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International Maritime Boundary Disputes: Legal and Strategic Issues

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SUMMARY

This paper provides a practical guide to the issues facing governments and petroleum companies in dealing with offshore hydrocarbon resources located in areas where there are competing maritime boundary claims. The first part of the paper briefly describes some of the main principles of public international law which apply to the delimitation of maritime boundaries. The second part of the paper describes the available mechanisms for resolving competing maritime boundary claims, including litigation in the International Court of Justice, international arbitration and negotiation. This part of the paper also explores a number of different models that can be adopted in resolving competing maritime claims, such as agreed boundary delimitations, the establishment of joint development areas and other provisional arrangements of a practical nature. The third part of this paper draws on the author's experience in the context of a number of case studies in the region and considers some of the legal and practical issues which have arisen in relation to those disputes. The paper concludes by highlighting a number of issues which are of particular interest to petroleum companies, including issues in the joint development of petroleum resources.

INTRODUCTION

Once proclaimed to be free to all and belonging to none, oceans are today governed by an extensive body of international rules, the implementation of which is often a source of conflict between states. Disputes between states are particularly likely to arise with respect to rights to the natural resources found in and beneath the ocean, including petroleum resources. This paper focuses on the issues that arise when two or more states claim rights over the same maritime area

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(overlapping maritime claims) and where such area is either considered to be prospective for petroleum or contains petroleum resources that have actually been discovered.

While questions of sovereignty over maritime areas were once thought to be the sole preserve of governments, today these questions are of increasing relevance and importance to oil companies and other petroleum sector participants. With advances in technology, and the growing global demand for petroleum products, petroleum companies are looking further and further afield for petroleum prospects and find themselves considering investment in areas that are or become subject to overlapping claims between neighbouring states.

There are numerous regional examples of maritime areas with significant prospectivity for petroleum being locked up for years or decades as a consequence of overlapping maritime claims. On a positive note, there are also a number of regional examples of governments successfully resolving deadlocks and agreeing provisional measures which enable petroleum activities to commence despite seemingly intractable disagreements over maritime entitlements.

Maritime boundary resolution is an area of legal practice in which the interests of national, local and provincial governments, petroleum companies and other private sector investors are at stake. The outcomes of these disputes are generally of great significance to governments, as they determine a state's national boundaries and the areas within which they can exercise economic rights. Resolution of these disputes can also have a significant economic impact, in particular for developing countries, which often seek to use petroleum development as a catalyst for attracting other foreign investment and to use petroleum revenues as a means of funding the development of national infrastructure. For petroleum companies, overlapping claims may affect their rights with respect to petroleum resources worth billions of dollars and the terms on which those resources may be exploited.

This paper briefly addresses the main principles of international law which underpin sovereign claims to maritime areas and the alternative methods and models for resolving overlapping maritime claims. It also identifies issues which have arisen in the context of a number of regional examples. Finally, some key joint development issues for petroleum companies are addressed.

APPLICABLE LEGAL PRINCIPLES

Public international law governs the legal basis on which states may claim sovereign and economic rights over maritime areas. It also provides the principles to be applied in resolving overlapping maritime claims between two or more states. These legal principles are applied both by international courts and tribunals in adjudicating maritime boundary disputes and by states in negotiating maritime boundaries.

The law of the sea is one of the most analysed areas of public international law and there are numerous excellent text books, and a myriad of learned articles and publications, describing in detail the principles of public international law which apply to the making of maritime claims and their resolution. The intention in this paper is not to add to that material or even to summarise it. Nevertheless, for the purpose of providing background in the area, it is useful to briefly state some of the key principles which, although not without some controversy, have a degree of general application in understanding and dealing with overlapping maritime claims.

- The main sources of the law of the sea are bilateral and multilateral treaties between states, and decisions of the International Court of Justice (ICJ) and other international legal tribunals, including the International Tribunal for the Law of the Sea (ITLOS).
- The first major, post-war multilateral conventions on maritime entitlements were the 1958 Geneva Conventions on the Territorial Sea and Continental Shelf. The rights and entitlements of States to maritime areas were further developed in the United Nations Convention on the Law of the Sea (UNCLOS), which was concluded in 1982 and came into force as a binding treaty from 16 November 1994 for those parties which had agreed to be bound by it.[1]
- UNCLOS seeks to regulate all matters relating to the use and exploitation of oceans by setting out rules relating to such things as the delimitation of maritime boundaries, navigational rights, protection of the marine environment, conservation and management of the marine resources, marine scientific research and the settlement of disputes relating to ocean matters. At the time of its adoption, UNCLOS embodied in one instrument traditional rules concerning use of the oceans as well as new rules designed to address new concerns. Thus, while UNCLOS is only binding on those countries which agree to be bound by it, many of its provisions are binding on all countries as they simply reflect norms of customary international law (ie, laws formed by state practice).
- As UNCLOS is in large part declaratory of customary international law, it is a useful starting point for analysing the principles of international law that apply to the making and resolution of overlapping maritime claims.
- The making of maritime claims is essentially a unilateral decision of a state.[2] There are several different maritime entitlements which states may claim. These include a territorial sea, continental shelf and an exclusive economic zone. Subject to the rights of neighbouring states, states are entitled to a territorial sea that extends 12 nautical miles (nm) from its baselines,[3] a

[1] One year after Guyana became the 60th state to adhere to it.

