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How Central Asia Was Won: A Revival of the Great Game

Morgan R. Davis

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How Central Asia Was Won: A Revival of the Great Game

Cover Page Footnote
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How Central Asia Was Won: A Revival of "The Great Game"

Morgan R. Davis†

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I. Introduction: The Great Game of Then and Now

In 1991, the world watched in shock and awe as the Union of Soviet Socialist Republics (USSR) collapsed leaving the United States as the winner of the forty-six year long Cold War.\(^1\) As the Newly Independent States of Eastern Europe and Central Asia broke away from the Soviet Union, few paid attention.\(^2\) The only concern for most major international players was that the USSR was gone and that the face of international politics would be changed forever.\(^3\) Almost no one noted the issues for each new republic as they attempted to rise from the settling dust of the USSR.\(^4\)

At first, the new republics of Central Asia were unwilling or unable to venture out from their relationship with the former

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\(^2\) See Nadia Diuk & Adrian Karatnycky, New Nations Rising: The Fall of the Soviets and the Challenge of Independence 268-70 (1993) [hereinafter Diuk & Karatnycky] (detailing the early years after the Soviet Union’s 1991 collapse in which U.S. policymakers were slow to recognize the problems facing former Soviet republics). The Newly Independent States, a common nickname for all newly sovereign states created at the fall of the USSR, include Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.

\(^3\) See id.

\(^4\) See id.
USSR, now the Russian Federation. Unfortunately, the new Russian establishment was struggling and unwilling to aid its neighbors. Inflation soared and national incomes plummeted throughout Central Asia. Quickly, the five countries of Central Asia—Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan, and Turkmenistan—took steps to either further establish ties with Russia or to seek aid from external sources.

Central Asians are used to the presence of external forces. For the majority of the nineteenth century, the British Empire and the Russian Empire competed for supremacy in Central Asia. The 10,000 km trade route deemed “The Silk Road” between Europe and Asia was well sought-after by the British and Russian Empire. British novelist Rudyard Kipling is attributed with naming the century-long rivalry “The Great Game.”

Today, games are once again afoot in the Eurasian Steppe. Like the “Great Game” of the nineteenth century there are multiple players involved, with almost identical motives but competing strategies. Unlike “The Great Game,” it is not Russia and Great Britain competing for control; the United States, Russia, Europe, and China are the most prominent figures. While control of the

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5 See id. at 68-69 (asserting that a post-1991 exodus of relatively skilled ethnic Russians and economic disparities had put nearly all of the Central Asian republics on the path to economic dependence on Russian subsidies).

6 See id.

7 DIUK & KARATNYCKY, supra note 2, at 68-69.

8 See 2 RUSSIA, THE CAUCASUS, AND CENTRAL ASIA: THE 21ST CENTURY SECURITY ENVIRONMENT 10 (Rajan Menon et al. eds., 1999) [hereinafter Menon et al.] (“Countries, companies, and organizations from beyond are courting Central Asian states. The rivalries that have emerged in this new zone of competition afford Central Asian government many new opportunities.”); see also DIUK & KARATNYCKY, supra note 2, at 68-69.


10 ld. at 4.

11 ld. at 2.


13 KLEVEMAN, supra note 9, at 3.

14 ld. at 4.
region's goods is desirable, the major interests of the United States, Russia, and China center around stability, security, and energy.\footnote{See Assessing Energy and Security Issues in Central Asia: Hearing on H.R. Before the Subcomm on Middle East and Central Asia, 109th Cong. 1 (2006) (statement of Hon. Ileana Ros-Lehtinen, Chairman of Subcommittee) [hereinafter Assessing Energy and Security Issues] (sketching the three interests as being interrelated).}

II. The Second Transoceanic Era and How it has Changed the Face of "The Great Game"

In 2007, the Center for Strategic and Budgetary Assessments (CSBA), a defense think tank in Washington, D.C., released a report entitled A New Global Defense Posture for the Second Transoceanic Era.\footnote{See Andrew Krepinevich & Robert Work, A New Global Defense Posture for the Second Transoceanic Era, CTR. FOR STRATEGIC & BUDGETARY ASSESSMENTS (2007), http://www.csbaonline.org/4Publications/PubLibrary/R.20070420.A New_Global_Defence/R.20070420.A New_Global_Defene.pdf [hereinafter Krepinevich & Work].} The report illustrates the characteristics of the Second Transoceanic Era.\footnote{The First Transoceanic Era is marked by the Cold War stretching from 1947 until the fall of the Berlin Wall. The Second Transoceanic Era is viewed as the period of American transition to a new global defense scheme tailored to address the demands of a post-Cold War world. See id. at i.} While focused on the foreign policy of the United States, the report touches on the specific variables present in this “Era” that have not existed in any other.\footnote{See id.}

Economically, the private sector now plays a much larger role in influencing the actions of international players than was the case a hundred years ago.\footnote{Compare Bülent Gökay, History of Oil Development in the Caspian Basin, in OIL AND GEOPOLITICS IN THE CASPIAN SEA REGION 10 (Michael P. Croissant & Bülent Aras, eds., 1999) (detailing efforts in the nineteenth and early twentieth centuries by the Nobel and Rothschild families to explore Caspian oil fields and develop markets) [hereinafter OIL AND GEOPOLITICS], with Vladimir Mesamed, Turkmenistan: Oil, Gas, and Caspian Politics, in OIL AND GEOPOLITICS at 220-21 (describing a 1997 agreement in which oil companies from more than a half-dozen nations—including Amoco, Exxon, Shell, and Unocal, as well as state-backed firms from Turkey, Malaysia, and others—agreed with Turkmenistan to rebuild a major oil refinery in Terkmenbashi, a Caspian seaport).}

Foreign policy has moved away from the Monroe Doctrine,\footnote{The Monroe Doctrine of 1823 asserted that the Western Hemisphere was not to be further colonized by European countries and that the United States would not interfere with existing European colonies nor meddle in the internal concerns of European} “Big Stick” Diplomacy,\footnote{See id.} and the
aspiration for an empire. The Second Transoceanic Era is characterized by the linkage of external policy interests with domestic policy interests. The report describes the “increasingly important role” that strategic and operational concepts will play in the Second Transoceanic Era. These concepts link the overall posture with existing or emerging contemporary national security challenges and the militaristic capabilities needed to address them, forming the posture’s “connective tissue.”

Central Asia is a region where its inner-workings have significant domestic and foreign policy implications for the United States, Russia, China, and the European Union. This Comment will examine how the history, political turmoil, and natural wealth of Central Asia have had a significant effect on the face of the international community. Specifically, international law has attempted to respond to the special issues that have arisen as the states of Central Asia have gained their independence.

Central Asia is a region with a legacy shaped by centuries of manipulation and neglect. Today, the region is exemplified by a lack of national identity, a paranoid status quo left over from the Soviet era, very little established infrastructure, and what some believe is the world’s last major untapped supply of oil and natural gas.

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21 “Big Stick” Diplomacy was Theodore Roosevelt’s corollary to the Monroe Doctrine of 1823, stating that the United States had the right to enforce “international police power” over the Western Hemisphere. Big Stick and Dollar Diplomacy, ENCYCLOPEDIA, http://www.encyclopedia.com/doc/1G2-3468300113.html (last visited Feb. 7, 2011). “Big Stick” Diplomacy received its nickname from Theodore Roosevelt in quoting the old African proverb, “Speak softly and carry a big stick, and you will go far.” Id.


23 See Krepinevich & Work, supra note 16, at 19 (discussing the differences in the American global presence between the First and Second Transoceanic Era).

24 Id.

25 See RUMER ET AL., supra note 22, at 7.

26 See KLEVEMAN, supra note 9, at 3.

A. Overview of the Region

Kazakhstan, the most democratic of the Central Asian countries, is the largest holder of natural oil wealth in the region and has a somewhat "open-door" foreign policy. Kazakhstan is similar to Kazakhstan in its policies, but does not possess the same natural fortune lying beneath its terrain. Uzbekistan has been very closely tied to Russia since it ejected the U.S. military in 2005 from the Karshi-Khanabad airbase. Tajikistan is still crippled from its civil war in the early 1990s. Tajikistan is in such desperate need for external aid, it will partner with any country willing to pay. Turkmenistan is still a mystery. The country’s longtime ruler, Saparmurat Niyazov died in December 2006 and was replaced by his Premier. Naming himself "Turkmenbashi" ("leader of all Turkmens"), Niyazov set forth policies aimed at establishing a cult of personality—silencing political opposition and independent media while naming cities and calendar months after himself and his family—at the expense

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29 See Krepinevich & Work, supra note 16, at 13 (describing the relationship between Uzbekistan and the United States, specifically examining the termination of the lease held by the U.S. in Uzbekistan).

30 See RUMER ET AL., supra note 22, at 49.

31 See Bess A. Brown, The Civil War in Tajikistan, 1992-1993, in TAJIKISTAN: TRIALS OF INDEPENDENCE 95 (Mohammad-Reza Djalili et al. eds., 1997) [hereinafter Brown] (explaining the civil war’s devastation of the Tajik economy, leaving the country dependent on Russian aid); Assessing Energy and Security Issues, supra note 15 (statement of Ms. Lana Ekimoff, Director, Office of Russian and Eurasian Affairs, U.S. Department of Energy) (explaining that Tajikistan has few natural resources other than hydropower); KLEVENMAN, supra note 9, at 193 (citing Russian statements around 2003 that Russian peacekeeping troops would remain in Tajikistan for at least 15 more years); David L. Stern, Fragile Tajikistan Hopes Water Will Power Its Ambitions, N.Y. TIMES, Sept. 1, 2008, at A5 (reporting on a bilateral agreement with China to build a 300 million dollars hydroelectric power plant).

of the liberty and well-being of his countrymen. His deputy premier, Gurbanguly Berdymukhammedov, replaced him and has attempted to undo Niyazov’s policies, though some human rights groups and other observers remain skeptical.

B. International “Players” in Central Asia

The natural resources of Central Asia are a significant factor in the policies of the United States, Russia, and China. Central Asia has a very large supply of both natural gas and oil. With the demand for energy resources increasing, the diversification of energy sources is important to every global power. Energy source diversity decreases the possibility that a few suppliers can use their influence to incite a global conflict. Central Asia is thought to be the final frontier in terms of natural resource wealth. Some believe all other reserves have been found and either tapped or abandoned due to complications with extraction. To ensure energy security in the region, the resources of Central Asia need to be made available to the global market.

