Joint Development as an Appropriate Legal Response to Overlapping Maritime Claims

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INTRODUCTION
There is much ado about the significance of natural resources, particularly hydrocarbons, perceived as vital to States for strategic, economic and environmental reasons. Consequently, inter-State disputes are inevitable where hydrocarbon resources are located in areas without clear boundary delimitations. Disputes can also occur as a result of the possibility of hydrocarbon resources straddling boundary lines due to its fugacious character.

Land boundaries are pretty much easily defined, with each State restricted to its territorial sovereignty. Maritime boundaries on the other hand are not always clearly defined. Although the nineteenth and early twentieth centuries provide some examples of bilateral treaties establishing maritime boundaries, it was after the 1930 Codification Conference in The Hague and the coming into force of the various Laws of the Sea that State practice on the subject became substantial.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) which supersedes the UNCLOS 1958 regulates the international maritime environment. The UNCLOS gives coastal States rights to maritime zones, which can extend to a distance of 200 nautical miles or more from the baselines. These zones are known to be rich in natural resources. While this extension of jurisdiction has led to an increase in offshore hydrocarbon activities, it has created the problem of overlapping maritime boundaries resulting from the proximity of some coastal States to each other.

The most prominent boundary disputes include the dispute in the East China involving China, Japan and Taiwan, in the South China concerning the Spratly Islands claimed by China, Taiwan, Vietnam, Malaysia, Brunei and the Philippines. There are also maritime disputes in the Gulf of Guinea and in the

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3 UNCLOS 1982, Article 311.
4 The Territorial Sea, Exclusive Economic Zone and the Continental Shelf.
6 On June 18, 2008 the Kyodo News Agency reported that China and Japan had announced that they had reached an agreement to jointly develop the gas fields in the disputed areas of the East China Sea. See “Profit over patriotism”, http://www.economist.com/world/asia/PrinterFriendly.cfm?story_d=11591458 [Accessed April 17, 2009]. See also Yusuf Mohammad, Fn. 6 above.
7 In relation to the dispute between China and Vietnam, the two countries have signed a delimitation agreement in respect of their maritime boundaries in the Gulf of Tonkin. This marks the first maritime boundary agreement that China has entered into with any of its neighbours.
8 Nigeria, Cameroon, Equatorial Guinea, Gabon and Sao Tome and Principe. Nigeria is in joint development with Sao Tome and Principe and is currently negotiating a JDA with Cameroon.
Middle American and Caribbean regions.\(^9\) Cooperation on maritime issues by States is therefore very important in contributing to the maintenance of peace, security and economic well-being for all the nations of the world.\(^{10}\)

This Newsletter aims to show the legal responses to maritime boundary disputes: negotiation and other adversarial dispute resolution processes. The Nigeria-Cameroon case study is utilized, as well as Nigeria – Sao Tome & Principe joint development. Conclusion is further drawn advocating the concept of Joint Development Agreements (JDA) as an innovative and viable option in managing boundary disputes where natural resources are involved.

**INTERNATIONAL LAW & THE USE OF THE SEA**

Every coastal State has jurisdiction over the oceans and seas, the limits of which are defined by international laws and conventions. These limits are as set out in the UNCLOS (the “Convention”) as maritime zones.\(^{11}\)

The UNCLOS III (1982) is the most comprehensive international regime regulating the rights and obligations of States in relation to the marine environment. Apart from the 127 States and other entities that have ratified the Convention, States that have signed but not ratified it are nevertheless obliged to refrain from acts which will defeat its object and purpose.\(^{12}\) It also prevents States from taking out reservations to any part of the Convention.\(^{13}\)

Following UNCLOS 1982 and the emergence of the new maritime zones, the importance of maritime delimitation in international law increased extensively. These zones are each discussed below.

- **Baselines**

As the starting point for the determination of a coastal State’s maritime territory, the baseline is the low water mark closest to the shores of the coastal State.\(^{14}\) Alternatively it may be an unlimited distance from permanently exposed land; provided that some portion of elevations exposed at low tide but covered at high tide (like mud flats) is within 12 nautical miles of permanently exposed land. Baselines can also connect Islands across a coast.

The baseline has the function of establishing from what points on the coast the outer limits of the different maritime zones are to be measured.\(^{15}\) The waters towards the landward territory of the baseline are the *internal waters*.\(^{16}\) While the baselines are the boundary between the internal waters and the territorial sea and other maritime zones, perhaps their more important relevance is their role in maritime boundary delimitation\(^{17}\) as the

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\(^{9}\) Example Nicaragua against Colombia and Honduras. See Yusuf Mohammad Fn. 6 above.


