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End the Moratorium: The Timor Gap Treaty as a Model for The Complete Resolution of the Western Gap in the Gulf of Mexico

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End the Moratorium: The Timor Gap Treaty as a Model for The Complete Resolution of the Western Gap in the Gulf of Mexico

ABSTRACT

The United States and Mexico recently entered into a treaty to delimit the continental shelf in the Gulf of Mexico, allowing both countries access to explore and exploit valuable natural resources in the Western Gulf. Included in the treaty is a ten-year moratorium on oil production within a buffer zone that encompasses transboundary reserves.

This Note explores the issues surrounding the buffer zone and suggests a model to resolve the dispute over access to transboundary reserves that will benefit both the United States and Mexico. Part II describes the relevant international law governing the Gulf of Mexico. Part III outlines the background and most recent treaty addressing the Western Gap, and explains the source of each country's claims to the area. Part IV provides a model for resolution by detailing the history of the Timor Gap and introducing the major provisions of the Timor Gap Treaty. Finally, Part V recommends that the United States and Mexico implement a similar joint development scheme, using the Timor Gap Treaty as a model.

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I. INTRODUCTION

The United States faces a potential energy crisis.¹ Surging gasoline, natural gas, and electricity prices have been identified as “perhaps the greatest threat to future economic prosperity.”² California has suffered power problems for several years as a result of the deregulation of the state’s electric utility industry, with rolling blackouts required in some areas to ration limited power supplies.³ Dependence on foreign oil has increased as well.⁴ Politicians are arguing over the proper solutions to the nation’s perceived energy problems, often engaging in public forum debates over who is responsible and expressing outrage at the existence of the crisis.⁵ Even in the 2000 presidential campaign candidates argued over the ramifications of tapping into emergency reserves and the possibility of oil exploration in the wildlife preserves of Alaska.⁶ Following the election, President Bush immediately outlined a legislative proposal that would open the Arctic National Wildlife Refuge to oil and gas drilling to increase domestic supplies in response to California’s electricity crisis.⁷ The general consensus is that the United States needs more power, specifically oil and natural gas, and preferably should get it from domestic sources.

1. David Ivanovich, *Energy bill draws threat of filibuster*, HOUSTON CHRON., Feb. 27, 2001, at 1, available at 2001 WL 3002295.

2. *Id.* (quoting then-Senate Majority Leader Trent Lott, R-Miss).

3. *Id.*

4. William Dorzdiak, *Energy Crisis Feared if Oil Prices Gyrate*, WASH. POST (Internet Edition), Nov. 21, 2000, at <http://www.washingtonpost.com/wp-dyn/articles/A46488-2000Nov20.html>.

5. *Id.*

6. *Bush: California Crisis Shows Need for Alaska Oil*, HOUSTON CHRON., Jan. 22, 2001, available at <http://www.chron.com/cs/CDA/story.hts/politics/803106>.

7. *Id.*

The United States has demonstrated an increasing dependence on foreign oil in recent decades to satisfy its energy needs.⁸ The Organization of the Petroleum Exporting Countries (OPEC) tightly controls its production levels and, in turn, has substantial power to set the global price of oil.⁹ Senator Chuck Hagel declared that “[w]e are more dependent on OPEC for our oil now than at any time in the history of this country.”¹⁰ He sees increased domestic production as a necessary step to reduce U.S. dependence on foreign oil.¹¹ Domestic consumption has increased, giving fluctuating prices the ability to significantly impact the economy as a whole.¹² As the trade deficit increases, energy consumption is expected to skyrocket.¹³ Politicians have called for a reduced reliance on Middle East oil, despite the fact that it remains the cheapest available energy source.¹⁴ They have also called for increased exploration and production within U.S. borders, hoping to decrease dependence on OPEC.¹⁵

One possible area available to domestic producers is the deep-water areas of the Gulf of Mexico, which is believed to hold the fourth largest oil reserve in the world.¹⁶ The Gulf of Mexico is approximately 3.9 million square miles and accounts for roughly ninety percent of U.S. offshore oil and gas production.¹⁷ Although domestic oil companies have long explored the shallower depths of the

8. Dorzdiak, *supra* note 4.

9. *Markets & Policy: Capitol Hill*, OIL & GAS NEWSL., July 1, 2000, available at 2000 WL 10576927.

10. *Consideration of Pending Treaties: Hearing of Senate Foreign Relations Comm.*, 106th Cong. 40 (2000) (statement of Sen. Chuck Hagel, Member, Senate Foreign Relations Comm.).

11. *Id.*

12. Note the oil crisis in the early 1980s, as well as in 1998, when oil prices fell to \$10 a barrel, while current levels are over \$30 a barrel. Dorzdiak, *supra* note 4. For an excellent, detailed overview of the impact oil prices had on U.S. banking and speculative lending in the 1970s and 1980s, see PHILLIP L. ZAIRE, *BELLY UP: THE COLLAPSE OF THE PENN SQUARE BANK* (1985), which focuses on the Penn Square Bank crisis and subsequent bank failures triggered by unstable oil prices and severely speculative lending.

13. Dorzdiak, *supra* note 4. Dorzdiak suggests that oil consumption will increase worldwide from 76 million barrels per day today to 115 million barrels per day in 2020, with demand doubling by 2030 and quadrupling by the end of the century. *Id.*

14. *Id.* This recent development does not consider the argument to increase efforts to reduce oil consumption in exchange for other sources of energy, as nuclear power is still “taboo” in Western countries. *Id.*

15. Note President Clinton’s use of the emergency fuel reserve to attempt to lower prices of heating oil in the northeastern United States. See *Markets & Policy: Capitol Hill*, *supra* note 9.

16. Suggestions to open areas of Alaska were met with strong environmental and political opposition. Ivanovich, *supra* note 1. U.S. geologists believe that the area could be the “world’s 4th biggest oilfield.” David B. Sheinbein, *Delimitation of the Western Gap Land in the Gulf of Mexico: A Need for Diplomatic Resolution*, 6 TUL. J. INT’L & COMP. L. 583, 587 (1998).

17. American Petroleum Institute, *Energy and the Gulf of Mexico: The Petroleum Industry in the Gulf of Mexico*, available at <http://www.api.org/ehs/gulf/oldpage.htm>.

Gulf of Mexico, it has not been technologically or economically feasible until recently to pursue oil and gas in the mineral-rich deep waters of the Gulf.¹⁸ Furthermore, exploration of this area seems less likely to ignite as much political and environmental heat as development of the Arctic National Wildlife Refuge in Alaska has.

This Note addresses the area known as the "Western Gap," or the "donut zone" or "donut hole," which lies approximately halfway between the Yucatan Peninsula and the United States and considers the potential for oil exploration and development of this area.¹⁹ Parts of the Western Gap are ten thousand feet deep and were not accessible until major production companies made recent technological advances.²⁰ Given this new technology, many U.S. companies can now access the deep water—or least begin the exploration process—if they follow rigid federal guidelines.²¹ Until June 2000, the Western Gap was located outside the boundaries of the treaty between the United States and Mexico and was functionally off-limits for diplomatic and scientific reasons.²²

In June 2000, the United States and Mexico entered into a treaty that delimited the continental shelf in the Gulf of Mexico, including the Western Gap.²³ The treaty includes all of the Western Gap, but leaves unresolved a buffer zone that runs along the equidistant line separating each country's portion of the Western Gap.²⁴ A ten-year moratorium is in effect on the buffer zone to allow both sides to determine the best way to divide the reserves that are believed to exist along the actual equidistant line.²⁵ This Note offers a potential resolution, beneficial to both the United States and Mexico, which would result in an equitable sharing of buffer zone reserves. The suggested solution is to create a zone of cooperation, allowing any and all companies to bid on drilling within the zone. The United States and Mexico would then share the royalties.²⁶ Such cooperation will

18. See *infra* notes 62-66 and accompanying text.

19. Jim Kennett, *U.S., Mexico agree on split of Gulf site with oil potential*, HOUSTON CHRON., June 3, 2000, at 1, available at 2000 WL 4302627.

20. Gerald Karey, *US-Mexico Treaty, Never Ratified, Becomes Key in Era of Deepwater GOM*, PLATT'S OILGRAM NEWS, Mar. 20, 1997, at 1, available at 1997 WL 8877920.

21. See *infra* notes 73-76 and accompanying text.

22. Kennett, *supra* note 19.

23. *U.S., Mexico Approve Gulf Oil Drilling Accord*, CHICAGO TRIB., June 10, 2000, at 20.

