

NOTES

A Proposal to End the Stalemate in the Caspian Sea Negotiations*

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I. INTRODUCTION

The Caspian Sea is an oil-rich natural resource bordering five countries. Surrounded by Azerbaijan, Russia, Kazakhstan, Turkmenistan, and Iran, the Caspian is considered by many to be the boundary between Europe and Asia.¹ As a result of its geographic location, the Caspian Sea and its resources have been at the center of many regional disputes.² Following the breakup of the Soviet Union, “the legal status of the [Caspian] [S]ea has emerged as one of the most contentious international problems facing the region.”³ Problems arose because all five littoral, or bordering, states wanted access to the Sea’s natural resources, but only some states agreed that, regardless of the technical borders, all states should still share the resources.⁴ Currently, the five states are engaged in negotiations to determine the best way to divide the Caspian Sea and its resources among themselves. Because the Caspian Sea contains what may be the third-largest oil and gas reserves in the world, it is understandable that each state wants to increase its share of the available resources.

This Note will examine the current dispute concerning the delimitation of the Caspian Sea, discuss how negotiation is being utilized to avoid serious armed conflict, and suggest that third-party intervention is necessary to

¹ See Alexander Rahr, *Caspian Oil*, INTERNATIONALE POLITIK—TRANSATLANTIC EDITION, Summer 2001, at 80.

² *Caspian Sea Region*, Energy Information Administration, at <http://www.eia.doe.gov/emeu/cabs/caspian.html> (July 2002) (discussing how several conflicts have arisen over mutual claims to the Sea and that the unresolved status of the Caspian has hindered development of oil and gas resources and potential export pipelines). See also Natalia Borisova, *U.S. Members of Caspian Consortium Get News of Unwelcome Guest—Iran*, OIL DAILY (Washington, D.C.), Nov. 15, 1994, at 1; Michael P. Croissant & Cynthia M. Croissant, *The Caspian Sea Status Dispute: Azerbaijani Perspectives*, 3 *Caucasian Regional Studies* (1998), at <http://poli.vub.ac.be/publi/crs/eng/0301-01.htm> (last visited Feb. 8, 2002) (discussing how “cultures and geopolitical orientations are clashing [in the Caspian Region]”).

³ Kamyar Mehdiyoun, *Current Development, Ownership of Oil and Gas Resources in the Caspian Sea*, 94 AM. J. INT’L L. 179, 179 (2000).

⁴ *Caspian Border Dispute Is Latest Woe*, PLATTS OILGRAM NEWS (New York), July 21, 1993, at 3 (stating that Kazakhstan leadership maintains that all states should continue to have access to natural resources).

resolve the dispute because ten years of negotiations have produced few results. Part II details the history of the Caspian Sea Region and provides the reader with a framework for analyzing the ongoing dispute. In international disputes, it is often necessary to acknowledge the historical context in order to understand the present dynamics. In this case, the breakup of the Soviet Union has affected the Caspian Region by creating successor states to treaties that initially were between two states, and has increased tensions in the area as the newly created states have struggled to maintain separate identities from that of Russia. Part III of this Note examines how international law has shaped the negotiations among the littoral states and then focuses on how the Caspian negotiations have changed in the past decade and examines each littoral state's evolving position on the demarcation of the Caspian.

Part IV then discusses how border disputes involving shared waters have been resolved elsewhere, providing comparisons and identifying useful frameworks for resolving the type of border dispute plaguing the Caspian. Part V then examines international methods of dispute resolution⁵ in an effort

⁵ This Note focuses more on traditional "American" alternative dispute resolution (ADR) processes, such as third-party assisted negotiation [mediation/conciliation], independent expert investigation [inquiry], appraisal and evaluation, and combinations or adaptations of methods that create a range of innovative methods to resolve disputes that are also used in international settings. See U.N. CHARTER art. 33, para. 1, for a complete listing of peaceful methods of dispute resolution. See also Christine Chinkin, *Alternative Dispute Resolution Under International Law*, in REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA 123 (Malcolm D. Evans ed., 1998). This Note will only specifically discuss negotiation, mediation, and conciliation, despite the potential applicability of other international dispute resolution mechanisms. It is important, however, to note that coercion and voluntary relinquishment are also mechanisms to resolve disputes. Richard B. Bilder, *An Overview of International Dispute Settlement*, 1 EMORY J. INT'L DISP. RES. 1, 20–21 (1986) (suggesting that these mechanisms, although occasionally utilized, are not advocated by Mr. Bilder and are usually the source of last resort for the countries involved). In fact, coercive procedures were utilized in the Caspian when only Imperial Russia and Persia shared the resources of the Sea. See Eric W. Sievers, *The Caspian, Regional Seas, and the Case for a Cultural Study of Law*, 13 GEO. INT'L ENVTL. L. REV. 361, 368 (2001) (discussing how Russia's military power was repeatedly exerted on Persia). Russia, when seen as a world superpower, was easily able to violate Persian rights in the Caspian and could get away with such action because Persia was not as powerful. *Iran: Paper Views Problems with Caspian Sea Legal Regime*, WORLD NEWS CONNECTION, Aug. 7, 2001, available at 2001 WL 27167115. It is interesting to note that even Soviet Russia recognized the many concessions previously made by Persia in the Treaty of Friendship, signed by the parties on February 26, 1921. See Treaty of Friendship (Feb. 26, 1921), in 1 SOVIET TREATY SERIES, (1917–1928) 92–93 (Leonard Shapiro ed., 1950). The Treaty stated that (1) the Soviet Government declared all treaties, agreements, and conventions signed by the Tsarist Government of

to identify a more effective framework of resolving the status of the Caspian and suggests alternatives to the state party negotiators who have been meeting to parcel out the seabed of the Caspian. Part VI discusses the potential for conflict if this dispute is not resolved peacefully and details what is necessary to bring the dispute to resolution. Because the potential for conflict is great, it is important that the parties continue the use of peaceful dispute resolution mechanisms to bring about an end to the dispute. An examination of the effectiveness of negotiations between the states and the progression of the negotiations, along with comparisons to other similar border disputes, may display a framework for dealing with other types of complex border disputes. Negotiations involving all of the parties may appear on the surface to be the best method for resolving this dispute. However, because the negotiations have been ineffective for the past decade, this Note suggests using a neutral third-party mediator or establishing a conciliation commission to resolve the dispute in the Caspian.

II. HISTORY OF THE CASPIAN REGION

A. *The Caspian Sea*

For an accurate assessment of the Caspian negotiations to take place, one must first look to the history of the Caspian Region to understand why the Sea is so important to the littoral states. The Caspian Sea has played an important role in trade, serving as a shipping route since the Middle Ages.⁶ However, it was explorer Marco Polo who noted the abundance of oil in the Caspian region some 700 years ago.⁷ He wrote of “a fountain from which oil

Russia to be null and void; (2) the Soviet Government condemned the Tsarist policies that resulted in occupation without consent; and (3) Persia would be permitted to have a navy present on the Caspian. *Id.* Provision number three was necessary because previous agreements between the states had granted sole military might of the Caspian to Imperial Russia. *Id.*

⁶ Theodore C. Jonas, “Parting the Sea”: *Caspian Littoral States Seek Boundary Disputes’ Resolution*, OIL & GAS J., May 28, 2001, at 60, available at 2001 WL 9153154. Even the ancient Greeks knew of the Caspian Sea, calling it *Hyrcaunium Mare* or *Caspium Mare*. See ROSANNA KELLY, RUSSIA 26 (Madge Phillips ed., 1994). In fact, Virgil and Shakespeare both make mention of the Caspian as if its shores contained wild beasts. *Id.* (discussing Virgil’s reference to “Tigers of Hyrcania,” and Shakespeare’s mention of “The rugged Pyrrhus like th’ Hyrcanian beast” in *Hamlet*). These fanciful images are no longer accurate, as the Caspian has been transformed into a “busy navigation channel” as its “waters are exploited for fishing, and its sea-bed for oil extraction.” *Id.*

⁷ Robert Cullen, *The Rise and Fall of the Caspian Sea*, NAT’L GEOGRAPHIC, May 1999, at 11.

springs in great abundance.”⁸ The Caspian lies between Europe and Asia, east of the Caucasus Mountains, making it an important boundary between East and West. The Caspian Sea is the “largest inland body of water in the world” and is approximately the size of Japan.⁹ However, “[d]uring the past several centuries, the Caspian has been shrinking in size because the rivers that empty into it bring less water than it loses by evaporation.”¹⁰ Despite this loss of water, the Caspian remains extremely important for the resources it provides to those who border its waters.

B. *Legal Status Afforded by Treaties*

Negotiations between the littoral states have been unable to determine the precise legal status of the Caspian—possibly due to the myriad of treaties over the years that have also failed to provide a precise designation. Since Imperial Russia¹¹ and Persia¹² recognized the importance of the Caspian Sea, they deemed it necessary to create rules for its use, and the two countries

⁸ *Id.* at 15.

⁹ Faraz Sanei, Note, *The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with Its Geopolitical Realities*, 34 VAND. J. TRANSNAT'L L. 681, 693 (2001). The Caspian Sea is about 1000 meters deep with a surface area of approximately 400,000 square kilometers. *Id.*

¹⁰ Leszek A. Kosinski, *Caspian Sea*, in WORLD BOOK ENCYCLOPEDIA, 274–75 (1997) (discussing how “large irrigation projects built by the Soviet Union in the Caspian Basin drain off much water from the [] rivers”).

¹¹ When the Bolsheviks toppled Tsarist Russia during the Russian Revolution of 1917, Imperial Russia made way for the newly established Union of Soviet Socialist Republics (U.S.S.R.), also known as the Soviet Union. See generally MARTIN MALIA, *THE SOVIET TRAGEDY—A HISTORY OF SOCIALISM IN RUSSIA, 1917–1991* 110–38 (1994). When the Soviet Union collapsed in 1991, the U.S.S.R. gave way to a Russian Federation, the Commonwealth of Independent States (CIS); the twelve Soviet Republics were granted independence, but still maintained loose ties to the CIS and Russia, the largest republic. *Id.* at 489. Many of these republics have since broken away and become totally independent nations, but unless otherwise designated, for the purposes of this Note when speaking of post-Soviet Russia, they are collectively referred to as “Russia,” the most powerful state in the CIS. Actually, the CIS has become much more dynamic under President Putin, who is said to have created “an atmosphere of cooperation on an equal footing beneficial to all parties.” Olga Nedbayeva, *Azerbaijan Urges Russia to Play a “Decisive Role” in Karabakh Dispute*, AGENCE FR. PRESSE, Jan. 26, 2002, available at 2002 WL 2325763.

