

# Can Multinational Corporations Help to Trigger International Dispute Resolution in Maritime Border Disputes?

A Thesis Presented By

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## Table of contents

<b>Abstract</b>	<b>3</b>
Preface	3
<b>I. Introduction</b>	<b>5</b>
II. Delegated Dispute Resolution and Related Literature	10
<b>A. Guyana v Suriname – Why Arbitration?</b>	<b>10</b>
B. Delegated Dispute Resolution	13
<b>C. Triggering Mechanism</b>	<b>15</b>
D. Principal Agent Theory	18
<b>E. Realism and Delegated Dispute Resolution</b>	<b>22</b>
F. The Domestic Actors Model and Delegated Dispute Resolution	24
<b>G. Modified Realism?</b>	<b>29</b>
H. Reputational Costs	31
<b>III. The Role of MNCs?</b>	<b>33</b>
A. Deficiencies in Simmons’ Domestic Actors model	33
<b>B. Corporate influence on Government</b>	<b>37</b>
C. MNCs Versus Domestic Corporations	43
<b>D. Hypotheses</b>	<b>47</b>
IV. Body III - Cases	52
<b>A. Delegated Dispute Resolution In Treaties</b>	<b>53</b>
B. Arbitration Versus Adjudication	55
<b>C. A Brief History of the ICJ, the ITLOS, and the PCA</b>	<b>59</b>
D. The Cases	65
<b>1. Romania v Ukraine</b>	<b>65</b>
2. <i>Guinea-Bissau v Senegal</i>	70
<b>3. Bangladesh v Myanmar</b>	<b>77</b>
4. <i>Bangladesh v India</i>	83
<b>5. Barbados v Trinidad and Tobago</b>	<b>87</b>
E. Findings	92
<b>V. Conclusion</b>	<b>96</b>
Appendix/Tables	99
<b>Works Cited</b>	<b>103</b>

## **Abstract**

After the 1982 United Nations Convention on the Law of the Sea (UNCLOS) came into force in 1994, states' rights over coastal waters were expanded, and there was a large increase in the number of maritime border disputes. Many of these disputes, including several with hydrocarbon resources in the disputed area, were referred by the disputing states to an international dispute resolution body for a ruling, despite costs associated with such delegation. Realist theory has limited use in explaining what triggers states to refer a particular maritime border dispute to an international dispute resolution body. Beth Simmons develops a model that incorporates the role of domestic actors in influencing a government's decision to refer a particular dispute to an international dispute resolution body; however, she does not account for the role of Multinational Corporations (MNCs). MNCs have vast resources, are able to pressure governments, and their interests are directly affected by festering maritime border disputes that limit their access to hydrocarbon resources in the disputed area. This leads to the following question: can MNCs have an impact on a state's decision to refer a particular dispute to an international dispute resolution body? I propose a modified domestic actors model that accounts for the influence of MNCs, and I test this model with six cases of maritime border disputes with hydrocarbon resources in the disputed area. Through an in-depth analysis of the timelines of these cases, and the confirmation of hypotheses derived from my modified domestic actors model, I find that my model successfully explains which states refer maritime border disputes, and that it is likely that MNCs have an impact on a state's decision to refer a particular dispute to an international dispute resolution body. This finding confirms the need to include the role of third parties such as MNCs in studies of delegated dispute resolution, which has been identified as the research frontier in this area of study.

## **Preface**

I first became interested in international relations when I participated in a model United Nations simulation in high school. In college I pursued this interest by taking several political science and history classes on international issues, including James Morrow's Introduction to World Politics and Barbra Koremenos' Public International Law. In professor Koremenos' class we briefly discussed the topic of delegated dispute resolution in treaties, and I became interested in what could lead states to give their sovereign power to resolve disputes to independent international bodies, which could potentially undermine their interests. I took a second smaller seminar on international politics with Professor Koremenos, and we continued to focus on issues regarding delegated dispute

resolution in this class. After hearing a guest presentation from Timm Betz, a graduate student working with Professor Koremenos, I decided that I wanted to better understand delegated dispute resolution, and that my senior thesis would provide me with an opportunity to do this. In order to study what triggers states to delegate dispute resolution power, I chose to use cases of maritime border disputes, because these disputes actually matter to the states involved. This decision was due in part to my interest in shipping and the law of the sea, and my hope to pursue a career in international law. My decision to use maritime border disputes as my case studies was also influenced by the existence of previous studies on delegation of dispute resolution in territorial disputes (Simmons 2002), and I hoped to expand the study of delegated dispute resolution to new types of disputes.

It wasn't until the end of my first semester senior year that I settled on my final thesis question, and decided to incorporate the role of Multinational Corporations (MNCs) into my research on what triggers states to refer a particular maritime border dispute to an international dispute resolution body. The decision to study whether MNCs have a role in a state's decision to refer a dispute to an international dispute resolution body was a result of my interest in how governments are constrained by nonstate actors. I originally began thinking about the relationship between governments and nonstate actors after reading Simmons' domestic actors model, and began to realize that MNCs have distinct preferences and capabilities that are different from other domestic or nonstate actors. By focusing on the distinct role of MNCs on influencing governments, I hoped to better explain states' decisions to refer particular disputes to international dispute resolution bodies.

Throughout my time writing this thesis, I have been greatly assisted by many people. I would like to thank my advisors Andrei Markovits and Barbra Koremenos for their countless hours of consultation and advice during the development and writing of my thesis. I also want to thank my parents and grandparents for their support during the many hours I spent writing my thesis. I was greatly assisted in the development of my thesis topic by constructive criticism from my classmates in my thesis class, as well as from my fellow students Jordan Bailey and Chris Boffi. I would also like to thank Professor Steve Ratner for serving as the third reader for my thesis defense.

## **I. Introduction**

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) came into force in 1995, and it extended states' jurisdiction over their adjacent maritime waters to 200 miles, leading to many undelineated or conflicting maritime borders. Out of an estimated 400 maritime borders in the world, only 180 of them have been agreed upon by the neighboring states (Anderson 2006). Furthermore, advances in oil exploration and extraction technology, an increased world demand for oil, and instability in oil producing countries in the Middle East have led states to increase their exploration for offshore hydrocarbon deposits. Because of the potential for hydrocarbon wealth, there is a high cost for festering maritime border disputes. For this reason, many states have begun to delineate their disputed or undelineated borders, using both bilateral negotiations and the referral of the dispute to international dispute resolution bodies for an authoritative ruling.

Scholars from various theoretical traditions have agreed that states are reluctant to delegate areas of state sovereignty, such as the power to delineate borders or resolve

disputes, to third parties (Simmons 2002). In other words, states would prefer to resolve disputes through bilateral negotiations, where they remain in control of the entire negotiation process, rather than allowing an independent international body to issue a ruling on the dispute, which may go against the interests of at least one of the states involved.<sup>1</sup> This reluctance to refer disputes to an international dispute resolution body is especially strong in disputes where resources such as hydrocarbons are involved, because of the potential loss of valuable resources in the event of an unfavorable ruling by the dispute resolution body. Despite this reluctance to refer disputes, there are many instances of the governments of states including Bangladesh, Barbados, and Guyana referring maritime border disputes complicated by hydrocarbon resources to an international dispute resolution body.

Different scholars have proposed different reasons as to why states would choose to refer such disputes to an international dispute resolution body, and one promising explanation is put forward by Beth Simmons (2002). Simmons argues that although governments would prefer to settle disputes diplomatically, domestic political actors can place constraints on governments that lead them to refer a particular dispute to an international dispute resolution body. This theory seems promising for the territorial disputes that she studies; however, it does not account for the interests of Multinational Corporations (MNCs), which are intimately involved in maritime border disputes where hydrocarbon resources are present. These corporations are often larger than the states

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<sup>1</sup> Hensel's study of territorial disputes in the Americas (2001) confirms that states prefer bilateral negotiations over international dispute resolution for highly salient territorial disputes.

involved in the border dispute,<sup>2</sup> and because they need border stability in order to extract hydrocarbon resources, their interests are negatively affected by ongoing maritime border disputes. Furthermore, unlike states, MNCs are not faced with high costs of delegating dispute resolution,<sup>3</sup> and are thus much more likely to favor settling maritime border disputes via an authoritative ruling from an international dispute resolution body such as the International Court of Justice (ICJ), or the International Tribunal on the Law of the Sea (ITLOS). Theorists of business ethics have shown the ways in which corporations influence governments, when government activities affect their interests (Arnold 2003; Lindblom 1977; Mitchell 1997); however, similar ideas of corporate influence over government have not been applied to the issue of what will trigger a government to refer a particular dispute to an international dispute resolution body.

Through my research, I want to show that MNCs have the potential to influence a state's decision to refer a particular dispute to an international dispute resolution body. In order to show this, I analyze the timelines of several maritime border disputes in depth to highlight likely instances of MNC influence. I also create a modified domestic actors model similar the one proposed by Simmons, but with the role of MNCs explicitly included, and I use my cases to examine several hypotheses derived from this model. I find that my model is much better in explaining which states will refer a particular maritime border dispute where hydrocarbon resources are present to an international dispute resolution body, than a domestic actors model that does not include the role of MNCs.

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<sup>2</sup> In terms of annual revenue compared to annual GDP. See Table I.

<sup>3</sup> This is especially apparent when costs are considered in terms of agency loss, as discussed in section II.D. Unlike states, MNCs are not principles, so they lose nothing from a state's delegation of the power to resolve disputes to an international dispute resolution body functioning as the state's agent.

The first body section details the literature regarding delegated dispute resolution. I begin with an overview of the maritime border dispute between the governments of Guyana and Suriname over an area of the Atlantic Ocean with substantial hydrocarbon resources. This dispute is typical of maritime border disputes that are referred to international dispute resolution bodies for resolution, and demonstrates the potential influence of MNCs. Next I give a general definition and overview of delegated dispute resolution, followed by an emphasis on differences between delegating the power to resolve disputes in a treaty, and actually using a dispute resolution framework to refer a particular case to an international dispute resolution body. After introducing the concept of delegated dispute resolution I briefly overview principal agent theory, which I use to frame the subsequent theories of delegated dispute resolution. My overview of theories of delegated dispute resolution begins with a standard realist account; after showing some of the deficiencies of this realist narrative in accounting for what triggers states to refer a case to an international dispute resolution body, I introduce a domestic actors model proposed by Beth Simmons (2002). Simmons' model is much more successful in explaining what triggers states to refer a particular dispute to an international dispute resolution body than the realist model. I briefly discuss attempts to incorporate the role of domestic audiences into the realist theoretical framework, but it becomes clear that modified realist theory falls victim to the same problems faced by a standard realist account when explaining what triggers states to refer a particular dispute to an international dispute resolution body.

In the second body section I emphasize deficiencies in Simmons domestic actors model in accounting for what triggers states to refer maritime border disputes complicated by the presence of hydrocarbon resources to an international dispute resolution body. I

propose that these deficiencies may be remedied by explicitly accounting for the role of corporations, and in particular MNCs, whose interests are affected by the dispute. I provide a theoretical basis for this proposition by incorporating literature on corporate influence on government from scholars of business ethics, such as Arnold (2003), Lindblom (1977), and Mitchell (1997) into the domestic actors model proposed by Simmons (2002). Subsequently, I outline several relevant differences between domestic corporations and MNCs, which emphasizes the importance of considering the role of MNCs in particular in my modified domestic actors model. I conclude this section by developing three hypotheses based on my modified domestic actors model, when applied to maritime border disputes where hydrocarbon resources are present. Other things equal: (1) a delegated dispute resolution mechanism is more likely to be triggered when a MNC is directly affected by a particular dispute; (2) countries with a governing system in the range of flawed democracies and hybrid regimes<sup>4</sup> will be most likely to refer a dispute to an international dispute resolution body; (3) the likelihood of referral increases in disputes involving small (in terms of GDP) countries, and large (in terms of yearly revenue) MNCs.

In the third body section I analyze all six cases of maritime border disputes with hydrocarbon resources involved that have been referred to the ICJ, the ITLOS, or the PCA for a ruling.<sup>5</sup> I begin this section with an overview of treaty based delegated dispute resolution, followed by an explanation of the differences between arbitration and adjudication, as well as a brief history of the ICJ, the ITLOS, and the PCA. Next I analyze the

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<sup>4</sup> According to the Economist Intelligence Unit's democracy index.

<sup>5</sup> These three bodies are the primary international dispute resolution bodies for maritime border disputes.

timelines of five disputes in depth,<sup>6</sup> in order to show the likely influence of MNCs on a state's decision to refer a particular dispute to an international dispute resolution. In all of my cases, except for the dispute between the governments of Barbados and Trinidad and Tobago, it appears that MNCs likely had an impact on the states' decisions to refer their disputes to international dispute resolution bodies. The success of my hypotheses also shows the added explanatory value of considering the role of MNCs in the framework of a domestic actors model.<sup>7</sup>

## **II. Delegated Dispute Resolution and Related Literature**

### **A. Guyana v Suriname – Why Arbitration?**

Since the 17th century, British and Dutch colonial governments, and the subsequent independent governments of Guyana and Suriname, have been locked in a heated dispute over their territorial and maritime borders. This dispute involves three separate regions: the Courantyne River, which runs between the two countries; the New River Triangle, which lies in the south of the two countries; and a part of the Caribbean along their northern coastlines (Donovan 2003). The Dutch and English colonial governments concluded several agreements in 1667, 1799, 1802, and 1936 in attempts to solve these

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<sup>6</sup> I do not repeat my analysis of Guyana v Suriname from Section II.A.

<sup>7</sup> Because I only have a small sample of disputes submitted to international dispute resolution bodies, and do not consider disputes settled by other means, my research cannot say with absolute certainty that MNCs trigger states to refer maritime border disputes to international dispute resolution bodies. Instead, I want to connect previously unrelated literature, and use my modified domestic actors model to show the importance of considering the role of MNCs in triggering states to refer maritime border disputes to international dispute resolution bodies. In this manner, I hope my research can serve as a starting point for future research projects with more resources and a larger sample of case studies.

border disputes; however, the disputes have continued to simmer into the present in spite of these colonial agreements.

After the first UN Convention on the Law of the Sea went into force in 1958, the colonial governments began to focus more heavily on their maritime border dispute in the Caribbean. During the last negotiations between the colonial powers in 1958-1961, they could not agree on definitive maritime borders and left the issue unresolved for the newly independent governments (Donovan 2003). This disputed border was complicated by the discovery of offshore oil, with Guyana drilling its first offshore well in 1940-1941, and Suriname drilling its first offshore well in 1965 (Li 2011).

During the 1960s, there were a series of armed skirmishes along the disputed border regions between the newly independent governments Guyana and Suriname.<sup>8</sup> After Suriname's independence these skirmishes continued on the disputed territorial borders, and along the maritime border, and Guyana confiscated several fishing vessels from Suriname in 1977 (Donovan 2003). Despite these confrontations, the government of Guyana's grants of oil concessions to Shell, Oxoco, and Major Crude were undisturbed by Suriname, and in 1989, the governments of Suriname and Guiana agreed to joint petroleum development pending final resolution of the border. This agreement was codified by a 1991 memorandum of understanding. Despite these agreements, and continued negotiations, the government of Guyana granted more concessions unilaterally to Exxon, Maxus, and CGX.

In 2000, after CGX began drilling in the disputed area, CGX's oil rig was confronted by Suriname's gunboats, and forced to leave the area. This incident renewed tensions between the countries over their border disputes, and diplomatic attempts at resolving the

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<sup>8</sup> Guyana gained its independence from Britain in 1966, and Suriname was a Dutch colony until 1975.

situation were unsuccessful (Donovan 2003). In 2004, the government of Guyana decided to refer the maritime border dispute to an international arbitral body separately from the ongoing territorial disputes. The arbitral body was under the auspices of the Permanent Court of Arbitration (PCA) constituted via Annex VII of the UNCLOS. The government of Suriname agreed to refer the dispute to arbitration, but objected on the jurisdiction of the arbitral body to hear the case (La Rose 2006). In 2007 the arbitral body issued a ruling that was judged on the principle of equidistance, but gave Guyana slightly more territory. The government of Suriname complied, and CGX was able to continue its operations (Wilkinson 2007).

This dispute between the governments of Guyana and Suriname is a good example of a case of delegated dispute resolution where the material interests of the disputing states are directly affected by the dispute, due to the presence of hydrocarbon resources. The best cases to test theories regarding the delegation of dispute resolution power are disputes that states actually care about, including those that directly affect their economic or territorial interests, and maritime border disputes with hydrocarbon resources involved are a good example of this type of case. By analyzing the case of *Guyana v Suriname*, along with several other cases of delegated dispute resolution involving maritime border disputes with hydrocarbon resources, I want to examine what would trigger states the government of states such as Guyana to refer a particular dispute to an independent dispute resolution body. For instance, why did the government of Guyana choose to refer its maritime border dispute to the PCA in 2004, after Suriname threatened CGX's platform, and not after its independence from Britain, or after the countless other provocations along the maritime border region? Also, why would the government of Guyana choose to

separate the maritime border dispute from the territorial disputes, and send only the maritime border dispute to delegated dispute resolution, when previous attempts to resolve the border issues had bundled all three disputes together (Donovan 2003; 60). I propose that the influence of multinational oil companies, in particular CGX, likely contributed to Guyana's decision to refer the dispute to an international dispute resolution body.

## **B. Delegated Dispute Resolution**

Since the creation of the United Nations in 1945, the number of international organizations has increased dramatically, and so has their role in areas once exclusively controlled by states. A particularly important aspect of this expansion of international institutions is the increase in the number of international judicial and dispute resolution bodies after the Cold War. These bodies now number anywhere between seventeen and forty, not including ad hoc dispute resolution bodies (Keohane, Moravcsik, and Slaughter 2000), and they resolve disputes on diverse topics ranging from border delineation to whaling. In addition to a proliferation of new bodies, older bodies including the PCA have also seen an increased use in recent years.<sup>9</sup>

After the emergence of an international system comprised of states, most instances of interstate dispute resolution have been in the form of direct negotiation between leaders of the states involved in a particular dispute. Often war would break out when these negotiations failed. However, since the time of ancient Greece, states have also periodically

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<sup>9</sup> Permanent Court of Arbitration, "Cases," [pca-cpa.org](http://www.pca-cpa.org), accessed March 20<sup>th</sup>, 2012, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1029](http://www.pca-cpa.org/showpage.asp?pag_id=1029).

turned to arbitration to solve disputes peacefully.<sup>10</sup> Usually the ruler of an independent state would act as a facilitator of negotiations, or as an arbitrator, but this role was on an ad hoc basis, and states did not create independent dispute resolution bodies. For example, the Czar of Russia helped to arbitrate a claim that arose from a disputed provision in the Treaty of Ghent, which ended the War of 1812 between the US and Britain (Posner and Yoo 2005; 22). This type of single arbitrator arbitration is the simplest form of delegation (Posner and Yoo 2005; 22). It is relatively unobtrusive on state sovereignty, and there is little danger of a loss of agency.<sup>11</sup> As a head of state, who will have future interactions with the leader of both disputing states, the single arbitrator has an incentive to render a neutral judgment. Furthermore, since the arbitration is ad hoc, there is no arbitral institution that could potentially develop its own institutional interests separately from the interests of the disputing states.<sup>12</sup>

The first independent international dispute resolution body was the PCA, created in 1899. Despite its name, the PCA was initially nothing more than a pool of arbitrators that could be easily called upon by states to help solve disputes, and was thus relatively dependant to state's wishes and unobtrusive on state sovereignty.<sup>13</sup> Despite states' historical aversion to more intrusive forms of delegated dispute resolution such as

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<sup>10</sup> The International Court of Justice, "The Court: History," The International Court of Justice, accessed February 19<sup>th</sup>, 2012, <http://www.icj-cij.org/court/index.php?p1=1&p2=1>.

