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## THE CURSE OF BLACK GOLD: HOW MARITIME OIL RESERVES CAN SINK INTERNATIONAL NEGOTIATIONS

DOUGLAS R. BROOKING\*

When one hears of oil and gas development today, the debates in the new media also seem to focus on the certain drilling techniques, pipeline placements, and the roll of “foreign oil.” The often-forgotten area of oil and gas development, an area of tremendous potential, lies offshore, under the sea. Subsea petroleum development has played a huge role in the industry, and the control of oil and gas fields beneath the sea surface remains vital for both domestic and international interests of almost every nation. Every nation and oil and gas company desires efficient, safe, environmentally mindful, and profitable oil and gas production. To effectively achieve this goal, control of the petroleum molecules, or the right to proceeds of their development, must be accurately and definitively determined, lest the industry fall into chaos. Despite the international community’s best efforts, maritime boarder disputes still exist in certain areas around the world, impeding the development of oil and gas.

This paper explores the development of maritime law, first throughout history, and then in relation to the access to and control of subsea oil and

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gas plays. This paper additionally highlights certain disputed territorial claims around the world and provides reasons why dispute resolution has been successful or unsuccessful in those regions. This paper suggests the role that private oil and gas companies could play in dispute resolutions regarding these disputed fields, citing both the positive and negatives that a non-governmental, international body can bring to the dispute resolution arena. Although not the perfect solution to the difficulties of settling international maritime disputes, private, commercial entities may offer one other method to find lasting peace in certain maritime border disputes.

### *Law of the Sea*

Much if not all of history has been defined by the dominate power of the sea. Power over and control of the sea equated a control of the market. The evolution of the market economy and the global market, thanks again to maritime navigation, shrunk the world and brought greater disagreement regarding the most powerful trading network on the planet. Access to and rights over (and under) the Sea became vital to every nation, without which they may lose out on the next great innovation or discovery.<sup>1</sup> To establish parity, or at least attempt to, the various nations of the world called upon the United Nations to establish some sort of law for the sea and a system to settle disputes.

From the first moments of maritime expansion, control of the sea was limited to those nations with the will and economic power to successfully navigate the globe.<sup>2</sup> Colonial expansion brought world wars, and those world wars brought increased interest to the control of the seas. Unilateral and bipartisan agreements no longer satisfied the insatiable thirst for control, and perhaps more importantly, the exclusive control of the large swaths of open waters from competing nations, both economically and militarily. This created a problem on the high seas where the rights to control traditionally ended within inline of the shore or that nations' vessel.<sup>3</sup> The Cold War and the proliferation of the world's superpowers enabled certain seafaring nations to operate, control, use, and destroy maritime natural resources at an alarming rate.<sup>4</sup> Quickly, nations began to claim large

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1. *The United Nations Convention on the Law of the Sea: A Historical Perspective*, UNITED NATIONS (2012), [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm) (examining multiple examples of maritime disagreement regarding access to natural resources).

2. *Id.*

3. U.N. GAOR, 22d Sess., 1515th mtg. at 2, U.N. Doc. A/C.1/PV.1515 (Nov. 1, 1967).

4. *Id.* at 3-5.

sections of the sea for themselves—rights above and below the surface. The open sea, the area far beyond the shoreline and the direct control of nations, contains the largest wealth of natural resources located above, within, and below the sea, and the international free-for-all became too great for the globe to sustain, so the United Nations set out to resolve the disagreements.

Finally, in 1973, the United Nations convened to create some sort of lasting solution to the problem regarding the control of the sea.<sup>5</sup> It took nearly a decade of diplomacy, deal making, and problem solving to finally formulate a solution.<sup>6</sup> The Law of the Sea resolution established many guidelines relating to navigation, economic development, and national defense at sea.<sup>7</sup> The United States, for several reasons, chose not to adopt the Law of the Sea as resolved by the United Nations.<sup>8</sup> This meant, at least formally, the United States did not abide by the same maritime standards and laws as the 150 other nations that joined the Law of the Sea Resolution.

The Law of the Sea covers a broad range of topics in the hopes to remedy issues before they arise and to establish a system to resolve all other disputes. This comment specifically focuses on the economic concerns resolved by the Law of the Sea, as these resolutions govern most directly the acquisition of and interest in particular natural resource deposits below the ocean surface. The continued growth of global demand for oil and natural gas has led to increased exploration of potential petroleum fields below the sea's surface. Nations and multinational corporations (MNCs) have a significant interest in acquiring the rights to develop these fields and market the resources around the world. To successfully develop and market the field, the developer needs to first establish the nation with the rights to those natural resources and then acquire the rights to produce those natural resources.

### *History of Maritime Law*

As in every area of law, the Law of the Sea developed out of the historical significance of maritime law and the modern necessity to preserve and maintain peace and sovereignty. As soon as mankind took to the high

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5. *The United Nations Convention on the Law of the Sea: A Historical Perspective*, *supra* note 1.

6. *Id.*

7. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982) [hereinafter Law of the Sea].

8. *Id.*

seas, systems of laws and regulations began to pop up, thus planting the seeds that grew into modern maritime law.

The first documented code of admiralty law, at least in the West, originated in the Mediterranean under the great sea power of Ancient Greece, Rhodes.<sup>9</sup> The Rhodian Sea Laws set forth uniform regulations by which the sailors, captains, port masters, and empires were to relate with one another while conducting their sailing operations.<sup>10</sup> Over the years, the transitions of power from empire to empire altered and added to the Rhodian Sea Laws as best served the particular empire; with the growth of sailing technology, so expanded trade into the far corners of the Mediterranean and Europe.<sup>11</sup> The various codes and customs that developed around the world focused specifically on the law governing maritime commerce. The maritime powers fought, diplomatically and militarily, for the control of shipping routes, rights to explore, and access to new markets, as it became clear to the powers that “the financial power base was shifting, at least to some degree, from land-based commerce to maritime commerce.”<sup>12</sup> Regardless of the interests sought, the seafaring nations of the world knew that they needed to move in the direction of unifying their efforts to maintain equitable and predictable legal systems about the sea.

The increased calls for uniformity in maritime laws resulted in perhaps the first maritime legal conferences of their kind in Antwerp in 1885 and in Brussels in 1888, each with the goal of creating uniform laws for all mariners.<sup>13</sup> Not long after these conferences, the nations of Europe met again in Brussels in 1897 to establish a similar set of codes to provide some semblance of uniformity on both sides of the Atlantic.<sup>14</sup> These two conferences and the legal minds that bore the results eventually formed the Comité Maritime International (CMI), with the stated goal to become a non-governmental organization to promote the unification of all aspects of

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9. Robert D. Benedict, *The Historical Position of the Rhodian Law*, 18 YALE L.J. 223 (1909).

10. Gordon W. Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065 (1983).

11. *Id.* at 1071-74.

12. *Id.* at 1075.

13. Albert Lilar & Carlo van den Bosch, LE COMITÉ MARITIME INTERNATIONAL 1897-1972 6, (Comité Maritime Int'l 1972), <http://www.comitemaritime.org/Uploads/History/LILAR-VAN%20DEN%20BOSCH-Le%20Comit%C3%A9%20Maritime%20International.pdf>.

14. *Id.* at 12.

maritime law.<sup>15</sup> From its constitution, two "of these words recognize the past history of maritime law, its present dilemma, and its future. The first is *non-governmental*, indicating its professional rather than political foundation. The second is, of course, *uniformity*, a word used by governments as often as it is *not* practiced by them."<sup>16</sup> The CMI and its predecessor within the ranks of the United Nations, the International Maritime Organization (IMO), both focused on the commerce conducted on the surface of the seas and remained more or less silent regarding the bountiful resources located beneath the sea floor.

#### *Importance of Sub Sea Petroleum*

The oil and natural gas industry predates the American Civil War when Edwin Drake successfully drilled a well and extracted oil in Titusville, Pennsylvania.<sup>17</sup> The demand for electric power around the world drove engineers, pioneers, and innovators to develop new and improved techniques to access and discover petroleum reserves.<sup>18</sup> Prospectors quickly bought leases all over the country, which drove some companies to follow in the footsteps of the explorers in the Age of Exploration and look to the sea. As early as the 1890s, oil companies began to drill offshore, though their operations resembled little more than immobile wooden docks connected to the shore by gangplanks.<sup>19</sup> Moveable drilling barges entered operation in the 1930s in Louisiana, although in inshore marshes rather than on the open sea.<sup>20</sup> Within the decade, innovative oil companies sought to go beyond inshore marshes to the open oceans. In 1938, two oil companies drilled the first freestanding well about thirteen miles from the Louisiana

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15. Comité Maritime International (CMI) Const. art. I, <http://www.comitemaritime.org/part-1-general/0,2736,13632,00.html>.

16. See Paulsen, *supra* note 10, at 1084 (emphasis in the original).

17. Parke A. Dickey, *The First Oil Well*, Oil Industry Centennial: Journal of Petroleum Technology, Jan 1959, 23. Drake's well came because of coal gas, developed in England in the 18th century but which could not sustain the need for worldwide power. *Id.* Drake's well did not produce the first hydrocarbons extracted from the earth to be used as fuel on a large scale. *Id.*

18. *Id.* at 26.