¹² Persia has been referred to as the Islamic Republic of Iran since 1935. AMERICAN HERITAGE COLLEGE DICTIONARY 717 (3d ed. 1993). This Note refers to either Persia or Iran depending on whether references are pre- or post- 1935.

entered into various treaties.¹³ Following several wars, Russia and Persia signed treaties to “fix the land boundaries between them and regulate [the] use of Caspian waters.”¹⁴ The 1723 Treaty of St. Petersburg was one of the first recorded treaties regarding the Caspian Sea, whereby Russia obtained rights to use the Caspian.¹⁵ Later treaties between the two countries further demonstrated the military power that Russia exerted upon Persia, as Russian rights to the Caspian were repeatedly affirmed and expanded, while Persian rights were diminished.¹⁶ However, the tide changed following the Russian Revolution, and on February 26, 1921, the Russian Socialist Federated Republic and Persia entered into a Treaty of Friendship that actually provided Persia with *some* rights to the Caspian Sea.¹⁷ This treaty was the first effort to correct some of the sweeping concessions that Persia had granted to the mighty Imperial Russia, and as a result, those previous concessions were declared void.¹⁸ The 1921 Friendship Treaty was expanded and further affirmed by a series of treaties, most granting Persia increased rights for navigation and fishing. One such treaty, implemented in 1940,¹⁹ confirmed ten-mile exclusive national zones for each state, which remained in effect until the collapse of the Soviet Union.²⁰ One comprehensive boundary treaty, executed in 1954, still exists, but unfortunately for the

¹³ See *infra*.

¹⁴ Jonas, *supra* note 6, at 60. Since the treaties all dealt with water use, military might, or fishing, it is obvious that the Russian and Persian Empires were interested in the Sea as a trade route and source of food—not for the minerals in the seabed. *Id.* As a result, the states have no legal regime to provide guidance in apportioning the rights to the Sea.

¹⁵ Sievers, *supra* note 5, at 368.

¹⁶ *Id.* For example, the 1813 Gulistan Treaty stipulated that “except for the Russian State, no other state may have a military flag on the Caspian Sea.” Sanei, *supra* note 9, at 768–69 (showing that “the Turkmenchai Treaty of 1828 reaffirmed the exclusive right of Russian naval presence in the Caspian”).

¹⁷ SOVIET TREATY SERIES, *supra* note 5, at 92–94. See also Barry Hart Dubner, *The Caspian, Is It a Lake, a Sea or an Ocean and Does It Matter? The Danger of Utilizing Unilateral Approaches to Resolving Regional/International Issues*, 18 DICK. J. INT’L L. 253, 260 (2000).

¹⁸ Sievers, *supra* note 5, at 369.

¹⁹ “The 1940 Treaty on Trade and Navigation . . . [is] the most detailed and comprehensive set of rules regarding legal relations between the two states in the Caspian.” Sanei, *supra* note 9, at 769.

²⁰ Sievers, *supra* note 5, at 369.

parties involved, it only determines the land border—not the sea boundary across the Caspian.²¹

It has been suggested that the U.S.S.R. delimited the Caspian between the Soviet littoral republics in 1970, but no written documentation verifying this has ever been produced by *legal* scholars.²² However, Azerbaijan and Kazakhstan have produced maps and documents “officially” recognizing the division of the Caspian among the Soviet republics that the Soviet Union suggests were made.²³ According to the international agreements of 1921 and 1940, any decisions that affect the Caspian and its resources must be made jointly by those countries bordering the Sea.²⁴ Despite the breakup of the U.S.S.R., Russia still endorses many of the treaties that existed between Soviet Russia and Persia concerning the use of the Caspian, including these two.²⁵ Moreover, some in Iran also believe that the treaties should still be in force and that the former Soviet republics should be entitled to divide among themselves only that portion of the Sea previously afforded to Soviet

²¹ Mehdiyoun, *supra* note 3, at 181. However, even if the sea boundary were determined by the treaty, it is unlikely that all the Russian Republics would agree to share only the Soviet portion. See Steven Lee Myers, Editorial, *Russia: Carving Up the Caspian Sea*, N.Y. TIMES, Sept. 24, 2002, at A8 (discussing how Russia has signed independent agreements with Azerbaijan and Kazakhstan in recent months—an indication that Russia will form its own plans, without regard to the former Soviet divisions).

²² Sievers, *supra* note 5, at 369. The inability of legal scholars to produce such documents, is, of course, not determinative; however, it does suggest that no *de jure* division ever occurred—even if a *de facto* division did exist.

²³ Sanei, *supra* note 9, at 779. Of course, these divisions would support the sectoral division they are promoting, so as to keep the plentiful oil fields within their national boundaries.

²⁴ *Azerbaijan & The Transcaucasus—The Caspian Demarcation Problem*, APS REV. OIL MARKET TRENDS, Nov. 14, 1994, available at 1994 WL 2478345. Because of the language requiring joint decisions, it may not be possible for Russia to delimit its portion of the Caspian without Iran’s consent. Of course, when the 1921 and 1940 agreements were signed, only two countries bordered the Caspian. *Id.* Now, due to the breakup of the Soviet Union, five states are expected to make joint decisions regarding resources. “Although Azerbaijan, Kazakhstan and Turkmenistan did not sign the treaties, the Alma Ata Declaration of December 1991, which established the Commonwealth of Independent States, included a provision recognizing the validity of all treaties and agreements signed by the U.S.S.R. and was signed by all of the former Soviet republics.” Croissant & Croissant, *supra* note 2. Consequently, the states have accepted the fact that decisions should be made jointly, even though they do not all accept the treaties. See *Azerbaijan & The Transcaucasus—The Caspian Demarcation Problem*, *supra*.

²⁵ *Azerbaijan & The Transcaucasus—The Caspian Demarcation Problem*, *supra* note 24.

Russia.²⁶ Consequently, because none of the previous treaties have created a substantive basis for delimitation that can be applied today, the littoral states must determine the best rules for dividing the resources of the Caspian to the benefit of all.

C. Breakup of the U.S.S.R.

The unresolved division of the Caspian Sea is a problem that has been festering for over ten years (since the collapse of the Soviet Union), because the parties have not been able to devise a clear plan for delimitation.²⁷ Following the breakup of the U.S.S.R. in 1991, Russia, Kazakhstan, Turkmenistan, and Azerbaijan became independent.²⁸ A sea that was once shared between only two countries, the U.S.S.R. and Iran, suddenly had to be apportioned among five independent nations—including four newly created states—with conflicting interests regarding the oil and other resources contained in the Caspian Sea.

The breakup of the U.S.S.R. has left the region with unstable politics, ethnic tensions, and faltering economies.²⁹ It is against this unstable backdrop that party negotiators must devise a manageable plan to demarcate the Caspian. Any agreement adopted by the parties must be fair and yet still

²⁶ Interview with Dr. Ebrahim Yazdi, General Secretary of the Freedom Movement of Iran, Former Foreign Minister of Iran, in Columbus, Ohio (Nov. 13, 2001) (slightly contradicting the Iranian policy that has been advocated at some meetings of the littoral states, which requires national economic zones, with common ownership of the remainder of the Caspian; also contradicting the other Iranian proposal of equal division); Cf. Peter Goodspeed, *Military Tensions Heightened over Caspian Sea Oil*, NATIONAL POST, Aug. 25, 2001, at A13, available at 2001 WL 27076531 (stating that Russia, Kazakhstan, and Azerbaijan “insist Iran should be satisfied with its old boundaries”).

²⁷ *Caspian Summit Shelved Again*, HART’S EUR. OFFSHORE PETROLEUM NEWSL., Sept. 5, 2001, available at 2002 WL 7167435.

²⁸ Mehdiyoun, *supra* note 3, at 179. The breakup of the Soviet Union is especially significant because three historic rivals—Russia, Iran, and Turkey—now struggle for influence across the Caspian Region and beyond. Croissant & Croissant, *supra* note 2. While Russia attempts to maintain the influence it has enjoyed over the former Soviet republics, Turkey strives to become the new force of influence in the area by emphasizing the common bonds of religion, ethnicity, and language which it shares with the Muslim republics. *Id.*

²⁹ See Martha Brill Olcott, Oral Testimony on Caspian Sea Oil Exports, before the Subcommittee on International Economic Policy, Export and Trade Promotion of the Senate Foreign Relations Committee (July 8, 1998), at <http://www.ceip.org/people/olccaspo.htm> (last visited Nov. 19, 2002) (referring to the declining standards of living, health care, and education that are prevalent in the Caspian Region).

aid the economies of the littoral states as they struggle to overcome decades of Soviet neglect.

III. LAKE/SEA QUESTION AND CURRENT NEGOTIATIONS

The Caspian is unique in that it has held many different classifications, including all of the following: “lake,” “enclosed sea,” “closed sea,” “inland sea,” “sea,” and “unique body of water.”³⁰ Factually, the Caspian is the largest *lake* in the world.³¹ However, the multi-faceted designations that are used to describe the Caspian prove problematic now that the Caspian’s resources must be apportioned among five countries because each different designation alters the legal rules used to apportion boundaries and resources. As will be shown in this section, classification as a sea produces very different results from that of a lake when international rules are applied to delimit maritime boundaries.³²

The choice of law determination is important to the littoral states as they struggle to define the boundaries of the Caspian.³³ Although it appears that no legal scheme exists that the parties can be *forced* to use, the parties can use other established frameworks to guide their negotiations. Therefore, because the delimitation of boundaries often depends upon the classification of the body of water, the question of whether the Caspian is a lake or a sea becomes increasingly important.³⁴ The littoral states should decide whether under international maritime law the Caspian is a sea, or whether it should be classified as a lake because it does not have the characteristics of a true sea.³⁵ If the Caspian is classified as a sea, the rules for delimitation in the United Nations Convention on the Law of the Sea (hereinafter UNCLOS), which

³⁰ William Constantinos Papadopoulos, Note, *International Law & Pipeline Geopolitics in the Caspian Sea*, 36 TEX. J. BUS. L. 1, 2 (1999).

³¹ *Id.*

³² *See infra.*

³³ A boundary is defined as an “imaginary line which divides two pieces of land [or water] from one another.” Mary Ellen O’Connell, Commissions for the Peaceful Settlement of International Boundary Issues 1 (May 19, 2000) (unpublished manuscript, on file with author).

³⁴ *Azerbaijan & The Transcaucasus—The Caspian Demarcation Problem*, *supra* note 24.

³⁵ *Id.* Part IX, art. 122 of UNCLOS defines “enclosed or semi-enclosed sea” as a body of water with an outlet to the sea or ocean. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1984). The Caspian does not have an outlet to another sea or an ocean, and thus does not meet this technical definition.

grants a twelve-mile territorial water zone³⁶ followed by a two-hundred mile exclusive economic rights zone,³⁷ could be applicable.³⁸ However, if the Caspian is classified a lake, “the border is drawn on a median line,” typically from equidistant points.³⁹

Once the choice of law determination is made, the parties will be able to deal with the more practical aspects of the legal determination, as they use dispute resolution mechanisms to actually determine the littoral states’ technical borders in the Caspian. Although these mechanisms are known as “alternatives” in American legal terminology, international parties do not regard them as alternatives, but rather as the “norm.”⁴⁰ The use of these methods can provide disputants with options on how to apply the rules established.⁴¹ As a result, dispute resolution does not end once the choice of law determination is made, but rather becomes more important because the

³⁶ A nation’s territorial sea is defined as the waters lying “beyond its coast or the boundary of its internal waters.” UNCLOS, *supra* note 35, Part II, art. 3. Nations have more authority over their internal waters than their territorial seas. The main difference is that ships of other countries can freely cross territorial seas in peacetime. Various nations have set different outer limits for their territorial sea. Most of the approximately 120 coastal nations have a limit of twelve or fewer nautical miles based upon the UNCLOS provision that a territorial sea is twelve miles. *Id.*

³⁷ An exclusive economic zone extends 200 miles from shore, and grants the coastal state “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources.” UNCLOS, *supra* note 35, Part. V, art. 56, 57.