<sup>11</sup> See section II.D. for more on agency losses.

<sup>12</sup> For a discussion on how international organizations can develop different institutional preferences from their principles, see Cortell and Peterson (2006).

<sup>13</sup> Haftel and Thompson (2006) highlight the passage of time as an important contributing factor to the independence of international organizations. As time passed since the founding of the PCA, it has gained more institutional identity, and can be seen as more independent at the present, than its founders originally intended. For more information, see section IV.B.

independent tribunals, the governments of states including Romania and Bangladesh have increasingly relied on newly created independent arbitral and adjudicatory institutions for help in resolving disputes during the latter part of the 20<sup>th</sup> century. These new international dispute resolution bodies as a whole are “qualitatively different” (Alter 2008; 38) than previous dispute resolution bodies, and are:

More likely to have compulsory jurisdiction and either private access or access for international nonstate actors to initiate litigation, even though most observers agree that these features make ICs [International Courts] more independent and more likely to rule on cases in which a government is an unwilling participant (Alter 2008; 38).

However, despite the increasing independence of these new bodies, international dispute resolution bodies have seen a recent surge in use, and a full seventy-five percent of the output of international courts in terms of decisions, opinions, and rulings (24,863 out of 33,057) have been delivered since 1990 (Alter 2008; 38).

There have been many studies over why states would design more independent and authoritative dispute resolution institutions (Koremenos, Lipson, and Snidal 2001; Posner and Yoo 2003; Helfer and Slaughter 1999; Chayes and Chayes 1995); however, there has been relatively little research in the area of what would trigger states *to refer* particular disputes to an independent international dispute resolution body, when they have successfully used less intrusive forms of arbitration for hundreds of years.

### **C. Triggering Mechanism**

When discussing the topic of delegated dispute resolution, it is important to recognize that different factors may lead states to create a delegated dispute resolution mechanism in a treaty than the factors that trigger them to actually use this framework.

Scholars such as Barbara Koremenos (2007) and Eric Posner and John Yoo (2005), have offered useful explanations of what would lead state to establish a delegated dispute resolution framework; however, they have not focused specifically on what triggers states to actually use these mechanisms. In Beth Simmons' domestic actors model (2002), domestic constituencies can be seen as triggering states to refer a dispute to resolution; however, she doesn't explicitly differentiate between the logic and costs of creating and joining an agreement with a delegated dispute resolution framework, versus the costs of actually referring a potential dispute to an international dispute resolution body. Recognizing these different costs is important when examining the topic of MNC influence over a state's choice to refer a particular dispute to international dispute resolution.

Barbara Koremenos uses her rational design framework to explain state's choice to include a delegated dispute resolution provision in a treaty. According to this theoretical framework, all international agreements are the result of state's attempts to solve cooperation problems, which she divides into several independent variables (Koremenos 2009). She also identifies several design features of international agreements, which act as dependent variables. From these variables she derives the following four conjectures, which she subsequently tests against a random sample of international agreements:

“[1]States facing enforcement problems are more likely to include delegated dispute resolution provisions in their international agreements; [2] states facing uncertainty about behavior are more likely to include delegated dispute resolution provisions in their international agreements; [3] states facing uncertainty about the state of the world are more likely to include delegated dispute resolution provisions in their international agreements; and, [4] states facing commitment problems are more likely to include delegated dispute resolution provisions in their international agreements” (Koremenos 2007; 193-94).

These conjectures clearly and convincingly describe situations where states, with the goal of solving a cooperation problem, will include delegated dispute resolution provisions in their agreements; however, they do not consider the circumstances under which states actually choose to use these provisions and refer a particular dispute to an international dispute resolution body.

In her findings, Koremenos recognizes that “sovereignty costs of having activities like dispute resolution dictated are probably much more significant to states than are the contracting costs of spelling out such provisions” (2007; 209), and states make a cost-benefit analysis as to whether they should include such provisions when they draft an agreement. Thus, she concludes that states are unlikely to include delegated dispute resolution provisions in agreements where they are unneeded. However, she does not specifically spell out the conditions under which states will refer a particular dispute to an international body with delegated dispute resolution power. It is likely that the underlying cooperation problems that would lead states to include delegated dispute resolution provisions in an agreement such as the UNCLOS are very different from the cost-benefit analysis that would lead the government of a state to refer a particular dispute to international dispute resolution via the dispute resolution provisions of the UNCLOS.<sup>14</sup>

In their overview of the impact of an international tribunal’s independence on its effectiveness, Posner and Yoo (2005) develop a theory of dispute resolution based on the

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<sup>14</sup> For instance, states would likely include a delegated dispute resolution mechanism in any agreement where they foresee potential incentives for states to enter the agreement, and then violate the terms of the agreement, thereby free-riding and gaining cooperation benefits without making any sacrifices. However, a state party to the agreement would only choose to use this framework when it is directly affected by a particular dispute, and a unique set of costs and benefits leads it to refer the dispute to an international dispute resolution body.

informational role of these international tribunals. They argue that states can cooperate because of repeated interactions over time, and that international dispute resolution bodies can help to facilitate this cooperation by providing states with information on their treaty obligations<sup>15</sup> and/or on the customary international law that is relevant to their dispute (2005). However, despite highlighting conditions under which delegated dispute resolution is possible, they do not discuss what specific factors can trigger states to refer a particular dispute to an international dispute resolution body.<sup>16</sup>

In my thesis I will focus primarily on the costs and benefits that lead a state's government to refer a particular dispute to an international dispute resolution body. Because of this, I will not focus specifically on the costs and benefits that lead states to include delegated dispute resolution mechanisms in treaties.

#### **D. Principal Agent Theory**

When delegating dispute resolution power to an international dispute resolution body, there is a substantial chance that the body will deviate from the preferences of one or both of the states involved in a dispute. For a comprehensive examination of the costs and benefits of delegating dispute resolution power, it is helpful to look to Hawkins et al. (2006), who develop a model of delegated dispute resolution in treaties based on principal agent theory. According to Hawkins et al., "delegation is a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former" (2006; 7). Relations between a principle and agent are "always governed by a contract" (Hawkins

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<sup>15</sup> In disputes where both states are parties to a relevant treaty.

<sup>16</sup> Koremenos also captures the informational roles in her dependent variables "uncertainty about behavior", and "uncertainty about the state of the world" (Koremenos 2007).

et al. 2006; 7), which is usually a treaty in cases where a state's government acts as a principle and delegates the power to resolve disputes to an international organization acting as an agent.

It is important to note that there can be several levels of principle agent relationships operating simultaneously. As Hawkins et al. assert, "to be a principal, an actor must be able to both grant authority and rescind it" (2006; 7). In a democratic system, the ultimate principles are the citizens (viewed collectively), who grant their government the authority to govern based on a contract, usually in the form of a constitution, and can rescind this authority through elections. At the same time, the government in turn can act as a principle, and draft a treaty granting the power to resolve disputes between itself and other governments to an international organization, which subsequently acts as an agent of the government. Consistent with their role as a principle, governments generally reserve the right to withdraw from a treaty if they provide ample warning (Koremenos, Lipson, and Snidal 2001). Hawkins et al., also note that third parties such as interest groups and corporations can actively influence principles<sup>17</sup>, even though they themselves aren't principles in the previously defined manner (2006; 9).

Despite the fact that principles grant agents authority conditionally, this "does not imply that agents always do what principles want" (Hawkins et al. 2006; 8). In fact, agents "implement policy decisions and pursue their own interests strategically" (Hawkins, et. al. 2006; 5), which can cost principals *agency losses* when the agents engage in unwanted

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<sup>17</sup> On multiple levels, including citizens and governments.

actions. However, the ability for agents to express their own wishes independently from those of their principals are constrained by their level of independence.<sup>18</sup>

It is important to recognize that agency loss is just another name for the sovereignty costs identified by Bradley and Kelly, resulting from international delegation (2008; 27). Both agency loss and sovereignty costs refer to “reductions in state autonomy through displacement of its decision-making or control” (Bradley and Kelly 2008; 27), and are present in all acts of international delegation; however, these costs are particularly high in cases where states delegate the power to resolve disputes (Bradley and Kelly 2008). Furthermore, these sovereignty costs due to delegation are highest when “issues touch on elements of Westphalian sovereignty such as territory or relations between a state and its citizens” Bradley and Kelly 2008; 30). The referral of a maritime border dispute to an international dispute resolution body would have especially high potential sovereignty costs, and these costs would be even higher if the territory involved had valuable hydrocarbon resources, or was strategically significant for economic or military reasons.

Despite the possible costs from delegating dispute resolution power, delegating this power to an agent can help to foster cooperation, thereby securing benefits that would not be possible in lieu of delegation (Hawkins et al. 2006; 17).<sup>19</sup> When treaties are ambiguous or incomplete, allowing a relatively independent institution to solve disputes can preserve cooperation. This explains why states may choose to delegate in some situations, and Hawkins et al. examine design features that would make agents more useful to their principals, and reduce agency losses (2006; 18). However, they do not elaborate on what

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<sup>18</sup> For an in depth discussion of independent vs. dependent tribunals, see Posner and Yoo (2005).

<sup>19</sup> For more on the benefits of delegation, see Bradley and Kelly (2008).

factors in particular will trigger a state to make use of existing delegated dispute resolution channels, and actually refer a particular dispute to an international dispute resolution body.

The principle agent theory developed by Hawkins et al. is useful in recognizing the costs and benefits that are inherent in delegating dispute resolution power to an international dispute resolution body, and offers insight into how states may construct treaties with the goal of reducing unnecessary agency losses during delegation; however, it does little to further the understanding of what triggers states to refer a particular dispute to delegation within the framework of a treaty regime. One, and often both, of the states involved in a dispute must agree to bring a case to an international dispute resolution body on a case-by-case basis, despite their status as states parties to a convention or treaty that includes a framework for delegated dispute resolution. For example, even though Guyana and Suriname are both members of UNCLOS, and thus have access to its dispute resolution channels, the dispute wasn't automatically referred to the PCA, and the government of Guyana still had to choose to refer the particular dispute. Because of this, theories of delegation would gain increased explanatory power by explicitly considering what triggers states' governments to refer particular cases to international dispute resolution.

The concept of sovereignty costs, however, is also important to consider when states decide to refer a particular dispute to an international dispute resolution body. The case of *Guyana v Suriname* highlights the potential sovereignty costs associated with the referral of a maritime border dispute with hydrocarbon resources to an international dispute resolution body. If the PCA did not deliver a decision that the government of Guyana felt it could accept, the government could not simply walk away, as it could in

direct negotiations with the government of Suriname. If it chose to comply it would be faced with high sovereignty costs due to a loss of control over its territory, as well as high monetary costs from the loss of valuable oil deposits; however, if it did not comply, it would face heavy reputational costs associated with non-compliance.<sup>20</sup> Fortunately for the government of Guyana, the ITLOS issued a ruling that was acceptable to both parties, but ultimately the decision to refer the case to an independent organization for dispute resolution is a gamble, with potentially high costs in the face of an unfavorable ruling. The existence of sovereignty costs in referring a dispute to an international dispute resolution body for a ruling underscores the importance of discovering what triggers states to overlook these costs and refer the dispute.

The general structure of principle agent relationships discussed by Hawkins et al. are “relatively theory neutral” (2006; 9), meaning that they can be easily applied to a variety of different delegation theories. Below I will use the clear framing provided by the principle agent theory, with its appreciation of agency losses resulting from delegation, and apply it to the realist model, as well as the newly emergent domestic actor model.

### **E. Realism and Delegated Dispute Resolution**

The realist theoretical tradition has been a dominant theory of international relations during the 20<sup>th</sup> century. Realists assume that states are the main actors in international politics, that states are self-interested and risk averse rational actors, and that they pursue their own goals in the anarchy of the international system (Snyder 2004; Morgenthau 1978). Subsequently, they see international politics as a state centric system

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<sup>20</sup> For more on reputational costs, see section II.H.

governed almost exclusively by power politics (Nielson and Tierney 2003). Given this theoretical foundation, realists generally argue that international courts, tribunals, and arbitral bodies have a negligible impact on state's actions.

According to the realist view, states choose their actions based on what is in their immediate national interest, and would be highly unlikely to refer any dispute to an independent dispute resolution body unless they were coerced to seek this form of settlement by a more powerful state, or the issue at hand did not have an impact on their national interests (Simmons 2002; 838). Thus, the more impact that a dispute has on a state's national interests, the less likely that state will be to refer the dispute to a third party for dispute resolution. According to Diehl, "states are reluctant to put the most critical aspects of their national interests before an international body" (1996; 161). Because of this reluctance, the realist model predicts that issues directly involving state security, territory, or material resources would almost never be submitted to delegation.

The realist view is somewhat useful in understanding delegated dispute resolution because it captures the influence of state power on decisions to refer a dispute to an international dispute resolution body. This theory explains the unlikelihood of a small country involved in a dispute with a world power over an important issue (i.e. territorial dispute, etc.) successfully bringing a case against the world power to an international court. This scenario is intuitively unlikely, given large discrepancies in important measures such as GDP and the size of a country's military, and realism explains why: the larger state has

the power to get what it wants without referring the dispute to an international dispute resolution body, and thus it will simply take what it wants using threats or coercion.<sup>21</sup>

The realist view fails, however, to explain disputes involving important issues being successfully referred to an international dispute resolution body by the governments of disputing states, as was the case with Guyana and Suriname. In her article in the *Journal of Conflict Resolution* titled “Capacity, Commitment, and Compliance”, Beth Simmons cites several instances of countries as diverse as Peru and Ecuador, Nicaragua and Colombia, Cameroon and Nigeria, Namibia and Botswana, Indonesia and Malaysia, and Qatar and Bahrain successfully referring territorial disputes to international dispute resolution (Simmons 2002; 830), which further compromises the explanatory power of realism. Given the inability for realism to adequately account for these cases, its ability to explain what triggers states to refer particular disputes to international dispute resolution is limited.

#### **F. The Domestic Actors Model and Delegated Dispute Resolution**

A promising alternative to the traditional realist view of delegated dispute resolution is a domestic actors model. This model was originally developed by George Tsebelis (1990), and has been expanded by subsequent scholars (Epstein and O’Halloran 2008). In contrast to the unitary state assumption in realist theory, the domestic actors model sees states as a conglomeration of different domestic groups and interests led by a government, which in turn has its own independent interests. When applying the framework of principle agent theory to the domestic actors model, the government is the

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<sup>21</sup> My case studies confirm the effect of a state’s power on the decision to delegate, with no instances of the permanent five (P5) members of the UN Security Council (US, China, Russia, France, Britain) involved in an instance of delegated dispute resolution. See section IV.

principle that delegates dispute resolution power to a third party international dispute resolution body. However, this model highlights the fact the government is the agent of the citizenry of a particular state. As an agent, the government pursues its own interests, but is constrained by citizens acting as its principle,<sup>22</sup> and is also influenced by third parties such as interest groups, etc. Government is also a principle in this situation, however, and can thus delegate power to an international dispute resolution body as a means to leverage itself against the preferences of its citizens, as discussed below.

In her examination of territorial disputes delegated to an independent body for dispute resolution, Beth Simmons develops a theory along the lines of the domestic actors model (2002). Similarly to realist theory, she assumes that states “delegate sovereignty grudgingly and prefer to solve international controversies through political means” (Simmons 2002; 835); however, this preference is not as unshakeable as the realists assume, and she asserts there are many instances where governments will choose to willingly refer territorial disputes to delegated dispute resolution due to costs associated with a festering dispute, and the desire to stay in power.

First she examines the incentives for governments, considered separately from other domestic actors, for settling a territorial dispute. She argues that there are high opportunity costs for undefined borders, in terms of trade. Countries that have a territorial dispute trade less frequently with each other, and there are also significant opportunity costs for a dispute in itself (Simmons 2002; 832). States involved in a border dispute are also likely to spend unnecessarily on their military, and a fixed and mutually respected border can reduce these costs. Because military expenditures and tax gains from trade both

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<sup>22</sup> The level of democracy in a country impacts the influence of citizens over their government.

directly affect a government's budget, the government will try to maximize the money available to them by resolving the border dispute.

Since there are incentives for governments to settle territorial border disputes, Simmons looks to domestic politics to explain why governments would choose to send a dispute to international adjudication or arbitration instead of conducting bilateral negotiations with the government of the other state involved in the dispute. She argues that in democratic countries, powerful domestic groups may oppose a politically negotiated settlement, but that they may be willing to take a gamble on international dispute resolution, because they believe *ex ante* that they may gain a better deal than would be possible through negotiations (Simmons 2002; 834). Even if they get a worse deal through arbitration or adjudication, many domestic groups may be more willing to support their government making concessions to a disinterested tribunal or court rather than a political adversary, which could signal weakness and lead to negative outcomes in future interactions (Simmons 2002; 834). Furthermore, an authoritative ruling by an international tribunal may raise the costs of non-compliance in terms of reputational costs and the likelihood of enforcement by the international community, and thus gain the support of domestic groups that would have opposed a politically negotiated settlement with the same terms (Simmons 2002; 835).<sup>23</sup>

Governments prefer to settle disputes politically (Simmons 2006; 838) given possible agency loss associated with delegation. However, a government will choose to refer a particular dispute an international institution when it is faced with possibility of a powerful domestic group opposing a negotiated settlement that it favors, given its desire to

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<sup>23</sup> For more info on reputation costs, see Posner and Yoo (2005).

remain in power. This is a perfect example of an agent (the government) pursuing different goals than its principle (in this case the citizens of a country), and it is interesting that it does this through further delegation of agency. Although Simmons' doesn't consider this in her theory, it is very likely that third parties could also influence the preferences of citizens and the government regarding the decision to delegate (Hawkins et al. 2006).

Simmons' domestic actors theory is important because it highlights the opportunity costs of territorial disputes in terms of trade and military expenditures. These costs are significant, and can explain why a government would wish to resolve territorial disputes. Furthermore, the idea of opportunity costs can be extended to other economic activity, such as mineral exploration and extraction, which require definitive ownership of land in order to be successful. Her theory is also helpful because it departs from the traditional realist assumption of a state as a unitary actor, and it accounts for the interests and incentives of domestic groups in the framework of a principle agent model.

The domestic model is also conceptually important because it underscores the importance of the level of democracy in a country. In a democracy, domestic audiences function as a principle, and directly pressure the government according to their preferences, thereby generating audience costs. Scholars such as Fearon have explored the idea of audience costs in the context of escalating violence leading to war (Fearon 1994); however, these costs are present in virtually all interactions between governments in countries where citizens are able to influence government and express their preferences as a collective principal. Audience costs constrain governments' ranges of actions internationally, according what will allow the government to win domestic elections, and thereby maintain the agency delegated to it by the people. As the level of democracy in a

state diminishes, these audience costs are also diminished because dictators can buy off important constituencies such as the military, and thus exercise their preferences more freely, with fewer constraints from their domestic citizens (Fearon 1994).

According to Simmons' theory, "democracy should be associated with fewer arbitrations, but better compliance when arbitration is sought" (Simmons 2002; 848), because domestic constituencies in more democratic countries will have less "extreme expectations" (Simmons 202; 848), and their governments will subsequently be able to pursue their preferred political means of dispute settlement. Simmons asserts that there are two reasons why domestic constituencies in a democracy have less extreme expectations: (1) "democracies allow for a better informational flow" (Simmons 2002; 842), which gives their domestic constituents a more realistic view of a particular dispute, and thus more realistic expectations; (2) also, democratic governments are less likely to use propaganda that would inflate domestic constituencies' expectations to an unrealistic level and make bilateral negotiations nearly impossible (Simmons 2002; 839).

