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The rights (and wrongs) of capture:
international law and the implications of the
Guyana/Suriname arbitration

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"Da steh ich nun, ich armer Tor!
Und bin so klug als wie zuvor."
– Goethe, Faust

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--If the pen is mightier than the sword, the world will continue to offer glittering prizes to those with stout hearts and sharp lawyers. Nothing can more epitomise this than the realm of upstream oil and gas developments, where, particularly in recent times, glittering prices of over \$100 a barrel await those who can maximise their hydrocarbon production.

This of course breeds its own problems. Since the close of the Second World War and the end of European Empire, there has been a growing number of boundary disputes, especially amongst emerging States. Increasing numbers of these disputes have been fuelled by the discovery of hydrocarbons on or near a claimed boundary line. Efforts to create a framework for the resolution of these disputes – especially with the codification of an international law of the sea under the United Nations Convention on the Law of the Sea (UNCLOS)¹ – have arguably increased the number of such boundary disputes. Indeed, the United Nations noted in 2001 that '100 maritime boundary delimitations throughout the world still await some form of resolution by peaceful means.'² By 2006, some commentators were suggesting that this figure had increased to some 220 potential maritime boundary disputes – which by definition must exclude boundary disputes on land.

Following a brief overview of the international landscape and the boundary disputes currently extant, this article will look at the practical causes of boundary disputes, and some of the general legal principles by which maritime disputes are resolved. It will then consider the real difficulties posed by the discovery of hydrocarbons in disputed territory by application of the so-called 'rule of capture' and compare and contrast its development in municipal laws and its treatment in international law. Finally, the article will look at how the rule of capture was considered under international law in the recent international boundary dispute between Guyana and Suriname³ before concluding with a review of the implications of the *Guyana/Suriname* award and the new considerations for States and oil companies wishing to develop reserves against the wishes of a co-claiming State.

The international landscape: boundary disputes and their causes

Over the last 2 years or so, there has been a flurry of claims and counterclaims between States over disputed territory at land and at sea. For example, arbitral tribunals have made awards in the maritime disputes between Barbados and Trinidad & Tobago, and the potentially significant

dispute between Guyana and Suriname. The International Court of Justice (ICJ) too has been busy, having ruled on the dispute between Honduras and Nicaragua⁴ in October and then between Nicaragua and Colombia⁵ in December 2007. Still pending at time of writing are the disputes between Malaysia and Singapore (Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge),⁶ and Romania and the Ukraine in the Black Sea.⁷

This is by no means a comprehensive overview of the ICJ's docket – and there is more to come. A cursory glance around South-East Asia alone will reveal the real extent of the potential for future dispute (see Figure 1). To the west, Thailand and Cambodia are (finally) talking about resolution of their overlapping claims in the Gulf of Thailand although there is little real

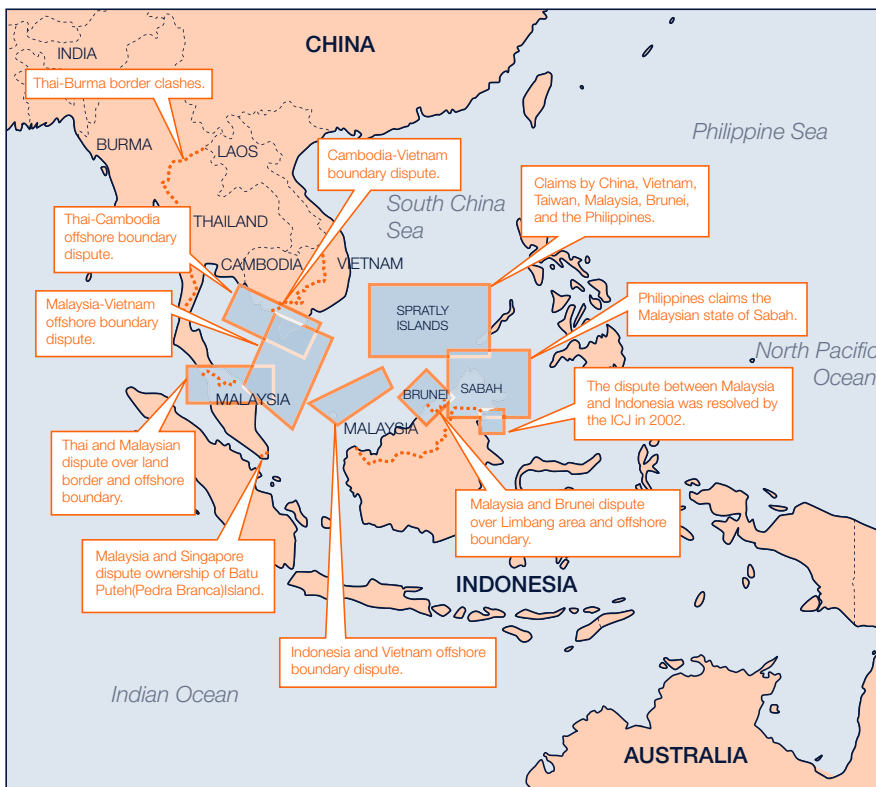


Figure 1: Territorial disputes in South-East Asia⁸
Source: National Intelligence Council

progress in this 30 year dispute. In the South China Sea, Malaysia and Brunei are eyeing each other uneasily over disputed offshore areas. Meanwhile sovereignty over the Spratly Islands remains as intractable as ever, with claims being asserted by Vietnam, China, Taiwan, Malaysia, Indonesia and the Philippines: indeed in December 2007, demonstrations and riots were being reported in Vietnam over the whole question of China's claims to the Spratly Islands and to the Paracel Islands to the north.

Even the most sanguine observer must ask 'Why?' Simple answers are rarely possible.

There are many reasons for these ongoing disputes. In the case of the Spratly Islands, for example, there is the strategic and military significance of the islands, lying as they do at a geographical cross-roads in the South China Sea between the Pacific and Indian Oceans.⁹ The disputants may be emerging nations, as was the case with Eritrea in its claims against Yemen over islands in the Red Sea¹⁰ and against Ethiopia over their shared land border.¹¹ There may be historical factors at play, such as the exercise of ancient fishing rights, anthropological factors such as the ethnicity of indigenous peoples, or geographical factors such as the existence of islands (which can have a skewing effect on nominal median lines).

But perhaps one of the greatest drivers in recent times has been the impact of economic factors. In this regard, the significance of oil and gas reserves should not be understated. As was noted by the Energy Information Administration in March 2006:-

'Ownership of virtually all of the South China Sea remains contested. The disputed areas often involve oil and natural gas resources.'¹²

The point is neatly illustrated in Figure 2 showing the competing claims to oil and gas reserves in South-East Asia.

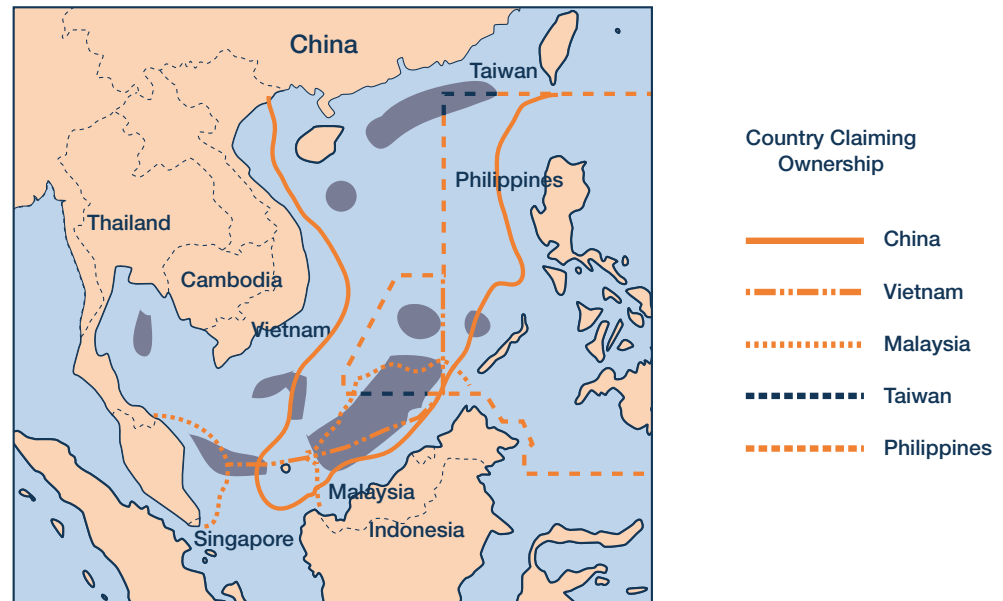


Figure 2: COMPETING CLAIMS TO OIL AND GAS FIELDS IN THE S. CHINA SEA
Source: www.southchinasea.org