24. *Id.*

25. *Id.*

26. Mexico has an additional concern given its nationalized oil company. Because PEMEX is the government, Mexico uses its oil reserves in its valuation of the country as a whole. U.S. Energy Information Administration, *Mexico Country Analysts Brief*, available at <http://www.eia.doe.gov/emeu/cabs/mexifull.html>. Simply sharing royalties with the United States may have serious ramifications for the Mexican economy.

inevitably be affected by the Mexican Constitution's current prohibition on private ownership of natural resources.²⁷ Nevertheless, this Note argues that the principles of the zone of cooperation may still be applied.

A particularly good example of such a zone of cooperation is the Timor Gap Treaty, a joint development regime that controls the development of the deep boundary water in the Timor Sea.²⁸ The Timor Gap Treaty has been successful, both originally between Indonesia and Australia and as recently renegotiated between East Timor and Australia, and serves as an important model for the settlement of boundary disputes in international waters.

This Note suggests that a joint development scheme, similar to the Timor Gap Treaty, presents a possible solution to the Western Gap buffer zone moratorium. Part II briefly describes the relevant applicable international law governing the Gulf of Mexico. Part III analyzes the background and most recent agreement governing the Western Gap and each country's claim to and interests in the area. Part IV discusses the background and history of the Timor Gap and introduces the major provisions of the Timor Gap Treaty. Finally, Part V recommends that the United States and Mexico implement a similar joint development scheme using the Timor Gap Treaty as a model, while maintaining consideration for the issue of Mexico's nationalized oil regime.

II. THE INTERNATIONAL LAW STANDARD

The Western Gap is considered part of the continental shelf of the Gulf of Mexico.²⁹ Because of its location, two international laws may apply. The first is the 1958 Geneva Convention on the Continental Shelf, to which both the United States and Mexico are parties.³⁰ Article 1 of the 1958 Convention provides that the continental shelf of a coastal state extends beyond the depth of two

27. See *infra* notes 90-93 and accompanying text.

28. Lian A. Mito, *The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands*, 13 AM. U. INT'L L. REV. 727 (1998).

29. Jorge A. Vargas, *The Gulf of Mexico: A Binational Lake Shared by the United States and Mexico*, 9 TRANSNAT'L LAW. 459, 464-65 (1996) (arguing that, based on new scientific data, the Western Gap is actually part of the Continental Shelf rather than deep water that would require a separate international law standard involving the United Nations, essentially preventing bilateral resolution by the United States and Mexico).

30. Letter of Submittal, U.S. Dept. of State, Washington D.C., July 5th, 2000, SEN. TREATY DOC. No. 106-39, available at 2000 U.S.T. LEXIS 60, *2 [hereinafter Letter of Submittal].

hundred meters where the depth of the superjacent waters admits the exploitation of the natural resources of the shelf.³¹

The second body of international law possibly applicable to the continental shelf of the Gulf of Mexico is the 1982 United Nations Convention on the Law of the Sea (UNCLOS), adopted by the Third United Nations Conference on the Law of the Sea,³² to which Mexico is a party.³³ The United States, however, refused to sign UNCLOS in 1982 because it contained what the United States considered to be "flaws in the regime it would have established for managing the development of mineral resources of the seabed beyond national jurisdiction."³⁴ President Reagan, while rejecting the Convention due to its stance on seabed mining, expressly recognized that the balance of interests achieved in the remaining parts of the Convention was in the interests of the United States and the international community as a whole.³⁵ Thus, the United States accepts that UNCLOS reflects customary international law in this respect and has acknowledged that UNCLOS provides a more scientifically based definition of a continental shelf.³⁶

Article 76 of the Convention provides that the continental shelf of a coastal state comprises the greater of (1) the area in which the seabed and subsoil of the submarine areas extend beyond a country's territorial sea throughout the "natural prolongation of its land territory to the outer edge of the continental margin," or (2) "the area to a distance of two hundred nautical miles from the baselines from which the territorial sea is measured."³⁷ Under either UNCLOS measurement, the coastal state has exclusive control over the exploration and exploitation of the natural resources, including oil and gas, of the continental shelf.³⁸

With respect to the areas beyond two hundred nautical miles from coastal baselines, the 1958 Geneva Convention and UNCLOS provide that certain criteria must be met in order to qualify as a continental shelf. Specifically, a coastal state can establish the shelf's outer boundary to coincide with the outer edge of the continental

31. *Id.*

32. United Nations Convention on the Law of the Sea, opened for signature, Dec. 10, 1982, U.N. Doc. A/Conf./62/122 (1982), reprinted in 21 I.L.M. 1261.

33. Letter of Submittal, *supra* note 30, at *6.

34. Letter from the President to the Senate, Oct. 7, 1994, U.S. Dept. of State Dispatch Supp., Feb. 1995, Vol. 6, No.1, reprinted in 34 I.L.M. 1396 (Sept. 1995).

35. Bernard H. Oxman, Current Developments, *United States Interests in the Law of the Sea Convention*, 88 AM. J. INT'L L. 167, 168 (1994). He announced that the United States would act in the future in a manner that was consistent with the balance of U.S. interests with the rest of the Convention. *Id.*

36. Letter of Submittal, *supra* note 30, at *5.

37. *Id.*

38. *Id.*

margin.³⁹ This requires that the outer edge of the continental margin be physically located further than the two hundred nautical mile limit.⁴⁰ This is an exceptional submarine geological formation that is quite rare in the world.⁴¹

While negotiating the treaty with Mexico on the Delimitation of the Continental Shelf, both the United States and Mexico agreed that all of the seabed and subsoil of the submarine areas beyond the two hundred mile exclusive economic zone limit in the Western Gulf of Mexico met the legal requirements described in both the 1958 Geneva Convention and UNCLOS concerning the continental shelf.⁴² This determination prevented the area at issue from being considered part of the "common heritage of mankind," held in trust for the people of the world.⁴³

III. THE WESTERN GAP

The drawing by the United States and Mexico of the two hundred nautical mile national territory formed the Western Gap, which is roughly halfway between the Texas coastline and the Yucatan Peninsula to the southeast.⁴⁴ The United States formed the boundary following its coastline, while Mexico used its coastline as well as small Mexican islands north of the Yucatan.⁴⁵ The result was a gap of approximately 129 nautical miles created by the distance between the opposing coasts: they are more than four hundred nautical miles apart and thus create a space between the respective

39. Vargas, *supra* note 29, at 468.

40. *Id.*

41. *Id.* (noting that very few coastal states have reported such geological formations to UNCLOS).

42. Letter of Submittal, *supra* note 30, at *5-6.

43. Dabney Welsh, *Access to Our Backyard Reserves: A Final Resolution of the Western Gulf of Mexico's Maritime Boundaries*, 23 HOUS. J. INT'L L. 609, 626-27 (2001) (discussing the history of the UNCLOS and both the Mexican and U.S. interpretation of UNCLOS). Had the area been classified as common heritage, it would not be subject to exclusive regulation between the two countries. *Id.* Common heritage is not subject to exclusive regulation between two countries. *Id.*

44. Kennett, *supra* note 19.

45. Vargas, *supra* note 29, at 464. While there was some debate concerning the use of certain islands as the starting point of the EEZs, there was general consensus in 1976, but not official agreement until the 1997 ratification of the TMB. *Id.* The United States did not object to Mexico's use of the islands north of the Yucatan because it used islands in the Pacific for its own benefit and thus could not realistically oppose Mexico on the issue. Mark B. Feldman & David Colson, *The Maritime Boundaries of the United States*, 75 AM. J. INT'L L. 729, 743 (1981).

two hundred nautical mile exclusive economic zones.⁴⁶ The total area comprises approximately 5,092 nautical square miles.⁴⁷

A. *Background and History of the Dispute*

Despite the generally amicable relations between the United States and Mexico, both sides historically approach boundary issues delicately.⁴⁸ The boundary treatment dates back to the 1848 Treaty of Guadalupe-Hidalgo following the Mexican-American War.⁴⁹ In the war, Mexico ceded a large amount of territory to the United States, including Texas and California as well as other western states.⁵⁰ Even in modern times, boundary issues have been contentious.⁵¹ Additionally, both countries' motives diverged significantly with respect to resolution of the Western Gap. As a result of these factors, it continues to be important that both the United States and Mexico maintain a perception of sociality between themselves to "heighten their sense of long-term self-interest" and increase their efforts to cooperate.⁵²

Maritime boundary negotiations addressing significant portions of the Gulf of Mexico began in 1976 after Mexico established its two hundred nautical mile exclusive economic zone by amending Article 27 of its 1917 Constitution.⁵³ Text inserted into the Mexican Constitution provided that Mexico would exercise control over an area situated outside the territorial seas and adjacent to them, under the rights and sovereignty and the jurisdiction that the laws of the Congress determined.⁵⁴ Any boundary conflicts or overlap with another country's exclusive economic zone would be resolved by agreements with those countries.⁵⁵

46. Feldman & Colson, *supra* note 45, at 743.

47. *U.S. and Mexico Sign Treaty Creating Boundary on Continental Shelf in Gulf*, FOSTER NAT. GAS REP., June 15, 2000, at 17, available at 2000 WL 8690245.

