

# International Energy Investments and Unrecognized States: Opportunities and Risks for Private Actors

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*The recognition of an entity as a state is pivotal in international law. Whether it be that recognition grants statehood or merely confirms a state's legal existence, it has important implications for the concerned entity and for the entire international community. This article analyzes the impact of non-recognition on private energy companies holding investment interests in areas of disputed jurisdiction. A sovereignty dispute is, in itself, a source of tension between the concerned state entities. But this tension also extends to non-state actors operating in the disputed area. A series of risks arise for private interests, not only amid the dispute between the concerned entities but also after its potential settlement. The crucial question is what legal or*

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*commercial means can protect private interests from disturbance or discharge. In this article, these issues are discussed in the context of two case studies: the dispute between the Greek and Turkish communities of Cyprus, and that between Israel and Lebanon. A comparison between these cases brings to light a number of important considerations for companies operating or seeking to operate in areas with similar disputes. The article concludes that, although various legal mechanisms are available for the protection of private interests, their efficacy is uncertain. International law primarily protects the interests of states rather than non-state actors. Also, depending on the specifics of the dispute, the degree of recognition between the state entities and their participation to international treaties, the commercial value of resources, and the stage of operations, an area may be suitable or completely incompatible with the investment portfolio of a company. As a result, before expressing their interest in an area of uncertain jurisdiction, energy companies must do their due diligence and develop a risk mitigation strategy. Unfortunately, no risk mitigation mechanism is perfect in such complex situations. A company may eventually have to abandon an area if relations between the concerned state entities deteriorate.*

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## INTRODUCTION

This Article examines the nexus between international energy investments and unrecognized states.<sup>1</sup> The recognition of an entity as a state is pivotal in international law. Whether recognition grants statehood or merely confirms a state’s legal existence has important implications not only for the concerned entity but also for the entire international community.

State recognition primarily affects a territorial entity and its inhabitants. In general, it contributes to the treatment of that entity as a sovereign equal to other states:<sup>2</sup> possessing substantive rights, duties, powers, and immunities.<sup>3</sup> By contrast, the non-recognition of an entity as a state has an impact on its legal, economic, and socio-political progress. An unrecognized entity is almost invisible in international law. It may fail to invoke international law rights vis-à-vis the members of the international community, or resort to international forums to protect its interests.<sup>4</sup>

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<sup>1</sup> In international law, the capitalized term “State” describes an entity which meets the criteria of statehood. But since the relationship between statehood and recognition is unclear, the present study will use the term “state” in lowercase for all territorial state-like entities, whether recognized or not.

<sup>2</sup> U.N. Charter art. 2, ¶ 1.

<sup>3</sup> *Reparation for Injuries Suffered in Service of United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11). Non-state actors, like organizations (e.g., the UN) and individuals may also possess (limited) international legal personality (i.e., international rights, duties, procedural capacities) but states remain the main subjects of international law. *Id.* at 178–79; Philip Jessup, *The Subjects of a Modern Law of Nations*, 45(4) MICH. L. REV. 383, 385 (1947).

<sup>4</sup> Yaël Ronen, *Entities that Can Be States but Do Not Claim to Be*, STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 23, 24 (Duncan French ed., 2013).

Many unrecognized states are located in areas of strategic geopolitical importance which are, or are suspected to be, rich in natural resources like oil and gas and are thus alluring to foreign investors.<sup>5</sup> On some occasions, these areas are the subject of dispute between recognized and unrecognized states, and are offered to international investors for exploration and development.<sup>6</sup> In those situations, important questions arise about the challenges that energy investors may face and the appropriate legal responses to those risks.

The Mediterranean Sea region provides numerous examples of energy investment in unrecognized states. Two cases stand out: one between the Republic of Cyprus and the self-titled “Turkish Republic of Northern Cyprus” and another between Israel and Lebanon. In both cases, one of the entities is not recognized as a state by the other, or by certain United Nations (“UN”) member states. Additionally, hydrocarbons are present or suspected to be abundant in the affected areas, bringing them to the forefront of investors’ interest.<sup>7</sup> This Article analyzes the potential risks for private actors operating or seeking to operate in areas lacking recognition, and the means for the effective mitigation of those challenges.

The dynamics in each case study are different. Every region has its own history, investment culture, and domestic laws. This diversity might indicate that investment risks vary or are addressed differently from place to place. This Article will provide a comprehensive view of the relationship between unrecognized states and energy investments by analyzing these two cases. While the focus will center on oil and gas investments, as these are the main subjects in both case studies, the conclusions made in this Article extend to all energy projects—ranging from conventional to renewable resources—that involve private investments and unrecognized states.

The Article contains three main sections. Part I introduces the concept of a state and its recognition under international law.<sup>8</sup> Part II focuses on the selected case studies and analyzes the implications of non-recognition for private investments in energy law.<sup>9</sup> It considers the risks that private actors may face amid the dispute between territorial entities as well as

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<sup>5</sup> E.g., Kurdistan.

<sup>6</sup> E.g., The self-called “Turkish Republic of North Cyprus” in North Cyprus.

<sup>7</sup> Georgios Georgiou et al., *Cyprus Sees Gas Deal with Egypt as Cairo Weighs Israeli Supply*, BLOOMBERG (Feb. 20, 2018, 2:00 PM), <https://www.bloomberg.com/news/articles/2018-02-20/cyprus-sees-gas-deal-with-egypt-as-cairo-weighs-israeli-supply>.

<sup>8</sup> See *infra* Part I.

<sup>9</sup> See *infra* Part II. Even when an energy company is wholly or partly owned by its home state (e.g., Eni), its operations in the host state are conducted by subsidiaries which are private companies.

from the parties' attempt to settle their differences, and discusses the potential legal responses to those challenges under international law. Part III of the Article analyzes alternative commercial means which might assist private actors in securing their investments in areas of uncertain jurisdiction.<sup>10</sup> By bringing together (1) the doctrine of public international law, (2) the law of oil and gas contracts, and (3) the rules of international investment law, this Article seeks to shed light on a complex yet relevant issue and to provide guidance to actors with interests in the examined parts of the Mediterranean or in other areas with similar features.<sup>11</sup>

## I. THE CONCEPT OF STATE RECOGNITION

### A. Definition of State

The concept of the state is central to international law. A state's functions, acts, rights, and duties are governed by international conventions,<sup>12</sup> custom,<sup>13</sup> judicial decisions,<sup>14</sup> and Resolutions by the United Nations ("UN").<sup>15</sup> Accordingly, the formation of a state is subject

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<sup>10</sup> See *infra* Part III.

<sup>11</sup> Although both examined cases are heavily politicized, the present analysis is legal and does not reflect the authors' political views. Any reference to factual or historic events is based on the primary (legal) and secondary (literature, media) sources cited in the Article. This study is independent of any academic institutions or professional bodies with which the authors are affiliated.

<sup>12</sup> These can be bilateral or multilateral.

<sup>13</sup> In this Article, the terms "custom," "customary rule," and "customary law" refer to international, not regional law. According to Article 38(1) ICJ Statute, custom is a source of international law (along with international conventions, general principles of law, judicial decisions, and the teachings of the most highly qualified publicists). A customary rule consists of two main elements: state practice (long, general, consistent) and *opinio juris* (conception that this practice is accepted by states as law). For an analysis, see I.C.J. Statute, art. 38, ¶ 1; North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8–13 (7th ed. 2008); ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 51 (1971); HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 53–54 (1972).

<sup>14</sup> Judicial decisions are subsidiary sources of international law. Although the rule of *stare decisis* (precedent) does not apply in international law, international courts interpret or identify rules of international law.

<sup>15</sup> Typically, the Resolutions of the UN General Assembly are mere recommendations, and as such they are not legally binding instruments. However, it is accepted that they possess important legal value as evidence of *opinio juris* for the presence of customary norms. Marco Divac Öberg, *The Legal Effects of Resolutions of the UN*

to certain requirements of international law. According to Article 1 of the Montevideo Convention, “the State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) a government; and d) capacity to enter into relations with other States.”<sup>16</sup>

The first criterion of statehood requires that a concrete bond exist between the people and the territory in which they reside, irrespective of the inhabitants’ nationality and language.<sup>17</sup> The second criterion requires that a state possess *some* territory, regardless of its size,<sup>18</sup> and irrespective of the presence of land or maritime boundaries.<sup>19</sup> The third criterion requires that the central government of the state be coherent and competent (or “effective”).<sup>20</sup> The fourth criterion requires that the state possess sovereignty. Externally, sovereignty denotes the independence of the state in relation to others.<sup>21</sup> Domestically, it signifies the state’s authority to control and regulate the activities of all persons and the conduct of any events within its domain.<sup>22</sup>

### B. *The Act of Recognition*

Although international law provides the four criteria of statehood, it is uncertain whether an entity which meets those requirements is *ipso facto* a state or requires recognition by other states in order to exist in the

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*Security Council and General Assembly in the Jurisprudence of the ICJ*, 16(5) EUR. J. INT’L L. 879 (2005).

<sup>16</sup> Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 3802 (1936). It is supported, however, that these four criteria are only minimal (with a limited scope) and that additional criteria of statehood should be considered, like self-determination, democratic regime, and respect of human rights. JAMES FAWCETT, *THE LAW OF NATIONS* 38–39 (1968).

<sup>17</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 40–41 (1979).

<sup>18</sup> Examples of small states include: Monaco, San Marino, Malta, and the Vatican City.

<sup>19</sup> North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 46 (Feb. 20); Question of the Monastery of Saint Naoum (Albanian Frontier), Advisory Opinion, 1924 P.C.I.J. (ser. B) No. 9, at 10 (Sept. 4); Deutsche Cont’l Shelf Gas-Gesellschaft v. Polish State, 5 Ann. Dig. 11, 14–15 (Ger.-Pol. Mixed Arb. Trib. 1929).

<sup>20</sup> CRAWFORD, *supra* note 17, at 116.

<sup>21</sup> Island of Palmas (Neth. v. U.S.), (1928) Arbitral Award, 829, 832.

<sup>22</sup> MALCOLM SHAW, *INTERNATIONAL LAW* 645 (6th ed. 2008); FREDERICK MANN, *The Doctrine of Jurisdiction in International Law* in 111 RECUEIL DES COURS 1, 13 (The Hague Acad. of Int’l L. ed., 1964).

international community.<sup>23</sup> To a great extent, this uncertainty is caused by the debate between the proponents of two divergent theories: the constitutive and the declaratory. According to the former, an entity becomes a state upon its recognition by other states.<sup>24</sup> According to the latter, a state exists from the moment it meets the four criteria of statehood, meaning its subsequent recognition is simply a declaratory or political act.<sup>25</sup> In both situations, recognition can be: (1) individual (by individual state acts) or collective (by a group of states signing a multilateral treaty); (2) express (by diplomatic or governmental acts) or implicit (through the establishment of amicable relations and cooperation); (3) conditional (subject to the meeting of certain conditions, like the presence of democratic governance) or unconditional; (4) *de facto* (temporary acknowledgment of the current government) or *de jure* (definite, permanent, and irrevocable state recognition).<sup>26</sup>

The constitutive theory prevailed in the nineteenth century, as it was supported strongly by positivists.<sup>27</sup> The main foundation of this theory is that a state's external sovereignty in its relations with third-party states, an element of statehood, is only acquired by recognition. So, until this legal requirement is met, the entity is not a state.<sup>28</sup> However, problems arise when an entity that meets the criteria of statehood is recognized only by some states but not by others.<sup>29</sup> As a result, the constitutive theory cannot

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<sup>23</sup> “[I]t has long been asserted [by the proponents of the declaratory theory] ‘that the formation of a new State is ... a matter of fact, and not of law’...On the other hand, according to the constitutive theory (the theory that the rights and duties pertaining to statehood derive from recognition by other States), the proposition that the existence of a State is a matter of fact seems axiomatic ... Neither theory of recognition satisfactorily explains modern practice ... Fundamentally the question is whether international law is itself, in one of its most important aspects, a coherent or complete system of law.” CRAWFORD, *supra* note 17, at 4–5.

<sup>24</sup> JAMES BRIERLY, *THE LAW OF NATIONS* 138–39 (6th ed. 1963).

<sup>25</sup> Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 *AM. J. INT’L L.* 605, 605–08 (1941).

<sup>26</sup> DANIEL HÖGGER, *THE RECOGNITION OF STATES* 15–25 (2014); Herch Lauterpacht, *Recognition of States in International Law*, 53 *YALE L. J.* 385, 386 (1944).

<sup>27</sup> “As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not imply membership of the Family of Nations. Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members as having been recognized by the body of members already in existence when they were born.” LASSA OPPENHEIM, *INTERNATIONAL LAW VOL 1. PEACE* 125 (8th ed. 1955); *see also* JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 7 (1987).

<sup>28</sup> *See infra*.

<sup>29</sup> *See infra*.

be relied on in determining with certainty whether an entity is a state or not.

The declaratory theory gained significant ground in the twentieth century.<sup>30</sup> Proponents appreciated its less-rigid construction.<sup>31</sup> But, although the declaratory theory allows a state to exist even without recognition, it is criticized for failing to consider the way in which the entity has met the four requirements of statehood.<sup>32</sup> In particular, when the declaration of statehood rests on unlawful acts, such as the use of force, this can cause serious problems. The very existence of such state would contradict international law, and there would be no legal act granting statehood if it were to be recognized.<sup>33</sup> Several decades after the development of the above theories, the law of statehood thus remains extremely vague, causing problems in both theory and practice.<sup>34</sup>

### C. Types of State Entities Based on Recognition

Based on the degree of recognition, an entity can be: (1) fully recognized, and a member of the UN;<sup>35</sup> (2) a member of the UN but receive limited recognition, *viz.*, by some states;<sup>36</sup> (3) have no membership

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<sup>30</sup> “[T]he recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates.” *Deutsche Cont’l Shelf Gas-Gesellschaft v. Polish State*, 5 Ann. Dig. 11, 13 (Ger.-Pol. Mixed Arb. Trib. 1929); “[T]he effects of recognition by other States are purely declaratory.” Conference in Yugoslavia, Arbitration Commission, Opinion 1, 29 November 1991, 92 I.L.R. 162, 164–65 (Nov. 1991); see CRAWFORD, *supra* note 17, at 24.

<sup>31</sup> For example, the declaratory theory was applied for the recognition of Slovenia, Croatia, and Bosnia and Herzegovina by European states after the dissolution of the Federal Republic of Yugoslavia in 1991, although the newly independent entities were lacking an effective government. See Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 LEIDEN J. INT’L L. 467, 470 (2011); Allain Pellet, *Appendix: Opinions No. 1, 2, and 3 of the Arbitration Committee of the International Conference on Yugoslavia*, 3 EUR. J. INT’L L. 182, 182–83 (1992); *Annex 3: Opinion No. 4-10 of the Arbitration Commission of the International Conference on Yugoslavia*, 4 EUR. J. INT’L L. 74, 90 (1993).