By way of example, the current dispute between Thailand and Cambodia involves territory of some 9,922 square nautical miles and some 11 trillion cubic feet of natural gas reserves, estimated to have a value of \$15 billion. One of the points known to have been advanced in negotiations by Cambodia is that a negotiated settlement to share these precious natural resources would be to the benefit of both parties. However, and as was sagely noted by Rainer Lagoni, 'It will probably be easier to reach an agreement to divide an area of overlapping claims if it is known that there are no resources within it'.¹³ There can be no sadder indictment of the divisive effect of finding natural resources and their ability to fuel legal disputes over their sovereignty.

Resolving a maritime boundary dispute: UNCLOS and the conferral of sovereignty

Were the legal position entirely clear, then perhaps many of these disputes would be more quickly resolved. However, if the extraneous causes of boundary disputes identified above are the catalyst, the crucible must be the consideration of the correlative rights of the competing claims of each State and the historic ambiguity of the legal position in which those claims are advanced.

It is axiomatic that the success of a claim to territory depends upon establishing sovereignty over it. With sovereignty comes certain rights.¹⁴

The concept of a State's sovereignty over a 12 nautical mile territorial sea¹⁵ 'measured from baselines' is established and indeed determined in accordance with UNCLOS.¹⁶ Under Article 2, a State's sovereignty 'extends to the air space over the territorial sea as well as to *its bed and subsoil*' (emphasis added). This gives a State sovereignty over the hydrocarbons in the ground within the breadth of its territorial sea.

'Sovereign rights' are also conferred by UNCLOS over the Exclusive Economic Zone (EEZ)¹⁷ and the Continental Shelf,¹⁸ each of which extends up to 200 nautical miles 'from the baselines from which the territorial sea is measured'.¹⁹

A State's 'sovereign rights' over the EEZ expressly extend to:-

'... exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil ...'²⁰

In relation to the Continental Shelf, the coastal State exercises:-

'... sovereign rights for the purpose of exploring it and exploiting its natural resources.'²¹

Such 'natural resources' are defined to include 'the mineral and other non-living resources of the seabed and subsoil'.²² The hydrocarbon nature of such 'natural resources' is emphasised by Article 81 which provides that the coastal State 'shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.'

Figure 3 offers a schematic depiction of these rights.

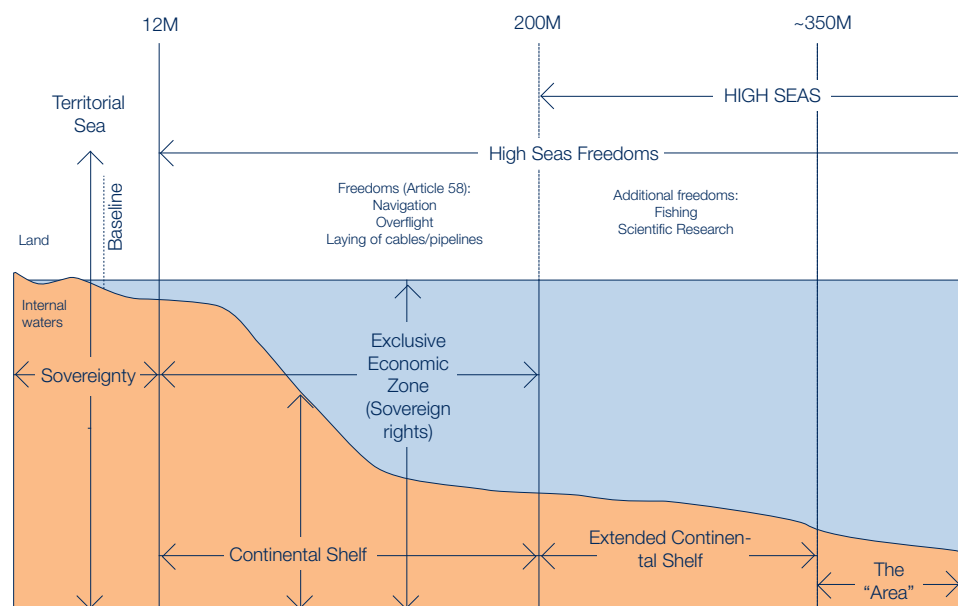


Figure 3: Illustration of zones established under UNCLOS.

Overlapping claims

The theoretical application of UNCLOS is all well and good where there are no competing claims to part of the territorial sea or Continental Shelf/EEZ asserted by one State against another. However, in cases where there are overlapping claims, most often in respect of the Continental Shelf and EEZ²³ between States with 'adjacent or opposite coasts', the delimitation is to be 'effected by agreement on the basis of international law ... in order to achieve an equitable solution'²⁴ under UNCLOS Articles 74 and 83. As two eminent international lawyers put it, this is 'not very meaningful'.²⁵ Other commentators have instead described Articles 74 and 83 as 'inherently evolutionary', able to be interpreted in line with developments and practice in international law, rather than being 'cast in stone somewhere around 1982'.²⁶

The language of Articles 74 and 83 reflects the compromise reached between different camps during the negotiation of these important provisions. On the one hand were those States (such as the United Kingdom, Denmark, Norway, Spain, Canada and Japan) who promoted the use of the equidistance line between coastal States with overlapping claims; they found justification in Article 6 of the 1958 Geneva Convention on the Continental Shelf. On the other hand were those (including France, Ireland, Libya, Poland and Romania) who insisted on an equitable approach following the 1969 decision of the ICJ in the *North Sea Continental Shelf Cases*.²⁷ In that case, the Court held that Article 6 was not a principle of customary international law (not least as the 1958 Geneva Convention had not been ratified by Germany) and favoured instead a more equitable principle which took into account the convex nature of the Danish and Dutch coastlines and the concave nature of the German coastline.

Following the North Sea Continental Shelf Cases, the orthodoxy for some time was that:-

'... equidistance may be applied if it leads to an equitable solution; if not, other methods may be employed.'²⁸

Since then, a number of different factors have been taken into account when varying the equidistance line 'to bring about a [more] equitable solution'.²⁹ Indeed, the present orthodoxy might best be encapsulated by the ICJ itself in its Press Notice issued on the 20th anniversary of the opening for signature of UNCLOS:-

'The maritime delimitation of States with opposite or adjacent coasts is now governed by a unified system of applicable law. For the Court, any delimitation must lead to equitable results. It

first determines provisionally the equidistance line and then asks itself whether there are any special circumstances or relevant factors requiring this initial line to be adjusted with a view to achieving equitable results.'³⁰

Such 'special circumstances or relevant factors' have included the existence of fisheries,³¹ proportionality, the shape and general direction of coastlines,³² the existence of islands³³ and the claims and rights of other States.

Whilst many of these factors were invoked in the *Cameroon/Nigeria*³⁴ decision in 2002, the ICJ saw no good reason to adjust the equidistance line, thereby causing concern amongst international lawyers as to the future direction of the ICJ's thinking. Be that as it may, a nice visualisation of various of the same factors at play can be seen in the map illustrating the



Figure 4: MAP TAKEN FROM THE GUINEA/GUINEA-BISSAU AWARD, illustrating the equidistance line as varied by the line of the General Direction of the Coast and the existence of the Bijagos islands and Alcatraz island.