The United States’ internal energy usage will not directly benefit from the energy supplies of Central Asia, at least not to a large degree. But, a loosening of Russia’s grip on Central Asian energy would mean a reduction of Russia’s ability to use the

33 Id.
34 See Eye on Image, Turkmenistan Overhauls Laws, N.Y. TIMES, Sept. 27, 2008, at A7 (reporting on constitutional changes transferring power from a body of Niyazov-picked delegates to an elected parliament).
35 See infra Section II.
39 See generally Bernard A. Gelb, CRS Report for Cong. on Caspian Oil and Gas: Production and Prospects (Sept. 8, 2006) [hereinafter Caspian Oil and Gas] (explaining how geopolitical, technological, and economic obstacles intertwine to block extensive exploration and exploitation of the region’s voluminous proven and unproven energy reserves).
supply to exert political pressure on its customers throughout much of Europe. The establishment of an alternative Central Asian pipeline system will help to make the countries in this region "economically independent and by extension politically independent and give them breathing space from Russia." Finally, as the world's super power, the United States has an interest and global responsibility to do everything possible in preventing a global conflict, which is exactly what an energy-monopoly in Central Asia, or any region for that matter, could cause.41

Central Asia is the last known virtually untapped source of oil and natural gas.42 However, these countries are high-risk environments for international investors.43 International law has sought to catalyze Central Asian growth and establish a safer investment atmosphere through instruments like the Energy Charter Treaty.44

A splintering of Central Asia would mean disaster not only for the region and its neighbors, but also for the United States, Europe, Russia, and China.45 Disaster for major international players will also result in catastrophe for the international community as a whole. The success of any one power in this region will be a significant indication of that power's geopolitical

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41 See Caspian Oil and Gas, supra note 39, at 1 (created by Bernard A. Gelb, Specialist in Industry Economics, Resources, Science and Industry Division).

42 See Murray, supra note 37.


44 Discussed further infra Section 4.

45 Cf. RUMER ET AL., supra note 22, at 6-7 (summarizing the political and economic interests of the United States, Russia, and China, as well as those of India, Iran, Israel, Pakistan, Turkey, multinational corporations and nongovernmental organizations). "What we have witnessed since 1991 is the demolition of the [Soviet] imperial edifice and the emergence of multiple and multifarious horizontal lines connecting Central Asia to regions to its west, south, and east." Id. at 8.
future. The United States must succeed in its Global War on Terror. The United States hopes to establish ties between Iraq and Afghanistan with a stable Central Asia in order to encourage and ensure the long-term success of the War on Terror. Its ability to establish a reliable military base in Central Asia is key to that success. The United States needs to be able to station a portion of its military inside of Central Asia in order to be successful in its Iraq and Afghanistan operations.

For Russia and China, the countries of Central Asia are their geographical backyards. Russia enjoyed an unchallenged dominance in the region until the fall of the USSR and the formation of the Newly Independent States. China, a country with enormous growth, envisions Central Asia as a new trade market in which it can exercise power without having to actively ensure the success of the region. The clash of internal and external interest, plus the differing and often conflicting strategies of the external players, has created a highly volatile atmosphere within Central Asia.

III. The History of Central Asia

By examining how Central Asia was formed and its historical relations with Russia, it is easier to understand the current state of affairs and factors that complicate the power struggle taking place. This section provides a history of Central Asia from the formation of the USSR to the fall of the Soviet Union. It also describes the

46 See id.
47 Id.
50 See Rumer et al., supra note 22, at 61. “Central Asia is the strategic backyard of every major power of Europe and Asia.” Id.
51 See id. at 77-79.
52 See The Pursuit of Black Gold, supra note 40, at 8 (statement by Evan A. Feigenbaum, Deputy Assistant Secretary For South and Central Asian Affairs, U.S. Department of State). “The Chinese are dropping hundreds of millions of dollars of soft money into places like Tajikistan. And when I say soft money, I mean no-strings loans. And the loans are for good things. The loans do things like build infrastructure and highways and tunnels.” Id. at 8.
internal instability in each Central Asian state, another factor that
must be understood in order to fully comprehend the multifaceted
nature of the power struggle occurring on Central Asian soil.

A. Formation of the USSR through the Cold War

Central Asia is currently defined as the five sovereign states of
Turkmenistan, Tajikistan, Kazakhstan, Uzbekistan, and
Kyrgyzstan. From the 1910s until 1991, they were absorbed into
the Soviet Union. Prior to the Soviet era, mostly nomadic Turkic
tribes inhabited the territories. The czars badly abused their
"nomadic neighbors." Like the leaders of most empires,
Russians saw Central Asia as a rich territory overrun with inferior
inhabitants.

During the Communist era from 1917 to 1991, the Soviet
Republic’s attitude toward the five republics of Central Asia was a
unique form of colonialism, which displayed neglect in some
areas, and nepotism in others. Unlike the USSR’s Slavic states
who played a more closely tended and publicly featured role, Central Asia was used for its resources but saw very few of the
privileges promised by the new Soviet rulers. The general
strategy of the Soviet Union toward Central Asia was to divide
and conquer.

Economically, the Soviet Union was very irresponsible in its
treatment of Central Asia. “It saw Asia as ‘a sleeping giant,
awakened’ and in need of Soviet education.” Central Asia and

53 See Rumer et al., supra note 22, at 3.
54 See Menon et al., supra note 8, at 8.
56 Id.
57 See Diuk & Karatnycky, supra note 2, at 43 (quoting Soviet Premier Mikhail Gorbachev as admitting to reporters in 1988 that the region had been “neglected for a long time by the Soviets.”).
58 See id.
59 Such as Belarus and Ukraine.
60 See Becker, supra note 55, at 23.
61 See Diuk & Karatnycky, supra note 2, at 41.
the Slavic republics provided a buffer zone for Moscow against both the West and the East. 63 Remembering the trauma of invasions by Napoleon and Hitler, and conveniently forgetting the far more frequent, successful and long lasting imperialism of the czars, the Soviets were determined to be impenetrable. 64 In order to achieve its security goals, the USSR believed that it needed to be an intensely united territory. 65 Therefore, any form of resistance was eliminated by this territorial unity. 66

Attempting to create a homogenous population, the Soviet Union used a process, borrowed from czarist Russia, that has since come to be known as “Russification.” 67 “Russification” of the heterogeneous population of the Czar’s subjects thus represented a violent, conscious welding of two opposing political orders, one ancient, one quite new. 68

The territories were carved into republics, creating the modern states of today that are identified as Central Asia. 69 People were separated in order to make it impossible for them to form factions and politically mobilize. 70

The local communist governments were as corrupt as the main body of the government in Moscow. 71 Basically, local governments were given the illusion of responsibility in order to pacify the “natives,” while Moscow reaped all of the profits. 72

63 See generally RUDYARD KIPLING, KIM (Macmillan & Co., 1901) (popularizing the term “Great Game” into mainstream culture and discussing Central Asia’s importance in the future of Russia).
64 See RUMER ET AL., supra note 22, at 77-78.
65 See, e.g., DIUK & KARATNYCKY, supra note 2, at 17-21 (describing efforts by the Soviet government to promote the Russian language as a means of binding the nations of the Union together); see also Blank, supra note 62, at 42-47 (describing the Soviet view of Islam, the dominant religion of Central Asia, as being chauvinistic).
66 See id.
67 See DIUK & KARATNYCKY, supra note 2, at 50.
68 BENEDICT ANDERSON, IMAGINED COMMUNITIES 86 (1991) [hereinafter ANDERSON].
69 DIUK & KARATNYCKY, supra note 2, at 179 (“[T]he borders of republics were drawn by Stalin primarily to promote political expediency.”).
70 See id. at 178.
71 See id.
72 Id.
Government roles were given mostly to Russian Soviets, though occasionally they were given to rival clan members to further separate and antagonize the ethnic groups of Central Asia. As a result of being governed by uncaring political elite, the major problems in Central Asia—such as a lack of urbanization, rampant disease, and an incredibly high infant mortality rate—were ignored.

By the 1980s, the percentage of people living below the poverty level, defined as earning less than 100 U.S. dollars a month, was above thirty percent in all five Central Asian Republics. In Turkmenistan it was higher than fifty percent. The economic, cultural, and political projects of the Soviet Union had failed. The USSR’s mismanagement of Central Asia would prove to be a major factor in the empire’s eventual demise.

The period between the 1970s and the eventual fall of the USSR in 1991 was fraught with friction and change. This period saw the rise of Nationalist parties within the Central Asian Republics, a process that was accelerated by the more open policies of Soviet premier Mikhail Gorbachev after 1985. Both would contribute to the secession of the Central Asian Republics from the Soviet Union. The rise of Nationalist parties among the republics was a long time coming. It began in the 1920s, but the Russian Security Forces, including the KGB, and the Sixth Detachment of the Internal Affairs Department, proved to be very effective in arresting and detaining any opposition forces within the Soviet Union. They were later found responsible for having detained millions of non-Russian prisoners, who were arrested for

73 See id.
74 See DIUK & KARATNYCKY, supra note 2, at 45-49.
75 See Anderson, supra note 65, at 186.
76 See id.
77 See DIUK & KARATNYCKY, supra note 2, at 42.
78 See id. at 4.
79 See, e.g., id. at 57-59 (arguing that Gorbachev’s policy of glasnost, or “openness,” brought to light the inequities suffered by non-Russians of the USSR).
conspiring to incite riots.  

The real reason for most of the arrests was to aid Moscow in separating the ethnic tribes, as well as to break the will of anyone who opposed the government by forcibly moving possible leaders to other areas. The Central Asia population began to understand that it was at a “profound cultural, economic, educational, and social disadvantage” in a way that it never had before. At the same time, the new opportunities of the late 1980s also began to dawn on the region. Local parties were gaining a larger percentage of the vote in each Republic. The rise of Mikhail Gorbachev in 1985 could not have come at a better time for the Central Asian Republics or at a worse time for Moscow.

Gorbachev was the new face of the Communist Party of the Soviet Union (CPSU). He traveled throughout the Soviet Union and realized that his country was dying a slow and very painful death. The economy was pathetic, unemployment was at an all time high, and alcoholism was rampant. Gorbachev concluded that in order for Russia to survive, Soviet workers had to become more productive. His answer was to give them more freedom so that they would be more motivated to work. His two-part plan consisted of a new economic strategy, perestroika, and a new political strategy, glasnost. Essentially, the economy would move toward being market-based and parties other than the Communist Party would be allowed to participate in the government. The latter process originated in the former Soviet Republics, excluding Russia.
The results of glasnost and perestroika in the Central Asian Republics were not exactly what Gorbachev expected. While the Turkic Soviets were motivated by these developments, they were not motivated in a direction that was useful in preserving the Soviet Union. Protests broke out across Central Asia during the mid-1980s. In Kazakhstan, students and young workers swarmed Brezhnev Square to protest the removal of a local Kazakh leader from the republic's top position.

By 1990, "[g]eneral strikes motivated by a rising tide of nationalism became a regular feature on the Soviet landscape." While Central Asians yearned for a national identity, never having possessed any other than the one handed to them by the Soviet Union, they struggled to find a set of common goals or characteristics to define themselves by. Civil conflicts broke out in Uzbekistan, Georgia, Kazakhstan, Azerbaijan, and Kyrgyzstan. The majority of these conflicts exacted a small death toll, but the reaction of the Soviet troops after the conflicts came at a much greater cost. Hundreds of civilians were slaughtered in the name of repressing the popular fronts and independence groups. This bloodletting only fueled the new nationalist parties and reinforced the feelings of abuse among Central Asians. However, even with all of the ill feelings Central Asians had for Moscow and the CPSU, the Republics of Central Asia were shocked and without directives as to how to proceed as sovereign entities when the empire collapsed in 1991.