Despite these initial expectations, Simmons' analysis of territorial disputes shows that "there is no evidence that arbitration is more likely in a less democratic regime where information bias is likely to be more extreme" (Simmons 2002; 840). This is possibly because the views of domestic constituencies aren't solely determined by government propaganda. There are many other factors that influence the preferences of domestic audiences, besides the level of government in a particular country, so it isn't surprising that Simmons' expectations aren't fulfilled by her data. It is also possible that considering the role of MNCs in a modified domestic actors model could explain the domestic pressures faced by governments, and what triggers the referral of a dispute to an international

dispute resolution body, more accurately. After her data disproves her original hypothesis, she doesn't offer a new one, but merely asserts that her data shows there is "no evidence that high stakes strip governments' desire to commit to arbitration" (840), which highlights realism's deficiencies in accounting for the referral of important cases to international dispute resolution. Despite showing this weakness of realism, her hypothesis' lack of success leaves room for alternative explanations of which levels of democracy are most likely to lead a state to refer a particular dispute to an international dispute resolution body.

#### **G. Modified Realism?**

Some scholars have attempted to account for the preferences of domestic actors in a modified realist theory, put forward by those such as Paul Huth (1996). This modified realist theory argues that even though decisions over matters of national security are made by a "single unitary actor" (Huth 1996; 35), this state leader is influenced by domestic groups and personal preference to stay in power. This allows for domestic considerations to shape leader's foreign policy to a certain extent, in conjunction with the traditional realist belief that leaders see the territorial integrity of their state as a primary goal (Huth 1996 ; 41). These two factors work together to constrain leaders' international choices in matters of security.

The modified realist theory also accepts that reputation costs<sup>24</sup> will lead states to generally follow agreements that they have signed. However, this model continues to use the traditional realist assumption that "the threat or use of military power is the ultimate

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<sup>24</sup> See II.H for more detail on reputational costs.

recourse for state leaders to resolve disputes with other countries”, and that “nonmilitary sources of influence and power have only a secondary impact on resolving interstate disputes” (Huth 1996; 47). This focus on military power, coupled with the primacy of state leaders as the active participants in dispute resolution, prevents the modified realist theory from seriously considering delegated dispute resolution as a choice that a state’s leader would pursue in any cases that would limit the state’s sovereignty, especially in areas that affect its territorial integrity.

An examination of territorial disputes shows the difficulty for modified realism in accounting for state’s decisions to refer cases that impact their sovereignty or territorial integrity to an international dispute resolution body for a ruling. When considering initiating a border dispute, a state leader weighs domestic concerns, the cost of a military operation, and the possibility of success, and chooses the “option with the greatest expected utility” (Huth 1996; 36). Huth recognizes that governments may consult a third party mediator to prevent conflict (1996; 13), and may seek compromise or conciliation in lieu of military engagement (1996; 34). However, he does not acknowledge that states would seek to refer the dispute to binding dispute resolution in the form of adjudication or arbitration, given the assumed overwhelming aversion of state leaders to relinquish their sovereignty in the international sphere, especially in disputes that affect their territorial integrity. In his work, Huth doesn’t consider the possibility that a state may choose to delegate dispute resolution power, because whichever state had the requisite military capabilities and domestic support for victory would refuse to submit to international dispute resolution in the first place.

Thus, according to the modified realist model, even though domestic actors may constrain a leader's choices in international disputes, the only conceivable situations where a state's leader would refer a case to an international dispute resolution body is when they have signed an agreement that includes compulsory delegated dispute resolution and they would face substantial reputational costs from noncompliance, they are forced to refer a dispute by a state with a stronger military, or the issue involved in the dispute is relatively unimportant (Simmons 2002; 838). Leaders would rather solve a dispute militarily and through direct diplomacy in the shadow of a military threat, or not initiate a dispute in the first place. In this manner, the modified realist theory falls prey to some of the same weaknesses as the traditional realist model when considering the referral of high stakes cases to an international dispute resolution body. Because this theory doesn't account for the referral of important issues to international arbitration or adjudication, and it uses the same level of analysis as the domestic actors model, I will use the domestic actors model as the conceptual framework for my research. This doesn't mean, however, that realist theory's considerations of power politics is irrelevant. It is important to account for state power and national interests, but the preoccupation of realist theory with these two aspects overshadows many other important factors, and limits its descriptive ability when applied to the issue of delegated dispute resolution.

## **H. Reputational Costs**

In their study of the effectiveness of international tribunals, Posner and Yoo focus on compliance with decisions from international dispute resolution bodies, given that compliance determines the effectiveness of any given tribunal (2005; 20). They argue that

costs from an unfavorable ruling can be extensive for states,<sup>25</sup> and that compliance with an unfavorable ruling is due to a state's perception of future reputational costs. For example, in order for a state to be able to propose to use a tribunal to settle a future dispute, which may turn out in its favor, it has to maintain its credibility and comply with the present unfavorable decision (Posner and Yoo 2005). Therefore, compliance with the decision of an international dispute resolution body depends on a state valuing the potential reputation costs of non-compliance higher than the immediate costs of compliance (Posner and Yoo 2005).

While Posner and Yoo don't consider what triggers states to refer a particular dispute to an international dispute resolution body, the concept of reputation costs is very helpful in explaining why a second state involved in a dispute would be willing to submit to international dispute resolution following the referral of the dispute by another state. When a state refers a case to international delegated dispute resolution, the second state involved in the dispute has to weigh the reputational costs of ignoring this referral against the costs of a potential negative decision. In cases of maritime border disputes where there are hydrocarbon resources involved, I will assume that when states' governments are forced to weigh the opportunity costs of a festering dispute and the potential reputational costs of refusing to submit the case to an international dispute resolution body against sovereignty costs and the potential for an unfavorable ruling,<sup>26</sup> they will almost always be willing to gamble on the delegated dispute resolution. This is because if they refuse to submit the dispute to an international dispute resolution body, they will be guaranteed

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<sup>25</sup> For example, by forcing states to pay reparations or yield territory (Posner and Yoo 2005; 20).

<sup>26</sup> Which could lead to the loss of resources or territory.

reputation and continued opportunity costs; however, if they gamble on the delegated dispute resolution there are only sovereignty costs and a potential for a loss of territory and resources in the event of an unfavorable ruling. I assume that once the dispute resolution process is initiated by another government, governments will almost always allow the case to proceed to court, and in the event of an unfavorable ruling they will consider non-compliance at that stage in the process, once they have a better knowledge of the costs in terms of sovereignty, reputation, territory, and resources. The impact of reputational costs on a government's decision to comply with a delegated dispute resolution process after a dispute is initiated is particularly high when the referral of a dispute by one party leads to compulsory jurisdiction for the other party, as is the case with many types of disputes referred under the UNCLOS.<sup>27</sup> Because of this logic, and my interest in determining what will trigger a state to refer a particular dispute to an international court, not why a second state will follow after an initial referral, I will assume that once delegated dispute resolution is initiated, reputational costs will lead the second state to comply with this process at least until the dispute resolution body issues a ruling.

### **III. The Role of MNCs?**

#### **A. Deficiencies in Simmons' Domestic Actors model**

As shown in the previous section, even though she doesn't explicitly focus on what trigger's a state's decision to refer a particular dispute to delegated dispute resolution, Beth

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<sup>27</sup> According to Merriam Webster Dictionary, Compulsory jurisdiction is "a mandatory jurisdiction that a state has agreed to accept in certain prescribed matters." m-w.com, s.v. "compulsory jurisdiction," accessed March 20, 2012, [http://www.merriam-webster.com/dictionary/compulsory% 20jurisdiction](http://www.merriam-webster.com/dictionary/compulsory%20jurisdiction). For more on compulsory jurisdiction, see Oxman (2001).

Simmons' domestic actors model allows for the preferences of domestic constituencies to act as a trigger for a government to refer a territorial dispute to an international dispute resolution body. In my study of maritime border disputes with hydrocarbon resources involved, I will argue that Simmons' model would gain more explanatory power by considering the role of MNCs exerting pressure through domestic political systems, and thereby triggering a government to refer a particular maritime border dispute to an international delegated dispute resolution body. This is not to say that other domestic constituencies, including those considered by Simmons, have no impact on a government's decision to refer a particular dispute to an international delegated dispute resolution. Rather, MNCs unique preferences, position, and influence merit explicit consideration, in addition to other domestic constituencies, and may explain some instances of disputes being referred to an international dispute resolution body better than Simmons' model.

Despite the ability for the Simmons' domestic actors model to explain what can trigger states to refer a particular dispute to international dispute resolution, some difficulties arise when this theory is examined closely. In her studies of high stakes territorial disputes, Simmons relies on the opportunity costs in terms of trade and military spending being so high that they will outweigh a government's reservations against relinquishing some of its sovereignty to an international organization (Simmons 2002). This picture becomes much more complicated if one considers cases of maritime border disputes where hydrocarbon resources are involved.

In cases of maritime border disputes in areas with oil or gas deposits, there are substantial opportunity costs, given that there must be a stable border in order for the natural resources to be effectively exploited. If a border is not properly defined, an oil

company working in the area could have its profits and machinery endangered by a rival state, and would be reluctant to conduct business without the reassurance that its investment is secure. If no companies are willing to begin extraction of resources, for fear of confiscation by a rival state, neither state can gain revenue from these resources. Because of this, both states have an incentive to resolve the border dispute, but unlike trade disputes, where both sides will reap the benefits from resolving the dispute, a dispute where natural resources are involved is a zero sum game, and therefore a good example of a distribution problem.<sup>28</sup> In a maritime border dispute between states A and B, where hydrocarbon resources are present, if the final established border is closer to state A's preferred border, then state A will gain access to greater hydrocarbon resources at the expense of state B, and vice versa. The existence of a zero sum game makes it more doubtful that both states' governments would be willing to gamble on delegated dispute resolution, given that there are many more possible negative consequences than simply the loss of land, which can be offset by increased trade and decreased military spending.

It is also important to note that in the case of resources such as hydrocarbons in a disputed maritime border region, states can create a joint development zone for the purpose of exploiting these resources. In his work "Joint Development and Maritime Border Delineation", Masahiro Miyoshi defines joint development as "an intergovernmental arrangement of a provisional nature designed for functional purposes of joint exploration for and/or exploitation of hydrocarbon resources of the seabed beyond the territorial sea" (1999; 3). The idea of joint development of offshore oil and gas reserves was first articulated in 1969 by the ICJ in the *North Sea Continental Shelf Cases*, where the court

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<sup>28</sup> For more on distribution problems, see Koremenos, Lipson, and Snidal (2001).

“referred to the possibility of the parties deciding on ‘*a régime of joint jurisdiction, use, or exploitation for the zones of overlap [of territorial claims] or any part of them*’” (Miyoshi 1999; 1). Subsequently the governments of many states including Malaysia and Thailand, and Japan and South Korea, have drafted joint development agreements following failed maritime border delineation negotiations, which have allowed them to successfully exploit their shared hydrocarbon resources without resolving their underlying border disputes (Miyoshi 1999).

Joint development agreements are useful to governments engaged in a maritime border dispute with hydrocarbon resources involved because they allow for the exploitation of hydrocarbon resources in the seabed, even after failed border delineation negotiations, without requiring them to refer their dispute to an international body for dispute resolution. This allows the disputing states to eliminate the opportunity costs from a festering border dispute and reap the benefits from their hydrocarbon wealth without facing the sovereignty costs and agency loss from delegating to an international dispute resolution body, or the possibility that the international dispute resolution body will issue a ruling favoring their rival, and effectively exclude them from exploiting the hydrocarbon wealth in the previously disputed area. The possibility of using joint development agreements to eliminate the opportunity costs of a dispute without adding the additional costs of delegation presents a challenge to Simmons’ domestic actors model, which relies on opportunity costs as the incentive for governments to delegate a border dispute.

An even more important deficiency in Simmons’ domestic actors model is that it doesn’t explicitly allow for non-state global actors such as multinational corporations (MNCs) to influence a government’s actions. Even though it doesn’t directly address

corporate influence on government, Simmons' domestic actors model allows domestic corporations to have different interests than governments and domestic actors in a given country, and it is conceivable that they can use their resources to influence governments' actions and preferences at an international level. However, Simmons' model doesn't explicitly consider how corporate influence actually works in practice. For a more comprehensive view of corporate influence, the theoretical work on the coercive power of corporations by scholars of business ethics such as Arnold (2003) and Lindblom (1977) is very helpful, and is backed up by the empirical work of scholars such as Mitchell (1997).

## **B. Corporate influence on Government**

In democracies, corporations are able to use their resources to directly lobby elected officials and finance election campaigns, and to indirectly shape public preferences through media (Arnold 2003, Lindblom 1977). In a study of the US and Great Britain, Mitchell asserts that "business interests' incentives and resources to influence public preferences generally exceed those of other interests" (Mitchell 1997; 59), and an effective manner of influencing public preferences is via the media. The media in democracies like the United States and Great Britain plays a large role in shaping public preferences, and businesses in turn help in "determining what issues the media covers, and whose opinions are heard" (Arnold 2003; 168). Corporations can fund conservative think tanks that provide opinions in the news, they control advertising content and which media outlets will receive their advertising dollars, and many corporations directly own media outlets (Arnold 2003). A good example of this corporate ownership of media, and subsequent media bias, is Rupert Murdoch and his company NewsCorp's ownership of several papers

and television networks, such as Fox News in the US, which on NewsCorp's own admission pushes "opinionated" news.<sup>29</sup> In these ways corporations can employ media to help to shape public preferences, which determine how citizens will vote in elections, and what policies they will support.

Corporations also directly pressure governments by investing in political campaigns, and lobbying politicians, both legally and illegally. In the United States, corporations can make Political Action Committees (PACs), which serve as a legal means for them to contribute to political campaigns. In the area of PAC spending, corporate and business interests consistently outspend other domestic groups such as labor, as Mitchell (1997) highlights. For example, in 1994 labor PACs spent a mere \$82.2 million compared to the \$211 million spent by corporate PACs and trade associations (Mitchell 1997;79). Those such as Wilson (1978), have argued that just because corporations spend disproportionately on business, this doesn't mean that they receive special treatment from politicians. Mitchell (1997) acknowledges this, but responds with a fairly straightforward rebuttal: why would corporations continue to spend large sums of money on politicians if there was no return on this investment? He backs up this intuitive argument with data showing the top ten contributors to different committees in the US House of Representatives. Unsurprisingly agricultural corporations and trade associations are the largest contributors to the House Agriculture Committee, defense contractors are the leading contributors to the House Armed Services Committee, and banking, finance, and real estate corporations are the leading contributors to the House Banking and Finance committee, etc. (Mitchell 1997; 84).

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<sup>29</sup> "Submission to the Secretary of State for Culture, Olympics, Media and Sports," *The Guardian*, accessed March 31<sup>st</sup>, 2012, <http://image.guardian.co.uk/sys-files/Media/documents/2011/01/25/News-Corp-response.pdf>.

Mitchell argues that “Targeting members of the powerful committees that can make decisions affecting the contributor’s industry is consistent with a strategy of seeking specific benefits from policymakers, rather than any larger political commitment” (1997; 81), and this behavior is present across the political landscape. Furthermore, corporations can also hire lobbyists, who directly pressure lawmakers to support positions favored by these corporations.<sup>30</sup> Data shows that these lobbying efforts pay off handsomely, for example, corporations reap between six to twenty dollars in tax breaks for every dollar they spend on lobbying (Reichter et al. 2009, and Alexander et al. 2009).

Political interest groups including corporations can also seek to directly finance politicians through illegal bribes, kickbacks, and undisclosed gifts; however, this type of activity is risky and can lead to public backlash and potential legal consequences or fines. Despite the potentially risky nature of this type of activity, “business interests also appear to dominate over other interest groups” in the area of illegal financing of politicians (Arnold 2003; 168). As with legal financing of politicians, the fact that this activity continues year after year is indicative of some benefits for the corporations spending this money. If this money had no noticeable benefits for the corporations involved, then the corporations would likely end their spending, especially when the potentially substantial costs of getting caught engaging in this type of illegal activity are considered.

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<sup>30</sup> According to OpenSecrets.org, an organization dedicated to publicizing the details of lobbying in the US Federal Government, corporations and corporate interest groups including US Chamber of Commerce consistently rank as the top lobbying spenders. Furthermore, opensecrets.org estimates that the total yearly lobbying expenditures in the US is an average of 3.5 billion, which emphasizes the large-scale lobbying activities even in a strong democracy like the US. For a list of top spenders, see: “Lobbying Top Spenders,” opensecrets.org, accessed February 26<sup>th</sup>, 2011, <http://www.opensecrets.org/lobby/top.php?indexType=s>.

As discussed above, literature on business ethics shows how corporations can help bring the preferences of self-interested democratic governments seeking reelection closer to their own corporate interests through direct and indirect (i.e. by influencing public opinion) pressure. Ultimately this influence is enabled by the government's desire for reelection, and the belief that accepting the benefits offered by corporations will increase its chances for reelection. The ability for corporations to influence governments should be lowest in countries with full democracy, where people ideally elect their representatives with limited corporate interference,<sup>31</sup> and increase as the level of democracy decreases. This is because the impact of citizens' preferences as expressed through voting is diminished in governments with lower levels of democracy. However, as Mitchell's research demonstrates, there is significant corporate influence even in well-functioning democracies such as the United States.

Even though most scholarship on corporate influence in politics focuses on democracies (Arnold 2003, Mitchell 1997, Lindblom 1977), businesses can also influence authoritarian regimes (Schweitzer 1964). The relationship between business and government in an authoritarian regime depends on the relative power of each party, and as Schweitzer argues, in an authoritarian state "political policy by business cannot limit itself to private interests but has to accept some of the economic, political, and military goals of the government to be influenced" (Schweitzer 1964; 438). Businesses can express their preferences easier in an authoritarian regime than in democracy, because there is less competition with citizen's votes, but their preferences are constrained by the ability of an authoritarian government to control business easier than a democratic government.

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<sup>31</sup> Except for indirect corporate influence via media, etc.

Corporations in authoritarian regimes can directly support the government with resources and side payments much easier than in a democracy, and subsequently have the potential for greater political influence. However, if a business' preferences stray too far from those of the authoritarian regime, the business runs the risk of being appropriated and run by the government, or restricted from doing business in the country if it doesn't bring its preferences closer to the government. This balance of power between corporations and the government in an authoritarian regime is largely dependent on the relative strength of government and corporations. In weak authoritarian regimes, large corporations may be able to use their resources to influence the government more than in a democracy, given that they do not need to contend with the interests of citizens expressed through voting. On the other hand, in a fully authoritarian regime, corporations may have less ability to influence the government because the government will simply appropriate or proscribe corporations with preferences that are too divergent from the regime's preferences. Because of this situation, it seems that corporations are able to exert the least power in a strong authoritarian regime, and more and more power as a government's level of authoritarianism diminishes.

In order to determine the level of democracy or authoritarianism in a particular state, the Economist Intelligence Unit's Democracy Index is a useful tool. Measuring the level of democracy in a particular country is difficult, and there is "an ongoing lively debate" (Kekic 2007; 1) over simply defining democracy; however, free and fair elections are a basic component of all definitions of democracy. The Economic Intelligence Unit's measurement of democracy is based on 5 categories: "electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture"

(Kekic 2007; 2). All five of these categories are relevant to the ability of corporations to influence government, because they capture citizens ability to express their votes, and the governments willingness or ability to listen to these votes - both of which are factors that constrain a corporation's ability to impact government preferences across different types of governmental systems. The Economist Intelligence Unit's index ranks countries on a ten point system, with ten representing full democracy, and zero representing a strong authoritarian regime. Countries are then divided into four broad groups based on their scores: full democracy, flawed democracy, hybrid regimes, and authoritarian regimes (Kekic 2007).