Award made in the earlier *Guinea/Guinea-Bissau* arbitration (see Figure 4). There, the delimitation claimed by Guinea-Bissau based on a pure equidistance line was varied in part because of the existence of various islands, including in particular the Bijagos islands to the north and Alcatraz further to the south. In addition, the Tribunal reasoned that it should take account of the overall shape of the West African coastline, including the coastline of Sierra Leone to the south, to prevent Guinea, as 'the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits'.³⁵

The rule of capture and the need to find a work-around

Whilst boundary disputes on land and at sea can be and are resolved over the course of time, there remains the difficult question as to what to do with the hydrocarbons straddling either side of the disputed boundary line. The traditional answer was to drill first and answer questions later. In more technical terms, this is known as the "rule of capture".

In terms of municipal law, there are at least two variants of the rule of capture and its application.

The first has its origins in the Roman law principle 'cuius est solum, eius est usque ad coelum et ad infernos' ('he who owns the soil also owns the skies above and the depths below'). This suggests that there is a proprietary right exercisable over any chattel or substance found in, on or above a person's land. With the increasing importance of oil to the local economy, it was in accordance with this analysis that the Texas courts applied the rule of capture to oil and gas. Despite the acceptance of the rule in Texas, the most influential decision was probably *Westmoreland & Cambria Natural Gas Co. v. De Witt*.³⁶ In that case, the Pennsylvania Supreme Court embraced the application of the proprietary analysis to hydrocarbons migrating across wells, holding:-

'If an adjoining, or even a distant owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.'

The other analysis precludes liability in tort for taking substances migrating onto your land. It was perhaps most famously applied in English law in relation to groundwater rights in *Acton v Blundell*.³⁷ There, the Court of Exchequer Chamber held that a mine owner was not liable in damages to a miller whose wells he had pumped dry. The rationale of *Acton* was not so much that the mine-owner had proprietary rights in the water migrating from the miller's well as that there was a preclusion of tortious liability. The principles in *Acton* found support in a number of 19th century cases in the United States dealing with groundwater.

The modern rule of capture is understood in similar terms as a preclusion of tortious liability rather than a recognition of proprietary rights in the migrating substance. Williams & Meyers for example put forward the following definition:-

'The legal rule of non-liability for (1) causing oil or gas to migrate across property lines and (2) producing oil or gas which was originally in place under the land of another, so long as the producing well does not trespass.'³⁸

It is worth at this point pausing to consider the effects of the rule of capture. It has been criticised by many for causing waste. Typically, adjoining lessees would compete to be the first to produce oil and gas from a common reservoir, before the reservoir ran dry. In the ensuing scramble, wells would be drilled unnecessarily, reservoir pressure would be lost (sometimes causing problems with the structural integrity of the reservoir) and the over-production of hydrocarbons would result in increased storage costs and local supply gluts. For these reasons, municipal systems of law have sought to resolve the consequences of the application of the rule of capture by various means, including an increasing recognition of correlative rights and duties, well-spacing, production quotas and, the 'most complete solution',³⁹ unitisation.

Asserting rights to hydrocarbons in an international context

These practical concerns apply equally in the international context. There is no doubt that hydrocarbon resources straddle international boundaries, whether those boundaries are agreed or disputed. Perhaps the most famous examples can be found in the North Sea between the UK and Norway, but also in the Persian Gulf, in the Gulf of Guinea, the South China Sea and in the Gulf of Thailand.

In such cases, the political and economic dynamics of these shared reservoirs can become very interesting. States will have competing sovereign claims for their 'share' of hydrocarbon production and tax revenues and whilst oil companies may themselves wish to develop and produce those hydrocarbons for commercial gain, their enthusiasm to do so may be bridled by the uncertainties as to how to share the spoils or indeed whether they may risk their investment in developing a field which may in fact fall on the other side of an (as yet) undetermined boundary line.

Even so, it is not unknown for States in such circumstances to assert their sovereignty in different ways. At this point, it is worth pausing to note that traditionally, a State could not as a rule⁴⁰ pull itself up by its own bootstraps by awarding an oil or gas concession and asserting that this either gave or improved its claim to sovereignty over the hydrocarbons in a particular territory. This important point was established in the *Cameroon/Nigeria* case,⁴¹ in which the ICJ held that:-

'... oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.'⁴²

Nevertheless by encouraging oil companies to explore for (if not produce from) reservoirs which straddle an international boundary, there is an interesting question as to whether or not the rule of capture is recognised under international law.

Certainly, it might be said that in the North Sea, the rule was taken into account given the language of the UK-Norway Continental Shelf Agreement of 1965.⁴³ Under its Article 4, the UK and Norwegian Governments agreed that:-

'If any single geological petroleum structure or petroleum field ... extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees if any seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned.'

At the very least, it has been said that the UK and Norwegian Governments were alive to the possibility that if the rule did exist, its effects would be obviated by the operation of Article 4.⁴⁴

Whilst not expressly considered, neither the application nor exercise of any international rule of capture was endorsed by the ICJ in the *Aegean Sea Continental Shelf* decision.⁴⁵ In its Interim Measures Order, the ICJ held that the 'continual seismic exploration activities undertaken by Turkey' were all 'of a transitory character', did not involve 'the establishment of installations on or above the seabed of the continental shelf' nor the 'actual appropriation or other use of the natural resources of the areas of the continental shelf which are in dispute'.⁴⁶ As such, and given its finding that 'the risk of an irreparable prejudice to rights in issue in the proceedings' did not exist, the ICJ declined to make any order for interim measures against Turkey. Two points arguably follow. First, that it is implicit in the ICJ's decision that if any of these activities had taken place, interim measures of protection would (more likely) have been granted to Greece. If that is right, then second, a State may not exercise a right of capture in international law, because no such 'right' was recognised at least as international law stood before UNCLOS.

In the practical world, drilling activities of any kind in disputed territory will often be met with protest from the other side involved, if not a visit from its armed forces. Consequently, the view of leading jurists meeting in 1985 was that international law did not at that point recognise the rule of capture. They noted, somewhat pragmatically, that:-

'No international "rule of capture" exists – although as a practical matter nations will aggressively pursue resources and conflicts may arise.'⁴⁷

On the other hand, others were to comment at a later stage again that, certainly in connection with a settled boundary:-

'... in the absence of an agreement to the contrary, a State or international oil company is free to maximise production from its side of the boundary line notwithstanding the policies of neighbouring States which share the same field'.⁴⁸

UNCLOS Articles 74(3) and 83(3)

Perhaps the essential words are 'in the absence of an agreement to the contrary'. By the time of the latter statement, UNCLOS was about to come into force, bringing with it the important provisions of Articles 74 and 83 concerning delimitation of the Continental Shelf and EEZ respectively.

Whilst considerable jurisprudential attention has been paid to the provisions of Articles 74(1) and 83(1) in the debate between equity and 'special circumstances' in the delimitation of maritime boundary disputes, somewhat less has been said about the meaning and effect of paragraph (3) of each Article and the nature of the rights and obligations they impose under international law.

Articles 74(3) and 83(3) each provide as follows:-

'Pending agreement [in relation to delimitation of the EEZ or Continental Shelf], the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.'

Twin duties of co-operation and mutual restraint were said to be imposed upon States party to UNCLOS in relation to disputed maritime delimitations. For some time, however, there was no clear view as to the form in which any such co-operation might be mandated beyond the anodyne statement that they simply required States to negotiate in good faith 'provisional arrangements of a practical nature'.

Guyana and Suriname

This was to change following the threat of the use of force by a Suriname gunboat against a drilling rig undertaking exploratory work for Guyana.

The origins of this dispute stretch back to a 1799 border agreement and the inability, in particular, of the Dutch and British colonial authorities in the 1930s to define the borders between Suriname and British Guyana (as it then was) with greater precision. Following the independence of both States and the granting of offshore oil concessions in a disputed area of the sea, where the Corentyne River flows into the Atlantic Ocean, matters came to a head in June 2000: a CGX drilling rig under contract to Suriname was ordered by the Guyana navy either to leave the disputed area within 12 hours – 'or face the consequences'.

