

Transboundary oil and gas reservoirs and the Law of the Sea: the US–Mexico case

David Enríquez

Goodrich, Riquelme y Asociados, Mexico City;

Lecturer in International Law, Instituto Tecnológico Autónomo Mexico

denriquez@goodrichriquelme.com

The continental shelf and the coastal state's inherent rights

A number of international instruments relate to the US–Mexico maritime boundary, including bilateral treaties from 1978 and 2000 (see table). Yet the comprehensive rules governing the law of the sea are those of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This instrument is effectively the codification of customary international law of the sea, because of the large number of states which are party to it, as well as the number of judicial decisions that accept its binding authority on the international community.

Date	International instruments
29 April 1958	United Nations Convention on the Continental Shelf.
4 May 1978	Treaty on Delimitation of Maritime Boundaries between the United States and Mexico.
10 December 1982	United Nations Convention on the Law of the Sea.
9 June 2000	Treaty between the United States and Mexico on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles.

One of the most important features of this instrument is the set of rules governing the continental shelf, in part because its delimitation has been the subject of great debate by international courts. UNCLOS sets forth the principles applicable to the continental shelf, its definition and delimitation criteria, the rights of coastal states, the juridical conditions of waters and aerial space, as well as other states' rights and freedoms.

In accordance with UNCLOS, natural resources either found in the continental shelf or in the exclusive economic zone are fundamentally and expressly characterised as sovereign, exclusive, and belonging to the state in which they are physically located.

The term 'sovereignty' has been analysed by the International Court of Justice in a case concerning the North Sea continental shelf. In its ruling of 1969, the court established that 'coastal states exercise rights on their continental shelf, being a consequence of the sovereignty exercise in its territory and in view that the shelf is regarded as a natural prolongation of the territory itself'. The same court subsequently reaffirmed this ruling in the case concerning the Aegean Sea continental shelf.¹

Only the coastal state is entitled to exploit its natural resources. If the coastal state decides to refrain from said exploitation, no other state is entitled to do so. Otherwise, the coastal state's consent is absolutely necessary. The exclusive character of these resources was not only recognized by UNCLOS, but also by the ICJ.

Thus, for the Mexico-US case, pursuant to international law we may conclude that, even if the former has not intended to exploit its resources in areas falling outside the limits established in the 2000 treaty, US national agencies cannot explore and exploit transboundary reservoirs, either directly or via private corporations acting as lessees.

The concept of 'inherent rights' means that coastal states' rights exist *ipso facto* and *ab initio*, and that procedural or judicial mechanisms are not necessary to determine those rights.

This position on sovereignty, exclusivity and inherency relates just as clearly to the exclusive economic zone as it does to the continental shelf, as UNCLOS grants sovereign and other rights regarding the exploration and exploitation of said zone to coastal states. The obligation of a coastal state to refrain from appropriating its neighbours' energy resources relates therefore to both the continental shelf and the exclusive economic zone.

Now, studying UNCLOS in its dual character – as international treaty and codification of customary international law – is also relevant when considering the relation between Mexico and the US. The legal authority is based upon express obligations within international treaties, ratified by both parties, as well as by general practices, accepted as law and recognised by the international community, evidencing customary international law.

In accordance with the statute of the ICJ, the primary sources of international law are international treaties, international custom and the general principles of law. In particular, international treaties are those instruments intended to create binding obligations upon the parties. In this sense, even if UNCLOS could only be considered as an international instrument, it has been ratified by 157 states, has codified the international practices of states through centuries and has been declared as an international source in a great number of international treaties concerning sea issues.

However, while Mexico is a contracting party of UNCLOS, the US is not. Nevertheless, the provisions embodied in the convention have a customary character and are binding upon the international community, meaning that all states, party or not to the convention, are obliged to observe the fundamental provisions embodied in it. This is particularly important regarding the fundamental character of the sovereign, exclusive and inherent rights of the coastal states as to their natural resources in the continental shelf and the exclusive economic zone.

Under international law, customary law is twofold as it requires both an objective element reflected in the state practices, and a subjective element considered as the *opinio iuris sive necessitatis*. The US international practice is consistent in recognising UNCLOS as a binding instrument. A couple of illustrations may be sufficient to demonstrate this practice by the US.

First, as elaborated during the negotiations of the 2000 treaty, it was accepted by both states that the marine areas beyond the limits of the exclusive economic zone in the eastern region of the Gulf of Mexico fulfilled the requisites demanded by the 1958 Geneva Convention on the Continental Shelf and UNCLOS. It is worth noting that the provisions embodied in the Geneva Convention were fully adopted subsequently by UNCLOS.

Equally, the US was the head delegation on the negotiations of the SUA Instruments in the IMO in 2005, the preamble of both of which clearly recognise the relevance of UNCLOS and reaffirm its customary character.

So one can argue that, legally, the maritime frontier between the US and Mexico is not governed exclusively by the 1978 treaty on the delimitation on maritime boundaries or the 2000 treaty on the continental shelf limits, but also by fundamental rules of UNCLOS, since it has been recognised as customary international law. As argued above, special importance should be regarded to the character of the sovereign, exclusive and inherent rights of the coastal states as to their natural resources in the continental shelf and the exclusive economic zone.

What in case of lack of bilateral cooperation?

The Minerals Management Service (MMS) is a US federal agency in charge of the administration of the mineral resources of that country. The MMS operates in three specific areas of the Gulf of Mexico. The Alaminos Canyon is one of the most important areas within the eastern operation zone of the MMS.

Within this area, which falls outside the zone contemplated by the 2000 treaty, there are 14 blocks already active, and two more apparently not operating. Because of the geological structure of the Gulf of Mexico, it is not unreasonable to consider the likelihood of having transboundary reservoirs in more than one of those blocks. Of course, this presumption needs factual demonstration.

