimate successor. In the international space, this meant that Russia argued for the application of the 1921 and 1940 Soviet-Iranian treaties to the Caspian question. In particular, Russia claimed that because the Caspian was a landlocked body of water, extant international norms, such as the law of the sea, did not apply to it. Instead, Russia argued that what governed the Caspian was the condominium principle enshrined in the 1921 and 1940 Soviet-Iranian treaties, according to which exploration and exploitation of hydrocarbon resources were to be jointly shared among the littoral states. Moreover, the Russian government contended that all of the successor states were bound by these agreements in part because they inherited the obligations of the former common state, that is, the Soviet Union. Some scholars have criticized Russia's initial approach, claiming that its focus on the "obsolete" Soviet-era treaties was ill suited to address the resulting post-Soviet legal vacuum as well as the "key issues of regional security, trade and communication among Caspian states."

Eventually, the above mentioned legal position of the Russian government changed when its Ministry of Fuel and Power began assisting Azerbaijan in the country's negotiations with Western oil companies. First, in November of 1996, Russia "propos[ed] a hybrid plan that combined Azerbaijan's position, calling for national sectors in the Caspian, with Iran's and Russia's positions in support of shared use and ownership," such that each state would possess "national sovereignty over the mineral resources within forty-five miles of [its] coast, with the middle area to be left for joint development." Second, in February of 1998, Russia capitulated to the powerful oil interests within its

---

51 See AGHAI, supra note 27, at 32 (noting that Russia "assumed the seat of the USSR in the United Nations . . ., accepted the debts of the former Soviet regime, [and] declared it was fully committed to the 1921 and 1940 treaties").
52 See id. at 32–33.
53 See Mehdiyoun, supra note 2, at 185.
54 See AGHAI, supra note 27, at 32–33; Mehdiyoun, supra note 2, at 185.
55 See Mehdiyoun, supra note 2, at 185–86. As an example of this position, in 1994, the Russian Ministry of Foreign affairs, in response to Azerbaijan's ongoing negotiation of an $8 billion deal with a Western consortium of oil companies, sent a letter to the United Nations Secretary-General threatening that Russia would take all the necessary steps to restore and maintain the legal order in the Caspian Sea. See id. at 185.
56 Romano, supra note 27, at 148. See also id. ("Indeed, there are not many treaty-based or customary rights and duties that could be carried over to the successors, while those few that can be transmitted are patently inadequate to answer the challenges of the twenty-first century.").
57 See Mehdiyoun, supra note 2, at 186.
58 Id. (noting also that Azerbaijan never subscribed to this compromise). This hybrid plan was also known as the "modified medial line (MML) principle." Griffiths, supra note 1, at 168.
government and declared its support for sectoral division of the entire Caspian seabed. In line with this stance, the Russian government signed two new agreements: one with Kazakhstan in July of 1998, to which Iran and Turkmenistan objected, and another with Azerbaijan in January of 2001. Although this move represented a “significant development towards the genesis of a modern Caspian legal regime,” it left open the issue of enforcement and “also which rights each Caspian state [would] accord itself and the other within its area.”

Similar to Russia’s stance, Iran’s initial position “was more or less based on the validity of the 1921 and 1940 treaties.” “Because of [the Caspian’s] unique geographical characteristics,” Iran’s argument went, the international rules and norms regarding seas were “not applicable to it.” Rather, the 1921 and 1940 Soviet-Iranian treaties controlled. In practice, this meant that the littoral states would have to use the Caspian’s hydrocarbon resources on a shared basis, at least until they could come up with a new controlling multilateral legal regime. However, due to Russia eventually shifting its view and Azerbaijan’s increasing recalcitrance with respect to the “shared ownership” proposition, Iran changed its position as well. In September of 1998, Iran officially declared its support for dividing the Caspian into five sectors, with the caveat that such division

59 See Mehdiyoun, supra note 2, at 187.
60 See id.
61 See Griffiths, supra note 1, at 168.
62 See id. at 169. The Kazakhstan agreement divided the northern part of the Caspian seabed based on the equidistant lines. See Mehdiyoun, supra note 2, at 187. It is worth noting that the two agreements did not apply to Caspian waters.
63 Romano, supra note 27, at 149, 150.
64 AGHAI, supra note 27, at 34.
65 Mehdiyoun, supra note 2, at 182. Iran’s argument of course ignored the fact that the Caspian is not completely landlocked and could indeed be classified as a sea. See the discussion in Section III, infra.
66 See Mehdiyoun, supra note 2, at 182.
67 See id. (“The intent of the parties . . . to own and use the Caspian on a shared basis can readily be seen from the repeated references in the Treaties to the Caspian as a ‘Soviet-Iranian sea.’”). In an effort to arrive at such a common legal regime, the Iranian government in 2004 proposed the creation of the Caspian States Cooperation Organization, which was rejected by the other littoral states. See Griffiths, supra note 1, at 170.
68 See Mehdiyoun, supra note 2, at 183.
apply both to the Caspian waters and seabed and delimit 20% shares for each littoral state.70

Azerbaijan has maintained a stance on the Caspian Sea’s boundaries that is completely divergent from Russia and Iran’s, although it is unclear what exact geographic classification it has chosen to support its position.71 In short, Azerbaijan wanted to achieve a complete sectoral division of the Caspian—including its waters and seabed—based on the equidistant line.72 First, Azerbaijan claimed that it was not bound by the 1921 and 1940 Soviet-Iranian treaties.73 Second, Azerbaijan argued that even if the Soviet-Iranian treaties applied, they did not govern the exploration and exploitation of hydrocarbon resources, only fishing and navigation.74 Third, the Azeris contended that state practice prior to 1991 validated their overall position of delineating the Caspian according to national sectors.75

Economic considerations largely explain Azerbaijan’s position. Were the Caspian Sea divided as Azerbaijan claims it should be, some of the biggest oil and natural gas reserves found in the Caspian would be under Azerbaijan’s sovereign control.76 This outcome would not only attract much-desired foreign investment into Azeri oil projects, but would also exclude the Iranian

