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ARTICLES

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

Barry Hart Dubner*

Preface

In 1986, I went swimming in the Caspian (Sea, Lake, Ocean). My wife and I were staying in Baku, "the windy city." At that time there were many interesting sights to see in the area. I chose the swim. However, much to my surprise, swimming in the Caspian was like swimming in an oil slick. Everything in that geographic area (Azerbaijan) looked old, relics from the past, especially the oil derricks. I just assumed that nobody cared much about pollution problems and continued on with the tour.

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Recently, I prepared a report on international law of the sea events in 1998.¹ In reviewing 1998 newspaper articles, I noticed that there was much interest in the Caspian because of the vast oil and gas potential for the area. What triggered my concern for that area were at least two items: (1) that the Aral Sea is decreasing in size at an alarming rate so that the environmental effects could be disastrous; and (2) that Turkey was threatening to hold up oil tanker traffic in the Bosphorus (an international strait) because of alleged environmental and public safety concerns.²

It occurred to me that a certain amount of cooperation among the littoral States (and other States as well) will be necessary in order to protect the Caspian and, by so doing, protect the people in that part of the world.

The purpose of this article is to address the problems that would occur if littoral and other interested States began utilizing unilateral declarations and actions instead of utilizing an international/regional approach for the "common heritage of mankind."³

I. Introduction

The development of international law is an ongoing, evolving process. Without this process, there would be chaos. The 1982 Law of the Sea Treaty ("Convention") was drafted as a framework for identifying and resolving problems that may develop with regard to jurisdiction in ocean and maritime environmental situations that could arise during the exploration of various regions.⁴ The Caspian has the potential for the creation of such problems due to its estimated oil reserves in that basin. To illustrate, compare the following estimated reserves of the Caspian basin (in billions of barrels) to the proven oil reserves of other nations in 1998.⁵

1. The report appeared in the A.B.A. International Lawyer during the summer, 1999. In August, 1999, I took over as Chairman of the Committee on Law of the Sea, A.B.A. Section on International Law.

2. Stephen Kinzer, *Turks Fear an Oil Disaster as the Bosphorus Gets Busier*, N.Y. TIMES, Jan. 11, 1998, at 8.

3. 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]. The theme of the 1982 Convention was the "common heritage of mankind."

4. Convention, *supra* note 3.

5. Frank Viviano, *Perilous Lifeline to West; Conflict-ridden Caspian Basin is the World's Next Persian Gulf*, S. F. CHRON., Aug. 10, 1998, at A1.

Caspian Basin (estimated) 200-300	
Saudi Arabia	262
Iraq	110
United Arab Emirate's	97
Kuwait	95
Iran	93
Venezuela	72
Other nations with significant reserves, in billions of barrels:	
Russia	48
Mexico	40
United States	28
Libya	27
China	22
Nigeria	19
Norway	10
Algeria	9
Canada	8
Angola	5
Oman	5
Indonesia	5

The following tables provide a better understanding of the oil and gas reserves as well as the export routes that are available in the Caspian region that are available at the present time:⁶

6. United States Energy Information Administration, *Caspian Sea Region*, 8-10 (Oct. 1998). [URL: <http://www.eia.doc.gov/emeu/cabs/caspian.html>.]

Table 1. Oil and Gas Reserves in the Caspian Region

	Proven Oil Reserves	Possible Oil Reserves	Total Oil Reserves	Proven Gas Reserves	Possible Gas Reserves	Total Gas Reserves
Azerbaijan	3.6-11.0 BBL	27 BBL	31-38 BBL	11 Tcf	35 Tcf	46 Tcf
Iran*	0 BBL	12 BBL	12 BBL	0 Tcf	11 Tcf	11 Tcf
Kazakstan	10.0-16.0 BBL	85 BBL	94-101 BBL	53-83 Tcf	88 Tcf	141-171 Tcf
Russia*	0.2 BBL	5 BBL	5 BBL	N/A	N/A	N/A
Turkmenistan	1.4-1.5 BBL	32 BBL	34 BBL	98-115 Tcf	159 Tcf	257-314 Tcf
Uzbekistan	0.2-0/3 BBL	1 BBL	1 BBL	74-88 Tcf	35 Tcf	109-123 Tcf
Total	15.4-29.0 BB:	163 BBL	178-191 BBL	236-337 Tcf	328 Tcf	564-665 Tcf

* only the regions near the Caspian are included

BBL = billion barrels, Tcf = trillion cubic feet

Table 2. Caspian Sea Region Oil Production and Exports

	Production (1990)	Production (1996)	Exports (1990)	Exports (1996)
Azerbaijan	259.3	198.7	76.8	42.6
Kazakstan	602.1	532.1	109.2	254.5
Turkmenistan	124.8	103.9	69.0	26.4
Iran*	0.0	0.0	0.0	0.0
Russia**	62.0	52.0	0.0	0.0
Total	1134.4	1069.3	86.9	327.3

* only the regions near the Caspian are included

**includes these regions bordering the Caspian Sea: Astrakhan, Kalmyk Republic, Dagestan, and Stavropol Kray

Table 3. Caspian Sea Region Natural Gas Production and Exports
(billion cubic feet/year)

	Production (1990)	Production (1996)	Exports (1990)	Exports (1996)
Azerbaijan	349.6	222.5	-271.9	0.0
Kazakstan	251.2	149.8	-257.0	-114.4
Turkmenistan	3099.5	1243.1	2539.0	865.2
Uzbekistan	1439.5	1730.4	102.5	91.7
Iran*	0.0	0.0	0.0	0.0
Russia*	N/A	N/A	N/A	N/A
Total	5139.8	3345.8	2112.6	845.5

Table 4. Oil Export Routes in the Caspian Sea Region

	Route	Crude Capacity	Length	Investment	Status
AIOC-Main	multiple routes considered from Baku (Azerbaijan)	1 million barrels/day	1100 miles if to Ceyhan, Turkey	\$3.3 billion if to Ceyhan, turkey	Final Route Selection
AIOC-Early Oil Western Route	Baku (Azerbaijan)-Supsa (Georgia)	0.1 million barrels/day	550 miles	\$290 million	Exports begin late 1998
AIOC-Early Oil Northern Route	Baku (Azerbaijan)-Novorossisk (Russia) via chechnya	0.1 million barrels/day	868 miles; 90 miles are in Chechnya	\$2.4 billion repairs to Chechen line	Exports begin late 1997-early 1998
Northern Route-Early Oil Chechnya bypass	Azerbaijan/Russian border-Terskoye (Russia) via Dagestan	N/A	176 miles	\$220 million	Announced 9/97; tender planned
Caspian Pipeline Consortium	Tengiz (Kazakstan)-Novorossisk (Russia)	1.34 million barrels/day peak	930 milesx	\$2.2 billion	Flows 1999; peak early next decade
Cross-Caspian	Tengiz-Baku or Turkmenbashi-Baku	0.4-0.5 million barrels/day	underwater 370 miles or 190 miles	\$2.5-\$3.0 billion	Feasibility Study
Kazakstan-China (may extend to Turkmenistan & Uzbekistan)	Aktyubinsk (Kazakstan)-Xingiang (China)	0.4 million barrels/day, rising to 0.8 million barrels/day	1,800 miles	\$3.5 billion	Signed Agreement
Turkmenistan-Afghanistan-Pakistan (may extend to Uzbekistan)	Charjou(Turkmenistan)-Gwardar (Pakistan)	1 million barrels/day	1,000 miles	\$2.5 billion	Memorandum Understanding for this Central Asia Oil Pipeline Segment
Turkmenistan-Persian Gulf (may extend to Kazakstan)	Turkmenbashi (Turkmenistan)-Kharg Island (Iran)	0.2-0.4 million barrels/day	930 miles	\$1.5 billion	Proposed

Table 5. Natural Gas Export Routes in the Caspian Sea Region

	Route	Gas Capacity	Length	Investment	Status
Cross-Caspian	(Turkmenbashi) (Turkmenistan)	N/A	N/A	N/A	Proposed
Turkmenistan-Uzbekistan-Kazakstan-Russia-Europe	multiple routes considered from Turkmenbashi (Turkmenistan)	N/A	N/A	N/A	Proposed expansion of existing system
Turkmenistan-Iran	Ekarem (Turkmenistan)-Iranian border	283 billion cubic feet/year 2005; 530 billion cubic feet/year 2020	90 miles	\$190 million	Exports begin late 1997-early 1998
Turkmenistan-Iran-Turkey	Ekarem (Turkmenistan-Tabriz (Iran)-Ankara (Turkey))	1 trillion cubic feet/year	1,350 miles	\$3.1-\$3.8 billion	Signed agreement for exports
Turkmenistan-Uzbekistan-Kazakstan-China-Japan	Dauletad Field (Turkmenistan)-Xingiang (China)-Japan	0.7-1 trillion cubic feet/year	3,800 miles China; 5,000 miles Japan	\$12 billion China; \$23 billion Japan	Preliminary feasibility study
Turkmenistan-Afghanistan-Pakistan (may extend to Uzbekistan)	Dauletad or Yashlar Fields (Turkmenistan)-Sui (Pakistan)	700 billion cubic feet/year	900 miles	\$2-\$2.5 billion	Memorandum Understanding with the 3 countries & Uzbekistan