19. *The History of Offshore Oil and Gas in the United States (Long Version)*, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 1, [https://docs.lib.noaa.gov/noaa\\_documents/DWH\\_IR/reports/HistoryofDrillingStaffPaper22.pdf](https://docs.lib.noaa.gov/noaa_documents/DWH_IR/reports/HistoryofDrillingStaffPaper22.pdf). The Commission notes that this paper is subject to change but is useful for expanded knowledge beyond the special constraints of the official report. *Id.*

20. *Id.*

coast.<sup>21</sup> This first well began the research and development of petroleum located beneath the ocean. Soon, technology and the desire to control the rights to different petroleum plays drove companies and nationalized petroleum industries further from shore and into conflict with one another.

The U.S. offers an excellent starting point to examine the issue of establishing the rights to develop oil and gas plays under navigable waterways. The principle of Federalism, the divide of power between the many states and the Federal government, has continuously effected the legal landscape of the United States since its founding. Following the Second World War, the ability to reinvest in offshore exploration caused President Truman to proclaim for the federal government the exclusive rights to the petroleum under the United States Continental Shelf.<sup>22</sup> Almost immediately, states with offshore oil production ignored this proclamation.<sup>23</sup> The Supreme Court resolved the conflict in 1947 when it denied the California's claim to the three-mile tract of ocean beyond its shores and granted the federal government the exclusive ability to grant rights to the minerals in that tract.<sup>24</sup> Congress codified a clarification to the Supreme Court's decision in that the "Submerged Lands Act," which granted all right and title to the respective states in land beneath navigable water ways within three miles of the state's shoreline.<sup>25</sup> All other rights and titles outside this three-mile range remained with the federal government, and permits granted in this land from the various states must be refiled with the federal government.<sup>26</sup> With the passage of the Submerged Lands Act, the United States established its own system by which private individuals and corporations could seek rights to explore and extract minerals offshore. Regardless of the respective states' opinions of the Supreme Court decisions and subsequent legislative clarification, the uniformity in the law of right and title to subsea minerals brought some stability to negotiations for the right to drill and develop offshore. While the United States may have experienced relative stability in subsea petroleum negotiations, international dispute resolution regarding maritime law still posed many difficulties.

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21. *Id.* at 2.

22. *Id.* at 4.

23. *Id.*

24. *United States v. State of California*, 332 U.S. 19, 40-41 (1947); see also *United States v. State of Louisiana*, 339 U.S. 699 (1950); *United States v. State of Texas*, 339 U.S. 707 (1950).

25. 43 U.S.C. § 1312 (2016).

26. *Id.*

*Dispute Resolution Prior to the Law of the Sea*

The modern landscape in offshore petroleum rights and the players involved in this fight constitute the largest obstacles for lawyers, diplomats, and executives to peacefully and profitably produce subsea oil and gas reserves. Three main parties play roles in the development of subsea petroleum assets: the individual sovereign nations, one or more international governmental organizations, and the petroleum company, whether private or nationalized. The difficulty in deciding the proper method of dispute resolution stems directly from the different positions of these three distinct parties, specifically their bargaining power in relation to one another and their power to impact international relations on a global scale. Before discussing the modern dispute resolution case studies, it is important to understand international dispute resolution prior to the establishment of the Law of the Sea.

The simplest and most efficient route to take would require these actors, specifically state actors, to negotiate their respective differences and result in a state treaty.<sup>27</sup> Each party would propose solutions with little if any input from outside actors not a party to the dispute.<sup>28</sup> The parties (there are usually two, but can be multilateral) each put forward positions then work through their respective diplomats and negotiators to reach a solution, usually landing somewhere in the middle of the two proposals.<sup>29</sup> Negotiations allow a certain amount of flexibility for the parties to maneuver through tenuous issues not just limited to international legal disputes.<sup>30</sup> Negotiation, however, has its limits, the most notable and troublesome being that the entire nature of the resolution hinges on the will of the parties involved.<sup>31</sup> If one party wants to win each and every point without conceding anything, the other party that may be more willing to find mutual points of agreements can be left marooned at the negotiation table. In situations in which one party either refuses to fairly negotiate or simply refuses to abide by the terms of the negotiation, more forceful mechanisms of peaceful dispute resolution can be implemented.

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27. SIR HUMPHREY WALDOCK, *INTERNATIONAL DISPUTES: THE LEGAL ASPECTS* 77 (Europa Publications: London 1972).

28. *Id.*

29. *Id.*

30. *Id.* at 80. Opposing parties use litigation to avoid going before courts everyday, in the United States and internationally. Negotiations allow parties to remain in control of their own deal making before the necessity of a court or arbitrator to resolve the mutual issues.

31. *Id.*



Occasionally, to get certain actors to work with one another, the parties submit to international arbitration. The model definition for international arbitrations has remained mostly unchanged from that of The Hague Convention of 1899: “International arbitration has for its object the settlement of difference between states by judges of their own choice, and on the basis of a respect for the law.”<sup>32</sup> The two provisions of this definition provide both the strength and weakness of arbitration. The clause, “by judges of their own choice,” allows for the parties by agreement to appoint a particular arbitrator to decide disputes in which they cannot agree. Inherently, however, this implies that the parties can first agree on the arbitrator and then that they will follow the decision thereof.<sup>33</sup> Second, the clause, “on the basis of a respect for the law,” empowers or rather “requires” that parties accept the decision of the arbitration as binding and abide by it as if it were some other international body of law.<sup>34</sup> One word in the clause can commandeer the entire arbitration process. The definition and interpretation of “the law” has perplexed philosophers, politicians, lawyers, and judges for millennia, and each state actor likely will have their own definition. The inability to agree upon a definition of the “law” and the inability to enforce arbitration agreements caused the international arbitrations model to suffer.<sup>35</sup>

The international community attempted to ensure more effective enforcement of arbitrations in the mid-twentieth century. Thus, the International Law Commission, in 1953, proposed the adoption of a general understanding about the goals, procedures, and requirements of arbitration in the international setting.<sup>36</sup> The Commission approached the issue from

“the principle of non-frustration”; that I, by the principle that an agreement to arbitrate involves an international obligation and that states having once entered into such an obligation are bound not only to take all necessary steps to allow the arbitration to

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32. *Id.* at 101 (citing British and Foreign State Papers, Vol. 91, 1889-99, p. 970; Scott, *Hague Court Reports*, 1st Series, 1916, p. xxxii).

33. *Id.* at 102.

34. WALDOCK, *supra* note 27.

35. *Id.* at 107 (examining the ways that different countries legal definitions prolonged the debates to establish a uniform international arbitration mechanism).

36. *Id.* at 106.

proceed, but also to refrain from any action which would impede or frustrate it.<sup>37</sup>

This idea sought to fix the problem by allowing parties to back out of agreements and use arbitration as a dispute resolution method. The important hook for this change, however, came in the obligation to arbitrate; if the country opts to arbitrate, failure to arbitrate then adversely affects their position and continues regardless of their representative presence.<sup>38</sup> Should parties fail to “take the necessary steps,” then the compromise would remain enforceable, despite the actions of the noncompliant party.<sup>39</sup> Although this amendment to international arbitral procedures might help with certain troublesome nations, some disputes would continue to the final level of international dispute resolution.

That final step in the international dispute resolution process comes in the form of international courts. The international courts are the final decision makers regarding international law and help to define the idea of law in the international community.<sup>40</sup> The international courts combine the other two forms of dispute resolution with an added note of objectivity from the international community. The entire basis and existence of these courts comes from the philosophy of international law.<sup>41</sup>

Regardless of a state’s definition of or respect for the law, countries and citizens understand that courts represent the idea of the rule of law. The establishment of an international court first demonstrated to the global community that “the law” flourished and remained important to all the members of the global society.<sup>42</sup> The second theory behind the court undoubtedly sprung from the common law judicial philosophy.<sup>43</sup> The presence of an international court symbolizes the fact that the law itself “tends to be more objective and autonomous but may be developed by the Court in its jurisprudence.”<sup>44</sup> The United Nations sought to establish the court so that international players would understand the system of

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37. *Id.* at 106. (citing the commentary on the draft Convention on Arbitral Procedure, A/CN.4/92, April 1955).

38. *Id.*

39. *Id.*

40. *Id.* at 128.

41. Statute of the International Court of Justice, 1946 I.C.J. Acts & Docs., art. 1, <http://www.icj-cij.org/documents/?p1=4&p2=2>.

42. WALDOCK, *supra* note 27, at 130.

43. U.N. Charter art 94, ¶ 1.

44. WALDOCK, *supra* note 27, at 131.

accountability and the method through which to file a grievance in the international arena.<sup>45</sup> Perhaps the most philosophically based method of dispute resolution—the International Court of Justice—still lacked the necessary enforcement mechanism missing in both negotiation and arbitration, outside of an appeal to the Security Council.<sup>46</sup>

All these different forms could be applied to a variety of international disputes, including those specifically regarding issues at sea. However, the growth of the global economy and the increased technological abilities to access the resources of the oceans caused the international community to revisit international law, specifically maritime law. The traditional forms of law no longer sufficed to meet the needs of the increased legal interest in the subsea resources.<sup>47</sup> With increased interest and economic potential beneath the sea came increased tension between nations to have the rights to primary access to these minerals and other resources.<sup>48</sup> The increased reward or profit potential made it even harder for the international community to bring parties to the table to cooperate and inevitably bargain for exchange. Thus, the United Nations decided to create a new body of law that would join the nations together. The law crafted eventually became known as the Law of the Sea.