48. Feldman & Colson, *supra* note 45, at 743.

49. *Id.*

50. *Id.*

51. One example is the issue of water rights in the Rio Grande Valley. James Pinkerton, *Bitter Fruit: Valley Citrus Farmers Say Mexico Hoarding Water, Harming Crops*, HOUSTON CHRON., Sept. 30, 2001, at A29. Under a 1944 water-sharing treaty that resulted in the construction of two reservoirs on the river, Mexico is required to release water into its tributaries that feed the Rio Grande. *Id.* Since 1992, Mexico has withheld 1.35 trillion acre-feet of water, citing drought conditions. *Id.* U.S. officials and farmers claim that Mexico is, in fact, hoarding water for its own farmers, demonstrated by the dramatic increase in Mexican agricultural exports since 1992. *Id.*

52. Gary L. Scott et al., *Success and Failure Components of Global Environmental Cooperation: The Making of International Environmental Law*, 2 ILSA J. INT'L & COMP. L. 23, 58 (1995).

53. Vargas, *supra* note 29, at 462.

54. Welsh, *supra* note 43, at 615 (quoting Article 27 of the Mexican Constitution).

55. *Id.*

While the United States deemed Mexico's demarcation as generally consistent with its interests, diplomatic negotiations began to establish their respective maritime boundaries where the zones overlapped.⁵⁶ The line set forth was based on methodology from a previous treaty that created a twelve nautical mile boundary, that being a simplified equidistant line, with equal area tradeoffs, giving full effect to islands.⁵⁷ The agreement was incorporated into the Treaty on Maritime Boundaries (TMB), which was signed on May 4, 1978.⁵⁸

Although the TMB was signed by both countries and ratified by Mexico in 1979, the U.S. Senate did not ratify the agreement until 1997.⁵⁹ While the Foreign Relations Committee reported favorably on the TBM in August 1980, the Treaty was withdrawn from consideration on the Senate floor on September 16, 1980 after questions were raised about the potential for petroleum in the continental shelf.⁶⁰ Despite receiving a study of the resources by the U.S. Geological Survey in 1981, no action was taken by the Senate.⁶¹ The "[d]elimitation of the Western Gap became increasingly important to U.S. interests as petroleum exploration has moved into deeper waters."⁶² One of the reasons that the U.S. Senate did not take quicker action on the TMB was that the oil industry did not have the capability to drill in 8,200 feet of water until the mid-1990s.⁶³ Private companies have been drilling in the Gulf of Mexico for many decades, but generally only in the shallower areas of the continental shelf.⁶⁴ As technology improved with the advent of ultra-deep drillships, artificial seabeds, and midwater completions,⁶⁵ companies pushed the frontier of exploration into deeper waters.⁶⁶

56. Vargas, *supra* note 29, at 462.

57. Feldman & Colson, *supra* note 45, at 743.

58. Treaty on Maritime Boundaries, May 4, 1978, U.S.-Mex., 17 I.L.M. 1073 (1978); David B. Sheinbein, *supra* note 16, at 585. While Mexico ratified the treaty in 1978, the U.S. Senate did not do so until 1997, almost seventeen years later. *Id.* Sheinbein claims that this failure by the U.S. Senate has contributed to the current lack of resolution for the Western Gap given Mexico's ill will. *Id.*

59. *US, Mexico Advance Gulf Treaty Effort*, PLATT'S OILGRAM NEWS, Nov. 17, 1997, at 5, available at 1997 WL 8881802.

60. Feldman & Colson, *supra* note 45, at 745.

61. *US, Mexico Advance Gulf Treaty Effort*, *supra* note 59.

62. Letter of Submittal, *supra* note 30, at *4.

63. Jerry Greenberg, *Data Ready when Gap Close*, *Explorer* (Oct. 2000), available at http://www.aapg.org/explorer/archives/10_00/western_gap.html.

64. KATE VAN DYKE, *FUNDAMENTALS OF PETROLEUM* 74 (1997). The Outer Continental Shelf Lands Act of 1953, as amended in 1978, governs offshore drilling beyond the states' inland waters. *Id.*

65. William Furlow, *US, Mexico about to deal with the boundary "donut hole"*, *OFFSHORE*, July 1997, at 60, available at 1997 WL 10234914.

66. *U.S.-Mexico gulf treaty pressures rising*, *OIL & GAS J.*, May 12, 1997, at 34, available at 1997 WL 9574810.

As deepwater technology advanced, the TMB became an issue once again.⁶⁷ The Department of Interior urged ratification under pressure from the oil industry.⁶⁸ Mexico began pressuring for ratification as well because of concerns that deepwater drilling near the boundary threatened to drain off reserves that properly belonged to Mexico.⁶⁹ The late opposition leader, Mexico Senator Jose Angel Conchello, popularized the "drinking straw" theory describing the drain off concerns.⁷⁰ He suggested that if no agreement was reached, foreign companies would simply drill in the U.S. side and "suck out" Mexico's oil.⁷¹ Coupling the U.S. oil industry pressure with Mexico's refusal to begin negotiations on the Western Gap until the U.S. Senate ratified the TMB through an exchange of notes, the Senate finally ratified the Treaty and the two sides exchanged the Instruments of Ratification on November 13, 1997.⁷² This agreement paved the way for negotiations over the Western Gap.

1. The U.S. Perspective on the Western Gap Issue

The Minerals Management Service (MMS) of the Department of the Interior manages U.S. natural gas, oil, and other mineral resources on the Outer Continental Shelf and collects, accounts for, and disburses the annual \$4 billion in revenues from onshore and offshore leases.⁷³ As it pertains to this Note, the MMS is responsible for Outer Continental Shelf leasing, production programs, and royalty management.⁷⁴ Over the last few years, the MMS has offered royalty deduction relief to increase drilling in waters deeper than eight hundred meters.⁷⁵ While the Department of Interior has great latitude to choose how to lease offshore lands, the standard lease sale involves public notice of the proposed lease blocks followed by competitive bidding that includes cash bonuses and royalty

67. *Id.*

68. *Id.* Deepwater is defined as one thousand feet or deeper. Michael Davis, *High interest in deep water*, HOUSTON CHRON., Aug. 4, 2000, at 1, available at 2000 WL 24501790.

69. Nick Anderson, *Mexico fears U.S. drillers will siphon off its oil*, SAN DIEGO UNION-TRIB., Mar. 31, 1996, at I2. Despite the fact that the Shell Oil Company project was more than twenty miles within the U.S. territorial waters, some Mexicans protested that their sovereignty was at risk. *Id.*

70. Ronald Buchanan, *Mexico Sees Progress on Gulf 'Donut Hole'*, PLATT'S OILGRAM NEWS, Mar. 8, 2000, at 2, available at 2000 WL 14094053.

71. *Id.*

72. *US, Mexico Advance Gulf Treaty Effort*, *supra* note 59.

73. *MMS Lauds U.S. and Mexico continental shelf boundary treaty agreement*, M2 PRESSWIRE, June 14, 2000, available at 2000 WL 22276453.

74. VAN DYKE, *supra* note 64, at 74.

75. Gerald Karey, *US details new deep Gulf royalty program*, PLATT'S OILGRAM NEWS, Nov. 30, 2000, at 1, available at 2000 WL 14098324.

agreements with the U.S. government.⁷⁶ Deepwater leases last twice as long as shallower leases—ten years versus five years in duration.⁷⁷ Foreign companies may participate in federal lease sales where reciprocal agreements allow U.S. nationals to lease in that country.⁷⁸

The MMS pushed for the treaty in support of exploration and development of this portion of the Gulf.⁷⁹ By resolving the boundary dispute, the MMS could offer leases to private companies within the Western Gap without risking Mexican protests, which could delay development even further.⁸⁰ Also, it should be noted that both the oil industry and the U.S. government were probably aware that Petróleos Mexicanos (PEMEX), Mexico's state oil company, did not have the technology or the funding to develop the Western Gap. It does not seem unreasonable that the United States was at least partially motivated by a desire to "get there first." Thus, the oil companies and the government had great interest in the swift resolution of the Western Gap issue.