69 See id.
71 Compare Sergei V. Vinogradov, The “Tug of War” in the Caspian: Legal Positions of the Coastal States, in THE CASPIAN SEA: A QUEST FOR ENVIRONMENTAL SECURITY 197 (William Ascher & Natalia Mirovitskaya eds., 2000) (“Azerbaijan treats the Caspian Sea as an ‘international or boundary lake,’ the floor and the superjacent waters of which should be divided . . . into zones under [the littoral states’] complete control in accordance with the sectoral principle.”), with Sani, supra note 44, at 755 (claiming that Azerbaijan has abided by the principles of the law of the sea, “recognizing [that] the existence of territorial seas and exclusive economic zones should apply to the Caspian”). Regardless of the geographic classification, the end result is very similar, if not the same, as the following paragraphs demonstrate.
72 See Mehdiyoun, supra note 2, at 183.
73 In support of this argument, Azerbaijan cited the principle of “rebus sic stantibus”—or fundamental change in circumstances—as well as the principle of “clean slate,” which postulates that newly-independent states can shape their own future post-colonization. See Aghai, supra note 27, at 39.
74 See Aghai, supra note 27, at 39; Mehdiyoun, supra note 2, at 183.
75 See Mehdiyoun, supra note 2, at 183 (noting that an inter-republic division based on the imaginary “Astara-Hosseinqoli” line of the Caspian into a Soviet zone and then into smaller zones “was approved by Russian Prime Minister Viktor Chernomyrdin in 1993, two years after the breakup of the Soviet Union”). In addition, Azerbaijan emphasized the fact that it has been “exploiting Caspian oil resources since [sic] long time [sic] ago, and Iran, as the only other party to those treaties has never objected to the existing practice.” Aghai, supra note 27, at 39.
76 See Mehdiyoun, supra note 2, at 184.
government from any decision-making process, a result that the U.S. government has fully supported. As part of its unilateral effort, in February of 1998, Azerbaijan reached a general agreement with Turkmenistan on the division of the Caspian seabed, though they still disagree about how exactly the equidistant lines should be drawn.

Kazakhstan has treated the Caspian as an enclosed sea, arguing that the rules and principles of the law of the sea should determine the governing legal regime. Two main arguments have underlined Kazakhstan’s position: first, each of the littoral state’s borders should include a territorial sea extending up to twelve nautical miles; second, the remainder of the Caspian should be divided into exclusive economic zones. Like with Azerbaijan’s position, such delimitation would bolster Kazakhstan’s access to hydrocarbon resources, granting it control over “approximately 113,000 km of the Caspian surface.”

However, due in large part to geopolitical and geographic reasons, Kazakhstan has also been willing to compromise. A landlocked state with no access to the high seas except via rivers and canals flowing across Russia’s territory, Kazakhstan “is almost completely dependent on transit through Russian territory, which weakens its bargaining position vis-à-vis Russia.” This consideration explains why Kazakhstan was willing to enter into an Agreement with Russia in 1998, which delimited the northern portion of the Caspian Sea with respect to subsoil and mineral resources.

---

77 See id. The gravity of the Caspian question’s geopolitical consequences became apparent when, in September of 1994, the Azeri government angered both Russia and Iran by signing the “Contract of the Century,” which “issued licenses to a consortium of Western oil companies for exploration and development of offshore oil fields that it considered to be within its own jurisdiction.” Griffiths, supra note 1, at 166.

78 See Mehdiyoun, supra note 2, at 184-85; EIA, supra note 10, at 8 (“Azerbaijan and Turkmenistan both claim the Serdar (Turkmenistan)/Kyapaz (Azerbaijan) field, originally discovered in 1959 by Azerbaijani geologists.”).

79 See Vinogradov, supra note 71, at 197 (noting that these principles include “those relating to the establishment of a territorial sea, an exclusive economic zone and a continental shelf by each coastal state”); see also Mehdiyoun, supra note 2, at 187 (“Accordingly, Kazakhstan supports the establishment [] of internal and territorial waters and an exclusive economic zone.”). For a more detailed discussion of the principles of the law of the sea, see Section III, infra.

80 See Sanei, supra note 44, at 756.

81 Id.

82 Vinogradov, supra note 71, at 197 (claiming that Azerbaijan does not share Kazakhstan’s predicament because it “has at least one route—through Georgia—not controlled by Russia” and “can effectively use oil transit, and transit revenues, through Russia as a ‘carrot’”).

83 See the discussion supra note 62. See also Sanei, supra note 44, at 756–57 (“Kazakhstan has taken a very careful position on the status of the Caspian because it does not want to escalate conflict with Moscow.”).
Drilling for Black Gold

Turkmenistan, on the other hand, has been less exact and more ambiguous in its argumentation. It essentially pioneered unilateral activity among the five littoral states when, in 1992, it passed a law “extending its ten-mile coastal zone out to twelve, and identifying its southern terminus at the Astara-Hasanqoli line [as] a maritime boundary,” meaning, as its “maritime economic zone.”

Moreover, like Azerbaijan, Turkmenistan decided to issue its own licenses to Western oil companies in 1997. This international tender was ultimately unsuccessful due in large part to its “politicized nature” and because of Turkmenistan’s ongoing territorial dispute with Azerbaijan over two oil fields in the Caspian. Finally, in addition to the general agreement reached with Azerbaijan in February of 1998, Turkmenistan signed a similar agreement with Kazakhstan in March of 1997, dividing the Caspian into sectors by the use of equidistant lines.