Whilst some no doubt might have initially viewed the incident as a little local trouble, the effect was to bring to a head a long-running dispute between the two States over sovereignty over the territorial sea, Continental Shelf and EEZ. Following commencement by Guyana of an arbitration constituted pursuant to Article 287 and in accordance with Annex VII of UNCLOS on 24 February 2004, an eminent Arbitral Tribunal was finally to consider the meaning and effect of Articles 74(3)/83(3).⁴⁹

In its Award, the Tribunal held that:-

'Articles 74(3) and 83(3) of the Convention impose two obligations upon States Parties in the context of a boundary dispute concerning the continental shelf and exclusive economic zone. The two obligations simultaneously attempt to promote and limit activities in a disputed maritime area.'⁵⁰

Helpfully, the Tribunal in *Guyana/Suriname* went to some length to explain its view as to the meaning and effect of the twin obligations imposed under Articles 74(3)/84(3) and the apparent tension between "promoting" and "limiting" activities in a disputed maritime area. In that regard:-

'The first obligation is that, pending a final delimitation, States Parties are required to make "every effort to enter into provisional arrangements of a practical nature."⁵¹

In addition:-

'The second is that the States Parties must, during that period, "make every effort ... not to jeopardise or hamper the reaching of the final agreement."⁵²

The Tribunal's reasoning in relation to both 'obligations' merits further consideration.

The first obligation: "provisional arrangements of a practical nature"

The first obligation imposed by Articles 74(3)/83(3) was explained by the Tribunal in *Guyana/Suriname* as being 'designed to promote interim regimes and practical measures'. These would in turn 'pave the way for provisional utilization of disputed areas pending delimitation'.⁵³ Running like a thread through its exposé of the first obligation was the Tribunal's express desire to encourage 'the equitable and efficient utilisation of the resources of the seas and oceans' whilst discouraging the sterilisation of the sea's natural resources where claimed by more than one State – subject always to the objectives of the second obligation, namely that 'such activities do not affect the reaching of a final agreement'.

In particular, the Tribunal appeared to have in mind the encouragement of 'arrangements for the joint exploration and exploitation of maritime resources' as between States. It found support in previously decided cases on the basis of which it opined that:-

'Joint exploitation of resources that straddle maritime boundaries has been particularly encouraged by international courts and tribunals.'

In that connection, the Tribunal referred specifically to the ICJ's treatment of such matters in the *North Sea Continental Shelf Cases*. There, State practice was taken by the ICJ as being of some weight in interpreting the extent of the obligation to co-operate under the pre-UNCLOS regime. In that regard, it noted with reference to the (then) recent UK-Norwegian Continental Shelf Agreement:-

'To look no farther than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or apportionment of the products extracted.'⁵⁴

In this instance, the ICJ found that where there are overlapping claims, joint exploitation agreements were 'particularly appropriate when it is a question of preserving the unity of a deposit'.⁵⁵

It might perhaps have been desirable for the Tribunal in *Guyana/Suriname* to have gone further in referring to 'the practice of States' in interpreting its so-called 'first obligation' and to have offered some guidance as to what extent (if any) it considered there to be a developing trend of customary international law. Where the boundary has been fixed, but there is a reservoir straddling it, unitisation is the panacea often recommended, as 'the most common basis for co-operative exploitation of petroleum reservoirs world-wide, both nationally and internationally'.⁵⁶ On the other hand, where the boundary has yet to be settled, joint development zones have been adopted by many States around the world. However significant debate has raged amongst academic writers of the true extent of State practice in this area over the last 50 years or so and whether such practice can be said to be reflective of a (new) principle of customary international law, and whether, if there is such a principle, it exists internationally or solely on a regional basis.⁵⁷

Amongst States with sovereign claims to hydrocarbons in the North Sea, in the Persian Gulf and in South-East Asia, a trend has been identified whereby differences have been put aside in favour of joint exploitation agreements. Indeed, the concept was pioneered in the Middle East in the agreement between Saudi Arabia and Bahrain in 1958 over the Fashtu Abu Sa'afa Hexagon,⁵⁸ but

has seen further acceptance (and evolution) in the agreements between Saudi Arabia and Kuwait in 1965,⁵⁹ Abu Dhabi and Qatar in 1969,⁶⁰ Saudi Arabia and Sudan in 1974⁶¹ and the Aden Agreement of 1988 between the then separate States of North and South Yemen.⁶²

Perhaps more interesting are the developments in South-East Asia. Joint development agreements have been concluded most famously between Malaysia and Thailand in 1990⁶³ and between Malaysia and Vietnam in 1992.⁶⁴ There is also the suite of agreements entered into by Australia with Indonesia and East Timor over the Timor Gap.⁶⁵ Perhaps most interesting of all is the Memorandum of Understanding between Cambodia and Thailand made on 18 June 2001⁶⁶ under which both Parties 'consider that it is desirable to enter into provisional arrangements of a practical nature' in relation to their overlapping claims in the Gulf of Thailand: the allusion to Articles 74(3) and 83(3) could not be clearer – notwithstanding the fact that neither Party is a Contracting State under UNCLOS.

However, there are two issues in relation to whether or not it can be said that the entry into these joint development arrangements is reflective of any crystallising rule of customary international law. First, there is the general issue of the extent to which habitual acts can become a rule of customary international law. In other words, the plural of acts is not law. To the contrary, as is clear from, for example, Article 38(1)(b) of the Statute of the International Court of Justice, under which the ICJ may decide a matter in accordance with 'international custom, as evidence of a general practice accepted as law', there would appear to be two essential elements, namely practice and the subjective belief of *opinio juris sive necessitatis*. In the *North Sea Continental Shelf Cases*, the ICJ itself held that:-

'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.'⁶⁷

This then feeds into the second issue, namely the sheer diversity of 'joint exploitation agreements'. Putting aside unitisations, there are three commonly recognised models of joint development agreement, namely single party, joint party and the so-called 'highly structured' model (as typified most recently by the Nigeria-Sao Tome joint development agreement⁶⁸) each of varying degrees of complexity.

In adopting joint development, there has been no uniformity of approach even on a regional basis. By way of example in South-East Asia, the joint development arrangements in the Timor Gap alone originally resulted in three separate zones, Areas A, B and C, with two very distinct regimes. In Areas B and C, Australia and East Timor unilaterally administered the zone closest to their territory, giving the other State 10% of any revenues. In the former Area A, now broadly speaking, the Joint Petroleum Development Area or JPDA established under the Timor Sea Treaty,⁶⁹ East Timor and Australia 'jointly control, manage and facilitate the exploration, development and exploitation of the petroleum resources' in that territory through the Designated Authority.

Another 'highly structured' arrangement similar to that of the JPDA in the Timor Gap exists in the Malaysia-Thailand Joint Authority (MTJA). The Malaysia-Thailand Memorandum of Understanding 1979⁷⁰ established the MTJA 'for the purpose of the exploration and exploitation of the non-living natural resources of the seabed and subsoil in the overlapping area'.⁷¹ It was to 'assume all rights and responsibilities on behalf of both Parties for the exploration and exploitation of the non-living natural resources of the sea-bed and subsoil in the overlapping area'.⁷² The Malaysia-Thailand Joint Development Agreement of 1990⁷³ refined some of the details but made it clear that the MTJA was to be a powerful joint authority empowered to 'control all exploration and exploitation of the non-living natural resources in the Joint Development Area and shall be responsible for the formulation of policies for the same'.⁷⁴

By contrast, adjacent to the MTJA, a Memorandum of Understanding between Malaysia and Vietnam established in 1992⁷⁵ a joint party regime whereby the States agreed to nominate their respective NOCs, respectively Petronas and PetroVietnam, to undertake petroleum exploration and exploitation in the 'defined area'. There was no devolution of authority or power but instead, the two NOCs concluded an arrangement in August 1993 to establish an eight-member Coordination Committee responsible for policy guidelines for management of joint petroleum operations.