\(^{11}\) The zones are: the Baselines, Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf.


\(^{13}\) UNCLOS 1982, Article 309.

\(^{14}\) UNCLOS 1982, Article 5.


\(^{16}\) UNCLOS 1982, Article 8.

application of the equidistance rule of maritime delimitation logically begins from the baselines.

- **The Territorial Sea**
  The territorial sea is the marine territory making up 12 nautical miles from a coastal State’s baseline.\(^{18}\) The sovereignty of a coastal State extends beyond its land territory and internal waters (and in the case of an archipelagic State, its archipelagic waters) to the territorial sea, the air space over the territorial sea and also its sea bed and subsoil.\(^ {19}\) Other States do however have a right of innocent passage through the territorial sea of any coastal State.\(^ {20}\)

- **The Contiguous Zone**
  The contiguous zone is the area covering and not exceeding 24 nautical miles from the baseline from which the breadth of the territorial sea is measured.\(^ {21}\) The coastal State has control of this area in order to prevent and punish the infringement of its customs, fiscal, immigration or sanitary laws and regulations in this zone.\(^ {22}\)

- **The Exclusive Economic Zone (EEZ)**
  The EEZ is the area that stretches but does not extend beyond 200 nautical miles from the baseline.\(^ {23}\) Within its EEZ, a nation may among others, explore and exploit the natural resources (both living and inanimate) found both in the water and on the seabed, pass laws for the preservation and protection of the marine environment, and regulate fishing.\(^ {24}\)

  The world's EEZs are estimated to contain about 87% of all of the known and estimated hydrocarbon reserves (and almost all offshore mineral resources),\(^ {25}\) as well as almost 99% of the world's fisheries,\(^ {26}\) which should motivate nations to work together for the sustainability of the oceans and their vital and limited living resources.

- **The Continental Shelf (CS)**
  The CS is a geological formation that occurs naturally, by the gentle sloping of the undersea plain between the above water portion of a landmass and the deep ocean.\(^ {27}\) The CS and the EEZ are to some extent synonymous and coextensive with regards to the territory or marine reaches covered by both concepts (200 nautical miles).\(^ {28}\) However, UNCLOS includes provisions for nations to lay claim to a CS that extends up to 350 nautical miles from the baselines.\(^ {29}\)

  The CS is host to most of the world's oceanic plant, aquatic as well as animal life and plays a vital role in energy production, from offshore oil and gas

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\(^{18}\) UNCLOS 1982, Article 3.
\(^{19}\) UNCLOS 1982, Article 2; See also Fn.15 above.
\(^{20}\) UNCLOS 1982, Article 17.
\(^{21}\) UNCLOS 1982, Article 33(2).
\(^{22}\) UNCLOS 1982, Article 33.
\(^{23}\) UNCLOS 1982, Article 57.
\(^{24}\) UNCLOS 1982, Articles 56, 61 – 64. See also, Daniel J. Hollis & Tatjana Rosen, Fn.17 above.
\(^{25}\) Daniel J. Hollis & Tatjana Rosen, Fn.17 above.
\(^{27}\) Daniel J. Hollis & Tatjana Rosen Fn.17 above.
\(^{28}\) Igiehon Mark Osa, Present International Law on Delimitation of the Continental Shelf, IELTR, 2006, 208-215. See also, UNCLOS 1982, Article 76 (1).
\(^{29}\) UNCLOS 1982, Article 76 (5).
reserves to renewable energy resources.\textsuperscript{30} States have the sovereign right over natural resources in the CS as well as its living organisms.\textsuperscript{31}

A coastal State’s exercise of its rights over the continental shelf as conferred by international law does not affect the status of the superjacent waters of the continental shelf and of the airspace above it.\textsuperscript{32} Thus the waters of the continental shelf retain the character of “high seas” and the vessels of all other States retain the right to move freely therein and above it.\textsuperscript{33}

**Overlapping Boundary Issues**

The significance of maritime boundaries in current international relations has grown with the expansion of national limits of maritime jurisdiction in the last fifty or sixty years.\textsuperscript{34} Currently 180 boundaries have been agreed upon, which is far less than an estimated 400 boundaries that potentially exist, according to geographers.\textsuperscript{35}

