

# Energy and International Boundaries

 **TIM MARTIN**

Originally Published in:  
Research Handbook on International Energy Law  
Edward Elgar (2014)

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Tim Martin

The energy sector, in particular the oil & gas business, has a long history of dealing with international boundaries and the disputes that sometimes arise from them. This happens when oil and gas fields extend over international borders. Geology pays no attention to political boundaries. However, international oil companies (IOCs) have to pursue that geology wherever it may take them, including over and through boundaries that are placed in their path.

The setting of boundaries and any disputes related to those boundaries essentially involve only governments since only they are able to claim sovereign title and only they can resolve boundaries with their neighboring states. However, IOCs get indirectly involved in these disputes when they are granted concessions that straddle disputed boundary lines. Most of those boundary disputes occur in maritime waters.

The number of boundary disputes has increased as the industry has moved into deeper waters and further offshore with improving technology. There are certainly a large number of boundary disputes remaining that will take many years to resolve.

It is difficult to provide definitive figures for the number of maritime boundaries around the world. ... the International Boundaries Research Unit has counted 430 potential maritime boundaries around the world.... Of the 430 potential boundaries, 210 have one or more agreements addressing them.... What can be noted with confidence is that over half of the world's potential maritime boundaries are yet to be agreed in any shape or form. At the current average rate of just over five agreements per year, it will take until [the year] 2051 ... for all of the world's maritime boundaries to be at least partly agreed.<sup>1</sup>

The primary source of international law for determining and resolving maritime boundary disputes amongst sovereign states is the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>2</sup> Under that treaty, sovereign states can claim rights over the resources of the sea up to 200 nautical miles from their coasts and potentially further offshore for their seabeds. That was not always the case. Until the late nineteenth century, a state's offshore jurisdiction was limited to a narrow band of three nautical miles of coastal waters determined by the distance that a cannon ball fired from the shore could reach. As a result of claims by a number of nations and a series of international treaties (including the 1958 Geneva Convention on the Continental Shelf)

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<sup>1</sup> Derek Smith and Martin Pratt, *How to Deal with Maritime Boundary Uncertainty in Oil and Gas Exploration and Production Areas*, at 16-17. (AIPN, 2007) available at: [www.aipn.org](http://www.aipn.org)

<sup>2</sup> The UNCLOS treaty is available at:  
[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm).

over the last half century, that distance was extended until it was codified in UNCLOS, which amongst other things, provides an overall international legal framework for the world's seas. UNCLOS addresses a number of maritime issues; including navigation, marine scientific research, the use of living and non-living resources in the oceans, the protection and preservation of the marine environment (including the decommissioning of offshore facilities), and the settlement of ocean-related disputes (including boundary disputes). There are presently 164 states that have ratified UNCLOS.<sup>3</sup> Its provisions are now widely considered to be customary international law. Some of those provisions are intentionally vague in nature as a result of the compromises necessary to negotiate and ratify such a treaty. Overall, however, the law relating to the seas and the establishment of maritime boundaries has advanced with the ratification of UNCLOS.

## **1. Maritime boundary zones**

There are several zones that are considered in determining a state's sovereignty over the area that extends beyond its coast.

### **1.1 Territorial sea**

The first zone of sovereignty is the territorial sea. It has replaced the historical three mile limit with a zone extending 12 nautical miles, measured from the low-water line or other baselines provided under UNCLOS. It covers the sea, in addition to the seabed, subsoil and the air space above. The vast majority of coastal states adhere to this 12 mile limit. However, a few states claim territorial seas narrower than 12 nautical miles and a few claim areas wider than that distance.

A state's sovereignty over its territorial sea, which would include natural resources, is similar to its sovereignty over its land territory (i.e., it has absolute sovereignty over the territory), with one exception. Article 17 of UNCLOS provides that all ships, regardless of their nationality, have the right of 'innocent passage.' That means that if a ship does not threaten 'the peace, good order or security of the coastal state,' it can pass through those waters.