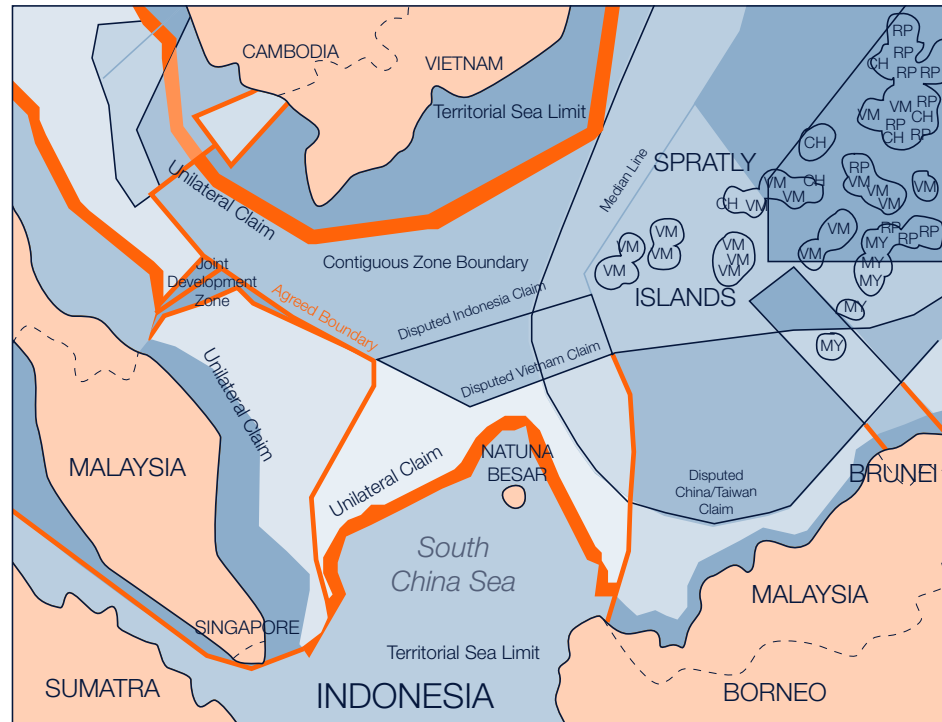


Figure 5: SOUTH CHINA SEA JOINT DEVELOPMENT ZONES showing the MTJA adjacent to the Malaysia-Vietnam Joint Area. The Vietnam-Cambodia joint exploitation area can be seen further to the north.

Source: ESRI.

In the circumstances, it is difficult to see how an international tribunal or court could feasibly prescribe a 'one size fits all' solution to disputed transboundary hydrocarbon reserves. Each joint development arrangement can be seen to reflect the political, geographical, geological, historical and other factors extant at the time of their negotiation and which contribute to make each so different. For this reason, it is perhaps not surprising that the Tribunal in *Guyana/Suriname* did not look further into how 'Joint exploitation of resources that straddle maritime boundaries' had been 'particularly encouraged by international courts and tribunals', save to say that:-

'In the Eritrea/Yemen arbitration, the arbitral tribunal, although no mineral resources had yet been discovered in the disputed waters, wrote that the parties "should give every consideration to the shared or joint or unitised exploitation of any such resources."¹⁷⁶

Perhaps this is the extent of current international law. It is highly unlikely that the ICJ or any arbitral tribunal would wish, even if so requested, to impose a joint development arrangement upon States in dispute over a transboundary hydrocarbon reservoir. To the contrary, that is something that should be left to the States to negotiate between themselves. Indeed, this appears to have been recognised by the Tribunal in *Guyana/Suriname* in light of the wording within Articles 74(3)/83(3) requiring States not necessarily to enter into such 'provisional arrangements of a practical nature' but to make 'every effort' to do so. Such language, opined the Tribunal, required of States:-

'... a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement. Such an approach is particularly to be expected of the parties in view of the fact that any provisional arrangements arrived at are by definition temporary and will be without prejudice to the final delimitation.'¹⁷⁷

Even so, the Tribunal ended its deliberations over the 'first obligation' with the thought-provoking conclusion that 'provisional arrangements of a practical nature' have been recognised 'as important tools in achieving the objectives of [UNCLOS]'. This, said the Tribunal, was the reason why UNCLOS 'imposes an obligation on parties to a dispute to make every effort to reach such agreements'. Such reasoning might very well suggest that there was at least an underlying view in the Tribunal's mind that States are required under customary international law to negotiate in good faith with a view to entering into agreements for joint exploitation, certainly if 'suspension of economic development in a disputed maritime area' is to be avoided.

The second obligation: "not to jeopardise or hamper ... the final agreement"

Indeed, the fear of sterilising precious natural resources seems to have underpinned the Tribunal's reasoning in relation to the second obligation. This it described as:-

'... the duty to make "every effort ... not to jeopardise or hamper the reaching of the final agreement."¹⁷⁸

As such, the Tribunal considered the second obligation as 'an important aspect of [UNCLOS]'s objective of strengthening peace and friendly relations between nations and settling disputes peacefully.'¹⁷⁹

For this reason, the Tribunal was highly critical of the threat of the use of force by a Suriname gunboat against the CGX drilling rig engaged by Guyana in exploratory drilling in disputed waters. Despite finding that Suriname had breached UNCLOS, the United Nations Charter and general international law,⁸⁰ the Tribunal rejected Guyana's claim for damages on the basis that the injury done to Guyana had been "sufficiently addressed" by the fact of its Award giving to Guyana undisputed title to the area where the incident occurred.⁸¹ Nevertheless, it held very clearly that there was an overriding obligation upon States to use 'peaceful means' to resolve their disputes under UNCLOS Article 279 and that in the event relief was required urgently (e.g. against unlawful drilling activities), injured States should apply for provisional measures under UNCLOS Article 290.⁸²

Having encouraged disputing States to seek interim or provisional measures of protection, the remainder of the Tribunal's reasoning in relation to the second obligation appears to seek to distinguish the issues before it from the jurisprudence of the ICJ's decision in the *Aegean Sea Continental Shelf* decision.⁸³ In that case, it will be recalled that Greece had sought interim measures of protection under Article 41 of the ICJ Statute on the basis that:-

'... the concessions granted and the continued seismic exploration undertaken by Turkey in the areas of the continental shelf which are in dispute threaten to prejudice the exclusive sovereign rights claimed by Greece in respect of those areas; and ... Turkey's seismic exploration threatens in particular to destroy the exclusivity of the rights claimed by Greece ... thereby permanently impairing its sovereign rights with respect to the formulation of its national energy policy.'⁸⁴

The ICJ however declined the application. This was on the basis that:-

'... the seismic exploration undertaken by Turkey, of which Greece complains, is carried out by a vessel traversing the surface of the high seas and causing small explosions to occur at intervals under water; ... no complaint has been made that this form of seismic exploration involves any risk of physical damage to the seabed or subsoil or to their natural resources; ... the continued seismic exploration activities undertaken by Turkey are all of the transitory character just described, and do not involve the establishment of installations on or above the seabed of the continental shelf; and ... no suggestion has been made that Turkey has embarked upon any operations involving the actual appropriation or other use of the natural resources of the areas of the continental shelf which are in dispute'.⁸⁵

In the circumstances, the ICJ held that there was no risk of 'irreparable prejudice' to preserve Greece's rights from Turkey's conduct as required under Article 41 of the Statute of the ICJ.⁸⁶

However, the Tribunal in *Guyana/Suriname* took the view that the ICJ was constrained in the *Aegean Sea Continental Shelf* decision by the fact that 'the regime of interim measures is far more circumscribed than that surrounding activities in disputed waters generally'.⁸⁷ This was because 'the power to indicate interim measures is an exceptional one, and it applies only to activities that can cause irreparable prejudice'.⁸⁸ Consequently, whilst cases such as *Aegean Sea Continental Shelf* were merely 'informative as to the type of activities that should be permissible in the absence of a provisional arrangement', different considerations needed to be taken into account in non-interim measures cases. Specifically:-