#### *Importance of the Law of the Sea*

Up through the adoption of the Law of the Sea, the only real control of the sea and the rights thereto came through the traditional forms of international law: treaties and customs.<sup>49</sup> Treaties, in their own regard, still occupy perhaps the best option for parties wishing to benefit and convert oceanic resources. However, even treaties have their shortcomings both through a lack of enforcement mechanisms and the tenuous ability of parties to give rights away.<sup>50</sup> Customary international law creates perhaps an even greater enigma for international scholars to decipher. The primary issue with customary law stems from the need for “relatively uniform and consistent state practice regarding a particular matter.”<sup>51</sup> For nations with

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45. U.N. Charter, *supra* note 43, at ¶ 2.

46. *Id.*

47. Gabriele Goettsche-Wanli, *The United Nations Convention on the Law of the Sea: Multilateral Diplomacy at Work*, U.N. CHRONICLE (Dec. 2014), <https://unchronicle.un.org/article/united-nations-convention-law-sea-multilateral-diplomacy-work>.

48. *Id.*

49. Paulsen, *supra* note 10, at 1066.

50. SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 78 (THOMSON WEST 2006).

51. *Id.*

extensive diplomatic or economic ties, customary practices might very well be able to govern most disputes. Given their mutual proximity to and reliance on the North Sea, the International Court of Justice looked to the customs of interaction between the United Kingdom and Norway to settle a dispute.<sup>52</sup> The reliance upon custom, rather than the establishment of some new international law, better suited the two nations. However, not all states have a mutually amicable or interested customary law like the UK and Norway.<sup>53</sup> Many states have openly adverse goals regarding one another's customs in the region or even around the globe.<sup>54</sup>

To appropriately manage the vast resources contained in the oceans and the common inability of nations to see eye-to-eye, the international community needs a clear system to determine economic rights and dispute resolution mechanisms. Therefore, one of the most important interests established by the Law of the Sea came in the form of each (coastal) nation's Exclusive Economic Zone (EEZ).<sup>55</sup> A particular nation's EEZ allows that state to "assume[ ] jurisdiction over the exploration and exploitation of marine resources in its adjacent section of the continental shelf."<sup>56</sup> This area extends out 200 nautical miles from the shoreline.<sup>57</sup> This exclusive control grants the respective states immense power in the ability to develop, exploit, or market the resources contained in that particular zone.<sup>58</sup> Even the 200-nautical-mile distinction creates problems between the nations, as Libya and Malta fought (in court) to establish how this mileage is measured.<sup>59</sup> Although these 200 miles might contain countless resources, these maritime resources may not be sedentary or may extend beyond these 200 miles. It is outside the EEZs that the Law of the Sea becomes truly important.

The Law of the Sea makes one incredibly important distinction for the EEZ from other interests a nation might possess in the sea. Islands extend the EEZ's of nations, but that does not mean that all islands claimed by a nation established an EEZ. The Law of the Sea importantly notes that

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52. Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 139, (Dec. 18).

53. WALDOCK, *supra* note 27, at 133.

54. *Id.*

55. Law of the Sea, *supra* note 7, at Part IV, art. 48.

56. DEPT. FOR ECONOMIC AND SOCIAL INFORMATION AND POLICY ANALYSIS: STATISTICS DIVISION, *GLOSSARY OF ENVIRONMENTAL STATISTICS*, (FEB. 1997), [http://unstats.un.org/unsd/publication/SeriesF/SeriesF\\_67E.pdf](http://unstats.un.org/unsd/publication/SeriesF/SeriesF_67E.pdf).

57. *Id.*

58. *Id.*

59. *See* Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 34 (June 3).

“[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone.”<sup>60</sup> With the development of modern engineering and the ability to construct artificial islands for any number of uses, this provision will become even more important.

Most—if not all—legal systems desire to establish a system in which parties, both foreign and domestic, can transact business with some sort of clarity. Although the transactions may differ depending on the sophistication of legal systems or the unfortunate corruption of government officials, states and private players desire a predictable system in which to conduct business. Acquiring the rights to access the resources of one EEZ remains mostly unchanged by the Law of the Sea: simply contract with the controlling coastal nation.<sup>61</sup> However, as so often happens, contracts fail, parties become dissatisfied with the terms, or perhaps the most detrimental option, the parties to the contract never possessed the rights to the economic interest in the first place. “Although the Convention that emerged . . . accepts extensive coastal state control over broad coastal zones, it limits the broadest unilateral claims of sovereignty over these zones and guarantees navigational freedoms to maritime powers.”<sup>62</sup> The limitation of broad economic claims sought to secure the interests of parties with lesser bargaining power over maritime resources and traditional international subordinates ravaged from centuries of imperialism.<sup>63</sup>

The Law of the Sea creates a series of mechanisms with which to settle international disputes. The first and most important requirement of the Law of the Sea is a peaceful resolution of the dispute, which takes precedent over all other requirements of dispute resolution.<sup>64</sup> When states cannot come to a peaceful resolution on their own, the Law of the Sea lays out a plan through which the disputes may be resolved. First, the parties must exchange their respective views regarding the particular dispute, and in the absence of a decision, parties must agree to non-binding recommendations from a panel of conciliators.<sup>65</sup> Should this solution fail, the states must submit to one of four different fora to issue binding declaration: the International Tribunal for the Law of the Sea, the International Court of

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60. Law of the Sea, *supra* note 7, at art. 121.

61. *Id.* at art. 56.

62. John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 114 (1998).

63. *See id.*

64. Law of the Sea, *supra* note 7, at art. 280.

65. *Id.* at art. 283-84.

Justice, a general arbitral tribunal, or a special arbitral tribunal.<sup>66</sup> Whichever fora is used, the decision is binding upon the parties to the dispute resolution.<sup>67</sup>

This extensive dispute resolution apparatus can aid many nations in the resolutions of disputes but raises two important problems with the Law of the Sea. First, that the Law of the Sea remains limited to those nations that have ratified the Convention, which excludes the United States.<sup>68</sup> Second, despite the “binding nature” of the Law of the Sea resolutions, enforcement mechanisms remain wholly inadequate in their ability to ensure the party-states abide by the decisions.

#### *Non-Party Members*

The United States foreign policy toes the line of a careful dichotomy between the isolationist nation of the early twentieth century to the sole superpower following the fall of the Soviet Union in the 1990s. Domestic political opinion controls much of the United States’ foreign policy decisions, with most Americans desiring to keep power at home rather than submitting to foreign control. President Clinton submitted the Law of the Sea to Congress in 1994, whereupon Congress failed to vote for nearly a decade and eventually rejected the Law of the Sea, citing that it “would constitute the most egregious transfer of American sovereignty, wealth, and power to the U.N. since the founding of that ‘world body.’”<sup>69</sup> Despite the America’s failure to adopt the Law of the Sea, like so many of her allies and rivals, the United States still abides by many of its provisions. But the failure to become a party to the Convention causes two layers of regulation for other countries operating in United States waters; they must abide by the Law of the Sea and the US laws governing the sea.<sup>70</sup> In addition, the United States enters binding agreements with party members regularly, often concerning the petroleum interests around the world. Perhaps the most notable example comes out of the negotiations regarding the Arctic resources.

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66. *Id.* at art. 287.

67. *Id.* at art. 15.

68. *See*, U.N., CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AND THE RELATED AGREEMENTS, (last updated Sep. 23, 2016), [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm).

69. MURPHY, *supra* note 50, at 365 (citation omitted).

70. Patricia C. Bauerlein, *The United Nations Convention on the Law of the Sea & (and) U.S. Ocean Environmental Practice: Are We Complying with International Law*, 17 *LOY. L.A. INT’L & COMP. L. REV.* 899, 919 (1995).

The Arctic region represents perhaps the most untapped area of resources left on the planet. In 2008, the United States estimated that the Arctic contained thirteen percent of the undiscovered oil and thirty percent of the undiscovered gas, with the majority of this potential discovery occurring in offshore plays.<sup>71</sup> This vast potential of resources, in addition to issues such as polar ice, climate change, and control of shipping routes, demanded that Arctic nations take action to protect their interests. Different nations began taking bold steps, including shows of economic and military force, as well as diplomatic appeals to the U.N.<sup>72</sup> With the United States not being a party to the Law of the Sea and the other Arctic nations vying for control of the vast resources, the eight Arctic nations—with the addition of the indigenous peoples of the Arctic regions—sought to establish an independent accord to help govern Arctic disputes.<sup>73</sup> These countries adopted The Ottawa Declaration, which declared that the member states would seek cooperative solutions and work together to establish proper access to the Arctic resources.<sup>74</sup> The Arctic Council is more of a joint operating agreement between the nations rather than any sort of international legal framework under which disputes might be settled like the Law of the Sea. However, this accord constitutes another step in the correct direction regarding dispute resolution at sea, as it specifically denotes the desire to work together for the future development of Arctic resources.<sup>75</sup>

The United States has also found other ways to govern their Southern maritime interests without resorting to international government bodies for resolution. The United States and Mexico entered a treaty through which the two nations might equitably divide the resources of the Gulf of Mexico. A system of peace and reliability of action in the Gulf requires the two dominant nations surrounding the Gulf of Mexico to establish a mechanism through which to tap into these resources. To do this, the two nations entered into a treaty dividing the Gulf on a latitudinal basis, which granted each nation sole right to develop the resources below the surface of the sea

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71. *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*, U.S. GEOLOGICAL SURV., (July 23, 2008, 1:00 PM), <https://archive.usgs.gov/archive/sites/www.usgs.gov/newsroom/article.asp-ID=1980.html>.