**LARGEST
FIELDS**

Tnegiz
Kazakhstan

BP Amoco-led
Baku Field
Azerbaijan

Karachagnak
Kazakhstan

	<i>Oil</i>	<i>Oil</i>	<i>Oil</i>	<i>Gas</i>
RESERVES	9-13.5 billion barrels of oil	4.5 billion barrels	2 billion barrels	20 trillion cubic feet
PRODUCTIO N PER DAY Current	200,000 barrels	115,000 barrels	50,000 barrels	300 million cubic feet
Potential	800,00 to 1 million barrels	700,000 to 900,00 barrels	250,000 to 350,000 barrels	2.5to 3 billion cubic feet

NUMBER OF ●●●● ●●●● ●●●●
 FOREIGN ●●●● ●
 PARTNERS ●●●●

This resource potential is leading to an exacerbation of oil related politics which, in turn, may create certain international legal and environmental problems including the following: (1) how does one determine the jurisdiction over this area; (2) how will the choosing of pipeline routes interfere with navigation of ships through the Black Sea and the Bosphorus Strait; (3) how will international boundary problems interfere with the fragile ecosystem in the Caspian and surrounding regions; and (4) how will the 1982 Convention assist States in reaching a consensus on how to proceed in that geographic area?

Historically, the U.S.S.R. and Persia (Iran) entered into a treaty on February 26, 1921.⁷ One commentator (Iranian) has stated that:

“The Caspian Sea has always had a *sui generis* legal status. The sea is linked to the Black Sea and the Baltic Sea through constructed canals via the Volga and Don rivers. According to international law, it is not considered a high sea and navigation

7. S. Vinogradov and P. Wouters, *The Caspian Sea: Quest for a New Legal Regime*, 9 LEIDEN J. INT'L L. 87; 87-98 (1996). The authors provide the information in footnote 2, as follows:

The current regime is based on the Treaty between Soviet Russia and Iran (Persia) of 26 February 1921, see 1959 Documentary Vnesbney Politiski SSSR (Documents of the Foreign Policy of the USSR) 536; and the Treaty of Commerce and Navigation between the Soviet Union and Iran of 25 March 1940, see Sbornak Desitvovuyuschikh Dogovorov, Soglasheniy i Konventiy, Zaklyuchyomakh SSSR Inostrannymi Gosouarstvami (Collection of Treaties, Agreements, and Conventions, Concluded by the USSR With Foreign States) 56 (1955). *Id.* at 87.

is exclusive to the neighboring countries. Accordingly, current regulations of the international law on the high seas and the naval zones do not apply to it”

Another commentator has noted that, “In letters attached to the 1940 treaty, the Caspian Sea was reportedly referred to as the Iran-Soviet Sea,”⁸ and “. . . there is no specific legal concept and definable border that can fully answer the question of sovereignty over this sea”⁹

It is apparent that each country is currently making unilateral declarations in order to further their interests. The problem is that each of the divergent views can find a viable argument in international law with the assistance of stretching various principles. When one compounds this problem with the fact that there is no consensus on the current legal status of the Caspian, extensive bargaining will be necessary to arrive at an agreement.

During 1998, there were unilateral declarations regarding jurisdiction, by various countries surrounding the Caspian. For example, a foreign ministry press release of Azerbaijan indicated that a protocol was signed based on Azerbaijani-Russian consultations on issues relating to the legal status of the Caspian. The protocol stated, in part:¹⁰

“Azerbaijani-Russian consultations on issues relating to the legal status of the Caspian Sea took place in Baku on 27th March 1998.

The sides pointed with satisfaction to the perceptible turn toward the littoral states moving closer together on issues relating to the legal status of the Caspian Sea.

During the consultations the sides expressed the opinion that the division of the bed of the Caspian Sea as an element in its legal status could help all the Caspian littoral states reach a consensus on a convention other legal status of the Caspian.

The sides agreed that the division of the bed of the Caspian Sea into sectoral zones be carried out in line with an

8. Mohammed-Reza Dabiri, *A New Approach to the Legal Regime of the Caspian Sea as a Basis for Peace and Development*, 6 IRANIAN J. INT'L AFFAIRS 28, 32 (1994).

9. Dabiri, *supra* note 8, at 33.

10. ‘Bakinskiy Rabochiy’, *Azeri-Russian Protocol on Division of Caspian*, 1998 British Broadcasting Corporation, BBC Summary of World Broadcasts, Part 1, former USSR; Georgia; SU/D3191/F, Apr. 2, 1998.

agreement between the relevant contiguous and opposite states on the basis of the principle of equidistant points (the median line) and other universally recognized principles of international law, and also taking into account the established practice in the Caspian.

The sides agreed that as a result of such a division into zonal sectors, each of the littoral states is recognized as having exclusive rights to the mineral resources of the bed of the Caspian Sea.

The sides agreed to continue consultations and negotiations on the legal status of the Caspian Sea, including discussion of issues such as preserving for common use the surface of the Caspian Sea and the depths of the water in order to ensure freedom of shipping, observance of uniform standards for fishing and environmental conservation.”

This declaration took place in 1998. On January 31, 1999, it was reported that the Azerbaijani government had suggested that the United States open a military base there.¹¹ No formal request was made but it may be a topic of discussion when President Heydys Aliyev visits Washington later in 1999. In fact, on November 18, 1999, at a ceremony in Istanbul, Turkey, together with the Presidents of Georgia, Azerbaijan, Kazakhstan and Turkey, President Clinton agreed to support the building of a pipeline that would carry oil from the Caspian Sea to ports in the west on route that would not pass through Russia or Iran.¹² Of course, Russia “. . . considers the Caucasus region, all of which was part of the Soviet Union, as its sphere of influence. It has troops in both Armenia and Georgia and resents Azerbaijan’s unwillingness to accept them. Russian leaders are also seeking to persuade Azerbaijan to export the bulk of its oil through a pipeline across Russian territory, rather than choosing a route across Turkey that is favored by the United States” Currently, the largest contingent of American soldiers in the region are in Incirlik, southern Turkey.¹³ Iran has objected to any military base

11. Stephen Kinzer, *Azerbaijan Asks the U.S. to Establish Military Base*, N.Y. TIMES, Jan. 31, 1999, at 11.

12. Kinzer, *Summit in Turkey: The Caspian Accord*, N.Y. TIMES, Nov. 19, 1999 at 12.

13. *Id.* at 11.

of the United States in Azerbaijan. According to Foreign Minister Kama Kharrazi, said base would not be tolerated.¹⁴

Other so called arrangements include *inter alia*, a joint statement by Russia and Iran regarding the legal status as they would have it:¹⁵

“Russia and Iran have signed a joint statement on the legal status of the Caspian Sea and its development by littoral states, an official at the Russian Foreign Ministry said.”

“The parties considered several options for the use of the Caspian Sea by the littoral states,” the official said.

“The first one involves the division of the Caspian seabed without the division of the sea’s surface or waters. The second one envisages the division of both the seabed and the waters. And the third one involves the joint use of the seabed’s reserves and the waters by all littoral states,” the official added.”

He indicated that Iran agreed in principle on the possible division of the Caspian seabed among all the states.

“Iran said a possible division of the seabed should be carried out fairly by all the states, but did not specify how the midline would be defined,” the official said, adding Iran claimed the division of the seabed into equal sectors.

He also said Russia and Iran still have disagreements on certain problems related to the development of the Caspian Sea’s oil and gas reserves.

“The parties agreed to continue consultations on this issue,” he said.

Earlier this month, Russia and Kazakstan signed a protocol on the division of the northern part of the Caspian Sea, which had been opposed by Iran and Turkmenistan.

14. Reuters Service, *Iran: Plan for U.S. Base Protested*, N.Y. TIMES, Feb. 9, 1999, at A8.

15. Maria Zabalova, *Russia, Iran Sign Caspian Sea Accord*, Journal of Commerce, Sect.: Commodities/Chemicals/Energy, July 22, 1998, at 8A.