When combining the literature on corporate influence on democracies and authoritarian regimes, it appears likely that corporations will exert the greatest influence in flawed democracies and hybrid regimes, and less influence in full democracies or authoritarian regimes. Corporations must have some avenue with which to convey their interests to the government, which is not present in strong authoritarian regimes; however, in full democracies corporate interests can be overshadowed by citizen's votes, which diminishes the corporate influence on the government.<sup>32</sup>

Arnold has noted that despite the empirical research regarding domestic corporate influence in countries such as the United States, there is little empirical research "concerning the coercive influence of multinational corporations on the policies of developing nations" (Arnold 2003; 169). A study by Pat Choate (1990) has shown that Japanese companies have perused a program of influencing American politicians through PACs and by shaping public opinion through the media, with the goal of making America

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<sup>32</sup> Even though corporations also condition citizens votes via the media.

more friendly to Japanese business and export interests. However, there haven't been similarly comprehensive studies of MNC influence in developing countries, with the notable exception of Transparency International's work in identifying illegal bribes and kickbacks in by corporations in developing countries (Arnold 2003; 173). Despite this lack of direct empirical research, Arnold hypothesizes that the influence of large MNCs on developing countries may be even greater than in countries such as the US and Britain. If such a corporation is able to influence public policy in large democratic countries such as the US, it is unlikely that it would "refrain from exerting similar coercive influence over public policy in developing nations in which it has a significant financial interest" (Arnold 2003; 169).

Furthermore, Arnold asserts that:

In nations where there is little pretense of democracy, where entrenched elites determine public policy, and where corruption is widespread, MNC are likely to find it less problematic to influence public policy decisions. If such corporations have the will to use bribes or threats to counter policies and practices that are contrary to their interests, the low probability of negative repercussions is likely to make such practices attractive to the MNC (2003; 169).

This conforms to my assessment of the cases where such corporate influence is most likely, i.e. flawed democracies, and hybrid regimes.

### **C. MNCs Versus Domestic Corporations**

After recognizing the potential ability for MNCs to exert influence via domestic political processes in a state, and subsequently influence governments' actions internationally, it becomes clear that the domestic actors model may gain greater explanatory power by incorporating the preferences of MNCs, not simply domestic corporations, into its theoretical model. By explicitly incorporating the role of MNCs into my modified domestic actors model, it is likely that my theory will help to explain cases of

delegated dispute resolution that would seem unlikely otherwise. In order to illustrate the importance of differentiating between domestic corporations and MNCs, I will briefly highlight possible differences in the preferences of the two types of corporations.

First, the interests of MNCs are less entangled with the interests of national governments than those of domestic institutions. Domestic actors are under coercive authority of their government, and thus their preferences cannot stray too far from those of the government without potentially serious repercussions.<sup>33</sup> In the case of MNCs, the worst possible repression for going against the preferences of a government would be banned from doing business in the particular company, a cost that could be offset by conducting business elsewhere. Furthermore, both the government and domestic corporations are comprised of citizens of the same nation, who often share similar cultural, linguistic, and ideological views. These shared experiences may help to shape the preferences of domestic corporations and national governments in a similar manner, which could lead to a streamlining of preferences. For example, it is likely that the Saudi Arabian government and domestic Islamic banking institutions in Saudi Arabia have closer preferences due to shared ideology and culture than the Saudi Arabian government and a large western multinational bank such as Chase.

Second, in the specific cases of maritime border disputes with hydrocarbon resources involved, MNCs need long-term security that will allow them to safely invest in the disputed border region. International dispute resolution attorney Justin Marlles has emphasized this need for stability, and he notes that “energy companies should be wary of becoming drawn into long-lasting and volatile territorial disputes which could easily erode

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<sup>33</sup> This is largely influenced by the political system and the level of democracy in a given country.

the potential for profits from oil and gas concessions in contested waters” (2007;2). Because of this need for stability, it is likely that they will push one or both of the disputing governments to seek delegated dispute resolution, as opposed to bilateral negotiations, or the creation of a joint development zone. In the case of bilateral negotiations, successive governments may wish to renegotiate the terms of the agreement to be more favorable to their own country; however, this is much more difficult to do with an international adjudicative or arbitral ruling. Joint development zones are also created bilaterally, and thus relatively easy to violate, ignore, or renegotiate, potentially at the expense of the MNCs involved.<sup>34</sup> The inability of countries to come to a new agreement and modify the ruling of an international dispute resolution body provides stability that is not present in agreements that result from direct negotiations between states, or through the creation of joint development zones.

Scholars have also noted that international arbitral or adjudicative rulings raise the likelihood of enforcement by third party states due to the “compliance objective” of the international community, which wants its members to comply with institutional rules (Simmons 2002; Fisher 1981). However, even without the likelihood of enforcement, an independent ruling by a neutral third party can increase the legitimacy of “a particular focal point for settlement” (Simmons 2002; 835), and subsequently the likelihood for compliance. However, even if governments do not comply with a ruling and resume the border dispute, a MNC negatively affected by the resumed dispute can point to an

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<sup>34</sup> For a discussion of the inherent instability of joint ventures between companies, which follows a similar logic to the instability of joint development agreements between states, see Reuer and Miller (1997).

authoritative legal ruling to support its operations, and to justify potential reparations if its investment has been damaged by the disputing states.

The assumption that MNCs prefer delegated dispute resolution to negotiation between disputing states hasn't been developed in the literature; however, the basic logic of this assumption is simple. MNCs, unlike states, have nothing to lose in terms of sovereignty or loss of agency via delegation, which would lead them to favor negotiations over delegation. Furthermore, as previously discussed, binding legal rulings from an international dispute resolution body are less easy to renegotiate, and have a better likelihood of establishing stability than bilateral negotiations or the creation of joint development zones. Domestic corporations, on the other hand, are part of the collective principle behind the domestic delegation of agency to their government, and thus face agency losses when their government in turn delegates dispute resolution power to an international organization. These costs from agency loss are likely to lead domestic corporations to be much less uniformly supportive of their government referring a maritime border dispute to an international body for dispute resolution.

Third, it is also very important to note large potential differences in wealth between domestic corporations and MNCs, especially when contrasted with the wealth of smaller states. Scholars such as Boda (2002) have noticed and documented this phenomenon,<sup>35</sup> where the annual revenue of companies such as Exxon Mobil (\$284.6 bil) is comparable to the GDP of developed countries such as Finland (\$238.8 bil), and dwarfs the GDP of developing countries such as Tanzania (\$23.5 bil). This difference in wealth is very important to note, because corporations rely on their wealth as the primary means of

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<sup>35</sup> See Table I in the Appendix.

influencing politicians either directly or indirectly (Arnold 2003). Thus, wealthy MNCs with many times the wealth of a small developing country would seem much more likely to be able to effectively influence the government of that country, compared to smaller and less wealthy domestic corporations in that same country.

#### **D. Hypotheses**

In order to test the theory that MNCs may have an impact on a state's decision to delegate dispute resolution power, I will use six maritime border disputes with hydrocarbon resources in the disputed area as case studies. I choose this specific type of case for several reasons. Scholars have identified "situations where states' interests are directly opposed, such as competing interstate claims over territory, maritime areas, and cross-border rivers" (Mitchell and Hensel 2007; 721) as the best cases to test theories of delegation and compliance. This is due in part to the fact that realist theory suggests states will almost never delegate such important issues to an international dispute resolution body, and domestic actors models allow for such delegation of important cases only under certain conditions. Maritime border disputes where hydrocarbon resources involved are even more central to states interests than ordinary maritime border disputes, given that hydrocarbon resources directly impact a state's potential revenue.

I choose to study maritime border disputes in particular, instead of territorial border disputes, because they are relatively common. During the last fifty to sixty years the number of maritime border disputes has increased significantly due to the extension of territorial waters and exclusive economic zones (EEZs), and only 180 out of an estimated 400 maritime borders are agreed upon (Anderson 2006), whereas territorial borders are

better defined. The lack of defined maritime borders indicates a potential for many future disputes as more and more states fix their maritime borders, so research in this area is likely to be relevant in the near future.

Another reason I choose to study maritime border disputes where hydrocarbon resources are present is because this type of case offers the greatest ability to differentiate between Simmons's domestic actors model, and my model, which explicitly recognizes the potential influence of MNCs on governments. For her research, Simmons studies territorial disputes where resources aren't necessarily involved. This type of case offers a particular set of opportunity costs in terms of lost trade and increased military expenditures, which Simmons relies on to explain government's preferences for dispute resolution, and subsequently delegation. Maritime border disputes where hydrocarbon resources are involved also have high opportunity costs; however, states can resolve these costs via the creation of a joint development zone, which would let them exploit the hydrocarbon resource, without incurring sovereignty costs and the potential for a loss of resources that are inherent in delegation to an international dispute resolution body. The reality that states in a maritime border dispute complicated by the presence of hydrocarbon resources have the possibility to eliminate opportunity costs via the creation of a joint development zone, yet still opt to incur potentially substantial costs by referring the dispute to an international dispute resolution body, points to the potential role of MNCs in pressuring the governments to incur these costs despite their reservations. In this manner, maritime border disputes with hydrocarbon resources involved are much more conducive to showing the role of MNCs in triggering the referral of a dispute to an international dispute

resolution body than the territorial disputes not complicated by the presence of resources, which Simmons uses as the basis of her study (2002).

For my case studies I will examine six cases in depth (including the previously discussed Guyana v Suriname case). Many of the interactions between MNCs and governments are difficult to examine,<sup>36</sup> and an in-depth analysis of a small number of cases will give me the greatest ability to evaluate the role of MNCs in triggering states to refer dispute resolution. While this method of analysis will not give my findings the level of certainty provided by large-n statistical analyses, I want to show that merging the theoretical traditions of the domestic actors model of delegated dispute resolution with business ethicists' theories of corporate influence on government can explain states' referral of disputes to international dispute resolution bodies better than the unmodified domestic actors model proposed by Simmons. By showing the value of accounting for the preferences and influence of MNCs in the delegation process, my research can serve as a starting point for larger statistical studies in the future.

I will use my case studies to examine the following hypotheses, which combine aspects of the domestic actors model and theories of corporate influence on government. If my case studies confirm some or all of my hypotheses, this will show the need to consider the influence of MNCs on government, within the framework of the domestic actors model.

First, other things equal, a delegated dispute resolution mechanism is more likely to be triggered when a MNC is directly affected by a particular maritime border dispute. This hypotheses is very straightforward, and stems from the basic logic of my expanded domestic actors model, which incorporates the role of MNCs. I assume that governments

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<sup>36</sup> This is especially true in smaller developing countries where public records and documentation of government activities are limited.

prefer not to delegate disputes, especially in cases where there are resources involved, due to the sovereignty costs and potential loss of access to the resources in the disputed; however, they can be pressured to delegate by domestic interest groups, as well as MNCs. As previously discussed, I assume that MNCs will almost always favor international dispute resolution because of the likelihood that it will provide more stability than bilateral negotiations, or the creation of joint development zones. Mitchell (1997) has shown that corporations are most likely to attempt to influence politicians that have control over issues that affect their industry, and this same argument is easily expanded to MNCs, i.e. they will seek to influence governments when government decisions will directly effect their interests. Thus, when a festering maritime border dispute impacts a MNCs ability to exploit resources in the disputed area, the MNC will pressure one or both of the disputing governments to refer the dispute to an international body for resolution. This pressure is constrained by other domestic groups, and will not always lead to delegation; however, it will increase the likelihood of delegation.

Second, other things equal, I expect that states with a government in the range of flawed democracies or hybrid regimes would be most likely to delegate dispute resolution in maritime border disputes with resources involved.<sup>37</sup> This is due to the likelihood that corporations are able to influence these types of governments easiest, as previously discussed in section III.B.<sup>38</sup> In order to test the level of democracy, I will use democracy scores developed by the Economist Intelligence Unit Democracy Index, which ranks a

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<sup>37</sup> As classified by the Economist Intelligence Unit's democracy index.

<sup>38</sup> As Mitchell's (1997) research as shown, it is certainly possible for MNCs to influence government in full democracies, and it is also likely that MNCs could influence authoritarian regimes under certain circumstances; however, I expect most instances of delegation in maritime border disputes complicated by the presence of hydrocarbon resources to involve states with flawed democracies or hybrid regimes.

government's level of democracy into four groups: full democracy; flawed democracy; hybrid regimes; and authoritarian regimes.

There are three different Economist Intelligence Unit democracy indexes, from 2006, 2008, 2010, and 2011, and I will use whatever index is closest to the year that a particular dispute was referred to international dispute resolution. Five of my six cases were referred to international dispute resolution between 2004 and 2009, and thus the data in the respective democracy indexes will accurately represent their political system at the time of referral; however, the case of *Guinea-Bissau v Senegal* was referred to the ICJ in 1989. Because of the long time period between 1989 and the earliest democracy index in 2006, I will individually analyze the political situation in Guinea Bissau in 2006 compared to 1989, in order to gain an accurate picture of its political situation at the time of referral of the dispute

This second hypothesis is more refined than Simmons' model, which simply argues that the amount of referrals should increase as the level of democracy decreases; however, her data disproves her assumptions in this area. If the results of my case studies conform to my predicted range of the types of governments that are most likely to refer a case to an international dispute resolution body, this will emphasize the importance of considering the role of MNCs in triggering a state's decision to refer a dispute to an international dispute resolution body.

Third, other things equal, the likelihood of referral to an international dispute resolution body increases in disputes involving small (in terms of GDP) countries, and large (in terms of yearly revenue) MNCs. This hypothesis is grounded in the fact that MNCs use their wealth to influence governments (Mitchell 1997); thus, the more wealth they have in

comparison to a government, the more likely they will be able to use their wealth to influence that government. GDP and yearly revenue are the most useful measurements to determine the comparative size of countries and MNCs respectively, since both of these measurements are in terms of capital, and other measurements of state size are not applicable to MNCs.<sup>39</sup> Because of this, I will use GDP and yearly revenue as a means of comparing the relative size of MNCs and states.

My focus on MNCs does not exclude the impact of other domestic constituencies in triggering delegated dispute resolution. In fact, the impact of other domestic actors is to be expected, as shown in Simmons' formulation of the domestic actors model. Instead, I want to show that by excluding MNCs from other potentially relevant domestic actors, proponents of previous formulations of the domestic actors model have overlooked a potentially important source of pressure for a government to delegate dispute resolution. Furthermore, due to the disproportional wealth and organizational capabilities of MNCs compared to other domestic political actors, it is likely that MNCs wield relatively substantial influence compared to other domestic actors, and considering their role could help to explain many instances of delegation that would be anomalies according to other domestic actors theories that don't explicitly consider the role of MNCs. If any of my hypotheses are supported by my case studies, my research will confirm the importance of considering the role of MNCs in delegated dispute resolution.

#### **IV. Body III - Cases**

In order to properly understand why states delegate dispute resolution power to an international court or arbitration body, it is important to examine cases with disputes that

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<sup>39</sup> Including population size, and territory under control.

actually matter to the states involved, such “competing interstate claims over territory, maritime areas, and cross border rivers” (Mitchell and Hensel 2007; 721). Given the significance of maritime border disputes for a state’s material interests, and the recently increased number of disputes in this area, these disputes are good case studies to study why states choose to use international dispute resolution bodies to settle their disputes.

The three primary dispute resolution bodies for maritime border disputes are the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the Permanent Court of Arbitration (PCA) (Anderson 2006). Before states actually have need for dispute resolution, they generally sign a treaty specifying which body has the authority to hear possible future disputes in the area covered by the treaty. In the following section, I will briefly overview treaty-based dispute resolution mechanisms relevant to maritime border disputes.

#### **A. Delegated Dispute Resolution In Treaties**

In maritime border disputes, the most common way that governments select which international bodies have the power to judge their future disputes is via the UNCLOS. According to Article 247 of the UNCLOS,<sup>40</sup> upon signature of UNCLOS, or any point thereafter, states parties can declare in writing their preferred forum for the settlement of disputes that may arise in areas covered by the convention. However, states parties to UNCLOS still must choose to send particular disputes to their preferred body on a case-by-case basis, as detailed in Article 246 of Part XV, Section 2, of the UNCLOS, which states: “Subject to section 3 [exemptions], any dispute concerning the interpretation or application

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<sup>40</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

of this Convention shall, where no settlement has been reached by recourse to section 1 [the peaceful settlement of disputes], be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”<sup>41</sup> Thus, only one of the disputing governments needs to choose to submit a dispute in order to trigger the dispute resolution method. This is an example of compulsory jurisdiction; however, according to Article 298, upon signature of the convention, a state can declare in writing that it doesn’t accept a particular aspect of the dispute settlement provisions outlined in Section 2, such as the ability for one state to trigger dispute resolution without the agreement of the other state.<sup>42</sup> This can protect governments from being forced to refer a dispute to international dispute resolution body, if they file the proper objections upon signature of the treaty.

The UNCLOS allows governments to choose from four different dispute resolution routes upon signing the convention: referral of the dispute to the ICJ for adjudication; referral of the dispute to the ITLOS for adjudication; arbitration via Annex VII of the UNCLOS;<sup>43</sup> and special arbitration via Annex VIII of the UNCLOS.<sup>44</sup> If states don’t agree on the forum for delegated dispute resolution, then the default form is Annex VII arbitration, according to Article 287 of the UNCLOS.

There are currently 162 states parties to the UNCLOS, and the UNCLOS is the most common way for a state to select which international dispute resolution bodies it can refer

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<sup>41</sup> UNCLOS, *supra* note 40.

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

<sup>43</sup> In practice five out of the six cases of Annex VII arbitration, and all cases of Annex VII arbitration involving maritime border disputes with resources involved, have been under the auspices of the Permanent Court of Arbitration.

<sup>44</sup> Special arbitration is reserved for special cases, such as those relating to marine environmental issues, and not maritime border disputes. For more examples, see UNCLOS, *supra* note 40, Annex VIII.

future maritime border disputes to; however, a state can also select one of these dispute resolution bodies via a bilateral treaty with another state. A good example of this phenomenon is the maritime border dispute between Romania and Ukraine in the Black Sea. This conflict dated back to the end of the Cold War, and the governments of the two states negotiated a bilateral Treaty on Relations of Cooperation and Good Neighborliness<sup>45</sup>, followed by an Additional Agreement of the Treaty on Relations.<sup>46</sup> The Additional Agreement the outlined a plan for settling the dispute, and Article 4(h) declares that if:

“Negotiations shall not determine the conclusion of the above-mentioned [delineation ] agreement in a reasonable time, but not later than 2 years since their initiation, the Government of Romania and the Government of Ukraine have agreed that the problem of delineation of the continental shelf the exclusive economic zones shall be solved by the UN International Court of Justice, at the request of any of the Parties, provided that the Treaty on the regime of the State border between Romania and Ukraine<sup>47</sup> has entered into force.<sup>48</sup>

In this manner, the Additional agreement established a mechanism to delegate dispute resolution, and was used by the government of Romania as the grounds for referring the dispute to the ICJ in 2004.

## **B. Arbitration Versus Adjudication**

Even though arbitration and adjudication are both forms of delegated dispute resolution, there are some differences that are worth noting. Arbitration is a form of alternative dispute resolution with the goal of settling a dispute outside of legal systems and courts. With arbitration, the states involved in a dispute agree to refer the dispute to a

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<sup>45</sup> Signed on June 2, 1997, and entered into force on October 22, 1997.

<sup>46</sup> Signed on June 2, 1997, and entered into force on October 22, 1997.

<sup>47</sup> Henceforth the “2003 Border Treaty”.

<sup>48</sup> Additional Agreement of the Treaty on Relations, Romania-Ukraine, June 2, 1997.

group of one or more arbitrators, who then produce a binding decision.<sup>49</sup> Arbitration is usually used to decide a “narrow legal or factual issue. The arbitrators may invent their own rules of procedure and evidence, and they frequently draw on conventional or codified rules” (Posner and Yoo 2005; 30). Simple forms of arbitration have been practiced since the time of the ancient Greeks, and modern delegation is usually dated to the 1794 Jay Treaty, “which provided that the outstanding claims arising from the [American] revolutionary war would be submitted to arbitration” (Posner and Yoo 2005; 30). Arbitration was first institutionalized in 1899 by the Permanent Court of Arbitration (PCA); however, the PCA was not a strong independent institution at its inception, but simply a pool of arbitrators that could be called on an ad hoc basis by states involved in a dispute.