'It should not be permissible for a party to a dispute to undertake any unilateral activity that might affect the other party's rights in a permanent manner.'⁸⁹

On the other hand:-

'... international courts and tribunals should also be careful not to stifle the parties' ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time consuming process.'⁹⁰

The Tribunal considered that there was therefore a 'delicate balance' between 'the obligation to make every effort not to hamper or jeopardise the reaching of a final agreement' by 'drawing a distinction between activities having a permanent physical impact on the marine environment and those that do not'.⁹¹

In the circumstances, the Tribunal held on the facts in *Guyana/Suriname* that 'unilateral acts that cause a physical change to the marine environment will generally be comprised in a class of activities that can be undertaken only jointly or by agreement between the parties'.⁹² That is because 'these activities may jeopardise or hamper the reaching of a final delimitation agreement as a result of the perceived change to the status quo that they would engender'.⁹³ It was presumably for this reason that pending resolution of their cases before the ICJ, Libya and Tunisia halted their operations in the area of overlapping claims and Libya and Malta reached a 'no drilling' understanding⁹⁴ (points not in fact noted by the Tribunal in the *Guyana/Suriname* award).

In practical terms, the Tribunal's conclusions appear to endorse the view that 'not ... all exploratory activity should be frozen in a disputed area'. Consistent with *Aegean Sea Continental Shelf*, it considered that seismic activity 'should be permissible'. However, it went on to add that 'some exploratory drilling might cause permanent damage to the marine environment', and this presumably would not be 'permissible'.

This rather begs the question whether 'some [other] exploratory drilling' might be permissible if it did not cause permanent damage. The issue, both at a legal and at a technical level, is not fully answered save that the Award reveals that when it was threatened by Suriname's gunboat, the drilling rig engaged by Guyana was undertaking 'drilling for core samples'⁹⁵ and such drilling was not criticised. Even so, there is a hint that exploratory drilling might also be acceptable if the State commissioning or authorising it offers to 'share the results of such exploration' and give the other State 'an opportunity to observe the activities' and to offer to 'share all the financial benefits received from the exploratory activities'.⁹⁶

Jaw, jaw, jaw not war, war, war?

Like Faust, scholars of UNCLOS might in the wake of *Guyana/Suriname* berate themselves that notwithstanding all their lore, they stand no wiser than before. Despite its length and accepted significance, the Award is not a primer for States and oil companies wishing to resolve maritime boundary disputes involving hydrocarbon resources in a small number of easy steps.

First, there remains a vacuum in relation to the meaning and effect of UNCLOS Articles 74(3) and 83(3). Of course there is every exhortation to States to engage in 'good faith negotiation' of their

disputes with a view to entering into 'provisional agreements of a practical nature' so as to avoid stifling economic development. The difficulty however remains that there is no obligation to enter into such agreements, although of course a State will be expected to make 'every effort' to do so. Whilst this is in itself a relatively high standard of obligation, it is unlikely that the Tribunal would agree with Onorato that 'Joint development is [now] mandated'⁹⁷ and compel an unwilling State to enter into such arrangements, not least as there remains no international standard form of joint exploitation agreement. That said, the Tribunal's exhortations should not be ignored lightly.

In addition, there remains uncertainty as to the full extent to which States may assert their sovereign rights over the natural resources which they claim. States are apparently entitled to undertake exploratory work: seismic exploration was approved by the ICJ in *Aegean Sea Continental Shelf*, and the Tribunal in *Guyana/Suriname* not only embraced that finding, but went further in seemingly allowing 'some exploratory drilling', such as drilling for core samples. This would be even more likely to be 'permissible' where the State gives 'official and detailed notice' of its planned activities, seeks co-operation in relation to them, gives an opportunity to observe the activities, offers to 'share the results of the exploration' and finally offers to 'share all the financial benefits received from the exploratory activities'. The key is that such activities must not lead to 'permanent damage to the marine environment'.

Arguably, *Guyana/Suriname* may be a primer as to how such disputes should not be resolved. On one view, therefore, its significance is in fact purely negative. The Tribunal was very clear about what was not 'permissible'. Amongst other things, threats of and the use of force were clearly held not to be acceptable means by which States may assert their rights. Resort instead should be had to the compulsory procedures provided in Section XV of UNCLOS for the peaceful resolution of disputes, including, in urgent situations, by way of an application for provisional or interim measures.

But therein lies the first irony of the decision: it was Suriname's very threat against the CGX rig which arguably brought about resolution of a dispute whose origins could be traced back to 1939. The Award itself notes that 'Following the CGX incident of June 2000, numerous meetings and communications between the Parties took place'⁹⁸ which although unsuccessful 'demonstrated a willingness to negotiate in good faith' in satisfaction of the 'obligation relating to provisional arrangements' and culminated in the commencement in 2004 of the Arbitration by Guyana. Although Suriname's actions are in no sense to be applauded, the cynic might take the view that without its gunboats, the dispute might still be rumbling on without resolution. Indeed the origins of the *Eritrea/Yemen* arbitration are rooted in the "hostilities" in December 1995 that ended with Eritrean forces occupying one island and Yemeni forces another.

The second irony is that whilst 155 States had ratified UNCLOS by 26 October 2007, a number of States have not. This creates legal and practical difficulties about how to resolve disputes between States who have not ratified UNCLOS, such as Thailand and Cambodia, or who may be party but have declared like Australia that it does 'not accept any of the procedures provided for in section 2 of Part XV ... with respect of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations ...'.⁹⁹ Then what?

In the absence of any clear legal answers, the practical answer must be to encourage a dialogue between the States and enable them to find a mutually acceptable answer to the common problem. Whilst gunboats have obtained results, their use under international law is not to be commended. Third party States of course have a role to play in brokering solutions through international diplomacy of a more conventional kind. However, with the funds, technical data, and international lawyers at their disposal, best placed of all to inform if not lead the process of resolution are the international oil companies, no doubt incentivised by the fallow nature of their disputed concessions. Whilst goading a recalcitrant host State through political and legal pressure in recognition of its increasingly clear obligations under international law¹⁰⁰ may in extreme situations be the only option, this is unlikely to advance any oil company's interests before a host State in the long-term. Instead, gentle persuasion and guidance is often the most effective way of leading a State through the process of resolving a boundary dispute, whether by assisting and advising in State-to-State negotiations for a delimitation treaty, joint exploitation agreement or towards an *ad hoc* dispute resolution process.

Ultimately, every State needs to understand and accept the Tribunal's apparently overriding concern that its neighbours' economic development should not be 'stifled'. The Award in *Guyana/Suriname* may to that extent be seen as giving every encouragement to States to find a peaceful means to their dispute. It is nevertheless disappointing that the Award did not go on to explore the legal implications of a State refusing to negotiate in good faith the joint exploitation of a common or disputed reservoir and what could be done about it. Perhaps it is too soon and too dangerous to endorse the views of those jurists in the 1980s like Lagoni who saw unilateral exploitation as justified where a State refused to negotiate in good faith. In such case, it has been argued that the State might be estopped from claiming State responsibility for the violation of its sovereignty or sovereign rights.¹⁰¹

But such views, whilst not the currently accepted orthodoxy, may not yet be as heretical as they at first appear. There are clear risks for those States which have ratified UNCLOS but which can be shown to have refused to engage in good faith negotiation over joint exploitation of shared resources. Arguably, the increasing acceptance of the principles of UNCLOS as State practice might also have implications for those States that have not ratified. It is unlikely that any such States would be helped by the increasingly vocal calls that natural resources need to be "conserved" – there is a clear world of difference between 'conservation' and 'sterilisation' of natural resources, the real issue being that such resources need effective and responsible management by those States claiming sovereignty over them.