<sup>32</sup> Ryngaert and Sobrie, *supra* note 31, at 470.

<sup>33</sup> See the “Turkish Republic of Northern Cyprus” discussed *infra*.

<sup>34</sup> Kelsen, *supra* note 25, at 605.

<sup>35</sup> E.g., Germany; Great Britain; Greece; Honduras; Italy; Ireland; Japan; Norway; USA. These are recognized by the remaining (192) UN members, and comprise the vast majority of the world’s states.

<sup>36</sup> E.g., Israel, which is not recognized by 32 UN members.



in the UN but still receive recognition by many states;<sup>37</sup> (4) be recognized by one state;<sup>38</sup> or (5) be recognized by no states.<sup>39</sup> The latter four categories are often merged by theorists.<sup>40</sup> In that sense, territorial entities are broadly classified between “recognized states” and “unrecognized states.” Even if a territorial entity is recognized by a significant number of states but not by a group of others, it can be considered “unrecognized” in its affairs with the latter.<sup>41</sup> This demonstrates two main points: (1) that recognition is not a fixed term but a fluid and contextual concept, as “a spectrum of degrees of recognition” exists;<sup>42</sup> and (2) that the issue of state recognition is highly significant for the concerned entity.

It is also important to distinguish the above entities from so-called “failed states” and disputed territories. The term “failed state” describes an entity which possesses full statehood but lacks a competent central government.<sup>43</sup> Despite its domestic problems, a failed state is not necessarily unrecognized. Disputed territories, on the other hand, typically involve two or more legitimate states which are in dispute about the possession of certain territories or the position of their mutual boundaries.<sup>44</sup> Insofar as the involved entities meet the criteria of statehood, a mere dispute about their mutual boundaries or controlled territories does not prejudice their existence. On some occasions, though, a territorial

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<sup>37</sup> Palestine, which is a UN observer (non-member) recognized by over 130 UN members (more than half of the world’s sovereign States); Kosovo, which is recognized by 113 UN members.

<sup>38</sup> E.g., the self-called “Turkish Republic of Northern Cyprus”, which is recognized only by Turkey.

<sup>39</sup> E.g., Somaliland.

<sup>40</sup> See Nina Caspersen and Gareth Stansfeld, *Introduction to UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM* 3 (Nina Caspersen and Gareth Stansfeld eds., 2011); Francis Owtram, *The Foreign Policies of Unrecognized States*, in *UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM* 128, 129 (Nina Caspersen and Gareth Stansfeld eds., 2011).

<sup>41</sup> E.g., Israel.

<sup>42</sup> Owtram, *supra* note 40.

<sup>43</sup> E.g., Somalia. By contrast, Somaliland, which is independent and possesses “a high degree of internal legitimacy” is unrecognized by the international community. For an analysis see Scott Pegg and Pal Kolsto, *Somaliland: Dynamics of Internal Legitimacy and (lack of) External Sovereignty*, 66 *GEOFORUM* 193 (2015).

<sup>44</sup> E.g., the dispute between China and Japan about sovereignty over the *Senkaku/Diaoyu* islands in the East China Sea and the maritime boundaries therein. A territorial or boundary dispute is a difference between two or more state entities that remains unresolved for a long time. John Merrills, *The Means of Dispute Settlement*, in *INTERNATIONAL LAW* 529, 529–30 (Malcom D. Evans ed., 2003); JUNWU PAN, *TOWARD A NEW FRAMEWORK FOR PEACEFUL SETTLEMENT OF CHINA’S TERRITORIAL AND BOUNDARY DISPUTES* 23–24 (2009).

dispute may also involve unrecognized states.<sup>45</sup> In that case, the issue of statehood is predominant and must be resolved before the territorial or boundary settlement can be.

## II. THE IMPACT OF STATE (NON-)RECOGNITION ON ENERGY INVESTMENTS: CASE STUDIES

The next two examples illustrate the concepts outlined in the above sections and demonstrate the impact that the lack of state recognition may have on energy investments situated in the involved territorial entities. Private operations may temporarily freeze or be permanently discharged. Vested property and economic rights may vanish, and the reputation of investors may be severely harmed.

### *A. Republic of Cyprus/"Turkish Republic of Northern Cyprus"*

#### *1. Case Features: The Subjects of Dispute*

The island of Cyprus ("Cyprus"), demographically comprised of 82% Greek Cypriots and 18% Turkish Cypriots, became an independent state in 1960 after a long history of British administration.<sup>46</sup> A constitution was established the same year in order to "balanc(e) the interests of the island's two communities,"<sup>47</sup> and the Treaty of Guarantee was signed appointing Greece, Turkey, and the United Kingdom as guarantors of the independence, security, and territorial integrity of Cyprus.<sup>48</sup> Yet, the tension between the two demographic communities remained.<sup>49</sup>

In 1974, a coup d'état was launched against President Archbishop Makarios III by the Cyprus National Guard and supported by the Greek military junta, seeking to unite the island with Greece (in Greek "ένωσις").<sup>50</sup> In response, Turkey invaded Cyprus to protect the interests

<sup>45</sup> As the cases examined in Part II.

<sup>46</sup> DUGARD, *supra* note 27, at 108.

<sup>47</sup> *Id.*

<sup>48</sup> Treaty Concerning the Establishment of the Republic of Cyprus art. 1–3, Aug. 16, 1960, 382 U.N.T.S. 5476.

<sup>49</sup> It was largely expressed that the 1960 treaties were imposed by external powers and did not provide a fair distribution of control in the island. MOVEMENT FOR FREEDOM AND JUSTICE IN CYPRUS, BLOODY TRUTH 329–30 (2009); MARTIN PACKARD, GETTING IT WRONG: FRAGMENTS FROM A CYPRUS DIARY 1964 16 (2008).

<sup>50</sup> DUGARD, *supra* note 27, at 108. The idea of union with Greece had been active since the time of Ottoman control and reached a peak between 1950 and 1960. JAMES KER-

of the Turkish minority.<sup>51</sup> The war led to the de facto partition of the island into two sections: the northern section, covering thirty-seven percent of the territory and controlled by Turkish forces; and the southern section, which remained under Greek Cypriot administration,<sup>52</sup> subject to the so-called “green line.”<sup>53</sup> This line, which extends approximately 180 kilometers across the island, is not an international boundary<sup>54</sup> but a demilitarized buffer zone patrolled by the United Nations to maintain the peace in Cyprus.<sup>55</sup>

The Republic of Cyprus (“RC”) in the South is a sovereign state and UN member, receiving recognition by the entire international community, with the exception of Turkey. It became a European Union (“E.U.”) member in 2004 and joined the eurozone in 2008.<sup>56</sup> The RC maintains international relations with other states and has adopted international conventions, like the United Nations Convention on the Law of the Sea (“UNCLOS”).<sup>57</sup> Under UNCLOS, the RC is entitled to a twelve-nautical

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LINDSAY, *THE CYPRUS PROBLEM – WHAT EVERYONE NEEDS TO KNOW 22–27* (2011) (ebook).

<sup>51</sup> DUGARD, *supra* note 27, at 108; JAMES KER-LINDSAY, *THE CYPRUS PROBLEM – WHAT EVERYONE NEEDS TO KNOW 22–27* (2011) (ebook). Turkey based this action on Article 4 of the Treaty of Guarantee, according to which: “(i)n the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions. In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.” Treaty of Guarantee art. 4, Aug. 16, 1960, 382 U.N.T.S. 3.

<sup>52</sup> An exchange of population was effected: Turkish Cypriots were moved from the South part of the island to the North and Greek Cypriots were moved from the occupied part to the South.

<sup>53</sup> Bruce Leigh, *Cyprus: A Last Chance* 58 FOREIGN POLICY 115, 118 (1985); see Illustration of the Green Line/Buffer Zone in *The Green Line in Cyprus*, MILITARY HISTORIES, <http://www.militaryhistories.co.uk/greenline/explanation> (last visited June 1, 2018). The “green line” separates the Turkish-Cypriot community in the north from the Greek-Cypriot community in the south.

<sup>54</sup> This line (which is a “no man’s land”) is not an international boundary as it does not divide two sovereign states.

<sup>55</sup> “Since 2003, a number of crossing points have opened up in the green line between the north and the south.” *About the Buffer Zone*, U.N. PEACEKEEPING FORCE IN CYPRUS, <https://unficyp.unmissions.org/about-buffer-zone> (last visited June 1, 2018).

<sup>56</sup> *Welcome Message from Ambassador Kornelios S. Korneliou*, CYPRUS AT THE UN <http://www.cyprusun.org> (last visited Jun. 1, 2018); *Overview*, EUROPEAN UNION [https://europa.eu/european-union/about-eu/countries/member-countries/cyprus\\_en](https://europa.eu/european-union/about-eu/countries/member-countries/cyprus_en) (last visited June 1, 2018).

<sup>57</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

mile (“M”)<sup>58</sup> Territorial Sea (“TS”); a 200-M Exclusive Economic Zone (“EEZ”); and a 200-M Continental Shelf (“CS”).<sup>59</sup> In 2003 and 2010, the RC signed agreements with Egypt and Israel, respectively, for the delimitation of its maritime zones in the South and East Mediterranean Sea.<sup>60</sup>

By contrast, the “Turkish Republic of Northern Cyprus” (“TRNC”)<sup>61</sup> in the North is a self-proclaimed “breakaway” state. Even if the entity meets the first three criteria of statehood regarding territory, government, and permanent population, problems arise with the requirement of sovereignty.<sup>62</sup> In 1983, Rauf Denktash, the president of the “TRNC,” declared it an independent state.<sup>63</sup> However, the unilateral declaration of independence by an entity is not an act of international law but a purely internal act.<sup>64</sup> The rules of international law apply later, regarding whether the international community recognizes the declaration of independence. Unless such declaration receives international acceptance, it will only be “ink on paper.”<sup>65</sup>

There is no specific rule in international law as to whether states must recognize an entity as a state. Notwithstanding, the general rules of international law and *jus cogens* may prohibit recognition when an entity’s

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<sup>58</sup> “M” is the abbreviation for the nautical mile used by the International Hydrographic Organization and by the International Bureau of Weights and Measures.

<sup>59</sup> UNCLOS, *supra* note 57, at 403, 427–28, 431.

<sup>60</sup> *Cyprus*, UN, <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/CYP.htm> (last visited Oct. 19, 2018).

<sup>61</sup> The name used herein for Northern Cyprus is that used in literature. The UN refers to it as “occupied part of the Republic of Cyprus.” See S.C. Res. 550 (May 11, 1984). The Article uses the term “TRNC” in quotation marks as the entity is a self-claimed state. The same is found in legal sources (e.g., the decision of the European Court of Human Rights in *Cyprus v. Turkey*).

<sup>62</sup> MALCOLM SHAW, INTERNATIONAL LAW, 184 (Cambridge University Press ed., 8th ed. 2017).

<sup>63</sup> Leigh, *supra* note 53, at 128–29.

<sup>64</sup> See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government in Kosovo, Public Sitting, CR 2009/28, 27 [31] (Dec. 4); Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government in Kosovo, Public Sitting, CR 2009/32, 47 [6] (Dec. 10); JURE VIDMAR, *Unilateral Declarations of Independence in International Law in STATEHOOD, SELF-DETERMINATION, AND MINORITIES: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW* 60, 61–62 (D. French ed., 2013).

<sup>65</sup> See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government in Kosovo, Public Sitting, CR 2009/28, 27 [31] (Dec. 4); Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government in Kosovo, Public Sitting, CR 2009/32, 47 [6] (Dec. 10); VIDMAR, *supra* note 64, at 61–62.

declaration of independence is based on internationally unlawful acts (e.g., use of force). In particular, Article 2(4) of the UN Charter reflects a customary rule which prohibits the use of force between members of the international community.<sup>66</sup> Likewise, *jus cogens* prohibits acts of aggression and attacks against the territorial integrity of a state by others.<sup>67</sup> This norm applies *erga omnes* and cannot be ruled out by treaty or consent.<sup>68</sup>

The “TRNC” is an example of this type of situation. The UN Security Council, the European Community, the Committee of Ministers of the Council of Europe, and the Commonwealth Heads of Government condemned its unilateral declaration of independence as legally invalid and called upon the international community to deny recognition of the self-proclaimed state.<sup>69</sup>

Consequently, the declaration of independence by the “TRNC” is not merely a unilateral internal act, but an illegal one under international law.<sup>70</sup> The invasion and partition of Cyprus, and the continuous occupation of the North violates Article 2(4) of the UN Charter which prohibits the use of force in international relations against the territorial integrity or independence of any state. As stressed by the International Court of Justice (“ICJ”) in the case of Kosovo (with reference to the unilateral declarations of independence by various territorial entities, including the “TRNC”),

[T]he illegality attached to [those] declarations of independence . . . stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would

<sup>66</sup> Exceptionally, the use of force can be authorized by the UN Security Council or based on self-defense. U.N. Charter art. 42, 51.

<sup>67</sup> *Barcelona Traction, Light and Power Company, Limited Judgment (Belg. v. Spain)* 1970 I.C.J. 3, 33–34 (Feb. 5).

<sup>68</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 337 [hereinafter Vienna Convention]; Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, U.N. Doc. A/56/10 (2001); Int’l Law Comm’n, Rep. on the Work of Its Twenty-Eighth Session, U.N. Doc. A/31/10, at 102 (1976).

<sup>69</sup> See U.N. SC Resolutions: 3212(XXIX) of 1 November 1974; 3395(XXX) of 20 November 1975; 32/15 (1977) of 9 November 1977; 33/1(1978) of 9 November 1978; 34/30 (1979) of 20 November 1979; 37/253(1983) of 13 May 1983; 541(1983) of 18 November 1983; Statement of the European Economic Community issued on 16 November 1983; Resolution of the Committee of Ministers of the Council of Europe adopted on 24 November 1983; Communique issued at the Commonwealth Summit Conference in New Delhi on 29 November 1983.

<sup>70</sup> The European Court of Human Rights affirmed that “it is evident from international practice . . . that the international community does not recognize the ‘TRNC’ as a state under international law [and] the Republic of Cyprus has remained the sole legitimate government of Cyprus.” *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. at 21.

have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of peremptory character (*jus cogens*).<sup>71</sup>

To this day, the “TRNC” is only recognized by Turkey.<sup>72</sup> It has no international relations with other states,<sup>73</sup> nor has it signed international conventions, and it is not member of the UN, the E.U., or the eurozone.

A series of attempts have taken place in past years to secure a mutually accepted solution for the involved communities and their people. These include long bilateral negotiations, suggestions for demilitarization and reunification of the island based on a bizonal, bicomunal federation, and a referendum held in the two communities of Cyprus in 2004 on the UN-proposed “Annan Plan” which was eventually rejected by the RC.<sup>74</sup> Yet, four decades after the war, the “Cyprus question”<sup>75</sup> remains unresolved, raising concerns to the international community about peace and stability in the southeast Mediterranean.