### **1.2 Continental shelf**

The second zone of sovereignty is the continental shelf. Article 76 of UNCLOS defines the continental shelf as 'the sea-bed 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 margin.' This can be one of two lines: (a) a line connecting points at which the thickness of sedimentary rocks is at least 1% of the shortest distance from the point to the foot of the continental slope, or (b) a line connecting points located no more than 60 nautical miles from the foot of the continental slope. This may

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<sup>3</sup> The one notable exception is the United States. Numerous U.S. administrations, both Republican and Democrat, have attempted unsuccessfully to get the U.S. Senate to ratify the treaty.

not exceed the more seaward of (a) a line 350 nautical miles from the baseline, or (b) a line 100 nautical miles beyond the 2,500 meter isobath. At a minimum, UNCLOS gives all coastal states the rights over the natural resources of the seabed and subsoil extending 200 nautical miles from their baselines. Sovereign states that are signatories to UNCLOS and that claim continental shelves that extend more than 200 nautical miles from their baselines must define the outer limits of the shelf and submit them for approval to the United Nations Commission on the Limits of the Continental Shelf (CLCS). This is an ongoing process and has not been fully resolved for all coastal states as of the date of this publication.

### 1.3 Exclusive economic zone

The third maritime zone of sovereignty that is relevant to IOCs is the exclusive economic zone (EEZ). This concept appeared for the first time in UNCLOS. It extends from the outer limit of the territorial sea to a maximum distance of 200 nautical miles from the baseline. A sovereign state under Article 56 of UNCLOS exercises the following rights within its EEZ:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
  - (i) the establishment and use of artificial islands, installations and structures;
  - (ii) marine scientific research;
  - (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.

More than 120 states have established EEZs. The vast majority of EEZ and continental shelf boundaries overlap. As a result, the distinction between the two zones is usually minimal.

### 1.4 Contiguous zone

There is one other maritime zone to mention for the sake of completeness, the contiguous zone. It has no practical impact on how the energy sector deals with boundaries. It is the zone adjacent to the territorial sea that a state can exercise control to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.<sup>4</sup> The outer limit of the contiguous zone cannot extend more than 24 nautical miles from a coastal

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<sup>4</sup> UNCLOS Article 33.

state's baseline. Since the contiguous zone overlaps the EEZ, it does not arise as a factor in boundary disputes or accessing natural resources in maritime zones.

## 2. Boundary determinants

There are a number of factors that determine a maritime boundary.

### 2.1 Baselines

Maritime zones are measured from a baseline. That is usually the low-water line along the coast as marked on large-scale charts officially recognized by a coastal state.<sup>5</sup> Where the coastline is deeply indented, or if there is a fringe of islands along the coast, or the coastline is highly unstable, coastal states may use straight baselines by joining appropriate points on the low-water line.<sup>6</sup> Such baselines may not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.<sup>7</sup>

UNCLOS does not define what is meant by terms such as 'deeply indented', 'fringed with islands', or the 'general direction' of the coast. As a result, a number of countries have pushed the boundaries of their territorial sea many nautical miles seaward of where it should be if it was measured from the low-water line. Adjacent states can do little but object, until they find themselves in a boundary dispute. When that has happened, tribunals have mostly ignored straight baselines in determining a maritime boundary.<sup>8</sup> As a result, boundary claims based upon aggressive straight baselines tend to complicate boundary negotiations and hinder boundary settlements.

### 2.2 Islands

Article 121(1) of UNCLOS defines an island as a 'naturally formed area of land, surrounded by water, which is above water at high tide.' This would exclude reefs, low-tide elevations, artificial islands and man-made structures such as oil & gas platforms. Islands are entitled to the same kind of maritime zones as the mainland of a coastal state. However, 'rocks which cannot sustain human habitation or economic life of their own' are not entitled to a continental shelf or an exclusive economic zone.<sup>9</sup> UNCLOS does not provide guidance on what factors to consider in determining whether an island (or a rock) can sustain human habitation or economic life.

This provision of UNCLOS has been the basis of more disputes between states than any other article. Since an island that can sustain human habitation or economic life on its

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<sup>5</sup> UNCLOS Article 5.

<sup>6</sup> UNCLOS Article 7(1) and 7(2).

<sup>7</sup> UNCLOS Article 7(4).

<sup>8</sup> Smith and Pratt, *supra* note 1 at 8.

<sup>9</sup> UNCLOS Article 121(3).

own can significantly increase the size of a continental shelf or EEZ, disputing states invariably claim that they have an island and not a rock in the ocean, and go to great lengths to make them appear habitable.<sup>10</sup>

However, islands are not always given the same weight as mainland coastlines by tribunals in determining maritime boundaries.<sup>11</sup> Small or remote islands are often given reduced weight or ignored in setting a boundary. Tribunals have not been consistent in how they have factored islands into their determination of a boundary compared to some negotiated settlements.<sup>12</sup> As a result, the existence of islands tends to also complicate boundary negotiations and any ultimate resolution.