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93 See DIUK & KARATNYCKY, supra note 2, at 8.
94 See id. at 10.
95 Id. at 9.
96 See id. at 17.
97 See Brown, supra note 31, at 86; DIUK & KARATNYCKY, supra note 2, at 8-9.
98 See DIUK & KARATNYCKY, supra note 2, at 9.
99 See id. at 9-11.
100 See id. at 262.
scrambling to maintain a relationship with Russia and the rest of the former Soviet states.\textsuperscript{101}

\textbf{B. Independence and Internal Instability}

Since the collapse of the USSR, Central Asian states have been plagued by instability. With a history largely based in clan life, a newly appointed and very inexperienced leadership, and the potential for untold amounts of wealth, Central Asia has become a hot spot for civil war, autocracy, and government-sponsored repression.\textsuperscript{102} Frightened by the historical divisions within each country based on clan membership and the growing Islamic fundamentalist movements in neighboring countries, such as Iran, Iraq and Afghanistan, leaders in Central Asia have turned into dictators under the guise of maintaining stability at all costs.\textsuperscript{103} Unfortunately, that kind of "artificial, temporary stability often ends in explosive unrest." \textsuperscript{104} Tajikistan, Uzbekistan, and Kyrgyzstan have all been particularly affected by internal conflict.

Tajikistan's troubles began at the very beginning of its independence. The winter of 1992 was characterized by a heated civil war between the government dominated by the Kulyabi, a traditional clan of Tajikistan, and the United Tajikistan Opposition (UTO).\textsuperscript{105} The UTO was made up of the other clans of Tajikistan which felt oppressed during the Soviet era.\textsuperscript{106} The Kulyabi clan dominated during the Soviet era and would dominate after independence as well. Basically, the conflict was not over ideology but control. The actual civil war was over by May 1992; however skirmishes still broke out consistently until 1998.\textsuperscript{107} The government of Tajikistan had a very narrow base of followers and its authority was only legitimized by its control over the majority

\textsuperscript{101} See id. at 263.
\textsuperscript{102} See id. at 260-62.
\textsuperscript{103} See DIUK & KARATNYCKY, supra note 2, at 260-62.
\textsuperscript{105} Brown, supra note 31, at 88-93.
\textsuperscript{106} See id. at 86-97.
\textsuperscript{107} See id.
of the country’s wealth.\textsuperscript{108}

In 1994, the United Nations (UN) intervened, facilitating peace talks until 1998, when an agreement was finally reached between both sides.\textsuperscript{109} During the four years between the UN's arrival and the agreement, there were thousands of casualties among Tajiks.\textsuperscript{110} Finally, in 1998, fueled by the Taliban's capture of Kabul during the previous September, the UN forced an agreement between the Tajik government and the UTO.\textsuperscript{111} The agreement allowed President Emomalii Rahmon to retain his presidential powers while acting in consultation with the Commission on National Reconciliation headed by UTO Chairman Said Abdullo Nuri.\textsuperscript{112} Tajikistan is unlike its neighbors in that it has no vast supply of natural gas or oil and must rely on its own economy and the aid of others to survive.\textsuperscript{113} A silver lining for Tajikistan would be the possible transit of some of its neighbors' natural wealth through its territory, perhaps giving the country an opportunity to exact some sort of transit fee.\textsuperscript{114}

The internal conflict within Kyrgyzstan, the Tulip Revolution, occurred more recently in 2005.\textsuperscript{115} In 1991, Askar Akayev was named President of Kyrgyzstan.\textsuperscript{116} While a former member of the Soviet leadership, Akayev was seen as the most democratic new leader in Central Asia.\textsuperscript{117} He introduced multi-party democracy

\textsuperscript{108} See Tajikistan Civil War, GLOBALSECURITY.ORG (Nov. 1, 2010), http://www.globalsecurity.org/military/world/war/tajikistan.htm.
\textsuperscript{109} See id.
\textsuperscript{110} See id.
\textsuperscript{111} See id.
\textsuperscript{112} See id.
\textsuperscript{113} See Tajikistan Energy Profile, U.S. ENERGY INFORMATION AGENCY (Nov. 1, 2010), http://tonto.eia.doe.gov/country/country_energy_data.cfm?fips=TI. Tajikistan is ranked 71\textsuperscript{13} in the world for proven oil reserves and 82\textsuperscript{19} for proven natural gas reserves. Id.
\textsuperscript{116} See Profile: Askar Akayev, BBC NEWS (Apr. 4, 2005), http://news.bbc.co.uk/2/hi/4371819.stm [hereinafter BBC NEWS].
\textsuperscript{117} See Escobar, supra note 115.
and looked to many intergovernmental organizations like the World Bank and the International Monetary Fund for aid. The United States created “170 non-governmental organizations charged with development or promotion of democracy,” in Central Asia. As most outsiders saw it, Kyrgyzstan would be the Switzerland of Central Asia and Akayev was “hailed as an advocate for an open and liberal atmosphere.”

Unlike Tajikistan, Uzbekistan has not experienced a full-on civil war, but internal conflicts have been rampant. On May 13, 2005, a massive anti-government protest was held in Andijan, a city located in the most eastern part of the country very near the Fergana Valley. The day before the protest, twenty-three prominent businessmen in the city had been jailed on unjust charges of Islamic extremism, which has been allowed in most Central Asian countries. On the morning of May 13, gunmen broke the businessmen out of jail and gathered, along with 10,000 other protesters, in Bobur Square. The unarmed protesters were peaceful and included both women and children. By midday, government deployed tanks and armed soldiers surrounded the square. With no warning, the soldiers opened fire on the protestors. The government of Uzbekistan reported the casualties at 187, with other sources claiming over 700. “Reports later emerge[d] that injured people were summarily

119 Escobar, supra note 115.
120 BBC NEWS, supra note 116.
121 See JIM NICHOL, CONG. RESEARCH SERV., RS 22161, CRS REPORT FOR CONGRESS, UNREST IN UZB: CONTEXT AND IMPLICATIONS 3 (2005) [hereinafter NICHOL].
123 See id.
124 See id.
125 See id.
126 See How the Andijan Killings Unfolded, supra note 122.
127 See id.
executed." The United States, which had a military base within the country, demanded an external party conduct an investigation. The result was that while there was no external investigation, the government of Uzbekistan revoked the United States lease on their military base.

Turkmenistan has been the starkest example of a dictatorship in Central Asia almost since its independence. Former President Saparmurat Niyazov, self-proclaimed “Turkmenbashi,” or father of the Turkmen, created a kingdom for himself. “He renamed the month of January after himself and April after his mother; he banned ballet, gold teeth, and recorded music; he ordered the construction of a lake in the midst of the desert and a ski resort on snowless foothills of the Iranian border.” Niyazov built a revolving gold statue of his likeness, similar to the statues of Lenin, which revolves to face the sun. The capitol of Turkmenistan, Ashgabat, is covered in alabaster and gold, creating a paradise in the middle of a desert.

President Niyazov died unexpectedly in December 2006 and was replaced by his physician, Gurbanguly Berdimuhamedov. Turkmenistan has until very recently been completely closed off to all other parts of the world other than Russia. In fact, all of Turkmenistan’s natural gas exports have gone through Russia. Since the induction of President Berdimuhamedow, there has been more talk of opening the country.

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129 How the Andijan Killings Unfolded, supra note 122.
133 Id.
134 See id.
136 See Turkmenistan’s ‘Iron Ruler’ Dies, supra note 29.
137 See Sergei Blagov, Russia Labors as Neighbors Do Deal, ASIA TIMES ONLINE (Dec. 17, 2009), http://www.atimes.com/atimes/Central_Asia/KL17Ag01.html [hereinafter Blagov] (pointing out the fact that Turkmenistan and China have made a long term trade agreement for the exchange of natural gas).
How Central Asia Was Won

C How Important is Stability?

These conflicts create a unique problem for the external players within Central Asia. The United States, Russia, China, and Europe all have different strategies for dealing with the unrest in the region. All have an interest in maintaining stability, especially with regard to energy security.

IV. “The Devil’s Tears”: How many are there exactly?

In comparison with most of the Organization of Petroleum Exploring Countries (OPEC), Central Asia possesses relatively small amounts of oil and natural gas in terms of proven reserves. However, as world demand continues to grow over the next decade, the region will gain importance as various countries diversify their resources of oil and gas beyond traditional suppliers as the Middle East. Developing resources in Central Asia will prevent OPEC countries from driving up their trading prices, ensuring that no one country or group of countries has the ability to create an energy source conflict. Until 1991, there was little reason for anyone to have an interest in Central Asia. By 1993, most major oil companies in the world were present in the Caspian region. Oil companies are not frivolous or irrational investors. Therefore their initial rush to gain access to Central Asia, and their continued investment in the region, is telling evidence of the significance of the region.

138 A commonly used nickname for oil. See, e.g., KLEMEAN, supra note 9, at 1.

139 See Country Energy Profiles, U.S. ENERGY INFORMATION ADMINISTRATION, http://tonto.eia.doe.gov/country/index.cfm (last visited Nov. 1, 2010) [hereinafter Country Energy Profiles]. The countries are ranked as follows in terms of proven reserves for oil and gas in comparison with the rest of the world: Kazakhstan is 11th in proven oil reserves and 16th for natural gas; Uzbekistan is 41st for oil and 15th for natural gas; Turkmenistan is ranked 40th for oil and 14th for natural gas; Tajikistan is ranked 71st for oil and 82nd for natural gas; Kyrgyzstan is ranked 66th for oil and 82nd for natural gas. Id.

140 See generally Stephen Blank, The Strategic Importance of Central Asia: An American Review, 38 PARAMETERS 73, 73-4 (2008) (discussing the diverging policies of Russia, the United States, and Central Asia).


143 See Steve Levine, Former Foreign Correspondent, Wall St. J., Panel Discussion
The three major suppliers in the Central Asian region are Kazakhstan, Turkmenistan, and Uzbekistan.\(^{144}\) The subsequent sections will examine each individually.