72. See, e.g., Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 FOREIGN AFFAIRS 2 (Mar. – Apr. 2008) (highlighting Russia's strategic bomber flyovers, Canada's Arctic military expenditures, and Denmark's appeal to the UN under the Law of the Sea).

73. Declaration on the Establishment of the Arctic Council, Sep. 19, 1996, 35 I.L.M. 1382.

74. *Id.*

75. *Id.* at 1388.

on their respective side.<sup>76</sup> This bilateral treaty, with the addition of various treaties with the other Caribbean nations, enabled the United States to secure its maritime interest without being a party to the Law of the Sea.<sup>77</sup>

Other nations have likewise found ways to resolve their differences about subsea petroleum rights outside of an appeal to the Law of the Sea. The Loran-Mantee natural gas field crosses the maritime boundary between Venezuela and Trinidad and Tobago. For the interests to be properly divided, the two nations negotiated for more than a decade to establish ownership.<sup>78</sup> The field contained an estimated ten trillion cubic foot (Tcf) of natural gas sandstone reservoirs that spanned the area around the two nations borders.<sup>79</sup> Venezuela and Trinidad and Tobago allowed for various international gas companies to research and explore the gas contained within the field and, more particularly, which nations controlled the right to produce or sell the rights to production.<sup>80</sup>

The Loran-Mantee agreement recognizes two particularly important issues with the development of subsea petroleum rights. First, the extensive research done demonstrates the importance of definitively establishing ownership interests prior to development for each field discovery to prevent future disputes. Second, it demonstrates the role that corporate entities can play in the establishment of rights. Development of subsea petroleum involves significant investment in terms of money and time. As exemplified in the decade and a half long negotiation between Venezuela and Trinidad and Tobago, the research and development of these significant resources can often be too great for individual nations to take on. For this reason, countries may choose to exchange the rights to develop the petroleum in exchange for the oil and gas companies to put in the upfront costs of

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76. Treaty on Maritime Boundaries between the United Mexican States and the United States of America, U.S.-Mex. (May 4, 1978) S. Treaty Doc. EX. F, 96-1 (1997).

77. See, Treaty Establishing Caribbean Maritime Boundaries, U.S.-U.K., Mar. 9, 1994, S. Treaty Doc. No. 103-23 (1994); Three Treaties Establishing Maritime Boundaries Between the United States and Mexico, Venezuela and Cuba, S. Treaty Doc. No. 96-08 (1979).

78. *Five-Year Wait for Loran/Manatee Gas*, TRINIDAD & TOBAGO GUARDIAN ONLINE (Oct. 1, 2015), <http://www.guardian.co.tt/business/2015-10-01/five-year-wait-loranmanatee-gas>.

79. *PDVSA and Chevron to Develop the Loran-Manatee*, SUBSEAIQ (Sept. 13, 2013), [http://www.subseaiq.com/data/Project.aspx?project\\_id=1657&AspxAutoDetectCookieSupport=1](http://www.subseaiq.com/data/Project.aspx?project_id=1657&AspxAutoDetectCookieSupport=1).

80. Curtis Williams, *Venezuela, Trinidad and Tobago Sign Cross Boarder Development Deal*, OIL & GAS J., (May 24, 2016), <http://www.ogj.com/articles/2016/05/venezuela-trinidad-and-tobago-sign-cross-border-development-deal.html>.



establishing and gathering all the information about the different petroleum rights. Thus, oil and gas companies can play a very important role in dispute resolution schemes in future disputed territories.

For every great triumph in hurdling the challenges of international negotiations, many petroleum fields remain contested around the world. Various economic, political, and military interests cause many nations to become embroiled in deadlock debates that can last for decades. And even upon the resolution one or multiple nations may not like the decision and thus refuse to abide by the decision of the particular dispute.

Still other interests might be implicated in negotiations regarding a disputed oil and gas field. Control and ownership could implicate issue of national security or national pride dating back centuries. In addition to economic and political concerns, negotiation efforts might also get bogged down based on different countries international influence. Russia and Japan both possess formidable national economies with strong links to international markets. Even since its fall from superpower status, Russia still possesses an indisputable advantage in regards to international influence. And one such dispute between Russia and Japan dates back over fifty years to the dwindling days of World War II.

#### *Kuril Island Dispute*

The battle regarding territorial claims between Japan and Russia continued long after the guns of World War II fell silent in 1945. Despite a ceasefire, the Soviet Union (and its successor, Russia) and Japan failed to ever sign a formal peace treaty.<sup>81</sup> One of the major issues holding up peace negotiation, both then and now, stems from the disputed control over the Kuril Islands.<sup>82</sup>

The specific issue regarding the rights to economic explorations in the Kuril Islands (or “Northern Territories” to Japan) manifested themselves more importantly in the second half of the twentieth century.<sup>83</sup> The Soviets invaded the islands as part of their effort in the Pacific theater following the surrender of Nazi Germany and held possession of them at the time of the Japanese surrender.<sup>84</sup> The legal struggle regarding control stems from the

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81. Keith A. Call, *Southern Kurils or Northern Territories? Resolving the Russo-Japanese Border Dispute*, 1992 B.Y.U. L. REV. 727 (1992).

82. Glen W. Price, *Legal Analysis of the Kurile Island Dispute*, 7 TEMP. INT'L & COMP. L.J. 395 (1993).

83. Call, *supra* note 81, at 730.

84. *Id.* at 731.

most recent international agreement regarding the Kuril Islands' status: Japan agreed to renounce all right to the island, but the Soviet Union never signed the treaty.<sup>85</sup> Despite the Soviet Union's failure to sign the treaty, the Japanese revocation of all right to the island would seem to quiet the debate regarding control. However, the Cold War and the subsequent status of the United States as the sole superpower emerging from the early 1990s often forced politicians and international legal tacticians to resort to claims outside the legal framework.

The breakdown of negotiations following the Soviet failure to sign the peace treaty at the end of World War II caused further disputes that expanded far outside the Kuril Islands. The politically charged nature of every dispute, anywhere in the world, throughout the Cold War caused every nation to fight desperately for control of certain areas and use threats, to garner support. When Japan and the United States argued for stronger Japanese interests in and rights to the development of the Kuril Islands, the Soviets responded by threatening to block U.S. and Japanese fishing interests in the Northern Pacific and Arctic Oceans.<sup>86</sup> The Cold War also posed the constant threat of military intervention in small localized conflicts as well as on the macro, thermonuclear scale. The breakup of the Soviet Union and the presence of a single superpower quieted some of the military tensions of the Cold War but left behind the economic battlegrounds from years past.

The development of the subsea petroleum industry has only further perpetuated the claims of both nations for control of the islands. Current estimates claim that two fields occupy the disputed area with estimated reserves at one billion barrels of oil and 500 billion cubic meters of natural gas.<sup>87</sup> Although some development has begun on the fields and foreign investment into the regions hydrocarbon development continues, the fact that disputes have not been completely finalized leaves any potential undertaking vulnerable.<sup>88</sup> Private hydrocarbon development may well be at the mercy of potential nationalization efforts, such as those that nationalized BP's assets in Libya in 1971.<sup>89</sup> Any private oil and gas

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85. *Id.* at 732.

86. Bruce A. Elleman, Michael R. Nichols & Matthew J. Ouimet, *A Historical Reevaluation of America's Role in the Kuril Islands*, 71 PAC. AFFAIRS 498 (Winter, 1998-1999).

87. *Sakhalin & Kurile Islands*, JURISDICTION PROJECT: INSTITUTE OF ISLAND STUDIES, <http://projects.upei.ca/iis/files/2016/11/Sakhalin-Kurile-Islands.pdf>.

88. *Id.*

89. G. Winthrop Haight, *Libyan Nationalization of British Petroleum's Assets*, 6 INT'L LAW. 541.

company would want to ensure that their interests in the region would be well represented, but more importantly, well protected, lest their oil and gas assets suffer nationalization to Gazprom, as occurred in Libya.<sup>90</sup> This is not to suggest that Gazprom would undertake such a measure, as Gazprom's motives differ greatly from those of the Revolutionary Libyan government of the 1970s, but rather to suggest a frame work of protection for MNCs to protect their assets and insure stability of development.