With regard to the so-called "legal status" of the Caspian, the littoral States have, from the beginning of their recognition of the oil and gas potential of the region and the breakup of the Soviet Union block countries, disputed "ownership" of the vast resource under the Caspian. One newspaper article has summarized earlier legal stances of the country toward "legal status" as follows:¹⁶

There even is a dispute over which country owns the oil under the water. The Caspian is a large inland sea, some 200 miles across. Azerbaijan, Kazakstan and Turkmenistan say it is a lake and its underwater resources can be split by simply drawing straight lines out from the borders of the littoral nations until they meet. Iran and Russia say it is an ocean and each bordering nation owns the oil out to the 40 mile limit: after that, they say, the resources in the vast middle area of the Caspian must be shared.

If the Caspian is a lake, Russia and Iran control relatively little of it. If it is an ocean, they control much more. The issue is unsettled. No negotiations are going on, but at least the Russian dispute might be settled on a de facto basis with Azerbaijan authorizing wells in the disputed regions by Western oil companies that would buy off Moscow by giving a piece of the deal to Lukoil or other Russian firms.

As will be discussed throughout this article, the issue of whether the Caspian is a sea, lake, ocean, or has some other status, is an unnecessary venture into metaphysics.

There is no question that a regional (not unilateral) response by the various States in that area will be necessary in order to preserve order, maintain the environment and freedom of navigation.

It is necessary to turn our attention first to the geography of the Caspian. This subject can be broken down into descriptions of the physical environment, biological resources, socio-economic features, environmental problems regarding pollution, and concern over the rise of the sea level of the Caspian. Thereafter, the article will explore the existing legal framework contained in the 1982 Convention.¹⁷ The geography of the area is

16. R.C. Longworth, *Thirsty U.S. Wading Into Oil Tar Pit: Destitute Plum of Caspian has Many Suitors*, CHICAGO TRIBUNE, Feb. 9, 1998 at 1.

17. Convention, *supra* note 3.

uncontentious. It is necessary to set forth the geography in order to understand the problems raised in this article.

II. The Geography of the Caspian¹⁸

A. *The Physical Environment*

The sheer size of the Caspian is impressive. It is the world's largest inland body of water as it contains 44% of the volume of all inland lakes and seas. It has no natural connection to the oceans of the world and, at its current level, (-26.5m below MSL) its coastline is approximately 7,000 km in length, with a surface area of 386,400 km² and a water volume of about 78,700 km³. Approximately 130 large and small rivers flow into the Caspian, e.g., the Volga. The five largest rivers (i.e., Volga, Kura, Terek, Ural and Sulak) supply over ninety percent of the incoming freshwater. The Caspian's average salinity rate is just over one-third that of seawater. As will be alluded to later in this article, the most interesting physical characteristic of the Caspian from the human point of view is the continuous fluctuation in its surface level.¹⁹

18. The World Bank, Caspian Environmental Program, Republic of Azerbaijan, Islamic Republic of Iran, Republic of Kazakhstan, Russian Federation, Turkmenistan, Annex I (May 3, 1998) (unpublished concept paper). All of the geographic material of the Caspian Sea in this article was taken from Annex I.

19. *Id.* at 1-2. The full text states, as follows:
"ANNEX I - The Caspian Environment

a) *Physical environment*

1. The Caspian Sea, called the jewel of two continents, Asia and Europe, is the world's largest inland body of water, encompassing some 44% of the volume of all inland lakes and seas. The Caspian occupies a deep continental depression within the largest catchment basin in Europe (about 3,100,000 km²). It is approximately 1,030km long and its width ranges from 435km to a minimum of 196km. It has no natural connection to the world's oceans and its surface level is currently around -26.5m below MSL. At this level, its total coastline is some 7,000km in length, its surface area 386,400km² and its water volume about 78,700km³.
2. The Caspian can be divided into three parts: the northern, middle and southern. The border between the northern and middle parts runs along the edge of the North Caspian shelf between Chechen island (near the Terek river mouth) and Cape Tiub-Karagan (at Fort Shevchenko). The border between the middle and southern parts runs from the Apsheron threshold connecting Zhiloi Island in the west

with Cape Kuuli in the east (north of Turkmenistan). The northern part covers about 25% of the total surface area, while the middle and southern parts cover about 37% each. However, water volumes in the northern part account for a mere 0.5%, volumes in the middle part make up 33.9%, while the southern part contains 65.6% of the Caspian waters. These volumes are a reflection of the bathymetry of the Caspian: the northern part is very shallow, being mainly less than 5m in depth; in the middle part, the main feature is the Derbent Depression, which reaches depths over 500m; and the southern part comprises the South Caspian Depression, with its deepest point being 1025m below the surface.

3. Around 130 large and small rivers flow into the Caspian, nearly all of which flow into the north or west coasts. The largest is the Volga River, which drains an area of 1,400,000km² into the northern part of the Caspian. Over 90% of the inflowing freshwater is supplied by the 5 largest rivers: Volga, Kura, Terek, Ural and Sulak. The rest is accounted for by the Iranian rivers and the smaller streams on the western shores, since there are no permanent inflows on the eastern side. The Volga water is fresh (total ionic content from 200 to 400 mg/l), and enters the Caspian through the west part of the delta, flowing south along the west coast. Because the Caspian is so shallow there, no saline stratification can become established. The Volga and Caspian waters mix rapidly, causing a marked increase in salinity as one moves away from the delta. The Caspian's average salinity is slightly over 1/3 that of seawater, such that it may be classified as brackish and mesohaline, a rather unique hydrochemical environment.
4. Apart from the extensive shallows of the northern part, the other two physical features that characterize the Caspian are the delta of the Volga and the Kara Bogaz Gol gulf.
5. The Volga Delta covers about 10,000km² and the apron has a width of about 200km. A feature of the delta region are the so-called Baer knolls, which are hillocks between 3-20m in height, formed by the action of onshore winds on the river sediments that are discharged into the delta at a rate of 8 million tonnes per year. Numerous small lakes are found between the knolls, and there is a complex system of channels with many islets. The Volga-Caspian shipping canal traverses the delta, and is dredged to a minimum 2m depth.
6. The Kara Bogaz Gol is situated on the eastern coast of the Caspian and comprises a shallow depression with a surface area of about 18,000km², annual precipitation between 75-100mm and over 1,000mm evaporation per year. As a result, under natural conditions, water flows from the main Caspian into the Gol at a rate of about 18-25km³ per year. This significant volume of water moves through a 8km long channel at speeds of 50-100cm/sec and influences water levels of the Caspian by about 6-8cm. In 1980, in an attempt to stem the impact of dropping water levels, the

B. *Biological Resources*

Because of its long existence and its isolation the biodiversity of the Caspian aquatic environment has allowed ample conditions for speciation.

There are over 400 endemic aquatic taxa; 115 species of fish (some of which are anadromous and migrate from the Caspian up the rivers to spawn). The best known are the seven species and subspecies of sturgeon, and the Caspian freshwater seal (one of the two species in the world, the other being found in Lake Baikal).

Coastal wetlands attract a variety of birds; territorial flora and fauna are quite diverse and include several thousand flowering plants.²⁰

channel was blocked by a permanent dam and the Gol lost its supply of Caspian water. Its volume shrank immediately and its physical characteristics changed. Some water (around 2km;) has been allowed to flow into the Gol again since 1984, and more recently a full and free flow has been restored.

7. The most salient physical characteristic of the Caspian from the human point of view is the continuous fluctuation in its surface level. Modern observations began in 1830, and for the next 100 years the water level was recorded as fluctuating within a range of 1.0m with a mean level of -25.83m below MSL. In 1930 the level began to fall abruptly, and by 1941 it had gone down 1.9m. The dropping level continued to the mid-1950s, and stabilized in the late 1950s and 1960s, probably as a result of the major reservoirs that were built then on the Volga, and an increase in the amount of water drawn for irrigation. Without this draw-off, the Caspian waters would probably have started to rise again. But by 1977, the levels went down to the lowest reached over the past 500 years of so, -29.0m. However, from 1978 the trend was suddenly reversed, and the levels started rising again. By 1993 it had reached -27.0m, that is, it had gone up 2.0m in 15 years. In 1995, Caspian water levels stood around -26.5m and were still rising.
 8. The long term changes in Caspian water level have a complex character and have aroused great interest in scientific and economic quarters. The calculation of long-term forecasts of water level is not thought reliable, and it seems more expedient to plan for a further rise in water level, bearing in mind the levels that prevailed in the early 1900s."
20. The World Bank, *supra*, note 19, at 2, 3. The full text states, as follows:
- "b) Biological resources
 - i. The Caspian region lies in the center of the Palearctic zoogeographical realm and is comprised of two major biomes

C. Socio-Economic Features

The Caspian basin and the Ural mountain chain constitute the boundary between Europe and Asia. Historically, there were ancient caravan routes such as the Great Silk Road. The current population around the Caspian is about 5 million. Baku, the

- cold, continental deserts and semi-deserts in the north and east, and warmer mixed mountain and highland systems with complex zonation in the south-west and south. There is also a small area around the Volga Delta in the west where the temperate grasslands biome is represented. Caspian living resources reflect the range of climatic conditions that prevail around its perimeter, resulting in a significant degree of biological diversity. This is further enhanced by the existence of extensive wetland systems such as the deltas of the Volga, the Ural and the Kura rivers, and the hyper saline Kara Bogaz Gol.