[2] See, eg, *The Truman Proclamation on the Continental Shelf 1945* No 2667 10 Fed Reg 12303.

[3] The baseline refers to the low water mark along a country's coast (*United Nations Convention on the Law of the Sea 1982* (UNCLOS), Art 3).

continental shelf of up to 200 nm from its baselines (in some cases up to 350 nm from its baselines)[4] and an exclusive economic zone of up to 200 nm.[5]

- UNCLOS declares that beyond these limits, the natural resources found in the oceans are part of the common heritage of mankind and as such, no country is entitled to exercise sovereignty over them.[6]
- Article 15 of UNCLOS governs the delimitation of territorial seas between neighbouring states. It provides that, unless the states agree to the contrary or there exists an historic title or special circumstances in the area to be delimited, neither state is entitled to extend its territory beyond the median line, every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured.
- Article 74(1) and Art 83(1) of UNCLOS deal with the delimitation of exclusive economic zones and continental shelf, respectively, in the same terms: "The delimitation of the exclusive economic zone [and continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." The key test, therefore, is the equitableness of a given result. While there is some variation in the manner in which an equitable solution is to be arrived at, this is unquestionably the outcome to be obtained. The recent jurisprudence of the ICJ makes it clear that the general principle to be applied in achieving an equitable solution is the "equidistance / relevant circumstances" rule whereby the courts will generally calculate an equidistance boundary as a provisional first step in the delimitation process and will then consider whether there are any geographic or other relevant circumstances which justify a modification of that provisional line.
- The relevant factors that may justify modification of an equidistant line include: the configuration of the coasts of the states and their relationship to each other, the presence and relative position of third states,[7] the treatment of islands or coastal anomalies, such as promontories in the area to be delimited,[8] the conduct of the states,[9] the relevant relative coastal lengths of the states[10] and, to a limited extent, economic factors such as a dependence by a coastal community on fishing resources located with the disputed area.[11]

[4] UNCLOS, Art 76(1).
[5] UNCLOS, Art 57.
[6] The International Seabed Authority exercises control over resources beyond the limits of natural jurisdiction.
[7] See eg, *North Sea Continental Shelf Case*s *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3.
[8] See, eg, *Corfu Channel Case (Merits)* [1949] ICJ Rep 4.
[9] See, eg, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13.
[10] See, eg, *Case Concerning the Continental Shelf (Tunisia v Libya) (Merits)* [1982] ICJ Rep 18 (*Tunisia-Libya* case).
[11] See, eg, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Merits)* [1993] ICJ Rep 38.

- A modified equidistance line remains the most popular form of delimitation, certainly among those that result from negotiations between states with opposite coastlines.[12] For states with adjacent coastlines there are a wider variety of alternative outcomes and equidistance is only one of a number of possible methods for achieving an equitable solution rather than the preferred method.
- Article 74(3) and Art 83(3) of UNCLOS address the issue of provisional measures in the same terms. They provide that: "pending agreement … the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

The ultimate consideration in determining the precise delimitation of overlapping claims is what is equitable in the circumstances. As the geography and history of each maritime boundary is unique, each case or circumstance must be assessed on an individual basis. The assessment of any particular overlapping claims requires an understanding of the applicable principles of international law, the historical background to the claims, and the geography of the area in question.

It is apparent from the above that while a maritime boundary based on some form of equidistance line is a useful starting point for determining an equitable boundary, "equal" does not always equate to "equitable". There is ample ambiguity in the application of the relevant principles of international law to result in long-standing and genuine disagreements between states over the basis on which a particular overlapping claim should be delimited. The alternative methods of resolving these claims will now be discussed.

METHODS FOR RESOLVING OVERLAPPING MARITIME CLAIMS

Overlapping maritime claims can be resolved in a number of ways. These include agreement of a final and binding maritime boundary delimitation treaty, referral of the dispute for adjudication by the ICJ in the Hague or an international arbitral tribunal or the negotiation of an agreed joint development treaty, where negotiations on an agreed maritime boundary have become deadlocked and referral to a third party is not possible or desirable, and where the overlapping claims area is thought to contain significant hydrocarbon resources.

There are a variety of issues to be considered when determining which of these possible solutions is the most appropriate in any given circumstance. These include political considerations, legal questions and practical issues. The principal features of each of these alternative solutions is discussed below.

[12] See Chanary and Alexander, 3rd ed.

Maritime Boundary Treaty

Generally, a maritime boundary treaty is the preferred method of resolving overlapping maritime claims. The advantages of this form of resolution include certainty for both parties, the ability of the relevant states to co-operate to achieve an agreed outcome and the fact that, following agreement, each state is free to administer its own maritime areas.