As evident, the driving force behind the littoral states’ numerous and, at times, contradictory unilateral and bilateral actions was, and still is, of course, access to oil and natural gas reserves. Azerbaijan, Turkmenistan, and Kazakhstan—the states closest to the largest oil fields—have advocated for some type of a sectoral partition. Contrarily, Russia and Iran, whose coasts are farther away from these oil and gas deposits, initially argued for a shared-ownership regime, eventually acquiescing to the demands of their counterparts albeit with significant qualifications and caveats. The resulting current positions of the littoral states can be summarized as follows. First, Russia, Kazakhstan, and Azerbaijan seem to be in agreement over the sectoral divisions of the Caspian in its northern part, “which encompasses sovereignty over all resources on and below the surface waters and the seabed.” Second, it could be said that

84 Griffiths, supra note 1, at 166.
85 Mehdiyoun, supra note 2, at 187.
86 See Griffiths, supra note 1, at 167.
87 Vinogradov, supra note 71, at 198.
88 See Mehdiyoun, supra note 2, at 185 & n.59 (mentioning the Kyapaz/Serdar oil field as one of the oil fields disputed by Azerbaijan and Turkmenistan). See also Vinogradov, supra note 71, at 198 (claiming that Turkmenistan’s “international tender for developing seabed blocks off its Caspian cost” failed because it “put on offer the disputed Serdar oilfield”).
89 See the discussion supra note 78.
90 See Mehdiyoun, supra note 2, at 187. For an extensive list of other bilateral initiatives, see Ilias Bantekas, Bilateral Delimitation of the Caspian Sea and the Exclusion of Third Parties, 26 INT’L J. MARINE & COASTAL L. 47, 52–54 (2011).
91 See Romano, supra note 27, at 149.
92 See id.
93 Bantekas, supra note 90, at 54. The only disagreement here is Russia’s stance vis-à-vis the delineation of the Caspian waters. See the discussion supra note 62.
Azerbaijan, Kazakhstan, and Turkmenistan generally agree on the notion that the Caspian ought to be divided based on the equidistant-lines principle, although they still seem to disagree on the particular way of drawing such a line. See Mehdiyoun, supra note 2, at 187. But see Griffiths, supra note 1, at 176 (noting that Turkmenistan is in support of the MML division until the Caspian states reach an agreement on a controlling regime and has actually backed Iran’s plan).

Third, Iran appears to be an outlier: as stated earlier, its “government has petitioned for equal division by giving each country only [20%] of the sea floor and surface of the Caspian.” Further, Iran’s position, although similar to Russia’s, differs with respect to the division of the Caspian waters: Russia has refused to apply the sectoral delineation principle to the Caspian waters, while Iran takes a 20%-share view on division of both the Caspian waters and the seabed.

III. EXISTING PROPOSALS: THE LAW OF THE SEA AND CUSTOMARY INTERNATIONAL LAW

Given the emergence of these divergent positions, it is unsurprising that much of the academic literature about the Caspian Sea has been concerned with identifying the legal system that is to govern the body of water and the disputes arising therefrom. Commentators have noted the salience of this project as a means to ensure that the resulting regime “takes into account [the Caspian’s] characteristics and history, and... serves the diverse needs as well as the common interests of the people along its shores.” The need for a resolution is further amplified because the unilateral acts in question are in conflict with precepts of international law. For instance, the International Court of Justice (the ICJ) has stated that “[n]o maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States” and that “[s]uch delimitation must be sought and effected by means of agreement.” This section will provide a brief overview of the academic framework that has attempted to resolve the Caspian disputes and highlight the existing paradigm’s shortcomings.

94 See Mehdiyoun, supra note 2, at 187. But see Griffiths, supra note 1, at 176 (noting that Turkmenistan is in support of the MML division until the Caspian states reach an agreement on a controlling regime and has actually backed Iran’s plan).
95 EIA, supra note 10, at 5; see also the discussion supra Section II.B.2.
96 See, for example, Griffiths, supra note 1; Julie M. Folger, A Proposal to End the Stalemate in the Caspian Sea Negotiations, 18 OHIO ST. J. DISP. RESOL. 529 (2003); Barry Hart Dubner, The Caspian: Is It a Lake, a Sea or an Ocean and Does It Matter? The Danger of Utilizing Unilateral Approaches to Resolving Regional/International Issues, 18 DICK. J. INT’L L. 253 (2000).
97 Vinogradov, supra note 71, at 198–99 (“Without co-operative resource management, unrestrained competition will lead to inefficient exploitation and a ‘tragedy of the commons.’”).
98 See Alexandre N. Vylegjanin, Basic Legal Issues of the Management of Natural Resources of the Caspian Sea, in THE CASPIAN SEA: A QUEST FOR ENVIRONMENTAL SECURITY 166 (William Ascher & Natalia Mirovitskaya eds., 2000)
99 See id. at 167 (citation omitted).
In general, there are two well-established legal regimes that have been used to address the long-standing territorial disputes regarding the Caspian. Which one applies hinges on the geographical classification of the Caspian Sea itself. If the Caspian is classified as a “sea,” the United Nations Convention on the Law of the Sea (UNCLOS or the Convention on the Law of the Sea) governs the regime. If the Caspian is instead classified as a “lake,” then customary international law (broadly defined) governs the regime.

With approximately 135 signatories, UNCLOS was drafted with the intention of “resolving problems that may develop with regard to jurisdiction in ocean and maritime environmental situations that could arise during the exploration of various regions.” Article 122 of UNCLOS defines a “sea” as a “gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting . . . of the territorial seas and exclusive economic zones of two or more coastal States.” The initial question of UNCLOS’s applicability to the Caspian Sea has not been fully settled in the academic literature. One commentator has suggested that the Caspian, by itself, fits the UNCLOS definition of a “sea,” given that it is linked to the Black Sea via the Don-Volga canal. Another commentator, however, has argued that having no “internationally navigable outlet” or any other connection to one of the world’s oceans, the Caspian does not fall within the UNCLOS definition and is neither an “enclosed sea” nor an “international lake.”


101 Unlike the regime under UNCLOS, the current customary law regime that governs lakes and waterways is far less uniform and more context-specific: for starters, there is no single extant international legal document that applies to such waters. See Griffiths, supra note 1, at 182.