Should this possibility be confirmed, the US could not be allowed to continue exploiting those resources, as both states are bound by the customary provisions

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codified in UNCLOS, independently of the other international instruments relevant to their relationship.²

Accordingly, the US could not argue the so-called rule of capture, which is a property right over a natural resource in favour of its producer, regardless of the place in which the resources are located. The International Law of Treaties (the Vienna Convention) and UNCLOS prevent the US from invoking such a principle related to its domestic jurisdiction.³

The State Responsibility for International Wrongful Acts was codified in 2001 by the UN General Assembly, following decisions by the ICJ.⁴ Although not yet mandatory, this codification may be relevant for understanding the responsibility that the US might have before Mexico in case of unilateral exploitation of transboundary reservoirs. Of course, this would be based on international case law by the ICJ, regardless of the status of the 2001 codification. For instance, article 2 reads: 'There is an international wrongful act of a state when conduct consisting of an action or an omission: a) is attributable to the state under international law, b) constitutes a breach of an international obligation of that state.'

Damages arising out of an international wrongful act are also contemplated within the UN's codification. As per article 36, Mexico would not only be entitled to ascertain the international legal responsibility of the US before an international tribunal, but also to claim appropriate compensation regarding the oil and gas unilaterally exploited. It is worth remembering that the existence of the transboundary reservoirs and the effective exploration and exploitation are yet to be proven, however.

Potential steps towards cooperation? Learning from the experts

Joint development of transboundary reservoirs stands for the combination of cooperative actions between States, by which, they carry out joint exploration and exploitation of natural resources located in a limit zone.

The success of joint development depends upon the geopolitics, economics and juridical conditions within each region. There are more than 20 cases concerning transboundary reservoirs worldwide. The mechanisms implemented vary radically but can be categorised depending on their respective level of detail. Accordingly, the simplicity and complexity of each one is embodied in organisational elements, such as joint development conventions, supranational entities and multiple rules concerning environmental, tax, public procurement, employment and other fields.

When studying the various illustrations of cooperation worldwide, one finds from highly simplified cases, such as the Bahrain-Saudi Arabia one (1958), to very complex ones, as the Nigeria-Sao Tomé and Príncipe (2003) example. Based on some ideas proposed by Shane Kyriakou for determining the level of detail regarding the *status quo* on the subject, we see the merits for construing the table below:⁵

Range of complexity (simple to complex)	Conceptual degree of complexity	State practice
1	Unilateral development, absence of instruments governing the transboundary reservoir (absence of cooperation)	Kuwait – Saudi Arabia (approximately 1922) Malaysia – Vietnam (approximately 1922) (US – Mexico)
2	Individual development, jointly agreed, simple design	Bahrain – Saudi Arabia (1958)
3	Individual development, jointly agreed, complex design	Japan – South Korea (1974)
4	Simple joint development	Australia- East Timor (2003)
5	Complex joint development	Australia – Indonesia (1990)
6	Highly complex joint development	Nigeria – Sao Tomé & Príncipe (2001)

In the simplest cases – with effectively no cooperation involved – both States are considered to have property rights of half of the natural resources founded. However, since the simplicity of this mechanism does not provide for the execution of a formal agreement, the lack of legal certainty is considered as one of its main practical obstacles. Indeed, the lack of clear binding rules, leave chance, not only for unilateral appropriation by one of the States, but also for environmental disasters.

In medium complex cases, it is one of the States concerned that allows the exploration and exploitation. The other State is considered as an associate and is entitled to receive royalties depending upon the profits obtained by the operative State.

Finally, there are highly complex mechanisms, which effectively provide for the establishment of a Zone for Joint Development. The components of such a zone are usually the following: (i) the constitutive instruments; (ii) the establishment of competent agencies; (iii) the ancillary regulatory instruments; and (iv) the organisational structure for the development of the fields. This type of joint development mechanisms usually provides for bilateral structures with respect to the decision taking process: (i) a Designed Authority; (ii) a Joint Commission; and (iii) a Ministerial Council.

Final remarks

Public international law is the only source to solve controversies among states. Accordingly, even if the 2000 treaty does not include a restriction on unilateral exploitation of transboundary reservoirs in areas falling outside the limits established therein, customary law codified in UNCLOS must be considered when deciding any claim. In any event, and despite the merits –and procedural technicalities- of a potential claim before the

ICJ, there is an urgent need for adequate diplomatic cooperation to tackle such a sensitive issue between the US and Mexico.

Notes

- 1 North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands) ICJ Rep. 1969. Aegean Sea Continental Shelf (Greece v Turkey) ICJ Rep, 1978.
- 2 The debate on unitisation and cooperation has been duly analyzed, inter alia, by the following authors: (i) Ong, David, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law*, AJIL, num 4, vol 93, 771–804; (ii) Polkinghorne, Michael, *Unitisation and Redetermination:*

Right or Obligation, IBA Journal of Energy and Natural Resources Law, vol 25, no 3, August 2007, pp 303-323.

- 3 Some of the most representative cases of this rule of International Law are: (i) *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ Series A/B, number 44, 1932; (ii) *Advisory Opinion of the Greco-Bulgarian "Communities"*, PCIJ Series B, number 17, 1930; (iii) *Free Zones of Upper Savoy and the District of Gex (second phase)*, PCIJ, serie A, number 24, 1930; (iv) *Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep, 1949; and (v) *Elletronica Sicula Case (United States v Italy)*, ICJ Rep, 1989
- 4 Resolution 56/83, December 2001.
- 5 *Joint Development Workshop*, Freehills, presentation of 24 July 2008.