- j. The biodiversity of the Caspian aquatic environment is derived from the long history of the existence of the sea and its isolation, allowing ample conditions for speciation. The number of endemic aquatic taxa, over 400, is very impressive. There are 115 species of fish, of which a number are anadromous and migrate from the Caspian up the rivers to spawn. The best known of these are the seven species and subspecies of sturgeon, which have provided a valuable economic resource for over a century. There is also a Caspian freshwater seal, one of only two species that occur worldwide, with the other one found in Lake Baikal.
- k. recently noticed phenomenon that could lead to the potential loss of diversity among the sturgeon species is the hybridization that has occurred between sturgeon from the Black Sea and those in the Caspian Sea. This has come about through the connection now possible via the Don-Volga Canal. The canal also permits the accidental introduction of exotic species from the Black Sea and, via ballast water discharge, from the world's waters. While its precise effects are currently hard to evaluate, it is a cause of serious concern.
- l. Coastal wetlands attract a variety of birds that are prolific throughout the year in and around the Caspian, with their numbers swelling enormously during the migration seasons when many species visit the extensive deltas, shallows and other wetlands. It is at these times that ecologically-motivated visitors could be guided into carefully selected vantage points and allowed to experience the beauty and the bounty of protected ecological resources. Such ecotourism, carefully planned and managed, has tremendous potential both as an income earner and as an excellent mechanism to educate and inform the interested public, whether they are local or foreign visitors. Terrestrial flora and fauna are quite diverse as well, and include several thousand flowering plants, with a rate of endemism locally reaching 20%. A similar range of diversity is seen among insects, reptiles, birds and mammals."

largest city on the Caspian coast, has a 1.7 million population. The rest of the populous along the basin resides in towns or cities ranging in size from 20,000 to 670,000 with about one million rural inhabitants. In 1995 the annual GNP per capita was, as follows: Azerbaijan, US \$1240.00; Iran US, \$2410.00; Kazakhstan, US \$2030.00; Russia, US \$3470.00; Turkmenistan, US\$1440.00. The principal economic activities are fisheries, agriculture, petroleum production and related downstream industries. The Caspian contains over eighty percent of the world's sturgeon stock as well as substantial stocks of other commercially valuable species. Revenues to the littoral States from sturgeon, including caviar, are thought to be six billion dollars annually. Rich vegetable cultivation, cattle and sheep husbandry are prime agricultural activities as well as oil exploration which is increasing substantially with several western companies and consortia bidding for concessions. This, in turn, leads to environmental problems.²¹

21. The World Bank, *supra* note 19, at 3. The full text states, as follows:

c) Socio-economic features

13. The Caspian basin, together with the Ural Mountain chain, is considered the boundary between Europe and Asia and has seen centuries of commerce along ancient caravan routes such as the Great Silk Road. The current total population around the Caspian is estimated at about 5 million, with the main urban centers concentrated on the western and southern shores. In the west, Baku is the largest city on the Caspian coast, with a population of 1.7 million. The balance of the Caspian basin population resides in cities or towns ranging in size from 20,000 to 670,000, plus about 1,000,000 rural inhabits. In 1995, the annual GNP per capita was as follows: Azerbaijan US\$1240.00; Iran US\$2410.00; Kazakhstan US\$2030.00; Russia US\$3470.00; Turkmenistan US\$1440.00. As such, all Caspian countries qualify for GEF assistance.
14. The principal economic activities in the Caspian basin are fisheries, agriculture, petroleum production and related downstream industries. The sea contains over 80% of the world's sturgeon stock as well as substantial stocks of other commercially valuable species. Revenues to the littoral countries from sturgeon, including caviar, are thought to total US\$6 billion annually. Rice and vegetable cultivation and cattle and sheep husbandry are the prime agricultural activities in the catchment area. Oil exploration and production are increasing along the northern and eastern shelves of the Caspian and are already well established in the Baku and Tenghiz regions. Oil production is expected to increase substantially over the next few years, with several western companies and consortia bidding for concessions.

D. Environmental Challenges

Sea level rise has been the leading environmental problem. The challenges with regard to sea level rise include alleviating human suffering, protecting valuable infrastructure and preventing pollution incidents. Problems due to human activity and in the catchments of rivers draining into the Caspian are significant.²²

1. *Pollution*—The ecological integrity of the Caspian is under significant threat from pollution by particulate organic matter and excess inorganic nutrients (eutrophication); by various toxic materials, (radio nuclides, heavy metals, pesticide residues, persistent synthetic organic compounds such as phenols, PCB's, dioxins) with the Volga being the single major source as it drains the sewage of half the population of Russia and most of its heavy industry into the Caspian. Large quantities of toxic waste run-off and spills have been generated by on-shore and off-shore oil fields refineries and petrochemical plants.²³

22. The World Bank, *supra*, note 18, at 3-4. The full text states, as follows:
Environmental Challenges

15. During the Joint Mission and in other consultations, the Caspian governments repeatedly emphasized the primacy of the impacts of sea level rise as the leading environmental problem facing them. While response to the environmental impacts of sea level rise may well be considered the most urgent in terms of alleviating human suffering, protecting valuable infrastructure and preventing pollution incidents, other types and sources of environmental problems must also be considered in a comprehensive environmental program for the region. The Caspian Sea Environment Program seeks to address environmental problems due to human activity in or near the Sea and in the catchments of rivers draining into the Caspian, as well as problems caused by fluctuations in water levels. The measures to address these problems will be most successful if they combine long term, integrated and strategic approaches with short term emergency responses.”

23. The World Bank, *supra*, note 18, at 4. The full text states, as follows:
a) Pollution

16. The ecological integrity of the Caspian is under significant threat from pollution by particulate organic matter and excess inorganic nutrients (eutrophication) and by various toxic materials (radionuclides, heavy metals, pesticide residues, and persistent synthetic organic compounds such as phenols, PCB's and dioxins). As in other countries undergoing similar profound economic change, the economic decline that accompanied the dissolution of the former Soviet Union substantially reduced contaminant loading to the Caspian. However, as economic activity picks up, previous discharge and nonpoint source contamination levels can be

2. *Biodiversity and Depletion of Bio-Resources*—There is an urgent need to address contamination by waste products of human activities (heavy industry, agriculture, weapons development, power generation, etc.). For example, the sturgeon fishing industry has been dramatically affected. This resource is best known to the reader because of the value of caviar and fish, however, there has been a drastic decline in the sturgeon catch:

“... Landings have decreased from around 30,000 tonnes in 1985 to 13,300 tonnes in 1990, down to 2,100 tonnes in 1994. A quota system that was introduced together with a ban on pelagic fishing does not seem to have had the desired effect.

expected to resume. The potential impact of a changing industrial profile should also be examined in order to understand how future degradation patterns may differ from those of the past.

17. Except for oil products from oil fields or transportation by ship or pipeline, all other sources of pollution that are quantitatively important are well localized point sources. The Volga is beyond doubt the single major source: it drains the sewage of half the population of Russia, and of most its heavy industry. Much of the Volga pollution is broken down en route, or deposited on the bottoms of the Volga reservoirs, but sufficient amounts still reach the Caspian to cause major imbalances, especially in the shallow north basin, which has limited absorption capacity. While the Volga is a point source for the Caspian, it is itself a complex mix of point and non-point sources along its course. Coordination between the CSEP and the Upper and Middle Volga Components of the World Bank-funded Russian Environmental Management Project should be pursued as feasible and useful.
18. Major land-base point sources of pollution are oil extraction and refining complexes in Baku and Sumgait (Azerbaijan), the site of a century of oil production and environmental neglect, and radioactive solid and liquid waste deposits near the Gurevskaya nuclear power plant in Kazakhstan. The Sumgait industrial area, currently operating at only a fraction of capacity, and been partly constructed in a flood-prone zone. Large quantities of toxic waste run-off and spills have been generated by on-shore and off-shore oil fields, refineries and petrochemical plants. The shorelines and near-shore waters are heavily polluted in many areas, most prominently in Baku Bay.
19. The Gurevskaya nuclear power plant, which generates both power and desalinated drinking water, has been constructed sufficiently above sea level not to be immediately threatened by flooding. However, solid and liquid radioactive waste has been dumped in a number of depressions over karstic formations, which may be leaking radioactivity via the subsurface. Hard data on this problem are lacking.