However, it is not always possible to achieve a negotiated boundary. A state may lack the political will to concede an area to which that state believes it is legitimately entitled or a state may be reluctant to negotiate a final outcome when the possible economic effects of any compromise solution remain unknown. The possibility of deadlock or stalemate increases where the overlapping claims area is thought to contain significant hydrocarbon prospectivity. In such instances, the risk of losing access to a valuable resource becomes a salient consideration. This consideration has even greater significance where one or more of the states involved in the dispute is a developing country, as the economic significance of losing access to resources has disproportionate significance for those states' economic development.[13]

Regional examples

While there are many examples of countries agreeing on a maritime boundary in an area considered likely to contain petroleum resources, agreement generally occurs only after a prolonged period of impasse. For instance, in 1999 Thailand and Vietnam finally agreed upon a maritime boundary in the Gulf of Thailand, having maintained overlapping claims in the Gulf of Thailand for over 26 years. Another example is the recent agreement by Vietnam and Indonesia concerning their maritime boundary in an area of the Natuna Sea over which they have each maintained overlapping claims for over 30 years.

Where states wish to resolve their overlapping maritime claims but are unable to negotiate a maritime boundary treaty, there are three alternatives. These are continuation of the impasse, referral of the issue for determination by the ICJ, or agreement of a joint development treaty or some other form of provisional arrangement.

International Litigation or Arbitration

Referral of overlapping maritime claims to the ICJ or to international arbitration may have a number of advantages. These include a decision which is externally determined, which is impartial and legitimate, and which is arrived at through a process which reduces the influence of political or economic stakeholders on the national governments involved. This last attribute means that considerations such as domestic political pressures, which may otherwise make compromise impossible, can in some cases be removed as factors in the process of resolution.

[13] For example, East Timor, which only became an independent state on 20 May 2002.

The disadvantages of referring overlapping claims to third party determination may include the following:

- The cost and time involved in pursuing a result through these processes can be substantial. External resolution can take anywhere from four to eight years to reach a conclusion.
- The inherently adversarial nature of the process can taint the relations between the protagonists. The most likely outcome of external adjudication is an externally imposed boundary which, depending upon the location of petroleum resources, may result in a clear winner and loser.
- There is an inherent risk that one or other state will refuse to accept the decision and that the external decision therefore does not end the dispute. This can arise where one state takes the position that it will not accept the decision of the external adjudicator or where all of the issues in dispute are not referred for determination.
- It is not possible to directly enforce decisions of the ICJ or arbitral awards against a state. In order to give effect to these decisions or awards, further domestic legislation is often required.

Another consideration to be kept in mind is the fact that it is not always possible to refer disputes for resolution by the ICJ or other international tribunals. Part XV of UNCLOS provides for disputes between those countries which have agreed to be bound by UNCLOS (referred to in UNCLOS as "State Parties") to be settled by separate agreement, conciliation, arbitration and litigation. However, not all of these methods may be available. Article 287 allows a State Party to choose one or more of the ICJ, the ITLOS or certain arbitral tribunals as the means for settlement of disputes concerning the interpretation or application of UNCLOS. Under Art 298 of UNCLOS a State Party may also declare that it does not accept any of the compulsory procedures set out in s 2 of Pt XV (ie, a binding decision by the ICJ, the ITLOS or certain arbitral tribunals) with respect to specified categories of disputes.

Regional examples

There are numerous regional overlapping boundary disputes which cannot be referred to the ICJ or other international tribunal because one or other party does not accept the compulsory jurisdiction of the court in relation to maritime boundary issues and is not prepared to agree to refer the dispute for resolution by the court or other arbitral tribunal. In these circumstances it is not possible to refer the dispute to the ICJ or to an international tribunal.

A recent regional example of the ICJ being asked to determine an issue affecting the location of maritime boundaries involved Indonesia and Malaysia.[14] The parties held extensive bilateral negotiations throughout the 1990s with respect

[14] *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia v Malaysia) (Merits)* [2002] judgment of 17 December 2002.

to sovereignty over the islands of Pulau Ligitan and Pulau Sipidan, but were unsuccessful in resolving their dispute. In 1998 the two states submitted the dispute to the ICJ, which recently decided in favour of Malaysia in relation to the sovereignty of those islands.

While this decision by the ICJ may appear to have comprehensively resolved the dispute, in fact it gives rise to a number of further issues. The two states may have to revisit the question of where the maritime boundary between them should be located. This question was not put to the court. One possible outcome of this process may be that Indonesia will have to give up an area of continental shelf over which it has previously agreed a production-sharing contract. This could potentially lead to Indonesia's contractors seeking some form of compensation from Indonesia in respect of their forgone acreage. Alternatively, Malaysia may be prepared to award those contractors equivalent rights over the area on terms set by Malaysia. A further possibility is that this process may produce opportunities for other petroleum companies to now seek an award of rights by Malaysia over the area previously claimed by Indonesia.