Similarly to arbitration, adjudication relies on a third party to solve a dispute by issuing a binding ruling; however, with adjudication this third party is a court, instead of an ad hoc group of arbitrators. A full-fledged court has features including: “(1) compulsory jurisdiction—the court would have automatic jurisdiction over certain classes of disputes; (2) a permanent judiciary whose members do not depend on the disputing states for their appointment or salary; and (3) regular procedures and substantive legal rules that would not be renegotiated from dispute to dispute” (Posner and Yoo 2004; 7).

Principle agent theory helps to frame the comparison between adjudication and arbitration in terms of the level of independence of the respective types of international dispute resolution bodies from the governments that have delegated their dispute resolution power to these bodies (Posner and Yoo 2005). Traditional arbitration in the

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<sup>49</sup> There are also non-binding forms of arbitration that closely resemble mediation; however, as the arbitration provided for in Annex VII of UNCLOS is binding, I will only focus on binding arbitration.

form of an arbitrator (or panel of arbitrators) appointed to resolve a specific dispute, with the mandate to determine their own rules of procedure and evidence, has characteristics of “a highly dependant tribunal” (Posner and Yoo 2005; 30), with little danger of agency loss for the disputing governments. In contrast, courts such as the ICJ are much more independent, and display a permanent judiciary, regular procedures, and often compulsory jurisdiction. These attributes lead the ICJ to be much more susceptible to agency loss.

Scholars differ over the question of whether independent or dependent international dispute resolution bodies are more effective. Those such as Helfer and Slaughter argue that independent bodies are more effective, because independence shows neutrality, and neutrality is the source of the courts authority (1997). If states believe that a tribunal is politically influenced, they will be less likely to refer disputes to it, or comply with its decisions. Posner and Yoo (2005), on the other hand, assert that states are unlikely to use independent dispute resolution bodies because of their inability to veto tribunals or panels they do not trust, which creates a potential for large agency losses. They argue that independent tribunals may be more effective in situations where there is political unification, such as the EU; however, without political unification, states are unlikely to trust a truly independent judicial branch that they have little to no control over. Helfer and Slaughter (2005) responded to Posner and Yoo with a modified theory of constrained independence, which recognized the need for states to have some control over dispute resolution bodies in order for them to be effective. Despite differences over the ideal level of state control, both sides of this debate recognize the need for states to have some means of control over international dispute resolution bodies, in order to offset costs due to agency losses.

The three primary dispute resolution bodies for maritime border disputes, the ICJ, ITLOS, and PCA, are all relatively independent tribunals. Both the ICJ and ITLOS are courts, and thus exhibit substantial independence from the governments that may use them to resolve disputes. Despite the fact the PCA is an arbitral body, it exhibits several characteristics of a court, and can be seen to be much more independent than traditional arbitration, and closer to adjudication. Arbitration under the auspices of the PCA allows participants to pick arbitrators from a pool of arbitrators-in-waiting (Posner and Yoo 2005), which is very close to a permanent judiciary; and over the century since its founding since 1899, it has developed as an institution that resembles an independent court more than an ad hoc group of arbitrators.<sup>50</sup> Because the structure of the PCA is relatively independent and it resembles an adjudicatory body in many ways, I will not focus directly on the differences between its arbitration, and the adjudication of the ICJ and the ITLOS.<sup>51</sup> Instead, I will treat all three bodies as relatively independent dispute resolution bodies, with a possibility for agency drift,<sup>52</sup> and thus potentially high cost for the states submitting disputes to them. The potentially high sovereignty costs associated with these independent institutions, combined with the high impact on a state's national interests from maritime border disputes with hydrocarbon resources involved, makes delegation of these maritime disputes seemingly unlikely. Because these cases seem costly for states to submit to an international dispute resolution body, they are particularly helpful in testing my theory of

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<sup>50</sup> Haftel and Thompson highlight the passage of time since the creation of an international organization in particular as a source of independence for these organizations (2006; 270).

<sup>51</sup> It is interesting to note that even though the ICJ and ITLOS resemble traditional courts more closely than the PCA, they also show certain traits that are typical of arbitral bodies, such as states' ability to appoint ad hoc justices of their choice in addition to the sitting justices in certain types of cases.

<sup>52</sup> Agency drift refers to differing preferences between principals and agents, due to the independence of the agents and subsequent agency losses.

MNCs triggering the referral of maritime border disputes. If MNCs are able to pressure a state towards the referral of these disputes, it is very likely that a similar effect can be seen in other issue areas where there are less potential costs from referring disputes to an international dispute resolution body.

### **C. A Brief History of the ICJ, the ITLOS, and the PCA**

Before I analyze specific cases, I will give a brief institutional history of the ICJ, the ITLOS, and the PCA. This historical picture will help to contextualize the maritime border disputes with hydrocarbon resources involved that were brought before these respective bodies.

The PCA was established in 1900 by the Convention for the Pacific Settlement of International Disputes after deliberations during the Hague Peace Conference of 1899, and it became operational in 1902,<sup>53</sup> making it the oldest of these three international dispute resolution bodies, and the “first global mechanism for the settlement of disputes between states.”<sup>54</sup> At its inception, the PCA was seen as simply a pool of arbitrators in waiting, with the goal of simplifying the creation of independent arbitral tribunals when necessary.<sup>55</sup> The PCA is comprised of an International Bureau, which functions as the PCA’s secretariat and establishes the rules of procedure to govern the conduct of its arbitrations,<sup>56</sup> an Administrative Council that oversees the PCA’s policies and budget, and a pool of sitting

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<sup>53</sup> ICJ, *supra* note 10.

<sup>54</sup> The Permanent Court of Arbitration, “History,” PCA, accessed February 19<sup>th</sup>, 2012, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1044](http://www.pca-cpa.org/showpage.asp?pag_id=1044). The PCA was revised slightly during the second Hague Peace Conference in 1907.

<sup>55</sup> ICJ, *supra* note 10.

<sup>56</sup> ICJ, *supra* note 10.

arbitrators called the Members of the Court.<sup>57</sup> To date 115 states have acceded to the founding conventions of the PCA,<sup>58</sup> and each of these states is entitled to name up to four arbitrators to the PCA's pool of arbitrators.<sup>59</sup> Even though its founders likely did not intend to create an independent institution for dispute resolution, the creation of the PCA "institutionalized the law and practice of arbitration"<sup>60</sup> by providing a set of rules and predetermined potential arbitrators. This effect is heightened by the inherent development of institutional identity in the many years since its foundation.<sup>61</sup>

Posner and Yoo argue that the creation of the PCA was meant to reduce the transaction costs associated with finding and agreeing on arbitrators on a case-by-case basis for each dispute; however, they argue that these transaction costs were replaced by the lack of a "guarantee that any particular arbitrator will be able or willing to maximize the ex ante value of the agreement between them [the disputing governments]" (2005; 24), due to the fact that the arbitrators are not personally accountable to the states involved, and would likely continue to have opportunities to adjudicate through the PCA even they handed down an inequitable decision in one case. Posner and Yoo argue that states would rather rely on their own information and incur the transaction costs required to select their own ad hoc arbitrators, than risk selecting an arbitrator from the pool, about whom they know little – a situation that could easily lead them to incur unseen costs due to agency loss (2005; 24). It would seem that governments would be especially reluctant to refer disputes

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<sup>57</sup> Permanent Court of Arbitration "Structure," PCA, accessed March 21<sup>st</sup>, 2012, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1039](http://www.pca-cpa.org/showpage.asp?pag_id=1039).

<sup>58</sup> Permanent Court of Arbitration, "Member States," Permanent Court of Arbitration, accessed March 23, 2012, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1038](http://www.pca-cpa.org/showpage.asp?pag_id=1038).

<sup>59</sup> ICJ, *supra* note 10.

<sup>60</sup> ICJ, *supra* note 10.

<sup>61</sup> For more on the impact of the passage of time on institutional identity, see Haftel and Thompson (2006).

that directly affect their material interests to the PCA, if it was possible for them to simply choose their own arbitrators. Posner and Yoo highlight this reluctance to enter the pool as the source of the limited use of the PCA for most of the 20<sup>th</sup> century (2005; 24).

Despite Posner and Yoo's predictions, states have recently begun to use the PCA more often. Since the 1990s, the PCA has seen three disputes over maritime borders where resources are involved, along with several other disputes that directly affect states' interests, including territorial disputes and disputes regarding the transportation of nuclear material through international waters.<sup>62</sup> Furthermore, these three maritime border disputes are the only maritime border disputes with hydrocarbon resources involved arising from UNCLOS Annex VII arbitration. This raises the question of what would trigger governments to refer these disputes to the PCA, and potentially incur substantial costs from an unfavorable decision, when they could use the same procedure under Annex VII of UNCLOS to convene an ad hoc panel of arbitrators? States' choices to use the PCA instead of ad hoc Annex VII arbitration implies that something leads these states to value reduced transaction costs more than they value the potential negative costs that would be the result of an unfavorable ruling from the PCA arbitrators. A plausible reason for this could be the influence of MNCs, which prefer a cheap and stability-producing ruling by the PCA, and are not affected by the potential sovereignty costs and agency loss faced by states when referring a dispute to an independent international dispute resolution body like the PCA.

The ICJ was created in 1946 by the Statute of the International Court of Justice, which was contained in the Charter of the United Nations. Article 93, Paragraph 1, of the Charter of the United Nations provides that all Members of the United Nations are ipso

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<sup>62</sup> PCA, *supra* note 9.

facto parties to the Statute, so all of the 192 current members of the United Nations can use the ICJ.<sup>63</sup> The Articles 36, 37, and 65 of the Statute of the International Court of Justice lay out the court's Jurisdiction.<sup>64</sup> According to Article 36, there are three means by which states parties may grant the court jurisdiction to see their cases: (1) a special ad hoc agreement between two states to submit a particular dispute to the ICJ; (2) a jurisdictional clause in a treaty that specifies the ICJ as the dispute resolution body for disputes arising from the treaty; and (3) States may consent to compulsory jurisdiction of the court, which gives the ICJ the power to hear all international legal disputes between states who have accepted the same obligation to use the ICJ for compulsory jurisdiction (Posner and Yoo; 2005).<sup>65</sup>

The ICJ is a good example of a permanent international court,<sup>66</sup> and as Posner and Yoo assert: "It has a substantial administrative bureaucracy, a broad jurisdiction, and is considered by many to have the final word on questions of international law" (2005; 35). According to Articles 3 and 4 of the Statute of the Court, the UN General Assembly and Security Council select the 15 judges to serve on the court, no two of which are allowed to be from the same country.<sup>67</sup> According to Article 31 of the Statute of the Court,<sup>68</sup> if no judge

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<sup>63</sup> ICJ, "Statute of the International Court of Justice," [icj-cij.org](http://www.icj-cij.org), accessed March 27<sup>th</sup>, 2012, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>64</sup> For a discussion of these three different types of jurisdiction, see Posner and Yoo (2005).

<sup>65</sup> There are currently 66 states that have accepted the compulsory jurisdiction of the ICJ. See: International Court of Justice, "Declarations Recognizing as Compulsory the Jurisdiction of the Court," International Court of Justice, accessed February 15<sup>th</sup>, 2012, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

<sup>66</sup> As opposed to the PCA, which is much less institutionalized than the ICJ.

<sup>67</sup> ICJ, *supra* note 63.

<sup>68</sup> ICJ, *supra* note 63.

from the nationality of the states involved in a dispute is sitting on the ICJ, they may appoint an ad hoc judge of their nationality to hear the particular dispute.<sup>69</sup>

Posner and Yoo have argued that the ICJ shows characteristics of both an independent and dependent tribunal, depending on the manner in which it has been granted jurisdiction. In the case of ad hoc grants of jurisdiction, they argue that the ICJ is relatively dependant (2005; 36). According to their argument, since the ICJ depends on the states to choose to use it for ad hoc arbitration, it has an incentive to render judgments that will appease both states, in order to ensure that states will choose to use it again the future, and thus there will be only minimal agency loss. They contend that in the case of compulsory jurisdiction, the ICJ is relatively independent. In the case of jurisdiction provided via treaty, the ICJ is moderately independent, because if it renders judgments not favored by the states involved in a dispute, they will not include it in later treaties (which undermines its interest in being the forum for the settlement of international disputes). While this line of argument seems to make sense, it doesn't account for potential bias due to the overrepresentation of powerful countries on the ICJ, or the likelihood that even if the ICJ always tries to make an agreement that accounts for the interests of both states involved, its own instructional culture and history may influence its decision in a manner contrary to the preferences of both states involved in the dispute.

To date the ICJ has seen 152 cases,<sup>70</sup> of which two have involved disputes over maritime border delineation, where hydrocarbon resources were present. These two cases

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<sup>69</sup> Even though not provided for by the Statute, since the founding of the ICJ it has been the tradition for each of the five permanent Security Council members to be represented by a Judge on the ICJ, and thus it is clear that power politics are represented in the court to some extent (Posner and Yoo 2005; 35).

were the dispute between the governments of Guinea-Bissau and Senegal over their maritime border that was submitted to the court in 1989, and the dispute between the governments of Romania and Ukraine over their maritime border in the Black Sea, which was submitted in 2004.

The ITLOS is the youngest of these three international bodies, and is an example of the proliferation of international dispute resolution bodies following the Cold War. It was established in 1982 by the UNCLOS, but did not become operational until 1996, after the UNCLOS came into force in November, 1994 (Posner and Yoo 2005; 70). According to Annex VI of the UNCLOS, the ITLOS consists of twenty-one independent members, who are elected for renewable nine year terms by the states parties to the convention, and who represent the different geographic regions and principal legal systems of the globe.<sup>71</sup> Furthermore, a state party involved in a dispute without a judge of their nationality sitting on the court may appoint an ad hoc judge of their nationality in addition to the sitting judges. The ITLOS has the jurisdiction to hear cases in areas covered by the UNCLOS, with the exceptions discussed in the previous section, when a state can waive its jurisdiction over certain types of disputes via written declaration. The only issue areas where accession to the UNCLOS creates mandatory compulsory jurisdiction for the ITLOS are cases concerning the prompt release of fishing vessels according to Article 292, and the settlement of seabed disputes according to Article 187.<sup>72</sup>

To date the ITLOS has seen nineteen cases, eighteen of which were contentious cases, involving a dispute between states parties, and one of which was an advisory

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<sup>70</sup> International Court of Justice, "Cases," International Court of Justice, accessed March 21<sup>st</sup>, 2012, <http://www.icj-cij.org/docket/index.php?p1=3>.

<sup>71</sup> UNCLOS, *supra* note 40.

<sup>72</sup> UNCLOS, *supra* note 40.

decision. Ten of the contentious cases deal with the prompt release of fishing vessels seized by coastal states for alleged illegal fishing in their waters, three proscribe provisional measures pending later arbitration, two deal with ships seized for other non-fishing violations, two involve a dispute over swordfishing, and one deals with a disputed maritime border, where hydrocarbon resources were present. With the exception of the maritime border dispute, these disputes have a relatively small impact on state sovereignty, and are thus not very costly for states to delegate to a relatively independent organization such as the ITLOS. This picture seems to conform to the assessment of realists, and scholars such as Posner and Yoo (2005), who argue that the costs in terms of agency loss are prohibitively high in cases where states consider referring disputes over issues that impact their sovereignty or material resources to an independent international tribunal. This makes the single maritime border dispute between the governments of Bangladesh and Myanmar, which was complicated by the presence of hydrocarbon resources in the disputed area, even more interesting. Namely, what could trigger the governments of Bangladesh and Myanmar to refer their dispute to the ITLOS despite the inherent dangers associated with agency loss over an issue directly affecting their sovereignty and material resources? MNC influence is a plausible answer to this question.

#### **D. The Cases**

##### **1. *Romania v. Ukraine***

The communist governments of Ukraine and Romania, the USSR, and the subsequently democratic governments of Ukraine and Romania have been locked in a decades-long maritime border dispute in the Black Sea, centered around a small rock called

Serpent Island. Serpent Island is a tiny island that was claimed by Russia and Romania at different times in history, and in 1947 it became a part of USSR. In 1997 the government of Romania ceded the island to Ukraine; however, the governments of Romania and Ukraine remained in disagreement over the exact delineation of the maritime border around the island (Spinat 2009). The dispute largely revolved around whether Serpent Island is legally an island, and could thus be considered as a factor in the delineation of the border. This area of the Black Sea is important for both countries because of its oil deposits, and despite numerous attempts to resolve the issue of maritime border delineation, they could not reach an agreement. In September 2004, the government of Romania referred the dispute to the ICJ, and requested that the court draw a “single maritime boundary between the continental shelf and the exclusive economic zones of the two States” (Bederman 2009; 543-544).

The government of Romania’s referral of the border dispute with Ukraine to the ICJ was facilitated by a bilateral Treaty on Relations of Cooperation and Good Neighborliness, and the subsequent Additional Agreement of the Treaty on Relations, which were signed together on June 2, 1997, and entered into force on October 22, 1997. As previously discussed in section IV.A, Article 4h of the Additional Agreement stipulated that if the two states could not reach an agreement on an equitable delineation of their Exclusive Economic Zones (EEZs) and continental shelves within two years, either state could bring the issue before the ICJ, as long as their bilateral border regime treaty had entered into force.<sup>73</sup> This treaty on the border regime was signed in 2003, and entered into force on May 27, 2004. Since the parties had undergone unsuccessful negotiations between 1998-2004,

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<sup>73</sup> Additional Agreement of the Treaty on Relations, *supra* note 48.

the Additional Agreement's requirements for referral of the dispute to the ICJ were fulfilled and either of the state's parties could refer the dispute to the ICJ for a binding ruling (Bederman 2009; 544), as the government of Romania did in September of the same year. The government of Ukraine did not object to the ICJ's jurisdiction to hear the case, although it questioned the ICJ's jurisdiction to determine a small section of the border that affected Ukraine's territorial sea, because the delineation of territorial sea was outside the delineation of EEZs and the continental shelf provided for by the Additional Agreement. However, the ICJ "disagreed that it was therefore prevented from delineating between 'on the one hand, the exclusive economic zone and the continental shelf of one State, and, on the other hand, the territorial sea of the other State at its seaward limit'" (Bederman 2009; 545). Thus, the ICJ determined that its jurisdiction allowed it to delineate the entire disputed border.

The ICJ's decision that it had jurisdiction to rule on the part of the disputed border that abutted Ukraine's territorial sea, despite Ukraine's objections, shows the inherent dangers of agency losses in delegating to an international dispute resolution body. The government of Ukraine had interpreted the Additional Agreement as applying only to EEZs and the continental shelf; however, upon delegation to the ICJ, the ICJ interpreted the Additional Agreement as allowing for its determination of territorial seas in conjunction with delineation of EEZs and the continental shelf. This created a situation for the government of Ukraine, where it was faced with agency losses and an unintended intrusion on its sovereignty that had the potential to negatively impact its territorial integrity. However, if the Ukrainian government decided to ignore the court after the somewhat

generous interpretation of its own jurisdiction, it is likely that it would face high reputational costs, and would be unable to use the ICJ effectively in the future.