### **3. Maritime boundary delimitation**

UNCLOS provides succinct guidance on maritime boundary delimitation for the various maritime zones when coastal states have overlapping claims.

#### **3.1 Territorial sea boundaries**

The delimitation of boundaries for overlapping territorial seas is governed by Article 15 of UNCLOS which states that, unless the states agree otherwise or there exists 'historic title or other special circumstances' in the area to be delimited, neither state is entitled to extend its territorial sea beyond the median line. The median line, also called the equidistance line, is the line on which every point 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.

#### **3.2 Continental shelf and EEZ boundaries**

UNCLOS treats continental shelf and EEZ boundaries in a similar manner. Articles 74(1) (for an EEZ) and 83(1) (for a continental shelf) both state that:

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<sup>10</sup> An example is Japan's efforts to make a small outcrop of rocks called Okinotorishima habitable to which China and South Korea have protested. The Japanese essentially poured large amounts of reinforced concrete around some small rocks and then placed water breakers around the perimeter. There are other examples in the South China Sea, such as Vietnam's occupation of Spratly Island and the Philippine's occupation of Thitu Island, both of which have been protested by competing countries' claims. One of the few cases where a country has rescinded such a claim is the United Kingdom who stopped claiming a fishery zone around the tiny North Atlantic 'island' of Rockall when it acceded to UNCLOS in 1997.

<sup>11</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Judgment, paragraph 64 where the International Court of Justice stated that "the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain islets, rocks and minor coastal projections."

<sup>12</sup> As an example, the large Swedish island of Gotland in the Baltic Sea, received only 'three-quarters effect' for the boundary agreed between Sweden and the USSR in 1988; whereas, many small islands have been given full weight when islands of a similar size and situation relative to the mainland are located on both sides of the boundary.

The delimitation of the exclusive economic zone (or 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.

### 3.3 Equitable solution

UNCLOS does not explain what an 'equitable solution' is. States have therefore relied upon decisions from the International Court of Justice (ICJ) and *ad hoc* arbitral tribunals to determine what is an equitable division of maritime space. The decisions have not been consistent. However, recent tribunals have begun to follow a similar process in determining an equitable solution: first they establish the median line between the two coasts, and then they consider whether there are any circumstances which would justify a departure from that median line.<sup>13</sup> It is now clear that the ICJ and most tribunals will expect disputing states to justify why an equitable solution should depart from the median line. Those justifications would primarily consist of coastal geography; in particular the length and configuration of the coastlines, and the location and size of islands.

A principle that is often cited by tribunals is from the North Sea Continental Shelf case where the ICJ stated that an equitable solution required 'a reasonable degree of proportionality...between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline.'<sup>14</sup> In general, this principle of proportionality means that coastlines of similar length should result in similar areas of continental shelf being set between adjacent coastal states. If one coastline is significantly longer than another, it should then result in a comparatively larger continental shelf for the state with the longer coastline. However, tribunals in practice have not strictly applied proportionality to determine boundaries and have allowed themselves flexibility to consider other factors. The result is that the setting of boundaries has become more of an art than a science.

## 4. Natural resources in maritime zones

The ownership and control of natural resources within their maritime zones is of critical importance to coastal states.

### 4.1 Sovereign rights over natural resources

Coastal states have full rights over the natural resources under the seabed of their territorial seas, continental shelves and EEZs. Only coastal states or entities that have agreements with those coastal states can develop and produce the natural resources

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<sup>13</sup> Smith and Pratt, *supra* note 1 at 10.

<sup>14</sup> North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment, 1969, paragraph 98.

within those maritime zones. That includes jurisdiction over the infrastructure used to develop those resources within those zones, except for some unique provisions for pipelines.

#### 4.2 Pipelines

UNCLOS treats pipelines differently in territorial seas as opposed to those located within the continental shelf or EEZ. Coastal states have complete jurisdiction over pipelines within their territorial sea. That is not the case for pipelines on the continental shelf or within an EEZ. Article 79 of UNCLOS states that:

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.
2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.
3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.
4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.
5. When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

Article 79 of UNCLOS creates competing rights between a state that wants to lay a pipeline within another coastal state's continental shelf or EEZ and that coastal state. There are presently no published decisions on what state would prevail under such circumstances. Instead, sovereign states have negotiated agreements to allow such pipelines to transit.