A recent regional example of a country acting to exclude the possibility of third-party determination of overlapping maritime claims is Australia's withdrawal of its unreserved acceptance of the jurisdiction of the ICJ and ITLOS in respect of maritime boundary issues. In response to the increasing prospect of East Timor reopening the question of Australia's entitlement to the Timor Gap area, on 21 March 2002 Australia announced the revocation of its 1975 declaration accepting the compulsory jurisdiction of the ICJ and ITLOS over all disputes concerning the interpretation and application of UNCLOS and replaced it with a declaration, effective immediately, which excluded from the compulsory jurisdiction of the ICJ and from the compulsory procedures set out in s 2 of Pt XV of UNCLOS all disputes concerning maritime boundaries and the interpretation or application of Arts 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.[15]

Where it is not possible to negotiate a maritime boundary or to refer the dispute to the ICJ or other arbitral tribunal, then a negotiated provisional solution may be the only way forward.

Provisional Arrangements

As noted above, Art 83(3) of UNCLOS contemplates the agreement of provisional arrangements of a practical nature pending final boundary delimitation. These often take the form of joint development treaties. Clearly, in some cases joint development treaties are a useful means of circumventing an impasse in negotiations over a final maritime boundary, particularly where referral to a third party is not possible or not considered desirable. The principal characteristic of joint development regimes is that they are intended to provide a

[15] Declaration of 21 March 2002 by the Government of Australia under Arts 287 and 298 of UNCLOS.

basis for permitting exploitation of petroleum resources while deferring the determination of the final boundary between the two states and resolution of their respective entitlements to the area in question.

The main advantage of a joint development treaty, as a provisional measure pending final agreement on a delimitation, is that it permits exploitation of resources on a co-operative basis while there is a continuing impasse on an agreed maritime boundary. There are several subsidiary advantages which include the avoidance of political tension caused by the overlapping claims, the intangible benefits of co-operating towards an outcome which is to the states' ultimate mutual benefit and the economic benefits of earlier revenues from successful exploration and development of petroleum resources. The primary disadvantages of joint development are that, relative to a final boundary agreement, this solution is more complicated to administer as it requires the on-going agreement and co-operation of the two states in the administration of petroleum operations, and it results in a greater degree of sovereign risk for the petroleum companies investing in the joint development area relative to investment in undisputed areas. Effective joint development arrangements are complex and states must invest considerable time and effort in order to negotiate and administer these arrangements.

In considering whether or not joint development is an appropriate solution in a given situation there are a variety of factors to consider. These include questions which are largely of a political and practical nature. A key question at the most basic level is whether the two states concerned will be able to work together to administer the joint development area successfully over the life of any petroleum operations. Another key question is whether the states will be able to agree on the range of details which are required to be settled before the regime can be established and administered effectively. This is not a straightforward exercise, notwithstanding that there are now a number of working precedents, there remain problems with most joint development regimes.

Examples of issues which need to be considered and the processes required to be adopted in order to finalise a joint development treaty include the following. Generally, there is first an attempt by both states to justify under international law their maritime claims to the overlapping claims area. This process helps establish the legitimacy of the dispute and may lead to some form of adjustment of the overlapping claims area. Ordinarily, negotiation does not proceed to the next stage until each side is convinced that the other has a justifiable claim to the overlapping claims area.

When both sides are convinced of the legitimacy of the other's claim and that there is a genuine dispute, then they may proceed to formulate proposals with respect to the implementation of a joint development treaty. The issues which need to be agreed by each side before a joint development treaty can be successfully implemented include the following.

- *A definition of the geographic limits of the joint development area*: This usually follows from the legal grounds put forward by each party as justification for its

claim to the overlapping area. This joint development area is often not the entire overlapping claims area, but only that part over which the parties are prepared to accept some form of joint administration. Alternatively, in some cases the joint development area encompasses territory not previously claimed by one of the parties.

- *The political and administrative framework for the management and administration of petroleum operations and other activities within the joint development area*: For example, the states will need to determine the body that will be responsible for administering the joint development area and the operations that take place within it, and whether each state will have equal representation on that body or whether one state will have a disproportionate say in the administration of the joint development area.
- *The legal, fiscal and petroleum regimes to apply within the joint development area:* This is often complex and involves consideration of the existing legal, fiscal and petroleum regimes that apply within each country. It will also be necessary to address the basis for amending or otherwise dealing with changes that may be required to these regimes over the life of the joint development treaty. A key issue will include the basis on which the two states will share petroleum revenues between them, in particular whether it will be on a basis that reflects the relative merits of each country's claim to the joint development area. Ordinarily, it can take considerable time to agree upon the revenue split, as each percentage point of oil revenue can be worth tens of millions of dollars in revenue each year.
- *The taxation rules to apply to petroleum operations within the joint development area*: For example, should the taxation regime of one state or another apply (and, if so, how should the revenue be collected and split) or should a hybrid of both apply to operations within the joint development area?
- *The number of years that the joint development treaty should remain in force*: This period should be long enough to allow for the exhaustion of any petroleum resources located in the joint development area.
- *The basis for approval of downstream developments*: How will the location of any new downstream processing facilities for petroleum from the joint development area be determined? Will it require the approval of the administrative body responsible for the joint development area? Will petroleum produced in the joint development area be processed in one state or another or on a floating station located within the joint development area? Will any compensation be payable by one country to the other in the event that its downstream industry is not developed because petroleum is being processed elsewhere? This is a significant issue in the ongoing administration of many joint development regimes, again particularly so when one of the disputing states is a developing country or where there is a significant disparity between the level of development of those states.
- *The basis for awarding replacement contracts to petroleum contractors under the joint development treaty*: The mechanism for determining the rights of the