Ultimately, the encouragements given by the Tribunal in *Guyana/Suriname* to make every effort to negotiate joint exploitation agreements were expressed not for the benefit of those two States alone, but rather, and more importantly, *pour encourager les autres*. The goal of peaceful economic development between States would appear to be paramount.

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| <p>1 <i>United Nations Convention on the Law of the Sea, UN Doc. A/CONF. 62/122 (1982), reprinted in 21 ILM 1261 (1982) (hereinafter 'UNCLOS').</i></p> <p>2 <i>Oceans and the law of the sea: Report of the Secretary-General, UN General Assembly Fifty-sixth session UN Doc A/56/58 (9 March 2001) at para. 42.</i></p> <p>3 <i>Guyana –v– Suriname, Arbitral Award made 17 September 2007 ('Guyana/Suriname'). The text of the award can be found at http://www.pca-cpa.org.</i></p> <p>4 <i>Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), ICJ Judgment 8 October 2007 ('Nicaragua/Honduras').</i></p> <p>5 <i>Territorial and Maritime Dispute (Nicaragua v. Colombia), ICJ Judgment 13 December 2007.</i></p> <p>6 <i>Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia / Singapore); documents available at www.icj-cij.org/docket/index.php?p1=3&p2=1&code=ru&case=130&k=2b.</i></p> <p>7 <i>Maritime Delimitation in the Black Sea (Romania v. Ukraine); documents available at www.icj-cij.org/docket/index.php?p1=3&p2=1&code=ru&case=132&k=95.</i></p> <p>8 <i>The dispute between Malaysia and Indonesia was resolved by the ICJ in the Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), ICJ Judgment 17 December 2002 (ICJ Reports 2002, 625).</i></p> <p>9 See M. Valencia et al, <i>Sharing the Resources of the South China Sea</i> (Martinus Nijhoff Publishers, 1997).</p> <p>10 See W. M. Reisman, 'The Eritrea/Yemen Arbitration', 94 AJIL 721 (2000), B. Kwiatkowska, 'The Eritrea/Yemen Arbitration', 32 <i>Ocean Development & International Law</i> 1 (2001) and Nuno</p> | <p>Sérgio Marques Antunes, 'The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law' 50 ICLQ 299 (2001).</p> <p>11 See G. Khadiagala, 'Reflections on the Ethiopia-Eritrea Border Conflict', 23 <i>Fletcher Forum of World Affairs</i> 39 (1999), B. Simma and D-E Khan, 'The Case of the Frontier Dispute Between Eritrea and Ethiopia' in <i>Liber Amicorum Judge Shigeru Oda</i> (Brill: Leiden, 2002), 1179-1196, Donaldson & Pratt, 'International Boundary Developments' 9 <i>Geopolitics</i> 501 at 502 and 506-507, and M. Shaw, 'Title, control, and closure? The experience of the Eritrea-Ethiopia Boundary Commission' 56 ICLQ 755 (2007).</p> <p>12 http://www.eia.doe.gov/emeu/cabs/South_China_Sea/Full.html</p> <p>13 R. Lagoni, <i>Interim Measures Pending Maritime Delimitation Agreements</i>, 78 AJIL 345 at 361 (1984).</p> <p>14 <i>Whilst land-related territorial claims are resolved by applying general principles of the acquisition and exercise of sovereignty, maritime-related claims additionally require an understanding of UNCLOS. For a general discussion of each, see inter alia, Brownlie, Principles of Public International Law, 5th ed (Oxford, 1998) at Parts III and IV; and Jennings and Watts (eds), Oppenheim's International Law 9th ed (Longman, 1996), Chapters 5 and 6.</i></p> <p>15 UNCLOS, Part II. The concept of 'sovereignty' over the territorial sea under UNCLOS is established in Article 2.</p> <p>16 UNCLOS, Part II, Section 2 provides the modalities for measurement of the baselines.</p> <p>17 UNCLOS, Part V. Article 57 establishes the 200 nautical mile breadth of the EEZ.</p> <p>18 UNCLOS, Part VI.</p> <p>19 A State's Continental Shelf claim may in certain circumstances be extended a further 150 nautical miles: UNCLOS, Article 76,</p> |
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- para. 5.
- 20 UNCLOS, Article 56, para. 1(a).
- 21 UNCLOS, Article 77, para. 1.
- 22 UNCLOS, Article 77, para. 4.
- 23 *Disputes over overlapping claims in the territorial sea are settled by a median line, unless otherwise 'necessary by reason of historic title or other special circumstances'* (UNCLOS, Article 15). See most recently the ICJ's Judgment of 8 October 2007 in *Nicaragua/Honduras*, n 4 above, and its treatment of various geographical and historical factors when applying UNCLOS Article 15.
- 24 UNCLOS, Articles 74 (EEZ) and 83 (Continental Shelf).
- 25 R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester University Press, 3rd Edition, 1999), at 191.
- 26 A. Boyle, *Further Development of the 1982 Convention on the Law of the Sea in Freestone*, Barnes & Ong (eds) *The Law of the Sea: Progress and Prospects* (OUP, 2006), 40 at 46.
- 27 *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Judgment 20 February 1969 (ICJ Reports 1969, 3) ('North Sea Continental Shelf Cases').
- 28 *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Judgment 24 February 1982 (ICJ Reports 1982, 18) ('Tunisia/Libya'), para 109.
- 29 *Ibid*, para 110.
- 30 ICJ Press Notice 2002/38.
- 31 *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Judgment 14 June 1993 (ICJ Reports 1993, 38); *Barbados v The Republic of Trinidad and Tobago*, *Arbitral Award of 11 April 2006*. Note that the relevance of fisheries was discounted in the earlier *North Sea Continental Shelf Cases*, n 27 above, at para 65, and the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, ICJ Judgment 12 October 1984 (ICJ Reports 1984, 246) ('Gulf of Maine'), at paras 234 to 238.
- 32 *Gulf of Maine case*, n 31 above.
- 33 *Tunisia/Libya*, n 28 above; and *Guinea/Guinea Bissau*, *Arbitral Award of 14 February 1985*, reprinted in 25 ILM 252 (1986) ('Guinea/Guinea Bissau').
- 34 *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon/Nigeria: Equatorial Guinea intervening)*, ICJ Judgment 10 October 2002 (ICJ Reports 2002, 303) ('Cameroon/Nigeria').
- 35 *Guinea/Guinea Bissau*, n 33 above, para 104.
- 36 18 A. 724 (Pa. 1889).
- 37 152 Eng Rep 1223 (1843).
- 38 P. Martin & B. Kramer (eds), *Manual of Oil and Gas Terms*, 10th ed (Williams & Meyers, 1997).
- 39 Libecap, 'Unitization' from Newman (ed), *New Palgrave Dictionary of Economics and Law* (Palgrave Macmillan, 1998).
- 40 *In Tunisia/Libya*, however, the ICJ saw the presence of oil wells in an area to be delimited as 'an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result' (at para. 107). It is worth however mentioning that in terrestrial claims (to which UNCLOS does not apply), the ICJ was persuaded that the erection of a 10 m high antenna to 'assist in drilling activities in the context of oil concessions granted' by Honduras constituted the effective exercise by Honduras of sovereignty over the island where the antenna was erected (*Nicaragua/Honduras* at para 207).
- 41 *Cameroon/Nigeria*, n 34 above.
- 42 *Ibid*, at para 304.
- 43 *Agreement Relating to the Delimitation of the Continental Shelf between the Two Countries, Mar. 10, 1965, UK-Nor., 1965 Gr. Brit. TS No. 71 (Cmd. 2757), 551 UNTS 214.*
- 44 See Daintith & Willoughby, *United Kingdom Oil and Gas Law* (London: Sweet & Maxwell, 1984), at 1-723, 3-811 and 5-2732 particularly in relation to the position under the municipal law of the UK.
- 45 *Aegean Sea Continental Shelf Case (Greece v Turkey): Request for the Indication of Interim Measures of Protection*, ICJ Order 11 September 1976 (ICJ Reports 1976, 3) ('Aegean Sea Continental Shelf').
- 46 *Ibid*, at 30.
- 47 M. Miyoshi, 'The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf' 3 *Int'l J. of Estuarine & Coastal L* 1 at 18 (1988).
- 48 R. Bundy, 'Natural Resource Development (Oil and Gas) and Boundary Disputes' in Blake, Hildesley, Pratt, Ridley and Schofield (eds), *The Peaceful Management of Transboundary Resources* (Kluwer Law International, 1995) at 24.
- 49 *Guyana/Suriname*, n 3 above.
- 50 *Ibid*, para 459.
- 51 *Ibid*.
- 52 *Ibid*.
- 53 *Ibid*, para 460.
- 54 *North Sea Continental Shelf Cases*, n 27 above, para 97.
- 55 The reference to the "unity of a deposit" derives from the views of Gidel and Mouton expressed in the 1950s as to the unity of national ownership and exploitation of authority over hydrocarbon deposits, and the preservation of joint sovereignty over such deposits in favour of States properly entitled to them.
- 56 C. Robson, 'Transboundary Petroleum Reservoirs: Legal Issues and Solutions' in Blake, Hildesley, Pratt, Ridley and Schofield (eds) *The Peaceful Management of Transboundary Resources*, n 48 above, at 6.
- 57 See for example, R. Lagoni, 'Oil and Gas Deposits Across National Frontiers' 73 *AJIL* 215 (1979) where he argues (at 235) that a duty to negotiate in good faith about the exploitation and apportionment of common resources is a rule of customary international law. The emergence of a rule mandating joint development was posited by William T. Onorato, 'Joint Development of Seabed Hydrocarbon Resources: An Overview of Precedents in the North Sea', in Mark J. Valencia (ed), *The South China Sea: Hydrocarbon Potential and Possibilities of Joint Development* (1981) (at 1315) and 'A Case Study in Joint Development: The Saudi Arabia-Kuwait Partitioned Neutral Zone', in Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Development (1985) (at 539). Moreover, in a recent and relatively extensive review of the subject, David M. Ong argues in 'Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?' 93 *AJIL* 771 (1999) (at 795 and 802) that whilst there may be no specific obligation requiring States to cooperate in the form of joint development, there may however be a 'regional' rule of customary international law in regions such as the North Sea and Persian Gulf which are at the 'vanguard of practice in joint development agreements' (at 795).
- 58 *Agreement Concerning the Delimitation of the Continental Shelf in the Persian Gulf, Feb. 22, 1958, Bahr.-Saudi Arabia, United Nations, National Legislation and Treaties Relating to the Law of the Sea 409, UN Doc. ST/LEG/SER.B/16, UN Sales No. E/F.74.V.2 (1974)* (hereinafter 'Legislation and Treaties').
- 59 *Agreement relating to the Partition of the Neutral Zone, July 7, 1965, Kuwait-Saudi Arabia, 4 ILM 1134 (1965).*
- 60 *Agreement on the Settlement of Maritime Boundaries and Sovereign Rights over Islands, Mar. 20, 1969, Qatar-Abu Dhabi, Legislation and Treaties, at 403.*