Despite its status as a breakaway entity and its nonrecognition by the international community, the “TRNC” proclaims the powers of a state, asserting that it possesses full sovereignty on the occupied land and sovereign rights at sea. In 2011, it signed an agreement with Turkey for the delimitation of its’ CS in the eastern Mediterranean.<sup>76</sup> Because the “TRNC” lacks statehood, the agreement was not listed in the official deposit of the UN Department of Oceans and the Law of the Sea.<sup>77</sup> Despite

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<sup>71</sup> Accordance with International Law of the Unilateral Declaration of Independent in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. ¶ 81 (July 22).

<sup>72</sup> This makes the “TRNC” the entity with the least recognition in the world. David Milne, *One State or Two? Political Realism of the Cyprus Question*, 92 COMMONWEALTH J. OF INT’L AFF. 145, 147 (2010); Stephan Talmon, *The Cyprus Question Before the European Court of Justice*, 12(4) EUR. J. OF INT’L L. 727, 727 (2001); Vasileios Karakasis, *Energy Security and the Cyprus Question: “Securitization” of Energy in the Eastern Mediterranean*, 27 Politicon: POL. SCI. J. 5, 29 (2015).

<sup>73</sup> Except with Turkey, which is the parent-state and guarantor country of the entity in all negotiations for the Cyprus question.

<sup>74</sup> See DAVID HANNAY, David Hannay, *Cyprus: Lessons from the Debacle of 2004 and the Way Ahead*, 95(383) THE ROUND TABLE 95, 95–100 (Jan. 2006).

<sup>75</sup> Republic of Cyprus, *The Cyprus Question*, Permanent REPRESENTATION OF THE REPUBLIC OF CYPRUS TO THE EUROPEAN UNION, [http://www.mfa.gov.cy/mfa/PermRep/PermRep\\_Brussels.nsf/page32\\_en/page32\\_en?OpenDocument](http://www.mfa.gov.cy/mfa/PermRep/PermRep_Brussels.nsf/page32_en/page32_en?OpenDocument) (last visited June 1, 2018).

<sup>76</sup> Letter from Y. Halit Çevik, Permanent Representative, Turk., to Sec’y-Gen., United Nations (Apr. 29, 2014) [https://digitallibrary.un.org/record/770697/files/A\\_68\\_857-EN.pdf](https://digitallibrary.un.org/record/770697/files/A_68_857-EN.pdf).

<sup>77</sup> Nikolaos Ioannidis, *The Continental Shelf Delimitation Agreement between Turkey and “TRNC,”* BLOG OF THE EUR. J. OF INT’L L. (May 26, 2014), <https://www.ejiltalk.org/the-continental-shelf-delimitation-agreement-between-turkey-and-trnc>.

the status of this agreement, the maritime claims of the “TRNC” overlap with the RC’s entitlements under international law.<sup>78</sup>

The recent discoveries of the Leviathan and Tamar offshore gas fields in Israel by Noble Energy,<sup>79</sup> and of the Zohr gas field by Eni in Egypt<sup>80</sup> sparked hopes that similar findings could be made in Cyprus.<sup>81</sup> In 2011, Noble made a discovery in the Aphrodite gas field in Block 12 of the RC.<sup>82</sup> In February 2018, Eni confirmed a promising gas discovery in Block 6, which it had previously received from the RC for exploration.<sup>83</sup> However, Eni’s operations in Block 3 were disrupted when a fleet of Turkish warships reportedly approached the drillship Saipem 12000 and threatened to use force, asserting that the licensed blocks fall within the jurisdiction of the “TRNC.”<sup>84</sup> After several days of standstill, the Italian drill abandoned the area and reportedly moved to Morocco for scheduled operations.<sup>85</sup> Following this event, Turkey continued to issue navigational

<sup>78</sup> *Id.*

<sup>79</sup> *Operations: Eastern Mediterranean: Trailblazing Toward Energy Security*, NOBLE ENERGY, <https://www.nblenergy.com/operations/eastern-mediterranean-trailblazing-toward-energy-security> (last visited June 1, 2018) [hereinafter NOBLE ENERGY].

<sup>80</sup> *Zohr: Production Underway in Record Time*, ENI, [https://www.eni.com/en\\_IT/operations/upstream/exploration-model/zohr-egypt.page](https://www.eni.com/en_IT/operations/upstream/exploration-model/zohr-egypt.page) (last visited June 1, 2018).

<sup>81</sup> Andreas Stergiou, *Turkey-Cyprus-Israel Relations and the Cyprus Conflict*, 18(4) J. OF BALKAN AND NEAR EASTERN STUD. 375, 381 (2016).

<sup>82</sup> NOBLE ENERGY, *supra* note 79; see *Illustration of Offshore Cyprus Exploration Blocks in Cyprus Blocks Attract Six Applications*, OIL & GAS J. (July 28, 2016), <https://www.ogj.com/articles/2016/07/cyprus-blocks-attract-six-applications.html>.

<sup>83</sup> *Eni announces a gas discovery Offshore Cyprus*, ENI, [https://www.eni.com/en\\_IT/media/2018/02/eni-announces-a-gas-discovery-offshore-cyprus](https://www.eni.com/en_IT/media/2018/02/eni-announces-a-gas-discovery-offshore-cyprus) (last visited June 1, 2018); *Eni makes ‘Zohr-like’ discovery offshore Cyprus*, ENI, <https://www.offshoreenergytoday.com/eni-makes-zohr-like-discovery-offshore-cyprus> (last visited June 1, 2018); see *Illustration of Offshore Cyprus Exploration Blocks in Cyprus Blocks Attract Six Applications*, OIL & GAS J. (July 28, 2016), <https://www.ogj.com/articles/2016/07/cyprus-blocks-attract-six-applications.html>.

<sup>84</sup> *ENI Drillship at Standstill, North Says Will Not Accept Activities in Block 3 (Update 2)*, CYPRUSMAILONLINE, (Feb. 10, 2018), <http://cyprus-mail.com/2018/02/10/kasoulides-turkish-interference-expected-increase-cyprus-eez; Turkey’s Navy Threatens To Sink Eni Drilling Ship Offshore Cyprus>, OILPRICE.COM, (Feb. 23, 2018), <https://oilprice.com/Latest-Energy-News/World-News/Turkeys-Navy-Threatens-To-Sink-Eni-Drilling-Ship-Offshore-Cyprus.html>; see *Illustration of Offshore Cyprus Exploration Blocks in Cyprus Blocks Attract Six Applications*, OIL & GAS J. (July 28, 2016), <https://www.ogj.com/articles/2016/07/cyprus-blocks-attract-six-applications.html>; *Illustration of Turkish Cypriot claims in EEZ in Elias Hazou, Cyprus Should Seek Maritime Arbitration to Nullify Turkish EEZ Claims*, CYPRUSMAIL (July 23, 2017), <https://cyprus-mail.com/2017/07/23/cyprus-seek-maritime-arbitration-nullify-turkish-eez-claims>.

<sup>85</sup> *Eni Drillship Leaves Cyprus after Turkish Disruption*, INTERFAX GLOBAL ENERGY (Feb. 28, 2018), <http://interfaxenergy.com/gasdaily/article/29792/eni-drillship-leaves-cyprus-after-turkish-disruption>. Later on, Eni reportedly announced that it would return to

telex warnings (“Navtex”), reserving the entire maritime area around the RC’s oil and gas blocks for military training.<sup>86</sup> This situation may further affect the plans of ExxonMobil and Eni to perform drilling in Blocks 10, 2, and 8<sup>87</sup> or other energy companies seeking to receive permits from RC in the future.

The dispute between the RC and the “TRNC” is long and complicated. It involves the question of statehood and its form (whether as a single, unified, sovereign state functioning as federation, or as two autonomous states comprising a confederation), the allocation of territorial sovereignty and the establishment of boundaries on land and at sea, the administration of the island, and, ultimately, the co-existence between the two communities.

Given the island’s proximity to the large gas reserves of Israel and Egypt, and its strategic position as an energy passage from Europe to Africa and Asia, it is arguable that the dispute is also a quest for control of the potential natural resources of the seabed. Turkey insists that any exploration and exploitation of natural resources in Cyprus should be conducted mutually between the Greek and the Turkish communities of the island.<sup>88</sup> This challenges the RC’s plans to proceed with offshore operations and creates risks for its current or prospective license holders. The next section examines the risks which energy investors may face in Cyprus, both pending and after a potential settlement of the sovereignty

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Cyprus to “fulfill its obligations” under its contracts with the RC. *Italy’s Eni Says Won’t be Scared Again by Turkish Warships Off Cyprus*, THE NATIONAL HERALD, (Mar. 17, 2018), <https://www.thenationalherald.com/193968/cyprus-eni-committed-to-gas-search-despite-turkeys-dissent>.

<sup>86</sup> Kostis Geropoulos, *The Escalation of Turkey’s Actions in Cyprus’ EEZ Brings a New Dimension That Cyprus Can Only Confront Through Diplomatic and Legal Means*, NEW EUR. (Feb. 16, 2018), <https://www.neweurope.eu/article/gas-drilling-navtex-fuel-turkey-cyprus-tensions-east-med>.

<sup>87</sup> According to Charles Ellinas, CEO of Cyprus Natural Hydrocarbons Company, Turkey’s stance is more likely to affect Eni than Exxon in the future, as blocks 2 and 8 fall within the Turkish Cypriot claims in the Mediterranean, whereas block 10 does not. *Id.*; see *Illustration of Offshore Cyprus Exploration Blocks in Cyprus Blocks Attract Six Applications*, OIL & GAS J. (July 28, 2016), <https://www.ogj.com/articles/2016/07/cyprus-blocks-attract-six-applications.html>.

<sup>88</sup> George Psyllides, *Turkey Issues New Navtex for Cyprus EEZ (updated)*, CYPRUSMAILONLINE (Mar. 10, 2018), <http://cyprus-mail.com/2018/03/10/turkey-issues-new-navtex-cyprus-eez>. “Either we will do it together – by discussing, agreeing and moving together – or things will stop, or, we (Turkish Cypriots) will do the same thing: we will start exploiting and drilling as well... Our argument is based on historic rights and the rights deriving from the partnership republic” said Kudret Ozersay, foreign minister of the ‘TRNC.’” *Id.*



dispute, and the means to address those risks effectively under international law.

## 2. *Challenges for Energy Investors Amid the Parties' Dispute and Legal Responses*

The risks that may arise for private investors, pending a settlement of the Cyprus question, vary from a temporary delay in operations to permanent cancellation due to forcible eviction. These are analyzed below.

The first risk posed by the dispute is the issuance of Navtex by Turkey in the waters surrounding Cyprus.<sup>89</sup> The warnings extended to date cover precisely the blocks which the RC awarded for exploration, affecting current operations.<sup>90</sup> The consequences vary, depending on whether the delay in operations is characterized as *force majeure* or contract frustration.<sup>91</sup> In the first instance, operations will be temporarily stalled for as long as Turkey's Navtex last. But if the parties decide that operations are no longer viable in that area, they may terminate the contract early on the basis of frustration or impossibility of performance, discharging the entire investment.<sup>92</sup>

The crucial legal question is whether the issuance of Navtex by Turkey in the waters of Cyprus is lawful. Absent an international maritime boundary between the two parts of the island, it is unclear where exactly the claims of each side should begin and end. Turkey asserts that the blocks which the RC awarded in the southern and eastern Mediterranean fall within the CS of Turkey and the "TRNC."<sup>93</sup> However, this claim can be legally challenged. Under conventional and customary international law, the RC is legally entitled to a 12-M TS, a 200-M EEZ, and a 200-M

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<sup>89</sup> See *supra* Part II.

<sup>90</sup> See *supra* notes 86 and 87 and accompanying text.

<sup>91</sup> This rests on the contracts' clauses and governing law. Typically, *force majeure* applies in civil law systems, whereas frustration is met in common law. However, that is not always absolute. For instance, it is usual for common law contracts to bear a *force majeure* clause.

<sup>92</sup> Compare GUENTER TREITEL, THE LAW OF CONTRACT 841 (10th ed. 1999), with EWAN MCKENDRICK, FORCE MAJEURE AND FRUSTRATION OF CONTRACT (Ewan McKendrick ed., 1995).

<sup>93</sup> Illustration of Turkish Cypriot claims in EEZ in Elias Hazou, *Cyprus Should Seek Maritime Arbitration to Nullify Turkish EEZ Claims*, CYPRUSMAIL (July 23, 2017), <https://cyprus-mail.com/2017/07/23/cyprus-seek-maritime-arbitration-nullify-turkish-eez-claims>; illustration of Regions Overlapping with the Turkish Continental Shelf in Andrew Jacovides, *Turkey and the Law of the Sea: Some Facts*, CYPRUSMAIL (Feb. 11, 2018), <https://cyprus-mail.com/2018/02/11/turkey-law-sea-facts>.

CS.<sup>94</sup> Hence, insofar as the awarded blocks extend within 200 M from the coast, they fall within the jurisdiction of the RC.

By contrast, Turkey's legal entitlement in the ocean cannot extend beyond 200 M from its coast.<sup>95</sup> So, even if it is accepted that Turkey's claims overlap partly with blocks 1, 4, 5, 6, and 7 of the RC (which are not currently awarded for exploration),<sup>96</sup> they certainly cannot extend beyond this point to the remaining blocks of RC. At the same time, the "TRNC" is merely a self-claimed state, and therefore it cannot have any maritime zones or claims of its own in the ocean. Based on the above, Turkey has no legal right to issue Navtex for the areas which are currently explored by the RC (e.g., block 3) without the latter's consent, nor unilaterally perform any operations in those areas, including military exercises or exploration of hydrocarbons.<sup>97</sup> Thus, the Navtex issued by Turkey for areas beyond its entitled CS could constitute an unlawful infringement of the sovereign rights of the RC at sea.

A further challenge that a license holder of the RC may face pending the settlement of the Cyprus dispute is forcible eviction by Turkey on the basis that the latter secures the interests of the Turkish-Cypriot community. As seen above, that has already been the case with Eni earlier in 2018. The crucial question is whether the threat that the Turkish naval forces extended towards the captain of the Italian vessel and its crew was an act of law enforcement, based on the assertion that the block in question falls within the jurisdiction of the "TRNC."

As on land, every sovereign state has the power to enforce its laws within its maritime zones (TS, CS, and EEZ) and prevent third parties from entering those areas without its prior consent.<sup>98</sup> Examples of enforcement acts include: surveillance; stopping and boarding vessels; search or

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<sup>94</sup> UNCLOS, *supra* note 57, at 400, 419, 428. The customary status of these zones has been affirmed by international jurisprudence. *See* Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 160 (Dec. 18) (Dissenting opinion by McNair, J.); Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. 18 (Feb. 24); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1982 I.C.J. 246, 294, ¶ 94 (Jan. 20).