102 Folger, supra note 96, at 539. As of October 3, 2014, among the five littoral states, only Iran and Russia had ratified UNCLOS. See Chronological Lists of Ratifications of, Assents to and Successions to the Convention and the Related Agreements As at 3 October 2014, Oceans & Law of the Sea (Oct. 3, 2014), available at http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.html#. But they are also the only ones to advocate that the Caspian not be classified as a “sea.” See, for example, Mehdiyoun, supra note 2, at 182–83, 185–87; see also Griffiths, supra note 1, at 179–80 (“The reasons . . . are primarily to do with the issue of maritime boundary delimitation and its impact on the offshore hydrocarbon resources, and the desire to limit unwanted foreign presence.”).

103 UNCLOS, supra note 100, art. 122.

104 See Dubner, supra note 96, at 277–78 (“The canal also permits the accidental introduction of the exotic species from the Black Sea, via ballast waste discharge from the world’s waters.”).

105 See Folger, supra note 96, at 539–40 & n.47 (reasoning that “(1) for centuries, the countries surrounding the Caspian have exercised exclusive control over its use; (2) it has no internationally navigable outlet; (3) it has no contact with the world’s oceans; and (4) the only navigable outlets are long inland Russian waterways that cannot be used without Russian permission”) (internal
Notwithstanding the abovementioned question of applicability, the intended results of applying the Convention on the Law of the Sea could be summarized as follows. Under the "sea" classification, UNCLOS would confer "a twelve-mile territorial water zone followed by a two-hundred mile exclusive economic rights zone" based on the equidistant line. Turkmenistan and Azerbaijan, for example, would end up having exclusive access to the offshore hydrocarbon resources, to which Iran would not have access. Thus, the UNCLOS regime would create national sectors based on equidistant division of the natural resources. Further, each littoral state would exercise its "right to explore, exploit, conserve, and manage" the hydrocarbon resources within the designated exclusive economic zone.

On its face, UNCLOS provides an easily applicable and efficient legal framework that may very well counteract the flurry of bilateral agreements and unilateral initiatives among the five littoral states. In addition, UNCLOS provides for a dispute-resolution mechanism. That said, the fact that only two of the littoral states—Iran and Russia—are parties to UNCLOS, coupled with Iran’s desire to have the Caspian Sea classified as a lake rather than a sea, diminishes the likelihood that UNCLOS will actually give way to a consistent, unanimous legal regime. Although the littoral states could certainly use UNCLOS as a framework to structure future negotiations, the default position, or the starting point, seems to weigh heavily against Russia and Iran’s positions. To reiterate, UNCLOS confers on each littoral state a twelve-mile territorial sea and an exclusive economic zone drawn upon the equidistant line; Russia and Iran, on the other hand, oppose such "pure sectoral sovereignty," with the former advocating for joint control of the Caspian waters, and the latter rejecting the equidistance principle itself. In other words, UNCLOS’s applicability rests on a strict classification of the Caspian that produces a result unfavorable to the interests of both Russia and Iran, the two countries that, as stated above, are the only ones among the five littoral states that have actually adopted UNCLOS. At

quotation marks omitted). But even if the Caspian does not meet the strict definition, which in turn means that the five littoral states cannot be forced to abide by UNCLOS’s terms, they are still free to use UNCLOS as one of the "established frameworks to guide their negotiations." Id. at 537.

---

106 Id. at 538; see also EIA, supra note 10, at 5.
107 See EIA, supra note 10, at 5.
108 See Folger, supra note 96, at 540.
109 See Sanei, supra note 44, at 801.
110 See id. at 795–801 (outlining the many ways UNCLOS could apply to the Caspian Sea).
111 See UNCLOS, supra note 100, art. 287.1.
112 See Griffiths, supra note 1, at 179–81.
113 See Sanei, supra note 44, at 765–66.
the same time, the case for UNCLOS's mandatory application is rather weak. This all means that a productive dialogue within its legal framework is less likely to take place.

The systems that govern international lake boundaries under customary international law are in turn determined by the use of bilateral and multilateral agreements and the principle of *res communis*, or the condominium approach. Under this regime, precedent—both judicial and historical—is highly valued as well. Despite its seeming elegance, however, the application of customary international law is less likely to make a difference in the current situation. First, as already outlined, Russia and Iran—the two states that initially advocated for shared ownership of the Caspian—have largely abandoned their support for the condominium approach, while the other three states never supported the approach to begin with. What is more, one commentator has noted that "the history of the littoral states' practice in the Caspian weakens the argument that the Soviet Union and Iran [ever] regarded the Caspian as a common sea." Second, the application of the condominium approach is simply impractical, for it entails a complete joint ownership of surface and seabed resources, an outcome that the majority of the littoral states are unlikely to favor. Third, relevant historical precedent, which mainly consists of various states bordering lakes, seas, and other bodies of water agreeing to negotiate with each other and

---

114 See Griffiths, supra note 1, at 180–81.

115 *See id.* at 801, 802 ("The principle of *res communis* or condominium may be thought of as a doctrinal outgrowth of the commonage principle of the laws of the sea."). In the Caspian context, *res communis* assumes three chief arguments: (1) the 1940 Treaty defines the Caspian's current status pursuant to the condominium regime; (2) as a unitary ecosystem, the Caspian requires common environmental protection; and (3) international case law and precedent have used and applied the condominium approach in delineating the boundaries of other lakes. *See id.* at 802.

116 *See Griffiths, supra note 1, at 183–85* (discussing the *Great Lakes* precedent and its applicability in the Caspian context); Folger, *supra* note 96, at 549–50 (same); Sanei, *supra* note 44, at 803 (discussing the Lake Constance precedent). *See also* Sanei, *supra* note 44, at 805 (claiming that the use of *res communis* by way of judicial precedent, such as the ICJ's decision in the *Gulf of Fonseca* case, is not as valuable because "none of the peculiarities of [that case] seem to exist in the Caspian Sea case"). For an example of applicable judicial precedent, see Land, Island and Maritime Frontier Dispute (El Sal. v. Hond., Nicar. intervening), 1992 I.C.J. 351 (Sept. 11).