Countries tend to relegate boundary-making in the absence of any incidents or natural resources.\textsuperscript{36} Conversely, when States have boundaries that are not clearly delineated, problems arise. Some of these include enforcement of national laws, nationality of people in the disputed area, navigation and occupational rights. Not only would immigration and customs laws be difficult to enforce in disputed territories, there will also be issues of jurisdiction for the punishment of offenders in these areas. Further, exercise of territorial jurisdiction would be dicey (positioning of military submarines for instance).\textsuperscript{37}

Where overlapping maritime claims exist, the resultant uncertainty over jurisdiction may well complicate ocean resource management\textsuperscript{38} and environmental protection measures. Sustainable management of such resources can be severely hampered through, at the very least, uncoordinated policies and, at the more severe end of the spectrum, potentially destructive and unsustainable competition for access to the resources in question.\textsuperscript{39} In addition, oil and gas resources have a migratory nature, making it possible to develop oil deposits “that extend to both sides of the boundary of a continental shelf” from one side of “the


\textsuperscript{31}However, any extension beyond 200nautical miles must be done within 10 years of UNCLOS coming into force for that particular state. See UNCLOS 1982, Annex II, Article 4.

\textsuperscript{32}Igiehon Mark Osa, See Fn. 28 above.

\textsuperscript{33}Igiehon Mark Osa. See Fn. 28 above.

\textsuperscript{34}Anderson David: “Methods of Resolving Maritime Boundary Disputes”. Introductory Paper; Chatham House International Law Discussion Group, 2006, 1.

\textsuperscript{35}Anderson David, see Fn. 34 above.

\textsuperscript{36}Anderson David, see Fn. 34 above.

\textsuperscript{37}An example of this is the citing of the Nigerian Eastern Naval Command in the disputed area of bakassi. The question then is what happens to the command in light of the ICJ decision ceding the region to Cameroun.


\textsuperscript{39}Clive Schofield, see Fn. 38 above.
boundary.”  This can escalate to open conflict.

In effect, bilateral relations between States may easily be affected, subsequently resulting in a breach in international peace and security. Such disputes may also lead to open violence, and also delayed economic development in overlapping maritime areas. In addition, trespassing on a State’s claims could have serious consequences of fines, arrests, ship confiscation, prison, loss of limb or loss of life.

These issues which arise in overlapping territorial areas are rendered immaterial by demarcating the boundaries. In the alternative, these issues can be more efficiently managed by mutual agreement between the States or by State parties choosing to utilize other dispute resolution mechanisms.

Methods of Resolving Boundary Dispute

The resolution of maritime boundary disputes may be classified into two broad ways.

- **Negotiation with a view to executing Boundary Agreements or Treaties:** This may take a considerably long time, invariably halting the exploitation of the disputed areas. For example, it took Russia and Norway 40 years to negotiate and agree on a Boundary Treaty. Negotiation could also lead to innovations such as the JDA which would be explained in more detail below.

- **Adversarial dispute resolution mechanisms:** These include litigation, arbitration, and mediation, through international bodies such as the International Court of Justice (ICJ) and the Permanent Court of Arbitration, to demarcate the boundaries in line with UNCLOS 1982 and other international law principles.

These methods impose protracted wait on the parties for which there is no guarantee that the outcome would be favourable and acceptable to both parties.

**Nigeria v. Cameroon**

Nigeria and Cameroon have had an age long territorial dispute (over Bakassi and Lake Chad) almost culminating in a war in 1981. The dispute was however referred to the International Court of Justice (“ICJ”) by Cameroon in 1994 in what turned out to be an extremely complex litigation requiring the review of diplomatic exchanges dating back over a hundred years. The ICJ delivered its judgment in 2002 ceding the oil rich Bakassi to Cameroon.

Nigeria initially did not accept this decision. However the UN intervened as mediator and chaired a tripartite summit with the two

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40 North Sea Continental Shelf Cases, ICJ Reports (1969) 3, at 51, para. 97.
44 See UNCLOS 1982, Part XV, Articles 279 – 299 for dispute resolution mechanisms.
countries which established a commission to facilitate the peaceful implementation of the ICJ’s judgment.

Further to the foregoing, Nigeria signed an agreement with Cameroon in 2010 to jointly develop several hydrocarbon fields located along their maritime boundary. A complex land and maritime legal battle at the ICJ could have been averted by employing other appropriate dispute resolution mechanisms, which would have seen both countries with better diplomatic relations as well as mutually benefitting from the resources in the overlapping boundary.