petroleum companies who are affected by the joint development treaty should be agreed in advance. For example, on what terms will existing concession holders be offered an opportunity to participate in the joint development area and how will the issue of the inconsistent rights granted to various petroleum companies in respect of any joint development area be addressed? Will petroleum contractors' entitlements reflect the revenue split between the two governments? Also relevant to these questions are the terms of pre-existing agreements between the governments and their respective petroleum contractors. This is often an area which can result in significant delays in the implementation of joint development arrangements.

Reaching agreement on a position with respect to many of the issues outlined above can take a considerable period of time. The precise terms agreed may have a significant impact on the relative benefits that each state achieves from petroleum operations that are conducted within the joint development area. Failure to agree on any of these matters may prevent petroleum operations taking place at all.

Regional examples

Experience shows that failure to agree these issues in advance can lead to delays and possible deadlock in the administration of petroleum operations. One example commonly used to illustrate this point is the experience of Thailand and Malaysia. On 21 February 1979 the governments of Thailand and Malaysia signed a Memorandum of Understanding designating a joint development area in the Gulf of Thailand and establishing a joint authority to administer it. It took them over 11 years to agree finally on all of the matters necessary to enable petroleum operations to commence. On 30 May 1990 they signed a second treaty setting out the basis of their further agreement on these issues.

A further issue illustrated by the Thailand and Malaysian experience is the question of dealing with pre-existing rights of petroleum companies. The question of how best to deal with these existing rights was an issue of considerable controversy, which delayed implementation of the regime. In the end, the Thai government purchased from Texas Pacific its concessions over part of the joint development area, as a means of facilitating a speedier conclusion.

The history of negotiation of the Timor Sea Treaty between Australia and East Timor illustrates the significance of the relative merits of each party's claims to the overlapping claims area in determining the revenue-sharing arrangements to apply to any joint development. While in 1991 Australia and Indonesia agreed a 50:50 sharing of revenues in Block A under the Timor Gap Treaty, the Timor Sea Treaty 2002 provides for a 90:10 sharing of revenues in favour of East Timor. This reflects in part developments in international law which arguably weakened Australia's claim to the area. It may also in part reflect the changing legitimacy of East Timor's administration and Australia's willingness to support its development.

A further issue that is illustrated by the Timor Sea Treaty is the importance of the location of any downstream industries that develop as a result of petroleum operations in a joint development area. This can be a very significant issue because the economic benefits of downstream developments can be as significant as the upstream activity. Ignoring this possibility, and focusing only on the upstream revenue-sharing arrangements, may skew the benefits of the overall development substantially in favour of one or other state. Controversy surrounded this issue in relation to the previous Timor Gap Treaty on a number of levels, both between the governments concerned and between contractors. In relation to the Bayu Undan development (within the Timor Sea area) these issues were partly addressed by agreement between East Timor and the contractor parties that the economics of the downstream projects would be structured so that greater levels of profit were generated in the upstream project, and hence subject to the 90:10 revenue-sharing arrangements in favour of East Timor, rather than being subject to taxation by Australia only.

This issue may also be a significant factor in any Cambodia-Thailand joint development regime and perhaps also in relation to Brunei and Malaysia's current talks in relation to their overlapping claims area.

CASE STUDIES

There are two examples of working regional joint development regimes. These are the Thai-Malaysia joint development regime and the Timor Sea Treaty between Australia and East Timor. There are two further joint development agreements which are in the process of being negotiated. Cambodia and Thailand signed a Memorandum of Understanding on 18 June 2001 which provides for the joint development of an area in the Gulf of Thailand and which established a joint committee for the drawing up of a joint development treaty. Negotiations on this Treaty are currently underway. Brunei and Malaysia have recently begun talks on their overlapping maritime claims and are exploring joint development as one possible means of resolving these competing claims.[16] Experience from three case studies is used to highlight some of the issues which face governments and petroleum companies in dealing with overlapping maritime claims.

Cambodia-Thailand

Cambodia and Thailand have maintained overlapping claims in the Gulf of Thailand since 1973. Their June 2001 Memorandum of Understanding provides that they will delimit a maritime boundary in the northern area of their overlapping claims and will draw up a joint development treaty covering the balance of the area of their overlapping claims. This Memorandum of Understanding was the

[16] Other examples which are now superseded or defunct are the Australia-Indonesia Timor Gap Treaty 1991 and the Japan-South Korean Agreement 1974.

culmination of periodic negotiations which began in 1994. Both sides are continuing to negotiate on their northern maritime boundary and on the terms for joint development of the balance area.