While fishing methods have become more efficient and overfishing has occurred, the greatest impact on the sturgeon and other anadromous species is thought to arise from the construction of numerous dams on the Volga river, and to a lesser extent on the Dura river. These dams have effectively barred the fish from their main spawning grounds, reducing such areas to a small fraction of their previous size. In addition, the development of industrial complexes on the river banks with their subsequent discharges, coupled with non-point source run-off from intensive agriculture, have led to pollution of the remaining waterways.”²⁴

The Caspian basin is also rich in hydrocarbon deposits, with proven extensive reserves of oil and gas. This production increases the risks to aquatic resources, in part, due to the constant shipping traffic generated. In addition to the oil industry transport there must be added the fishing fleets of each country as well as cargo and passenger traffic that crosses the Caspian in order to reach the Volga-Don Canal and the Black Sea.

The water level fluctuations have caused problems:

The lowest level for the last five hundred years was reached in 1977 (-29m below sea level); therefore, it is a fair assumption that the level could continue to rise from the current level (-26m) until it reaches at least the 1900 level (-25m), presenting the littoral states with many urgent investment needs. In less than two decades, water levels have risen two and a half meters, inundating residential areas, transport, telecommunications and energy infrastructure, chemical and petrochemical industries, croplands and hatcheries. Thousands of residents have been evacuated from flooded homes, and up to 100,000 people in coastal cities and towns in Azerbaijan alone have been affected by the spread of toxic wastes, contamination of water supplies, loss of infrastructure, and inundation of workplaces and settlements.²⁵

The problems associated with the changing sea level generally fall into two main categories:

i) those that are exacerbated by the rising water, such as the spread of toxic contaminants into ground and surface waters, the collapse of vital fisheries due to the loss of natural and artificial hatcheries, and increased pressure on fragile lands because of displaced activities and communities; and

24. The World Bank, *supra*, note 18, at 4.

25. *Id.* at 5.

ii) those that are caused by changing water levels, such as residential flooding, saltwater intrusion into freshwater aquifers and the submersion of productive infrastructure (coastal factories, farms, roads, railways, etc.)²⁶

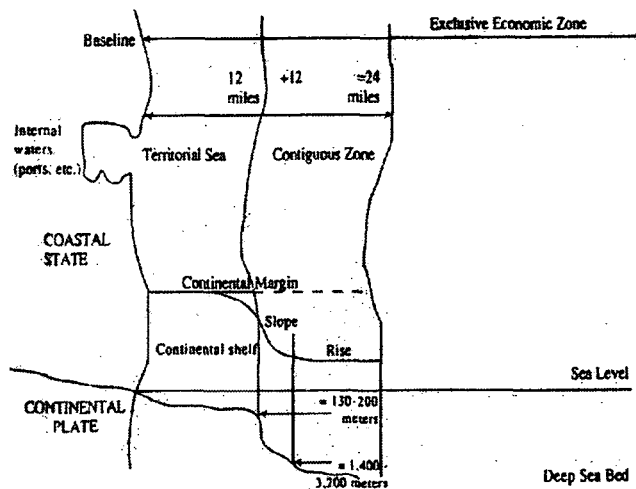
Against, this background, let us now review the provisions of the 1982 Convention that are applicable to our discussion. First, we will have an introductory sketch of the applicable law of the sea terms that will be utilized throughout this article. Then, we will turn to the jurisdictional provisions that are at the forefront of the sea-lake-ocean dispute.

III. Basic Law of the Terminology

A. A Jurisdictional Schematic

During the course of this article, there are law of the sea terms that will need to be understood by the reader. The following is a schematic jurisdictional diagram which has been drawn for the purpose of introductory analysis:

Normally, the coastal state exercises the utmost jurisdiction over its land territory. Every coastal state has a baseline²⁷ which is used to measure the state's diminishing jurisdiction as one moves seaward. The coastal state exercises exclusive jurisdiction over its



26. The World Bank, *supra* note 18, at 6.

27. Convention, *supra* note 3. The 1982 Convention defines "baseline" as follows: "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is a low-water line along the coast as marked on large-scale charts officially recognized by the coastal state." *Id.* at art. 5.

ports and harbors (with possible access to visiting ships). As one moves seaward from the baseline, the state exercises almost total jurisdiction over its territorial sea²⁸ (except for the doctrine of innocent passage²⁹) which is measured twelve miles seaward from its baseline. The coastal State's jurisdiction diminishes further when the contiguous zone,³⁰ which extends for twelve miles

28. Convention, *supra* note 3, The scope of the "territorial sea" is defined by Article 3 and 4 of the 1982 Convention. "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." *Id* at art. 3. "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea." *Id.* at art. 4.

29. Convention, *supra* note 3, art. 19. "Innocent passage" is defined by the 1982 Convention at Article 19 as follows:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order for security of the coastal State if in the territorial sea it engages in any of the following activities:
 - a. any treat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

any exercise or practice with weapons of any kind;

any act aimed at collecting information to the prejudice of the defense or security of the coastal State;

any act of progaganda amime at affecting the defense or security of the coastal State;

the launching, landing or taking on board of any aircraft;

the launching, landing or taking on board of any military device;

the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

any act of willful and serious pollution contrary to this Convention;

any fishing activities;

the carrying out of research or survey activities;

any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

any other activity not having a direct bearing on passage.

Id. at art. 19.

30. Convention, *supra* note 3, art. 33. "Contiguous zone" is defined by the 1982 Convention at Article 33 as follows:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
 - a. Prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or

beyond the territorial waters reaches the high seas. The contiguous zone is a limited area of jurisdiction of the coastal state (*e.g.*, navigation, sanitation, customs, fiscal) and is actually part of the high seas.³¹ The high seas areas are open to all nations and therefore the coastal State is not allowed to exercise its jurisdiction in this area (with limited exceptions, *e.g.*, the exclusive economic zone).³²

territorial sea;

- b. punish infringement of the above laws and regulations committed within its territory or territorial sea;
2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Id. at art. 33.

31. Convention, *supra* note 3, art. 55.

The term “high seas” is open to at least two interpretations. The Convention defines it as, “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” *Id.* at 86. Defining the exclusive economic zone introduces new variables to the high seas analysis, however. As set forth by P.W. Birnie:

Although Article 58 states that in the EEZ [Exclusive Economic Zone] all states continue to enjoy the freedoms of navigation and overflight and “other internationally lawful uses of the sea related to them, such as those associated with the operation of ships’ and aircraft, it also makes these rights subject to the relevant provisions of the Convention” without making it clear which are the “relevant provisions” or which take priority. Article 86 adds that the article “does not entail any abridgement of the freedoms enjoyed by all States” in the EEZ under Article 58, which itself also adds that “Articles 88 to 115 . . . apply to the exclusive economic zone so far as they are not incompatible with this Part” but coastal states may consider that as the zone’s purpose is to secure their exclusive right to its economic uses and as its legal status is arguably left *sui generis* by the wording of the UNCLOS since it is not clearly stated to be part of the high seas, it is their responsibility to protect navigation from piratical assaults; the better view, however, would be that as the zone is by its terms not part of the territorial sea the piracy articles apply in it. States taking the other line might also argue, however, that piracy is an unlawful use outwith [*sic*] the residual rights of other states.

P.W. Birnie, *Piracy—Past, Present and Future*, Piracy at Sea 131, 141 (Eric Ellen ed., 1989) (citations omitted). The UNCLOS Drafting Committee has not resolved these ambiguities satisfactorily.

32. Convention, *supra* note 3, art. 55. The concept of the “exclusive economic zone” is defined by the 1982 Convention at Article 55, as follows:

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction

The high seas have been traditionally open to all nations for the purpose of preserving international shipping and commerce. International straits are also preserved for international commerce and are therefore open to all nations.³³ The flow of international

of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.
Id. at art. 55.

Article 56 of the 1982 Convention governs the rights, jurisdiction and duties of the coastal State in the exclusive economic zone:

1. In the exclusive economic zone, the coastal State has:
 - a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - b) as provided for in the relevant provisions of this Convention with regard to:
 - i. the establishment and use of artificial islands, installations and structures;
 - ii. marine scientific research;
 - iii. the protection and preservation of the marine environment;
 - c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with part VI.

Id. at art. 56.

Finally, Article 57 of the 1982 Convention defines the breadth of the exclusive economic zone: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* at art. 57.

33. Convention, *supra* note 3, art. 34. Article 34 of the 1982 Convention governs the legal status of waters forming straits used for international purposes:

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or in the exercise by the States bordering the straits is exercised subject to this Part and to other rules of international law.

Id. at art. 34.

Article 37 and 38 of the 1982 Convention apply to transit passage for international purposes. Article 37 limits transit passage to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." *Id.* at art. 37. Article 38 then defines the right of transit passage as follows:

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except

commerce is at the heart of all major maritime conventions and concerns regarding maritime violence. Commerce must be able to flow freely, uninhibited, without danger to life and limb and without fear of widespread environmental contamination.