<sup>95</sup> Can./U.S., 1982 I.C.J. at 294, ¶ 94 (Jan. 20).

<sup>96</sup> Turkey's claim to those oil blocks rests on a different interpretation of international law, according to which, islands (like Cyprus) do not generate their own maritime zones. This contradicts Part VIII of UNCLOS. However, it is not the purpose of this paper to assess Turkey's maritime claims in detail.

<sup>97</sup> Pursuant to Art 77(2) UNCLOS which reads: "if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State." The same (principle of exclusivity) applies in the TS and the EEZ. UNCLOS, *supra* note 57, at 429.

<sup>98</sup> NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 63 (2011).

inspection; reporting; arrest or seizure of persons and vessels; detention; and formal application of judicial or other processes, including the imposition of sanctions.<sup>99</sup> In the present case, however, Turkey's act can be challenged on two main grounds.

First, Turkey is a completely distinct entity from the "TRNC." Turkey is a sovereign state with legal powers over its land and entitled maritime zones, which do not extend beyond 200 M from its coast. The "TRNC" on the other hand, is a peculiar entity. It is not a sovereign state, so it is not entitled to a TS, CS, or EEZ. Also, it is not an annexed part of Turkey. This means that Turkey has no right under international law to send its military or naval forces or enforce its own laws in the "TRNC."

Second, even if it is somehow accepted that Turkey can act on behalf of the Turkish Cypriot community (perhaps as guarantor or controller of a dependent protectorate which has no domestic authorities or military forces), the threat it extended to Eni does not qualify as law enforcement. The power of law enforcement can be neither absolute nor excessive.<sup>100</sup> Rather, it is severely circumscribed by various limitations imposed by international law.<sup>101</sup> If those limitations are not respected, the conduct in question will not qualify as lawful enforcement (as the acting state would contend) but as an unlawful act under international law. A key example where a proclaimed act of enforcement is unlawful is when it rests on the use of force. Article 2(4) of the UN Charter provides that,

All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.<sup>102</sup>

Articles 42 and 51 of the UN Charter provide certain exceptions: forcible acts are allowed when authorized by the UN Security Council, or if they are based on self-defense towards a previous attack.<sup>103</sup> But under no other circumstance is force allowed.

The prohibition of force is repeated almost verbatim in Article 301 of UNCLOS, which regulates the behavior of coastal states in the ocean. The provision reads:

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<sup>99</sup> *Id.* These acts are also stipulated in UNCLOS. See UNCLOS *supra* note 57, at 407, 427, 437–38, 488, 490–91.

<sup>100</sup> KLEIN *supra* note 98.

<sup>101</sup> *Id.*

<sup>102</sup> U.N. Charter art. 2, ¶ 4.

<sup>103</sup> U.N. Charter art. 42, 51.

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.<sup>104</sup>

Hence, whether on land or at sea, and unless authorized by the UN Security Council or based on self-defense, the threat or use of force is prohibited in interstate relations. Yet the obligation of states to refrain from forcible acts does not merely stem from the above provisions. Rather, it rests on a long-existing peremptory international rule (*jus cogens*), which prohibits aggressiveness and coercion for the maintenance of world peace and security.<sup>105</sup> As it is peremptory, this norm binds all states—even those which have not signed the UN Charter or UNCLOS—and cannot be ruled out by treaty or state consent.<sup>106</sup>

Given that forcible acts are prohibited in international law, and therefore, they cannot qualify as law enforcement, it remains uncertain whether Turkey's threat towards Eni's vessel and members might be a forcible act. The hostile behavior of a state towards an oil and gas company has been discussed in the famous Guyana/Suriname boundary dispute.<sup>107</sup>

In that dispute, the Surinamese Navy ordered a Canadian oil rig, which was operating on behalf of Guyana in disputed waters, to abandon the area for interfering with the exploratory rights of Suriname.<sup>108</sup> In response to the verbal warning, the rig withdrew from the concession area, fearful that the Surinamese Navy would resort to force.<sup>109</sup>

The hearing tribunal first affirmed that “force may be used in law enforcement activities provided that such force is unavoidable, reasonable

<sup>104</sup> UNCLOS, *supra* note 57, at 516.

<sup>105</sup> Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, at 174–94 (June 27); Int'l Law Comm'n, *Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission of the General Assembly*, [1966] 2 Y.B. INT'L L. COMM'N 1, 247, U.N. Doc. A/CN.4/SER.A/1966/Add. 1. For a historic analysis of this customary rule see Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the UN Charter*, 3 SANTA CLARA J. OF INT'L L. 72, 90–92 (2005).

<sup>106</sup> Vienna Convention, *supra* note 68, at 344, 347; G.A. Res. 56/83, at 502 (Dec. 12, 2001); *see also* Belg. v. Spain, 1970 I.C.J. at 32, ¶ 33–34; Sandre Torp Helmersen, *The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 61 NETH. INT'L L. REV. 167, 170–71 (2014).

<sup>107</sup> *See* Guyana/Surinam, 30 R.I.A.A. 1 (Perm. Ct. Arb. 2007).

<sup>108</sup> *Id.* ¶¶ 151, 433.

<sup>109</sup> *Id.* ¶ 151.

and necessary.”<sup>110</sup> But, although no weapons were used and no injuries occurred in this case, the tribunal found that the Surinamese Navy’s warning was not an act of law enforcement but a threat of military action equal to the prohibited threat of force under international law.<sup>111</sup> As a result, Suriname was pronounced responsible for conducting an internationally wrongful act.<sup>112</sup>

Based on the above, it can be argued that Turkey’s behavior towards Eni was a forcible act, unlawful under international law. The consequences of such behavior extend to the domestic (contractual)<sup>113</sup> relationship between the private investor and the state from which it received the exploratory permit. The sudden ejection of an oil and gas company from the awarded block will stall scheduled operations temporarily or permanently.<sup>114</sup> This may cause a great loss of money<sup>115</sup> and time for the permit holder. It may further affect the investor’s reputation in the business world.<sup>116</sup>

<sup>110</sup> *Id.* ¶ 445 (citing *S.S. “T’m Alone”* (Canada/United States) 3 RIAA 1609, 1615; *Red Crusader* (Gr. Brit. v. Den.), 29 R.I.A.A. 521 (Comm’n of Enquiry 1962); *M/V Saiga* (No.2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 2 ITLOS Rep. 10).

<sup>111</sup> *Id.* ¶¶ 445, 488.

<sup>112</sup> According to the judges, Suriname had breached collectively its obligations under U.N. Charter art. 2, ¶ 4 and UNCLOS *supra* note 57, at 428, 431. *Guyana/Surinam*, 30 R.I.A.A. at 128, ¶ 452. *See also* Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Surinam Award*, 13(1) J. CONFLICT & SEC. L. 49, 50–52, 69–72 (2008).

<sup>113</sup> In general, the permits which states grant to oil companies may take the form of: production sharing agreements, service contracts, or concessions. Production sharing agreements (which the RC awards to its investors under its licensing system) and service contracts are pure contractual instruments of private law, although entered between a state and a private actor. But even concessions (which are more akin to administrative acts) bear contractual elements too. Marianthi Pappa, *Private Oil Companies Operating in Contested Waters and International Law of the Sea: A Peculiar Relationship*, 16(1) OIL, GAS & ENERGY L. INTELLIGENCE J. 1, 5–6 (2018).

<sup>114</sup> On the basis of *force majeure* or frustration. *See supra* Part II.

<sup>115</sup> E.g., capital paid in advance, loss of profit from non-exploration.

<sup>116</sup> The company may lose investment opportunities in the future (in the countries involved in the dispute or elsewhere). *See Norway Regrets Claims by a UN Report Linking Norwegian Development Efforts to Commercial Interests in Somalia*, NOR. MIN. FOREIGN AFF. (July 19, 2013), <https://www.regjeringen.no/en/aktuelt/development-efforts-somalia/id732864>. For that reason, many oil and gas companies avoid areas with territorial disputes. An example is Statoil (Equinor). *See id.* (“Norwegian [] company Statoil [was advised by the] Norwegian Government ... not to apply for such concessions in any areas where there may be a potential legal dispute, and ... Statoil [has] decided not to get involved [when legal disputes arise].”). The company was originally interested in an offshore oil block announced by Kenya but eventually opted out when it became apparent that the area was also claimed by Somalia. *Id.*

The RC protested Turkey's unlawful acts. It issued its own Navtex, advising seafarers to disregard Turkey's acts.<sup>117</sup> But in turn, Turkey responded with counter-Navtex.<sup>118</sup> The authorities of the European Union became aware of the incident with Eni. The European Commission called on Turkey to refrain from unlawful acts towards the RC that may affect good neighborliness and peaceful settlement of the Cyprus dispute.<sup>119</sup> If diplomatic means fail, the RC may need to bring the matter to an international court to seek protection of its sovereign rights.

Turkey's action in the Mediterranean affects not only the RC but the area's investors as well. The problem is not just the delay or cancellation of operations and the financial or commercial consequences that the operator may incur, but also the legal means, or lack thereof, by which a company may seek redress in this situation.

Arguably, Turkey's potential breach of international law would give rise to state responsibility for an unlawful act. According to the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Draft Articles"), adopted by the International Law Commission ("ILC") in 2001, "every internationally wrongful act of a State entails the international responsibility of that State."<sup>120</sup> The responsible state is under the obligation to cease the act and abstain from repetition, and to make full reparation for any resulting injury in the form of restitution, compensation, or satisfaction.<sup>121</sup>

But according to the Draft Articles, only two types of entities can invoke state responsibility. The first are states that have been injured by the wrongful act.<sup>122</sup> The second category comprises states other than the injured.<sup>123</sup> These may invoke state responsibility for the breach of an obligation that "is owed to a group of states" or "to the international

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<sup>117</sup> *Exxon Mobil: "Zohr-like play" in Block 6, Turkish Navtex Will Not Stop Plans (Wrap-up)*, MARKETSCREENER.COM (Feb. 8, 2018), <https://www.marketscreener.com/EXXON-MOBIL-CORPORATION-4822/news/Exxon-Mobil-Isquo-Zohr-like-play-rsquo-in-Block-6-Turkish-Navtex-will-not-stop-plans-Wrap-up-25958564>.

<sup>118</sup> Geropoulos, *supra* note 86.

<sup>119</sup> Gabriela Baczynska, *EU Tells Turkey to Avoid Damaging Actions After Cyprus Ship Incident*, REUTERS (Feb. 12, 2018), <https://uk.reuters.com/article/uk-cyprus-natgas-turkey-eu/eu-tells-turkey-to-avoid-damaging-actions-after-cyprus-ship-incident-idUKKBN1FW19Q>.

<sup>120</sup> Int'l Law Comm'n, *Reports of the Commission to the General Assembly on the Work of Its Fifty-Third Session*, 2001-II Y.B. Int'l L. Comm'n 1, 32, U.N. Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2).

<sup>121</sup> *Id.* at 88–91, 95.

<sup>122</sup> *Id.* at 117.

<sup>123</sup> *Id.* at 126.

community as a whole,” like the obligation to refrain from forcible acts.<sup>124</sup> In both cases, only states can trigger responsibility, either in their own interest or on behalf of another state. By contrast, a non-state entity, like the private oil company which may have suffered from the defendant state’s unlawful behavior, cannot appear before an international court and initiate those proceedings. Consequently, a successful claim can only benefit the claimant state, leaving the private investor without a remedy.

To protect its interests, the investor may resort to other areas of international law, such as human rights.<sup>125</sup> It is generally accepted (in domestic and international law) that an oil and gas permit qualifies as a private property right or interest.<sup>126</sup> Hence, the company whose operations have been affected by Turkey’s Navtex or forcible acts may submit a claim to the European Court of Human Rights (“ECtHR”) under Article 1 of Protocol 1 to the European Convention on Human Rights (“ECHR”).

However, this option is not without difficulties.<sup>127</sup> A procedural requirement for protection under human rights law is that the company exhaust all local remedies in Turkish courts and bring the case to the ECtHR within six months.<sup>128</sup> But even if the human rights claim is successful, it does not mean that Turkey will eventually respect it. Article 46(1) of the ECHR provides that its signatories are obliged to comply with the judgments of the European Court of Human Rights, but there is no legal mechanism to control or enforce compliance.<sup>129</sup> Absent such a mechanism, compliance with the announced awards rests on the respondent states’ discretion.<sup>130</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> The scenario where the affected company (here, Eni) would sue the RC on the basis of investment law for lack of protection against Turkey seems unlikely for two main reasons: first, no Bilateral Investment Treaty (BIT) exists between the RC and Italy; and second, such move would have a negative impact on the relations between the RC and the company’s home state.

<sup>126</sup> Akin to usufruct or *profit-à-prendre*. Pappa, *supra* note 113, at 7–9.

<sup>127</sup> Pappa, *supra* note 113 at 1, 25.

<sup>128</sup> ANTONIO CASSESE, INTERNATIONAL LAW 82–84 (2001).

<sup>129</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

<sup>130</sup> See *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 443 (concerning violation of the property right of a Greek-Cypriot by Turkey in the “TRNC”). Although the claimant was successful, Turkey refused to comply fully with the award.

### *3. Challenges Stemming from a Potential Solution Between the Concerned Parties and Legal Responses*

Challenges for private investors in Cyprus may also arise from a potential solution between the concerned territorial entities. These challenges concern the recognition of preexisting rights by the new sovereign regime, as analyzed below.

The most commonly discussed solution is the unification of the island.<sup>131</sup> Although this would terminate the long dispute between the Greek and the Turkish Cypriot communities, it may jeopardize the existing private rights of permit holders. Depending on whether the communities adopt a federal or confederal model,<sup>132</sup> private investors may face modification of their existing rights or complete discharge thereof.

A first option for the unification of Cyprus is the establishment of a federation.<sup>133</sup> Under this model, certain powers are reserved to the two communities for the purposes of local administration, but this does not create two independent states. Rather, there would be one sovereign state comprising both communities, and a central government would handle national issues (e.g., constitution, political regime, economy, defense) and foreign policy.

In this scenario, the main challenge for the existing private investors would be to preserve their acquired rights vis-à-vis the new government. The government would represent the interests of both communities (Greek and Turkish) of the island. Tensions might arise, since the original permits were awarded solely by the Greek Cypriot government amid the dispute. If the new government did not recognize those contracts,<sup>134</sup> investors might have to abandon operations. Alternatively, the new government might renegotiate the terms and conditions of the permits to reflect the interests of both communities and the new legal and tax regime of the state. This might also affect the interests of private investors if the new conditions were less favorable.

By contrast, if the two territorial entities of the island are recognized as separate sovereign states, then Cyprus would be unified under a

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<sup>131</sup> See *supra* note 75 and accompanying authority.