#### *Nationalized Interests*

In the international oil and gas industry, the race to acquire petroleum rights and control the cornerstone of markets has two main participants: Multinational oil and gas corporations (ExxonMobil, Royal Dutch Shell, British Petroleum, etc.) and nationalized petroleum companies (Gazprom, Perotbas, China National Petroleum Corp., etc). In the race to dominate rights to reserves and production, the multinational corporations occupy a meager ten percent of the market share compared to nationalized companies controlling over seventy-five percent of the market.<sup>91</sup> The nationalized companies profit from the ability to use public money to jumpstart the expansion and pressure private companies into selling off petroleum rights. Rather than allowing mineral owners to sell the rights to develop the minerals they control, nationalized oil and gas companies develop and control the minerals in the ground and after production for the claimed benefit of the entire country. For example, in 2006 to 2007 alone, Russia increased political pressure by revoking permits and pressuring sales to solidify Gazprom as the world's largest producer of natural gas.<sup>92</sup> The nationalized companies have another tool in addition to the ability of their respective governments to pressure private competitors: since these companies operate as an agency of the sovereign nation, they do not need to fight other companies for rights to take with the government. The tremendous potential for increased production and thus increased profit from offshore energy plays, can bring about increased tension regarding hydrocarbon recovery and disagreements regarding the dispute resolution mechanism most apt to work.

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90. *Id.*

91. Ian Bremmer, *The Long Shadow of the Visible Hand*, WALL STREET J. (May 22, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704852004575258541875590852>.

92. *Id.*

With the clear majority of oil and gas reserves controlled by nationalized companies, a deeper knowledge of these types of oil and gas companies will clarify the implications on disputed petroleum plays. The structure of nationalized industries, their control mechanisms, and the methodological basis for their founding will weigh heavily on any effort to broker some sort of cohesive, mutually beneficial deal regarding disputed oil and gas rights. Economics remains the main driving force behind the decision to nationalize the oil and gas industries in most countries. Nationalization allows the government to avoid hydrocarbon revenue sharing with private corporations<sup>93</sup> This offers a two-fold benefit for the country. First, the country can acquire the entire revenue from its oil and gas industry and reinvest that money in the domestic oil industry or enter profit sharing agreements to develop international petroleum trade to market their products.<sup>94</sup> Second, a nationalized industry's control of the country's oil and gas assets can be spun off as protection against foreign interests and exploitation of the country's oil and gas resources.<sup>95</sup> These two interests would become decisive during times of high oil and gas prices, as privately owned interests would allow for the money to leave the country with the actual oil, whereas a nationalized industry would keep the revenue at home.<sup>96</sup>

Control of oil reserves also lends massive political power to countries in addition to the economic interests. Following the Arab-Israeli War of 1973 and the subsequent oil embargo, nations around the world realized how they could assert control over other countries, both friend and foe, using national control of the oil industry.<sup>97</sup> The twentieth Century saw an explosion in the demand for oil, especially in the developed world. The reliance on foreign oil, specifically by the United States, presented an opportunity for the nationalized industries to flex their muscles. Thus, since the 1970s, countries have advocated for "energy independence," or being able to control their own destiny in regards to acquisition to adequate supply of energy.<sup>98</sup> Perhaps the better term might be "energy diversification."<sup>99</sup> As a

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93. Paasha Mahdavi, *Why Do Leaders Nationalize the Oil Industry? The Politics of Resource Expropriation*, 75 ENERGY POL'Y 228, 229 (2014).

94. *Id.* at 230.

95. *Id.*

96. *Id.*

97. *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. PA. L. REV. 610 (1975).

98. John J. Fialka, *Energy Independence: A Dry Hole?*, WALL STREET J. (updated July 5, 2006, 12:01 AM), <http://www.wsj.com/articles/SB115204999066897677>.

large consumer nation, the United States cannot afford to put all their eggs in one OPEC-controlled basket again or risk the gas shortages following the embargo. Instead, the country has attempted to create a balance between imported hydrocarbons, hydrocarbons produced in North America, and renewable sources, to maintain good relations with OPEC nations while not allowing for too much vulnerability on the domestic consumer market.<sup>100</sup> It is this control, however, that fully develops the one-two punch for nationalized petroleum companies at the negotiation table.

When nationalized oil and gas companies come to the negotiation table, they bring with them these basic economic and political arguments that often overshadow any potential deal that might be brokered. When the ownership of the petroleum assets is undisputed, private parties negotiate for profit sharing measures in ways similar to the negotiation methods in the United States. In the United States, companies negotiate oil and gas leases with the private mineral interest owners or with surface owners to build pipelines or other midstream or downstream installations.<sup>101</sup> For nationalized interests, the private companies must negotiate with the government to access the minerals or rights to build the necessary infrastructure to access and develop the minerals. However, this paper is focused on the unique situation of negotiating for the rights to petroleum when two nations dispute the ownership of the petroleum. The method and outcome of negotiation will completely change, depending on whether any of the sovereign participants have nationalized oil and gas industries. To understand the consequences of the various implications of negotiating with industries more thoroughly, a brief highlight of one such country's nationalized corporate structure may explain negotiation efforts.

Perhaps the most well-known nationalized company is Gazprom, the Russian natural gas giant. Gazprom controls the world's largest shares of natural gas reserves, with seventeen percent of the global reserves and seventy-two percent of the Russian gas reserves.<sup>102</sup> The Russian Federation, either directly or indirectly (through shared ownership of other state controlled industries) owns more than fifty percent of Gazprom's shares,

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99. *Id.*

100. *Id.*

101. Robert A. James, *United States: California*, OIL & GAS L. REV., 363, <https://www.pillsburylaw.com/siteFiles/Publications/UnitedStatesCalifornia.pdf>.

102. *About Gazprom*, GAZPROM, <http://www.gazprom.com/about/> (last visited Jan. 19, 2017).

giving it the controlling interest of the gas giant.<sup>103</sup> Gazprom's corporate structure allows for corporate voting based on shareholder ownership, with the general operations run by the executives and Board of Directors.<sup>104</sup> This corporate structure, with the majority ownership of shares by the Russian government, gives the Russian government the controlling interest in voting on business decisions and directors. So, for any negotiation with Gazprom, parties must inherently negotiate with the Russian government, lest any deal struck in the boardroom be overruled during the next shareholder voting cycle. As countries do not usually want to relinquish control of valuable assets or abandon any claim thereof, negotiation efforts with Gazprom may often place the outside private party with an uphill battle.

In relation to the Kuril Islands dispute, Japan, an open-market oil and gas industry, lacking the singular power of a nationalized petroleum giant, would negotiate with Gazprom. Since the end of the Second World War, Japan has created one of the fastest growing and largely market-based economies in the world.<sup>105</sup> Japan focused on privatizing ownership interests in all industries, with corporations and private citizens promoting, investing in, and receiving the benefits of the Japanese economy.<sup>106</sup> This style of economy helped Japan to recover from a war-ravaged wasteland to the world's second largest economy less than twenty years after the war.<sup>107</sup> However, with lack of public-sector control on the oil and gas industry, it lacks the same enforcement mechanisms possessed by a nationalized company. The lack of nationalization allows greater flexibility and ease of negotiation for similarly situated parties but often places private parties at a disadvantage with nationalized industries.<sup>108</sup> When the nation's only stake in the oil and gas industry comes from the tax revenue, as in a market economy, the government will not use their political influence to aid the oil

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103. *Equity Capital Structure*, GAZPROM, <http://www.gazprom.com/investors/structure/> (last visited Jan. 19, 2017).

104. Resolution of the Annual General Shareholders' Meeting of PJSC Gazprom, GAZPROM (June 30, 2016), [http://www.gazprom.com/f/posts/74/562608/regulations-shareholders-meeting-2016-06-30-en\\_ms.pdf](http://www.gazprom.com/f/posts/74/562608/regulations-shareholders-meeting-2016-06-30-en_ms.pdf).

105. Lucien Ellington, *Learning from the Japanese Economy*, NAT'L CLEARINGHOUSE FOR UNITED STATES-JAPANESE STUD., (Sept. 2004).

106. *Id.*

107. *Id.*

108. WALDOCK, *supra* note 27, at 133. While this discusses the ability of the International Court of Justice to adjudicate cases between countries of the same bloc during the Cold War, the premise carries over to privatized-nationalized dichotomy in the oil and gas industry. Negotiations will be much more difficult between parties not similarly situated due to their inherent differences regarding government control on the oil and gas industry.

and gas negotiations in their favor to the same extent that a nationalized government would.

The seemingly daily technological advancements made in the oil and gas industry have proliferated the number of fields that nations now can access. However, this ability can be limited by territorial disputes even more recent than the Kuril Islands dispute, a relatively calm dispute between nations. This calm does not exist today in the Eastern Mediterranean Sea. Beginning in 2009, several nations discovered natural gas plays under the Mediterranean.<sup>109</sup> These particular plays represent more than just massive natural resource deposits with the potential for development. The Eastern Mediterranean and near East have been in almost a perpetual state of war for the better part of half a century. The discovery of natural gas plays has the potential to bring energy independence or stability to the region that has long quarreled over access to adequate energy sources.