The overlapping claims of Cambodia and Thailand have resulted from two different interpretations of the basis on which each is entitled to make claims in the Gulf of Thailand. Cambodia's claimed upper lateral maritime boundary is based on its claimed historic rights and is in part supported by the Protocol to the 1907 Franco-Siam Treaty on frontiers and jurisdictions. The balance of Cambodia's claim is based on an equidistance line which takes into account Cambodia's and Thailand's mainland coasts and islands. Thailand's claim is based on a projection of the direction of the land boundary and then upon an equidistance line based on mainland coasts and large islands located close to those coasts only.

Both sides have licensed the overlapping claims area; Thailand in the early 1970s and Cambodia in 1997. The Thai concessions (Thai 1 terms) have been dormant on the basis of force majeure since the mid-1970s. The Cambodian concession agreements were structured as conditional petroleum agreements. They recognise the fact that the concession areas are the subject of an overlapping claim and define the process to be followed in the event that the overlapping claims are resolved in accordance with a number of alternative outcomes, while at the same time protecting the concession holders' entitlements on a pre-agreed basis. At the time the concession agreements were signed this approach was unique and it remains the most sophisticated effort by a government to tailor concession terms to the realities of contracting in an overlapping claims area.

There are two issues which will be of particular significance going forward. The first is the basis on which revenues will be shared between the two governments and the second is how the two governments will solve the issue of the overlapping and inconsistent concessions granted to petroleum companies in respect of the joint development area.

One observation on this process is the different role played by petroleum companies in the negotiation process. On the Thai side, the government has not involved their concession holders in the process of developing a joint development regime or addressing the question of pre-existing concession holder rights in the joint development area. In contrast, the Cambodian Government holds regular meetings with its petroleum companies during which they are provided with an opportunity to consult with the government and comment on the resolution process. This has meant that in the event that a joint development treaty is agreed, the process for moving from the current concession agreement structure on the Cambodian side will be easier for both oil companies and for governments than it may be on the Thai side.

A further observation on this process is the importance of the exercise during which each side demonstrated to the other the basis on which it justified its claims in the Gulf of Thailand. This process, which occurred periodically over a number of years, resulted in the carving out from the joint development area of an area in

which a final maritime boundary is to be agreed. While neither side was prepared to resort to third party determination of these issues, nevertheless, the process for justification of each side's claims in the area was both formal and legalistic.

Brunei-Malaysia

In September 1958, the British Government enacted two Orders-in-Council delimiting the maritime boundaries between the colony of North Borneo and Sarawak and Brunei out to a water depth of 100 fathoms (or 200 metres). This legislation was enacted at a time when Britain had sovereign rights over each of these territories and has been accepted as binding upon the successor states of Brunei and Malaysia.

The 1958 British Orders-in-Council were consistent with the law of the sea at that time as set out in Art 1 of the 1958 Geneva Convention on the Continental Shelf.

In 1979, Malaysia issued a map which depicted its territorial sea and continental shelf boundary with neighbouring states, which showed that Malaysia claimed the area outside the 1958 British Orders-in-Council beyond the 100 fathom mark. This was protested by Great Britain on behalf of Brunei.

Following the adoption of Art 76 of UNCLOS, states became entitled to claim a 200 nm exclusive economic zone. In 1993, Brunei proclaimed an exclusive economic zone which extended its claims out to a median line between Brunei and Vietnam. Brunei's claim extended the direction of the maritime boundaries delimited by the 1958 Orders-in-Council out to this median line. At this time, it was clear that there was an overlap between the claims of Brunei and Malaysia in respect of the area offshore Brunei beyond the 100 fathoms depth.

Last year, Brunei conducted a licensing round for deep-water acreage in the overlapping claims area. In the lead up to execution of production sharing contracts by Brunei with two consortia, Malaysia awarded and executed a production sharing contract with a different group of petroleum companies, but covering the same area. At present, one of the Brunei consortia has executed a production sharing contract; the other consortia has not, apparently waiting for the outcome of talks between the two governments to resolve the impasse.

Earlier this year, Malaysia and Brunei's concession holders commenced petroleum operations in the disputed area. Following a gun boat standoff, Brunei's concession holder suspended operations. Malaysia's concession holder subsequently agreed to also suspend operations. The two governments have now agreed that they will not authorise petroleum operations until they resolve their overlapping maritime claims.

One issue which will make resolution of these overlapping claims a matter of priority is the discovery of an oil field (the Kikeh field) in an area immediately east of the overlapping claims area. This field has been reported to have estimated

recoverable reserves of up to 700 million barrels (or 21% of Malaysia's current oil reserves) and is likely to extend into the overlapping area.[17]

Issues which may be of significance to the negotiations include the fact that the overlapping claims area results from an extension of Malaysia's claims to an area offshore Brunei. It may be that in the course of negotiations, Brunei will seek to extend its claim to take in a corresponding area offshore Malaysia. Another issue that is likely to be significant is the treatment of existing concession holders and whether one state or the other seeks to buy back the concessions that it has previously issued or whether existing concession holders' rights are preserved in some form.