<sup>132</sup> Based on the concerned parties' reference to a single sovereign state (favored by Greek Cypriots) and two sovereign states (favored by Turkish Cypriots) in the context of negotiations. See TURKEY AND THE EUROPEAN UNION: FACING NEW CHALLENGES AND OPPORTUNITIES (Firat Cengiz & Lars Hoffmann eds., 2013); Harry Anastasiou, *Negotiating the Solution to the Cyprus Problem: From Impasse to Post-Helsinki Hope*, 12 CYPRUS REV. 11, 13 (2000); Stergiou, *supra* note 81, at 386.

<sup>133</sup> Examples of federations include the United States, Germany, and the USSR.

<sup>134</sup> E.g., if the new constitution of the state prohibited investments by private or foreign actors or if the new government preferred to award the permits to other companies.



confederation model.<sup>135</sup> The two members of the confederation would be autonomous, but a central government would also exist for foreign affairs with other states. Also, the two states would need to establish international boundaries on land and at sea.<sup>136</sup>

In that scenario, a challenge may arise for the existing private investors if the area of operations changed hands from the RC to the “TRNC” due to the maritime boundary’s course. Then, the contract area of the existing oil and gas permits would pass to a different state, with its own legal and economic regime. Under contract law, this may cause the discharge of agreements between the RC and its investors pursuant to the doctrines of frustration or impossibility of performance.<sup>137</sup> That would lead to problems over the recognition and enforceability of the company’s vested right against the absorbing state.

As demonstrated above, it is possible that the federal government of the newly established state might refuse to recognize the existing investments or unilaterally alter their conditions. To respond to this challenge, the affected private actors may invoke the doctrine of acquired rights (*droit acquis*) which has its roots in the fourteenth century and has been recognized in theory and jurisprudence as a fundamental principle of international law, protecting private rights from state interference.<sup>138</sup> This

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<sup>135</sup> This model is applied in Switzerland. Andreas Würzler, *The League of Discordant Members*, in *THE REPUBLICAN ALTERNATIVE: THE NETHERLANDS AND SWITZERLAND COMPARED* 29, 29–43 (André Holenstein et al. eds., 2008). It can also be argued that the EU resembles a confederation, although it bears features of a federation too. MICHAEL BURGESS, *FEDERALISM AND EUROPEAN UNION: THE BUILDING OF EUROPE, 1950–2000* 49 (2000) (arguing the EU resembles a confederation, although it bears features of a federation too).

<sup>136</sup> Under a delimitation treaty or by a third body (e.g., international court) if no agreement can be reached.

<sup>137</sup> If such reallocation is unforeseeable and supervening. For an analysis of Cyprus contract law (which is heavily influenced by UK common and Indian law), see Christos Mitsides, *Cyprus Contract Law*, *CYPRUS L. DIG.* (June 6, 2012), <http://www.cypruslawdigest.com/topics/basic-aspects-of-cypriot-law/item/137-contract-law>. For a deeper analysis of common law and contract frustration in the context of maritime boundary delimitation see Marianthi Pappa, *The Impact of Judicial Delimitation on Private Rights Existing in Contested Waters: Implications for the Somali-Kenyan Maritime Dispute*, 61(3) *CAMBRIDGE J. AFR. L.* 393 (2017).

<sup>138</sup> See EMER DE Vattel, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* 200–01 (Béla Kapossy & Richard Whatmore eds., 2008); Ko Swan Sik, *The Concept of Acquired Rights in International Law: A Survey*, 24(1) *NETH. INT’L L. REV.* 120, 120–142 (1977); Pierre Lalive, *The Doctrine of Acquired Rights*, in *RIGHTS AND DUTIES OF PRIVATE PERSONS ABROAD* 183 (Matthew Bender ed., 1965); *Settlers of German Origin in Poland*, *Advisory Opinion*, 1923 P.C.I.J. (ser. B) No. 6, at 33 (Sept. 10); *Mavrommatis Palestine*

doctrine has particular importance when new states emerge after decolonization or from the dissolution of a former federation, or when one state acquires the territory of another. In those situations, the new state has a duty to respect any private rights existing in the absorbed area.<sup>139</sup> Based on the above, the affected private investors in Cyprus may request preservation of their pre-existing private rights by the new state or receive compensation on the basis of expropriation.<sup>140</sup>

Unfortunately, the above option is not without practical problems. To protect its interests against the new state, the private actor must resort to that state's domestic courts. These might favor the local government over the foreign private actor.<sup>141</sup> Also, the application of the doctrine of acquired rights will depend on the treatment of international law by the legal system of the new state. In some legal systems, international law possesses a superior position over domestic law.<sup>142</sup> In others, however, domestic laws prevail.<sup>143</sup> In those jurisdictions, an international doctrine may be rendered ineffective if it contradicts domestic law.<sup>144</sup>

Alternatively, the private actor can resort to an international court—like the ICJ—through its home state with the doctrine of diplomatic protection.<sup>145</sup> But this option is not ideal either for the following reasons.

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Concessions, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 25 (Aug. 30); German Interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 42 (May 25). However, it is worth noting judicial enforcement of acquired rights has its roots in domestic law. *See* U.S. v. Percheman, 32 U.S. 51 (1833); *Cook v. Sprigg* [1899] AC 572.

<sup>139</sup> The only requirements are that the private rights have been “properly vested” by the previous state and possess “an assessable monetary value.” DANIEL PATRICK O’CONNELL, *STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW* 245–47 (1967). Typically, these are property rights. *Id.*

<sup>140</sup> The uncompensated lapse of an acquired right “fall[s] short of the international standard of civilized society, because it violates the sense of equity of the civilized world, on which its deepest legal convictions rest, which is at the root of all legislation on expropriation, and which has been ratified by a long international custom.” Georges Kaeckenbeeck, *The Protection of Vested Rights in International Law*, 17 BRIT. Y.B. OF INT’L L. 16 (1936).

<sup>141</sup> Maria Dakolias & Kimberly Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT’L L. J. 353, 353–406 (2000); Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Cases of Corruption in the Judiciary*, 30 L. & POL’Y IN INT’L BUS. 95 (1999).

<sup>142</sup> Mostly in civil law. *See* ROBIN CHURCHILL & ALAN LOWE, *THE LAW OF THE SEA* 291 (1983); LAMBERTUS ERADES, *INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY* (Malgosia Fitzmaurice & Cees Flinterman eds., 1993).

<sup>143</sup> *See* CHURCHILL & LOWE, *supra* note 142; ERADES, *supra* note 142.

<sup>144</sup> *See* CHURCHILL & LOWE, *supra* note 142, at 291; ERADES, *supra* note 142.

<sup>145</sup> *See* Mavrommatis Palestine Concessions, 1924 P.C.I.J. at 25; *Belg. v. Spain*, 1970 I.C.J. at 33–34. The option of resorting to an investment law tribunal seems unlikely, as it

First, an international claim for diplomatic protection requires that all local remedies available under the foreign state's legal system be exhausted.<sup>146</sup> Second, a submission of such a claim is not guaranteed, as it rests on the discretion of the individual's home state.<sup>147</sup> Third, the mechanism of diplomatic protection is designed only to protect the interests of the individual's home state from injury caused by the foreign state's actions.<sup>148</sup> Hence, even if a claim for diplomatic protection is eventually successful, the remedy (e.g., compensation) would be awarded to the entity's home state, not the entity itself.

The challenge of redistribution in the confederation scenario is far more severe. It may be possible for affected private actors to seek remuneration for any paid money sums to the RC or compensation for damages or loss under the governing laws of the contract.<sup>149</sup> Yet this remuneration would not secure the investor's presence in the area, as the previously awarded oil and gas blocks would permanently pass to the absorbing state upon delimitation and might then be granted to another company. To prevent discharge of current contracts, the concerned states must cooperate in one of the following ways.

If delimitation is effected by a treaty, the parties may insert a grandfather clause, under which the absorbing state would agree to preserve the existing private rights post-delimitation.<sup>150</sup> Alternatively, if no such provision is made or if delimitation is effected by an international court or tribunal, the states could also cooperate post-delimitation. An effective solution would be the implementation of a unitization agreement between the two states, under which the existing companies would keep

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requires the private company's home state and host state (the new federal state of Cyprus in this case) be parties to a BIT. It might be argued that the BITs of the RC will be automatically adopted by the successor state (the new federal state) but no such treaty has been signed by the RC with Italy, the United States, or France for the protection of Eni, Exxon, and Total (which also expressed interest in the RC), respectively.

<sup>146</sup> Int'l Law Comm'n, *Report of the Commission to the General Assembly on the Work of Its Fifty-Eighth Session*, 2006-II Y.B. Int'l L. Comm'n 1, 22, U.N. Doc. A/CN.4/SER.A/2006/Add. 1 (Part 2).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Pappa, *supra* note 137; see also George Coucounis, *The Doctrine of Frustration in Tenancies*, CYPRUS NEWS ONLINE (June 2016), <http://cyprus-mail.com/2016/06/12/doctrine-frustration-tenancies>.

<sup>150</sup> Such a provision can be found in the 1971 North Sea delimitation treaties between Germany, Netherlands, and Denmark. See Treaty Concerning the Delimitation of the Continental Shelf Under the North Sea, Ger.-Neth., Jan. 28, 1971, 1973 U.N.T.S. 143; Treaty Concerning the Delimitation of the Continental Shelf Under the North Sea, Den.-Ger., Jan. 28, 1971, 1973 U.N.T.S. 120.

operating in the area on behalf of both sides.<sup>151</sup> This “win-win-win” option would allow the parties to explore and exploit any transboundary resources in common, and allow the existing operator to preserve its interests in the area.

Of course, the above options are not without problems. The absorbing state might reject the grandfather clause because of public policy or local interest.<sup>152</sup> Likewise, state cooperation post-delimitation rests solely on the concerned parties’ will, as it is not mandatory under international law.<sup>153</sup> Also, reaching a unitization agreement requires that states enter into a new round of negotiations. These negotiations, ideally, should also involve the concerned oil companies, even though they will not be signatories of the agreement. The unitization agreement should cover conditions of exploration, the sharing of profits and resources, and other practical issues.<sup>154</sup>

In sum, although certain legal mechanisms are available for the protection of private interests in areas with territorial and sovereignty disputes, they may not be effective. Part 4 discusses how private actors, and states, can take additional steps to secure investments in those contexts.

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<sup>151</sup> See Agreement Relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas therefrom to the United Kingdom, Nor.-U.K., May 10, 1976, 1979 U.N.T.S. 4; Agreement Relating to the Exploitation of the Statfjord Field Reservoirs and the Offtake of Petroleum therefrom, Nor.-U.K., Oct. 16, 1979, GR. BRIT. TS NO. 44 (1981), (Cmnd. 8282). For references to a Unitization Agreement for the Exploitation and Development of Hydrocarbon Reservoirs of the Manakin-Cocuina Field, Trin. & Tobago-Venez., Aug. 16, 2010, see, e.g., *2015 Annual Administrative Report of the Ministry of Energy and Energy Affairs*, TRIN. & TOBAGO MIN. ENERGY & ENERGY AFF. (2015), <http://parlcloud.ttparliament.org:8081/PapersLaidViewer/TempFiles/MEEA%20Administrative%20%20Report%202015.pdf>; Curtis Williams, *Venezuela, Trinidad and Tobago sign cross-border development deal*, OIL & GAS J. (May 2016), <https://www.ogj.com/articles/2016/05/venezuela-trinidad-and-tobago-sign-cross-border-development-deal.html>.

<sup>152</sup> E.g., the absorbing state may prohibit foreign operations in its domain or prefer to award the area for exploration to a local company.

<sup>153</sup> Whereas, it is argued, state cooperation during delimitation rests on a rule of customary law.

<sup>154</sup> For a discussion of the merits and challenges of unitization, see Ian Townsend-Gault, *Zones of Cooperation in the Oceans: Legal Rationales and Imperatives*, in MARITIME BORDER DIPLOMACY 110–33 (Myron Nordquist & John Norton Moore eds., Ctr. Ocean L. & Pol’y 2012).

## B. Israel and Lebanon

### 1. Case Features: The Subjects of Dispute

The next case study examines Israel and Lebanon. Until the First World War, this part of the Middle East belonged to the Ottoman Empire.<sup>155</sup> Following the Ottomans' defeat, the area was allocated between the British and the French Mandates based on a previous boundary agreement in 1916.<sup>156</sup> However, the dynamics of the area changed radically in the following years with the emergence of Lebanon and Israel.

Lebanon gained independence from France in 1943 and became a UN member in 1945.<sup>157</sup> It is a fully recognized state, with active international and diplomatic relations, and has signed numerous international treaties, including UNCLOS. Under UNCLOS, it is legally entitled to a 12-M TS, a 200-M EEZ, and a 200-M CS.<sup>158</sup>

Following the first Arab-Israeli war in 1948, Israel declared independence.<sup>159</sup> After two unsuccessful attempts to become a UN member, Israel's request was eventually accepted in 1949.<sup>160</sup> Today, Israel is recognized as state by 161 UN members and has diplomatic relations with most countries in the world. Hence, it meets all criteria of statehood, including sovereignty. Yet most Arab states, including Saudi Arabia, the United Arab Emirates, Bahrain, Iraq, Syria, and Lebanon (which refers to Israel as "the occupying power") do not recognize it as a state.<sup>161</sup> Israel is also a signatory to numerous international treaties, including the United Nations Convention on Contracts for the International Sale of Goods, the Kyoto Protocol, the Outer Space Treaty, the Convention on the Territorial Sea 1958, and the Convention on the Continental Shelf 1958, but not UNCLOS. Although not a signatory of UNCLOS, Israel is entitled to a 12-

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<sup>155</sup> Ian Slesinger, *Alterity, Security and Everyday Geopolitics at Israel's Border with Lebanon*, 31 J. BORDERLAND STUD. 123, 123–27 (2016).

<sup>156</sup> *Id.* at 127–28.

<sup>157</sup> *See id.*

<sup>158</sup> UNCLOS, *supra* note 57, at 400, 419, 428.

<sup>159</sup> *Id.*; Crawford, *supra* note 17 at 434 (“[I]t must be concluded that Israel was effectively and lawfully established as a State by secession from Palestine in the period 1948 to 1949.”).

<sup>160</sup> Donald Neff, *Third Time's a Charm: Israel Admitted as U.N. Member in 1949*, WASH. REP. MID. E. AFF. 24 (July 2011), <https://www.wrmea.org/011-july/third-time-s-a-charm-israel-admitted-as-u.n.-member-in-1949.html>.

<sup>161</sup> *See* Ehud Eiran, *Between Land and Sea: Spaces and Conflict Intensity*, 5(2) TERRITORY, POL., GOVERNANCE 190, 194 (2017) (Lebanon rejected Israel's statehood before the latter declared independence in 1948).