#### *Eastern Mediterranean Gas Field Disputes*

Since the 2009 discoveries, various nations discovered numerous plays in their territorial waters. Israel discovered first the Tamar field, followed soon after by the Leviathan field, which experts estimate contain up to twenty-six TcF of natural gas.<sup>110</sup> This amount of gas could allow for Israel to break their dependence on Middle Eastern hydrocarbons, a geopolitical splinter in the side of international peace in the region.<sup>111</sup> Since the Israeli discoveries, a United States firm discovered the Aphrodite field in Cyprian territorial waters and an Italian company discovered the Zohr field in Egyptian waters.<sup>112</sup> For these three nations, the fields represent the potential to meet some, if not all, of the nations' natural gas needs, as well as the potential to become net exporters to the rest of Europe.<sup>113</sup> The Zohr field also has the ability to potentially help cure an ongoing energy crisis within Egypt.<sup>114</sup> These fields pose the possibility to potentially enable negotiations between hostile nations to be brokered if they can set aside disputes.

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109. Michael Ratner, *Natural Gas Discoveries in the Eastern Mediterranean*, CONG. RES. SERV., 1 (Aug. 15, 2016), <https://fas.org/sgp/crs/mideast/R44591.pdf>.

110. Yuri Zhukov, *Trouble in the Eastern Mediterranean Sea: The Coming Dash for Gas*, Foreign Affairs (last updated Jan 2, 2014), <https://www.foreignaffairs.com/articles/cyprus/2013-03-20/trouble-eastern-mediterranean-sea>.

111. Ratner, *supra* note 109, at 11.

112. *Id.* at 5.

113. *Id.*

114. *Id.* at 7.

Since its founding in 1948, Israel and her neighbors have struggled to find peace. The root of the absence of regional peace is beyond the scope of this article. Specific to the natural gas plays in the Mediterranean, Lebanon and Israel dispute the maritime boarder between the two nations territorial waters.<sup>115</sup> The dispute dates to the Israeli-Lebanese War in 1949 when the two nations disputed the armistice line that extended out into the Sea as the de facto maritime boarder.<sup>116</sup> The territorial dispute does not directly concern the Tamar and Leviathan plays but rather impacts Lebanon's claimed ability to develop unidentified fields in its own territorial waters.<sup>117</sup> The Israeli-Lebanese dispute is not the only roadblock stopping the development of the natural gas field of the Mediterranean.

The island of Cyprus contains two separate governments, both of which claim to govern the entire island. The U.N. and the majority of the world governments formally recognizes the Republic of Cyprus as the government of the entire island, whereas Turkey alone recognizes the Turkish Republic of Northern Cyprus as the true government.<sup>118</sup> This divide has been at a stalemate since 1974, with United Nations peacekeeping forces attempting to forgo another outbreak of violence.<sup>119</sup> Although the Republic of Cyprus might have international recognition, this does not inherently solve the problem for the disputed gas fields, as Turkey, one of the region's major players, wants to forgo development "until a resolution to the 'Cyprus problem' is found."<sup>120</sup> The potential for the Aphrodite field to enable Cyprus to lower emissions through cleaner energy or simply sell the rights to development could play a dynamic and important role in so desired resolution to the Cyprus problem.

The Zohr field, though important to the region, most likely will enable Egypt to solve or lessen certain domestic issues. Although important to the peace and prosperity in the region, the Egyptian development of the Zohr

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115. *Id.* at 9.

116. *Id.* (citation omitted).

117. *Id.* at 2. (examining the map charting the disputed Lebanese-Israeli maritime boarder in relation to the discovered gas fields).

118. Doug Bandow, *Resolving the Cyprus Problem*, CATO INST., (Dec. 7, 1999), <https://www.cato.org/publications/commentary/resolving-cyprus-problem>.

119. A. Marco Turk, *Cyprus Reunification Is Long Overdue: The Time Is Right for Track III Diplomacy As the Best Approach for Successful Negotiation of This Ethnic Conflict*, 28 LOY. L.A. INT'L & COMP. L. REV. 205, 206 (2006).

120. Ratner, *supra* note 109, at 6.



field will likely play little to no role in international concerns, as Egypt will not likely export any of the produced natural gas.<sup>121</sup>

The fragile state of the region, the deep-rooted conflicts between the countries, the ever-growing demand for energy, and the discovery of recoverable hydrocarbons prime the region for renewed efforts to settle these disputes. This paper does not seek to oversimplify the complex and nuanced art of international negotiations to end longstanding conflicts. Instead, this paper focuses on the ways that the oil and gas industry can be used as a carrot to aid negotiations and achieve the common goal of fulfilling every nation's energy demands. All four of these international players have growing energy needs that, when not met, will rapidly bring parties to the table. The goal of these negotiations should be treaties that would ensure peaceful resolutions of conflicts and stability in the region.

Because of the complexity of the Eastern Mediterranean dispute, an international mediator may be needed rather than a simple negotiation. This method has been unsuccessful in the past: the Clinton Administration brought the Republic of Cyprus and the Turkish Republic of Northern Cyprus to the table without a resolution, and both the U.S. and France have led negotiations regarding the Israeli-Lebanese maritime dispute.<sup>122</sup><sup>123</sup> The region's current energy demands and new ability for development presents a unique opportunity for international players to resolve these disputes.

Israel discovered fields in its territorial waters that would allow it to meet, if not exceed, its energy demands while lowering carbon output by switching from oil production to natural gas production.<sup>124</sup> The vast quantities of natural gas from these two fields would also enable Israel to export gas to its neighbors.<sup>125</sup> However, the terror organization, Hezbollah, has threatened to attack Israeli gas platforms in the Mediterranean and, in terms of exportation, Israel's most likely access to European trading

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121. *Id.* at 8.

122. Bandow, *supra* note 118.

123. Karen Ayat, *Lebanon Pushes for Resumption of US Efforts to Solve Lebanon-Israel Maritime Border Dispute*, NAT. GAS WORLD (July 9, 2015, 12:10 AM), <http://www.naturalgasworld.com/lebanon-pushes-resumption-us-efforts-lebanon-israel-maritime-border-dispute-24550>; *see also* Maayan Groisman, *Lebanon Pushes for French Mediation in its Maritime Border Dispute with Israel*, JERUSALEM POST (Apr. 17, 2016 3:33 PM), <http://www.jpost.com/Arab-Israeli-Conflict/Lebanon-pushes-for-French-mediation-in-its-maritime-border-dispute-with-Israel-451478>.

124. *Israel*, U.S. ENERGY INFO. ADM. (July 2016), <https://www.eia.gov/beta/international/analysis.cfm?iso=ISR>.

125. Ratner, *supra* note 109, at 11.

partners through pipeline transportation would bring about direct contact with the Cyprian conflict.<sup>126</sup>

Cyprus heavily relies on imported hydrocarbons, so the ability to develop its own would be indispensable to energy diversification efforts.<sup>127</sup> Even if the island chose not to use its produced hydrocarbons, the ability to export such a huge amount of gas could boost the Cyprian economy.<sup>128</sup> However, Turkey wants the island to be unified before drilling these offshore gas plays in Cyprian waters or before Israel exports natural gas through the Cyprian zone.<sup>129</sup> This dichotomy would encourage Israel to aid in the resolution of the Cyprus problem to access preferred European markets for its natural gas. Lebanon, although not directly dependent on the other nations, severely fell behind the rest of the world in the research regarding natural gas development.<sup>130</sup> Even if Lebanon discovered natural gas in its territorial waters, it would need to contract with a production company to gain access, as Lebanon lacks such an ability.<sup>131</sup> In total, the Eastern Mediterranean gas dispute contains five nations, an opposition government, a maritime border dispute, domestic supply problems, threats of terrorism, an impotent production ability, and this is all overshadowed by at least half a century of distrust and animosity.

The delicate and intricate proceedings required to produce a lasting agreement between these nations regarding their access to these natural gas fields and the ability to economically development them requires skillful negotiation. Different governments have attempted to mediate areas of this dispute but have ultimately failed up to this point. Whenever one thinks of government negotiations, especially to readers in the United States or those well versed in the U.S. governmental system, one usually expects for government negotiations to be decided on political partisan lines. This can also happen in international negotiations: just as certain groups may influence decision making in domestic politics, the “control over political resources—the means by which one person can influence the behavior of other persons—is not distributed equally.”<sup>132</sup> Likewise, certain nations

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126. Zhukov, *supra* note 110.

127. Ratner, *supra* note 109, at 4.

128. *Id.*

129. *Id.*

130. James Stocker, *No EEZ Solution: The Politics of Oil and Gas in the Eastern Mediterranean*, 66 MIDDLE EAST J. 579, 594 (2012).

131. *Id.*

132. SHIRLEY V. SCOTT, INTERNATIONAL LAW IN WORLD POLITICS: AN INTRODUCTION 2 (Lynne Rienner, 2nd ed. 2010) (citation omitted).

carry an unequal distribution of the power in international politics, which can negatively impact the perception of those state players as mediators, regardless of their legitimate neutrality. Therefore, a change in the type of international party chosen to mediate these negotiations might very well lead to a more successful resolution to this dispute.