2. Mexico's Perspective on the Western Gap Issue

Mexico's urgency to settle the dispute was essentially a defensive tactic. While the United States stands to benefit immediately from the delimitation of the Western Gap, Mexico is technologically behind the U.S. petroleum industry by decades and needs to protect its own reserves from private development.⁸¹ Mexico has witnessed successful deepwater drilling all around their boundaries by the United States and Brazil, and fears it will be taken advantage of or left out of the game.⁸² Government officials and politicians in Mexico viewed the delay in finalizing the border as an attempt to rob Mexico of valuable resources.⁸³ The director of PEMEX's Exploracion y Produccion, Jose Antonio Ceballos, signaled his belief in the importance of a boundary resolution by stating: "Make no mistake, the overwhelming bulk of the hydrocarbon wealth is on the Mexican side of the maritime boundary."⁸⁴ Despite Mexico's new leadership

76. *Id.*

77. *Id.*

78. *Id.*

79. *MMS, industry praise Gulf of Mexico treaty*, ENERGY REP., June 26, 2000, available at 2000 WL 8749077 [hereinafter *Industry Praise*].

80. While the MMS could have applied the treaty provisionally, it is clear that the ratification of the treaty legitimizes U.S. efforts to develop in the deepwater. *Gulf of Mexico western gap division agreed, exploration pending*, OIL & GAS J., July 10, 2000, at 30, available at 2000 WL 14257607 [hereinafter *Exploration Pending*].

81. See *U.S.-Mexico Gulf Treaty Pressures Rising*, *supra* note 66.

82. Peter Gall, *Mexico, US on Brink of 'Doughnut Hole' Deal*, OIL DAILY, June 2, 2000, available at 2000 WL 23415903.

83. *Id.*

84. Welsh, *supra* note 43, at 640 (quoting Ronald Buchanan, *PEMEX Needs an Elephant Find: Gas Requirement Urgent*, PLATT'S OILGRAM NEWS, Apr. 21, 1999, at 2).

and pledge for greater cooperation with the United States, President Vicente Fox faces an uphill battle in further dealings with the Western Gap buffer zone and potential transboundary reserves.⁸⁵

Mexico is a country with a proud history, particularly with respect to the Gulf that bears its name. One commentator has declared that "Mexico is a luminary in the constellation of States that have consistently advocated the progressive development, codification, and strengthening of the international law of the sea."⁸⁶ Throughout the twentieth century, Mexico has been a leader in implementing new international law models in its own Constitution.⁸⁷ It was the first country to establish a two hundred nautical mile exclusive economic zone and to adjust its domestic legislation to conform to the 1982 UNCLOS standards by enacting the Federal Oceans Act in 1986.⁸⁸ The Federal Oceans Act systemized the previously piece-meal legislation. The most significant provision was Article 27 of the Mexican Constitution, which grants direct ownership of any natural resources to the Mexican government.⁸⁹

The Mexican oil industry was nationalized in 1938.⁹⁰ PEMEX, the state oil company, is the world's fifth largest oil company, the single most important entity in the Mexican economy, and a symbol of Mexican sovereignty and independence.⁹¹ PEMEX is the only oil company allowed in the Mexican oil market, as the Constitution all but prohibits foreign control of energy production.⁹² It enjoys a monopoly over exploration and production of all hydrocarbons—all of which are owned by the state.⁹³

This circumstance affects the ability of the United States and Mexico to create a joint development scheme in the Western Gap buffer zone. Foreign investment in production of Mexico's constitutional reserves will only be possible if the Mexican Congress

85. John King, *Bush, Fox Pledge Greater Cooperation Between U.S., Mexico* (Feb. 16, 2001), at <http://www.cnn.com/2001/ALLPOLITICS/02/16/bush.mexico.02/index.html>.

86. Jorge A. Vargas, *Mexico's Legal Regime Over Its Main Spaces: A Proposal for the Delimitation of the Continental Shelf in the Deepest Part of the Gulf of Mexico*, 26 U. MIAMI INTER-AM. L. REV. 189, 238 (1995).

87. *Id.* at 192.

88. *Id.* at 192-93.

89. *Id.* at 194-95.

90. Embassy.org, *Mexico*, available at http://www.countrywatch.com/files/114/em_topic.asp?TP=ENERG&COUNTRY=114.

91. *Id.*

92. Tim Weiner, *Bush Goes to Mexico Seeking Power: Electricity, Oil and Natural Gas*, INT'L HERALD TRIB., Feb. 13, 2001, available at <http://www.iht.com/articles/10605.html>.

93. U.S. Dept. of Energy, *An Energy Overview of Mexico*, available at <http://www.fe.doe.gov/international/mexiover.html>.

allows a mix of public ownership and private development in energy production.⁹⁴

Although the state-run organization has enthusiastic public support from those who see PEMEX as a symbol of sovereignty, President Fox campaigned on a promise to “renationalize” PEMEX by allowing oilfield professionals to run the operations, rather than politicians.⁹⁵ President Fox, however, has backed off his efforts to privatize PEMEX and plans instead to focus on modernizing and streamlining the oil giant.⁹⁶ Although it raised twenty-two billion dollars in 1999—thirty-one percent of Mexico’s federal income—PEMEX will have to invest billions to keep up with domestic demand for gasoline and natural gas for commercial and industrial use.⁹⁷ Mexico’s imports of natural gas from the United States are likely to reach seventeen billion dollars per year this decade,⁹⁸ and, remarkably, natural gas is the most liberalized of the energy sectors.⁹⁹ While the natural gas sector is partly privatized, it remains tied to PEMEX’s actions because the oil monopoly maintains exclusive rights for the extraction and sale of natural gas.¹⁰⁰

Other energy sectors, such as oil and gas refineries and electricity, have experienced partial privatization in the 1990s as well.¹⁰¹ The question remains, however, whether the Mexican government will part with its monopoly and point of pride. While Mexican politicians have held steadfast, it may not be economically efficient or even viable to try to streamline from within the company.¹⁰² With the Mexican economy suffering and its balance of payments equally poor, the hard-liners should consider the principle of discounted present value and open the doors for private investment. Having a joint interest today is worth far more than having it all twenty years from now when PEMEX is finally capable of extracting the reserves itself.

Mexico remains sensitive to any hint of U.S. interference in their country, and one of the main arguments against selling off PEMEX is that it would likely hand control of sovereign resources over to U.S.

94. *Id.*

95. *The Upturn Continues*, WORLD OIL, Aug. 1, 2000, at 37, available at 2000 WL 18974359.

96. Embassy.org, *supra* note 90.

97. Weiner, *supra* note 92.

98. *Id.*

99. United States Energy Information Administration, *Mexico* (Feb. 2000), at <http://www.eia.doe.gov/emeu/cabs/mexifull.html>. In 1995 the Mexican Congress approved the Natural Gas Law, modifying the Mexican Constitution, opening the natural gas market to private and foreign investors. *Id.*

100. *Id.*

101. *Id.*

102. *See generally* Weiner, *supra* note 92.

companies.¹⁰³ However, the benefits of privatization,¹⁰⁴ such as improved growth of the national gross product and substantial private investment, should force Mexico to reconsider its stance.¹⁰⁵ Admittedly the process is politically difficult, but the long-term benefits in the face of staggering costs to overhaul the current system without private investment should outweigh the political expense.¹⁰⁶ Even if full privatization is not possible, the Timor Gap Treaty principles may be successfully applied to the buffer zone of the Western Gap.¹⁰⁷

B. *The Treaty with Mexico on the Delimitation of the Continental Shelf*

In November 1997, the U.S. Senate ratified the 1978 treaty with Mexico settling the maritime boundary between the United States and Mexico.¹⁰⁸ That ratification paved the way for subsequent negotiations to determine the boundary in the Western Gap.¹⁰⁹

The result of Western Gap negotiations was officially named the "Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles,"¹¹⁰ signed by Secretary of State Madeleine Albright and Mexico's Foreign Minister Rosario Green on June 9, 2000.¹¹¹ The accord gave the United States 1,913 square nautical miles, about thirty-eight percent of the total, while Mexico received 3,179 square nautical miles, approximately sixty-two percent

103. *Mexico, U.S. May Solve Gulf Quarrel; Possible Oil Field Split Between Two Nations*, TIMES-PICAYUNE, June 3, 2000, at C3, available at 2000 WL 21261710.

104. Chile, Argentina, and Brazil exemplify the positives of natural resource privatization. J. Keith Russell, *The Time is Now for the Full Privatization of PEMEX*, 20 HOUS. J. INT'L L. 173, 176-79 (1997).

105. *Id.* at 176-77.

106. See Weiner, *supra* note 92 (noting that private investors rarely sink money into state-controlled enterprises).

107. If PEMEX remained nationalized, the scope of the joint development plan would be modified slightly. See *infra* notes 139-42, 229-33 and accompanying text.

108. Karey, *supra* note 20.

109. *US, Mexico Advance Gulf Treaty Effort*, *supra* note 59. Mexico had made it clear that it was not willing to discuss the Western Gap until the U.S. Senate ratified the TMB. *Id.*

110. Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, June 9, 2000, U.S.-Mex., S. TREATY DOC. No. 106-39 (2000) [hereinafter Western Gap Treaty].