\textbf{A. Turkmenistan}

\textit{1. Natural Gas}

Turkmenistan possesses the fourth largest reserve of natural gas in the world with 100,000 billion cubic feet of proven gas reserves within its borders.\(^{145}\) Turkmenistan is also one of the most underdeveloped of the Central Asian countries especially with regard to its infrastructure for storing and transporting its abundance of natural gas.\(^{146}\) Niyazov, former Secretary General of the Turkmen Communist Party, maintained a close relationship with Russia post-independence.\(^{147}\) With his death in December 2006 came the worldwide hope that Turkmenistan would begin to open its energy sector to the international market.\(^{148}\) "Obviously, everybody—the United States, the European Union, Russia—wants to try to get their foot in the door while there appears to be...

\begin{footnotes}
\footnote{144 See Country Analysis Briefs – Kazakhstan, supra note 27; U.S. Energy Information Administration, Country Energy Profiles, supra note 139.}
\footnote{147 See John C.K. Daly, Analysis: Turkmenistan, Russia, and China, Energy Tech (Feb. 25, 2008), http://www.energy-daily.com/reports/Analysis_Turkmenistan_Russia_and_China_999.html.}
\footnote{148 See id.}
\end{footnotes}
some sort of opening. Turkmenistan has held a foreign policy of positive neutrality since independence and President Berdimuhamedow has already stated that he intends to continue this policy.

The two major gas fields in Turkmenistan are Dauletabad and Shatlyk. Two other fields have been discovered, though their estimated reserves have not been confirmed. The Dauletabad is hoped to be the future starting point for the Trans-Afghan Pipeline, which will run from Turkmenistan through Afghanistan, and into Pakistan. The three largest investors that have made deals with Turkmenistan since its independence are Russia’s Gazprom, Argentina’s Bridas, and the United States’ Unocal. Gazprom has had the most success with Turkmenistan due to Russia’s history of dominance within the region and the fact that the entire country’s infrastructure for natural gas transportation leads north to Russia.

Beginning in 1999, Russia and Turkmenistan signed a long-term supply agreement that insured that the majority of the Turkmen gas export would go to Russia. While a small dispute over price stopped production in 2004, Turkmenistan increased its pledge from 212 bcf (billion cubic feet) in 2005 to 2.4 tcf (trillion

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152 See id. (“In the mid-2000s the supergiant South Yolotan-Osman was discovered in the southeastern part of the country. In October 2008 an independent audit confirmed that the field was among the world’s biggest. In August 2008 another large field, South Gutlyayak, was discovered.”).

153 See Table 5: Natural Gas Export Routes and Options in the Caspian Sea Region, Table in Caspian Sea Region: Reserves and Pipeline Tables, ANGELFIRE (Nov. 2, 2010), http://www.angelfire.com/dragon/asif/Caspian_Sea_Region.htm.

154 See Timeline of Competition between Unocal and Bridas for the Afghanistan Pipeline, WORLDPRESS.ORG (Nov. 4, 2010), http://www.worldpress.org/specials/pp/pipeline_timeline.htm.

155 See Bahgat, supra note 151, at 24.

156 See id.
cubic feet) in 2007. However, "The Great Game" has not been won yet and foreign energy investors are courting Turkmenistan as though their survival depends on it, which may be true in the long run. Turkmenistan has been exporting natural gas to Iran since the 1990s and has recently extended its existing agreement with China.

2. Oil

The oil reserves held within Turkmenistan are believed to contain anywhere between 546 million barrels and 1.7 billion barrels. The majority of the oil fields are located in the South Caspian Basin in the west of Turkmenistan. Turkmenistan’s troubles in its oil sector are two-fold. First, like its natural gas supply, the oil supply lacks foreign investment due to the country’s isolation over the past decade and consequential deficiency in infrastructure. Second, the majority of Turkmenistan’s oil lies either on the shore of or under the disputed waters of the Caspian Sea. The five littoral states of the Caspian Sea, Turkmenistan, Iran, Azerbaijan, Russia, and Kazakhstan, have yet to come to an agreement about whether or not the Caspian Sea is, in terms of international law, in fact a sea or a lake. The continuing debate makes it difficult for Turkmenistan

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158 Bahgat, supra note 151, at 24-25.
159 See Blagov, supra note 137.
162 See id.
163 See id.
164 See generally BAHMAN AGHAI DIBA, THE CASPIAN SEA IN THE TWENTY-FIRST CENTURY 26 (2003) (discussing the geographical classification of the Caspian Sea as a lake, but the historical classification as a sea); Siamak Namazi & Farshid Farzin, Division of the Caspian Sea: Iranian Policies and Concerns, in THE CASPIAN POLITICS, ENERGY AND SECURITY 214 (Shirin Akinder ed., 2004) (identifying the existing
and any foreign investor to develop the oil that lies under the Caspian Sea.

B. Kazakhstan

1. Oil

Kazakhstan has been the most stable and consistently successful of the Central Asian states since the Soviet dissolution. Due to a large population of wealthy Russians in its capital in Alma Ata, Kazakhstan was deemed the “most European of the Commonwealth of Independent States.”\(^{165}\) Having more of an open door policy, Kazakhstan signed an agreement with the U.S. oil company Chevron in 1992.\(^{166}\)

Possessing two-thirds of the region’s proven two million bbl/d (billion barrels per day), Kazakhstan also has the most developed infrastructure and economy for its energy sector. Its industrial sector (primarily “extraction and processing of natural resources”) provides for about thirty percent of the country’s GDP.\(^{167}\) In 2007, Kazakhstan was producing 1.44 million bbl/d of which only 240,000 bbl/d were used domestically.\(^{168}\) It hopes to increase production to 3.5 million bbl/d by 2015.\(^{169}\) The major oil fields in Kazakhstan are the Tengiz field, the Karachaganak, and the Kashgan.\(^{170}\)

The Tengiz field was the first to be developed by Chevron.\(^{171}\)
It is located on Kazakhstan’s northeastern shores of the Caspian Sea. It holds between six and nine billion barrels and will hopefully be producing up to one million bbl/d by 2012. The majority of the oil extracted from Tengiz is transported through the Caspian Pipeline Consortium (CPC). The CPC was established by Chevron in congruence with several other major oil companies, and the government-owned Kazmunaigaz and Oman. The oil is transported through the pipeline from Tengiz to the Russian Black Sea port of Novorossiysk. At first, Russia would not allow oil to be pumped through its territory, but in the end the Russian Federation joined the Consortium and exacted a land-use tariff. The Tengizchevroil joint venture is broken down as follows: Chevron/Texaco at fifty percent, ExxonMobil at twenty-five percent, Kazmunaigaz at twenty percent, and LukAcro at five percent. The development of this field is the perfect example of a successful development of Central Asia’s resources.

Karachaganak is located on the northern shores of Kazakhstan’s Caspian Sea territory. In 2007, the output of the field increased to over 250,000 bbl/d. A smaller pipe has been built that connects the Karachaganak field with the CPC, bypassing Orenburg field, which is Russian-owned, and reducing

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172 See id.
173 See id.
174 See id. at 4.
177 See Dellecker, supra note 175, at 12.
180 EIA Kazakhstan Oil, SILK ROAD INTELLIGENCER (Jan. 10, 2008), http://silkroadintelligencer.com/2008/01/10/eia-kazakhstan-oil [hereinafter EIA Kazakhstan Oil].
dependence on Russian consumers.\textsuperscript{181}

The Kashagan oil field is the prize jewel of Kazakhstan.\textsuperscript{182} It is "the largest known oil field outside the Middle East, and the fifth largest in the world in terms of reserves."\textsuperscript{183} Located off of the northern shore of the Caspian Sea, its reserves have been estimated around thirteen billion barrels.\textsuperscript{184} It also has a large reserve of natural gas, the volume of which has yet to be determined. It has been developed by another consortium, the Agip Kazakhstan North Caspian Operating Company, which was replaced by a new company in 2009.\textsuperscript{185} Unfortunately, the development of this field requires overcoming several obstacles. There are several environmental issues,\textsuperscript{186} as well as consideration of the extreme weather fluctuations of the area. Most of all, the new "rent tax" introduced by the Kazakh government in 2004 has made some of the investors skeptical.\textsuperscript{187} The new tax gives Kazmunaigaz the power to tax exports progressively according to the rise of oil prices.\textsuperscript{188} Additionally, "the new structure includes an excess profit tax, and limits foreign participation to fifty percent in each offshore project with no guarantees of operatorship."\textsuperscript{189} Finally, any oil that Kashagan produces "will require a completion of the existing BTC pipeline" in addition to a new treatment plant.\textsuperscript{190} They hope their output will reach 300,000

\textsuperscript{181} See id.
\textsuperscript{182} See id.
\textsuperscript{183} Country Analysis Briefs - Kazakhstan, supra note 27, at 3.
\textsuperscript{184} See id.
\textsuperscript{185} See id. The consortium includes ENI (Italian oil company), ConocoPhilips, Exxon Mobil, Inpex, Kazmunaigaz, Shell, Total. Id.
\textsuperscript{186} See id. The field is also rich with natural gas and the oil refinery process is much more involved due to high sulfur content in the oil. Due to all of the issues with the development of this field, the start date for production has been pushed back to 2014. Id.
\textsuperscript{187} See EIA Kazakhstan Oil, supra note 180. Kazakhstan's subsoil development policy poses a threat to foreign investors. "The new law, effective in November 2007, gives Kazakhstan two paths to terminate contracts with energy companies. One option forces the company into negotiations with the government, and the other option allows for the repudiation of the contract with a notice period of only two months." Id.
\textsuperscript{188} See id.
\textsuperscript{190} EIA Kazakhstan Oil, supra note 180.
bbl/d within the next decade, while the total costs are expected to reach $136 billion, up from the initial $57 billion Kazakh sources first thought the project would require.\textsuperscript{191}

2. Natural Gas

Kazakhstan’s proven reserves stand between 65 and 100 tcf.\textsuperscript{192} However, until 1999, the majority of this went untouched. New legislation introduced in August 1999 urged any “sub-soil users,” i.e. oil companies, to also research and develop natural gas projects.\textsuperscript{193} The government hopes to increase their natural gas production to 900 bcf by 2012.\textsuperscript{194} Karachaganak is where the majority of Kazakh’s natural gas is found.\textsuperscript{195} The majority of the natural gas found in Kazakhstan is associated with the oil that is found there.\textsuperscript{196} This is both a blessing and a curse. This type of gas can be reinjected into the ground and recovered when the liquid sources are exhausted.\textsuperscript{197} However, this procedure causes flaring, which can be very dangerous and a waste of the natural resource.\textsuperscript{198} Flaring occurs when an excess of natural gas leaks out and is purposely burned off.\textsuperscript{199} The Tengiz field consortium has developed the Sour Gas Reinjection Project in response to the excessive flaring they experienced in 2005, which caused it to completely shut down its energy generators.\textsuperscript{200}

Like the oil produced in Kazakhstan, the natural gas must also be exported through a series of pipelines.\textsuperscript{201} In 2005, Kazakhstan and the Chinese CNPC (oil company owned by the Chinese government) signed an agreement to construct a gas pipeline from