It is premature to provide any firm observations on this example, as talks are only now commencing between the two governments. However, it seems likely that both sides are prepared to consider some form of joint development arrangement in respect of part at least of the overlapping area. It is interesting that Malaysia has recently resolved maritime boundary issues with neighbouring countries by referral of disputed issues to the ICJ. In particular, in relation to Indonesia it sought the termination of the sovereignty of Pulau Ligitan and Pulau Sipidan and is now reported to have agreed to refer its dispute with Singapore over Pedra Branca to the ICJ. It will be interesting to see whether, if discussions with Brunei become deadlocked for any reason, Malaysia is prepared to refer this dispute to the ICJ also.

Australia-East Timor

Australia and Indonesia reached agreement on the boundary separating the two countries' continental shelves in 1972.[18] The agreed boundary reflected principles of international law then existing which recognised that a coastal state had sovereign rights over the continental shelf as the natural prolongation of its land territory up to a depth of 200 metres or "to where the depth of the superjacent waters admits of the exploitation of the natural resources" of the area.[19] At this time, the territory of East Timor was under the administrative authority of Portugal. As no agreement on maritime boundaries could be reached with Portugal, a gap was created between the eastern and western terminal points defining the limits of the agreed boundaries between Australia and Indonesia.

In December 1975 Indonesia "occupied" East Timor (following the withdrawal of Portugal from East Timor and the subsequent civil war) and on 14 February 1979 Australia officially recognised Indonesia as the sovereign over East Timor. Renewed attempts by Indonesia and Australia to close the Timor Gap in the early

[17] S Jayasankaran and John McBeth, "Malaysia and Brunei – Oil and Water", *Far Eastern Economic Review*, p 17.

[18] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of 18 May 1971.

[19] *Convention on the Continental Shelf 1958*, Art 1. This Convention was ratified by Australia on 14 May 1963.

1980s failed due to Australia's continued insistence that it was entitled to the full extent of the Australian continental shelf to the Timor Trough[20] and Indonesia's insistence that simply joining the eastern and western terminal points of the 1972 Seabed Agreement was no longer appropriate as international law had developed since 1972 (as reflected in UNCLOS). Indonesia claimed that the equidistance principle should apply to seabed delimitation in the Timor Gap.

Since gaining independence, East Timor has also claimed that that the equidistance principle should apply to seabed delimitation in the Timor Gap on the basis that there is a shared continental shelf between Australia and East Timor and that it is entitled to make a 200 nautical mile claim over this continental shelf. However, Australia continues to insist that the Timor Trough breaks the continental shelf between the two countries thus creating two separate continental shelves such that there is no common area to delimit.

The history of negotiations over maritime boundaries in the Timor Sea since the early 1970s illustrates many of the legal and political issues which commonly arise where there are overlapping maritime claims. One issue is the fact that international law develops over time in response to changing state practices. Thus, the method for determining the maritime boundary between Australia and Indonesia in 1972 was no longer seen by Indonesia to reflect international law when, 10 years later, the countries attempted to close the Timor Gap. Differing views as to the effect of geological features in a disputed area, such as whether or not the Timor Trough constitutes a break in the continental shelf between Australia and East Timor, further complicates the process of analysing the legitimacy of each country's claims,[21] as does the fact that Art 76(1) of UNCLOS provides two methods of claiming the continental shelf.[22] The codification in UNCLOS of the right to claim a 200 nautical mile EEZ (which East Timor also claims)[23] has also created legal uncertainty because, arguably, UNCLOS does not adequately address the relationship between claims over the continental shelf and claims to an EEZ.[24]

[20] The Timor Trough is approximately 40 nautical miles from East Timor, 250-350 nautical miles from the closest part of Australia and up to 3,000 metres deep.

[21] For further discussion on whether or not the Timor Trough constitutes a break in the continental shelf, see Vaughan Lowe, Christopher Carleton and Christopher Ward, *Opinion in the Matter of East Timor's Maritime Boundaries*, 11 April 2002, http://www.gat.com/Timor_Site/lgop.html>at 23 July 2002.

[22] Article 76(1) of UNCLOS provides: The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental shelf, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental shelf does not extend up to that distance.

[23] *Maritime Zones Act* 2002 (East Timor).

[24] Article 56(3) of UNCLOS requires that the EEZ created by Art 56 with respect to the seabed and subsoil shall be exercised "in accordance with" the continental shelf regime under Pt VI which suggests that a state cannot claim EEZ rights in an area over which another State already exercises continental shelf rights. For further discussion on this issue, see Gillian Triggs and Dean Bialek, "The New *Timor Sea Treaty* and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap" (2002) 3 *Melbourne Journal of International Law* 322 at 354.