111. Bob Deans, *Agreement on Border Runs Deep; U.S., Mexico Settle Ownership of Sea Bottom That's Apparently Rich in Energy Resources*, ATLANTA J. & CONST., June 10, 2000, at 11A.

of the total.¹¹² The accord further employed an equidistance method as the basis for the demarcation of clear borders, as suggested by the U.S. State Department.¹¹³ This equidistance method is consistent with previous U.S. treaties.¹¹⁴

The Western Gap Treaty also established a small 1.4 nautical mile buffer zone on each side of the new boundary, to which a ten-year moratorium on oil and gas exploration and production would apply.¹¹⁵ The size of the buffer zone was statistically calculated to encompass more than ninety-nine percent of the potential transboundary reserves.¹¹⁶ After the ten-year period, each country could permit exploration and drilling of oil and gas in its respective buffer zone.¹¹⁷

It is apparent that the buffer zone moratorium was created "mainly to allay Mexican nervousness that U.S. companies, who likely will be ready to produce reservoirs earlier than PEMEX, might drain oil or gas from the Mexican side of the boundary."¹¹⁸ This enabled Mexico to pass the Western Gap Treaty quickly without opposition from their Senate, whose Members have strongly denounced any efforts by the United States to drill anywhere near the boundary.¹¹⁹ Additionally, the delay "will allow Mexico to form a better idea about the nature and location of the cross-border reserves."¹²⁰ While both countries encourage exploration and analysis work during the ten-year period and must share any exploration information with each other,¹²¹ the larger issue of developing the transboundary reserves remains unresolved.

In addition to defining the area governed by the treaty specifically, the preamble acknowledges the purpose of the delimitation, "[t]aking into account the possibility that there could exist petroleum or natural gas reservoirs that extend across that continental shelf boundary, and the need for cooperation and periodic consultation between the parties in protecting their respective interests in such circumstances."¹²² Article I lists the coordinates of

112. Jerry Greenberg, *Data Ready when Gap Close*, EXPLORER (Oct. 2000), at http://www.aapg.org/explorer/archives/10_00/western_gap.html.

113. Welsh, *supra* note 43, at 649.

114. Examples include the Cuba-Bahamas boundary, the U.S. and British Virgin Islands boundary, the Cook Islands and New Zealand boundary, and the U.S. and Canadian boundary. *See id.* at 635-39.

115. *Id.* at 651-52.

116. Welsh, *supra* note 43, at 652; *Exploration Pending*, *supra* note 80.

117. *Industry Praise*, *supra* note 79.

118. *Exploration Pending*, *supra* note 80.

119. *Id.* Mexico fears that without this buffer zone, the advanced U.S. oil companies would drill as close as possible to the boundary and take reserves from the Mexican side that rightfully belong to Mexico. *See id.*

120. Kennett, *supra* note 19 (quoting a statement by the Mexican government).

121. *Id.*

122. Western Gap Treaty, *supra* note 110, at 1.

the boundaries,¹²³ while Article II states the computational bases for the coordinates.¹²⁴ Article III prohibits both the United States and Mexico from claiming or exercising sovereign rights or jurisdiction over the seabed and subsoil of the Western Gap.¹²⁵

Article IV sets forth the moratorium at issue in this Note. Specifically, it provides:

1. Due to the possible existence of petroleum or natural gas reservoirs that may extend across the boundary set forth in Article I (hereinafter referred to as "transboundary reservoirs"), the Parties, during a period that will end ten (10) years following the entry into force of this Treaty, shall not authorize or permit petroleum or natural gas drilling or exploitation of the continental shelf within one and four-tenths (1.4) nautical miles of the boundary set forth in Article I. (This two and eight-tenths (2.8) nautical mile area hereinafter shall be referred to as "the Area.")¹²⁶

Article IV then provides that the ten-year period may be modified by mutual agreement.¹²⁷ Additionally, Article IV requires each country to allow the other to conduct geological and geophysical surveys on its side of the Area to help determine the possible presence and distribution of transboundary reservoirs.¹²⁸ Furthermore, the United States and Mexico must share geological and geophysical information

123. The continental shelf boundary between the United States of America and the United Mexican States in the Western Gulf of Mexico beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be determined by geodetic lines connecting the following coordinates:

1.	25 [degrees] 42' 14.1" N.	91 [degrees] 05' 25.0" W.
2.	25 [degrees] 39' 43.1" N.	91 [degrees] 20' 31.2" W.
3.	25 [degrees] 36' 46.2" N.	91 [degrees] 39' 29.4" W.
4.	25 [degrees] 37' 01.2" N.	91 [degrees] 44' 19.1" W.
5.	25 [degrees] 37' 50.7" N.	92 [degrees] 00' 35.5" W.
6.	25 [degrees] 38' 13.4" N.	92 [degrees] 07' 59.3" W.
7.	25 [degrees] 39' 22.3" N.	92 [degrees] 31' 40.4" W.
8.	25 [degrees] 39' 23.8" N.	92 [degrees] 32' 13.7" W.
9.	25 [degrees] 40' 03.2" N.	92 [degrees] 46' 44.8" W.
10.	25 [degrees] 40' 27.3" N.	92 [degrees] 55' 56.0" W.
11.	25 [degrees] 42' 37.2" N.	92 [degrees] 57' 16.0" W.
12.	25 [degrees] 46' 33.9" N.	92 [degrees] 59' 41.5" W.
13.	25 [degrees] 48' 45.2" N.	93 [degrees] 03' 58.9" W.
14.	25 [degrees] 51' 51.0" N.	93 [degrees] 10' 03.0" W.
15.	25 [degrees] 54' 27.4" N.	93 [degrees] 15' 09.9" W.
16.	25 [degrees] 59' 49.3" N.	93 [degrees] 26' 42.5" W.

Id. at 2.

124. *Id.*

125. *Id.* at 3.

126. *Id.*

127. *Id.*

128. *Id.*

in their possession and notify one another of any possible transboundary reservoir.¹²⁹

Article V sets forth periodic meetings to facilitate the sharing of information and, more importantly, to "seek to reach agreement for the efficient and equitable exploitation of such transboundary reservoirs."¹³⁰ Both parties must inform the other of any licensing or concession grants or production commencement under Article V,¹³¹ and are also individually responsible for the observation of all terms of the Treaty.¹³² Article VI states that each party should consult the other for Treaty interpretation, while Article VII disclaims any prejudice by the Treaty, preserving independence in dealing with internal waters or the high seas.¹³³ Article VIII requires that any disputes be resolved by negotiations, while Article IX merely requires ratification.¹³⁴

The Articles at issue are Articles IV and V, as they set forth the sparse details of the moratorium while requiring efforts to seek an "equitable" resolution of the buffer zone.¹³⁵ One possible equitable resolution would be a joint development agreement such as the Timor Gap Treaty.

C. *The Effects of the Western Gap Treaty*

The Western Gap Treaty successfully resolves a festering issue and benefits both the United States and Mexico, at least in the short term. The United States will benefit almost immediately through lease sale of blocks located on the U.S. side of the boundary.¹³⁶ The MMS has already begun offering deepwater Gulf lease sales pursuant to the Outer Continental Shelf Lands Act.¹³⁷ The MMS included as many as fifty-three whole or partial blocks in the Western Gap in its March 28, 2001 sale.¹³⁸ With an expected 1.53 to 4.39 trillion cubic

129. *Id.*

130. *Id.* at 4.

131. *Id.*

132. *Id.*

133. *Id.* at 4-5.

134. *Id.* at 5.

135. *See supra* notes 125-31 and accompanying text.

136. Keely Coghlan, *MMS Expects Debut of Western Gap Leases to Attract Bidding Interest at Next Auction*, OIL DAILY, Dec. 15, 2000, available at 2000 WL 30361443. As an illustration of the importance of the Gulf lease sales to the U.S. Treasury, the three Western Gulf lease sales prior to the August 1997 sale yielded \$1.7 billion in high bids. Ray Tyson, *Gulf Donut Zone Might Be Hot in Upcoming Sale*, PLATT'S OILGRAM NEWS, July 28, 1997. Since 1956, oil and gas production as a whole has generated more than \$100 billion for the U.S. Treasury. *Id.* (examining statistics from MMS measuring from 1956 to 1995).

137. Outer Continental Shelf, Central Gulf of Mexico, Oil and Gas Lease Sale 178, Part 1, 66 Fed. Reg. 11,524 (Feb. 23, 2001).

138. *Id.*

feet, and a net economic value of \$1.2 billion to \$3.6 billion contained within blocks, both the oil industry and the United States will enjoy substantial gains.¹³⁹

The blocks or portions of blocks in the buffer zone, however, were excluded from the sale.¹⁴⁰ Through implementation of a joint development scheme such as suggested in this Note, the U.S. stands to gain further if the buffer zone is available for leasing as well.