\textsuperscript{191} Id.
\textsuperscript{192} See Energy Profile of Kazakhstan, supra note 189.
\textsuperscript{193} See id.
\textsuperscript{194} See Country Analysis Briefs: Kazakhstan, supra note 27, at 5.
\textsuperscript{195} See id.
\textsuperscript{196} See Energy Profile of Kazakhstan, supra note 189.
\textsuperscript{197} See id.
\textsuperscript{199} See Energy Profile of Kazakhstan, supra note 189.
\textsuperscript{200} Id.
\textsuperscript{201} See Country Analysis Briefs: Kazakhstan, supra note 27, at 5, 6.
Atasu to the Alashankov district.\textsuperscript{202} China agreed to finance the project and is the primary buyer of all of the gas traveling through it.\textsuperscript{203} In 2007, Russia, Kazakhstan, and Turkmenistan signed an agreement to transport natural gas from Turkmenistan to Russia via the Central Asia Center Gas Pipeline.\textsuperscript{204} Members are responsible for constructing the section of the line within their territory.\textsuperscript{205}

C. Uzbekistan

1. Natural Gas

As one of the largest natural gas producing countries in the Commonwealth of Independent States (CIS) second only to Russia, Uzbekistan holds estimated reserves of 66.2 Tcf of natural gas.\textsuperscript{206} With 52 developed fields, concentrated in the Amu Dar’ya Basin and the Mubarek area, Uzbekistan is one of the top ten gas producers in the world.\textsuperscript{207} Uzbekistan is similar to Kazakhstan in that it has concentrated on development since independence and has been open to foreign investors other than Russia.\textsuperscript{208} However, Uzbekistan had some issues with investors over the years. Beginning in 2001, Uzbekistan signed a “Production Sharing Agreement” (PSA) with the British Trinity Energy group.\textsuperscript{209} PSAs are common in Central Asia because of the high cost of exportation and processing. The project’s goal was to develop the Ustyurt and Gissar fields with an annual production goal of 71 bcf by 2006.\textsuperscript{210} Unexpectedly, in 2005 Uzbekneftegaz broke off the
PSA stating that the Trinity Energy Group's subsidiary UzPEC had not upheld certain parts of the 2001 agreement.\textsuperscript{211} The issue has yet to be resolved, and the Gissar field, which was shut down in 2004, has yet to be re-opened.\textsuperscript{212}

Added to this disagreement is the inability of the United States to hold onto its military bases in Uzbekistan.\textsuperscript{213} It seems the Western investors are having trouble holding onto their influence in this Central Asian country. Where they have failed, China and Russia have succeeded. Beginning in 2004, Russia's Gazprom has pledged significant funds to modernizing Uzbekistan's oil fields as well as exploring new fields.\textsuperscript{214} China's CNPC signed a deal in June 2005 to develop twenty-three new fields in conjunction with Uzbekneftegaz.\textsuperscript{215} This deal not only was profitable, but it was also a message to the Western investors. While the United States and other European countries publicly raged about the injustice of the Andizhan massacre, China made a deal with Uzbekistan that would allow them to be the sole benefactor of any natural gas produced within some of China's largest sites.\textsuperscript{216}

V. Pipeline Politics

The oil companies invented the pipeline in 1990, 1991, 1992. They already knew that the place was landlocked. They needed to be able to get that oil out. And on the back of envelopes and on napkins they were drawing how are we going to do it. And a BP man actually drew the first rendition of the Baku-Ceyhan pipeline on a napkin, and he still has that napkin.\textsuperscript{217}

A significant part of the "Great Game" in Central Asia is being

\textsuperscript{211} See Energy Profile of Central Asia, supra note 161.
\textsuperscript{212} See id.
\textsuperscript{213} See Nichol, supra note 121, at 5 (discussing the ejection of a U.S. Air base from Uzbekistan in 2005).
\textsuperscript{214} See Energy Profile of Central Asia, supra note 161.
\textsuperscript{215} See Neff, supra note 169, at 39.
\textsuperscript{216} See id.
A. Pipeline Options

There are four general routes which a pipeline, either gas or oil, can follow through Central Asia. The first is the most common route of the existing pipelines north through Russia to ports along the Black Sea or into Russia's pipeline system. The second is the western route through Turkey, either over the Caucasus Mountains or via the Caspian Sea. Both routes raise security problems and the cost of building any pipeline along this these routes is extreme. The shortest path is south through Iran, a route less than ideal for the United States and most Western energy investors. The eastern path to China is not only very expensive, but it would also mean any exports would go exclusively to China. The last option is likely to be the most desirable for the United States: a Southeastern path through Afghanistan, Pakistan and India. Unfortunately, due to the ongoing war in Afghanistan, this path is also a high security risk.

Oil pipelines are most common in Central Asia. There are currently eight major pipelines and barge routes:

- **Baku-Tbilisi-Ceyhan (BTC):** This line is transporting

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218 Auyezov, *supra* note 203.

219 **See** *Energy Profile of Kazakhstan, supra* note 189.


221 **See** *id.* at 18.

222 **See** *id.*

223 **See** *id.* at 19.

224 **See** *id.*

225 **See** *Hearing on U.S. Interests in the Central Asian Republics, supra* note 220, at 19.

226 **See** *id.* at 20.
oil at over one million bbl/day from the Azeri coast of the Caspian Sea to the Mediterranean coast of Turkey. The shareholders of this pipeline include British Petroleum (BP), the majority shareholder, Unocal, and ConocoPhillips.

- **Baku-Novorossiysk/ Baku-Supsa:** The first pipeline runs from the Azeri coast of the Caspian to the Black Sea port of Novorossiysk. It has a capacity of 100,000 bbl/day. Baku-Supsa carries approximately 145,000 bbl/day and runs from Azerbaijan to the Georgian Black Sea port of Supsa. Compared to the majority of the other existing pipelines, it carries small amounts of oil.

- **Atrayu-Samara:** This Russian owned line transports oil from Atyrau, Kazakhstan to Samara, Russia. Kazakhstan has pledged to export 340,000 bbl/day, but Russia has pledged to increase this to 500,000 bbl/day.

- **Kazakhstan-China:** The newest pipeline begins in Kazakhstan’s Aktyubinsk oil fields and continues into Atrayu. This is the first stage of the pipeline and was completed in 2003. The second phase was completed in 2006. It will carry approximately

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227 See Table 4: Oil Export Routes and Options in the Caspian Sea Region, CASPIAN SEA REGION: RESERVES AND PIPELINES TABLES (Nov. 8, 2010), http://www.angelfire.com/dragon/asif/Caspian_Sea_Region.htm.

228 See Mark Tran, Q&A: The Baku-Tbilisi-Ceyhan Pipeline, GUARDIAN.CO.UK (May 26, 2005, 4:38 PM), http://www.guardian.co.uk/business/2005/may/26/businessqandas.oilandpetrol.

229 See Table 4: Oil Export Routes and Options in the Caspian Sea Region, supra note 227.

230 See id.

231 See id.

232 See id.

233 See EIA Kazakhstan Oil, supra note 180.

234 See Table 4: Oil Export Routes and Options in the Caspian Sea Region, supra note 227.

235 See EIA Kazakhstan Oil, supra note 180.

236 See id.
400,000 bbl/day to 800,000 bbl/day\textsuperscript{237} and its funding is guaranteed by China.\textsuperscript{238}

- **Caspian Pipeline Consortium (CPC):** Owned and operated by a consortium of Western oil companies, this line runs from Kazakhstan’s Tengiz oil field to Novorossiysk.\textsuperscript{239} It currently carries 565,000 bbl/day.\textsuperscript{240}

- **Barge Routes:**
  - **Kazakhstan-Azerbaijan:** This is a new agreement between the two aforementioned countries that each year Kazakhstan will transport 733 million barrels to the BTC pipeline via barge.\textsuperscript{241}
  - **Turkmenistan-Iran:** a swap agreement\textsuperscript{242} between Iran and Turkmenistan where Iran refines and transports the Turkmen oil to its Persian Gulf port of Neka via barge.\textsuperscript{243} Iran is hoping to make many other swap agreements with its neighbors.\textsuperscript{244}

There are two major pipelines currently in the planning stages: the Trans-Caspian pipeline and the Central Asia Oil Pipeline
The Trans-Caspian would transport oil from Kazakhstan's Kashagan oil project to Baku, where it will be fed into the BTC pipeline. The Kashagan oil field was projected to be fully operational by 2012. The CAOP is the most desirable transport option for the United States. This line would transport oil from Turkmenistan via Afghanistan, into Pakistan where it would be exported out of the port of Gwadar on the Arabian Sea. All three countries signed a Memorandum of Understanding in 2002. Due to the continued unrest in Afghanistan, and the now growing issues in Pakistan, the project has been delayed several times.

The network of natural gas pipelines in Central Asia is almost wholly owned and controlled by Russia's Gazprom. The existing lines are as follows:

- **Central Asia Center Pipeline:** Built in 1974, this line has two branches. The western branch brings gas from Turkmenistan's Caspian Sea coastline north where it intersects with the eastern branch in western Kazakhstan. The eastern branch brings gas from eastern Turkmenistan and southern Uzbekistan, across

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245 See Table 4: Oil Export Routes and Options in the Caspian Sea Region, supra note 227.


249 See Energy Profile of Central Asia, supra note 161; THE ENCYCLOPEDIA OF EARTH (Sept. 4, 2008), http://www.eoearth.org/article/Energy_profile_of_Central_Asia#Turkmenistan.27s_Oil_Sector.


251 See id.

252 See Energy Profile of Central Asia, supra note 161.

253 See id.

254 See id.
Uzbekistan to western Kazakhstan. The two pipes combine and then continue on directly north into Russia’s pipeline system. The line has a capacity of 3.53 tcu [trillion cubic units], the majority of which is provided by Turkmenistan.

- **Korpedzhe-Kurt-Kui**: Built in 1997, this was the first non-Russian natural gas pipeline within the CIS. With a capacity of approximately 300 bcf per year, this line transports Turkmen gas into Iran.

- **Tashkent-Bishkek-Almaty**: Another Russian owned line, it carries gas from Uzbekistan into Southern Kazakhstan at a capacity of 777 bcf. It also delivers gas to Kyrgyzstan. In fact, it is Kyrgyzstan’s main source of natural gas. In the past ten years, conflicts between the three neighbors have led to Uzbekistan cutting off the supply, as well as numerous instances of the line being illegally tapped by Kyrgyzstan.

While the natural gas infrastructure looks bleak, there are two shining beacons of hope in Central Asia. One is the South Caucasus Pipeline, also known as the Baku-Tbilisi-Erzerum line. It was completed and became operational in 2006, with a capacity of seven bcf per year. It runs from Azerbaijan into Georgia, parallel to the BTC from the Azeri gas field of Shah Deniz. The Nabucco line, which will eventually link to the

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255 See id.
256 See id.
257 See Energy Profile of Central Asia, supra note 161.
258 See id.
259 See id.
260 See Cohen, supra note 241, at 5.
261 See id.
262 See Energy Profile of Central Asia, supra note 161.
263 Id.
266 See id.
South Caucasus pipeline, is the European Union’s major energy project. It will bring Central Asian and Caucasian energy sources into the European Union through Turkey, the Balkans, and then into Central Europe and Austria. Although initial discussions and planning for the project began in 2002, it was not until February 2008 that the Nabucco Consortium gained its sixth partner. The current projected start date for construction is 2012, with completion expected by 2015.