M TS, a 200-M EEZ, and a 200-M CS. That is because the possession of those maritime zones stems from customary international law.<sup>162</sup>

Israel and Lebanon have a long history of tension and conflict, including wars in 1982 and 2006.<sup>163</sup> The relations between the two neighbors remain challenged by a dispute about the Israeli possession of a territory called Shebaa Farms, and their international boundaries on land and at sea.

The Shebaa Farms lie between the Syrian-Lebanese border and are part of Golan Heights, which were unilaterally annexed by Israel in 1981.<sup>164</sup> When Israel invaded Lebanon in 1978, the UN Security Council ordered it to “withdraw its forces from all Lebanese territory.”<sup>165</sup> The UN certified that Israel’s withdrawal from Lebanon was completed in 2000,<sup>166</sup> and established the “blue line” between the two countries.<sup>167</sup> Yet, the “blue line” is not an international boundary, but rather a “practical line which best approximate[s] the international border and could be used for the purpose of verifying Israel’s withdrawal from Lebanon.”<sup>168</sup>

Nonetheless, Lebanon continued to claim sovereignty over the Shebaa Farms, which remained under Israeli control—a position which was also supported by the League of Arab States.<sup>169</sup> To this day, this small strip of land (approximately 11 km long and 2.5 km wide) creates serious tension. When the second Israeli-Lebanese war broke out in 2006, the UN Security Council called for “delineation of the international borders of Lebanon, especially in those areas where the border is disputed or

<sup>162</sup> See *supra* note 96.

<sup>163</sup> Charles Freilich, *Israel in Lebanon – Getting it Wrong: The 1982 Invasion, 2000 Withdrawal, and 2006 War*, 6(3) ISR. J. FOREIGN AFF. 41, 41–75 (2015); DAVID JOHNSON, *HARD FIGHTING: ISRAEL IN LEBANON AND GAZA* 33–97 (RAND Corporation 2011).

<sup>164</sup> S.C. Res. 497, ¶¶ 1–3 (Dec. 17, 1981).

<sup>165</sup> S.C. Res. 425, ¶¶ 1–2 (Mar. 19, 1978).

<sup>166</sup> Press Release, Security Council, Security Council Endorses Secretary General’s Conclusion on Israeli Withdrawal From Lebanon as of 16 June, U.N. Press Release SC/6878 (June 18, 2000), <http://www.un.org/press/en/2000/20000618.sc6878.doc.html>.

<sup>167</sup> Brendan O’Shea, *Lebanon’s “Blue Line”: A New International Border or Just Another Cease-Fire Zone?* 27(1) *STUD. IN CONFLICT & TERRORISM* 19, 30 (2010). The line is based on UN/S/R425 (1978). See Reuters, *Illustration of The “Blue Line” Between Israel and Lebanon in Israel Says 1st Phase of Offensive Completed*, NBC NEWS (Aug. 4, 2006), [http://www.nbcnews.com/id/14163530/ns/world\\_news-mideast\\_n\\_africa/t/israel-says-st-phase-offensive-completed/#.W\\_k9UZNKiLI](http://www.nbcnews.com/id/14163530/ns/world_news-mideast_n_africa/t/israel-says-st-phase-offensive-completed/#.W_k9UZNKiLI).

<sup>168</sup> *Line of Withdrawal of Israeli Forces from Lebanon—June 2000*, U.N. (July 2000) <https://www.un.org/Depts/Cartographic/map/profile/blueline.pdf>.

<sup>169</sup> Letter from Zeid Ra’ad Zeid Al-Husseini, Permanent Rep. of the Hashemite Kingdom of Jordan, to Sec’y-Gen. of the U.N. Sec. Council, U.N. Doc. S/2001/342 (Apr. 6, 2001), <http://www.un.org/documents/ga/docs/55/a55892.pdf>.

uncertain, including the Shebaa Farms area.”<sup>170</sup> Yet, to this day, the parties have not officially delimited their international boundary.<sup>171</sup>

The maritime boundary between Israel and Lebanon in the Mediterranean is also unsettled. In 2007, Lebanon signed a delimitation agreement with the RC, based on the median line.<sup>172</sup> Although the RC ratified the treaty, Lebanon never did.<sup>173</sup> Instead, Lebanon unilaterally submitted to the UN Secretary-General lists of geographical coordinates of its potential boundaries with Israel and Cyprus, which differ from those defined in the 2007 agreement with the RC.<sup>174</sup> In 2010, the RC concluded a maritime delimitation agreement with Israel based on its 2007 agreement with Lebanon.<sup>175</sup> A year later, Lebanon protested to the UN Secretary-General.<sup>176</sup> Similarly, recent U.S. attempts to mediate the offshore dispute between Israel and Lebanon have reportedly failed.<sup>177</sup>

The parties’ recent activities for the exploration of offshore hydrocarbons fueled the tension. Following Israel’s discoveries in the Levant basin in 2010,<sup>178</sup> members of the Lebanese leadership asserted that

<sup>170</sup> S.C. Res. 1701, ¶¶ 1–2 (Aug. 11, 2006).

<sup>171</sup> David Eshel, *The Israel-Lebanon Border Enigma*, 8(4) IBRU BOUNDARY & SECURITY BULL. 72, 79 (2000) (“According to experts, [~] 60% of the 120km borderline is not established in any formal agreement between Israel and Lebanon.”).

<sup>172</sup> *Exclusive Economic Zone and Continental Shelf*, MIN. FOREIGN AFF. (2016), [http://www.mfa.gov.cy/mfa/mfa2016.nsf/mfa86\\_en/mfa86\\_en?OpenDocument](http://www.mfa.gov.cy/mfa/mfa2016.nsf/mfa86_en/mfa86_en?OpenDocument).

<sup>173</sup> In order to bind its signatories, an international treaty must be transferred into domestic law with ratification or accession.

<sup>174</sup> *Lebanon Submissions In Compliance With The Deposit Obligations Pursuant To The United Nations Convention On The Law Of The Sea (UNCLOS)*, U.N. DIV. OCEAN AFF. & L. OF THE SEA, <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/LBN.htm> (last accessed June 1, 2018) [hereinafter *Lebanese Submissions*]; Eduardo Wassim Aboultaif, *The Leviathan Field Triggering a Maritime Border Dispute between Cyprus, Israel, and Lebanon*, 23(3) J. BORDERLAND STUD. 289, 292 (2017) (“It might be assumed that with this act Lebanon recognizes Israel. However, that is not the case, as in its U.N. submissions Lebanon describes Israel as the ‘occupying power.’”).

<sup>175</sup> *Cyprus Submissions In Compliance With The Deposit Obligations Pursuant To The United Nations Convention On The Law Of The Sea (UNCLOS)*, U.N. DIV. OCEAN AFF. & L. OF THE SEA, <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/CYP.htm>.

<sup>176</sup> Letter from Adnan Mansour, Minister for Foreign Affairs and Emigrants to Sec’y-Gen. of the U.N. (June 20, 2011), [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn\\_re\\_cyp\\_isr\\_agreement2010.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_cyp_isr_agreement2010.pdf).

<sup>177</sup> Tsvetana Paraskova, *U.S. Mediation on Israel-Lebanon Offshore Oil Dispute Reportedly Failed*, OILPRICE.COM, (Feb. 21, 2018), <https://oilprice.com/Latest-Energy-News/World-News/US-Mediation-On-Israel-Lebanon-Offshore-Oil-Dispute-Reportedly-Failed.html>.

<sup>178</sup> See *supra* Part II on Cyprus.

the rich Leviathan and Tamar gas fields extend into Lebanese waters.<sup>179</sup> This dispute now seems to have abated, however, since Lebanon did not include those fields in the maritime boundary proposal that it submitted to the UN in 2011.<sup>180</sup>

A new tension arose in 2018 when the government of Lebanon invited energy companies to explore its offshore oil and gas blocks. This time, the tension concerned the Lebanese block 9, which was awarded for exploration to Italian Eni, French Total, and Russian Novatek in early 2018.<sup>181</sup> This block neighbors the rich Karish and Tanin gas fields of Israel,<sup>182</sup> which could indicate a similar abundance of resources. However, the southern portion of block 9 is concurrently claimed by Israel, in a disputed 860 square kilometer area.<sup>183</sup> Although Lebanon's permit holders have stated that operations are scheduled in waters above the disputed area, the two countries reportedly exchanged defensive warnings and complaints to the UN Secretary-General.<sup>184</sup>

Absent a maritime boundary between Israel and Lebanon, and given their charged relations, which involve nonrecognition of Israel by Lebanon and a territorial dispute over the Shebaa Farms, the tension in the Levantine basin will likely remain or even escalate, posing risks for the

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<sup>179</sup> Tani Goldstein, *Landau: Israel Willing to Use Force to Protect Gas Finds*, YNETNEWS.COM (June 24, 2010), <https://www.ynetnews.com/articles/0,7340,L-3910329,00.html>.

<sup>180</sup> Barak Ravid, *U.S. Backs Lebanon on Maritime Border Dispute with Israel*, HAARETZ (July 10, 2011), <https://www.haaretz.com/1.5025893>; see *Lebanese Submissions*, *supra* note 174.

<sup>181</sup> Lisa Barrington, *Lebanon Begins Offshore Oil and Gas Exploration*, REUTERS (May 29, 2018), <https://www.reuters.com/article/us-natgas-lebanon/lebanon-begins-offshore-oil-and-gas-exploration-idUSKCN1IU15F>; see also Illustration of the Israeli-Lebanese dispute in relation to Lebanon's oil and gas blocks in Jeremy Arbid, *High Expectations: Lebanon's Exclusive Economic Zone Holds Good Prospectivity for Petroleum Reserves*, EXECUTIVE MAG. (Oct. 8, 2014), <http://www.executive-magazine.com/economics-policy/oil-and-gas-expecting-a-lot>.

<sup>182</sup> *Karish*, ENERGEAN OIL & GAS, <https://www.energean.com/operations/israel/karish> (last visited June 1, 2018).

<sup>183</sup> Seth J. Frantzman, *Israel-Lebanon Gas Woes Overshadow Tillerson Visit*, JERUSALEM POST (Feb. 19, 2018), <http://www.jpost.com/Arab-Israeli-Conflict/Israel-Lebanon-gas-woes-overshadow-Tillerson-visit-542989>. Also, other Lebanese blocks (8, 10) are partly claimed by Israel. See *id.*

<sup>184</sup> Barrington, *supra* note 181; Oded Eran, *Could Natural Gas in the Mediterranean Spark the Third Lebanese War?*, JERUSALEM POST (Feb. 18, 2018), <http://www.jpost.com/Opinion/Could-natural-gas-in-the-Mediterranean-spark-the-Third-Lebanese-War-542911>; Lisa Barrington & Dan Williams, *Israel, Lebanon Clash Over Offshore Energy, Raising Tensions*, REUTERS (Jan. 31, 2018), <https://uk.reuters.com/article/uk-natgas-lebanon-israel/israel-lebanon-clash-over-offshore-energy-raising-tensions-idUKKBN1FK1YC>.



countries' current and prospective holders of offshore energy permits. The next section examines the risks which current investors may face in the area, both pending and after a potential settlement of the sovereignty dispute, and the means to address those risks effectively under international law.

## *2. Challenges for Energy Investors Amid the Parties' Dispute and Legal Responses*

The risks for energy investors in the disputed waters of Israel and Lebanon range from the temporary suspension of operations to permanent eviction from the area. These are analyzed below.

At present, the most imminent challenge for Lebanon's permit holders in the disputed waters is forcible disruption of their operations by Israel. Israel has warned Lebanon of a potentially forcible response and characterized the presence of "respectable firms" in the disputed area as "a grave error . . . contrary to all of the rules and all protocol in cases like this."<sup>185</sup>

The use, or threatened use, of force by Israel in the context of the boundary dispute with its neighbor would be unlawful on various grounds. For example, under Articles 2(4) and 33(1) of the UN Charter it would breach the general obligation of states to settle their disputes peacefully without resorting to force.<sup>186</sup> It might also breach the two procedural obligations which states bear in maritime boundary disputes, viz., to cooperate with pending delimitation and not to jeopardize or hamper the reaching of the final delimitation agreement.<sup>187</sup> These obligations are stipulated in Articles 74(3) and 83(3) UNCLOS and are accepted as rules of customary law.<sup>188</sup> Hence, they bind all states, including those which have not adopted UNCLOS (e.g., Israel).

But even outside UNCLOS, it is generally accepted that states involved in international disputes bear the obligation of mutual restraint, which prohibits any conduct that may aggravate the situation.<sup>189</sup> Of course, this does not mean that any unilateral acts of the concerned parties

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<sup>185</sup> Eran, *supra* note 184 (quoting Israeli Defense Minister Avigdor Lieberman).

<sup>186</sup> As analyzed earlier in *supra* Part II.

<sup>187</sup> As procedural, these obligations exist when disputants are involved in a process for the settlement of their dispute (e.g., negotiations or arbitration/adjudication) in order to preserve the existing *status quo* until the final settlement.

<sup>188</sup> BRITISH INST. INT'L & COMPARATIVE L., REPORT ON THE OBLIGATIONS OF STATES UNDER ARTICLES 74(3) AND 83(3) OF UNCLOS IN RESPECT OF UNDELIMITED MARITIME AREAS 19–21 (2016).

<sup>189</sup> South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, at ¶ 1170 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086>.

violate this obligation, as that would excessively limit state sovereignty. However, extreme acts like the use or threat of force that threaten international peace and stability may be considered to have an aggravating impact on the boundary dispute.

A forcible reaction by Israel in the contested waters would also have consequences for private interests. Depending on the duration of forcible acts in the disputed area, operations may be disrupted temporarily under the mechanism of *force majeure*, or permanently if the companies agree to terminate their contracts with Lebanon early.<sup>190</sup>

A forcible reaction in the contested waters would arguably trigger Israel's international responsibility towards its neighbor under the Draft Articles.<sup>191</sup> Lebanon would be entitled to request cessation of the potentially unlawful act, and perhaps request compensation for any damages suffered from Israel's behavior. However, Lebanon might avoid making such a claim, for it would qualify as a recognition of Israel as a sovereign state.

A more critical question is how the affected private actors can protect their interests against Israel. Even if a company has suffered damages or losses from Israel's potentially unlawful behavior, it may not be in a position to sue it directly before an international court or tribunal.<sup>192</sup> At best, this could be done by an entity's home state. Again, this option may not be ideal, for it would qualify as a recognition of Israel's statehood by the claimant state, causing a diplomatic tension with Lebanon.

An alternative for Lebanon's permit holders would be to receive concurrent permits by Lebanon and Israel for the disputed area and explore it on behalf of both countries under a joint development agreement ("JDA"). This legal mechanism allows countries to shelve the boundary question and cooperate without prejudice with each other's sovereign claims by appointing the same company as their operator. The conclusion of such agreement also rests on Articles 74(3) and 83(3) UNCLOS,<sup>193</sup> and is considered by many scholars to be part of customary law.<sup>194</sup> Again, this

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<sup>190</sup> See *supra* Part II.