Mexico, conversely, protects its interests from possible development by companies or consortiums of companies other than PEMEX. Pirating concerns are alleviated, particularly in light of the buffer zone. Another important benefit for Mexico is the free information it receives as part of the Western Gap Treaty.¹⁴¹ Although PEMEX has already carried out seismic studies in an effort to establish the geological characteristics of the Western Gap, it is unclear how detailed the research data actually is.¹⁴² It is more likely that private companies regulated by the MMS on the U.S. side will do more intensive research, and such data will be available to Mexico under the Treaty. Essentially, Mexico can wait for aggressive U.S. companies to do the research for them.

Despite this apparent free ride, Mexico lacks any regulatory power over exploration efforts under the current Treaty.¹⁴³ A joint development scheme such as the one suggested in this Note would afford Mexico an opportunity to oversee all efforts concerning the buffer zone.

IV. THE TIMOR GAP TREATY AS A MODEL FOR JOINT DEVELOPMENT

On December 11, 1989, Australia and Indonesia entered into an agreement establishing a provisional zone of cooperation for joint development of seabed resources in the Timor Gap.¹⁴⁴ The resulting

139. MMS, INSIDE F.E.R.C.'S GAS MARKET REP., Dec. 22, 2000, at 21, available at 2000 WL 13101150.

140. *Id.*

141. See *supra* note 128 and accompanying text.

142. Ronald Buchanan, *Gulf 'Donut Hole' Focus of Study by PEMEX*, PLATT'S OILGRAM NEWS, May 22, 1998, at 3, available at 1998 WL 9828172.

143. Even though there is a ten-year moratorium on oil and gas exploration and production in the buffer area, each side can conduct its own seismic surveys and prepare for possible exploration. Greenberg, *supra* note 63. Following the moratorium, each side may permit drilling in its respective buffer zone, but must notify the other when any of the buffer area is made available for drilling. *Id.* Under the current scheme, Mexico would merely be informed of drilling on the U.S. side. *Id.*

144. Michael Shane French-Merrill, *The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached Its International Obligations in Ratifying the Timor Gap Treaty*, 8 CARDOZO J. INT'L & COMP. L. 285, 288 (2000).

Timor Gap Treaty resolved a lengthy dispute between the two countries concerning seabed boundary delimitation.¹⁴⁵

A. Background and History of the Timor Gap Dispute

The Island of Timor, with an area of approximately seventy-five thousand square miles, is located in the Indian Ocean roughly three hundred miles northwest of Australia.¹⁴⁶ The island is divided into two countries, East and West Timor. Yet despite their shared geography, each country has a decidedly different history and culture.¹⁴⁷ West Timor, once part of the Dutch East Indies, became part of the Indonesian Republic following World War II.¹⁴⁸ The eastern portion of the island, by contrast, was a Portuguese colony until late 1975 when Indonesia invaded East Timor, incorporating it into the Indonesian Republic as the twenty-seventh province on July 17, 1976.¹⁴⁹

The Timor Gap was created in 1972 as the result of two events. First, Australia and Indonesia enacted a treaty establishing a seabed boundary in an area east of Papua New Guinea and south of West Timor.¹⁵⁰ Australia was unsuccessful, however, in negotiating a similar treaty with Portugal governing a seabed boundary between itself and East Timor.¹⁵¹ The success of one negotiation and the failure of the other resulted in a gap in the seabed boundary between East Timor and Australia.¹⁵² Indonesia inherited the boundary dispute when it took control of East Timor in 1975.¹⁵³

In 1974, reports of petroleum discoveries in the Kelp structure within the Timor Gap region revealed significant oil and gas

145. *Id.*

146. Mito, *supra* note 28, at 750.

147. IAN ROWLAND, *TIMOR: INCLUDING THE ISLANDS OF ROTI AND NAO* 21-27 (1992).

148. *Id.* at 26.

149. *Id.* at 22-25; see also Stuart Kaye, *The Timor Gap Treaty: Creative Solutions and International Conflict*, 16 SYDNEY L. REV. 72, 75 (1994) (noting that in 1978, Australia granted de facto recognition of Indonesia's sovereignty over East Timor, despite Australia's initial "unenthusiastic" protest); James K. Kenny, Comment, *Resolution III of the 1982 United Nations Convention on the Law of the Sea and the Timor Gap Treaty*, 2 PAC. RIM L. & POL'Y J. 131, 134-35 (1993) (discussing that Portugal and the United Nations condemned Indonesia's actions and recognized the right of the Timorese to self-determination).

150. Ernst Willheim, *Australia-Indonesia Sea-Bed Boundary Negotiations: Proposals for a Joint Development Zone in the "Timor Gap"*, 29 NAT. RESOURCES J. 821, 822 (1989) (explaining the boundary dispute).

151. *Id.*

152. *Id.*

153. Julie M. Sforza, *The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonization*, 22 SUFFOLK TRANSNAT'L L. REV. 481, 515 (1999).

production potential.¹⁵⁴ This potential for oil discovery made resolution of the Timor Gap issue vital for both Australia and Indonesia.¹⁵⁵ Successful oil recovery in the Gap could ensure Australia's energy independence into the twenty-first century, as their reserves in other areas were dwindling.¹⁵⁶ Discovery of new reserves was also vital for Indonesia, OPEC's only Asian member.¹⁵⁷ Due to the then-current rate of rising consumption and dwindling reserves, Indonesia faced becoming a net importer of oil by 2001.¹⁵⁸ Because oil companies avoid exploration in disputed territories, the royalties could not be realized until a resolution was reached. Thus, Australia and Indonesia began negotiations to establish a workable boundary.¹⁵⁹

Australia claimed that the Timor Trough, a submarine trench located approximately forty to seventy nautical miles from and running parallel to the coast of Timor, was a natural boundary and represented the outer edge of the Australian Continental Shelf's natural prolongation.¹⁶⁰ Indonesia, alternatively, claimed that a single continuous continental shelf separated Timor and Australia, and therefore, a median line or equidistant method should be used to delimit the boundary between the countries' opposite territorial sea baselines.¹⁶¹

When neither country seemed willing to concede or compromise their respective positions, Australian officials suggested that the negotiations concentrate on a joint development zone.¹⁶² Despite Indonesia's initial reluctance, Australia and Indonesia agreed in principle to implement a joint development zone in October 1985.¹⁶³ Although overall relations between the two countries deteriorated in 1986 and impeded further Timor Gap negotiations,¹⁶⁴ an agreement was finally reached in 1988.¹⁶⁵ On December 11, 1989, the Foreign Ministers of Australia and Indonesia signed the Timor Gap Treaty while flying over the newly created zone of cooperation in the Timor Sea.¹⁶⁶

154. Mito, *supra* note 28, at 751.

155. GEORGE J. ADITJONDRO, IS OIL THICKER THAN BLOOD? A STUDY OF OIL COMPANIES' INTERESTS AND WESTERN COMPLICITY IN INDONESIA'S ANNEXATION OF EAST TIMOR 25 (1999).

156. *Id.*

157. *Id.*

158. *Id.*

159. Mito, *supra* note 28, at 750.

160. Willheim, *supra* note 150, at 822.

161. *Id.*

162. Kaye, *supra* note 149, at 78 (stating that Australian officials first suggested the concept of a joint development zone in 1984).

163. *Id.*

164. Mito, *supra* note 28, at 753.

165. *Id.*

166. *Id.*

B. Recent Developments—The Timor Sea Agreement

In August 1999, East Timor gained its freedom from Indonesian control after a referendum produced an overwhelming mandate for independence.¹⁶⁷ In October of the same year, Indonesia's legislature revoked the annexation, paving the way for the establishment of a United Nations Transitional Administration in East Timor (UNTAET).¹⁶⁸ As a transitional authority, UNTAET instigated talks between East Timor and Australia to find a more equitable way to share the Timor Sea's wealth.¹⁶⁹ Many politicians and commentators had argued for years that Indonesia's concessions to production companies and Australia under the Timor Gap Treaty had been too generous.¹⁷⁰

Australia and East Timor renegotiated the Timor Gap Treaty on July 5, 2001.¹⁷¹ The new agreement changed little in the way of structure of the joint administration of oil and gas development in the Timor Sea, but essentially reapportioned the royalties in the Joint Petroleum Development Area.¹⁷² What had been a fifty-fifty split between Australia and Indonesia was adjusted to a ninety-ten split in favor of East Timor.¹⁷³ The new arrangement is expected to provide a minimum of four to five billion dollars in revenues to the fledgling nation of East Timor.¹⁷⁴

For the purposes of this Note, the most important aspect of the scheme—the Joint Authority overseeing the development in the zone of cooperation—remains unchanged. It thus remains a viable model for the Western Gap.