Having reviewed elementary jurisdictional concepts regarding Convention provisions applicable to this article, it is now necessary to set forth the basic Convention provision that is proving contentious.

B. The Definition of an Enclosed or Semi-Enclosed Sea

The Convention defines an “enclosed or semi-enclosed sea” as a “. . . gulf basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive zones of two or more coastal States.”³⁴

The reader will notice at the outset, that part of the definition utilizes a word that the Article is seeking to define; namely, a “sea.” This definition leads us to an important question: is there an “outlet” to another sea or ocean? Yes. In fact, the World Bank points out that because of this particular outlet, “. . . a

that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone. However, the requirements of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions to entry to that State. *Id.* at art. 38.

34. Convention, *supra* note 3, 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.

Convention, *supra*, note 3, art. 122.

recently noticed phenomenon that could lead to the potential loss of diversity among the sturgeon species is the hybridization that has occurred between sturgeon from the Black Sea and those in the Caspian Sea . . . this has come about through the connection now possible via the Don-Volga Canal. The canal also permits the accidental introduction of the exotic species from the Black Sea, via ballast waste discharge from the world's waters"³⁵

However, we have an "outlet" going in the wrong direction. As was pointed out earlier, 130 large and small rivers flow into the Caspian. While not meeting the exact definition of an enclosed or semi-enclosed sea, the Article definition could easily be stretched to cover this situation. Why bother doing this mental aerobic? Because the next numerical convention article clearly requests that the States bordering such an area cooperate ". . . with each other in the exercise of their rights and in the performance of their duties under this Convention"³⁶

"Cooperation" is the key idea here. More than eighty percent of the Caspian shoreline is shared by Azerbaijan, Russia, Kazakhstan and Turkmenistan while the rest is controlled by Iran. Littoral States should cooperate in the exercise of their rights and in the performance of their duties. However, up until now, each State is attempting to make the best possible deal for itself.

Does it matter whether the Caspian is a "sea" or a "lake" or another type of geological entry? In order to answer this question,

35. The World Bank, *supra*, note 18, at 2-3.

36. Convention, *supra* note 3, art. 123. Article 123 states, as follows:

Article 123

Co-operation of States bordering enclosed or semi-enclosed seas

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavor, directly or through an appropriate regional organization:

- a. conservation, exploration and exploitation of the living resources of the sea;
- b. to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- c. to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- d. to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article. *Id.* at art. 123.

let us examine the writings of commentators, as well as relevant International Court of Justice elaborations.

IV. Is the Caspian a Sea, Lake, Ocean, Basin, or Some Other Form of Geological Entity?

According to a recent article, the issue of Caspian classification is rather difficult:³⁷

“The classification of the Caspian is a complicated issue. It is defined as an “inland sea,” for example. *See* 2NEB, *supra* note 2, at 612. The Food and Agriculture Organization’s (“FAO”) Systematic Index also qualifies the Caspian Sea as an “inland sea.” *See* FAO, *Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin*, in 2 LEGISLATIVE STUDY NO. 34, at 287-9184). Notably, however, the Caspian Sea is included in the list of “Major Lakes of the World.” WATER IN CRISIS 161-65 (P.H. Gleick Ed., 1993) (Table B.10). One expert from the Intergovernmental Oceanographic Commission of UNESCO has asserted that “from an oceanographic point of view (composition of water, fauna, flora) the Caspian Sea should be considered as a sea. In fact, the Caspian Sea is a relict marine basins.” *See Minutes of the meeting on Cooperation of UN Organizations in the Caspian Sea Initiatives 5* (Jan. 17, 1995) (on file with the author). For a detailed analysis of the legal issues regarding the Caspian Sea, *see* S. Vinogradov & P. Wouters, *The Caspian Sea: Current Legal Problems*, 55 *ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT* 604023 (1995); S. Vinogradov & P. Wouters, *The Caspian Sea: Quest for a New Legal Regime*, 9 *LEIDEN J. INT’L L.* (forthcoming 1996). Resource Journal.

The Caspian has been considered an inland sea, a major lake as well as a relict marine basin. If it is to be considered a “sea” it is because (a) historically, that is how it has been referred to; and (b) oceanographically, the composition of its water, and the type of flora and fauna, seem to indicate it is a sea. On the other hand it has been asserted that “. . . [a]s a land-locked body of water, laying some 27 meters below the ocean level, without any direct outlet to the ocean . . .”[footnote omitted], the Caspian is not

37. Sergei Vinogradov, *Transboundary Water Resources in the Former Soviet Union: Between Conflict and Cooperation*, 36 *NAT. RESOURCES J.* 393, 396 n.8.

stricto sensu a sea, i.e., a part of the world ocean”³⁸ As one scholar pointed out, “[t]he sea/lake dichotomy permits a symbiotic approach to the problem under which two sets of identifiable rules of international law could be appealed to by the littoral states in the regulation of the Caspian”³⁹

Normally, the approach taken by each of the concerned States would depend on how strong each considers its position to be *viz-a-viz* each other. As late as December 18, 1998, it was reported that:⁴⁰

“The five countries bordering the Caspian Sea failed to reach agreement on its legal status during a meeting in Moscow that Turkmenistan, Azerbaijan, and Iran wanted both the seabed and the surface divided into national sectors, while Russia and Kazakhstan proposed dividing only the seabed, leaving the surface free.”

We should now look at a possible procedure that could be utilized in order to create a legal regime thereby, hopefully, stabilizing the region from the repercussion of various unilateral claims of ownership.

V. The Proposed Procedure to Adopt Regarding The Exploration of the Caspian

The purpose of having a regional plan of arrangement (creation of a new legal regime) among the States is threefold: first, to set forth the procedure these States will utilize in order to obtain the resources available in the Caspian; second, to set forth a procedure that they will utilize in order to protect the non-resource rights such as navigation; and, third, because a regional plan is needed to proceed with development/distribution and at the same time, protect the environment. Why? As one commentator stated: “The fact that the Caspian is an inland sea and the littoral States do not have access to the open sea makes the issue of pipeline routes critical to the Caspian Sea oil exploration.”⁴¹

The classification of the Caspian body of water is disputed by

38. Vinogradov and Wouters, *supra* note 8, at 90.

39. *Id.* at 91.

40. Christopher Wren, *Talks on Caspian Sea Rights Fail*, N.Y. TIMES, Dec. 18, 1998 at A8.

41. See Jon E. Chicky, *The Caspian Sea Region: A Look at Future U.S. and Allied Military Missions*, Final Report, Naval War College. Feb. 13, 1998, at 2,11.

the littoral States. This dispute is one source of the tension between the littoral States. The Russians, Iranians, and recently the Turkmen have classified the Caspian as a lake whereas the Azerbaijanis and Kazaks call the Caspian an inland sea. The classification debate is more than academic. The debate centers on dividing the resources (while protecting the non-resources “rights”) of the Caspian. Those supporting the lake concept say that beyond a limited territorial boundary all littoral States must agree on the use or exploitation of Caspian resources. Those supporting the inland sea view believe that the Caspian should be treated like other enclosed seas, with territorial limits and the resources beyond them open for exploitation. According to the UN organizations, Food and Agriculture Organization and UNESCO, the Caspian, from an oceanographic point of view, is an inland sea.”⁴²

By now, the reader should be aware of the fact that it is impossible to call the Caspian a sea or lake because an effective argument could be made for either approach. However, it may be irrelevant that the Caspian be labeled as one or the other because the framework for proceeding to develop the area has been set forth in the Convention and in a “condominium” approach taken by the International Court of Justice in the Gulf of Fonseca case.⁴³

A. *Case Concerning the Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*

Before deciding on the paths that the oil pipelines will take, is necessary to develop a legal regime or basis for developing the oil from the Caspian. Why? Because there are other considerations that are important, *e.g.*, the environmental damage that could occur if the extraction of oil is taken in a “helter-skelter” manner. Developing this regime or plan should be quite simple once the littoral and surrounding States realize that cooperation will be necessary or very serious political problems will occur. Thus, we can have planned “greed” for the “common heritage of mankind” by utilizing a regional approach that should satisfy all of the States that are involved. Every State could benefit and thereby bring up the standard of living in each of the neighboring States.