### *Corporate Led Negotiations*

Although corporations have a bad reputation in the public eye for their greed and money hoarding, this profit interest might help the negotiations move forward, especially regarding hydrocarbon development. Despite the massive value listed on many oil and gas company's books, these companies operate in a state of constant commodity price changes and high operational costs to reap the rewards of hydrocarbon sale.<sup>133</sup> Because of this relatively low profit margin for oil and gas companies, the potential to economically develop a field stands as the utmost concern, rather than international political games or the long term strategic goals of state actors in a region. This places privately held corporations in a prime position to find common ground between the state actors. The nationalized oil and gas companies function almost as an extension of the state actors, all within the framework of international law, without the worry of alternative goals in their role as mediators.

Traditionally, a deal mediator facilitates the communication between the different parties.<sup>134</sup> The goal of the mediator, as expressed in international law, "reconcile[es] the opposing claims and appeas[es] the feeling of resentment which may have arisen between the States at variance."<sup>135</sup> Successful resolution of the disputes requires that the parties "disclose their strategic aims or other concerns in face-to-face encounters at the time of negotiating their initial agreement."<sup>136</sup> A state actor might have ulterior motives that may or may not come to the surface during initial agreements, and the history of prior state actors may weigh heavily on the minds of the parties to the negotiation. Ideally the mediator of the negotiations remains neutral but not indifferent to the outcome of the negotiations.<sup>137</sup> Oil and gas companies can hold this position in a way state actors cannot: the

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133. Robert L. Bradley, Jr., *Oil Company Earnings: Reality Over Rhetoric*, FORBES (May 10, 2011), <http://www.forbes.com/2011/05/10/oil-company-earnings.html>.

134. L. Michael Hager & Robert Pritchard, *Lawyers as Deal Mediators: The Value of Neutrality in International Business Negotiations*, 28 INT'L BUS. LAW 404 (2000).

135. WALDOCK, *supra* note 27, at 83.

136. Hager & Pritchard, *supra* note 134, at 405.

137. *Id.* at 406.

companies are interested in developing the natural gas fields for the mutual benefit of all parties, whereas the state actors look beyond this limited scope to wider geopolitical issues. For a region that broke from colonial powers less than a century ago, state influence over their dealings, no matter how innocent, might lead to a break down due to mistrust of motives.

Although these negotiations are international negotiations between state actors, it boils down to a business negotiation between potential business partners or at minimum non-adversarial business participants. “Dealing with cultural differences remains the single most challenging task for the international business negotiator.”<sup>138</sup> Direct cultural understanding requires an in-depth analysis of the multi-layered nature of culture and how those layers interact with, differ from, or mirror one another.<sup>139</sup> The religious, political, economic, and philosophical makeups of these different nations differ greatly from one another, but they all share a common interest in the development of their natural gas fields. Corporate players stand in the best position to work through these differences, as they do not have their own political agenda but still stand to benefit from remedying the differences at the outset to avoid the potential meltdown of post-negotiation deals.<sup>140</sup> The classic understanding of negotiation outcomes as being “win-win” or “win-lose” oversimplify the actual outcomes of negotiations, especially in culturally diverse regions.<sup>141</sup> Parties must understand that they will likely not accomplish everything that might be on their particular goal sheet.

Oil and gas companies already take part in many negotiations around the globe. Specific to the Eastern Mediterranean, Lebanon already offered the chance for both Shell and Exxon to begin exploration of the natural gas in their territorial waters.<sup>142</sup> Although this could stop at just the development of these assets, the relative lack of a natural gas market in Lebanon might require either Shell or Exxon to market to gas elsewhere in the world.<sup>143</sup> This could facilitate the states of the Eastern Mediterranean to come to the

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138. Garrick Apollon, *Cross-Cultural Deal Mediation as a New ADR Method for International Business Transactions*, 20 L. & BUS. REV. AM. 255, 256 (2014) (citation omitted).

139. *Id.* at 259.

140. *Id.* at 260. Mr. Apollon analogizes pre-negotiating cultural understanding to “premarital counseling” and the deal itself is a “marriage” between the two state players. *Id.*

141. *Id.* at 269.

142. Ratner, *supra* note 109, at 6 (citation omitted).

143. *Id.* at 8.

table to resolve differences in this area more productively than state mediators have been able to in the past.

MNC-led negotiations do have drawbacks for a few reasons. First, in disputes regarding fields contested by a nation with a nationalized oil and gas industry—such as the Kuril Islands dispute—a privately held oil and gas company such as an Exxon would have a lowered negotiating ability compared to the state-run energy company. Second, the issue of corporate “neutrality” might be at issue. Oil and gas companies have significant skin in the game regarding the environmental concerns of carbon output and the impact on global temperature data.<sup>144</sup> The impact of human caused climate impact goes beyond the scope of this paper, but does importantly factor into the global perception or the willingness to accept corporate players as international mediators. Whatever the motivations for oil and gas companies environmental impacts, their primary interest in the Eastern Mediterranean would be to develop the fields in an environmentally safe manner while simultaneously easing international animosity between the states to ensure the economic viability of the development and prevent the waste of hydrocarbons.

Allowing oil and gas companies to facilitate negotiations would also help move development in another fashion. The reliability and strength of international commerce relies on well negotiated business contracts, especially in the oil and gas industry.<sup>145</sup> International contract law concerns those contracts that have chosen “‘between the laws of different States’, or ‘affecting the interests of international trade.’”<sup>146</sup> Contracts resolving the disputed oil and gas fields would significantly impact international trade and therefore significantly impact the attitudes of the negotiating parties. Contracts allow the negotiating parties to dictate where disputes will be resolved and what law will resolve the dispute.<sup>147</sup> The decision regarding choice of law gives parties another level of flexibility and another bargaining chip to reach a potential deal.<sup>148</sup> When brokering deals between multiple states and private companies, the forum and choice of law to govern disputes may be just as highly contested as the control of the subject

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144. .SCOTT, *supra* note 132, at 64-65.

145. Cyril Emery, *International Commercial Contracts*, Hauser Global Law School Program, N.Y.U. Law, sec. 1, (Mar. 2016), [http://www.nyulawglobal.org/Globalex/International\\_commercial\\_contracts.html](http://www.nyulawglobal.org/Globalex/International_commercial_contracts.html).

146. *Unidroit Principles of International Commercial Contracts*, Preamble, Comment 1.

147. Emery, *supra* note 145, at 2.2.

148. *Id.*

of the contract. The Law of the Sea has a unique feature that specifically may help give flexibility in establish the choice of law.

Rather than immediately becoming subject to international resolution, parties may try to establish a means of contractual dispute resolution. However, if the state actors or the MNC remain unable to decide the forum or the law to apply, the Law of the Sea provides another option. Both state and non-state actors can petition for dispute resolution before the International Tribunal on the Law of the Sea.<sup>149</sup> Thus a dispute that arose from the contracts for the development of the gas fields could be determined by this international tribunal even if the appealing party was not a state actor, i.e., an MNC. Most other international courts limit the ability to initiate cases to only state actors.<sup>150</sup> The Law of the Sea does not limit, however, the ability of state actors to appeal disputes to other international tribunals.<sup>151</sup> This increased ability of parties to dictate for themselves the method and forum of future dispute resolution might go a long way in resolving disputes before they come to a head.

Despite the flexibility that international commercial contracts grant in choice of law and method of dispute resolution, international law in general can fall apart in one important way: enforcement. If parties fail or refuse to abide by the decisions of corporate-led mediation or even international tribunals, how should other parties respond? The dispute in the South China Sea presents an ideal reference point for discussion of enforcement difficulties.

#### *Enforcement of International Law*

World War II brought death and destruction on an unimaginable scale. The U.N. sought to remove the ability or incentive of nations to use armed conflict to settle differences.<sup>152</sup> The Charter of the U.N. specifically limited the use of force to self-defense or when explicitly authorized by the Security Council.<sup>153</sup> The Security Council may authorize members of the U.N. to use a variety of non-military enforcement mechanisms to enforce international law and the decisions of different tribunals made in

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149. Noyes, *supra* note 62, at 130 (citation omitted).

150. Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 613 (1994).

151. Noyes, *supra* note 62, at 113.

152. SCOTT, *supra* note 132, at 99.

153. *Id.*

accordance with international law.<sup>154</sup> If these economic, diplomatic, or political enforcement provisions fail or would be inadequate, the Security Council may authorize the use of military force to “maintain or restore international peace.”<sup>155</sup> The Security Council has authorized such force few times since the establishment of the U.N. but usually only after an act of international violence or war has already taken place.<sup>156</sup> It is therefore unlikely that the Security Council would authorize military force against a nation that simply fails to abide by a decision of an international tribunal.

In relation to the Law of the Sea and the enforcement of international maritime law, the enforcement mechanisms suffer from decentralization.<sup>157</sup> Specifically, Article 94 empowers each state to control and have jurisdiction over the ships flying their flag.<sup>158</sup> The divested enforcement mechanism creates a twofold problem for every nation whether they are a party to the Law of the Sea. First, states will be less likely to expend resources to enforce provisions that either negatively impact their interests or have negligible impacts thereon, and, second, the developing world lacks the resources to enforce international law provisions effectively.<sup>159</sup> Both issues apply to disputes regarding rights to subsea petroleum as nations will be unlikely to amicably yield their perceived rights or the disputing nations may be unable to effectively act upon their rights due to economic or military poverty. Perhaps the most notable example of such difficulty in enforcement occurred in the international arbitration award in the South China Sea.