³⁸ Christopher Pala, *Russia’s Caspian View Violates Law, in Eyes of Kazakhstan’s Minister*, PLATTS OILGRAM NEWS (New York), Nov. 22, 1994, at 1. However, since the parties to the dispute are not signatories to UNCLOS, it will not apply unless the parties *want* it to apply. Furthermore, the 200-mile economic zone is questionable because the Caspian is not wide enough to provide each country with its own two hundred mile zone. Therefore, the actual zones would have to be negotiated by the parties.

³⁹ *Id.* Dispute resolution becomes especially relevant when these principles are called into play because the countries involved must determine which points to use and where to draw the lines. This often requires numerous attempts at negotiation or mediation. When equidistant principles are used in delimitation, the result is more likely to ensure equity and proportionality. Brice M. Clagett, *Ownership of Seabed and Subsoil Resources in the Caspian Sea Under the Rules of International Law*, CASPIAN CROSSROADS MAG., Fall 1995, at <http://ourworld.compuserve.com/homepages/usazerb/131.htm> (last visited Feb. 5, 2002) (suggesting that the paramount requirement is a “reasonable degree of proportionality between the lengths of the relevant coasts of the state parties . . . and the quantity of maritime space assigned to those states[,]” because proportionality does not have to be precise).

⁴⁰ Mary Ellen O’Connell, Introduction to the Study of International Dispute Resolution 5 (Fall 2001) (unpublished manuscript, on file with author).

⁴¹ *Id.* at 1.

intricacies of demarcation can develop into tense situations. Dispute resolution methods must be used to prevent aggression and hostilities so the process can move along rapidly. As shown below, international law is available to resolve the strictest of legal questions and provide legal schemes for resolution, but in complex border disputes, many of the most important decisions can be and actually are made by the parties through methods like negotiation, mediation, and conciliation.⁴²

A. *United Nations Convention on the Law of the Sea*

UNCLOS is one of the legal frameworks available to the parties that may help resolve the dispute in the Caspian region. “The 1982 Law of the Sea Treaty . . . was drafted as a framework for identifying and resolving problems that may develop with regard to jurisdiction in ocean and maritime environmental situations that could arise during the exploration of various regions.”⁴³ This treaty is considered to be the “best collective wisdom on laws to govern waters that are shared by two or more states.”⁴⁴ Since its inception, approximately 135 countries have become signatories.⁴⁵ However, the unique makeup of the Caspian has prevented scholars from establishing a “ready geological and legal classification.”⁴⁶ Technically, the Caspian does not fall under the jurisdiction of UNCLOS because it is neither an “enclosed

⁴² See *infra* Part V.

⁴³ Dubner, *supra* note 17, at 254.

⁴⁴ Jonas, *supra* note 6, at 60. UNCLOS “takes into account centuries of rules developed to control international navigation, maritime borders, and the use of ocean resources” while also addressing modern concerns like the role of technology, the environment, and the need for peaceful resolution of disputes. *Id.*

⁴⁵ *Id.* A sea is defined as “a major body of water with an outlet to another major body of water,” such as the Black Sea and its outlet to the Mediterranean. Mary Ellen O’Connell, *The Application of International Law to the Contemporary Security Agenda*, Occasional Paper International Relations Seminar Series 1997, at 30 (Johns Hopkins U. Bologna Center, No. 2). Since the Caspian Sea does not have an outlet to another major body of water, its status cannot be technically that of a sea.

Delimitation is defined as “the legal science of dividing sea territory between neighboring coastal states that share common waters, especially if they are geographically positioned adjacent or opposite of each other.” Sanei, *supra* note 9, at 790.

However, none of the five littoral states involved in this dispute are parties to the Convention; therefore there is no mandatory application of UNCLOS rules and procedures. For UNCLOS to apply in this situation, all five states would have to agree to its application. Sanei, *supra* note 9, at 796.

⁴⁶ Mehdiyoun, *supra* note 3, at 179.

sea” nor an “international lake” under the specific definitions promulgated through UNCLOS.⁴⁷ While the actual label placed on a body of water may seem insignificant, the category actually “determines which body of law applies to delimitation of the waters and the resources of the subsoil.”⁴⁸ UNCLOS can therefore provide only a framework to identify and resolve problems dealing with jurisdiction in ocean and maritime situations when, as here, the parties are not signatories to UNCLOS.⁴⁹

UNCLOS does not govern inland lakes or other inland bodies of water, and if the Caspian is declared a lake, its resources could be jointly developed without the application of UNCLOS guidelines.⁵⁰ If the Caspian were declared a sea, governable by the Law of the Sea, then “full maritime boundaries for the five littoral states would be created based upon an equidistant division of the sea and undersea resources into national sectors.”⁵¹ Additionally, according to the International Court of Justice, “the use of the equidistance method of delimitation [is] not obligatory, and other factors ha[ve] to be taken into account, including factors such as: the general configuration of the coasts; the physical and geological structures and natural resources of the shelf, and; the principal of proportionality.”⁵² However, the parties can agree to use an already established legal regime like UNCLOS that could be adapted to their situation if they choose to resolve the dispute through negotiation, mediation, or conciliation, rather than through international courts.

⁴⁷ Jonas, *supra* note 6, at 60. The Caspian is not an “enclosed sea” for the following reasons: (1) “for centuries, the countries surrounding the Caspian have exercised exclusive control over its use”; (2) it has “no internationally navigable outlet”; (3) it has “no contact with the world’s oceans”; and (4) “the only navigable outlets are long inland Russian waterways that cannot be used without Russian permission.” *Id.* The Caspian is not an “international lake” for the following reasons: (1) it bears the oceanographic characteristics of a sea, and (2) the number of surrounding states makes an agreement on use, resources, and boundaries very difficult. *Id.*

⁴⁸ Mehdiyoun, *supra* note 3, at 179–80.

⁴⁹ Dubner, *supra* note 17, at 254.

⁵⁰ Papadopoulos, *supra* note 30, at 7–9.

⁵¹ *Id.* at 7.

⁵² *Id.* at 12 (citing North Sea Continental Shelf Case (W. Germany v. Den., W. Germany v. Neth.), 1969 I.C.J. 3). This is especially important, considering the unique geographical makeup of the Caspian, with its very steep southern basin, which may lend itself to the designation of a “special circumstance.”

B. Negotiations Since 1990

Negotiations concerning the demarcation of the Caspian have been ongoing for over a decade in an effort to finalize boundaries so that hydrocarbon resource development can proceed.⁵³ Because oil and gas development of the Caspian continental shelf, a potential profit machine in the Caspian region, is impacted by the question of offshore boundaries, it is vital that this dispute be resolved.⁵⁴ Consequently, the five littoral states have established a "Special Working Group," which has met periodically for the past several years to determine how to govern the Caspian.⁵⁵ Despite the establishment of the Special Working Group, negotiations have not resolved the boundaries so that development of the Caspian can resume. Consequently, it becomes necessary to look to some other means of resolving the dispute.

The negotiations that have occurred between the littoral states appear to have consisted primarily of some governmental officials engaging in consultations, but not all of the talks have included all of the countries involved.⁵⁶ Based on the principles of negotiation, these multi-party negotiations could be very harmful to the process, as mistrust could grow among the parties.⁵⁷ It does not appear that one country has taken the lead to serve as a mediator, and the parties have not requested third-party

⁵³ Denise Albrighton & Christian Lowe, *Opposing Sides in Caspian Oil Dispute Remain Oceans Apart*, AGENCE FR. PRESSE, Feb. 12, 2002, available at 2002 WL 2338517. Many foreign oil companies are hesitant to develop the Caspian's resources without permanent boundaries in place. *Id.*

⁵⁴ *Caspian Border Dispute Is Latest Woe*, *supra* note 4, at 3. "Failure to resolve the issue has hindered development of the [Caspian] region . . ." Denise Albrighton, *Azeri Feud Ups Stakes in Tense Caspian Oil Talks*, AGENCE FR. PRESSE, Aug. 3, 2001, available at 2001 WL 24983545. See also Albrighton & Lowe, *supra* note 53 (stating that the dispute is of "vital importance because the stalemate is putting a brake on development of the Caspian's resources").

⁵⁵ Sanei, *supra* note 9, at 752.

⁵⁶ See Putin Hosts "No-Ties" CIS Summit in Seaside Resort, AGENCE FR. PRESSE, Aug. 2, 2001, available at 2001 WL 24982960 (describing a summit during which Russia and the former Soviet republics gathered to discuss Caspian policies and held several bi- and multi-lateral meetings without Iranian representatives in attendance).

⁵⁷ See David M. Rothenberg, *Negotiation and Dispute Resolution in the Sri Lankan Context: Lessons from the 1994-1995 Peace Talks*, 22 FORDHAM INT'L L.J. 505, 526 (1998) (discussing how a lack of trust can seriously harm talks between parties). Additionally, parties may tend to be suspicious of deals created by combinations of other countries when all of the parties are not present.

intervention (and have rejected offers from both the United States and Turkey to act as mediators).⁵⁸ However, Russia has certainly taken an active role in attempting to bring the parties to the table in a “spirit of cooperation based on common principles and understandings.”⁵⁹

The five littoral states began meeting as early as 1993 in an attempt to resolve the border delimitation issues.⁶⁰ In 1993, the Caspian littoral states met in Russia and agreed to use median-line principles.⁶¹ However, negotiations stalled when no formal agreement was reached, and in 1995 Russia and Iran were still claiming common ownership as a legal regime for the Caspian.⁶² To help facilitate talks among the states, “[t]he five littoral

⁵⁸ Because the United States has vocally supported Azerbaijan’s position, it is understandable that the other parties may not want U.S. intervention due to potential bias. *See US Backs Baku in Caspian Dispute with Tehran*, TURKISH DAILY NEWS, Aug. 16, 2001, available at 2001 WL 22005637.

⁵⁹ Jonas, *supra* note 6, at 60. Russian President Putin even volunteered to lead negotiations in August 2001. Albrighton, *supra* note 53. Russia is probably the most powerful country bordering the Caspian, and it may feel obligated to push the negotiations along (and probably wants to push negotiations so that it will have clear access to some of the oil reserves).

⁶⁰ *See Caspian Border Dispute Is Latest Woe*, *supra* note 4, at 3.