42. See Chicky, *supra* note 42, at 2.

43. Gulf of Fonseca (El Salvador/Honduras: Nicaragua Intervening) 1992 I.C.J. 351.

The majority opinion of the Gulf of Fonseca provides an interesting approach.⁴⁴ The ICJ majority opinion decided that “. . . the Gulf waters, other than the 3-mile maritime belts, are historic waters and subject to a joint sovereignty of the three coastal states”⁴⁵ and that the waters of the Gulf are “the subject of [a] condominium or co-ownership.”⁴⁶ The Chamber decided that “. . . the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, from 1821 to 1839 of the Federal Republic of Central America were thereafter succeeded to and held in sovereignty by [the three littoral States], jointly, and continue to be so held but excluding a belt . . . extending three miles (1 marine league) from the littoral of each of the three States, such belts being under the exclusive sovereignty of the coastal State”

Judge Oda, in commenting on the majority opinion, stated in his dissent:⁴⁷

“Another thesis implicit in the 1917 Judgment and the present Judgment, which heavily relies upon its predecessor is – in the words of the latter – that “there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States” (Judgment, para 399). This prompts the question: if the assumption of unitary status for the entire waters in the Gulf had been correct in 1821 or 1839, why should the 1917 Judgment and the present Judgment not have preferred the far more natural interpretation that, once the territory over which a single state, Spain, and later the Federal Republic of Central America, had sovereignty was divided into five states as a result of their independence the authority over and control of the offshore waters (which had always been considered appurtenances of the land) might have been divided correspondingly to the divided territories of those newly independent States, and that the three riparian States of El Salvador, Honduras, and Nicaragua each inherited authority over and control of their respective offshore waters of their own land territory in the Gulf of Fonseca?”

44. The author of this article agrees with the well-reasoned dissent of Judge Oda.

45. *See id.* at 297. This quote is taken from dissenting opinion of Judge Oda. It appears in para. 404 of the main opinion.

46. *See id.* at paragraph 412 and 432(1) (majority opinion).

47. *See id.* at paragraph 38, Judge Oda's dissenting opinion.

Judge Oda further states that he agrees that a condominium may be created by the consent of the states concerned with respect to the area to which those States could have been entitled originally. He states that although there is precedent and refers to the case of the Baie du Figuiier,

“... where there has existed a zone of condominium possessed jointly by France and Spain since 1879 (Judgment, para. 401)) this precedent does not, however, give any ground for justifying the status of a condominium for the Gulf of Fonseca in connection with which no agreement between the States concerned has never existed”⁴⁸

Further, he states:⁴⁹

“... The Chamber states: that “the Gulf of Fonseca is an historic bay, . . . the waters of it are accordingly historic waters” (Judgment para. 383), that “[w]hat does present a problem . . . is the precise character of the sovereignty which the three coastal states enjoy in these historic waters” (para. 395), that “[t]he essence of the 1917 decision concerning the legal status of the waters of the Gulf was . . . that these historic waters were then subject to a ‘co-ownership’ (condomino) of the three coastal states” (para. 398), that “the maritime area in question had long been historic waters under a single State’s sovereignty (para. 401), and that “the Gulf waters, other than the 3-mile maritime belts are historic waters and subject to a joint sovereignty of the three coastal States” (para. 404). The Chamber seems to simply add confusion by its misconception of what constitutes historic waters.”

Judge Oda states in his opinion that he “agrees that a condominium may be created by the consent of the States concerned with respect to the area to which those States could have originally been entitled.”⁵⁰ Judge Oda does not mean to suggest any general rule suggesting that the concept of a condominium should not be applicable in maritime areas.

The approach of the majority of the ICJ could be utilized in the Caspian region if the States decide to utilize the joint ownership or condominium approach in order to resolve the problem of delimitation. On the other hand, an argument could

48. See *id.* at 754 (at para. 41).

49. See *id.* at 755 (at para. 42).

50. See *id.* at 754 (at para. 42).

be made that Article 15 of the Convention should apply. It states, as follows:⁵¹

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every part of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance there with.”

In commenting on Article 15, Judge Oda mentioned that “. . . in other words, the equidistance method is a rule in delimitation of the territorial sea of the neighboring States either opposite or adjacent to each other, and the shape of the coast as a baseline is of importance for measuring the territorial sea”⁵² He went on to state that “. . . while the delimitation of the exclusive economic zone and the continental shelf between the neighbouring States should be effected “in order to achieve an equitable solution” (1982 United Nations Convention, Articles 74 and 83), application of the equidistance method remains a rule in the delimitation of the territorial sea”⁵³

Against this background, let us look at additional reasons why a regional approach, rather than unilateral actions, will be necessary.

B. A Legal Regime Should be Created for the Entire Region

What type of legal regime should be created in the Caspian region? In addition to the equities of the situation, it is necessary to consider the practicalities of the problem that would occur without the joint cooperation of all of the littoral States. No matter what the equidistance method may provide in terms of resource recovery, if a legal regime is not created which is considered fair by all of the regional States, delivering the oil may pose a problem in the future. Why? Because the agreement to construct a pipeline, estimated at approximately \$2.4 million dollars, would carry Caspian oil to parts the West. The route

51. Convention, *supra*, note 3, art. 15.

52. See *Gulf of Fonseca*, 1992 I.C.J. at 759, para. 49.

53. See *id.* at 759, para. 50.

would not pass through Russia or Iran. The nations near the Caspian, which were part of the Soviet Union only a decade ago, would be driven further away from the influence of Russian and give the United States greater influence in the region.⁵⁴ In addition, cooperation among the States is essential in order to protect the environment and the pipelines. A feasibility study regarding this matter has not been completed.

Recently, the *New York Times* ran an article regarding what is called "A New Big-Power Race Starts on a Sea of Crude" in which the *New York Times* depicted the "great game" as the selection of a path for the oil that is retrieved from the Caspian.⁵⁵ In order to understand why a legal regime based upon a joint ownership or condominium approach would be sensible in this region, one need only look no further than the proposed paths for the oil. For example, through the Eastern European ports, the *New York Times* reported that utilizing Romania, Bulgaria, and the Ukraine oil could be sent by barge or pipeline straight to Western Europe from their ports on the Black Sea.⁵⁶ As far as selecting a path for the oil through Russia, the *Times* points out that the Soviet era pipelines still exist, that they could be supplemented and that the Russians are eager to do this.⁵⁷ However, American oil companies and the newly independent countries of the Caucasus want alternative routes—partly to avoid new dependence on Russia and partly to side step unstable areas of Russia like Chechnya. Another selection could be a route to China. A feasibility study is due later in 1999 concerning the possibility of building a natural gas pipeline that would deliver fuel directly to China through Kazakhstan. Another possibility would be to have the oil go through Georgia and the Black Sea. Some American oil companies favor this route for now because building a new pipeline here would be easier than going through Turkey because tankers could then go straight to Eastern Europe or out the Black Sea to the Mediterranean. However, Turkey objects to the increased traffic through the Bosphorus (which is an international strait and therefore not subject to any regulation by Turkey because the Bosphorus is equivalent to high seas areas).⁵⁸

54. *Supra* note 13 at 12.

55. Stephen Kinzer, *A New Big-Power Race Starts on a Sea of Crude*, N.Y. TIMES, Jan. 24, 1999, at 4.

56. *Id.*

57. *See id.*

58. *See* Convention, *supra* note 3. Part III of the LOS [1982] Convention addresses five different kinds of straights used for international navigation, each

with a distinct legal regime:

- a. Straits connecting a part of the high seas/EEZ and another part of the high seas/EEZ (Article 37 - governed by transit passage).
- b. Straits connecting a part of the high seas/EEZ and the territorial sea of a foreign state (Article 45(1)(a) - regulated by nonsuspendable innocent passage).
- c. Straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a state bordering the strait and its mainland, if there exists seaward of the island a route through the high seas/EEZ of similar convenience with regard to navigation and hydrographic characteristics (Article 38(1) - regulated by nonsuspendable innocent passage).
- d. Straits regulated in whole or in part by international conventions (Article 35(c)). The Convention does not alter the legal regime in straits regulated by long-standing international conventions in force specifically relating to such straits.
- e. Straits through archipelagic waters governed by archipelagic sea lanes passage (Article 53(4)).

Robert W. Smith & J. Ashley Roach, U.S. Dep't of State, *Limits in the Seas*, No. 112, *United States Responses to Excessive National Maritime Claims 301* (Mar. 9, 1992).

Article 34 of the Convention governs the legal status of waters forming straits used for international purposes:

- a. The régime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.
- b. The sovereignty or jurisdiction of the States bordering the straits, is exercised subject to this Part and to other rules of international law.

Article 22 of the Convention governs the sea lanes and traffic separation schemes in the territorial sea as follows:

- a. The coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.
- b. In particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes.
- c. In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account:
- d. the recommendations of the competent international organization;
- e. any channels customarily used for international navigation;

Another route would be through Turkey to Georgia. This route is favored by the United States which sees the route as another way to assist Turkey as well as assume delivery of oil to the Mediterranean through a friendly territory and promote as much independence as possible in the former Soviet Republics. American oil companies state that they would need major subsidies because of the expense involved if this route is utilized. Another possibility would be to have the oil go through Iran. This route would be the cheapest alternative. Currently, American companies are forbidden from doing business with the existing Iranian regime although there are intensive lobbying efforts being made to change this position. This route would necessitate building an 1,080 mile pipeline that would begin in Azerbaijan's capital, Baku, cross Georgia and Turkey and end in Turkey's Mediterranean port of Ceyhan. The oil would be shipped from there onto tankers and eventually to western countries. If Turkey guarantees the building of a Turkish pipeline, it is estimate that it would cost the oil companies no more than \$1.4 billion dollars. The entire cost of construction of this type of pipeline would cast \$2.4 billion dollars.⁵⁹

Finally, the oil could go through Afghanistan as Pakistan would like to develop this route. However, Afghanistan has been in the grip of a civil war for a decade and its current rulers, are considered to be the most radical of all Islamic regimes.