Therefore, where there are natural resources to be tapped and the States have no desire to wait for boundary delimitation in order to exploit these resources, a JDA becomes a more commercially expedient option.

THE CONCEPT OF JOINT DEVELOPMENT

Joint development is a procedure under which boundary disputes are set aside, without prejudice to the validity of the conflicting claims, and the interested States agree, instead, to jointly exploit, explore, and produce any hydrocarbons found in the area subject to overlapping claims.

JDAs differ slightly from Unitization Agreements which become apt only where maritime boundaries are clearly defined with the hydrocarbon deposits straddling the territory of two or more neighbouring States. However, Unitization Agreements are not within the purview of the newsletter, as the focus is on JDA and its relevance to States without clearly defined boundaries.

JDAs derive their legal validity from the UNCLOS which encourages parties to make “provisional arrangement of a practical nature” during the transitional period so as not to hamper the reaching of a final agreement on delimitation. The form of this “provisional arrangements” is not indicated in the UNCLOS, hence, the parties are at liberty to choose any mutually acceptable form of arrangement in accordance with principles of international law on peace and cooperation.

The ICJ provides an additional basis for joint development of resources in JDZs in the North Sea Continental Shelf cases stating:

“if...the delimitation leaves to the Parties areas that overlap, there are to be divided between them in agreed proportions or failing agreement, equally, unless they decide on a regime of joint jurisdiction, use, or exploitation for the zone of overlap or any part of them.”

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48 UNCLOS 1982, Articles 74 and 83, paragraph 3.
Furthermore, the United Nations General Assembly Resolution considers it necessary to ensure effective cooperation between countries through the establishment of adequate international standards for the conservation and the harmonious exploitation of natural resources common to two or more States. The concept was also endorsed by an Arbitral Tribunal in Eritrea vs. Yemen, and by the Arbitral Tribunal in Guyana vs. Suriname, adding that the parties also had an obligation to negotiate in good faith.

JDAs have gradually become a part of international commercial practice in relation to both disputed and undisputed areas. In practice, the creation of a JDA constitutes an effective provisional arrangement permitting countries to overcome territorial disputes while simultaneously facilitating the exploitation of natural resources in a transitional period. In the context of preventing any prejudicial exploitation and avoiding any waste by non-utilisation of natural resources, the application of a joint development regime for all or a portion of an overlapping area constitutes an attractive and agreeable measure pending a final delimitation.

JDAs are of three types.

- The state parties may decide that one State manage the development of the hydrocarbons in the disputed area on behalf of both parties. The managing State subsequently pays an agreed proportion of the net revenue to the other State party.
- Under the second model, a system of compulsory joint ventures between the States and their national (or nominated) oil companies is established.
- The third model involves the establishment of a joint authority or commission with legal personality and the mandate to manage the JDZ on behalf of the State parties.

Features of JDAs
A model JDA shall as a matter of importance address issues such as: operatorship and the rules for selecting contractors, financial provisions/tax regime, management structure of the JDZ, net revenue sharing formula, as well as applicable law and dispute resolution mechanism. The JDA should also define

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51 The Eritrea-Yemen Arbitration, Arbitral Tribunal Award of December 17, 1999 which is reproduced at (2001) 40 I.L.M. 983. It can also be accessed at http://www.pca-cpa.org/uploadfiles/EYPhaseII.PDF[Accessed April 17, 2009].
54 Nguyen Hong Thao, See Fn.53 above at p.85.
55 Nguyen Hong Thao, See Fn. 53 above at p.85.
56 This method was chosen in the Bahrain-Saudi Agreement. See Ong David, Joint Development of Common Offshore Oil and Gas Deposits: Mere State Practice or customary International Law. 1999 American Journal of International Law, 771 at 788.
57 Example is the Japan-South Korea Agreement. See Ong David Fn. 56 above at 789.
58 See Ong David Fn.56 above at 791. An example is Nigeria-Sao Tome and Principe.
the extent of the JDZ and a “Without Prejudice” clause showing that the arrangement is provisional pending a final delimitation of the boundaries. For a JDA to be successful, the parties must have a good degree of cooperation and good relationship between them, in addition to a willingness to negotiate in good faith.