Differing views over how the relevant principles of international law should be applied can also be seen in the academic debates regarding where the boundaries between Indonesia and East Timor should be drawn and in particular, what weight should be given to certain islands in the waters between the two countries.[25] The existence and location of islands has been a relevant circumstance affecting delimitation in numerous overlapping maritime claims[26] since it was noted in the *Continental Shelf Case (France v United Kingdom)* that special circumstances exist where the use of an unqualified median line would distort the boundary and have a disproportionate effect.[27]

Some observations on the recent history of maritime negotiations between East Timor and Australia are that the agreement by Australia to a 90:10 revenue sharing arrangement in favour of East Timor is consistent with the view that Australia's claim to the Timor Sea area is substantially weaker under current principles of international law than before UNCLOS. Australia's withdrawal of its acceptance of the compulsory jurisdiction of the ICJ and of ITLOS further confirms this view. Nevertheless, the ratification of the Timor Sea Treaty and the development of the Bayu Undan project seem to be of significant practical benefit to East Timor and represent a result which demonstrates that in some situations achieving an early practical resolution of maritime boundary issues is to be preferred over the alternative of prolonged and non-productive disagreement over legal entitlements. A further observation is that the role played by the proponents of the Bayu Undan project in negotiating fiscal arrangements which mitigated East Timor's concern about losing the downstream development of the Bayu Undan project to Australia is a good example of the positive role that petroleum companies can play in assisting in the resolution of these issues.

IMPLICATIONS FOR PETROLEUM COMPANIES

The process of resolving overlapping maritime claims should be of significant interest to petroleum companies which operate in border areas. Where maritime boundaries have not been finally agreed, there is always the possibility of a dispute arising which will have a significant impact on the rights and interests of petroleum companies. Petroleum companies can usefully protect their interests by

[25] For discussion on the weight to be given to certain islands in the Indonesian archipelago, see Lowe, Carleton and Ward, above n 21, at 8; Gillian Triggs and Dean Bialek, "The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap" (2002) *Melbourne Journal of International Law* 322 at 344.

[26] For example, the Kerkennah Islands in the *Tunisia/Libya* case, Seal Island in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Merits)* [1984] ICJ Rep 246 (*Gulf of Maine* case) and the island of Alcatraz in Arbitral Tribunal for the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, *Award of 14 February* 1985, 25 ILM 252 (1986) (*Guinea/Guinea Bissau* case).

[27] UN RIAA, Vol XVIII, para 244.

being aware of the historical, political and legal issues which give rise to boundary disputes and which can affect their resolution. In many cases, governments are willing to receive submissions from, or consult with, interested petroleum companies in relation to the making and resolution of maritime claims. Indeed, the key issue in any maritime boundary dispute is whether the necessary political will on both sides exists in favour of a resolution. While this is usually a factor of historical relationships between the states concerned, domestic politics and international reputations, petroleum companies can play a constructive role in generating support for an agreement.

The different bases on which maritime claims can be resolved can have a substantial effect on the interests of petroleum companies. For instance, while to a government participant it may make little or no difference whether or not they recognise pre-existing concession terms on a proportionate basis, or whether they re-purchase concessions, these alternatives may make a very substantial difference to the economics of a given investment for a petroleum company. The likely timeframe for the resolution of a dispute, the location of likely hydrocarbon resources and the relative strengths and weaknesses of the states' claims to a given area, are also all factors which should be taken into account in determining a petroleum company's approach to a given boundary dispute.

In addition to questions of what role to play in relation to a given negotiation process, the alternative possible outcomes may give rise to different issues for petroleum companies. While, as outlined above, there are a number of ways in which overlapping maritime claims can be resolved, resolution by way of agreement on a final boundary or determination by the ICJ gives rise to relatively few issues for petroleum companies. Generally, the two states administer and regulate petroleum operations in accordance with their respective regulatory regimes in the areas to which they retain sovereignty. Sometimes questions will arise as to whether compensation is payable by a state to a petroleum company which loses its entitlement to conduct petroleum operations in an area which has been allocated to another state. These issues depend, among other things, upon the terms of the relevant states' legislation and the terms of the concession agreement or production sharing contract which has been issued to or agreed with the petroleum company.

Joint development gives rise to a range of issues for petroleum companies, including which fiscal regime will apply to petroleum operations, how the states will guarantee the continuation of that fiscal regime throughout the lifetime of the project, the effectiveness of the on-going administration of the joint development area and the economics of any investment.

In order to understand maritime boundary disputes and perhaps to influence the outcome of a given dispute, petroleum companies need to have access to expertise in a variety of areas including international law, hydrography and obviously the ability to assess hydrocarbon potential.

CONCLUSION

Oil companies investing in offshore areas faced with potential overlapping maritime claims should have an understanding of the international legal principles which govern the making of maritime claims and the resolution of overlapping claims. They should also be aware of the fundamental differences between investment in maritime areas administered by one state relative to investment in areas subject to joint development. This will ensure that they are able to make informed assessments of their present and likely future rights and entitlements.

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