The second line is the Trans-Afghan Pipeline, also known as the Turkmenistan-Afghanistan-Pakistan (TAP) Pipeline. It has gone through the agreement and planning stages, but is not yet under construction. Similar to the CAOP, the TAP line will transport natural gas from Turkmenistan into Afghanistan and onto the port of Fazika, which is located on the Indian-Pakistani border. It has a planned capacity of 1.1 bcf per year.

Central Asia is the final frontier of undeveloped reserves as far as natural gas and oil are concerned. There is none left to be found, and the world’s consumption of both natural resources is only increasing. Fueled by the growing international concern with global warming, natural gas is seen as the best alternative to coal and petroleum. This is not to say, however, that the

271 See Energy Profile of Central Asia, supra note 161.
272 See id.
273 See id.
274 See id.
276 See id. at 35.
world’s consumption of oil has decreased or slowed in any way.\textsuperscript{277} To meet the increase in natural gas consumption, production in Central Asia is projected to increase by 22 million barrels per day from 2003-2015.\textsuperscript{278} The global market is characterized by rising prices, increasing consumption, non-OPEC supply growth, and an ever-stronger demand for OPEC oil.

The kind of natural resource wealth found in Central Asia will not go undeveloped, and the Newly Independent States\textsuperscript{279} will not be left to unravel the mess that is their economy on their own.\textsuperscript{280} The states themselves are wracked with internal conflict and questionable leaders, while the people of Central Asia see very little of the money gained from their land’s natural resources.\textsuperscript{281}

How this region is developed is also of great concern to the international community. Central Asia needs structure and guidance to prevent the region from falling victim to the same fate of many other resource rich regions. International law has taken steps to attempt to provide a safety net.

VI. The Energy Charter Treaty: A Multilateral Way to Even the Playing Field or Another Instrument of Destruction?

\textit{A. Introduction}

The Energy Charter Treaty is an idea born from a heated political argument during which the Prime Minister of the Netherlands suggested that economic recovery in the Eastern European and Central Asian states could be “catalyzed and accelerated by cooperation in the energy sector.”\textsuperscript{282} Negotiations forming the Charter ended in 1991, and it was formally adopted that December at the Hague Convention for the European Energy Charter Treaty (ECT).\textsuperscript{283} By the end of the convention, all original

\begin{footnotesize}
\begin{enumerate}
\item See id. at 21.
\item See id.
\item A common nickname for all the newly sovereign states created at the fall of the USSR.\textsuperscript{279}
\item See KLEVEMAN, supra note 9, at 89 (“No other problem poses a greater threat of engulfing the Caspian region-and with it the rivaling external powers-in conflict than the ultimate fate of the pipelines.”).
\item Id. at 1-10.
\item Wälde & Dorian, supra note 43, at 1.
\item See id.
\end{enumerate}
\end{footnotesize}
charter signatories signed the ECT, including all former republics of the USSR (Central Asia and Slavic countries) and Russia.\textsuperscript{284} The purpose of the ECT is defined in Article IV of its charter: "[t]o establish a legal framework in order to promote long-term cooperation in the energy field based on complimentary and mutual benefits in accordance with the objectives and principals of the charter."\textsuperscript{285} The ECT is a jigsaw puzzle of other multilateral frameworks. As a bi-product of the General Agreement on Trade and Tariffs, the World Trade Organization, and bilateral investment treaties, on the whole, the ECT seeks to incorporate all the strengths of these organizations while avoiding their weaknesses.\textsuperscript{286}

B. Development of the Energy Charter Treaty

1. The General Agreement on Trade and Tariffs

As the world’s dependence on oil and gas increases, every sovereign nation has an interest in energy security. Historically, steps have been taken to establish a legal framework under which global energy security can be reached.\textsuperscript{287} As part of a larger plan for economic recovery post-World War II, the General Agreement on Trade and Tariffs (GATT) was created and signed in 1947.\textsuperscript{288} The GATT, a predecessor of both the World Trade Organization and the Energy Charter Treaty, was designed to reduce tariff barriers that had been created during the World Wars.\textsuperscript{289} "The collapse of international trade in the 1930s and its effects on peace and war led some world leaders to conclude that new international economic institutions were essential."\textsuperscript{290} As such, the GATT was originally drafted as a simple trade agreement including only what

\begin{itemize}
\item \textsuperscript{284} See id. at 1-2.
\item \textsuperscript{285} Id. at 2.
\item \textsuperscript{286} Id.
\item \textsuperscript{288} See General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 UNTS 194 [hereinafter GATT].
\item \textsuperscript{289} See John H. Jackson, The Jurisprudence of the GATT and the WTO 38 (2000) [hereinafter Jackson].
\item \textsuperscript{290} Id. at 21.
\end{itemize}
was necessary “to protect the value of tariff concessions.”

The idea behind the GATT was that if tariffs on exports and imports could be controlled, international trade would restart itself. Essential to the agreement was the idea of trade without discrimination. This meant that when a GATT member and its trading partners agreed on a certain tariff reduction, that deal was automatically extended to all other GATT members. Originally, the GATT was only meant to be an interim instrument that would later be replaced by a more substantial international regime. The GATT was not replaced, and in fact it survived and expanded until the World Trade Organization (WTO) replaced it in 1995. However, though the GATT as its own agreement no longer exists, the regime lives on in two different forms; both the ECT and the WTO have adopted the GATT’s crucial principal of trade without discrimination.

Beyond adopting a nondiscrimination trade regime, the ECT shows great deference to the former establishment of the GATT. Article 29 subjects all members to the provisions of the GATT. This article governs all trade between any two members where either one or both are not GATT members. Mirroring many of the provisions of the GATT, Article 29 establishes that all members will report and regulate tariff prices.

2. The Hull Rule and the CT Article 13

The history of international relations contains many tales of expropriation of alien-owned property. Recently, the ability of
states to expropriate the property of foreign investors has been hotly debated in the realm of international law.\(^{301}\) The USSR expropriated all of Central Asia and a significant portion of Eastern Europe during World War I. "Since World War II... significant expropriations of alien-owned property had a more deliberative and pervasive character, reflecting less transitory passions than relatively long-range efforts to wrest local wealth from foreign hands and to develop economies which gave larger roles to the public sector."\(^{302}\)

As the focus shifted away from empire building and acquisition into state responsibility, domestic laws became one of the standards by which relations between sovereign states could be judged.\(^{303}\) The Hull Rule is one such rule, which is the long-accepted principle requiring proper compensation in the event of expropriation.\(^{304}\) Between 1915 and 1940, Mexico expropriated land owned by the United States.\(^{305}\) U.S. nationals who were affected by this taking sought compensation for their loss.\(^{306}\) "The controversy led to a series of diplomatic notes in which the two governments set forth their positions on the question of compensation" for taken property.\(^{307}\) In a note dated August 22, 1938, United States Secretary of State Cordell Hull set the standard for expropriation compensation:

The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore [sic]. In

\(^{301}\) Wälde & Dorian, supra note 43, at 365.

\(^{302}\) HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS: MATERIAL AND TEXT 479 (3d ed. 1986) [hereinafter STEINER ET AL.].

\(^{303}\) See id. at 480 ("Claims of expropriated parties for compensation rest on the premise that most national laws as well as international law recognize and protect interests of private parties in productive tangible and intangible assets.").


\(^{305}\) See id.

\(^{306}\) See id.

\(^{307}\) STEINER ET AL., supra note 302, at 488.
addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics embody the principle of just compensation.\footnote{308 Id. at 491.}

The Hull rule of "prompt, adequate, and effective" payment is the standard of compensation in the event of expropriation.\footnote{309 Wälde & Dorian, supra note 43, at 365. During the 1970’s, the Hull rule was made null and void during the United Nations General Assembly (UNGA) on a “New International Economic Order.” Id. The UNGA passed a resolution stating that states expropriating foreign property within their own borders were free to decide the amount of proper compensation, as well as the method of payment, and that any dispute arising from such decisions should be settled within the state itself. GA Res. 3171 (XXVIII), UN GAOR, 28th Sess., Supp. No. 30, UN Doc. A/9030, at 52 (Dec. 17, 1973).} Expropriation is covered in Article 13 of the ECT.\footnote{310 See Wälde & Dorian, supra note 43, at 633-34.} The basic formula disallows nationals of one member state in the territory of another member state to have their property expropriated unless it is:

(a) For a purpose which is in the public interest;
(b) Not discriminatory;
(c) Carried out under due process of law; and
(d) Accompanied by the payment of prompt, adequate and effective compensation.\footnote{311 Id. at 367.}

The ECT takes the Hull rule beyond its traditional definitions and defines compensation under Article 13, section (d) as being an “amount to the fair market value of the investment expropriated at the time immediately before the expropriation” and as due on the date of expropriation.\footnote{312 Id. at 367.}

One of the most frequent types of expropriation is nationalization. Article 13(1) includes nationalization in its definition of "expropriation."\footnote{313 Id.} The original Hull formula does not extend as far as the ECT has extended it. However, considering the amount of investment occurring throughout the member states of the ECT, especially Central Asia, nationalization is a very real issue. In general, remedies offered by the ECT in the event of expropriation are defined in Article 13(2), which “gives
the investor the right, but not the obligation, to seek prompt review” of both the legality of the expropriation and the value assigned it by the host government. The foreign investor is not required to seek remedy within the host government’s national legislation unless the dispute is over taxing.

This definition of expropriation is especially critical for foreign investors building transit pipelines for oil and gas. The land that they purchase and build stretches over thousands of miles and across borders. The value of development to that land is often in the billions of dollars. The ECT’s ability to offer a well-defined rule of law that enforces the loss of such a development will encourage investors to choose development projects in ECT member territories as opposed to non-ECT member territories. Unfortunately, the ECT offers no such guarantee to foreign investors. Of major concern is the ambiguity of Article 18 concerning member states’ sovereignty over energy resources. Article 18(1) states that “the Contracting parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.” The Article goes on to define the rights left to host states in determining the availability, exploration, and exploitation of the natural resources held within their borders. The Article is extremely vague and offers little in the way of standards by which foreign investors can hold host governments accountable. Furthermore, it is not well tied into the rest of the charter’s articles.

C. The Structure of the ECT

In general, the charter is designed “to promote access to international markets on commercial terms . . . to develop an open

314 Id. at 368.
315 Wälde & Dorian, see supra note 43, at 368; see also Article 21(5)(b) of the Energy Charter Treaty, which requires that any expropriation disputes believed to be as a result of a taxation issue within the host government be resolved within the host territory. The entirety of Article 21 is aimed at upholding the sovereign right of member states to control their own tax policies. See id. at 640-41.
316 See id. at 637.
317 Id.
318 See id.
and competitive market."³¹⁹ More specifically, the ECT aims to achieve:

(1) Investment protection (e.g. by granting investors non-discriminatory treatment); (2) National Treatment and Most-Favored Nation Treatment; (3) compensation in case of expropriation and other losses; (4) free transfer of capital; (5) trade in energy, energy products and energy related equipment, based on the WTO rules; (6) freedom of energy transit; (7) improvement of energy efficiency; (8) international dispute settlement, including investor-state arbitration and inter-state arbitration; and (9) improved legal transparency.³²⁰

The structure of the ECT is divided between "hard" and "soft" laws.³²¹ Most of the treaty's rights and requirements are "hard law" and are enforceable through arbitration.³²² There are also several practices encouraged by the treaty that are considered "soft law."³²³ The "soft laws" tend to be good practices or behaviors that the ECT seeks to encourage among its members.