117 *See the discussion supra Section II.B.2.*

118 Sanei, *supra* note 44, at 804 (classifying as one example of this historical incongruity the Soviet Union's exploitation of the Caspian's oil and gas reserves off Baku's cost without first acquiring the consent of Iran).

119 *See id.* at 805 ("This impracticality is magnified when the prospect of rich hydrocarbon reserves is introduced into the formula—one could easily imagine a situation where vague and undetermined ownership rights ultimately lead to chaos and possible military conflict.").
establishing some form of a dispute resolution mechanism,\textsuperscript{120} is highly unlikely to matter. After all, it is precisely through attempted negotiations as well as liberal use of bilateral agreements and unilateral actions that the five Caspian states have managed to reach the current impasse. A peaceful and voluntary resolution of the boundary disputes is certainly desirable, but judging from the present climate and the history of disagreement among the five littoral states, such a result will not be achieved absent some extraneous framework.\textsuperscript{121} Thus, a new legal regime is imperative if the littoral states are to move beyond the deadlock. This is where the Watercourse Convention comes in.


A. Threshold Question of Applicability

At the outset, it bears noting that the Watercourse Convention (the Convention)\textsuperscript{122} has not generally been applied to the Caspian case in the legal academic literature, which could partially be explained by its relative youth.\textsuperscript{123} Also worth noting is that the Convention, on its face, may not literally apply in the Caspian context because of the specific way it defines a “watercourse.”\textsuperscript{124} According to Article 2(a) of the Convention, a “watercourse” is “a system of surface waters and groundwaters constituting by virtue of their physical

\textsuperscript{120} See, for example, Folger, supra note 96, at 552–53 (noting the example of Lake Constance as “demonstrat[ing] the necessity not only of establishing good diplomatic relations among the littoral states, but also of setting the groundwork for dispute resolution mechanisms that can be used in the future to resolve other disputes”).

\textsuperscript{121} It is worth noting that in 2003, the five littoral states did enter into a multilateral agreement, called the Framework Convention for the Protection of the Maritime Environment of the Caspian Sea, which aims to improve the environmental conditions in the Caspian basin. See generally Barbara Januzs, *The Framework Convention for the Protection of the Marine Environment of the Caspian Sea*, 4 *Chinese J. Int’l L.* 257 (2005). However, this agreement does not address the territorial delineation within the Caspian Sea or the respective claims of the five littoral states as to the hydrocarbon offshore reserves.


\textsuperscript{123} The Convention took full effect in August of 2014 after Vietnam became the thirty-fifth state to ratify it. See *Status of the Watercourse Convention*, International Water Law Project (May 22, 2014), available at http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html. None of the five Caspian states is a signatory to the Convention.

\textsuperscript{124} But see Romano, supra note 27, at 152 (“The definition of international watercourse provided by the Convention is malleable enough to accommodate the Caspian.”).
relationship a unitary whole and normally flowing into a common terminus.” From the plain meaning of the definition, it might seem that the drafters conceived of a watercourse as containing a non-static body of water as opposed to a stationary, semi-enclosed lake or a sea. However, in its Draft Articles on the Law of Non-Navigational Uses of International Watercourses (the Draft Articles), the International Law Commission (the ILC) provided a more detailed explanation behind this definition that suggests otherwise. It states:

The term “watercourse” is defined as a “system of surface waters and groundwaters.” The phrase “groundwaters” refers to the hydrologic system composed of a number of different components through which water flows, both on and under the surface of the land. These components include rivers, lakes, aquifers, glaciers, reservoirs and canals. So long as these components are interrelated with one another, they form part of the watercourse. This idea is expressed in the phrase, “constituting by virtue of their physical relationship a unitary whole.” It also follows from the unity of the system that the term “watercourse” does not include “confined” groundwater, meaning that which is unrelated to any surface water.

Thus, to fit the definition of a watercourse, the Caspian has to constitute a system of either “surface waters” or “groundwaters.” Even assuming that the Caspian does not constitute a “system of surface waters,” it could very well serve as a “system of . . . groundwaters.” First, the Caspian is part of a “hydrologic system . . . through which water flows.” As an identifiable body of water, the Caspian serves as one of the “number of different components” of this hydrologic system, which include “rivers, lakes, aquifers, glaciers, reservoirs and canals.” Notwithstanding the legal implications of defining the Caspian as either a sea or a lake, the definition provided by the ILC is expansive enough to include the Caspian as part of the “system of . . . groundwaters,” hence as a watercourse. Second, if classified as a lake, the Caspian could be subject to the Convention. This interpretation is supported elsewhere in the Draft Articles, where the ILC explains its reasoning behind the definition of a “Watercourse

125 Convention, supra note 122, art. 2(a).


127 Id. at 90.

128 Hydrology refers to the properties of Earth’s water, in particular its movement with respect to land. See also, Dubner, supra note 96, at 278 (noting that “130 large and small rivers flow into the Caspian,” including through the Don-Volga Canal that connects it to the Black Sea).

129 See Draft Articles, supra note 126, at 90.

130 See Dubner, note 96, at 279 & n.37 (highlighting that the Caspian has been previously identified as a sea, as a lake—due to its inclusion in the list of “Major Lakes of the World”—and as a relict marine basin).
State.” Therein, the ILC states that determining where a watercourse is located depends on observable physical factors: “The most common examples would be a river or stream that forms or crosses a boundary, or a lake through which a boundary passes.” Although this classification would be identical to the way the Caspian is classified and governed under the general principles of customary international law, it would not lead to any of the problems associated with that regime, namely, the now-abandoned principle of res communis and the lack of a clearly defined legal framework.

Finally, the “flowing into a common terminus” requirement, included towards the end of the Convention’s definition of a “watercourse,” is not dispositive. As the ILC explains, once again:

The phrase “flowing into a common terminus” is modified by the word “normally.” This represents a compromise aimed not at enlarging the geographic scope of the draft articles but at bridging the gap between, on the one hand, those who urged simple deletion of the phrase “common terminus” on the grounds, inter alia, that it is hydrologically wrong and misleading and would exclude certain important waters and, on the other hand, those who urged retention of the notion of common terminus in order to suggest some limit to the geographic scope of the articles.