The territorial disputes of the South China Sea is some of the most highly contested in the world today. Territorial claims to the area date back for hundreds if not thousands of years between many nations.<sup>160</sup> Although these claims encompass far more than natural resources, control of fishing and petroleum rights constitute major bargaining points for different powers. As all the parties have formally ratified the Convention on the Law of the Sea, an international arbitration took place to resolve the hotly

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154. U.N. Charter, *supra* note 43, at art. 41.

155. *Id.* at art. 42.

156. SCOTT, *supra* note 132, at 103.

157. Doris König, *The Enforcement of the International Law of the Sea by Coastal and Port States*, 62 ZETTSCHRIFT FÜR AUSLÄNDISCHES OFFENSTLICHES RECHT UND VOLKERRECHT 1, 3 (2002).

158. *Id.*

159. *Id.* at 7.

160. *In re South China Sea Arbitration*, PCA Case no. 2013-19, Award, at ¶¶ 172-187 (Perm. Ct. Arb. 2016), <http://www.pccases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>.

contested rights.<sup>161</sup> The arbitration rejected the Republic of China's claims to much of the South China Sea, siding with the arguments of the Philippines.<sup>162</sup> Almost immediately, Beijing announced their intentions to refuse to abide by the terms of the arbitration, claiming the award to be "invalid, null and void."<sup>163</sup> If China follows through with these threats to refuse to abide by the arbitral ruling, what party sits in the best position to enforce the arbitrators decision?

The Law of the Sea calls upon the flag carriers of the nation to enforce international law or the decision of the international tribunals.<sup>164</sup> The Philippines lacks the necessary economic and political clout to adequately enforce the arbitral award; China outranks the Philippines in terms of GDP by more than twenty to one.<sup>165</sup> Lacking the individual capacity, the Philippines would likely turn to the mercy of the U.N. and the international community to aid in the enforcement of the arbitral award. The volatile nature of the relationship between China and the rest of the world would likely lead to apprehension on the part of other state actors to put pressure on China to abide by an unfavorable decision. In addition, China's position on the U.N. Security Council would prevent a definitive Security Council decision regarding any sanctions or force.

Enforcement of international law has troubled state actors and IGOs regardless of how powerful the different countries in the situation might be. The best-case scenario would be for the international community to avoid the potential conflict all together. Global politics often drive parties to avoid making deals out of their own national pride or aspirations to assert regional dominance. Acquiescing to the demands of another nation, particularly a nation that has adverse claims, would cause a blow to national pride. Rather than definitively and publically settling a dispute regarding a maritime border or control of islands and resources in a region, countries could enter brokered agreements with commercial entities, as opposed to state actors, to

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161. *See id.*

162. *Id.*

163. Anders Corr, *Enforce Law of the Sea Ruling: Stand with the Philippines Now, or Later Face China Alone*, FORBES (Jul. 13, 2016, 6:19 AM), <http://www.forbes.com/sites/anderscorr/2016/07/13/enforce-law-of-the-sea-ruling-stand-with-the-philippines-now-or-later-face-china-alone/#705464d14ac1>.

164. *See König, supra* note 157, at 3.

165. World Factbook, CENT. INTELLIGENCE AGENCY, (2015), <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html>, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (comparing the 2015 GDP numbers for the Republic of the Philippines and The People's Republic of China).



use petroleum or the profits derived from the sale of petroleum to quietly settle disputes.

The Kuril Islands, the South China Sea, and the Eastern Mediterranean maritime disputes all share one commonality: historically rooted claims to the disputed area paired with distrust of the other party. The complication of international law does not allow for a one-size-fits-all model, but the use of a private, commercial entity, such as an oil and gas company, in the negotiation process may allow for a dispute to be resolved peacefully without the countries feeling as if they have lost. For this to work effectively and for parties to trust the oil and gas companies as mediators in their negotiations, these must begin prior to any submission to the disputes to an international tribunal. Once before a tribunal for definitive resolution per international law, then the commercial entity would have a vested interest in the nation with the more favorable trade policies receiving the arbitration award or court judgment. Oil and gas companies can be used to broker the agreements in such a way that neither country officially renounces claim to the disputed maritime border.

All the countries mentioned in the above disputes have the desire to control a means to provide energy for their country and potentially export the oil and gas to help add money to the state coffers. Herein lies the potential solution to the dispute: energy and money. The oil and gas companies would have to find the right politicians from those two countries that would be willing to hear out the potential deal, but the produced petroleum and the money derived therefrom could be used as an alternative to a formal border-dispute claim. The oil and gas companies would act both as mediator and intermediary with the oil and gas and distribute it to the countries per the brokered deal. This solution sets aside all the other implications that accompany the maritime border disputes outside of control of natural resources but would grant parties the oil and gas or the revenue in exchange for quieting the dispute. These states need not formally renounce their claims regarding the maritime border, but rather quietly accept the revenue resulting from the deal. This proposed solution is not perfect and would suffer some difficulties, including lack of leverage and skepticism of corporations as international actors. Despite these shortfalls, the proposed solution is better than the current mechanisms and offers a greater potential of success.

If corporate actors broker such deals, exchanging the rights to develop the petroleum plays in exchange for the quieting of the maritime border dispute, the corporate actors would lack leverage in the deal. Corporate entities want to ensure, as best as possible, that their corporate assets remain

secure and in their exclusive control, even during financial downturn and political unrest. To make sure that state actors do not simply renege on the agreement, the payouts in terms of resources or revenue percentage would have to be directed more toward the countries, creating a lower profit margin for the oil and gas companies. The companies could also work into the deal the requirement to seek resolution of any subsequent dispute in an international arbitration, but this leads to the next concern with the role that corporations play in the international arena. It is not so much the worry that private entities play a role that government entities can also play, but when private companies exercise “direct and very significant influence” over the development of international law.<sup>166</sup> The concerns for many international legal scholars come from the prioritization of certain international contracts over that of later national law within the countries.<sup>167</sup> However, the types of agreements suggested by this comment would not come from private entities asserting their control over national law or to directly influence or alter international law. Rather, in exchange for the right to drill and develop, these commercial entities could use financial gain to quiet international disputes and placate the potential violence or regional unrest caused by ongoing maritime disputes.

### *Conclusion*

The Convention on the Law of the Sea brought countries together to join their mutual interests for a uniform international maritime law. Although the Law of the Sea helped to alleviate certain concerns regarding maritime law, certain disputes, due to their deep rooted historical and political differences, continue to proliferate despite the best efforts of the international community. Many of these areas contain massive amounts of untapped petroleum resources, so a resolution to these disputes would not only solve international diplomatic problems but also help certain countries economically. So far, mediations led by state actors or international governing bodies have not led to successful settlements of certain maritime disputes. Rather than doubling down on the efforts for state actors to resolve these disputes or force the parties into international court or arbitration, perhaps a new route could be attempted.

Despite the global skeptical perception of corporate involvement in international legal affairs, private involvement could help the process.

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166. Vaughan Lowe, *Corporations as International Law Actors and Law-Makers*, 14 *ITAL. YBK. INT'L L.*, 23, 23-26 (2004).

167. Julian Arato, *Corporations as Lawmakers*, 56 *HARV. INT'L L.J.* 229, 231 (2015).

Specifically, within the realm of oil and gas development, oil and gas companies could play the role of the mediator between state actors. Oil and gas companies share a common, limited goal with the state actors involved in these disputes: develop oil and gas in an economically and environmentally responsible manner. The commercial entities lack geopolitical opinions regarding state action—so long as that state action does not negatively impact their petroleum development—which places them in a good mediation position. The fungibility of money presents the potential for an alternative solution: rather than a signed treaty defining the borders, the two or more countries would silence their border disagreements in exchange for economically advantageous petroleum development. Nationalized oil and gas companies may present a problem for privately owned companies to mediate effectively, but nationalized and private oil and gas companies have worked together in development efforts. Successful commercial mediation would allow for the countries to develop their natural resources through a third party and settle a long-standing conflict without resorting to an international decision maker. Unsuccessful commercial mediation would leave the state actors in the same place regarding their disagreement as to their maritime boundaries and the oil and gas companies would have unsuccessfully used time and money to negotiate for the rights to drill—an all too common cost of doing business in the oil and gas community.

This comment's proposal does not claim to have uncovered the secret key to international dispute resolution. Rather than allowing the disputed control over huge deposits of subsea petroleum to sink negotiation efforts, this author's suggestion is for internal parties to use those deposits to facilitate a solution to the disputes. Oil and gas companies can use the potential payout from the petroleum development to calm, or even facilitate a resolution to, the maritime disputes. This successful facilitation of resolution would dispel the need for the countries having to submit to an international decision making body in which one state wins and the other state loses. While not the perfect solution, the encouragement of oil and gas companies to serve as mediators in maritime disputes for the control of petroleum deposits could present a positive alternative to the current state of international dispute resolution.