As has been previously discussed, the ECT is a multilateral treaty born out of several other establishments of international law.³²⁴ Most significant among those is the GATT. The ECT is considered to take a "GATT-plus" approach, enforcing not only the GATT structure, but also additional requirements that extend the GATT into non-GATT countries.³²⁵ There are three major focal points of the Energy Charter Treaty: trade, transit, and dispute resolution.³²⁶ The GATT's fingerprint is visible throughout all three areas.

³¹⁹ Energy Charter Treaty, supra note 298, art. 3.
³²² ld.
³²³ ld. ECT Article 7(2) is an example of a "soft law" obligation because it seeks to "encourage relevant entities to co-operate" in modernizing, developing, operating, and facilitating the interconnection of "Energy Transport Facilities." Id. at 7.
³²⁴ The Energy Charter Treaty, supra note 298, pmbl.
³²⁵ Wälde & Dorian, supra note 43, at 3.
³²⁶ ld.
1. Trade

As a "grandchild" of the GATT, the ECT seeks to promote East-West industrial cooperation by providing legal safeguards in areas such as investment, trade, and transit.\textsuperscript{327} Trade obligations under the ECT are identified in Article 5.\textsuperscript{328} The article is very specific. It states that "a Contracting party shall not apply any trade-related investment measure that is inconsistent with the provisions of Article III or XI of the GATT."\textsuperscript{329} There are no exceptions for domestic laws or administrative rulings.\textsuperscript{330} The importance given to trade in the ECT is significant considering that "petroleum alone is considered as the single most important commodity both in value and volume terms, traded internationally..."\textsuperscript{331} If the ECT hopes to successfully extend the rules of the GATT into the energy sector, trade must be addressed. However, other than the provisions created specifically for the energy sector, the ECT generally adopts the rules already set out by the GATT and the WTO.\textsuperscript{332}

Most-favored nation (MFN) treatment is one of the key principles set out by both the WTO and the GATT.\textsuperscript{333} It is defined as a principle of international economic trade, which grants the same status to one nation that is granted to all other nations.\textsuperscript{334} For example, all WTO members treat all other WTO members as MFN trading partners.\textsuperscript{335} "By applying government trade restrictions uniformly, without regard for the origin of goods, the market system of allocation of goods and production will have the maximum effect."\textsuperscript{336} Such a system decreases the development of trade cliques as well as the amount of special treatment given to
certain partners over others. In general, it decreases the competitive tensions created by an “open-market.”\textsuperscript{337} The ECT’s Article 4 and Article 5 work in accordance with the GATT/ WTO principles to all signatories.\textsuperscript{338} For signatories to the GATT, Article 4 ensures that no provision of the ECT will interfere with obligations outlined by the GATT.\textsuperscript{339} For non-GATT/WTO members, Article 29 of the ECT imports GATT-related rights and obligations in the ECT to apply only while “any contracting party is not a party to the GATT and Related Instruments.”\textsuperscript{340} The application of Article 29 ends when a signatory of the ECT becomes a member of the WTO.\textsuperscript{341} The effect of the combination of ECT Articles 4, 5 and 29 is that every signatory of the ECT is subject to the provisions of the GATT and the WTO.

Article 29(2)(b) articulates an exception for the nations of Central Asia.\textsuperscript{342} The provisions of Annex TFU govern trade agreements between these nations only.\textsuperscript{343} “Compliance with that annex is also a precondition to benefit from the exception,” ensuring that some degree of regulation is enforced.\textsuperscript{344}

2. Transit

Transit of materials is one of the most, if not the most, important subjects in discussing the international energy sector. Freedom of transit across the territory of another state in the interest of the community of nations has been a recognized concept in international law since the seventeenth century.\textsuperscript{345} “The existing ECT transit provisions oblige its Contracting Parties to facilitate the transit of energy on a non-discriminatory basis consistent with the principle of freedom of transit.”\textsuperscript{346} In contrast

\textsuperscript{337} Id.
\textsuperscript{338} See The Energy Charter Treaty, supra note 298, art. 4, 5.
\textsuperscript{339} See id. at art. 4.
\textsuperscript{340} Id. at art. 29(1).
\textsuperscript{341} See Wälde & Dorian, supra note 43, at 465.
\textsuperscript{342} See The Energy Charter Treaty, supra note 298, art. 29 (2)(b).
\textsuperscript{343} See Wälde & Dorian, supra note 43, at 467. See The Energy Charter Treaty, supra note 298, at Annex TFU.
\textsuperscript{344} Wälde & Dorian, supra note 43, at 467.
\textsuperscript{345} See id. at 499.
\textsuperscript{346} See Andrei Konoplyanik & Thomas Wälde, The Energy Charter Treaty and its
to this is the right of territorial sovereignty. This right allows nations to prevent the construction of devices for transit within their territory. Freedom of transit is particularly important for signatories like Kazakhstan, which "does not have access to a seaport." Kazakhstan, like all of the Central Asian members, must rely on the continued hospitality of Russia in order to export its resources to other markets. Any dispute between Russia and the members of the CIS could result in "Russia simply cutting off pipeline access." The ECT provides a standard for transit and a "dispute-resolution mechanism" to enforce it.

Transit under the ECT regime has three major goals: (1) to establish an open-ended obligation to favor construction of new facilities; (2) to abstain from the unwarranted closure of existing transit facilities as a result of political motivations; and (3) to make sure state and private transit operators do not undermine their obligation to facilities. Article 7 of the ECT defines "transit" as the following:

The carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and products originating in the Area of another state and destined for the Area of a third state, as long as either the other state or third state is a contracting party.

The type of transit described is "through-transit" and while the article seems to require the action of three parties, transit can be achieved by two parties where one of the parties controls both the origin and destination. One of the Russian Federation's biggest objections to the Treaty is its assertion that the ECT imposes a third-party access requirement for all energy trade agreements.

348 Id. at 180.
349 Id.
350 Id.
351 See id. at 509-10.
352 The Energy Charter Treaty, supra note 298, art. 7.
353 See Wälde & Dorian, supra note 43, at 508.
354 See id. at 168.
Such an obligation would open Russia’s transport system to cheaper resources from Central Asia and may create competition for Russian gas and oil supplies in Europe. Considering the abuse that the Central Asian states have endured from the Russian Federation, this fear is not completely unfounded. However, the ECT does not imply any such requirement and specifically states this in the ECT Understanding IV.1(b)(ii).

3. Dispute Resolution

One of the biggest criticisms of international law is, generally, that it cannot be enforced. The ECT is unique in its application of an extensive dispute resolution system. Under the ECT, not only are obligations enforced, but they are also imposed so as to create as little interruption in the trade of energy as possible. Article 27 generally addresses dispute settlement between parties. The treaty covers two types of dispute settlement: state-state arbitration and investor-state arbitration. The treaty expressly regulates certain categories of disputes: disputes between parties to the treaty (governed by Article 27); disputes between investors and host-governments (governed by Article 26); transit disputes (Article 7.7). Disputes concerning competition (Article 6) and environmental concerns (Article 19) are special exceptions to the general arbitration guidelines. Finally, any

355 See Konoplyanik & Wälde, supra note 346, at 540.
357 The provisions of the Treaty do not oblige any Contracting party to introduce mandatory third party access. The Energy Charter Treaty, supra note 302, Understanding IV (1)(b)(ii).
358 See MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 1 (6th ed, 2007).
359 See Michael Belz, Provisional Application of the Energy Charter Treaty: Kardassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties, 22 EMORY INT’L. REV. 729, 735 (2009) [hereinafter Belz]. “Beyond encouraging ‘long-term cooperation, the ECT aims to embolden the rule of law’ established in the treaty with a system of dispute resolution and arbitration.” Id. at 735.
361 The Energy Charter Treaty, supra note 298, art. 27.
363 See id.
party has three possible venues of arbitration: the International Center for the Settlement of Investment Disputes (ICSID), an ad
hoc committee of the United Nations Commission on International Trade Law (UNCITRAL), and the Arbitration Institute of the
Stockholm Chamber of Commerce (SCC).\(^{364}\)

This extensive system was designed partially in response to the
GATT’s lack of “teeth.”\(^{365}\) Ideally, the ECT’s arbitration system
would level the playing field among parties in energy related
investments and trade. Success is dependent on the role that the
courts of arbitration choose to play. Many of the ECT’s
arbitration provisions are vague or weak. Depending on the
interpretation of such articles by arbitration courts, the results
could only perpetuate the power-oriented geopolitical system as
opposed to creating a rule-oriented system.\(^{366}\) The following two
cases illustrate how key the role of arbitration courts are to the
implementation of the ECT.

\(a.\) Petrobart v. Kyrgyzstan\(^{367}\)

In February 1998, Petrobart Limited, a natural gas supply
company registered in Gibraltar, entered a contract with the
Kyrgyzgazmuniazat (KGM) for the supply and delivery of
200,000 tons of gas condensate.\(^{368}\) KGM is a natural gas supply
company that manages the majority of Kyrgyzstan’s natural gas
supply. The Kyrgyzstan government owns more than 90 percent
of the company’s stock.\(^{369}\) Petrobart brought the arbitration to the
SCC in 2003. KGM failed to deliver three separate payments

\(^{364}\) The Energy Charter Treaty, supra note 298, art. 26(2), 26(4).

\(^{365}\) Marc L. Busch & Eric Reinhardt, Developing Countries and the General
Agreements on Tariffs and Trade/WTO Dispute Settlement, 37 J. WORLD TRADE 719, 721
(2004).

\(^{366}\) See id. at 721-22.

\(^{367}\) Petrobart Ltd. (Gibraltar) v. Kyrgyzstan, SCC Arbitration No. 126/2003 (2003),
Petrobart Ltd. (Gibraltar) v. Kyrgyzstan].

\(^{368}\) Petrobart Ltd. (Gibraltar) v. Kyrgyzstan, SCC Arbitration No. 126/2003 (2003),
Energy Charter (Nov. 19, 2010),
Petrobart Ltd. (Gibraltar) v. Kyrgyzstan].

\(^{369}\) See id. at 19.
before declaring bankruptcy. Petrobart claimed that KGM violated Articles 10(1), 10(2), and 10(3) of the ECT and that Petrobart was entitled to compensatory damages, lost profits, and arbitration fees. The Republic of Kyrgyzstan responded with the argument that the contract between Petrobart and KGM did not fall under the ECT as an “investment” and that failure to pay Petrobart was due to a “stabilization program” functionally in compliance with Kyrgyz bankruptcy law, and therefore, it should be exempted from enforcement of the ECT.