⁶¹ Papadopoulos, *supra* note 30, at 6. The Russian position on the Caspian has been plagued with internal controversy and division. *See Mehdiyoun*, *supra* note 3, at 186 (stating that the Foreign Ministry was calling Azeri actions illegal, while the Ministry of Fuel and Power was preparing to work with Azerbaijan on oil projects). Russia’s original position seemed to be that the Soviet and Persian Treaties of 1921 and 1940 were still valid and, as such, the Caspian’s legal regime remained that of joint utilization. *Id.* at 185. The coastal states were also bound by the agreements because of the 1991 “Alma Ata Declaration,” reinforcing the notion that “successor states [] had inherited the treaty obligations of the former unitary state.” *Id.* at 185–86.

⁶² Papadopoulos, *supra* note 30, at 7. In 1996, Russia pointed out that it would claim the borders of the former U.S.S.R. are valid, under the *uti posseditis* principle of land boundary law, whereby “the one possessing the thing continues to possess it.” O’Connell, *supra* note 40 (manuscript at 29). Professor O’Connell states: “That rule [*uti posseditis*] means that boundaries—of whatever kind: administrative, colonial, provincial—which existed upon a state becoming independent remain the boundaries.” *Id.* at 29–30. Although this principle has been used by the International Court of Justice with respect to land disputes, in maritime situations “the general rule is that the equidistance line of the land boundary is continued seaward,” but cases may be decided on a case-by-case basis, and the rule can be “modified for special circumstances.” *Id.* at 30; UNCLOS, *supra* note 36, at art. 74. Early in the discussions regarding the status of the Caspian, Russia was a proponent of a condominium system that would allow access to all of the littoral states on an equal basis. Sanei, *supra* note 9, at 761. Russia advocated the condominium system because Russia insisted that because the Caspian Sea was a landlocked lake, UNCLOS did not apply. *Id.* at 760. Russian officials opined that the

states have created a Caspian Center in Baku to coordinate efforts to resolve the [] boundary disputes.”⁶³

In 1996, Moscow and Tehran worked together to convince the other littoral states that the Caspian was not a sea, but rather a large lake, and no wealth extracted from the Caspian could be disposed of without consent from all bordering states.⁶⁴ This follows the common ownership stance strongly advocated by the two nations.

On the other hand, Turkmenistan has not put forth a consistent position with regard to the Caspian. In 1993, Turkmenistan passed a law declaring jurisdiction over a twelve-mile territorial sea.⁶⁵ However, later Turkmenistan declared that the Caspian was a “unique body of water to which all littoral states should have access.”⁶⁶ Recently, the Turkmen officials seemed to change their minds by advocating sectoral division.⁶⁷

In February 1998, Azerbaijan and Turkmenistan reached a “general understanding on the division of the seabed according to an equidistant line.”⁶⁸ Then, in August, Azerbaijan announced that Russia had also agreed

Caspian should have a “special rights” status regarding natural resources, based upon the Soviet-Iranian treaties of the early twentieth century. *Id.* As a result, the resources would be shared by all of the littoral states. O’Connell, *supra* note 40 (manuscript at 30–31).

⁶³ Papadopoulous, *supra* note 30, at 7.

⁶⁴ Moorad Mooradian, *The Energized Mediation Process for Karabagh*, ARMENIAN REP., Apr. 6, 1996, at 6, available at 1996 WL 15835041. Initially, it was thought that Russia and Iran believed the Caspian is a lake with common resources, while the other nations argued that it was a sea with national sectors. Cullen, *supra* note 7, at 13. However, as can be seen in this section, as the five countries continue to negotiate in Baku, some of the positions have shifted. *Id.*

⁶⁵ Sanei, *supra* note 9, at 757.

⁶⁶ *Id.* at 758.

⁶⁷ *Id.* In July 2001, President Saparmurad Niyazov of Turkmenistan announced that he had invited the five Caspian heads of state to a summit in Ashgabat October 26–27, 2001, to further define the status of the Caspian. However, this twice-postponed summit never occurred in 2001 due to the events of September 11th and was rescheduled for April 2002 in Turkmenistan. *Caspian Sea Negotiators Note Headway on Status Dispute*, AGENCE FR. PRESSE, Jan. 24, 2002, available at 2002 WL 2324341; see also *Azerbaijan and Russia Agree on the Lease of Soviet-Built Military Radar, Discuss Caspian*, TURKISH DAILY NEWS, Jan. 26, 2002, available at 2002 WL 2214729. It was believed that the presidential summit would lead to the signing of a general accord that would settle the legal status of the Caspian. Isabel Gorst, *Iranian Minister in Moscow for Talks on Caspian Sea*, PLATTS OILGRAM NEWS (Moscow), Aug. 9, 2001, at 5. However, as late as August 2001, Russia had not made its position on the Caspian clear, but at the same time criticized Azerbaijan for exploring disputed areas. See Mehdiyoun, *supra* note 3, at 186.

⁶⁸ Mehdiyoun, *supra* note 3, at 185. Azerbaijan has consistently held that UNCLOS should apply to the Caspian Sea division. Sanei, *supra* note 9, at 755. The application of

to the equidistant line principle instead of common ownership.⁶⁹ In early 2001, newspapers reported that a boundary agreement was in sight as Azerbaijan and Russia agreed to draw maritime boundaries across the sea.⁷⁰ However, Azerbaijan appeared to use the media to further its interests by stating how Russia and Kazakhstan agreed with its position to divide the Caspian based on “international principles” (*i.e.*, UNCLOS).⁷¹ Azerbaijan spoke with what appeared to be the support of Russia and Kazakhstan while denouncing the actions of Iran in the southern Caspian when it forced an

UNCLOS would treat the Caspian as a sea and recognize territorial seas and exclusive economic zones. *Id.* See also *Storm in a Precious Teacup*, ECONOMIST (London), Aug. 4, 2001, available at 2001 WL 7320008 (discussing each state having its own territorial zone). Azerbaijan has strongly advocated this position from the beginning because approximately 80% of Azeri energy production comes from offshore oil fields. Sanei, *supra* note 9, at 755. Azerbaijan wants the Caspian divided according to median line principles (also known as equidistance principles) and firmly believes that the 1921 and 1940 treaties between the Soviet Union and Iran are applicable only to fishing rights and navigation routes. *Id.*

⁶⁹ Mehdiyoun, *supra* note 3, at 184. However, over time the Russian position has shifted significantly, and in 1996 Russia agreed to the principle of sectoral division. Sanei, *supra* note 9, at 762. November 1996 saw a softening of the Russian position, as the Russians agreed to a “hybrid plan” combining national sectors with shared use and ownership. Mehdiyoun, *supra* note 3, at 186. Despite Russian agreement to sectoral division in principle, Russia’s stance is that each state may claim a forty-five nautical mile territorial sea, but all area beyond the forty-five miles is to be shared. O’Connell, *supra* note 40 (manuscript at 31). All of the coastal states, except Azerbaijan, appeared to support this compromise. Mehdiyoun, *supra* note 3, at 186. In February 1998, Russia’s position appeared to flip-flop as the oil interests in the government stated that complete sectoral division—rather than a partial sectoral division—of the Caspian was now the official Russian position. *Id.* at 187. And, in a subsequent bilateral treaty with Kazakhstan, Russia actually divided the northern Caspian seabed according to an equidistant line. *Id.* This is not the position put forward by President Putin, who continues to classify the Caspian as a lake, based upon Soviet treaties with Iran, which would allow for joint ownership and management. *Storm in a Precious Teacup*, *supra* note 68.

⁷⁰ *Caspian Sea Boundary Agreement in Sight*, HART’S EUR. OFFSHORE PETROLEUM NEWSL., Jan. 10, 2001, available at 2001 WL 7166605 (stating that this one agreement could “trigger a solution” among the littoral states). However, this agreement has not yet “triggered” a solution, but in 2002 chief negotiators claimed to have “made headway on all issues related to the adoption of a fixed legal status for [the] Caspian Sea.” *Caspian Sea Negotiators Note Headway on Status Dispute*, *supra* note 67.

⁷¹ *Azerbaijan Claims Russian, Kazakh Support in Border Row with Iran*, AGENCE FR. PRESSE, Aug. 3, 2001, available at 2001 WL 24983767. The Kazakh government has also advocated the application of UNCLOS, which becomes applicable only if the Caspian is a “sea” or by agreement of the States. Sanei, *supra* note 9, at 756. This position is in line with the Azeri position, and the two countries are seen as close allies in this regard. *Storm in a Precious Teacup*, *supra* note 68.

Azeri research vessel out of the area.⁷² Azeri diplomats then revealed to the press that Russian President Putin was planning a summit of the former Soviet republics to discuss the status of the Caspian.⁷³

In early August 2001, Russian President Vladimir Putin met with most of the leaders of the former Soviet republics and held a series of bilateral meetings to discuss the division of the Caspian Sea.⁷⁴ Following the regional scare in July, when hostilities between Azerbaijan and Iran appeared possible, all of the littoral states seemed to demonstrate a “new willingness to finally solve the decade-old oil dispute.”⁷⁵

Russia, Kazakhstan, and Azerbaijan all support maintaining the “status quo” in the Caspian region by establishing each country’s share of the Sea so that the share would correspond roughly to the national boundaries of each littoral state.⁷⁶ However, an agreement of this sort would not allow Iran to receive any more of the Caspian than it had under old boundary agreements with the Soviet Union.⁷⁷

Due to Azerbaijan’s firm “refusal to accept ‘shared ownership’ and Russia’s shifting position vis-à-vis the principle of condominium,”⁷⁸ Iran has

⁷² *Azerbaijan Claims Russian, Kazakh Support in Border Row with Iran*, *supra* note 71.

⁷³ *Id.* This could be problematic, as the states could come to terms with an agreement and then “muscle” Iran (the left-out state) into an agreement with which it does not agree.

⁷⁴ *See Putin Hosts “No-Ties” CIS Summit in Seaside Resort*, *supra* note 56.

⁷⁵ *Id.* (referring to the after effects of the confrontation in which an Iranian military vessel forced an Azeri research ship out of disputed territory).

⁷⁶ *Azerbaijan Claims Russian, Kazakh Support in Border Row with Iran*, *supra* note 71.

⁷⁷ *Id.*

⁷⁸ Mehdiyoun, *supra* note 3, at 183. The condominium principle provides for shared property and may be based upon *res communis* principles, which provide that a thing may be used commonly by all, but it can never be exclusively acquired as a whole. *See* Sanei, *supra* note 9, at 802. Although Russia and Iran have both advocated this position at one time or another, it is rarely used between states in cases involving shared ownership of mineral resources. *Id.* In fact, some legal scholars dispute whether common ownership of lakes and inland seas does in fact actually exist. *See* Clagett, *supra* note 39 (stating that “Verzijl, a leading scholar . . . after an exhaustive study concluded that examples of common ownership ‘do not to my knowledge actually exist.’”). Actually, the *Gulf of Fonseca Case* (Case Concerning the Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), 1992 I.C.J. 351) is the only case supporting the use of condominium principles. Sanei, *supra* note 9, at 802–03. However, because the situation in the Gulf of Fonseca is so different from the situation in the Caspian region, it is hardly a useful comparison. *See generally id.* at 803–05. Most other international lakes are completely divided among the littoral states—the Great Lakes between Canada and

now become isolated as the lone advocate for shared resources. Although Iran originally was not alone on the shared principles approach, it has now become its single supporter. It has become apparent that the five states now agree on the principle that the seabed should be divided into national sectors. However, a “sticking point” has developed due to Iran’s adamant requirement of equal shares when the Caspian is finally divided.⁷⁹ Despite

the United States and Bodensee (also known as Lake Constance) among Austria, Germany, and Switzerland—not subject to some condominium scheme, as Azerbaijan and Turkmenistan have argued in the past. O’Connell, *supra* note 40 (manuscript at 31).