<sup>191</sup> See *supra* Part II. Such claim can be submitted by Lebanon (although this would qualify as recognition of Israel as state) or by any other state using *jus cogens*. G.A. Res. 56/83 art. 48(1)(a)–(b) (Dec. 12, 2001).

<sup>192</sup> See *supra* Part II.

<sup>193</sup> Both Articles read, "[p]ending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation." UNCLOS, *supra* note 57, at 428–31.

<sup>194</sup> At the same time, it is debated by others. See William Onorato & Ibrahim Shihata, *The Joint Development of International Petroleum Resources in Undefined and Disputed*

option does not seem feasible, as any legal arrangement between the two sides would essentially mean that Lebanon affirms the statehood of Israel. Even though the boundary dispute would be put aside, the sovereignty dispute would not.

### *3. Challenges Arising from a Proposed Solution Between the Concerned Parties and Legal Responses*

In general, a solution to the maritime boundary dispute between Israel and Lebanon seems unlikely, as it would require Lebanon to recognize Israel as a state. But even if they did reach an agreement, it would entail challenges for the private interests of existing permit-holders. The main challenges include reallocation and discharge of existing private rights and discovery of transboundary resources. These challenges are analyzed below.

A successful delimitation by treaty or judgment of the maritime boundary between the two countries may cause reallocation (even partially) of block 9 from Lebanon to Israel. According to Lebanon's contractors, operations are scheduled for the waters above the disputed part of block 9.<sup>195</sup> Insofar as they cover uncontested waters, the existing contracts are safe from a potential reallocation and discharge.

However, the situation would change if a larger part of block 9 were redistributed to Israel (including the area of operations) or if companies expanded operations south of their present point. That would present questions about the preservation of reallocated private rights by the absorbing state, similar to those discussed earlier for Cyprus.

Another challenge may emerge if the parties discover that the resources explored by Lebanon straddle the maritime boundary and extend to Israel's blocks. In that case, the exploration of transboundary resources by one country might "siphon off" its neighbor's share of the common reservoir.<sup>196</sup> This situation, which is known as the "rule of capture," is

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*Areas*, 11(2) ICSID REV. FOREIGN INVEST. L. J. 299, 299–317 (1996); David Ong, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?* 93(4) AM. J. INT'L L. 771, 771–804 (1999); Ian Townsend-Gault, *Offshore Petroleum Joint Development Agreements: Functional Instruments? Compromise? Obligation?*, THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES 69 (Gerald Blake et al. eds., 1995); THOMAS COTTIER, *EQUITABLE PRINCIPLES OF MARITIME BOUNDARY DELIMITATION: THE QUEST FOR DISTRIBUTIVE JUSTICE IN INTERNATIONAL LAW* 367 (2015).

<sup>195</sup> Eran, *supra* note 184.

<sup>196</sup> Ong, *supra* note 194 at 778–79; Joy Ejegi, *What are the Mechanisms for Resolving Disputes between Countries with Transboundary Resources? A Closer Examination*, OIL, GAS & ENERGY L. INTELLIGENCE J. 2 (2005); Ian Townsend-Gault, *The Frigg Gas Field –*

accepted in some domestic legal systems for operations on private lands.<sup>197</sup>

The rule of capture is considered to be incompatible with international law, as it may prejudice the sovereign rights of the involved states.<sup>198</sup> To avoid this problem in the current situation, operations might be stalled for both sides, causing considerable loss of money and time for the affected permit holders.

A solution to the problems outlined above depends on Israel's and Lebanon's mutual willingness to cooperate; this outcome is feasible in ways similar to those analyzed in the case of Cyprus.

In particular, a grandfather clause could be included in the parties' delimitation treaty, thereby preserving any reallocated private rights.<sup>199</sup> Alternatively, Israel and Lebanon may enter a unitization agreement, under which they will keep the existing permit holders as operators.<sup>200</sup>

As discussed above, the effectiveness of these legal mechanisms is not guaranteed. Insofar as the above suggestions require mutual recognition between the involved countries and the political will to modify their original sovereign claims in the spirit of compromise and good neighborliness, their implementation might be wishful thinking.

### III. ALTERNATIVE SOLUTIONS TO ADDRESS THE IDENTIFIED CHALLENGES

The previous sections demonstrate that private investments in areas involving unrecognized states come with certain risks. Energy companies may lose their investments and even jeopardize their reputations. The preceding section also stressed that these risks may not be effectively addressed under existing legal mechanisms of international law, like judicial proceedings, cooperation agreements, or special clauses inserted into delimitation treaties. This section will analyze whether a series of alternative commercial strategies employed by private investors would

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*Exploitation of an International Cross-Boundary Petroleum Field*, 3 MARINE POL'Y 4, 302-03 (1979).

<sup>197</sup> See Terence Daintith, *The Rule of Capture: The Least Worst Property Rule for Oil and Gas*, in PROP. & LAW IN ENERGY & NAT. RES. 140-58 (Aileen McHarg et al. eds., 2010).

<sup>198</sup> William Onorato, *Apportionment of an International Common Petroleum Deposit*, 17 INT'L & COMPARATIVE L. QUARTERLY 1, 101 (1968); Masahiro Miyoshi, *The Basic Concept of Joint Development of Hydrocarbon Resources in the Continental Shelf*, 3 INT'L J ESTUARINE & COASTAL L. 1, 5-6 (1998).

<sup>199</sup> See *supra* Part II on Cyprus.

<sup>200</sup> *Id.*

provide more workable solutions. These observations will be useful for potential investors in areas of uncertain jurisdiction, and are not just applicable to the Mediterranean Sea region.

In general, energy investors, especially those in the oil and gas sector, are familiar with the risks associated with their business, including geological, environmental, commercial, technical, and political risks. However, different types of investors might approach these risks differently. Some companies prefer to undertake a project with higher geological risks, while others might accept a project with higher political risks. The choice depends mainly on the investor's profile and its risk assessment mechanisms.<sup>201</sup>

The same applies to operations in areas with uncertain sovereignty or contested boundaries. Many investors might simply exclude that kind of risk from their portfolio and decide that they will not invest in a disputed area. Such a conservative approach tends to be more common with large international investors.<sup>202</sup> This is especially due to reputation risks, as dealing with one party to a dispute might also hinder the investor from conducting business with the other party.<sup>203</sup> For example, Lebanon does not cooperate with oil and gas companies doing business in Israel, so it would simply reject any investment proposals extended by those actors. Similar issues of "retaliation" might occur in other disputes (e.g., between Iraq and Kurdistan, China and Taiwan, Morocco and Western Sahara, Greece and Turkey, etc.).

Normally, an investor would prefer to wait for an interstate solution. This would provide stability for long-term investment projects in the formerly disputed area. By contrast, if a mutual solution is not found,

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<sup>201</sup> "Before expressing their interest in a foreign jurisdiction, companies conduct a comprehensive due diligence audit. Through this investigation process, a potential investor collects useful information regarding the legal, political, and economic background of the host state. But most importantly, the investor identifies the risks that already exist or may arise during its presence in the specific area." Pappa, *supra* note 113, at 12.

<sup>202</sup> See *supra* note 117.

<sup>203</sup> As analyzed by IHS Markit for the situation between Greece, Cyprus, and Turkey: "[t]here is an elevated risk that companies [with] offshore exploration licenses from Cyprus will see cancellations of any existing contracts [] in Turkey, as well as being blacklisted from future tenders. These include Italy's ENI, the US's Exxon Mobil, France's Total, and South Korea's KOGAS. In July 2017, President Erdogan warned oil companies taking part in Greek Cypriot exploration efforts [] they risked 'losing a friend'. There is precedent for the Turkish government taking retributive action. In 2013, following a previous round of confrontations over hydrocarbons in the Eastern Mediterranean, Turkey blacklisted ENI, . . . the latter being blocked from participating in the near-complete TANAP project." *Turkey-Greece-Cyprus Dispute Over Mediterranean Hydrocarbons Risks Disruption to Shipping Routes and Localised Naval Incidents in 2018*, IHS MARKIT (Jan. 19, 2018), <https://ihsmarkit.com/country-industry-forecasting.html?ID=10659123035>.

companies are more likely to avoid the area in question.<sup>204</sup> This would be the “safest” approach for any conservative investor.

Although an interstate arrangement would be the preferred scenario, it is not always workable. Such a solution would likely be fairly complex, as it requires goodwill and cooperation between the involved countries, which might not even recognize each other. So, how could disputants reach a solution if any negotiation or settlement attempt involves mutual recognition of the parties as sovereign states—which might be unrealistic? Perhaps the most “realistic” solution would be a moratorium on competition, prohibiting investments in the disputed area from both sides. But this is less likely to happen in practice, as most countries are keen to maximize their resources<sup>205</sup> or use the unilateral granting of private permits as a way to bolster their claims in the disputed area.<sup>206</sup>

The following section will provide the questions that potential investors should consider before expressing their interest in areas of disputed statehood, and the commercial mechanisms they may employ in order to secure their interests.

#### *A. Risk Assessment: Due Diligence Questions to be Made Before the Investment*

If an investor seeks to invest in a disputed area, the first question they should ask is what type of risk assessment their legal and commercial departments should make prior to such an investment. A strategic plan would start with a thorough risk assessment, including analysis of the dispute, checking of possible bilateral relations or applicable international conventions, assessing the commercial value of the area, and consideration of the stage of operations. These factors are explained in detail below.

First, it is important to understand what is in dispute: the land or the countries’ maritime zones? A small portion or a larger area? Is the disputed area offered as part of a larger space which extends to other non-disputed ones? Could the disputed portion be separated without affecting the commerciality of the other area?

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<sup>204</sup> James Manicom, *China’s Energy Development in the East China Sea*, JAMESTOWN FOUND. (Sept. 12, 2013), <https://jamestown.org/program/chinas-energy-development-in-the-east-china-sea>; KRISTINE S. BOE & THERESE JORDAL, IMPACT OF POLITICAL STABILITY AND PROPERTY RIGHTS PROTECTION ON OIL AND GAS INVESTMENTS 31 (June 2016).

<sup>205</sup> Especially if they are under development stage.

<sup>206</sup> The presence of private rights in the disputed area may be used as evidence of state jurisdiction or of the boundary’s exact location under the international law doctrines of *effectivités*, or acquiescence and estoppel.

It is also important to understand which countries are involved in the dispute and to what extent they are recognized by the international community. For example, in the Cyprus dispute, only one state recognizes the “TRNC” as a sovereign state, while all other nations around the world recognize the RC.<sup>207</sup> The Lebanon/Israel example is more complex, as many countries recognize each side as a legitimate sovereign state.<sup>208</sup>

Another factor that investors should be aware of is whether the oil blocks which they hold in the disputed area have been or might be awarded to a different company for exploration by the other country.<sup>209</sup> In that case, the tension between the territorial entities may escalate and evolve into an armed conflict for the protection of the parties’ and their investors’ interests.

Second, it is important to understand the relationship of the investor’s home state with the countries in dispute, as any decision of the private company or its home state may have a negative impact on that relationship. It is also important to verify whether the target country has signed any Bilateral Investment Treaties (“BITs”) with the investor’s home country. BITs could provide a number of legal protections for a foreign investor, varying from the right to fair compensation in case of expropriation, to non-discriminatory treatment and due process in international arbitration.<sup>210</sup> However, the precise language of BITs might vary and certain types of activities might not be included in the treaty.

Furthermore, BITs present two main problems. One is the debate about the legal substance of the company used as the legal vehicle for the said investment, as it could be disputed to what extent such company/individual is legally able to claim BIT protection. The host country could challenge the investor for “treaty shopping” (i.e., searching to open a company in the most favorable BIT regime without actually

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<sup>207</sup> See *supra* Part II.

<sup>208</sup> *Id.*

<sup>209</sup> For example, the administration of the “TRNC” has announced that it is planning to award permits to the National Oil Company of Turkey in the waters surrounding Cyprus. Murat Temizer, *N. Cyprus Ready to Give Oil Exploration Permit to Turkey*, AA ENERGY (Apr. 24, 2017), <https://www.aa.com.tr/en/energy/natural-gas/ncyprus-ready-to-give-oil-exploration-permit-to-turkey/2663>. Earlier this year, Turkey confirmed that it plans to send its drill ship to the oil blocks that are currently being explored by the RC. Helena Smith, *Turkey to Send Drill Ship to Contested Gas Field Off Cyprus*, THE GUARDIAN (Mar. 22, 2018), <https://www.theguardian.com/world/2018/mar/22/turkey-to-send-drill-ship-to-contested-gas-field-off-cyprus>.

<sup>210</sup> See Jeswald Salacuse & Nicholas Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46(1) HARV. INT’L L. J. 67, 67–130 (2005), reprinted in KARL SAUVANT & LISA SACHS, *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* (2009).

being from and/or operating in the country).<sup>211</sup> Thus, the investor might be required to prove that the investment and business are conducted by a company/individual in a legitimate manner instead of being in that country only to gain BIT protection. The other issue concerns the effectiveness and enforceability of a BIT. It might be a long, risky, and costly process to enforce the investor's rights against the host nation as the host nation might use a large variety of legal means to challenge and/or simply refuse to comply with such agreement.<sup>212</sup>

Third, it would be useful to verify if any of the disputed countries have signed international conventions, as this information would help the investors to understand the legal framework in their target countries. There are numerous conventions that could be relevant for an energy investment (e.g., WTO, Paris Agreement, NY Convention). But for an offshore energy investment, the most relevant would be UNCLOS. This instrument stipulates maritime jurisdiction among neighboring coastal countries, and provides a number of other principles about the ownership of offshore natural resources and their successful utilization, even in areas with uncertain or disputed boundaries.<sup>213</sup> It provides specific rules and procedures to solve disputes between countries, as well as its own tribunal (ITLOS).<sup>214</sup> The vast majority of countries around the world have adopted UNCLOS (including Cyprus and Lebanon).<sup>215</sup> However, a small number did not sign or ratify the convention (such as USA, Turkey, and Israel). Although many of the convention's provisions bear customary force (e.g., those fixing the limits of maritime zones or the principles of boundary delimitation), which makes them binding upon all states (even non-signatories), the same does not apply for the provisions which regulate the settlement of disputes.<sup>216</sup> In this case, a signatory of UNCLOS (e.g., Lebanon) will not be able to trigger those rules against a country which has not adopted the convention (e.g., Israel). In addition, UNCLOS is an

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<sup>211</sup> This is what the Venezuelan Government claimed that ExxonMobil did.

<sup>212</sup> Pappa, *supra* note 113, at 25.

<sup>213</sup> UNCLOS, *supra* note 57, at 400–03, 409, 418–33.