In determining the proper award in this case, the arbitral body of the SCC had to examine whether Petrobart could be regarded as an investor that made an investment protected under the ECT. Article 1(6) states that an “investment” is any asset, “owned or controlled directly or indirectly by an Investor.” The court reasoned that international law requires that when there is a dispute between parties who have entered into a treaty, the definitions within that instrument are controlling. In this case, the ECT was the controlling document; therefore, its definitions of “investment” and “investor” must be applied. Of particular note are Articles 1(4) and 1(5) in connection with Article 1(6)(f):

(4) “Energy Materials and Products” based on the Harmonized System of Customs and the Combined Nomenclature of the European Communities, means the items included in Annex EM,

370 See id. at 8. Note that before being submitted to the SCC for arbitration, both the local court of Bishkek and the UNCITRAL received this case. Both legal bodies rendered an award for Petrobart. See British Institute of International and Comparative Law (BIICL), Individual Case Summaries - Petrobart Limited v. the Kyrgyz Republic, available at http://www.biicl.org/files/3912_2005_petrobart_v_kyrgyz_republic.pdf (Jan. 20, 2011) [hereinafter BIICL].

371 See Petrobart Ltd. (Gibraltar), SCC Arbitration No. 126/2003, at 18.

372 Id. at 23. To deal with KGM’s mounting debt the Kyrgyz Republic transferred all of KGM’s assets to two new State companies but the liabilities remained in KGM. BIICL, supra note 370, at 3.

373 See Petrobart Ltd. (Gibraltar), SCC Arbitration No. 126/2003, at 69.

374 The Energy Charter Treaty, supra note 298, art. 1(6).


376 Id.
(5) “Economic Activity and the Energy Sector” means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of Energy materials or products except those included in Annex NI or concerning the distribution of heat to multiple premises.\footnote{The Energy Charter Treaty, supra note 298, app. 1.}

Under these articles, the tribunal found that “a right conferred by contract to undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty. This must also include the right to be paid for such sale.”\footnote{Petrobart Ltd. (Gibraltar) v. Kyrgyzstan, supra note 368, at 72.} Petrobart was found to be an investor and its contract with KGM was found to be an investment under the protection of the ECT.\footnote{See id.}

Investments under the ECT are entitled to “stable, equitable, favorable and transparent conditions.”\footnote{The Energy Charter Treaty, supra note 298, at article 10(1).} Article 10 of the ECT outlines the specific treatment afforded investors.\footnote{Id.} Petrobart claimed that the steps taken after failing to pay for the contracted-for gas condensate deliveries were in violation of Articles 10(1).\footnote{BIICL, supra note 370, at 2.} The tribunal found that the Kyrgyz Republic’s choice to move assets from KGM to other state-owned companies was done to the detriment of Petrobart and other investors to whom KGM owed money.\footnote{See Petrobart Ltd. (Gibraltar), SCC Arbitration No. 126/2003, at 76.} This type of action violated the requirement of “fair and equitable treatment” outlined by the Treaty’s Article 10.\footnote{See BIICL, supra note 370, at 4.} The facts showed a deliberate move by the Kyrgyz government to avoid paying its debts to Petrobart and other investors.\footnote{See id. at 6.} Ultimately, the court awarded compensatory damages to Petrobart amounting to the balance due, but denied damages for lost profits and fees.\footnote{See Petrobart Ltd. (Gibraltar), SCC Arbitration No. 126/2003, at 84, 87.} Each party was responsible for its own costs of
This case illustrates that in some cases arbitral tribunals are able and willing to enforce the ECT in a way that has tangible consequences for host-governments who may seek to take advantage of investors. Central Asia is a developing region with little experience in geopolitics. Due to the paternalism of Russia for the majority of Central Asian history, the governments of the five CIS members have been exposed to little other than the exploitative international relations of the “Great Game” and the Cold War era. Enforcement of the ECT in these countries will create a greater confidence in prospective investors. The greater the variety of investors in Central Asia, the looser the grip of power-players like Russia over the natural resources held within these countries.

b. Yukos Universal Ltd. (UK-Isle of Man) v. Russian Federation

This investor-state dispute is a pending decision within the Permanent Court of Arbitration in The Hague, a forum accepted by the WTO for international arbitration. It includes two of the ECT’s most controversial principals: expropriation and the option of provisional application. It also illustrates how detrimental an anemic ruling by the court of arbitration can be to the establishment of the ECT as a legitimate instrument of international law.

The majority shareholders of the Yukos Oil Company have brought three parallel claims under the Energy Charter Treaty against the Russian Federation for “wrongfully” expropriating Yukos’ main production unit, Yuganskneftgas. The Russian Federation argues that the Energy Charter Treaty does not bind it because it has not ratified it and only applies it provisionally.

Article 45 governs provisional application of the ECT. The definition of provisional application is vague, especially in terms

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387 See Pertrobart Ltd. (Gibraltar), SCC Arbitration No. 126/2003, at 87.
388 Dispute Settlement, supra note 362.
389 Id.
390 See Belz, supra note 359, at 727.
391 Id. at 727-28.
392 The Energy Charter Treaty, supra note 298, art. 45.
of which principals are required and which are optional. In general, "the extent to which provisional application grants legal rights and imposes obligations on states is still developing in international law, particularly through international arbitration."\textsuperscript{393} The ECT provides for provisional application of the whole treaty upon signature so long as the provisional application is not in contrast with domestic law.\textsuperscript{394} "Provisional application of the ECT is a unique concept because it is a multilateral investment treaty."\textsuperscript{395} The practice of provisional application is usually associated with addressing an urgent international issue.\textsuperscript{396} There are two separate issues that arise from this article. First, it provides a potential loophole through which signatories can slip to avoid certain provisions of the ECT. Second, this contradicts the accepted international principle that signatories of international treaties may not use their domestic laws as a justification for violating their treaty obligations.\textsuperscript{397} The ECT encourages provisional signatories that choose to do so to deliver a declaration upon signing indicating that provisional application is in violation of its domestic laws.\textsuperscript{398}

In the pending case, the Russian Federation did not declare at signing that its domestic laws were in contrast with the provisional application of the ECT.\textsuperscript{399} Therefore, the issue for the court becomes whether or not the Russian Federation waived its right to assert that provisional application conflicts with its domestic law post-signature of the Treaty.\textsuperscript{400} If the arbitral court finds in favor of the Russian Federation, the arbitral court will also be relinquishing jurisdiction and Yukos Oil will have to find another venue in which to seek remedy.\textsuperscript{401} If the arbitral court finds in

\textsuperscript{393} Belz, \textit{supra} note 359, at 729.
\textsuperscript{394} See \textit{The Energy Charter Treaty}, \textit{supra} note 298, art. 45(1).
\textsuperscript{395} See Belz, \textit{supra} note 359, at 734.
\textsuperscript{396} See \textit{id}.
\textsuperscript{398} See \textit{The Energy Charter Treaty}, \textit{supra} note 298, at art. 45(2)(a).
\textsuperscript{399} See \textit{Dispute Settlement}, \textit{supra} note 362.
\textsuperscript{400} Belz, \textit{supra} note 359, at 730.
\textsuperscript{401} See \textit{id}.
favor of Yukos Oil, it will be a signal to all member-states that provisional application of the ECT is not without consequence.

The ECT seeks to create a level playing field of rules to be governed by investors and states alike, thus decreasing the risks that are inherent in energy-related investments and trade. \(^{402}\) Allowing signatories to apply the ECT provisionally and then to later assert that it is inconsistent with their domestic laws will not only undermine the goal of the ECT, but it will also perpetuate the common assertion that international law lacks the power of domestic laws. \(^{403}\) Legally, this will require any investor to bear the burden of determining whether or not the provisional application of the ECT is consistent with a state’s domestic laws before entering into a contract with that state. Geopolitically, it will send a message to all signatories that have yet to ratify the Treaty that there is no incentive to do so because it offers no concrete protection against provisional application members.

**VII. Predictions for the Future**

With the dawn of a new decade comes the dawning of a new age for Central Asia, possibly even a new age for the global community. The ongoing war in the Middle East has spread the U.S. military thin and tested the limits of the government’s coffers. \(^{404}\) Russia’s trade policy, leaving its neighbors with somewhat of an imperial hangover, has pushed the Newly Independent States to find investment alternatives. \(^{405}\) At the annual summit of the CIS held in October 2010, only six of the eleven members attended. \(^{406}\) The entire summit lasted for half an hour and no representative spoke to any other representative. \(^{407}\) It seems that in the Second Transoceanic Era, “Russia has ended up

\(^{402}\) See id.

\(^{403}\) See id. at 745.


\(^{406}\) See id.

\(^{407}\) See id.
the biggest loser."\textsuperscript{408}

But their loss is China’s gain.

Essentially China is taking advantage of its enormous cash reserves and still growing market that is a magnet for exporters to secure key positions in key economic areas. China is basically buying up major energy assets in distressed countries at knock-down prices for long-term contracts and secures for itself not just energy flows but key strategic advantages for years to come.\textsuperscript{409}

On December 14, 2009, the Turkmenistan-China natural gas pipeline began production, and is projected to transport up to 40 bcm per year by 2012.\textsuperscript{410} The route will also pick up and export gas from Uzbekistan and Kazakhstan, re-routing even more natural gas away from Russian lines.\textsuperscript{411} Furthermore, China is lending Kazakhstan ten billion dollars in return for a minority holding in Kazakhstan’s state-run gas company, KazMunaiGaz.\textsuperscript{412} As China’s market grows and its cash flow increases, its investment in new Central Asian projects increases, while it also pushes for the completion of existing projects.\textsuperscript{413}

Russia will eventually push back on China’s encroachment into its “territory.” Surrounded by “growing factions,” Russia will have to stake its claim in the Newly Independent States.\textsuperscript{414} Very few have found the Russian embrace comfortable, and the countries of Central Asia are still sore from the years of suppression they suffered under the USSR. As the conflict in Central Asia heats up, there must be a release valve to keep the

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\textsuperscript{411} See id.

\textsuperscript{412} See China’s Peaceful Rise in Central Asia, supra note 409, at 9.

\textsuperscript{413} Id.

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region from exploding. The Energy Charter Treaty has the ability to act as that release valve.\textsuperscript{415} Whether it meets its potential as the Central Asian safety net is entirely dependent on how strictly it is enforced.\textsuperscript{416} The players of the “Great Game” have changed, as has the chessboard on which it is played. The rules and regulations dictating the “Game” need to change as well.

\textsuperscript{415} See Belz, supra note 359, at 744-45 (“The ECT seeks to strengthen the rule of law on energy issues by creating a level playing field of rules to be observed by all participating governments thus minimizing the risks associated with energy-related investments and trade.”).

\textsuperscript{416} See id. at 752.