⁷⁹ Jonas, *supra* note 6, at 60. Iran has repeatedly stated that it would like to resolve the Caspian dispute through “peaceful means and understanding.” *Iran Calls for Peaceful Solution to Caspian Oil Dispute with Azerbaijan*, XINHUA NEWS AGENCY (Hong Kong), Aug. 6, 2001, available at 2001 WL 26356398. Because sectoral division based upon a median line (under which each state would receive a share of the Caspian proportional to its shoreline) would afford Iran the smallest portion of the Caspian, it has vehemently opposed any type of median division and instead advocates equal division among the littoral states. Sanei, *supra* note 9, at 763–64. Iranian municipal law recognizes the Caspian as a “closed sea,” which would provide for no division—only equal access. *Id.* at 774. However, “[i]n September 1998, Iran officially announced its acceptance of the principle of sectoral division, on the condition that a single division scheme be applied to both the waters and the seabed.” Mehdiyoun, *supra* note 3, at 183 (this is a change from its original position of shared ownership). Because median line division would not increase Iran’s share of the Caspian, it is the most vocal proponent of an equal (20% each) division scheme. *Id.* Iranian Deputy Foreign Minister Ali Ahani has indicated that Iran and Turkmenistan are closely aligned in their views on the Caspian; however, Turkmenistan has shifted its position, making it hard to determine if Foreign Minister Ahani is still accurate in his statement. *Market Awaits Storage Report for Clear Gas Pricing Signal*, OIL DAILY (Washington, D.C.), Aug. 13, 2001, available at 2001 WL 14946513.

It is unlikely that Iran will agree to the current proposals concerning the delimitation of the Caspian Sea because it will receive the smallest share of the resources. Right now the countries are split between dividing the Caspian according to shoreline, on equidistant (proportional) principles, and dividing it equally among the five states. Nedbayeva, *supra* note 11. Iran and Turkmenistan are the only countries advocating the equal division of the Caspian. *Id.* Iran’s stance on the Caspian is not expected to change. In fact, the Iranian government has officially warned many international oil companies that any contracts in the disputed area of the Caspian are “illegal.” Vladimir Socor, *The Guns of Summer: Iran Prowls the Caspian*, WALL ST. J. EUR. (New York), Aug. 3, 2001, at 7. Iran also stated that further exploration in the Iran/Azerbaijan disputed area requires Iranian permission and that noncompliant companies would be excluded from future Irania oil projects in the Persian Gulf. *Id.* Perhaps most disturbing, Iran warned that it reserved the right to repeat military action in the Caspian. *Id.* The Iranian government and media have been relatively silent concerning recent developments regarding the Caspian delimitation; however, Mehdi Safari, Iran’s special envoy on Caspian issues, has voiced opposition to unilateral measures and has stated that “Iran reserves the right to refer the

the littoral countries' failure to agree on where to establish the demarcation lines so that special factors (like shoreline length) could be taken into account, the views of the five states now appear to converge as they discuss individual versus shared control.⁸⁰

Because the Sea must now be apportioned among so many states, estimates are frequently made regarding each littoral state's current portion of the coastline as an indicator of what each country's "share" of the Caspian's resources should be once divided, if an apportionment method is used.⁸¹

C. Outside Involvement

Because negotiations have produced few tenable results, it is likely that some form of outside involvement is necessary to bring about a resolution to the dispute. The United States has played an important role in this dispute due to its interest in Caspian oil.⁸² Because the United States desires to continue the sanctions against Iran, it strongly advocates any type of legal

matter to international arbitration." *BP Defies Iran Over Caspian*, IRAN TIMES (Washington, D.C.), Dec. 14, 2001, at 1. However, if the dispute is actually referred to arbitration, it is unlikely that Iran will prevail with its 20% equal division scheme.

⁸⁰ Jonas, *supra* note 6, at 60.

⁸¹ Sanei, *supra* note 9, at 694 (the figures found in this article are identical to those represented in the chart below under percent of total coastline). *See also* Mehdiyou, *supra* note 3, at 179 (However, these figures do vary slightly with other estimates. Iran's share has been estimated from 13–18.7% in other sources). A comparison of percentages of total coastline and the percent of the total Caspian Sea produces slightly different figures. *See* Clagett, *supra* note 39. The figures are estimated as follows:

State	Percent of Total Coastline	Percent of Total Caspian Sea
Azerbaijan	15.2	20.7
Iran	18.7	14.6
Kazakhstan	30.8	29.9
Russia	18.5	15.6
Turkmenistan	16.8	19.2

Id.

⁸² *See* Papadopoulos, *supra* note 30, at 21. Some Middle Eastern scholars have accused the United States of encouraging oil companies to enter the region so that the United States can gain footing and bring NATO into the region, especially because the United States has diplomatic ties with all of the countries in the area, except Iran. *Professor Says Wise Diplomacy Needed on Caspian Issue*, WORLD NEWS CONNECTION (Washington, D.C.), Aug. 5, 2001, available at 2001 WL 26897453.

regime that will keep oil and pipelines running away from Iran. In particular, it has openly supported the Azerbaijan position of median line division, which would provide the Azeri government with great oil resources that could flow out to Western Europe, away from Iran and the Persian Gulf. In fact, the United States has been accused of “fanning the flames” and pitting the other littoral states against Iran.⁸³

During the 1990s, the United States began to push its involvement in the Caspian region by stating that the Caspian is a “region of its national strategic interests.”⁸⁴ The United States even discussed with Azeri President Heydar Aliyev the possibility of locating a U.S. military base in Azerbaijan.⁸⁵ The Russians and Iranians see the West as backing Azerbaijan and Kazakhstan because oil companies have already heavily invested in the region.⁸⁶ Consequently, although a third-party mediator or conciliator may be necessary to resolve the Caspian dispute, it is likely that Western nations in strong alliance with the United States may not be regarded as effective choices due to a perceived lack of neutrality.⁸⁷

IV. COMPARATIVE SITUATIONS—HOW BORDER DISPUTES HAVE BEEN RESOLVED ELSEWHERE

All territorial divisions are unique—whether the division involves water or land. Likewise, the parties involved respond differently to various dispute resolution techniques—some disputes are resolved through negotiations, while others require court involvement. However, an examination of two similar situations where countries resolved territorial disputes regarding lakes may provide insight into methods of resolving the Caspian Sea dispute.

Because most lakes are small bodies of water shared between two countries via bilateral agreements, controversy over international laws does

⁸³ *Professor Says Wise Diplomacy Needed on Caspian Issue*, *supra* note 82.

⁸⁴ Rahr, *supra* note 1, at 81.

⁸⁵ Arthur L. Lowrie, *U.S. Foreign Policy Revolves Around New Dynamics*, TAMPA TRIB., Aug. 12, 2001, at 4, available at 2001 WL 5509795 (reviewing MICHAEL T. KLARE, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT* (2001)).

⁸⁶ *Storm in a Precious Teacup*, *supra* note 68.

⁸⁷ This lack of neutrality became even more apparent when newspapers reported that the Bush White House reaffirmed the United States’ commitment to “local western-aligned oil players such as Azerbaijan and ensuring that the Caspian’s two wild cards, Iran and Russia, are sidelined as much as possible from controlling the sea’s oil wealth.” Owen Matthews, *Caspian Sea States Wrestle over Oil Riches*, SCOTSMAN (Edinburgh), Sept. 1, 2001, at 10.

not frequently ensue.⁸⁸ However, precedents do exist for the peaceful division of lakes between two or more states.⁸⁹ At one end of the spectrum are the Great Lakes, the rights to which were determined through negotiations between the United States and Canada. At the other end of the spectrum is Lake Constance, which was divided among three European states through litigation in the court system. Although the Caspian Sea negotiators have attempted to resolve the dispute in a manner similar to the Great Lakes, they have done so without success. Because negotiations have failed, it appears that the parties are moving toward a situation very similar to Lake Constance.⁹⁰ A solution to the Caspian Sea dispute probably lies somewhere in the middle—with the parties utilizing a third-party mediator or conciliation commission.

A. *Great Lakes*

While the dispute in the Caspian region is not as easy to resolve as the Great Lakes situation, Caspian Sea negotiators can nevertheless use elements of the Great Lakes negotiations as examples or frameworks to move the parties closer to resolution of the dispute.⁹¹ The Great Lakes delimitation is an example for Caspian negotiators to imitate because the Great Lakes were delimited through negotiation according to an equidistant method in 1783, as have several other lakes in the intervening years.⁹² The fact that the Great Lakes situation was resolved through negotiation is significant because the Great Lakes contain many resources that need to be managed by the United States and Canada. The Great Lakes basin covers 95,000 square miles of water surface, and is the largest body of freshwater in the world.⁹³ Because

⁸⁸ *Iran: Paper Views Problems with Caspian Sea Legal Regime*, *supra* note 5.

⁸⁹ Croissant & Croissant, *supra* note 2 (citing the following examples: “Lake Victoria (among Kenya, Tanzania, and Uganda), Lake Malawi (between Malawi and Mozambique), the Great Lakes of North America (between Canada and the United States), Lake Titicaca (between Bolivia and Peru), and Lake Geneva (between France and Switzerland)”).

⁹⁰ *See infra* Part IV.A.

⁹¹ The Great Lakes situation was probably resolved easily due to the extremely friendly relations between the two countries.

⁹² Clagett, *supra* note 39. In fact, the author listed four other lakes that have been delimited by equidistant principles, including Lakes Geneva, Tanganyika, Lugano, and Maggiore. *Id.* (discussing the fact that the majority of treaties delimiting boundaries in lakes or inland seas have adopted median or equidistant principles).

⁹³ Mark J. Dinsmore, *Like a Mirage in the Desert: Great Lakes Water Quantity Preservation Efforts and Their Punitive Effects*, 24 U. TOL. L. REV. 449, 449 (1993). The

these lakes are situated between two countries, the best tactic available to manage the lakes was a treaty that served to control the use of the water and its resources.⁹⁴

Because the Great Lakes basin is such a valuable resource to both the United States and Canada, both countries entered into the Boundary Waters Treaty of 1909 as a way of preventing further disputes.⁹⁵ In fact, as part of that treaty, the parties created the International Joint Commission to have jurisdiction over all boundary water disputes.⁹⁶ As a result, a mechanism of resolving disputes was created before any major disputes arose. Although the parties to the Caspian dispute must first resolve their underlying problems before they can address future disputes, the framework for this type of dispute resolution is available. If the Caspian littoral states were able to create a similar arrangement, many future disputes could be avoided—especially in light of the immense natural resources estimated to exist beneath the Caspian that will inevitably create future controversies between the littoral states once further oil explorations begin.