The ICJ made its final decision in 2009, and “delivered a straightforward, single maritime boundary applying the equidistance method to the adjacent and opposite mainland coastal geography of the parties” (Bederman 2009; 547); however, in practice its decision favored Romania. The court excluded Serpent Island<sup>74</sup> as a base point for the construction of the equidistance line in the first step of its delineation process, which also reduced “its [the island’s] potential role as a relevant circumstance or factor calling for an adjustment to the provisional equidistance line” (Bederman 2009; 548).<sup>75</sup> Because of this, the decision gave Romania “the vast majority of a 12,000 square kilometer area rich in both oil and gas”, and according to experts, Romania’s share “holds an estimated 70 billion cubic meters of natural gas and 12 million tones of oil, currently valued at 23.4 billion Euros, which could ensure Romania's energy independence for more than 15 years” (Spinant 2009).<sup>76</sup> Despite the somewhat unfavorable ruling, “Ukrainian officials said that the ruling was a ‘wise compromise’ and that the country would abide by the courts decision” (Spinant 2009). Following the decision in 2011, ExxonMobil and Petrom began drilling in the territory southeast of Serpent Island that was granted to Romania, and have found the area

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<sup>74</sup> Serpent Island is Ukrainian territory.

<sup>75</sup> The IJC used a three-stage delimitation methodology. For more information, see Bederman (2009).

<sup>76</sup> Ukraine also got a portion of the disputed area; however, it was much smaller than Romania’s share.

to contain an estimated 42 to 84 billion cubic meters of natural gas, potentially surpassing previous estimates of the hydrocarbon wealth in the area.<sup>77</sup>

When considering what triggered the government of Romania to refer its border dispute to the ICJ, one could argue that with the 2003 Border Treaty's entry into force in May 2004, Romania had the framework needed to refer the case, and it quickly used this framework to send the dispute to the ICJ, in order to resolve the border dispute. However, this simplistic explanation does not fully evaluate the potential costs faced by the government of Romania when deciding whether to refer the case to an international dispute resolution body. Even though the government of Romania had the required delegated dispute resolution framework in place after May, it still faced substantial costs in terms of possible loss of sovereignty and material resources should it choose to actually delegate. Furthermore, it is necessary to ask why the governments of Romania and Ukraine would choose potentially costly delegated dispute resolution in favor of lower cost, but similarly beneficial<sup>78</sup> joint development zones. Because of this, it is worthwhile to consider the role of MNCs in triggering the government of Romania to refer the dispute to the ICJ.

Furthermore, even though direct documentation of MNC influence on government is often very difficult to find, there is evidence of dubious dealings between the Romanian government and ExxonMobil that began several years prior to the 1997 Treaty on Relations and Additional Agreement, which began the formal road to delegated dispute resolution. In 2006, the Romanian government granted ExxonMobil exploration rights in the disputed area, in conjunction with the Romanian company Petrom SA, three years

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<sup>77</sup> "CORRECT: OMV Announces Possibly Largest Gas Find In Black Sea," *The Wall Street Journal*, February 22, 2012, accessed February 27, 2012, <http://online.wsj.com/article/BT-CO-20120222-704622.html>.

<sup>78</sup> In terms of reducing the opportunity costs of a festering border dispute.

before it gained legal ownership of the area following the 2009 decision of the ICJ (Kristoffersen 2010). After pressure from the media, the Romanian government declassified a document showing that these dealings dated back to 1992 (Ciocoiu 2009). Although the existence of such dealings does not conclusively show any direct pressure from ExxonMobil on the Romanian government to refer the maritime border dispute to the ICJ, the existence of dealings between ExxonMobil and the government of Romania dating back to 1992 certainly allows for the possibility of such pressures, given the incentives for MNCs to push governments to use delegated dispute resolution in such cases.

In addition to ExxonMobil, there are several other large multinational oil companies that purchased data on the oil resources in this area of the Black Sea, which is indicative of their interest in engaging in oil extraction in the area. These companies include Hunt Oil from the US, Total from France, and Lukoil from Russia (Kristoffersen 2010). The presence of these companies raises the possibility that they also pressured the government of Romania to resolve the dispute via the ICJ, in order to have the stability needed to begin extraction activities. Instead of being seen as alternative explanations for the government of Romania's decision to refer the dispute to the ICJ, it is likely that MNC pressure and the 2003 Border Agreement worked in conjunction as a trigger. Once the 2003 Border Agreement provided the Romanian government with the necessary dispute resolution framework to delegate to the ICJ, it is very plausible that MNC pressure led the government of Romania to actually use the framework.

## **2. *Guinea-Bissau v. Senegal***

Senegal gained its independence from France in 1960, and Guinea-Bissau gained its independence from Portugal in 1974; however, after independence they inherited an undefined maritime border from their previous colonial governments. This border dispute would likely have been of relatively little importance to the newly emerging post-colonial governments struggling to establish themselves if it wasn't for the presence of hydrocarbon resources in the area of the disputed maritime border. Oil exploration in the area began in the late 1960s, and Esso Exploration Guinea<sup>79</sup> drilled six exploratory wells between the late 1960s and 1973.<sup>80</sup> After Guinea-Bissau's independence in 1974, its newly independent government wanted to promote domestic exploration, and Guinea-Bissau's national oil company Petrominas "commissioned an exploration evaluation and seismic survey of the area,"<sup>81</sup> which led to an upgrade of the area's oil potential. In 1984 Elf<sup>82</sup> drilled an exploratory well in the area, and Pecten<sup>83</sup> drilled three wells in the area between 1989-1990; however, oil exploration was greatly hindered by the ongoing insatiability border dispute with Senegal.<sup>84</sup> Given the activity of several multinational oil companies in the disputed area, and their need for stability to effectively exploit the hydrocarbon resources in the disputed area, it appears likely that these MNCs would attempt to pressure the

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<sup>79</sup> A subsidiary of ExxonMobil.

<sup>80</sup> Mbendi Information Services, "Extraction of Crude Petroleum in Guinea-Bissau," Mbendi Information Services, accessed March 21<sup>st</sup>, 2012, <http://www.mbendi.com/indy/oilg/ogus/af/gb/p0005.htm>.

<sup>81</sup> Mbendi Information Services, *supra* note 80.

<sup>82</sup> A French multinational oil company that was renamed Total in 2003.

<sup>83</sup> An exploratory firm largely owned by Shell Oil Company, which is in turn a subsidiary of Royal Dutch Shell. For more information on Pecten, see: "Pecten Cameroon Company - Douala, Cameroon," Mbendi Information Services, accessed March 1, 2012, <http://www.mbendi.com/orgs/ce88.htm>.

<sup>84</sup> Mbendi Information Services, *supra* note 80.

government of Guinea-Bissau towards delegating this dispute to an international body for resolution.

The governments of Guinea-Bissau and Senegal undertook several unsuccessful attempts to resolve their border dispute. Negotiations between the disputing states began in 1977, and continued until March 12<sup>th</sup> 1985, when the two governments signed an Arbitration Agreement agreeing to submit the dispute to an ad hoc Tribunal of three members. During these negotiations, the government of Senegal had argued that an exchange of documents between France and Portugal in 1960 had solidified the border; however, the government of Guinea-Bissau argued that because these documents were never published or ratified in Portugal they had no legal standing.<sup>85</sup> The disputing parties asked the ad hoc arbitral tribunal to rule on whether the exchange of letters “had the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal”, and if they did not, to determine a single maritime border line in the disputed area.<sup>86</sup> The Arbitral body presented its ruling on July 31<sup>st</sup>, 1989, and found that the 1960 exchange of letters had the force of law in the dispute between Guinea-Bissau and Senegal, yet this was solely in regard to “the areas mentioned in that agreement, namely the territorial sea, the contiguous zone, and the continental zone” (Lowe 1992; 1). The court determined that because the EEZs did not exist in 1960,<sup>87</sup> the exchange of letters between France and Portugal could not apply to them; however, because it had deemed that the 1960 exchange of letters had the force of law over the areas it considered, the tribunal decided that it was not required to answer the second question and define a single maritime border (Lowe

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<sup>85</sup> Maritime Delineation Between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal), Application Instituting Proceedings, 1991 I.C.J. (General List) No. 85 (March 12<sup>th</sup>).

<sup>86</sup> Maritime Delineation Between Guinea-Bissau and Senegal, *supra* note 85.

<sup>87</sup> EEZs were first established by the 1982 UNCLOS.

1992; 2). This left the border dispute partially unresolved, and led one of the three arbitrators to vote against the final decision on the grounds that the court should have interpreted the 1960 exchange of letters as having legal force over territorial sea, the contiguous zone and the continental shelves, but not the EEZs of the two states. In his opinion this interpretation would allow the Tribunal to delimitate a boundary in the disputed EEZ (Lowe 1992; 2). This would have resulted in a single maritime border between the two countries.

The government of Guinea-Bissau argued that the ruling offered only “fragmentary elements of a solution,”<sup>88</sup> and since one of the three arbitrators voted against the arbitral decision, and the arbitral decision did not delineate a singular maritime border as wished by the parties, this purported award should be considered “inexistent.”<sup>89</sup> On the other hand, the government of Senegal alternatively claimed that by validating the 1960 exchange of letters between France and Portugal, the tribunal upheld the “240 degree azimuth line derived from that text as a general delineation,”<sup>90</sup> or that the delineation of EEZs was not important (contrary to its previous assertions). Given the ongoing question of the exact location of the maritime boundary between Guinea-Bissau and Senegal, the government of Guinea-Bissau opted to refer the dispute to the ICJ in 1989 and requested that the court rule on the whether the arbitral tribunal’s decision could be considered an award given the aforementioned objections.<sup>91</sup> In 1991, the government of Guinea-Bissau

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<sup>88</sup> Maritime Delineation Between Guinea-Bissau and Senegal, *supra* note 85, 7.

<sup>89</sup> Maritime Delineation Between Guinea-Bissau and Senegal, *supra* note 85, 8.

<sup>90</sup> Maritime Delineation Between Guinea-Bissau and Senegal, *supra* note 85, 7.

<sup>91</sup> Guinea-Bissau could refer the dispute to the ICJ, because both it and Senegal were members of the UN. Guinea-Bissau joined the UN on September 19<sup>th</sup>, 1974, and Senegal joined the UN on September 28<sup>th</sup>, 1960. See, UN, “Member States,” un.org, accessed March 26<sup>th</sup>, 2012, <http://www.un.org/en/members/>.

submitted another application requesting the ICJ to delineate a single maritime border if it deemed the 1989 arbitral award invalid.<sup>92</sup> It is interesting to note that in its 1991 Application Instituting Proceedings, the government of Guinea-Bissau explicitly states that it would prefer a bilaterally negotiated maritime delineation, but that in light of previously ineffective negotiations, it felt that referral to the ICJ was its only option.<sup>93</sup>

Before the ICJ could rule on this case, the governments of Guinea-Bissau and Senegal reached an agreement on a joint development zone in 1993, followed by the creation Agence de Gestion et de Cooperation entre la Guinee-Bissau et le Senegal (AGC) in 1995 to manage this joint development zone.<sup>94</sup> The proceeds from the development of this joint development zone are to be split on an 85:15 ration between Senegal and Guinea Bissau; however, Guinea-Bissau's permits are located in shallower water, which is easier to access.<sup>95</sup> Following the creation of this joint development zone, several oil companies began to explore and extract the hydrocarbon resources in this area: in 1995 Monument Oil and Gas<sup>96</sup> and the Chilean company Sipetrol (Sociedad Internacional Petrolera SA) were granted access to Block 3 of this area (with Petrominas<sup>97</sup> retaining a 22.5% share of any output); in 1997 the AGC entered into an exclusive technical cooperation agreement with

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<sup>92</sup> Maritime Delineation Between Guinea-Bissau and Senegal, *supra* note 85, 11.

<sup>93</sup> Maritime Delineation Between Guinea-Bissau and Senegal, *supra* note 85, 11.

<sup>94</sup> Following the signature of the 1995 AGC deal, both governments requested that their case be discontinued and removed from the ICJ's docket.

<sup>95</sup> Mbendi Information Services, "Oil and Gas in Guinea-Bissau - Overview," Mbendi Information Services, accessed March 22<sup>nd</sup>, 2012, <http://www.mbendi.com/indy/oilg/af/gb/p0005.htm>.

<sup>96</sup> Acquired by Lasmo plc in 1999.

<sup>97</sup> Guinea-Bissau's state owned oil company.

West Oil NL;<sup>98</sup> in 1998 the governments of Guinea-Bissau and Senegal entered into an exploration and exploitation agreement with Benton Oil and Gas Co.<sup>99 100</sup>

The government of Guinea-Bissau was ranked 158 out of 167 countries in the Economist Intelligence Unit's first democracy index in 2006 with a score of 2.0, placing it firmly at the bottom of authoritarian regimes; however, because it referred the maritime border dispute to the ICJ in 1989, it is necessary to conduct a brief analysis of its political history in order to ascertain whether its political system in 1989 was similarly authoritarian. Since its independence, Guinea-Bissau's political history is rife with political assassinations and military coups. After independence in 1975, Guinea-Bissau was a one party political system governed by the Partido Africano da Independencia da Guine-Bissau e Cabo Verde (the P.A.I.G.C.). Following independence, President Luiz Cabral and Joao Bernardo Vieira, the commander of the army, were locked in a personal power struggle that led to a 1984 coup resulting from Cabral's attempt to assume the position of the commander of the army in addition to his presidency (Forrest 1987; 105). After the coup, Vieira immediately abolished the Council of Ministers and replaced it with a nine member Revolutionary Council (of which seven members were from the military), which gave him the power to mold the P.A.I.G.C. into "a selective, vanguard party, emphasizing centralization and a distinctly hierarchical structure, rather than ... linking it [the P.A.I.G.C.] with a mobilized, politicized mass-popular base (Forest 1987; 106). Vieira "consolidated his personal rule" (Forest 1987; 107) over state institutions and use the military to crush

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<sup>98</sup> Now Fusion Oil and Gas.

<sup>99</sup> A US based oil and gas firm.

<sup>100</sup> Mbendi Information Services, *supra* note 80.

opposition. One party rule continued until 1991, and the first elections were held in 1995; however, these were won by Viera.<sup>101</sup>

President Viera was deposed by a coup in 1999, but returned to power in 2005,<sup>102</sup> and ruled until 2009, when he was killed by renegade soldiers allegedly as revenge for his role in the death of the army chief of staff Tagme Na Waie.<sup>103</sup> The fact that Guinea-Bissau was under the authoritarian rule of Vieira during both the lead up to the 1989 decision to refer the maritime border dispute with Senegal to the ICJ, and during 2006<sup>104</sup> points to a fairly similar political situation. Furthermore, Guinea-Bissau was under single party rule with no pretense of democracy in 1989, while there was at least the pretense of multi-party elections in 2006. In this manner, it is possible that the political situation in Guinea-Bissau could have been even more authoritarian in 1989 than in 2006, when the democracy index data was collected.

According to my modified domestic actors model, authoritarian regimes can be pressured by MNCs if the preferences of the MNC are fairly close to those of the authoritarian government. In 1989, both the government of Guinea-Bissau, and the subsidiaries of Total and Royal Dutch shell wanted to resolve the border dispute in order to allow for oil exploration and extraction; however, the government of Guinea-Bissau preferred to resolve the dispute bilaterally via negotiations with the government of Senegal. The MNCs affected by the ongoing dispute preferred the stability provided by a

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<sup>101</sup> "Timeline - Guinea-Bissau's history of coups and strife," *Reuters*, March 2<sup>nd</sup>, 2009, accessed February 28<sup>th</sup>, 2012, <http://www.reuters.com/article/2009/03/02/us-bissau-attack-timeline-sb-idUSTRE5213KN20090302>.

<sup>102</sup> *Reuters*, *supra* note 101.

<sup>103</sup> "Guinea-Bissau president shot dead." *BBC*, March 2<sup>nd</sup>, 2009, accessed February 28<sup>th</sup>, 2009, <http://news.bbc.co.uk/2/hi/africa/7918061.stm>.

<sup>104</sup> When the first Economist Intelligence Unit democracy index was conducted.

decision from an international dispute resolution body, and could have plausibly pressured the government to refer the dispute to the ICJ; however, the governments of Guinea-Bissau and Senegal continued their preferred bilateral negotiations even after referring the case to the ICJ. Once the states reached an agreement on a joint development zone, they abandoned the case at the ICJ, given the potential for sovereignty costs and an unfavorable ICJ ruling. At this point, the government of Guinea Bissau began to grant concessions to oil companies that were not previously involved in the area. This outcome follows my theory, which predicts that authoritarian governments can be influenced by MNCs when their preferences are similar; but when their preferences diverge, as was the case when the governments of Guinea Bissau and Senegal independently reached an agreement on a joint development zone, the authoritarian regime will proscribe the MNCs with divergent preferences.

### **3. *Bangladesh v Myanmar***

The maritime border dispute between the governments of Bangladesh and Myanmar in the Bay of Bengal dates back almost forty years. The governments of the two states first held talks over their disputed border in 1974, shortly after Bangladesh's independence, and despite potential gas resources in the area, a lack of investment and technology prevented either state from effectively exploiting these resources (Bissinger 2010; 107). Because of this, neither side was dedicated to resolving the dispute and talks ceased in 1986, leaving the border undesignated. The government of Bangladesh's interest in the disputed region was reignited after India's 2005-2006 discovery of 100 trillion cubic feet of gas in the Bay of Bengal, and Myanmar's discovery of 7 trillion cubic feet of gas in the

Bay of Bengal (Choudhury 2009). The two governments resumed talks regarding the border delineation in November 2007, which continued through 2008; however, these negotiations were unsuccessful because neither side could agree on the fundamental principle to be used in the boundary delineation, with the government of Bangladesh in favor of using principle of equity, and the government of Myanmar in favor of using the principle of equidistance (Bissinger 2010; 107).<sup>105</sup>

In October of 2008, Maung Aye (Myanmar's vice senior general), told the government of Bangladesh that Myanmar would refrain from oil exploration in the disputed area; however, on October 17<sup>th</sup> four oil exploration ships owned by Daewoo, and escorted by two ships from Myanmar's navy, began operations in the disputed area (Bissinger 2010; 109). This action prompted the government of Bangladesh to send three naval vessels to confront Daewoo's exploratory fleet, and Bangladesh's foreign minister demanded Myanmar's withdrawal from the area until delineation of the maritime border had been finalized (Bissinger 2010; 109). Both countries mobilized several warships in the Bay of Bengal,<sup>106</sup> and a weeklong standoff ensued. The government of Myanmar claimed that the Bangladeshi warships were trespassing in its territory, but Daewoo ceased exploration and withdrew from the area, which diffused the situation (Bissinger 2010; 109).

This dramatic standoff highlighted the importance of resolving the ongoing border dispute, and prompted renewed attempts at bilateral negotiations to delineate a single

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<sup>105</sup> Equity and equidistance are different methods of delineating maritime borders that use different criteria for delineation, and yield different outcomes in terms of border placement.

<sup>106</sup> "Warships on battlegear over boundary dispute: Myanmar refuses to suspend drilling," *News from Bangladesh*, November 5<sup>th</sup>, 2008, accessed March 22, 2012, <http://newsfrombangladesh.net/view.php?hidRecord=229558>.

maritime border line from November 16<sup>th</sup>-17<sup>th</sup>, 2008, and again in January, 2009 – both of which proved unsuccessful. Further attempts at negotiating the delineation of a maritime border in May and July of 2009 also yielded little progress (Bissinger 2010; 9). Despite the ongoing dispute, on August 25, 2009, the government of Bangladesh granted the US multinational oil company ConocoPhillips and the Irish multinational oil company Tullow Oil three exploration blocks in areas of the Bay of Bengal, including in the disputed border regions with India and Myanmar.<sup>107</sup> The two oil companies plan to spend \$160.5m over five years exploring the area, which is a large risk considered the instability of the unresolved border dispute,<sup>108</sup> and the previously demonstrated willingness of both governments to use the threat of military force to both protect and deter oil exploration efforts in the area. Immediately following news of the grants, the government of Myanmar sent notices to ConocoPhillips asking the company to refrain from exploration in the area (Choudhury 2009).