- 61 *Agreement relating to Joint Exploration of the Natural Resources of the Sea-bed and Subsoil of the Red Sea in the Common Zone*, May 16, 1974, Sudan-Saudi Arabia, *Legislation and Treaties*, at 41, UN Doc. ST/LEG/SER.B/18, UN Sales No. E/F/76.V.2 (1976).
- 62 (Aden) *Agreement for the Exploration of [Investment in] the Joint Area Between the Two Sectors of Yemen*, Nov. 19, 1988, Yemen Arab Republic-People's Democratic Republic of Yemen, in Yemen Arab Republic, Bureau of Unity Affairs, *United Yemen 239* (3d series of Official Documents on Yemeni Unification, 1989) (in Arabic).
- 63 *Agreement between The Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and other matters relating to the establishment of the Malaysia-Thailand Joint Authority*, May 30, 1990, Malaysia-Thailand. See David Ong, 'Thailand/Malaysia: The Joint Development Agreement 1990', 6 *Int'l J. of Estuarine & Coastal L.* 61, 61-66 (1991).
- 64 *Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries*, June 5, 1992, Malaysia-Vietnam, in Ted L. McDorman, 'Malaysia-Vietnam', Report No. 5-19, in Charney & Alexander, *International Maritime Boundaries*, vol III (Martinus Nijhoff, 1998)
- 65 *Timor Sea Treaty*, Austrl.-E. Timor, May 20, 2002, 2003 Austrl. T.S. No. 13, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-TLS2002TST.PDF>.
- 66 *Memorandum of Understanding between the Royal Government of Cambodia and the Royal Thai Government regarding the Area of their Overlapping Maritime Claims to the Continental Shelf*, June 18, 2001 reprinted in Colson & Smith (eds), *International Maritime Boundaries* (Martinus Nijhoff, 2005) at 3743.
- 67 *North Sea Continental Shelf Cases*, n 27 above, para 77.
- 68 *Treaty between Nigeria and Sao Tome on the Joint Development of Petroleum and Other Resources in Respect of Areas of the Exclusive Economic Zone of the Two States*, Nig.-Sao Tome & Principe, Feb 21, 2001, available at <http://www.nigeriasaotomejda.com/PDFs/treaty.pdf>.
- 69 n 65 above. See, *inter alia*, G. Triggs and D. Bialek, 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap', 3 *Melbourne Journal of International Law* 322 (2002); for subsequent developments, see G. Triggs, 'The Timor Sea Treaty and the International Unitisation Agreement for Greater Sunrise: Practical Solutions in the Timor Sea', 23 *Australian Yearbook of International Law* 161 (2004).
- 70 *Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the establishment of the joint authority for the exploitation for the resources of the sea bed in a defined area of the Continental Shelf of the two countries in the Gulf of Thailand*, Feb. 21, 1979, Malaysia-Thailand., 6 *Energy* 1355 (1981).
- 71 *Ibid*, Article III(1).
- 72 *Ibid*, Article III(2).
- 73 N 60 above.
- 74 *Ibid*, Article 7(1).
- 75 N 64 above.
- 76 *Guyana/Suriname*, n 3 above, para 463.
- 77 *Ibid*, para 461.
- 78 *Ibid*, para 465.
- 79 *Ibid*, para 465.
- 80 *Ibid*, para 445.
- 81 *Ibid*, para 451. This formulation had previously been used in Cameroon/Nigeria, n 34 above, at para 319.
- 82 *Ibid*, para 446.
- 83 N 45 above.
- 84 *Ibid*, para 26.
- 85 *Ibid*, para 30.
- 86 *Ibid*, para 33.
- 87 *Guyana/Suriname*, n 3 above, para 469.
- 88 *Ibid*.
- 89 *Ibid*, para 470.
- 90 *Ibid*.
- 91 *Ibid*.
- 92 *Ibid*, para 480.
- 93 *Ibid*.
- 94 *Bundy*, n 48 above at 27, 28.
- 95 *Guyana/Suriname*, n 3 above, para 433, quoting from the witness statement of Mr Edward Netterville.
- 96 *Ibid*, para 477.
- 97 W.T. Onorato 'A Case Study in Joint Development: The Saudi Arabia-Kuwait Partitioned Neutral Zone' 10 *Energy* 539 (1985).
- 98 *Guyana/Suriname*, n 3 above, para 478.
- 99 *Declaration of the Government of Australia of 21 March 2002 under Articles 287 and 298 of UNCLOS*, available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.
- 100 While the utility of investment treaty claims in the context of a disputed boundary is questionable, it has raised interesting questions in at least one case (not yet in the public domain) as to the extent to which a host State may be liable for an investment made 'in its territory' (and so attracting the protections of an investment treaty) or was in fact made in the territory of another State (in which case the protections would not bite). In the latter case, a host State may be estopped from denying such investment was not made 'in its territory'.
- 101 R. Lagoni, 'Oil and Gas Deposits Across National Frontiers', n 57 above, at 238.

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