As far as resources of the Great Lakes are concerned, a consent provision exists, similar to the provision requested by Turkmenistan,⁹⁷ which would require all of the Caspian littoral states to consent to resource extraction.⁹⁸ In the Great Lakes Charter (a document expressing the agreement between the United States and Canada concerning resources), the fourth principle is “Prior Notice and Consultation,” requiring notification and consent of the other country before water resources can be consumed.⁹⁹ Similar provisions

Great Lakes represent 95% of the United States’ fresh surface water and 20% of the world’s fresh surface water. *Id.*

⁹⁴ *See id.* at 450 (speaking of the Boundary Waters Treaty of 1909 and the establishment of the International Joint Commission).

⁹⁵ *Id.* at 455–56 (stating that the “principal purpose of the treaty was to ‘ensure the equitable sharing of boundary waters between Canada and the United States’”).

⁹⁶ *Id.* at 456. Article VII of the Boundary Waters Treaty created the Commission, giving it jurisdiction over “all disputes concerning boundary waters between the two countries,” but providing that its decisions are merely advisory, unless a binding decision is requested by one of the countries involved in the dispute. *Id.* It is this type of preventative dispute resolution that has made the original treaties so effective, because the “resolution of most issues relies on the good faith efforts of the affected nation.” *Id.*

⁹⁷ *See infra* Part III.B.

⁹⁸ One advantage the Great Lakes system has over the Caspian is that the individual state boundaries have already been laid out, making it easier to regulate the rights to resources and require consent in certain areas. *See* Dinsmore, *supra* note 93, at 464.

⁹⁹ *Id.* at 462. The Great Lakes Charter provides as follows:

have been suggested in the Caspian situation, and theoretically could work to prevent problems in the interim before a final agreement on division is reached.¹⁰⁰ However, practically speaking, a consent document is unlikely because some of the littoral states have already been begun engaging in limited oil exploration due to the downturn in the economy.¹⁰¹

Caspian negotiators should note that diversions of water from the Great Lakes are determined by equitable apportionment.¹⁰² In light of the Great Lakes situation, littoral states could reasonably push for equidistant division, possibly demonstrating to Iran that international norms provide for equitable—not equal—apportionment. Even if a third-party mediator or conciliator is brought into the Caspian situation, based on the result reached in the Great Lakes, a similar result is possible for the Caspian Sea.

It is the intent of the signatory States and Provinces that no Great Lakes State or Province approve or permit any major new or increased diversion or consumptive use of the water resources of the Great Lakes Basin without notifying and consulting with and seeking the consent and concurrence of all affected Great Lakes States and Provinces.

Id. Despite the fact that the Great Lakes Charter is not binding upon the states, it represents a “symbolically united political stance.” Dr. James P. Hill, *Great Lakes Commentary: The New Politics of Great Lakes Water Diversion: A Canada-Michigan Interface*, 1999 TOL. J. GREAT LAKES’ L. SCI. & POL’Y 75, 79.

¹⁰⁰ See Christian Lowe, *Azerbaijan’s President to Visit Moscow for Key Talks*, AGENCE FR. PRESSE, Jan. 24, 2002, available at 2002 WL 2323892 (stating that Russia, Kazakhstan, and Azerbaijan have “agreed to respect each other’s boundaries”).

¹⁰¹ *Id.* (stating that “Iran and Turkmenistan are eyeing mineral reserves in Azerbaijan’s sector of the sea”). *Contra Russian Envoy Slams Turkmen Stance on Caspian*, AGENCE FR. PRESSE, Aug. 31, 2001, available at 2001 WL 25001939 (stating that Turkmenistan and Iran are calling for a moratorium on oil exploration in the disputed areas of the Caspian Sea). Despite the undecided borders in the Caspian, many major oil companies have already begun exploration in the Caspian region. Angela Charlton, *Caspian Sea Dispute Gains Urgency*, ASSOCIATED PRESS, Feb. 27, 2002, available at 2002 WL 14995213 (referring to Exxon, Mobil, BP, Chevron, and Russian oil company Lukoil).

¹⁰² See Julia R. Wilder, Note, *The Great Lakes as a Water Resource: Questions of Ownership and Control*, 59 IND. L.J. 463, 485–86 (1984). Equidistant divisions refer to the situations where a median line is drawn in a body of water and proportional sectors are apportioned to the states involved, thus providing for equitable apportionment. Clagett, *supra* note 39. In the Caspian, the parties have basically agreed that some form of equidistant division is necessary, but Iran and Turkmenistan insist that the national sectors be divided equally, rather than proportionally. *Turkmenistan Proposes Caspian Summit in April*, AGENCE FR. PRESSE, Mar. 6, 2002, available at 2002 WL 2355195.

B. Lake Constance

In some border division situations it is necessary for the parties to use a court system in order for the dispute to be resolved. For example, in 1920 it was necessary for the *Reichsgericht*, the former German federal court, to apply principles of international law requiring Lake Constance be divided by equidistant boundaries among Austria, Germany, and Switzerland.¹⁰³ However, since that time, the countries bordering Lake Constance have reached other agreements regarding different aspects of sharing the Lake, from water withdrawal to fishing.¹⁰⁴ Most importantly, the parties agreed to develop rules concerning an arbitration commission to settle disputes that the parties could not settle by diplomatic means.¹⁰⁵ The parties had the foresight to lay the groundwork and establish the rules governing a dispute before further disputes arose—the agreement details how arbitrators will be selected, what the arbitrators will base their decision upon, and the binding nature of the arbitrator’s decision.¹⁰⁶ The parties to the agreement selected a method of dispute resolution—arbitration—organized the important aspects of implementation and enforcement, and reduced their agreement to writing.

It will be useful for the Caspian negotiators to understand that the situation regarding Lake Constance is quite similar to the Caspian because Lake Constance has more than two countries bordering the lake, and therefore it is likely that any mechanism involving an international legal system can be resolved similarly. Lake Constance provides the negotiators apportioning the Caspian with yet another example of an equidistant, equitable boundary scheme that has achieved positive results. More importantly, Lake Constance demonstrates the necessity not only of establishing good diplomatic relations among the littoral states, but also of

¹⁰³ Clagett, *supra* note 39. In fact, the author goes so far as to state that a court would “hold it to be a principle of customary international law that waters should be divided, unless a particular situation presented special geographic and historic fact that dictated a different result.” *Id.* It is hard to determine whether any geographic or historical facts might group the Caspian situation into this caveat. However, the parties to the Caspian dispute should not need to look to courts to resolve the dispute—they should be able to do so independently of a structured court system.

¹⁰⁴ See Agreement Regulating the Withdrawal of Water from Lake Constance, Apr. 30, 1966, art. 3, available at <http://www.internationalwaterlaw.org/RegionalDocs/Lake-Constance.htm>.

¹⁰⁵ *Id.* at art. 10.

¹⁰⁶ *Id.* at art. 10–11.

setting the groundwork for dispute resolution mechanisms that can be used in the future to resolve other disputes.

Since the Caspian holds so many resources, it is inevitable that the parties to the Caspian demarcation dispute will once again meet at the negotiating table in another dispute. Therefore, it is essential that as the parties decide how to divide the Caspian, they also lay the groundwork for how future disputes will be resolved. The parties involved in the Caspian dispute will hopefully look at the methods used to resolve similar disputes and realize that equidistant boundaries are the most commonly applied method. It is becoming clear that if resolution of the Caspian dispute is possible, the most likely outcome is equidistant boundaries, regardless of whether negotiations are used, or a court system.¹⁰⁷ Therefore, the parties should not continue to engage in endless rounds of negotiations, but rather should employ a mediator or conciliator to help finalize an agreement that will benefit all of the littoral states. It should be plain that after a decade of negotiating, with abundant examples of boundary situations to look at for a division scheme to apply to the Caspian situation, the Caspian negotiations have reached a stalemate. Something different is needed to resolve the Caspian dispute. A neutral third party is necessary to assist the parties in reaching a delimitation decision. The parties must agree to request the services of either a mediator or conciliation commission if the dispute is ever going to be resolved in a timely fashion.

V. INTERNATIONAL DISPUTE RESOLUTION MECHANISMS

Some form of dispute resolution—other than the ongoing negotiations—is necessary to bring about resolution of the Caspian Sea dispute. The United Nations Charter reflects a desire for countries to engage in the peaceful settlement of disputes.¹⁰⁸ Some disputes are best resolved by unique solutions designed by the parties, instead of arbitrary reliance on existing substantive rules that would otherwise be applicable. One of the biggest advantages of dispute resolution is that the process typically requires consent,

¹⁰⁷ Although Iran could feasibly continue its hard-line position of equal shares for many years, it appears that the most likely litigated result would be an equidistant scheme, and it is hoped that Iran would eventually agree to this position.

¹⁰⁸ See U.N. CHARTER art. 2, para. 3 (“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”). Article 33 further defines peaceful means as “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” *Id.* at art. 33, para. 1.

which “is said to be empowering for disputants who can craft for themselves a mutually acceptable outcome, unfettered by the restrictions of legal procedures and remedies.”¹⁰⁹ Because the parties to the dispute are able to retain control over the outcome, the result is often more “durable and forward-looking” than one imposed by a court with a “win/lose” determination.¹¹⁰ The techniques of international dispute resolution would pose different advantages and disadvantages if used in the Caspian Sea dispute; however it is mediation and conciliation that would likely prove to be the most effective because a neutral, third party could push the parties toward resolution.

A. Negotiation

Negotiation is defined as a “process whereby the parties directly communicate and bargain with each other in an attempt to agree on a settlement of the issue.”¹¹¹ Negotiation is the most frequently used manner of dispute resolution in international contexts.¹¹² Negotiation has already been utilized in the Caspian Sea dispute with limited success.¹¹³ Some have suggested that negotiation may be the only way that settlement can actually be achieved, because the parties are able to deal directly with each other and

¹⁰⁹ CHINKIN, *supra* note 5, at 123 (discussing the well-accepted principle of mediation that parties are typically more amenable to settling a disagreement if they have some input into the resolution). *See also* JAY G. MARTIN & MARK S. ANSHAN, ALTERNATIVE DISPUTE RESOLUTION FOR OIL AND GAS PRACTITIONERS 3 (2001) (stating that party control over the process is one of the major advantages of ADR). This sentiment is particularly relevant in the Caspian situation because the more input the littoral states have on the demarcation determination, the more likely they will be to abide by the decisions made. Additionally, since ADR provides more flexibility in reaching a conclusion, the parties will not be forced to adhere to one particular legal scheme. *See id.* at 12.

¹¹⁰ CHINKIN, *supra* note 5, at 123–24 (parties are more likely to be unhappy with a “win/lose” determination than they are to be with a determination that allows each side to “win” a little).