**NIGERIA AND SAO TOMÉ & PRINCIPE**

In addition to Nigeria – Sao Tome & Principe (ST&P), a number of other countries have utilized JDAs in exploiting natural resources in disputing areas. Some of these include:

- Bahrain – Saudi Arabia (1958)
- Iran – Sharjah (1971)
- Japan – South Korea (1974)
- Argentina – United Kingdom (1995)

Nigeria and ST&P attempted negotiations with a view to delimiting overlapping boundaries in 1999, failing which a JDZ was established in 2000 with the consent and authorization of the Heads of State of both countries. After a series of negotiation, the JD Treaty was signed on February 2001, ratified by the National Assembly of both countries and deposited at the United Nations.

The treaty, which would last for a period of 45 years with a review after the first 30 years of its execution, describes the JDZ by coordinates and further provides for a 60 – 40 split of resources in the JDZ in favour of Nigeria. The JDZ is managed by a Joint Development Authority which reports to a Joint Ministerial Council (“JMC”). The JMC has responsibility for all matters relating to the exploration and exploitation of resources in the JDZ, and such other functions as the state parties may entrust to it. The JDZ blocks are currently at the exploration phase.

**CONCLUSION AND RECOMENDATION**

Disputes linger as long as there are unresolved boundaries. Whether State parties choose to negotiate boundaries or settle before the ICJ, the process is time-consuming. Maritime delimitation could assume very complex ramifications. Casualties may occur, diplomatic relations strained, and economic activities stunted.

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61 The Nigeria-ST&P Joint Development Authority website; [http://n-stpjda.com](http://n-stpjda.com)

62 For example the Cameroon-Nigeria case was referred to the ICJ in 1994 and judgment was delivered eight years later, which judgment was even unacceptable to the parties. Also, Russia and Norway agreed on boundary delimitation in 2010 after forty years of negotiation. See Parts III and IV of this paper.
because investors are reluctant to invest in high risk areas.

The past five decades have witnessed significant steps taken towards maritime cooperation in relation to areas of overlapping claims to maritime jurisdiction.\(^63\) Besides joint development, the other forms of provisional arrangements pending delimitation are not based upon joint zones, but upon provisional lines or upon the de-facto boundaries.\(^64\) However, maritime JDZs have emerged as an important means to overcome deadlock in relation to maritime jurisdictional claims.\(^65\) The increasing number of JDAs and their geographical diversity emphasize its practicability and the preference it has acquired all over the world.\(^66\)

Establishing a JDZ and executing a JDA is not a panacea for resolving maritime disputes.\(^67\) However, it takes the pressure of drawing boundary lines off the parties who may be satisfied by a guaranteed share in the resources; instead of delimiting the boundaries and discovering that the resources are on “the wrong side” of the boundary. It took eight years for the ICJ to finally delimit the Cameroon-Nigeria boundary and hand over the oil rich Bakassi Peninsula to Cameroon. A 50-50 JDA over the disputed area would have benefitted Nigeria strategically and economically compared to the eight year power tussle at the ICJ. The ST&P JDA hence is an evidence of a lesson well learnt in this regard.

In almost all cases, once the management of the natural resources is taken care of, the bone of contention in overlapping boundaries disappears, making delimitation an easier task. By saving time and cost of litigation, as well as ensuring that resources are exploited in JDZs to the mutual benefit of the parties, a win-win result is achieved. Because JDAs can subsist for years, it can possibly outlast the need for States to subsequently delimit boundaries.\(^68\)

It must be mentioned that JDAs are not permanent solutions to maritime disputes, and do not guarantee cooperation among neighbouring States. The conclusion of any joint development arrangement, in the absence of the appropriate level of consent between the parties, is merely redrafting the problem and possibly complicating it further.\(^69\) However, the economic importance of hydrocarbon resources and the global hustle for energy security is a fantastic motivation for States to cooperate in JDZs as they are currently doing in the Arctic Region. By taking care of the


\(^{65}\) Clive Schofield, see Fn. 63 above at p.4.


\(^{68}\) Nguyen Hong Thao, Joint Development in the Gulf of Thailand, [http://www.dur.ac.uk/resources/ibru/publications/full/bsb7-3_thao.pdf](http://www.dur.ac.uk/resources/ibru/publications/full/bsb7-3_thao.pdf), at p. 86.

energy resources which instigate State parties into pushing for maximum claims in boundary disputes, a JDA makes delimitation a much easier task, and hence is an effective legal response to managing overlapping maritime claims.
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