<sup>214</sup> *Id.* at 508–16

<sup>215</sup> To this day, 168 entities have signed UNCLOS (including the European Union and Palestine). See *Chronological Lists of Ratifications of, Accession and Succession to the Convention and the Related Agreements*, U.N., [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) (accessed Mar. 20, 2018) (updated Apr. 3, 2018). This confers a “quasi-universal” character on UNCLOS.

<sup>216</sup> Hugo Caminos & Michael Molitor, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871, 887 (1985); Ashley Roach, *Today's Customary International Law of the Sea*, 45 OCEAN DEV. & INT'L L. 239, 239–59 (2014); JAMES HARRISON, *MAKING THE LAW OF THE SEA: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW* 53–59 (2011).



international law instrument and does not possess an enforcement mechanism. The unenforceability problem was seen recently in the dispute between the Philippines and China in the South China Sea; the dispute was decided by the Permanent Court of Arbitration, but China refused to comply with the award.<sup>217</sup>

Fourth, and probably most importantly, the company must consider the commercial value of the areas in dispute. Energy investments (especially oil and gas) tend to possess a large amount of risks, varying from geological to political risks. Political risks tend to be a fairly common challenge for energy investments in developing and/or emerging markets (e.g., Arab Spring).

However, it is not common to deal with more than one state at the same time, since the ownership of the resources is usually clear from the very beginning of this process. To put it simply, an investor is less likely to purchase a house if the ownership of the house is in question or disputed among different parties. This is not a risk that any investor would be keen to take, unless the economic reward is sufficiently high to attract such investment. Thus, it is reasonable to argue that not many investors would choose to invest in a disputed area without a significant reward in exchange (e.g., amount, value of resources). This assumption is affirmed by the far greater number of foreign investors in non-disputed areas compared to the disputed jurisdictions analyzed in this paper and other jurisdictions as well (e.g., Kurdistan/Iraq, and Morocco/Western Sahara). So, arguably, a disputed area is less likely to attract foreign investors when the possible rewards do not exceed the identified risks. For example, a foreign investor might want to invest in a producing oil field in Kurdistan even though the legality of such investment could be disputed by the central government of Iran. The reason is that the investor could monetize its investment quite quickly. By contrast, this is less likely to happen in the disputed areas of the Mediterranean Sea because there is uncertainty about the amount of reserves and the recovery or monetization of any potential investment. In that sense, it is reasonable to suggest that large companies and companies listed to the stock exchange market are less likely to take such risks and be penalized by the market, whereas smaller companies and unlisted companies might be more flexible and have a more aggressive “appetite” for risky opportunities.

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<sup>217</sup> South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, at ¶ 1170 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086>; Tom Phillips, Oliver Holmes & Owen Bowcott, *Beijing Rejects Tribunal's Ruling in South China Sea Case*, THE GUARDIAN (July 12, 2016), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

Finally, the stage of operations—exploration, production, seismic surveys, and drilling—in the explored area also matters, since this influences the economic value of the project. From a commercial perspective, it is less likely that a disputed area would be attractive at the early stage of exploration, since too many uncertainties and risks are involved and it is unclear at that stage whether any return could be made. But if a disputed area is under development or in the production stage, it might be more attractive for investment, as the cash flow of the project would be positive and adequate to recover the related investments.

However, from an international law perspective, this logic works in reverse: actions of early exploration, like seismic surveys, can be conducted unilaterally in a disputed area pending delimitation, whereas actual exploitation (e.g., drilling) must be conducted jointly.<sup>218</sup> In that sense, the conduct of early exploration activities would be less risky for the private actor, as they are permissible under international law even when authorized unilaterally in the disputed area.<sup>219</sup> By contrast, unilateral drilling may be suspended by an international court until the final settlement of the international dispute.<sup>220</sup> Thus, from a business perspective, it would make more sense to invest in the disputed area later on, when more information is known about the resources. From an international law perspective, however, an early intervention would be more in line with international obligations as the actual drilling or production could breach the obligations of the involved state entities.

### *B. Risk Mitigation: Commercial Mechanisms to Address the Identified Risks*

As previously mentioned, some investors are unlikely to accept the risks and uncertainties associated with international disputes about statehood and territorial or maritime jurisdiction. But investors with an aggressive risk profile might be up for the challenge and seek to reap the benefits of the bargain to invest in a disputed area. Once an investor decides to operate in an area of disputed jurisdiction, the ultimate question

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<sup>218</sup> Aegean Sea Continental Shelf Case (Greece v. Turkey), Interim Protection Order, 1976 I.C.J. Rep. 3 (Sept. 11); Guyana/Surinam, 30 R.I.A.A. 1 (Perm. Ct. Arb. 2007); UNCLOS, *supra* note 57, at 428, 431.

<sup>219</sup> This was the case in Western Sahara or Southern part of Morocco, as the Moroccan Government signed reconnaissance licences with foreign investors in the disputed area. However, the said contract did not give any right to perform drilling but only a general right to survey the area.

<sup>220</sup> Guyana/Surinam, 30 R.I.A.A. 1 (Perm. Ct. Arb. 2007); Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures Order, 2015 ITLOS Rep. 146 (Apr. 25, 2015).

is what can be done to mitigate the respective risks and exposure. This section will analyze the commercial solutions to mitigate these risks. These solutions include contractual clauses, insurance products, dual investments, and joint ventures.

First, the investor and the selected country could include special clauses in their agreement (i.e., concession agreement, production sharing contract, or service contract) to guarantee further assurances and compensation for a potential loss for the investment.<sup>221</sup> Typically, the host nation does not guarantee anything in the contract—not even the stability in certain cases. Instead, the investors assume the risk in finding and producing oil and gas as well as the risk for a potential oil spill, usually regardless of fault. However, most oil and gas contracts (i.e., investment agreements) would state that the host nation owns the resources and reserves. So, when negotiating the contract, investors can insert a provision dealing with a potential negative outcome of such dispute (i.e., compensation) or even possible military intervention or threat thereof from the other country.

Second, investors can purchase insurance to guard against political conflict. These policies are called “political risk insurance.” These products are normally used to protect against an expropriation by a sovereign state. If a given state decides to expropriate the relevant investment, the investor would be protected and guaranteed a specific compensation by a given insurance policy. This mechanism could be useful to protect an investor for a political risk, as this is completely outside the control of any investor. Private companies typically offer this type of insurance, but some public institutions, or even the World Bank, could as well (i.e., MIGA).<sup>222</sup> The World Bank insurance would be an ideal option as it would add more “political” protection, but this organization is less likely to be involved in a disputed area. Still, an insurance policy could be a useful mechanism to recover some of the investments, but it will not secure ownership of resources. A policy is also very costly, particularly in light of the fact that it may not guarantee recovery of the full market value of the relevant assets.

Third, an investor might decide to make investments in both countries in order to prevent retaliation from any side. This could be an interesting option if the investor is large enough and important for both states’ economies. This option, however, seems far more hypothetical. In such a hypothetical case, neither of the disputants might desire to expel such a

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<sup>221</sup> E.g., due to expropriation.

<sup>222</sup> The World Bank’s Multilateral Investment Guarantee Agency (“MIGA”) provides political risk insurance and credit enhancement for cross-border private sector investors and lenders. *See generally* <https://www.miga.org>.

critical investor. Hence, although the countries might not like this situation, they would ultimately accept such “dual” business in the disputed area. This was the case with ExxonMobil, which is one of the largest oil and gas companies in the world. They decided to invest in both Kurdistan and the Central Government of Iraq. However, this strategy backfired when the central government of Iran threatened to penalize Exxon, which ultimately gave up its Kurdistan plans. Things are far more difficult for smaller investors, who are less likely to secure investments with both sides.

Finally, an investor might choose to enter a consortium (under a joint operating agreement) with companies possessing political and economic strength as well as support by the military powers from their home countries, which could help them to protect and secure their assets.<sup>223</sup> This investing factor is called the “flag” factor. Still, investors should carefully consider what each of their co-venturers could bring to the table besides their reputation. Some governments tend to be more proactive in order to support their private and/or national companies abroad (e.g., United States, United Kingdom, France, and China). For example, a number of countries around the disputed South China Sea rely on the strong US presence to counterbalance the Chinese military powers in the area.<sup>224</sup> A similar situation happened in Cyprus, as one of the key investors in offshore blocks managed to divest part of its equity to a British company.<sup>225</sup> This decision could have been motivated by a potential political or military support from the UK government in the area.<sup>226</sup>

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<sup>223</sup> *France's Total Seeks to Expand Cypriot Gas Plan as It Eyes Iran Exit*, ENERGY VOICE (May 22, 2018), <https://www.energyvoice.com/oilandgas/172065/frances-total-seeks-to-expand-cypriot-gas-plan-as-it-eyes-iran-exit>; *ENI-Total Might Extend Gas Search in Blocks 6 and 11*, CYPRUSMAIL ONLINE (Mar. 21, 2018), <https://cyprus-mail.com/2018/03/21/eni-total-might-extend-gas-search-blocks-6-11>.

<sup>224</sup> Ralph Jennings, *Analysts: US Military Moves in South China Sea Little Help to Vietnam, Philippines*, VOA NEWS (June 8, 2018), <https://www.voanews.com/a/analysts-us-south-china-sea-little-help-to-vietnam-philippines/4429976.html>.

<sup>225</sup> *Noble and BG Agree to Partnership in Block 12, Offshore Cyprus*, WORLD OIL (Nov. 23, 2015), <https://www.worldoil.com/news/2015/11/23/noble-and-bg-agree-to-partnership-in-block-12-offshore-cyprus>.

<sup>226</sup> Although a 1960 Treaty established that Cyprus was independent from British control, it also provided that two certain areas in Cyprus (Akrotiti and Dhekelia) would remain British sovereign territory. *Deployments Cyprus*, BRIT. ARMY, <https://www.army.mod.uk/deployments/cyprus> (last visited Oct. 19, 2018). The UK maintains military bases in both Akrotiti and Dhekelia. *See id.*; *see also* Illustration of the Green Line/Buffer Zone in *The Green Line in Cyprus*, MILITARY HISTORIES, <http://www.militaryhistories.co.uk/greenline/explanation> (last visited Nov. 21, 2018). The “green line” separates the Turkish-Cypriot community in the north from the Greek-Cypriot community in the south.

All of these options provide some comfort for an investor. The options might help energy companies recover their investment if they lose their assets to the other neighboring country, which might acquire the area of operations. However, no alternative can completely mitigate the risks involved in areas with uncertain jurisdiction. The relevant governments might not be willing to fulfill their obligations towards their investors or might offer a lower compensation in order to solve the dispute. Likewise, enforcement of the investor's rights might be a long and costly process, and an insurance product might be too costly or might not even recover the full value of the assets in dispute.

Also, any investment decision might cause reputation risks for a private company. A decision could affect their relationship with the other nations and their own investors/shareholders, who might not be pleased with seeing their capital being spent on such a risky project. Even non-governmental organizations might be pushing the investor to abandon the area and respect a variety of international laws or ethical principles. That is why large sized and listed companies tend to avoid investments in disputed areas, as their reputation and internal stability might be at stake. For example, only a small number of large oil and gas companies in the world are investing in disputed areas in comparison with undisputed areas. But some smaller, private and unlisted companies might be more flexible to take such risky projects, provided that they would receive significant rewards in case of success.

## CONCLUSION

The concept of state recognition is both a political and legal issue. The failure of a territorial entity to be recognized as a state has important implications. It may threaten international peace and stability and hinder economic and legal developments in the concerned area.

This Article did not, and could not, analyze all of these issues. Instead, it focused solely on energy investments made by private actors in the waters surrounding Cyprus and Israel and Lebanon. In those cases, the presence of an unrecognized state, even if is not the grantor of private rights, may cause great uncertainty and raise questions about the viability of private interests. A comparative analysis between the two cases brought to light a series of similarities and differences.

The dispute in Cyprus involves the RC, which is a sovereign state receiving recognition by the entire international community—save Turkey—and the “TRNC,” which is a self-proclaimed state receiving recognition only by Turkey. The ongoing tension between the Greek– and Turkish–Cypriot communities, and the presence of Turkish military

powers in the waters surrounding the island create a challenging environment for the permit holders of the RC. Amid the dispute, companies may have their operations stalled or permanently discharged if Turkey uses force in the explored areas. But even after a potential settlement of the long-standing Cyprus question, investors need to find ways to secure their existing rights vis-à-vis the new political reality that will emerge in Cyprus from the formation of a federation or a confederation.

The dispute between Israel and Lebanon involves two sovereign entities, which are members of the UN, and parties to numerous international law conventions. The issue there is that non-recognition is regional. The vast majority of the world's states have international and diplomatic relations with Israel. Yet, Israel is not recognized by Lebanon and other neighboring countries. This makes the territorial and boundary dispute between the two neighbors puzzling for international law, as it may never be solved. Amid the dispute, Lebanon's permit holders face the challenge of forcible eviction by Israel's military powers. And even if the two countries came to a settlement agreement, private actors may see their investments "change hands" from one side of the maritime boundary to the other and, eventually, perish.

In sum, both cases involve an entity with limited state recognition, and the presence of energy investors in contested waters. In both situations, challenges for active private rights exist not only amid the sovereignty dispute but may continue even after its successful settlement. Although various legal mechanisms are available for the protection of the involved private interests, their efficacy is uncertain. International law primarily protects the interests of states rather than non-state actors. Also, the lack of recognition among the involved state entities hinders the peaceful settlement of both examined disputes.

But not all situations involving unrecognized states are the same for energy investors. Depending on the features of the dispute (land, maritime, political, or legal), the degree of recognition (regional or international), the relation of the involved state entities with international law (active BITs or UNCLOS), the commercial value of resources (present or suspected), and the stage of operations (exploration or development), an area may be suitable or completely incompatible with the investment portfolio and the risk strategy of the interested private company. Hence, before expressing their interest in an area of uncertain jurisdiction, energy companies must do their due diligence, examining the area and its challenges for private interests.

In addition, each company must develop a risk mitigation strategy to address the identified challenges. Protection may be sought from

conventional or contractual means, commercial collaborations with other companies, or insurance products. And yet, energy companies must always be aware that no risk mitigation mechanism is perfect in such complex situations. Eventually, a company may have to abandon the area of operations if relations between the concerned state entities deteriorate. In that case, even if the company recovers the capital value of its investment, by way of insurance or indemnity by the granting state, it still will have not reached its main target to develop the valuable resources, which may eventually be explored by its competitors.

By analyzing a complex and topical issue, this Article has not sought to discourage energy companies from investing in areas of uncertain jurisdiction. Rather, its purpose has been to shed light on questions which remain unaddressed by theorists and experts, and to dispel some of the uncertainties associated with statehood disputes. The authors hope that the above discussion will be useful to companies operating or willing to operate in such challenging environments, territorial entities seeking to grant energy permits in areas of uncertain jurisdiction, and policy-makers concerned with the protection of private interests in international disputes.