¹¹¹ Bilder, *supra* note 5, at 22. Negotiation is also defined as a “[b]ilateral or multilateral process in which parties who differ over a particular issue attempt to reach agreement or compromise over that issue through communication.” DOUGLAS H. YARN, DICTIONARY OF CONFLICT RESOLUTION 314 (1999).

¹¹² Bilder, *supra* note 5, at 22. The parties are able to retain maximum control over both the process and outcome when using negotiation. *Id.*

¹¹³ For example, lead party negotiators are moving toward compromise regarding ownership and management of resources, with the only remaining question being the specific lines of demarcation. *News Briefs: International—Caspian*, PLATTS OILGRAM NEWS (New York), Jan. 23, 2002, at 6.

craft creative solutions to the demarcation problem.¹¹⁴ However, past negotiation efforts have been marked with self-serving unilateral and bilateral declarations. Bilateral negotiations are nothing new to the Caspian States. Since the breakup of the Soviet Union, a host of treaties have been signed by and among the littoral states.¹¹⁵ This general disinclination to work together makes arriving at a mutually acceptable agreement through

¹¹⁴ Because the Caspian demarcation is such a complex problem—dealing with navigation, fishing, pollution, and natural resources—it should be very helpful to the parties to be able to maneuver around some previously established legal rules, rather than be forced to adhere directly to a set legal scheme. Parties are most likely to engage in negotiations when they feel that results achieved through joint negotiations are better than alternative agreements. JAMES K. SEBENIUS, *NEGOTIATING THE LAW OF THE SEA* 72 (1984). If the parties refuse to allow third party intervention, negotiation may be the only option available to resolve the Caspian dispute. *Iran: Daily Says Consultations Vital for Consensus on Caspian*, BBC MONITORING, June 13, 2002, available at 2002 WL 22670118 (stating that “Iran is opposed to the interference of outside powers in Caspian affairs”).

¹¹⁵ “In 1997, Kazakhstan signed a joint communiqué with Turkmenistan pledging to divide sections of the Caspian along median lines.” Papadopoulos, *supra* note 30, at 8. Kazakhstan also signed a bilateral agreement in July 1998 with Russia, dividing the northern Caspian along median lines. *Id.* However, this is only an interim agreement until the Caspian status is finalized by the littoral states. It is also interesting because originally Russia had pushed for common ownership.

Moreover, July 1998 saw an agreement between Iran and Turkmenistan in which they declared their intent for the Caspian to have coastal zones divided into national sectors, with the remainder of the Caspian being subject to common ownership. *Id.* Iran and Turkmenistan have also expressed their vision that the Caspian be divided only by consensus among the littoral states. *Id.* at 9.

Around December 1, 2001, Russia and Azerbaijan signed an agreement to divide the Caspian seabed between themselves. *BP Defies Iran over Caspian*, *supra* note 79. A previous agreement to divide the seabed by mutual agreement of the five coastal states was rejected by the Russian Deputy Foreign Minister. *Id.* Russia and Azerbaijan have continued to “firm up” this bilateral treaty by signing yet another agreement specifically demarcating each country’s respective share. *See* Myers, *supra* note 21, at 13A. It seems odd that Azerbaijan would enter into this agreement because it had long advocated joint agreement between the littoral states on the Caspian. *Id.* This bilateral agreement could now cause a disadvantage in Azerbaijani dealings with Iran, especially considering the animosity already existing between the two countries.

Finally, the most recent bilateral agreement was signed in May 2002, between Russia and Kazakhstan. Pamela Ann Smith, *Caspian Oil Race Heats Up*, MIDDLE EAST, July 1, 2002, available at 2002 WL 10347178 (stating that “[a]fter years of negotiation, President Vladimir Putin of Russia and his Kazakh counterpart, Nursultan Nazarbayev, signed an accord in Moscow in May dividing the northern quarter of the Caspian Sea between their two countries”).

negotiation unlikely.¹¹⁶ In order for all five parties to work together and reach an agreement through negotiation, extensive bargaining will be necessary.¹¹⁷

The process of negotiation is seen as having a life cycle consisting of three stages: (1) exchanging demands; (2) discussing issues; and (3) reaching conclusions.¹¹⁸ In all reports from summits, presidential visits, and newspaper accounts, it appears that the parties to the Caspian dispute have clearly laid out their goals (even if they have been refined over time) and discussed the merits of the parties' contentions. Now is the time for the parties to make some decisions that will finally resolve the dispute. If the Caspian littoral states are actually to reach an agreement, they must be willing to compromise. In this complex dispute, the parties must be willing to engage in "give and take" negotiations, where parties are willing to make trade-offs. However, the decisions that need to be made may only come if some other third party "pushes" the parties toward an agreement. Although some parties have agreed to certain bilateral proposals, it will now become important for the parties to engage in bartering to settle the dispute—a task that may be best accomplished through a mediator.

B. Mediation

Mediation is distinguished from negotiation by the participation of a neutral third party mediator who has the ability to bargain directly with the parties and make substantive settlement proposals.¹¹⁹ With Iran's hard-line stance on the division of the Caspian, it appears that some of the other littoral states will have to come up with concessions in order for Iran to agree to any proposal other than the one they proposed. Iran's adamant refusal to accept any proposal other than a 20% equal division has likely been the most damaging to the negotiations. Unlike a negotiator, who will only strive to achieve the best result for the party he or she represents, a mediator will assist the parties in reaching a resolution and eliciting concessions.¹²⁰

¹¹⁶ Dubner, *supra* note 17, at 261. Because the parties are not working together when unilateral declarations are made, and each party only attempts to further that state's own interests—not the good of the entire region—it will be difficult for the littoral states to come to a mutually acceptable agreement through negotiation.

¹¹⁷ *Id.*

¹¹⁸ See THEODORE W. KHEEL, *THE KEYS TO CONFLICT RESOLUTION* 16 (1999).

¹¹⁹ See YARN, *supra* note 111, at 283.

¹²⁰ See KHEEL, *supra* note 118, at 49.

The challenging aspect of finding an effective mediator to resolve the Caspian dispute is the necessity of finding a neutral mediator who can combat the tense political atmosphere in the region.¹²¹ For example, Iran does not trust the United States or Turkey, two of the most likely state candidates to serve as a mediator.¹²² In particular, the United States is seen to invest itself in the region only because of the oil pipeline potential.¹²³

¹²¹ See CPR INST. FOR DISPUTE RESOLUTION, OIL & GAS INDUSTRY ADR I-8 (1994) (stating, “[i]t is essential that the mediator be a person in whose integrity and judgment both sides have full confidence”). It is also important that the mediator be “selected jointly by the parties,” and sometimes, as may be the case with the Caspian dispute, some knowledge of the subject matter is helpful. *Id.* Despite the potential advantages that mediation may bring, because of the mediator’s status as a neutral participant in the Caspian discussions, the parties may not want a mediator. In fact, some statements have been made that indicate the parties are entirely opposed to the presence of a third party. See *Minister Sets Out Russia’s Stance on Caspian*, BBC MONITORING, Feb. 26, 2002, available at 2002 WL 15122650 (reporting Russia’s position that “[t]he determination of the Caspian’s legal status, as well as forms and methods of using its water and subsurface resources, are exclusively the business of the five Caspian states”).

¹²² See Christian Lowe, *No Deal on Caspian as Azerbaijan President Meets Iran Envoy*, AGENCE FR. PRESSE, Aug. 28, 2001, available at 2001 WL 24999477; *Iran Concerned over Turkish Warplanes in Baku*, AGENCE FR. PRESSE, Aug. 22, 2001, available at 2001 WL 24995686. Iran’s position on parties like NATO and the United States interfering in the region is very clear: “The peace in the Caspian Sea is seriously threatened by the presence of numerous regional and ultra-regional powers and conflicts between their views and interests.” *Article Regarding Iran-Azerbaijan Relations and the Situation in the Caspian Sea*, WORLD NEWS CONNECTION (Washington, D.C.), Aug. 4, 2001, 2001 WL 27171250. Moreover, so long as millions of dollars worth of natural resources remain in the Caspian basin, the dispute between the littoral states will not technically be entirely resolved. Saadet Oruc, *Ankara Focuses on Tehran-Baku Escalation*, TURKISH DAILY NEWS, Aug. 14, 2001, available at 2001 WL 22005549.

The United States is viewed with great mistrust throughout the Middle East—particularly in the Muslim world because of U.S. support provided to Israel. *Cf. Israel Turns the Screws on Arafat*, MIDDLE E. ECON. DIG., Sept. 7, 2001, available at 2001 WL 8125133 (stating that President Bush and his advisors have “made clear that they see merit in the Israeli contention that primary responsibility for the violence lies with Arafat”). Additionally, Turkey is not seen to be neutral due to its pact on military cooperation with neighboring Azerbaijan, a close strategic ally and country sharing a common language with Turkey. *Turkey Plans Show of Military Force for Ally Azerbaijan*, AGENCE FR. PRESSE, Aug. 17, 2001, available at 2001 WL 24992816. However, Turkey has stated that it is necessary to resolve disputes peacefully through dialogue. *Turkey Calls for Dialogue on Caspian Sea Oil Dispute*, AGENCE FR. PRESSE, Aug. 8, 2001, 2001 WL 24986600; *Turkey Seeks Calm in Caspian*, OIL DAILY (Washington, D.C.), Aug. 14, 2001, at 7, available at 2001 WL 14946217 (referring to Turkey’s urgings to abide by United Nations principles in resolving the dispute). Turkey has voiced its concern to both Azerbaijan and Iran that negotiations be used instead of

In some other situations, religious figures, such as high-ranking Roman Catholic officials, have been able to mediate disputes because they are seen to have a spiritual authority over the countries involved.¹²⁴ However, because the area surrounding the Caspian is predominately Muslim, it is highly unlikely that any Christian mediator would be deemed acceptable. Moreover, even a high-ranking Muslim cleric may prove an unacceptable mediator due to the varying degrees of Islamic fundamentalism practiced in the region.¹²⁵ Therefore, the biggest obstacle the parties may face in choosing a mediator is ensuring the mediator is acceptable to all of the parties involved. If the parties are able to agree on one mediator (or a team of mediators), it is likely that a resolution to the Caspian dispute will be forthcoming. A mediator may

hostilities. Kemal Ilter, *Tension Between Azerbaijan and Iran in Caspian May Affect TPAO's Business: Turkey Tells Both Iran and Azerbaijan that the Dispute Should Be Solved by Negotiations Not by Brute Force*, TURKISH DAILY NEWS, Aug. 8, 2001, available at 2001 WL 22005328.

¹²³ Charlton, *supra* note 101. However, the United States has been an effective mediator in other international disputes. For example, Former President Jimmy Carter has had notable success as an international mediator. See George Melloan, *The Gnomes of Oslo Stir Up a Tempest Once More*, WALL ST. J., Oct. 15, 2002, at A21. See KHEEL, *supra* note 127, at 55 (pointing out that "civility is an essential component of mediation," which may explain why Kheel thinks that Former President Carter has been criticized for appearing "overly friendly" with dictators and other such "scoundrels"). It is reasonable that the parties to this particular dispute would not want the United States involved—its open support of the Azerbaijani position and its interest in the potential oil pipelines from the Caspian makes the United States appear to be somewhat less than disinterested. See Goodspeed, *supra* note 27, at A13. See also Pierre Celerier, *Azerbaijan's Aliyev and Putin Hail Deal on Radar Station*, AGENCE FR. PRESSE, Jan. 25, 2002, available at 2002 WL 2325397.