Thus, the Caspian could still constitute a watercourse without necessarily “flowing into a common terminus.”

While the ILC’s Draft Articles do not have as much legal force as the plain words of the Convention, they could nevertheless be used as a persuasive, guiding source to strengthen the proposition that the Convention does apply in the Caspian context. In addition, at least three commentators have separately noted that the Convention could be applied to the Caspian Sea. For example, Article 3.3 of the Convention provides that parties “may enter into one or more agreements . . . which apply and adjust the provisions of the present Convention

131 See also Convention, supra note 122, art. 2(c) (defining a Watercourse State as a “State Party to the present Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated”).

132 Draft Articles, supra note 126, at 90 (“The word ‘situated’ is not intended to imply that the water in question is static. . . . [W]hile the channel, lake bed or aquifer containing the water is itself stationary, the water it contains is in constant motion.”) (emphasis added).

133 See Section IV.B, infra.

134 Draft Articles, supra note 126, at 89.

135 See Romano, supra note 27, at 152 (“Indeed, the Caspian does not flow into a common terminus (it does not have effluents), though the adjective ‘normally’ allows for some flexibility.”).

136 See, for example, Griffiths, supra note 1, at 183 (noting that “there are elements of the Convention that could be adapted to the Caspian arrangement”); Sanei, supra note 44, at 806 (identifying the Convention as “a possible third macro-model that may have a significant impact . . . with respect to hydrocarbon ownership rights”); Romano, supra note 27, at 152.
to the characteristics and uses of a particular international watercourse or part thereof.” Broadly interpreted, this provision allows one or more of the littoral states to avail itself of the Convention and use its provisions in accordance with the geographic and hydrographic realities of the Caspian.

B. Core Provisions

Although the Convention is quite extensive, the relevant core provisions can be found in Articles 5 through 7, which introduce the principle of “equitable use” and the “no-harm” rule, and Article 33, which provides for a dispute-settlement mechanism. Article 5 establishes the “principle of equitable and reasonable utilization and participation.” It instructs the parties to “participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.” Article 6 provides a list of factors to be utilized in determining whether use is reasonable and equitable. Article 7 establishes the “no-harm” rule, providing that “Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other Watercourse States.”

Given the differing approaches evidenced in Articles 5 and 7, a scholarly debate has emerged about what happens when the two Articles conflict. The majority of scholars agree that in cases of clear conflict, “reasonable and equitable use has more force,” with some claiming that “the two can be

---

137 Convention, supra note 122, art. 3.3.
138 See also Griffiths, supra note 1, at 183 (“In other words, [the parties] can create their own appropriate provisions to meet their particular circumstances if they agree to do so.”).
140 See Caflisch, supra note 139, at 29.
141 Convention, supra note 122, art. 5.2.
142 See Caflisch, supra note 139, at 29 (claiming that “the factors and circumstances relevant for determining equitable and reasonable utilization and participation recall, in one way at least, the methods for apportioning the natural resources of the continental shelf”); see also Convention, supra note 122, art. 6.1 (listing as some of the pertinent factors the geographic, hydrographical, climatic, and ecological considerations; social and economic needs of the Watercourse States; the availability of alternatives to a particular use; the effects of watercourse use; and the conservation and protection of the use of water resources).
143 Convention, supra note 122, art. 7.1; see also id. art. 7.2 (“Where significant harm nevertheless is caused to another Watercourse State, the States whose use causes such harm shall . . . take all appropriate measures . . . to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.”).
reconciled and are indeed compatible." Further, "[t]hat the no-harm rule must give way to that of equitable utilization is also attested to by the ICJ's judgment in the Gabcikovo-Nagymaros case, where the Court often refers to equitable use but not to the no-harm rule." The following situation exemplifies a possible conflict: riparian states A and B use a watercourse. Subsequently, riparian states C and D, who have not previously taken part in such use (that is, new entrants), announce their desire to do so. Under the reasonable and equitable use model, the new entrants could very well be entitled to use the watercourse. Under the no-harm model, however, the new entrants' use of the watercourse could be prohibited if such use would damage and harm States A and B. One scholar, in analyzing the dispute between Ethiopia and Egypt over the use of the Nile River, has found just such a conflict between the rules in Articles 5 and 7.

Based on the result described above, some have criticized the Convention, noting that all the Convention does is emphasize the reconciliation of conflicts among riparian states, falling short of providing practical solutions. Additionally, the "equitable use and no-harm rules embedded in the Convention are ambiguous, "fuzzy[,] and afford poor definition of rights," often conflicting with the notion of state sovereignty. What these objections ignore, however, is that the Convention is by no means a panacea, and its potential efficacy in solving the Caspian dispute should not be judged in absolute terms.

144 Edith Brown Weiss, Water Transfer and International Trade Law, in Fresh Water and International Economic Law 64 (Edith Brown Weiss et al., eds. 2005); see also Mohammed S. Helal, Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On, 18 Colo. J. Int'l. Envt'l. L & Pol'y 337, 364 (2007) (concluding that what the no-harm principle prohibits is "not the causing of significant harm per se, but rather the infliction of legal harm," that is, the infringement "on the ability of co-riparians to enjoy their legal rights to and equitable share of the beneficial uses of an international watercourse") (emphasis in original); Shlomi Dinar, International Water Treaties: Negotiation and Cooperation Along Transboundary Rivers 41 (2008) (arguing that analytically, the "no-harm" rule could be interpreted as constituting but one factor in determining what is "equitable use," such that "the two principles may not be two separate doctrines but rather two sides of the same coin") (internal quotation marks omitted).