On October 8<sup>th</sup>, 2009, slightly more than a month after signing the exploration deal with ConocoPhillips, the government of Bangladesh referred the dispute to arbitration via Article VII of the UNCLOS. Two days following the arbitration notice, the government of Myanmar responded by massing “heavy tanks, artillery, twelve warships, and a frigate, as well as between five and nine light infantry battalions” along the border, which the government of Bangladesh countered by readying preparing 30 warships for conflict (Bissinger 2010; 110). Despite this confrontational behavior, no shots were fired, and in November of 2009, the government of Myanmar responded to government of Bangladesh’s

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<sup>107</sup> “Oil firms win Bangladesh rights.” *BBC*, August 25<sup>th</sup>, 2012, accessed February 28<sup>th</sup>, 2012. <http://news.bbc.co.uk/2/hi/8219861.stm>.

<sup>108</sup> *BBC*, *supra* note 107.

application for arbitration but proposed to use the ITLOS as the forum for dispute resolution as opposed to Annex VII arbitration (Bissinger 2010; 110). The government of Bangladesh agreed to this change of forum and the case was registered with the ITLOS on December 14<sup>th</sup>, 2009.

Despite the referral of the case to the ITLOS, bilateral negotiations continued during January 2010, and on January 8<sup>th</sup>-9<sup>th</sup> the two sides announced that they had come to an agreement that they would use both the principles of equity and equidistance in establishing the border, and they organized a technical team to work towards delineating the border. This team has not yet announced its progress.<sup>109</sup> Despite the continuation of bilateral negotiations, the proceedings at the ITLOS have progressed and the ITLOS is expected to issue a final ruling on the position of the maritime border in March of 2012.<sup>110</sup>

The continuation of bilateral negotiations resulting in a relatively successful outcome, even after decades of unsuccessful bilateral negotiations, confirms my assumption that states prefer to come to an agreement bilaterally and avoid the costs associated with referring a dispute to international delegation. This begs the question of what would pressure states to overcome their reluctance to refer a case, and in the case of Bangladesh and Myanmar, the explanation of pressure from multinational oil companies is very convincing. As the Daewoo incident showed, the ongoing border dispute created instability that was very dangerous to the interests of multinational oil companies conducting exploration activities

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<sup>109</sup> Bissinger, Jared, "Maritime dispute between Bangladesh and Myanmar," *Narinjara Independent Arakanese News Agency*, accessed March 22<sup>nd</sup>, 2012, <http://www.narinjara.com/Article/Maritime%20dispute%20between%20Bangladesh%20and%20Myanmar1872010.html>.

<sup>110</sup> "Myanmar confident in judgment of resolving Myanmar-Bangladesh maritime boundary dispute," *Xinhuanet*, September 27<sup>th</sup>, 2011, accessed March 15<sup>th</sup>, 2012, [http://news.xinhuanet.com/english2010/world/2011-09/27/c\\_131162642.html](http://news.xinhuanet.com/english2010/world/2011-09/27/c_131162642.html).

in the area, and ConocoPhillips had been specifically requested not to explore in the area by the government of Myanmar after receiving its grant from the government of Bangladesh. Years of failed bilateral negotiations and military confrontations showed that bilateral solutions at resolving the dispute had not provided the needed stability, thus multinational oil companies such as ConocoPhillips would be expected to push the governments of Bangladesh and Myanmar towards resolving the dispute via an authoritative ruling from an international dispute resolution body according to my theory of MNC influence. The fact that the government of Bangladesh chose to refer the case to international dispute resolution a mere month after signing its first exploratory deal with a multinational oil company points to MNC pressure as a likely factor contributing to the referral of the dispute. Furthermore, in June 2011, as the ITLOS dispute resolution neared completion and the likely establishment of a definitive border, ConocoPhillips and the government of Bangladesh signed a Production Sharing Contract, which paved the way for further exploration and potential extraction in the previously disputed area.<sup>111</sup> This confirms the continued relationship between ConocoPhillips and the Bangladeshi government, and affirms ConocoPhillips' desire for stability in order to explore and later extract the hydrocarbon resources in the Bay of Bengal.

The question arises why the government of Bangladesh, and not Myanmar, referred the dispute to international dispute resolution, given the fact that several MNCs including Daewoo were involved in oil exploration in the disputed area in partnership with the government of Myanmar. The answer to this question likely revolves around several

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<sup>111</sup> ConocoPhillips, "ConocoPhillips to explore offshore Bangladesh in the Bay of Bengal," ConocoPhillips, accessed March 22, 2012, [http://www.conocophillips.com/EN/newsroom/news\\_releases/2011news/Pages/06-16-2011.aspx](http://www.conocophillips.com/EN/newsroom/news_releases/2011news/Pages/06-16-2011.aspx).

factors. With the rank of 163<sup>rd</sup> out of 167 states in the 2008 Economic Intelligence Unit's democracy index,<sup>112</sup> Myanmar's government is heavily authoritarian, and thus only likely to be swayed by MNC pressure when the preferences of the MNC are relatively close to its own preferences. As demonstrated by continued negotiations over many years, it is clear that the government of Myanmar preferred bilateral negotiations (however ineffective), over the potential costs of referring the dispute to an international dispute resolution body. Despite the opportunity costs of the festering dispute, the government of Myanmar preferred to wait for a solution from bilateral negotiations, which eventually occurred (at least partially) after the successful January 2010 negotiations. The government of Bangladesh, on the other hand, is a hybrid regime with the rank of 91<sup>st</sup> according the 2008 Economic Intelligence Unit's democracy index, which would make it much more likely to be susceptible to MNC pressure to refer the dispute to an international dispute resolution body, according to my model

It may seem strange that the government of Myanmar would request the ITLOS over the ad hoc Annex VII arbitration proposed by the government of Bangladesh, given that the independent tribunal would likely have more potential costs than an ad hoc Arbitral body; however, upon closer examination it seems likely that the ITLOS actually imposed fewer costs than an ad hoc arbitral body in this particular situation. This was the ITLOS's first case regarding maritime border delineation, and there was thus no precedents for the case (Bissinger 2011). Because of this, in this particular case the ITLOS looks much more like an ad hoc arbitral body than an established international court. Like ad hoc arbitration, each

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<sup>112</sup> Economist Intelligence Unit, "The Economist Intelligence Unit's Index of Democracy 2008," Economist Intelligence Unit, accessed March 22<sup>nd</sup>, 2008, <http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>.

state is ensured that one of the justices on the ITLOS could be a citizen of their country appointed on an ad hoc basis; however, unlike ad hoc arbitration, they were not faced with the costs of finding arbitrators and establishing an ad hoc tribunal (Posner and Yoo 2005). This particular situation eliminated many of the costs that would have seemingly led to the government of Myanmar to favor ad hoc arbitration over the established ITLOS, and explains why it would be willing to accept the referral of the dispute to the ITLOS.

Even though the above factors explain why the government of Myanmar would be willing to accept the referral of the dispute to an international dispute resolution body, this does not mean that this was its favored mode of dispute resolution, as evidenced by its continued attempts at a bilateral solution to the problem even after the dispute was referred to the ITLOS. Furthermore, after instituting proceedings in the ITLOS, the government of Myanmar subsequently attempted to withdraw the case from the Tribunal, which demonstrated its reluctance to use this manner of dispute resolution. This request was denied by the Tribunal (ITLOS 2011; 6). In this manner, my theory of MNC influence clearly explains the way in which this dispute was referred to the ITLOS, even if the referral initially seemed counterintuitive.

#### **4. *Bangladesh v. India.***

Bilateral negotiations between the governments of Bangladesh and India regarding the delineation of their disputed maritime border in Bay of Bengal first began in 1974 and continued through 1975 at various levels of the two governments. These negotiations brought the parties closer to a compromise, yet yielded no firm solution to the delineation dispute (Rashid 2009). This dispute revolved around delineation of the border in the

territorial waters, the EEZ, and the continental shelf of the disputed area, as well as delineating the border in the Hariabhanga border river area (Rashid 2009). Negotiations resumed in 1978 after a change of government in Bangladesh in 1975, and in India in 1977, but after these governmental transitions the two governments were unable to successfully continue from where the negotiations left off in 1975, and the 1978 negotiations proved unsuccessful (Rashid 2009). Negotiations held in 1982 again proved unsuccessful (Fietta 2010). The government of India ratified the UNCLOS in 1995, and the government of Bangladesh ratified the UNCLOS in 2001 (Rashid 2009); however, despite the UNCLOS' requirement of a peaceful resolution of maritime border disputes,<sup>113</sup> this did not lead to the resolution of this dispute.

In 2005-2006, Indian oil exploration in uncontested areas of the Bay of Bengal discovered 100 trillion cubic feet of gas, which underscored the potential resources in the disputed areas, and emphasized the need to resolve the ongoing border dispute (Choudhury 2009). Negotiations to this end resumed in 2008; however, once again they were unsuccessful (Fietta 2010). On December 25<sup>th</sup>, 2008, Indian oil exploration ships supported by two Indian naval vessels began oil exploration activities in disputed area for the first time. The government of Bangladesh responded on December 26<sup>th</sup> by issuing a formal complaint requesting India to withdraw from the area, while sending a navy frigate into the disputed area.<sup>114</sup> On the same day, the government of India lodged a complaint about the presence of the Bangladeshi frigate in the disputed area, and the government of

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<sup>113</sup> UNCLOS, *supra* note 40.

<sup>114</sup> "Bangladesh to Protest India's Oil Exploration in the Bay of Bengal," *India Today*, December 27<sup>th</sup>, 2008, accessed March 1<sup>st</sup>, 2012, <http://indiatoday.intoday.in/story/Bangladesh+to+protest+India's+oil+exploration+in+Bay+of+Bengal/1/23711.html>

Bangladesh replaced the frigate with smaller vessels to monitor the withdrawal of the Indian vessels from the area.<sup>115</sup>

As discussed in the previous section, on August 25, 2009, the government of Bangladesh granted ConocoPhillips and the Irish Tullow Oil exploration blocks in areas of the disputed border regions with India and Myanmar, and the government of India responded to this grant by sending an objection to ConocoPhillips, requesting that it refrain from oil exploration in the disputed area (Choudhury 2009). On October 8th, 2009, the same day on which the government of Bangladesh submitted its dispute with Myanmar to arbitration, it also referred the dispute with India to arbitration via Article VII of the UNCLOS, and the government of India consented to this arbitration (Fietta 2010). Even though the government of Bangladesh did not apply for membership in the PCA until 2011,<sup>116</sup> Article 47 of the 1907 Convention for the Pacific Settlement of International Disputes<sup>117</sup> provides that “The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal.”<sup>118</sup> Because of this, the parties conducted the Annex VII arbitration under the auspices of the PCA,<sup>119</sup> which allowed them to take advantage of

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<sup>115</sup> India Today, *supra* note 114.

<sup>116</sup> “Bangladesh to apply for PCA membership,” *Burma News International*, October 18<sup>th</sup>, 2011, accessed March 1<sup>st</sup>, 2012, <http://www.bnionline.net/index.php/news/kaladan/11918-bangladesh-to-apply-for-pca-membership.html>.

<sup>117</sup> One of the founding documents of the PCA, along with the 1899 Hague Convention for the Pacific Settlement of International Disputes.

<sup>118</sup> Hague Convention for the Pacific Settlement of International Disputes, October 18, 1907, 205 CTS 233.

<sup>119</sup> PCA, “Annex 2- Cases Conducted Under the Auspices of the PCA or With the Cooperation of the International Bureau,” [pca-cpa.org](http://www.pca-cpa.org), accessed March 21<sup>st</sup>, 2012, <http://www.pca-cpa.org/upload/files/09%20Annex%202%20en%2051-56.pdf>

the administrative resources provided by the PCA. It is likely that the successful Annex VII arbitration provided to Barbados and Trinidad and Tobago (delivered in 2006), as well as Guyana and Suriname (delivered in 2007), under the auspices of the PCA led the parties to also place their Annex VII arbitration under the auspices of the PCA.

This case also appears to support my theory of MNC influence over a state's decision to refer a maritime border dispute to an international dispute resolution body - in this case the arbitral tribunal convened via Annex VII of the UNCLOS under the auspices of the PCA. The governments of India and Bangladesh conducted bilateral negotiations over the border delineation dispute sporadically from 1974-2008, and they became parties to the UNCLOS in 1995 and 2001 respectively,<sup>120</sup> but it wasn't until one month after ConocoPhillips became involved in the dispute, that the dispute was finally referred to international dispute resolution. ConocoPhillips needed the stability provided by an adequately delineated border, and its grants in the area were directly threatened by the Indian government's request to refrain from border exploration in the area. In this manner it seems likely that ConocoPhillips could have pressured the government of Bangladesh to resolve the border dispute via an international dispute resolution body. Although the arbitral tribunal has yet to make a ruling, it is likely to do so in the near future, and as mentioned in the previous section, ConocoPhillips and the government of Bangladesh signed a Production Sharing Contract in June 2011. This contract paves the way for further exploration and potential extraction in the previously disputed area,<sup>121</sup> and it is likely that ConocoPhillips signed this new contract in anticipation of the stability that the arbitral

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<sup>120</sup> And thus had the opportunity to resolve the dispute via an international dispute resolution body.

<sup>121</sup> ConocoPhillips, *supra* note 111.

tribunal's ruling will provide. In this way, pressure from ConocoPhillips is a plausible explanation for the government of Bangladesh's decision to delegate the dispute at the time that it did.

The likelihood of MNC influence on the government of Bangladesh's decision to refer the maritime border dispute to Annex VII Arbitration is further emphasized by the fact that on September 7<sup>th</sup>, 2011, the governments of Bangladesh and India completed bilateral negotiations resulting in a "landmark" protocol to their 1974 Land Boundary Agreement, providing for the final settlement of a territorial dispute that had persisted since Bangladesh's independence (Gupta 2011). If governments of Bangladesh and India favored referring such disputes to international dispute resolution without outside pressure, why would they not have chosen to send the territorial dispute to the ICJ for dispute resolution? The successful resolution of this territorial dispute, which was highly complicated and included resolving the issue of 162 enclaves (Gupta 2011),<sup>122</sup> without delegation to an international dispute resolution body, points to the likelihood that the governments of Bangladesh and India also preferred bilaterally negotiated solutions to their border disputes. This strengthens the case for MNCs influencing the governments' choice to refer their maritime dispute to the UNCLOS Annex VII arbitral body.

### **5. *Barbados v Trinidad and Tobago***

After Barbados' independence from the British in 1966, and Trinidad and Tobago's independence from the British in 1962, neither state formally delineated its borders;

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<sup>122</sup> These enclaves are small areas of Bangladeshi territory, within India, and vice-versa. In one extreme example, "an Indian enclave sits within a Bangladeshi enclave, itself situated within a larger Indian enclave, all surrounded by Bangladeshi territory" (Gupta 2011). This situation is obviously very complicated and difficult to resolve.

however, since 1976, the governments of these states have held a series of negotiations regarding the use of fishery and hydrocarbon resources in the undelineated maritime border region. In February of 1978, the government of Barbados adopted an “Act to provide for the establishment of Marine Boundaries and Jurisdiction” in order to extend its rights beyond its territorial sea and claim its EEZ and subsequent rights.<sup>123</sup> The government of Trinidad and Tobago adopted the Archipelagic Waters and Exclusive Economic Zone Act in 1986, which defined Trinidad and Tobago as an archipelagic State, and claimed its EEZ in accordance with UNCLOS.<sup>124</sup> This led to conflicting maritime border claims with the government of Barbados.

On April 30<sup>th</sup>, 1979, they agreed on a Memorandum of Understanding on Matters of Co-operation between the Government of Barbados and the Government of Trinidad and Tobago, which covered, among other things, issues regarding hydrocarbon exploitation and fishing;<sup>125</sup> however, this did not resolve the conflicting border claims. In November of 1990, the Parties concluded the Fishing Agreement between the Government of the Republic of Trinidad and Tobago and the Government of Barbados, which included regulations regarding the harvesting of fisheries by Barbadian fishermen in the EEZ of Trinidad and Tobago, but did not directly address the issue of the disputing maritime border claims. Between 2000-2003, the governments of Barbados and Trinidad and Tobago held several rounds of bilateral negotiations aimed at resolving fishery issues, and the ongoing dispute over border delineation. These meetings resulted in a series of Joint

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<sup>123</sup> Delimitation of the Exclusive Economic Zone and Continental Shelf (Barbados v. Trinidad and Tobago), Award of the Arbitral Tribunal (Permanent Court of Arbitration 2006), accessed March 15<sup>th</sup>, 2012, <http://www.pca-cpa.org/upload/files/Final%20Award.pdf>.

<sup>124</sup> Award of the Arbitral Tribunal, *supra note 123*

<sup>125</sup> Award of the Arbitral Tribunal, *supra note 123*.

Reports outlining the states' respective positions regarding these issues, and the parties agreed to resume negotiations in February of 2004.

Throughout the period from 1988-2004, on several occasions Trinidad and Tobago arrested Barbadian fishermen for allegedly illegally fishing off the coast of Tobago.<sup>126</sup> The government of Barbados also authorized several hydrocarbon exploration efforts in the area over a period of several decades. In November, 1979, the Barbadian government granted a geological and geophysical seismic license to Mobil Exploration Barbados Limited.<sup>127</sup> On the 30<sup>th</sup> of March 1999, the government of Barbados issued a new license and concession agreement to CONOCO Barbados Ltd,<sup>128</sup> in the same area as the previous Mobil license.<sup>129</sup> CONOCO partnered with TotalFinaElf in this exploration,<sup>130</sup> and noted promise in this area;<sup>131</sup> however, it subsequently ended its exploration activities, perhaps due to the instability caused by the uncertain ownership of the area. In both of these licensing arrangements, the government of Barbados informed the government of Trinidad and Tobago, as it was required to do according to the 1979 Memorandum of Understanding on Matters of Co-operation between the Government of Barbados and the Government of Trinidad and Tobago.<sup>132</sup>

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<sup>126</sup> Award of the Arbitral Tribunal, *supra* note 123.

<sup>127</sup> A subsidiary of Mobil.

<sup>128</sup> A subsidiary of CONOCO, Inc.

<sup>129</sup> Delimitation of the Exclusive Economic Zone and Continental Shelf (Barbados v. Trinidad and Tobago), Barbados Memorial (Permanent Court of Arbitration 2004), accessed March 15<sup>th</sup>, 2012, <http://www.pca-cpa.org/upload/files/BM.pdf>.

<sup>130</sup> Barbados Memorial, *supra* note 129.

<sup>131</sup> "Barbados gives BHP Billiton first oil exploration license," *The Gleaner*, January 23<sup>rd</sup>, 2009, accessed March 2<sup>nd</sup>, 2012, <http://jamaica-gleaner.com/gleaner/20090123/business/business8.html>

<sup>132</sup> Barbados Memorial, *supra* note 129.

On February 6<sup>th</sup>, 2004, before maritime border delineation negotiations could be resumed, Trinidad and Tobago arrested more Barbadian fishermen and accused them of illegally fishing in its waters.<sup>133</sup> On February 16<sup>th</sup>, the Prime ministers of Barbados and Trinidad and Tobago met to discuss the maritime border dispute. Directly following the meeting, the government of Barbados submitted the dispute to arbitration via UNCLOS Annex VII, and requested the court to delineate a single maritime boundary between the countries.<sup>134</sup><sup>135</sup> This arbitration was conducted under the auspices of the PCA. The arbitral tribunal delivered its ruling on April 11, 2006, and established a maritime border that primarily followed the equidistance line between Barbados and Trinidad and Tobago. It ruled that it did not have the jurisdiction to rule on the fishery regime that would apply in Trinidad and Tobago's EEZ, an issue that was important to Barbadian fishermen; however, it declared that the two states were under a duty to "agree upon the measures necessary to coordinate and ensure the conservation and development of flyingfish stocks, and to negotiate in good faith and conclude an agreement that will accord fisherfolk of Barbados access to the fisheries within the EEZ of Trinidad and Tobago."<sup>136</sup>

Following the ruling, the government of Barbados began soliciting bids for oil exploration in its newly delineated waters in 2007, and in 2009 it gave exploration rights

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<sup>133</sup> Award of the Arbitral Tribunal, *supra* note 123.