167. Thalif Deen, *East Timor on Track to Statehood, Say Officials*, INTER PRESS SERVICE, July 30, 2001, available at 2001 WL 4804793.

168. *Id.*

169. *Timor's troubled waters*, ECONOMIST, Dec. 2, 2000, at 44.

170. *Id.*

Ignoring Portugal's protests, Australia and Indonesia carved up the Timor Sea's wealth evenly between them in a treaty they signed in 1989. The treaty was deeply controversial in Australia and beyond, since it represented Australia's acknowledgment of Indonesia's illegal occupation of East Timor, never accepted by anyone else. The Suharto regime gave Australia far more generous terms than they would have got under international law.

Id.

171. Vandana Hari, *Agreement Opens Way for Development of Timor Sea Resources*, PLATT'S OILGRAM NEWS, July 6, 2001, at 1, available at 2001 WL 13395624.

172. *Id.*

173. Christine Forster, *Agreement Reached on Timor Gap Royalty*, PLATT'S OILGRAM NEWS, July 5, 2001, at 4, available at 2001 WL 13395703.

174. Hari, *supra* note 171. Overall economic benefits to Australia, however, are expected to far outweigh East Timor's gains, with a possible \$25 billion in downstream benefits going to Australia in the next two decades. *Id.*

C. *The Timor Gap Treaty*

The Timor Gap Treaty (the Treaty) details the joint development scheme of the Timor Gap. The Treaty's main purpose is to establish the actual zone of cooperation in the Timor Gap for the joint exploration and production of its natural resources.¹⁷⁵ The Treaty covers approximately sixty thousand square kilometers and divides the Timor Gap into three areas, labeled A, B, and C.¹⁷⁶ It will remain in effect for at least forty years, or until the parties agree on a permanent boundary.¹⁷⁷

The boundaries of each area reflect the maximum possible extent of the countries' claims.¹⁷⁸ The northernmost boundary of the entire zone represents the maximum extent of Australia's continental shelf claim,¹⁷⁹ while the southernmost boundary represents the maximum possible extent of Indonesia's two hundred nautical mile exclusive economic zone claim.¹⁸⁰ The eastern and western boundaries are comprised of simplified equidistant lines.¹⁸¹ The boundaries within the entire zone itself reflect the claims of Indonesia, East Timor, and Australia.¹⁸² The boundary separating Area C, in the north, from Area A, the central part of the zone, represents the fifteen hundred meter isobath.¹⁸³ The boundary separating Areas A and B in the south represents the median line between the two countries.¹⁸⁴ East Timor, under the new agreement, has successfully argued that it has sole sovereignty over the majority of the oil and gas reserves in the Zone of Cooperation A (ZOCA) once the sea boundaries were drawn

175. Australia-Indonesia: Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, Austl.-Indon., 29 I.L.M. 469 [hereinafter Timor Gap Treaty].

176. *Id.* art. 2.

177. *Id.* art. 33.

178. Kaye, *supra* note 149, at 79.

179. *Id.*

180. Note that the Zone of Cooperation is comprised only of the overlapping claims made by both Australia and Indonesia. Mito, *supra* note 28, at 753-54.

181. *Id.* at 754.

182. For a thorough explanation of the changes instituted by the New Timor Sea Agreement, see the *Memorandum of Understanding of Timor Sea Arrangement* (July 5, 2001), available at <http://www.austlii.edu.au/au/other/dfat/special/MOUTSA.html> [hereinafter *Memorandum of Understanding*] signed at Dili on July 5, 2001 by representatives from Australia and the East Timor Transitional Administration. For purposes of easing discussion and because of the pertinent portions of the Treaty remain unchanged, the Treaties will be referred to as a single agreement.

183. Kaye, *supra* note 149, at 79.

184. *Id.*

mid-way between the two countries,¹⁸⁵ following international norms under Article 83 of UNCLOS.¹⁸⁶

Area B is subject to the sole jurisdiction of Australia.¹⁸⁷ Australia must notify East Timor of any petroleum operations¹⁸⁸ and share sixteen percent of the tax revenue generated from the petroleum in this area.¹⁸⁹ Area C is under East Timorese jurisdiction.¹⁹⁰ East Timor, likewise, must notify Australia of any petroleum operations in Area C¹⁹¹ and share ten percent of the tax revenue.¹⁹² Area A, the central portion of the zone, represents overlapping territorial claims of Australia and East Timor and is subject to joint control.¹⁹³ The proceeds generated from oil and gas operations there are shared equally between the two countries.¹⁹⁴ Under the newly renegotiated Timor Sea Agreement, the royalties in the ZOCA will be split ninety-ten in favor of East Timor.¹⁹⁵

In addition to defining the areas governed, the Treaty provides for the creation of a Ministerial Council and a Joint Authority to oversee the various rights and responsibilities involved in the petroleum exploration in ZOCA.¹⁹⁶ The Council is composed of an equal number of Ministers appointed from each country,¹⁹⁷ and meets alternately in Australia or East Timor as often as necessary, or at least once per year.¹⁹⁸ All decisions of the ministerial council are made by consensus.¹⁹⁹ In addition to overseeing the Joint Authority, the ministerial council also has the responsibility to make major decisions and oversee all activities in Area A.²⁰⁰

The Joint Authority consists of an equal number of Executive Directors from each country, who are appointed by the Ministerial Council.²⁰¹ As with the Ministerial Council, all of the decisions made by the Joint Authority are also made by consensus.²⁰² Ultimately, the Joint Authority is responsible for managing petroleum

185. Vandana Hari, *Revenue Split of 85:15 Eyed for Timor Gap*, PLATT'S OILGRAM NEWS, May 14, 2001, at 2, available at 2001 WL 13394859.

186. *Memorandum of Understanding*, *supra* note 182 (explaining the appropriate delimitation methods under UNCLOS); *see also supra* Part II.

187. Timor Gap Treaty, *supra* note 175, art. 4(1).

188. *Id.* art. 4(1)(a).

189. *Id.* art. 4(1)(b).

190. *Id.* art. 4(2).

191. *Id.* art. 4(2)(a).

192. *Id.* art. 4(2)(b).

193. *Id.* art. 2(2)(a).

194. *Id.* art. 2(2)(b).

195. Forster, *supra* note 173.

196. Timor Gap Treaty, *supra* note 175, arts. 5(1), 7(1).

197. *Id.* art. 5(2).

198. *Id.* arts. 5(3), 5(4).

199. *Id.* art. 5(5).

200. *Id.* art. 6.

201. *Id.* art. 9(1)(a).

202. *Id.* art. 7(4).

exploration and exploitation activities in Area A. Other functions include the awarding of Petroleum Sharing Contracts, the dividing of Area A into contract blocks, and the collection and distribution of proceeds.²⁰³

The Treaty also provides a detailed Petroleum Mining Code²⁰⁴ and a Model Petroleum Sharing Contract.²⁰⁵ The Petroleum Mining Code details the obligations and rights of the Joint Authority and the petroleum contractors.²⁰⁶ Under this Code, contractors have the right to explore and extract oil while the Joint Authority retains ownership of petroleum extracted until it is loaded into tankers.²⁰⁷ The petroleum is shared by the Joint Authority and contractor according to a formula set forth in the Model Production Sharing Contract.²⁰⁸

The Model Production Sharing Contract forms the basis for all contracts entered into between the Joint Authority and the various contractors.²⁰⁹ In addition to providing the production sharing formula, the Model Contract sets forth the standards governing the relinquishment of petroleum blocks if oil discoveries are not made within specified time periods.²¹⁰

D. *Effects of the Timor Gap Treaty*

"In addition to resolving a protracted territorial dispute, the Timor Gap Treaty strengthened previously strained relations between Australia and Indonesia."²¹¹ While several commentators have referred to the Treaty as a "triumph of compromise"²¹² and "an imaginative approach to breaking deadlock in boundary negotiations,"²¹³ the agreement has faced criticism on many levels.²¹⁴

203. *Id.* art. 8.

204. *Id.* ann. B.

205. *Id.* ann. C.

206. *Id.* ann. B, art. 4.

207. *Id.* ann. B, arts. 4(3), 4(4).

208. *Id.* ann. C, 7.

209. *Id.* ann. B, art. 5.

210. *Id.* ann. C, 3; Kaye, *supra* note 149, at 89.