145 Caflisch, supra note 139, at 31 (discussing the Gabcikovo-Nagymaros case).

146 See id.

147 See Daniel Abebe, Egypt, Ethiopia, and the Nile: The Economics of International Water Law, 15 Chi. J. Int'l. L. 27, 39 (2014) ("[T]he Convention's two core articles—Articles 5 and 7—leave sufficient ambiguity to permit both states to view the Convention as supportive of their respective legal positions. Simply stated, there is no binding principle of international law that compels a particular result for the parties.").

148 See, for example, Dinar, supra note 144, at 41 ("It does not say which state has the property rights or which use by one state subordinates a different use by another state.").

149 Id.

150 See id. at 42.
What the Convention does is "codify customary [international] law in the most general terms" instead of providing "countries with specific guidelines," thereby striking somewhat of a middle ground between the two proposed solutions to the Caspian problem: the Convention on the Law of the Sea and general customary international law principles. As such, the strength of the Convention is better evaluated relative to the two legal regimes that have so far been applied to the Caspian case, and not on a standalone basis.

Before turning to the discussion of the Convention within the Caspian context, another article warrants a separate mention. Article 33 of the Convention provides for a dispute-settlement mechanism. It states that in the event the parties enter a dispute that they are incapable of resolving through negotiations, they may (i) request a mediation conducted by a third party, (ii) submit the dispute to arbitration or the International Court of Justice, or (iii) if incapable of settling the dispute within six months, refer to an independent fact-finding commission.

The fact-finding commission shall in turn be composed of two members, each nominated by one of the parties to the dispute, and an additional member "not having the nationality of any of the parties concerned chosen by the nominated members who shall serve as Chairman." If, however, the parties are unable to agree on a Chairman within three months of the beginning of the dispute-settlement process, one party may request that the Secretary-General of the United Nations appoint the Chairman instead. Moreover, the fact-finding commission may consist of only a single member, if one of the parties fails to nominate a member within three months of the commencement of the dispute. Finally, the Commission will determine its own procedure, and the parties to the dispute may be compelled "to provide the Commission with such information as it may require and, on request, to permit the Commission to have access to their respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its inquiry."

---

151 Id.
152 For a more detailed comparison between the Convention and the two legal regimes, see the discussion in Section IV.C, infra.
153 See Convention, supra note 122, art 33.1–4.
154 Id. art. 33.4.
155 See id. art. 33.5.
156 See id.
157 Id. art. 33.6–7.
C. Applying the Watercourse Convention to the Caspian

Notwithstanding concerns about the efficacy of the Convention, applying its principles has the potential to reconcile the conflicting arguments brought forth by the five littoral states. First, with respect to the sectoral delimitation in the northern part of the Caspian Sea, Azerbaijan and Kazakhstan may argue against Russia's refusal to divide the Caspian waters in a similar fashion by relying on the relevant factors listed in Article 6 of the Convention. They could claim under Article 5 of the Convention that equitable and reasonable use of the Caspian waters and of the hydrocarbon resources contained therein, in addition to the economic benefits derived therefrom, are denied to them by virtue of Russia's intransigence. While not mandating a clear-cut outcome, such reframing of this dispute—based on principles supplied by the Convention—has the potential to push the parties beyond the current impasse. Moreover, Azerbaijan, Kazakhstan, and Turkmenistan could rely on similar reasoning to resolve the question of drawing equidistant lines among themselves. The advantage here is that the three parties already have in place broader agreements that divide the Caspian seabed—it is the drawing of equidistant lines that is disputed. As such, the Convention can prove helpful because "[a]s an umbrella agreement it does not pretend to replace individual agreements negotiated between countries over specific disputes." With a general framework in place, the parties can use the principles in the Convention as theoretical guidelines so as to further narrow down their arguments into applicable precepts of customary international law. Once again, through adding extra theoretical ammunition to the parties' arsenal, the Convention could afford them the opportunity to overcome the existing deadlock, while at the same time preserving the progress that has been achieved so far.

As to Azerbaijan and Turkmenistan and their disagreement over the ownership of the two Caspian oil fields (particularly Kyapaz/Serdar), the dispute will probably resolve somewhat differently. Relying on the fact that

158 For an overview of the Caspian states' normative positions, see Section II.B.2, supra.

159 Cf. Abebe, supra note 147, at 38 (noting that in its dispute with Egypt over the Nile River, Ethiopia, as a new entrant and an upper riparian state, could similarly argue that the "Convention implicitly rejects an appropriation approach to international watercourses, one that would have assigned the right to exploit the international watercourse to the first state to utilize it, in favor of a riparian approach that permits each riparian state to have equal use of the international watercourse").

160 DINAR, supra note 144, at 42.

161 The Kyapaz/Serdar oilfield is of particular import to Azerbaijan and Turkmenistan because it contains 50 million tons of oil reserves and is currently undeveloped. Azerbaijan & Turkmenistan: Renewing Caspian Sea Energy Dispute, EURASIANET.ORG (July 11, 2012), http://www.eurasianet.org/node/65646.
Azerbaijani geologists were the first to discover the oilfield at issue in 1959. Azerbaijan will most likely refer to Article 5 and the no-harm rule. It will argue that Azerbaijan was there first and that Turkmenistan’s potential ownership of the field will cause it significant harm. On the other hand, Turkmenistan, relying on Article 5 of the Convention (including the factors listed in Article 6), can claim that it is entitled to equitable use of the Caspian, which extends to and includes ownership of the Kyapaz/Serdar field. In this unusual case, with an eye towards “attaining optimal and sustainable utilization,” perhaps the best outcome is to have the two parties negotiate over a possible joint ownership of the Kyapaz/Serdar oilfield.

Second, and on a broader scale, three of the littoral states (and, to a lesser degree, Russia) could challenge Iran’s wish to divide the Caspian into five equal sectors, rather than according to the equidistant-line rule. As “new entrants,” these states might contend that without the application of the equidistant-line rule, they will be robbed of equitable use that is guaranteed to them under the Convention. In response, Iran could retort that, under Article 7, it is entitled not to be significantly harmed by the other states’ use of the Caspian and that the new entrants’ use accomplishes precisely that. Iran’s argument is probably less persuasive than the others’, given the fact that Article 5 (equitable-use principle) is largely interpreted to subsume Article 7 (no-harm rule).