<sup>134</sup> Award of the Arbitral Tribunal, *supra* note 123.

<sup>135</sup> Barbados became a party to the UNLCOS on October 12<sup>th</sup>, 1993, and Trinidad and Tobago became a party on April, 25, 1986. See: Oceans and the Law of the Sea, "Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 03 June 2011," Division for Ocean Affairs and the Law of the Sea, accessed March 25<sup>th</sup>, 2012, [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).

<sup>136</sup> Delimitation of the Exclusive Economic Zone and Continental Shelf (Barbados v. Trinidad and Tobago), Press Release April 11<sup>th</sup>, 2006, (Permanent Court of Arbitration 2006), accessed March 15<sup>th</sup>, 2012, <http://www.pca-cpa.org/upload/files/BA-TRI%20Press%20release%20110406.pdf>.

Australian oil firm BHP Billiton.<sup>137</sup> However, despite the possibility that pressure from multinational oil companies contributed to the government of Barbados' decision to refer this case to arbitration, the timeline of this dispute points to the likelihood that domestic pressure from fishermen led it to refer the dispute to arbitration. According to the World Bank, Barbados' GDP in 2004 was 2.8 billion,<sup>138</sup> and the fishing industry accounted for a sizable 26 million US dollars.<sup>139</sup> According to the United Nations Food and Agriculture Organization's Fishery Country Profile of Barbados<sup>140</sup> there are 2000 fishermen, and 825 workers in industry related to fishing, out of a population of only 273,331 people. Domestic fishing thus accounts for a substantial part of Barbados' economic activity, and fishermen are an important domestic constituency; however, this fishing was disrupted by Trinidad and Tobago's repeated seizure of Barbadian fishing vessels. It is very likely that the government of Barbados is eager to support the interests of fishermen in order to gain their votes, and the seizure of the of Barbadian fishing boats by Trinidad and Tobago on February 6<sup>th</sup> <sup>141</sup> was the likely trigger for the decision to refer the dispute to an international dispute resolution body.

Despite the fact that MNC influence does not appear to be the primary triggering mechanism behind the government of Barbados' referral of this dispute to arbitration, this case does not undermine my theory of MNC influence. My theory does not exclude the

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<sup>137</sup> The Gleaner, *supra* note 131.

<sup>138</sup> The World Bank, "GDP (current US\$)," The World Bank, accessed March 25th, 2012, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries>.

<sup>139</sup> "Barbados Fishing Industry Said to Be Worth Millions." *Redorbit*, March 26<sup>th</sup>, 2008, accessed March 2<sup>nd</sup>, 2012, [http://www.redorbit.com/news/science/1312446/barbados\\_fishing\\_industry\\_said\\_to\\_be\\_worth\\_millions/](http://www.redorbit.com/news/science/1312446/barbados_fishing_industry_said_to_be_worth_millions/)

<sup>140</sup> Food and Agriculture Organization of the United Nations, "Fishery Country Profile – Barbados," [fao.org](http://www.fao.org/fi/oldsite/FCP/en/BRB/profile.htm), accessed March 15<sup>th</sup>, 2012, <http://www.fao.org/fi/oldsite/FCP/en/BRB/profile.htm>.

<sup>141</sup> A mere 10 days before the dispute was referred to UNCLOS Annex VII arbitration.

possibility of other domestic interest groups influencing a government's decision to refer a dispute to international dispute resolution – it merely argues that MNCs should also be considered as a relevant interest group in maritime border disputes where there are hydrocarbons present. The fact that in the particular case of Barbados and Trinidad and Tobago, fishermen were likely the domestic interest that pressured their government to refer the dispute to international dispute resolution, does not exclude the likelihood that MNCs could provide this pressure in other instances, as shown in my other five case studies. Furthermore, because this case points to domestic interest groups providing the trigger for a country to refer a dispute to international dispute resolution, it confirms the underlying logic of my theory.

## **E. Findings**

As shown in the previous section, and the examination of the *Guyana v Suriname* case in section II.A, in five out of the six cases that I have examined there is convincing evidence of MNCs pressuring the states involved in a maritime border dispute to refer the dispute to an international dispute resolution body.<sup>142</sup> This assessment is based on an analysis of the timeline of the dispute and the costs to both the MNCs and states involved in the dispute. In this section, I demonstrate the success of the hypotheses derived from my modified domestic actors model, which accounts for the role of MNCs. The success of these hypotheses confirms the importance of considering the role of MNCs when evaluating what triggers states to refer maritime border disputes to international dispute resolution bodies.

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<sup>142</sup> The exception being the case of *Barbados v Trinidad and Tobago*, where it appears that domestic pressures to resolve fishery issues was the primary trigger that led Barbados to use UNCLOS Annex VII dispute resolution.

My first hypothesis argues that, other things equal, a delegated dispute resolution mechanism is more likely to be triggered when a MNC is directly affected by a particular maritime border dispute. If this hypothesis were correct I would assume that multinational oil companies would be present in a majority of my cases. As Table II shows, multinational oil companies were directly affected by all six of the disputes that were referred to the PCA, the ICJ, and the UNCLOS. Even though these multinational oil companies were involved, albeit minimally, in the dispute between the governments of Barbados and Trinidad and Tobago, and they did not appear to be a significant factor behind the Barbadian government's decision to refer the dispute to the PCA for UNCLOS Annex VII arbitration, this does not undermine likely MNC influence in the other five cases. Instead, it merely shows that other domestic interest groups, such as fishermen, can also pressure the government towards referring a dispute to an international dispute resolution body.

My first hypothesis is also supported by the timelines of several of my case studies. This is particularly noticeable in the cases of Bangladesh v India, and Bangladesh v Myanmar, where the government of Bangladesh's decision to refer the cases to an international dispute resolution body came only a month after ConocoPhillips was requested by the governments of India and Myanmar to refrain from exploration in the disputed area, a request that made the border dispute directly impact ConocoPhillips (Choudhury 2009). The case of Guyana v Suriname, in which a 400 year old maritime border dispute was sent to international dispute resolution a mere four years following the expulsion of CGX's oil rigs by the Suriname navy, also demonstrates the likelihood of MNC influence. To add further support to the possibility of MNC influence, in both of these cases, the maritime border disputes were separated from ongoing territorial disputes after the

maritime disputes impacted the interests of MNCs, and only the maritime disputes were resolved via delegated dispute resolution.

My second hypothesis asserts that, other things equal, states with a governing system in the range of flawed democracies or hybrid regimes would be most likely to delegate dispute resolution in maritime border disputes with resources involved. This hypothesis is derived from literature on corporate influence on government (Arnold 2003, Mitchell 1997, Lindblom 1977, and Schweitzer 1964), and I use the Economist Intelligence Unit's democracy index to evaluate the level of democracy in my case studies. As Table II shows, out of the six cases I analyzed, Barbados was the only case where data on its government's level of democracy was missing in the Economist Intelligence Unit's democracy indices. Out of the other five cases, all were either flawed democracies or hybrid regimes, except for Guinea-Bissau, which has an authoritarian government. However, the government of Guinea-Bissau discontinued its case in the ICJ once it was able to reach a joint development deal with the government of Senegal, which confirms my assertion that authoritarian regimes can be influenced by MNCs, as long as their preferences don't stray too far from those of the government.<sup>143</sup> Out of the five cases where I was able to ascertain the level of democracy of the government referring the dispute to an international dispute resolution body, four of them were states that my theory predicts would be most likely to

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<sup>143</sup> In the case of Guinea-Bissau it is likely that the government could have been pressured to delegate the dispute to the ICJ by MNCs in 1989, because both the government and the MNCs impacted by the maritime border dispute wanted a resolution to the dispute that would allow them to exploit the hydrocarbon resources in the area. However, because delegated dispute resolution was not the government's preferred means of dispute resolution, it continued bilateral negotiations with the government of Senegal that resulted in a joint development zone. Once it completed this agreement, and realized its goal of allowing the extraction of hydrocarbon resources from the area without resorting to delegated dispute resolution, it discontinued the case at the ICJ.

be influenced by MNCs to delegate, based on their type of government. This is compared to Simmons' model, which predicts that as the level of democracy in a state rises, the likelihood of referral of territorial disputes to an international dispute resolution body decreases. Her data does not confirm her hypothesis (Simmons 2002), and neither does my research. This points to the added explanatory power of considering the role of MNCs in triggering a state to refer a particular dispute to an international dispute resolution body.

My third hypotheses states that, other things equal, the likelihood of a government referring a particular dispute to an international dispute resolution body increases in disputes involving small (in terms of GDP) countries, and large (in terms of yearly revenue) MNCs. This is because MNCs primarily use money as the means to influence government. As Table IV shows, my hypothesis is correct in all of the disputes except for the Guyana v Suriname dispute that impacted the small Canadian multinational oil company CGX, which had not begun generating revenue by the time of the dispute. However, even though CGX had not begun generating revenue, it had investments that allowed it to carry out operations in Guyana.<sup>144</sup> Furthermore, because it is primarily focused exploring and exploiting oil in the Guyana Basin, which was impacted by the ongoing border dispute, GCX had substantial incentives to pressure the government of Guyana to resolve the dispute via referral to an international dispute resolution body. My hypothesis does not require that multinational oil companies be larger than the states that they are pressuring in order for a state to refer a particular dispute to international dispute resolution, but simply argues that referral is more likely in this scenario. The fact that my hypothesis was supported by five out of the six cases lends support to my overall argument that MNC influence needs to be

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<sup>144</sup> CGX Energy, Inc, "Archived Press Reseases," [cgxenergy.ca](http://cgxenergy.ca), accessed March 3<sup>rd</sup>, 2012, <http://cgxenergy.ca/Investors/Archived-Press-Releases.aspx>.

considered when analyzing what triggers states to refer a particular dispute to an international dispute resolution body. Even though CGX had not begun generating revenue by the 2004 referral of the Guyana v Suriname border dispute to international dispute resolution, this does not mean that CGX was incapable of pressuring the government of Guyana to refer the case (given that it had investments funding its activities in the region), and does not undermine my hypothesis, or my modified domestic actors model in general.

The overall success of my hypotheses, and the detailed analyses the individual cases, demonstrates the likelihood that multinational oil companies influence a government's choice to refer a particular maritime border dispute complicated by hydrocarbon resources to an international dispute resolution body.<sup>145</sup> This does not mean that the other domestic constituencies considered by those such as Simmons do not influence a government's choice. Rather, it shows the increased explanatory power of considering the role of MNCs in addition to other domestic actors by, for example, predicting which governments (in terms of level of democracy) are likely to refer a case to an international dispute resolution body more accurately than Simmons' model.

## **V. Conclusion**

The results of my research confirm the importance of considering the role of MNCs in triggering states to refer maritime border disputes, where hydrocarbon resources are involved, to an international dispute resolution body. This discovery is especially important given a likely increase in the number these disputes in the near future as a result of better

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<sup>145</sup> Unlike New Sovereignists, who make normative evaluations of the influence of nonstate actors on states, I do not make normative value judgments of my findings. For more on New Sovereignists, see Hathaway (2008; 116)

underwater oil exploration and extraction technology. My findings show that accounting for the preferences and pressures of MNCs gives greater explanatory power to a domestic actors model's account of what triggers states to refer maritime border disputes an international dispute resolution body; however, it is likely that the influence of MNCs can be seen in other international disputes that affect the interests of MNCs.

In their work, "The logic of delegation to international organizations", David Lake and Mathew Mccubbins review the use of principle agent theory in analyzing the delegation of dispute resolution power to international organizations, and they go on to say that "incorporating the role of third parties (TPs)... is the research frontier" (2006; 341). Although Lake and Mccubbins do not specifically name MNCs as third parties, these corporations are certainly important actors in global affairs,<sup>146</sup> and my research successfully incorporates their role into the principle-agent framework for international delegation. Beth Simmons also recognizes the need to focus on third parties in analyzing states' compliance with treaties, and asserts that "to move away from a state-centric model of compliance and take more seriously the role of nonstate actors" is "necessary in the study of treaty behavior" (Simmons 2010; 292). While I do not specifically focus on compliance with the decisions resulting from delegated dispute resolution,<sup>147</sup> my work on incorporating the role of MNCs into a theory of delegation can serve as a stepping stone to later research aimed at analyzing the impact of MNCs and other nonstate actors on state compliance with decisions from delegated dispute resolution.

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<sup>146</sup> And are often larger than states. See Table I.

<sup>147</sup> Also known as second order compliance. For an in-depth discussion of the concept of second order compliance, in the context of trade regimes, see Ryan (1992).

By showing the importance of considering the role of MNCs in the referral of maritime border disputes to an international dispute resolution body, my research points to the need to account for the role of MNCs in other international disputes and interactions. If governments are influenced by MNCs in the case of maritime border disputes, which directly effect states' sovereignty and resources, it is likely that a similar influence will be observed in other disputes between governments. Other potential issue areas where MNCs could plausibly influence a governments' decision to refer a dispute to an international dispute resolution body include disputes over trade and workers rights, both of which have to potential to impact the interests of MNCs. Because these issue areas impact their interests, it is likely that MNCs will attempt to pressure governments to bring their actions closer the MNCs' preferences, which could include referring these disputes to international dispute resolution. However, cases such as territorial disputes without the presence of valuable resources are unlikely to impact the interests of MNCs, and are thus unlikely to lead MNCs to attempt to influence governments in these disputes. Future research regarding the potential for MNC influence in these issue areas would help to further the study of MNCs' influence on triggering a state to refer disputes to international dispute resolution, and I hope that my findings will serve as a foundation for future research on this topic.

## Appendices/Tables

**Table I – MNC Revenue Compared to State GDP (In Billions of US Dollars)<sup>148</sup>**

Poland	468.6
<b>Wal-Mart Stores</b>	<b>408.2</b>
Austria	376.2
Argentina	368.0
Denmark	310.4
Greece	304.8
<b>Royal Dutch/Shell Group</b>	<b>285.1</b>
<b>Exxon Mobil</b>	<b>284.6</b>
<b>BP</b>	<b>246.1</b>
Finland	238.8
Egypt	218.9
<b>Toyota Motor</b>	<b>204.6</b>
<b>AXA</b>	<b>175.2</b>
<b>China National Petroleum</b>	<b>165.5</b>
Romania	161.6
<b>General Electric</b>	<b>156.8</b>
Peru	153.8
Tanzania	23.5

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<sup>148</sup> Table taken from Boda (2002).

**Table II**

<b>State Referring Dispute</b>	<b>MNC(s) Before</b>	<b>MNC(s) After</b>
<b>Bangladesh</b>	ConocoPhillips, Tullow Oil <sup>149</sup>	ConocoPhillips <sup>150</sup>
<b>Barbados</b>	Mobil, CONOCO, TotalFinaElf <sup>151</sup>	BHP Billiton <sup>152</sup>
<b>Guinea Bissau</b>	Elf (Subsidiary of Exxon Mobil), Pecten (later Total SA) <sup>153</sup>	Monument Oil and Gas, Sipetrol, West Oil NL, Benton Oil and Gas Co <sup>154</sup>
<b>Guyana</b>	Shell, Oxoco, Major Crude, Exxon, Maxus, and CGX Energy Inc. <sup>155</sup>	CGX Energy, Inc. <sup>156</sup>
<b>Romania</b>	ExxonMobil <sup>157</sup>	ExxonMobil <sup>158</sup>

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<sup>149</sup> BBC, *supra* note 107.

<sup>150</sup> ConocoPhillips, *supra* note 111.

<sup>151</sup> Barbados Memorial, *supra* note 129.

<sup>152</sup> The Gleaner, *supra* note 131.

<sup>153</sup> Mbendi Information Services, *supra* note 80.

<sup>154</sup> Mbendi Information Services, *supra* note 80.

<sup>155</sup> From Donovan (2003).

<sup>156</sup> From Wilkinson (2007)

<sup>157</sup> From Ciocoiu (2009).

<sup>158</sup> From Kristoffersen (2010)

**Table III**

<b>State (Year Referred)</b>	<b>EIU Democracy Index Rank<sup>159</sup> - Score (Year)</b>	<b>EIU Classification</b>
<b>Bangladesh (2009)</b>	91 <sup>st</sup> - 5.52 Overall (2008) <sup>160</sup>	Hybrid Regime
<b>Barbados (2004)</b>	N/A	N/A
<b>Guinea-Bissau (1989)</b>	158 <sup>th</sup> - 2.0 Overall (2006) <sup>161</sup>	Authoritarian regime
<b>Guyana (2004)</b>	73 <sup>rd</sup> - 6.15 Overall (2006)	Flawed democracy
<b>Romania (2004)</b>	50 <sup>th</sup> - 7.06 Overall (2006)	Flawed democracy

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<sup>159</sup> Full Democracy = 1-28; Flawed Democracy = 29-81; Hybrid Regime = 83-112; Authoritarian Regime = 113-167.

<sup>160</sup> Economist Intelligence Unit, *supra* note 112.

<sup>161</sup> From Kekic (2007).

**Table IV**

<b>State (Year Referred)</b>	<b>GDP in US Dollars at Year of Referral<sup>162</sup></b>	<b>Primary MNC(s) Involved at Year of Referral (Yearly Revenue in US Dollars)</b>
<b>Bangladesh (2009)</b>	89,359,767,442	ConocoPhillips (230,764,000,000 <sup>163</sup> )
<b>Barbados (2004)</b>	2,824,000,000	CONOCO <sup>164</sup> (99,468,000,000 <sup>165</sup> )
<b>Guinea-Bissau (1989)</b>	213,143,606	Pecten <sup>166</sup> (266,386,000,000 <sup>167</sup> )
<b>Guyana (2004)</b>	785,918,770	CGX Energy, Inc (0 <sup>168</sup> )
<b>Romania (2004)</b>	75,489,440,362	ExxonMobil (213,199,000,000 <sup>169</sup> )

<sup>162</sup> The World Bank, *supra* note 138.

<sup>163</sup> CNN Money, "4. ConocoPhillips," money.cnn.com, accessed March 12<sup>th</sup>, 2012, <http://money.cnn.com/magazines/fortune/fortune500/2009/snapshots/327.html>.

<sup>164</sup> Subsidiary of ConocoPhillips.

<sup>165</sup> CNN Money, "Fortune 500, 2004 Full List," money.cnn.com, accessed march 12<sup>th</sup>, 2012, [http://money.cnn.com/magazines/fortune/fortune500\\_archive/full/2004/](http://money.cnn.com/magazines/fortune/fortune500_archive/full/2004/).

<sup>166</sup> Subsidiary of Royal Dutch Shell.

<sup>167</sup> This is the annual revenue of Royal Dutch Shell from 2004, which is the earliest report available on its website. Although this data is from much later than 1989, Royal Dutch Shell has consistently been one of the largest oil companies in the world since its founding in 1907. For annual financial reports, see: Shell, "Annual Reports and Publications Archive," shell.com, accessed March 27<sup>th</sup>, 2012, [http://www.shell.com/home/content/investor/financial\\_information/annual\\_reports\\_and\\_publications/archive/](http://www.shell.com/home/content/investor/financial_information/annual_reports_and_publications/archive/)

<sup>168</sup> Financial Times, "CGX Energy, Inc," ft.com/marketsdata, accessed March 12<sup>th</sup>, 2012, <http://markets.ft.com/research/Markets/Tearsheets/Business-profile?s=OYL:CVE>.

<sup>169</sup> CNN Money, *supra* note 165.

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