The interesting point here is that any unilateral declaration would not carry much force in the region because it seems that each State in the region is dependant upon other States in order to develop and ship their oil and gas out of the region.

In summary, it is apparent that the most beneficial method for development of the Caspian region is to have a legal regime based upon a condominium approach in order to guarantee safe pipeline passage for the oil. The countries could work together in order to establish a regional approach toward handling environmental problems that are currently, and will be in the future, facing the States. It should be pointed out that a regional

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- f. the special characteristics of particular ships and channels; and
 - g. the density of traffic.
 - h. The coastal State shall clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity shall be given.

See id. at art. 22.

59. *Supra* note 55; *supra* note 7; *see also* Jane Perlez, *U.S. Deal on Caspian Oil Still Faces Problem With Bottom Line*, N.Y. TIMES, Nov. 21, 1999, at 6.

approach will also allow countries to plan a successful environmental program.

C. A Regional Approach to Caspian Environmental Issues

The World Bank has produced a draft "Concept Paper" entitled the "Caspian Environmental Program."⁶⁰ The Concept Paper provides descriptions of the actions that could be undertaken by the Caspian governments (Azerbaijan, Iran, Kazakstan, Russia, and Turkmenistan) in cooperation with international donors. "... The overall goal of the program will be to promote sustainable development and management of the Caspian environment over the long-term (approximately 20 years)"⁶¹ Subsidiary goals have also been identified as follows:⁶²

1. Understanding and learning to live with the Caspian water level fluctuation;
2. Abatement of existing and prevention of new types of pollution and deterioration of the Caspian environment and its bioresources;
3. Recovery and rehabilitation of those elements of the Caspian environment (including biological diversity) that are degraded and that still have potential for recovery; and
4. Long-term sustainability of environmental quality and bioresources for the present and future human populations of the region.

The Concept Paper goes on in length to describe what would be the main components of these goals. It also states that the program would draw extensively on lessons learned from other regional seas programs (*e.g.*, Baltic Sea Program, Black Sea Program, Mediterranean Environmental Technical Assistance Program).

If a regional approach is not utilized and agreed upon by all of the littoral States and States surrounding the general geographic area, it is doubtful that the environmental issues will be taken into consideration and so the average people of the region will probably wind up being worse off than ever before.

60. The World Bank, *supra* note 18. (The Concept Paper is not paginated.)

61. *Id.* at para. 2. (Contained in "Executive Summary.")

62. *Id.*

VI. Conclusion

It is necessary to create a legal regime for the Caspian. This will allow for proper environmental development and control throughout the region. As this article is being written, the “big-power race” is on⁶³. Many of the States in the world are quite interested in making a fortune in the area. Picking the route for the pipeline would make some countries wealthy while other countries quite upset over the results. The main reason for having a legal regime based on a regional approach is so that there is a foundation or basis from which to work in cooperation so that countries are satisfied that their interests are being protected. As we know, the “common heritage of mankind” was a dominating theme of the 1982 Convention. This would be an outstanding opportunity to act accordingly. It is important that unilateral declarations be kept out of this procedure. It is important to protect the navigational rights of countries through international straits which is one reason why the concept of “transit” passage was introduced into the 1982 Convention. All these interests—environmental, picking a path for the oil exportation, navigational rights—resource and nonresource alike, would be better served by having a solid foundation from which to operate.

If the environmental/ecological problems are not tended to, this will produce unilateral assertions throughout the region. For example, it has been reported that more than 50,000 vessels transited the Bosphorus in 1997 in which 7,000 tankers passed through carrying an estimated 3 billion gallons of oil.⁶⁴ The Turkish government has been making unilateral declarations threatening to limit passage in an international strait which would be a clear violation of the 1982 Convention⁶⁵ as waters in international straits are considered high seas (not to mention the fact that they would be in violation of the 1936 Montreux treaty).⁶⁶

63. See Kinzer, *supra* note 56 at 4.

64. Stephen Kinzer, *Fearless Turks' Big Fear? Oil Tankers*, N.Y. TIMES, Oct. 24, 1998, at A4.

65. Kinzer, *supra*, note 2 at 8.

66. See generally Convention, *supra* note 3. A conference held in Montreux (Switzerland) from June 22 to July 20, 1936, by delegates from Bulgaria, France, Greece, Italy, Japan, Romania, the Soviet Union, Turkey, the United Kingdom and Yugoslavia agreed to replace the 1923 Straits Convention (part of the peace treaty signed with Turkey at Lausanne on July 24, 1923) by a new Convention.

See *id.* N.J. RENGGER & JOHN CAMPBELL, TREATIES AND ALLIANCES OF THE WORLD 23 (6th ed. 1995). The 1923 Convention had provided for freedom of transit and

Turkey could point to a tanker accident that occurred more than four years ago which killed 28 sailors and dumped one million gallons of oil onto the Istanbul shore. In August, a 900-foot-long super tanker loaded with seven million barrels of oil ran aground. Turkey has stated that more than nine million people live within twenty miles of the narrow Bosphorus and it is just a matter of time before large scale oil spills would reek an unprecedented health and economic damage.

With the water level of the Caspian rising at the rate of seven feet in the last eighteen years, with wind-induced surges carrying waves as far as twelve miles inland with the probability that the sea level will rise another seven to ten feet it is not inconceivable that sea water could drown thousands of square miles of towns

navigation by sea and air in the Bosphorus and the Dardanelles; for the demilitarization of both shores of the straits, the Sea of Marmora and certain islands in the Aegean Sea; and for the establishment in Constantinople (now Istanbul) of an international commission to supervise the implementation of the convention. The 1936 Convention essentially restored Turkish sovereignty over the straits area by ending their demilitarization and transferring the duties of the international commission to the Turkish government.

- a. The principal provisions of the 1936 Convention are:
- b. If Turkey considers itself in danger the strait must remain open to merchant ships, but strait entry must be made by day and Turkey may dictate the route (art. 2). (Traffic schemes have been in force since May 1, 1982.) In time of peace, light surface craft (whether those of the Black Sea power or not) have complete freedom of passage through the straits (Art. 10).
- c. Black Sea powers are granted broad use of the straits, including use for torpedo boats, submarines, and vessels carrying heavy tonnage (with some restriction) (art. 11).
- d. Non-courtesy visits of non-Black Sea powers must adhere to notice and tonnage restrictions (art. 11).
- e. Warships of belligerent powers shall be accorded passage if they are serving a humanitarian purpose as defined by the League of Nations.

Passage of warships is left to the discretion of the Turkish government in times of war where Turkey is a belligerent, or when Turkey considers itself menaced by "an imminent danger of war." (art. 11).

Although the Convention provided, in paragraph 3 of Article 28, that it would remain in force for 20 years, it was also laid down in that article that it would continue to be in force only until two years after a contracting party had given notice of denunciation of the Convention "two years prior to the expiry of the said period of 20 years." No such notice has been given; therefore, the Convention is still in force, the parties being Australia, Belgium, France, Greece, Japan, Romania, the Soviet Union, Turkey, the United Kingdom and Yugoslavia. *See id.* at 23-24.

and farms as well as billions of dollars worth of oil wells, pipelines and refineries.⁶⁷ Oceanographer Ms. Marzakhan Mansimov states that in Azerbaijan alone "... about 50 settlements and 220 industrial enterprises, 18 kilometers (11 miles) of railroad, 10,000 hectares (24,700) acres of grass land and farms that serve 100,000 people are exposed to flooding."⁶⁸ Nobody knows why the Caspian is rising and the various speculations include warming effects of pollution-related greenhouse gases on the Russian Arctic icecaps that feed the sea, oscillations in the Earth's crust, and unexpected effects of dam constructions.⁶⁹ It would seem that all the Caspian governments are facing this problem so that the next logical step would be one of regional cooperation. There is simply no room for unilateral declarations in the area, if the delicate balance between the environment and development is to be maintained for the "common heritage of mankind."

67. Frank Viviano, *Nightmare Underneath Caspian Basin; Oil Region is Previewed for an Ecological Crisis*, S. F. CHRON., Sept. 19, 1998, at 7.

68. *See id.* at 9.

69. *Id.* at 9.