Perhaps because of the nature of international law writ large as well as the lack of any clear and direct international enforcement mechanism, application of the Convention’s two guiding rules may lead to outcomes akin to a “double-edged sword.” It is thus unlikely that even with the availability of the Convention’s core provisions, the five littoral states will reach a mutual

162 EIA, supra note 10, at 8 (noting that the Kyapaz/Serdar oilfield was “originally discovered in 1959 by Azerbaijani geologists”).

163 It must be noted that Turkmenistan’s argument might fail in this dispute due to property- and ownership-rights considerations, subjects outside the scope of this Comment.

164 One possible explanation for Azerbaijan and Turkmenistan’s inability to reach a consensus could be staunch Russian opposition to the construction of a trans-Caspian pipeline, which would utilize the gas found in the Kyapaz/Serdar oilfield (in addition to two other oilfields) and “would circumvent Russia and thus limit Kremlin’s ability to control European-bound energy exports.” See Azerbaijan & Turkmenistan, supra note 161.

165 Iran would have a more persuasive argument if the Convention were interpreted in the alternative, such that both Articles 5 and 7 are considered complementary and on equal footing.

166 Jeffrey D. Azarva, Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create a Transboundary Water Regime in the Nile Basin, 25 TEMP. INT’L & COMP. L. J 457, 492–93 (2011) (noting that “[t]he same ambiguity that can help grease the wheels of negotiation can also serve to reinforce parties’ divergent bargaining positions, increasing the chance of conflict when one side’s performance fails to comport with the other party’s understanding of that side’s legal obligations”).
understanding or agreement. After all, states are generally unwilling to compromise, unless it is in their self-interest to do so, as demonstrated by Russia’s eventual acquiescence to the division of the Caspian seabed mainly due to the country’s powerful oil interests. However, regardless of what normative positions the five littoral states end up assuming in the end, the Convention, while not a panacea by any means, still provides a framework for resolving these disputes that is more useful and practicable than UNCLOS or general customary international law.

First, as compared to UNCLOS, the Convention does not inherently list towards one or another result. It does not attempt to establish strict exclusive economic zones or a territorial sea that Iran and Russia might find unfavorable or, worse yet, unacceptable. Instead, the Convention strikes a middle ground by providing that each state is entitled to an equitable use of the Caspian Sea, the scope of which “depends on the facts and circumstances of each individual case and, specifically, on a weighing of all relevant factors.”

Second, as compared to postulates of customary international law, the Convention is not too open-ended or lax. It does not wholly rely on the bilateral or multilateral actions of the littoral states that have so far proven to be unfruitful. In place of self-help, it offers a workable joint dispute-resolution mechanism that might channel and focus the efforts of the individual states. The importance and effectiveness of joint dispute-resolution mechanisms has been noted in academic literature, particularly with respect to the Great Lakes case. In that case, the U.S. and the British Colony of Upper Canada, albeit initially hostile to each other and engaging in war between 1812 and 1814, managed to settle their territorial and navigational disputes amicably and peacefully, primarily due to a 1909 Boundary Waters Treaty. This treaty also created an international joint commission to prevent the outbreak of future disputes. As a testament to its success, the joint commission is still active today in resolving water disputes between the U.S. and Canada. Similarly, the dispute-resolution mechanism provided by the Convention could succeed in curbing self-interested behavior and outbreaks of

167 See Mehdiyoun, supra note 2, at 186 n.66 (noting that the Russian acquiescence took place only after one of its oil companies, Lukoil, was granted a 10% interest in the Azerbaijani national oil company).
168 Romano, supra note 27, at 153.
169 See, for example, Griffiths, supra note 1, at 185 (“One of the most enduring successes in the Great Lakes regime has been the International Joint Commission, established by the 1909 Boundary Waters Treaty, and is [sic] still active today in coordinating water use issues.”) (emphasis omitted).
170 See Griffiths, supra note 1, at 183–84.
171 See id. at 185; Folger, supra note 96, at 549.
172 See Griffiths, supra note 1, at 185.
self-help by providing the five littoral Caspian states with a path to resolving disagreements and reconciling their differences.173

In sum, the advantages of the Convention in the Caspian context are twofold: it lacks the strict, unworkable definition evident in UNCLOS, while avoiding the legal morass caused by reliance on broad precepts of customary international law, which includes the belief in interstate negotiation and diplomacy as a means of rectifying the current standstill.

V. CONCLUSION

The Caspian Sea’s history has been one of political disagreement, conflict, and self-interest. The individual states are not willing to capitulate to their counterparts’ wishes and propositions, an arrangement that ultimately creates and maintains gridlock and political uncertainty. Although attempts have been made to reach bilateral agreements and to sign treaties, a mutually beneficial framework has yet to be created. The academic literature has attempted to solve the existing problems by applying to the Caspian two divergent legal principles: the law of the sea and general customary international law. Despite their general guidance, these mechanisms have failed to provide a clear solution to the disputes. In an attempt to remedy the impasse, this Comment has approached the Caspian question from a different perspective: that of the Watercourse Convention, which has, so far, enjoyed only cursory mention in the academic literature. The Convention contains principles and rules that could potentially provide the much-needed means of resolving the conflict. In addition, the Convention establishes a clear dispute-resolution mechanism, something that the five littoral states are in dire need of, but have been unable to attain on their own.

173 See Folger, supra note 96, at 550 (“If the Caspian littoral states were able to create a similar arrangement, many future disputes could be avoided.”); see also Kate Halloran, Is the International Court of Justice the Right Forum for Transboundary Water Pollution Disputes, 10 SUSTAINABLE DEV. L & POL’Y 39, 39 (2009) (concluding that, instead of having the ICJ resolve transboundary water disputes, “the international community must develop other methods of resolving transboundary water pollution disputes before economic development and water quality suffer irrevocably”).