211. Mito, *supra* note 28, at 756.

212. Kaye, *supra* note 149, at 95.

213. Mito, *supra* note 28, at 757.

214. ADITJONDRO, *supra* note 155 (denouncing the agreement on several grounds); Roger S. Clark, *Timor Gap—The Legality of the Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, in *EAST TIMOR AT THE CROSSROADS: THE FORGING OF A NATION 73-94* (Peter Carey & G. Carter Bentley eds., 1995) (challenging the legality of the agreement altogether). It is important to note that the scope of this Note does not address the issues raised by many scholars concerning the political and social issues raised by the Indonesian invasion of East Timor in 1975 and the subsequent dominance by Indonesia and the legitimacy of the Timor Gap Treaty. Rather, this Note merely looks at the mechanics of the agreement set forth to resolve the territorial dispute that had prevented the exploration of the Timor Gap for petroleum. This Note does not include

Opposition included individual legal actions challenging the Treaty's validity.²¹⁵ Portugal immediately sued Australia in the International Court of Justice for its failure to consider the right of self-determination of the East Timorese people, but ultimately lost due to Indonesia's refusal to recognize the jurisdiction of the Court.²¹⁶ Another challenge was a suit brought in 1994 by three Timorese activists seeking to have the Treaty nullified by the Australian High Court.²¹⁷ In June 1995 Portugal contested the Treaty's validity.²¹⁸ These challenges, however, were not successful.²¹⁹

The new Timor Sea Agreement provides much needed tax revenue for the "first nation of the new millennium."²²⁰ In connection with the Agreement, Australia has also agreed to give East Timor an annual grant of eight million Australian dollars to assist with the nation's resource development.²²¹

Since the signing of the Timor Gap Treaty, numerous production-sharing contracts have been approved, seismic surveys have been made, wells have been drilled, and various global oil companies have made several major oil discoveries.²²² Because the Treaty has successfully served its primary purpose and the settlement of a permanent boundary in the near future is unlikely, the Timor Gap Treaty is expected to continue in effect until a more lasting solution is found.²²³ East Timor is expected to work with existing arrangements, companies already producing, and companies planning to produce within the next few years.²²⁴

V. APPLICATION OF THE TIMOR GAP TREATY TO THE BUFFER ZONE MORATORIUM

Despite significant differences in the factual backgrounds, the Timor Gap Treaty serves as a workable model and source of ideas for

political discussion of Timor as it is only focused on the Treaty itself as a useful model for governments of various countries facing boundary disputes in international waters.

215. ADITJONDRO, *supra* note 155, at 34.

216. *Id.*; Sonny Inbaraj, *East Timor: Blood and Tears*, in ASEAN 109-10 (1995).

217. French-Merrill, *supra* note 144, at 289.

218. *Id.*

219. It is unlikely that additional challenges will be brought following the recent independence of the East Timorese and the promise of tax revenue from the renegotiated treaty. *See generally supra* note 174 and accompanying text.

220. Deen, *supra* note 167 (quoting Sergio Viera de Mello, Special Representative of the U.N. Secretary General).

221. *East Timor wins its just oil deal*, WKLY. PETROLEUM ARGUS, July 9, 2001, at 5, available at 2001 WL 23852683 [hereinafter *East Timor Wins*].

222. Christine Forster, *Phillips Reviewing Shell's Timor Scheme*, PLATT'S OILGRAM NEWS, Aug. 24, 2001, at 4, available at 2001 WL 13396464.

223. *East Timor Wins*, *supra* note 221.

224. Forster, *supra* note 173.

a solution to the unresolved buffer zone in the Western Gap. In fact, the Timor Gap Treaty may be easier to apply to the Western Gap than it was to the Timor Gap, given the absence of diplomatic wrangling over the legitimacy of the claims. The political issues between Indonesia and the East Timorese, including Australia's contributions, are not present in the unresolved buffer zone. The relationship between the United States and Mexico is positive and cooperative,²²⁵ and no actions such as those perpetrated by Indonesia²²⁶ are present. Furthermore, under the compromised interpretation of UNCLOS by the United States and Mexico, it is highly unlikely that any other nation or international body will successfully challenge the Western Gap Treaty.²²⁷

A joint resolution would offer quicker access to valuable reserves, while helping Mexico further develop its own Gulf resources. A royalty-sharing agreement would be even more beneficial and arguably more equitable in light of demonstrated cooperation and the scientific technology available to determine the location of reserves, including ownership percentages of transboundary reserves. Almost every well drilled in the Gulf has multiple investors to diversify the risk involved. Each agreement details the percentages owned by each party based on a variety of factors, but most noticeably capital investment.²²⁸

The Timor Gap Treaty outlines similar profit sharing, and the new Timor Sea Joint Development Authority has employed the principle of unitization to address transboundary reserve concerns.²²⁹ If Mexico liberalizes its stance on PEMEX, it could benefit tremendously from the current technology already being used by multinational oil companies, receiving royalties without investing its own capital. Obviously, the nationalized regime will not allow for such profit sharing, but a joint development venture limited to the transboundary reserves might afford the perfect opportunity for Mexico to open up its petrochemical industry to private investors.²³⁰ Given the current state of the Mexican Constitution, however, it is essential to consider a joint development agreement in two scenarios:

225. The recent visit by President Bush to Mexico to visit with Mexican President Vicente Fox and discuss multiple areas of cooperation demonstrated a possible trend towards an even closer relationship between the United States and Mexico. King, *supra* note 85.

226. See *supra* Part IV.

227. Vargas, *supra* note 29, at 475.

228. Unitization is the process of calculating the proportionate share of royalties based on ownership interest in the project. VAN DYKE, *supra* note 64, at 62.

229. Forster, *supra* note 222 (explaining the application of unitization to the Greater Sunrise gas field on the basis that 20% of the field lies within the Joint Petroleum Development Area and 80% within Australian jurisdiction).

230. Weiner, *supra* note 92.

one in which PEMEX remains nationalized, and one where private companies can develop and explore on both sides of the buffer zone.

A. *Application to a Privatized Oil Industry*

If Mexico were to amend its Constitution to allow private investment in its petroleum resources, the Joint Authority established by the Timor Gap Treaty would apply exactly as defined and practiced in the Timor Gap. Not only would the Joint Authority have oversight power, it would actively control the development on both sides of the buffer zone.

The Timor Gap Joint Authority operates essentially in the same manner as the Department of Interior's MMS. That is, it regulates all aspects of research and development and participates in the royalty share.²³¹ This would allow both the U.S. and Mexican governments to benefit financially with an optimal return on a nominal investment. By merely overseeing the development while not actually participating in the exploration efforts, the governments get paid through lease bids even if drilling is unsuccessful, as well as receiving royalties if exploration is successful. It is a win-win situation for both nations.

B. *Application to PEMEX*

Even if PEMEX remains publicly owned, the Timor Gap model is viable. The joint development agreement would employ a joint authority, similar to that established in the Timor Gap Treaty, to oversee the petroleum exploration of transboundary reserves. Essentially, the Authority would be comprised of an equal number of representatives from the United States and Mexico who would use seismic data to equitably divide the transboundary reserves on a percentage basis. This process, called unitization, is done everyday throughout the world in private joint development agreements.²³² This has been particularly successful in capitalistic markets and other joint development agreements.²³³

Because the Mexican Constitution prohibits any private party from owning petroleum within Mexico's boundary, a joint authority would admittedly be somewhat limited. Even so, Mexico faces no risk by participating in such a joint authority. Mexico would have

231. Timor Gap Treaty, *supra* note 175.

232. Single companies own very few exploration projects, most involve multiple parties as a way to diversify risk. VAN DYKE, *supra* note 64, at 70. Additionally, joint operating agreements make expensive explorations possible because few individual companies could attempt them alone. *Id.*

233. Unitization is a standard part of almost every lease agreement. *Id.* at 62-64.

guaranteed oversight over the development of transboundary production. Again, having a share of joint development royalties today is worth far more than having it all many years later, according to basic discounted present value analysis.²³⁴

VI. CONCLUSION

While the Timor Gap Treaty provides a model for joint development, the potential impediment of Mexico's nationalized oil monopoly is evident. Obviously, the Joint Authority envisioned would have different duties depending on the constitutional status of PEMEX; however, the model still provides an equitable result for the unresolved buffer zone of the Western Gap of the Gulf of Mexico.

Either way, both countries benefit. The United States benefits by getting quicker access to extremely valuable resources believed to be present in the Western Gap. This is obviously important in light of pressures to increase domestic production in the face of increasingly depleted resources on-shore as well as offshore in the shallower waters. Mexico has oversight of an area that many believe to be exposed to the risk of pilfering by U.S. companies, and receives an equity stake in a standard joint development scheme employed by the oil industry on a daily basis. These benefits suggest that the United States and Mexico should amend the current Western Gap Treaty to adopt provisions establishing a joint development agreement specifically modeled after the one provided in the Timor Gap Treaty.

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234. Particularly if the area is as resource rich as it is believed to be.

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