¹²⁴ See generally Thomas Princen, *International Mediation—The View from the Vatican*, 3 NEGOT. J. 347 (1987). In one instance, a border dispute between Argentina and Chile (known as the Beagle Channel Dispute) was resolved through the intervention of Cardinal Antonio Samore, a career Vatican diplomat. *Id.* at 347. Although the Pope was the official mediator, a mediation team headed by Cardinal Samore actually conducted the day-to-day mediation. *Id.* at 347–48. Although mediator neutrality is key to the resolution of disputes, because both countries were Catholic nations, the Cardinal's mediation team was viewed as having the moral authority—and obligation—to intervene so the matter could be resolved peacefully. *Id.* at 348–49. Mediator neutrality is essential to successful dispute resolution because when the mediator is neutral, the parties can open up to the mediator without fear that their words will be used against them. *Id.* at 350 (referring to the fact that trust in the mediator is essential and was obtained in the Beagle Channel situation because the parties trusted the religious figures mediating the dispute).

¹²⁵ In particular, Iran is noted for its strict adherence to Islamic fundamentalism, while other countries in the Caspian region are Islamic, but without strict adherence to Islamic laws within the government.

be more likely to push the parties toward a peaceful resolution if the mediator is (1) acceptable to the parties; (2) trusted; and (3) respected in the international arena.

C. Conciliation

Conciliation has two basic functions: to investigate and clarify the facts in dispute, and to attempt to bring the parties into agreement by suggesting mutually acceptable solutions to the problem.¹²⁶ The basic premise of conciliation is that a neutral third party acts as a mediator, attempting to bring the parties to some sort of agreement, while at the same time examining evidence and conducting his own investigation by attempting to clarify the situation.¹²⁷ Interestingly, Article 284 of UNCLOS provides that state parties to disputes under UNCLOS may submit their disputes to conciliation, but that the submission must be by the consent of all the parties to the dispute.¹²⁸ Conciliation differs from mediation only in that the conciliation commission has the ability to conduct an independent investigation, while a mediator only works with the parties to resolve the dispute.

Because it would be so difficult to find a neutral mediator, it is also unlikely that anyone would be able to fill this “enhanced mediation” role. Although the conciliation process itself is distinguishable from mediation, the problems regarding mediator neutrality are still present. If a neutral mediator could be found, it might be wise for the parties to switch to a conciliation scheme where they could engage in fact-finding to determine what options could be most successful. Although mediation should be the first choice for the parties to successfully resolve the dispute, conciliation is certainly a viable alternative.

¹²⁶ See YARN, *supra* note 111, at 106–07.

¹²⁷ See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID), Chap. III, art. 34. See also Lester Nurick & Stephen J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, 1 ICSID REV. 340, 348 (1986) (referring to a statement by Lord Wilberforce that a conciliator’s main responsibility is to “examine the contentions raised by the parties, to clarify the issues, and to endeavour to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement”).

¹²⁸ UNCLOS, *supra* note 46, at art. 284, para. 1–2. Despite the fact that this provision exists, none of the parties involved in the Caspian dispute have signed UNCLOS. Therefore, since UNCLOS does not technically apply to the dispute, it is unlikely this provision will have any effect.

VI. COMING EVENTS AND THE POTENTIAL FOR CONFLICT

Boundary disputes are probably one of the “oldest causes of armed conflict,” but they are now more typically settled by negotiations, not force.¹²⁹ As the field of international law has developed, states frequently use the comprehensive rules available and apply them in negotiated settlements, rather than resorting to armed conflict.¹³⁰ The Caspian region can be extremely volatile because of hostilities existing in the area. The boundary dispute over the Caspian has only increased the tension in the region.

The Caspian region is a hotbed of potential conflict. For example, in the summer of 2001, reports of Iranian military planes entering Azerbaijan’s airspace were in newspapers across the globe.¹³¹ Tensions between the two countries reached a peak when an Iranian warship forced an Azeri research vessel out of a disputed part of the Caspian.¹³² The deep-seated mistrust existing in the region, especially between Azerbaijan and Iran, does not help the parties negotiate to reach an agreement. Iran wants a larger share of the Caspian than it would have under current proposals put forward by other parties regarding sectoral division, and it is not likely to compromise.¹³³

¹²⁹ O’CONNELL, *supra* note 40 (manuscript at 29).

¹³⁰ *Id.*

¹³¹ *Iranian Military Plane Enters Azerbaijan Airspace Again*, AGENCE FR. PRESSE, Aug. 1, 2001, available at 2001 WL 24982522. Television stations in Azerbaijan reported that an Iranian air force reconnaissance plane entered Azeri airspace at least twice in four days. *Iran Denies Its Military Planes Have Entered Azeri Airspace*, AGENCE FR. PRESSE, Aug. 3, 2001, available at 2001 WL 24983580. Azerbaijan’s President Aliyev believes this to be a violation of international law because Iran is attempting to use force to get its way in the Caspian region. *Id.* However, Iran denied claims by Azerbaijan that Iranian military planes entered Azeri airspace. *Id.* This aspect of the conflict is sharply contrasted with the fact that some Middle Eastern scholars believe the reason for most conflict in the area is U.S. policy, as the United States views the Caspian as its next source of energy. *Professor Says Wise Diplomacy Needed on Caspian Issue*, *supra* note 82.

¹³² *Iranian Military Plane Enters Azerbaijan Airspace Again*, *supra* note 131. This incident, although alarming, could have pushed the parties into a “new willingness to finally solve the decade-old oil dispute.” *Putin Hosts “No-Ties” CIS Summit in Seaside Resort*, *supra* note 56.

¹³³ *Iranian Military Plane Enters Azerbaijan Airspace Again*, *supra* note 131. Interestingly, even if the other littoral states were to come to an agreement, it is unlikely that Iran will be persuaded to alter its position on equal division because Iran is not in a hurry to develop its Caspian resources—unlike the other littoral states whose economies could use the boost that oil production could cause. Albrighton & Lowe, *supra* note 53 (explaining that Iran does well enough in its Persian Gulf oil fields to “try to force the others into a corner”) (quoting Richard Lee, a senior analyst at the Centre for Global

Other states are optimistic that the dispute will not reach the point of armed conflict, especially considering the fact that Iran is known to have a relatively powerful military, and Russia has large remnants of the military that participated in an arms race with the United States during the cold war. However, Azerbaijan, Kazakhstan, and Turkmenistan have “no military capabilities at all in the Caspian Sea” and most likely do not have any intention of entering into a military conflict in the Caspian.¹³⁴ Russia’s adamant stance that the parties should resolve their problems “exclusively by political means at the negotiating table” should help prevent armed conflict.¹³⁵ Of course, if Iran and Russia were to begin another arms race, it is most likely that the former Soviet Republics would not be able to compete on the same level; therefore, demilitarization of the Caspian region is the best solution for all of the littoral states.¹³⁶ The parties will have to work diligently with one another in order to promote the peaceful resolution of this dispute; the best result will be achieved if the parties allow a neutral third party to assist with negotiations so the dispute may be resolved faster.

VII. CONCLUSION

As the littoral states continue to make bilateral treaties with each other, no quick resolution of the Caspian dispute is in sight. The parties need to find a neutral third-party mediator or conciliator that will stop the countries from forming bilateral alliances in attempts to maximize their present, temporary gains. These bilateral treaties only drive the countries further apart, as shaky and shifting alliances build mistrust among the parties.

It will probably be difficult for either the European Union or NATO to intervene in this dispute because of the unique regional nature of the dispute. Some of the countries involved in the dispute see the United States as behind

Energy Studies). Moreover, relations between Iran and Azerbaijan continue to be tense, despite visits between leaders of the two countries. *See, e.g.,* Sohrab Morovati, *Azerbaijan President Arrives in Tehran on Sensitive Visit over Caspian Row*, AGENCE FR. PRESSE, May 18, 2002, available at 2002 WL 2409251 (noting tense discussions, as President Khatami of Iran referenced the “Mazandaran Sea,” the old Persian name for the Caspian, causing quite a stir among the Azerbaijani delegation, who viewed Khatami’s use of the old Persian name as offensive).

¹³⁴ Socor, *supra* note 79, at 7. Russia and Iran are both known to have a “significant naval presence in the Caspian.” *Storm in a Precious Teacup*, *supra* note 68.

¹³⁵ *Russia Urges Azerbaijan, Iran to Show “Wisdom” and Restraint over Caspian*, WORLD NEWS CONNECTION (Washington, D.C.), Aug. 3, 2001, available at 2001 WL 26262004 (stating that direct dialogue between Azerbaijan and Iran could eliminate tension and help them find a solution).

¹³⁶ Socor, *supra* note 79, at 7.

these organizations, and most are not in any hurry to develop U.S. involvement in the area any further. As a result, it is difficult to imagine a mediator that would be acceptable to all of the parties. However, it is even more unlikely that the parties themselves will reach an understanding that is agreeable to everyone. One of the biggest problems with the Caspian dispute is Iran's staunch position regarding common ownership or equal division. Iran's adamant refusal to accept any proposal other than a 20% equal division has essentially stonewalled the negotiations. Unfortunately, Iran's position on equal division has not softened over the course of negotiations. In fact, it has appeared that Iran is determined to block any agreement that does not include an equal share among all of the countries. Moreover, negotiations are hampered by the fact that it seems like Russia is attempting to ensure Russian pre-eminence in the region, possibly through a subregional arrangement with the former Soviet republics.¹³⁷ These behaviors are very harmful to the negotiation process, and it is likely that only a third-party neutral will be able to bring the parties closer together.¹³⁸

Because the littoral states already have agreed on sectoral division, the big question remaining is where the lines will actually be drawn.¹³⁹ It appears that Azerbaijan and Iran have the positions that are the furthest from resolution, and they must come to some kind of an understanding if negotiations are to proceed. After a decade of stalled negotiations, the Caspian negotiators must realize that a change is necessary for the dispute to be resolved. The parties must consent to allow a third-party mediator or conciliator who is not personally invested in the dispute to intervene because that neutral party should be able to push the parties toward a resolution. If the parties refuse to allow a third party assist with the dispute resolution procedures, it is unlikely that the Caspian dispute will be resolved without violence, and consequently, the Caspian's resources will remain untapped for years to come.

¹³⁷ *Id.*

¹³⁸ As a last resort, if the parties involved were to take the dispute to the International Court of Justice, it is probable that the court would use the equidistant lines, and when considering proportionality, make adjustments using special circumstances. Papadopoulos, *supra* note 30, at 15. See also Clagett, *supra* note 39. Special circumstances could include equitable concerns, previous arrangements, and proportionality.

¹³⁹ Papadopoulos, *supra* note 30, at 25.