#### 4.3 Offshore oil & gas activity

Offshore oil & gas activity by itself does not determine where and how a maritime boundary is resolved in a dispute. The International Court of Justice has stated that it is only relevant when it is based on an express or tacit agreement between the governments involved:

Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered

as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account.<sup>15</sup>

Express agreement between states is not only relatively easy to confirm, but also probably eliminates the possibility of a dispute between those states. However, tacit agreement is another matter. It is not defined under UNCLOS nor definitively described in the case law. It will depend on the facts. As a result, disputing states will engage in a number of actions to establish that there is no tacit agreement on their part to oil & gas activity in disputed waters licensed by an adjacent state. That includes formal political objections in fora such as the UN, directly against the offending state and against IOCs active in disputed waters. This has sometimes extended to threatened military action and the sudden appearance of gunboats near offshore facilities.<sup>16</sup>

## 5. Joint development zone

UNCLOS mentions “provisional arrangements of a practical nature” between sovereign states to resolve boundary disputes absent a permanent setting of boundaries; in other words, a Joint Development Zone (JDZ). Joint development zones have taken a variety of forms but they are usually zones in which two states agree to share resource revenues for a specified period of time, typically 30 to 50 years. There are more than 20 JDZs around the world, most of them offshore. However, only a few of the JDZs that have been established have resulted in oil and gas production.

Establishing a JDZ can be a complex task, both practically and politically. Even when they are established, they are sometimes not successful because the parties are not able to cooperate on an ongoing basis and there is a high level of administrative complexity involved in operating a JDZ. They should therefore not be taken as a panacea for boundary disputes that appear unsolvable.<sup>17</sup>

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<sup>15</sup> Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) Judgment, ¶ 304.

<sup>16</sup> Texaco was awarded an offshore oil & gas concession by Malta, which it attempted to drill 68 nautical miles southeast of Malta in 1980. Texaco was forced to stop operations after being threatened by a Libyan gunboat. Both Malta and Libya claimed economic rights to the area. The matter was referred to the International Court of Justice in 1982. The court's 1985 ruling in *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Judgment dealt only with the delineation of a small part of the contested territory. A more recent example is the maritime boundary dispute between Suriname and Guyana. The Canadian company CGX was awarded an offshore concession by Guyana. It started drilling its first exploratory well and on June 2, 2000, Suriname gunboats forced its oil rig to leave the site.

<sup>17</sup> An interesting example can be found in the Eastern Mediterranean. The US Geological Survey reckons that there could be 120 trillion cubic feet of technically recoverable gas in the Levant basin, which runs along the shores of Israel, Lebanon, Syria and Cyprus. There has been no discussion of JDZs simply because the political differences are so stark. The result has been very little development of this potential resource, even though the technology is available and the economics is attractive.

## 6. Dispute methods and fora

There are a number of effective dispute resolution methods that can be used to resolve boundary disputes between sovereign states. On the non-binding side they include: negotiation, mediation and conciliation. On the binding side they include the following fora: the International Court of Justice, the International Tribunal for the Law of the Sea, and finally *ad hoc* arbitration managed by the countries themselves.

Both the UN Charter and UNCLOS provide for a variety of peaceful methods that nations can use to resolve disputes amongst themselves. Article 33(1) of the UN Charter states:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

### 6.1 Non-Binding: negotiation, mediation and conciliation

Most maritime boundaries are resolved by negotiation between governments. They generally take years to negotiate and agree upon since international boundaries are permanent in nature and few governments are willing to rush into a quick deal, which may cause them problems later. Governments that are negotiating a boundary rarely provide the public or media any information on what they are claiming, how they are progressing or even the fact that they are in negotiation because of the political sensitivity around the subject. This behaviour extends to IOCs that have been awarded a concession in disputed territory. Even though they have invested a lot into the concession, IOCs are often kept in the dark by governments.

Mediation is a non-binding alternative dispute resolution process that is often used when governments are unable to reach agreement through negotiation. It has been successfully used to resolve a number of boundary disputes. It requires an impartial and neutral mediator that is skilled at mediation and is respected by the disputing states. Its advantage is that it allows governments to retain control over the process and the final resolution. However, a successful mediation requires states to compromise since the mediator can only facilitate a resolution and cannot issue a binding decision.

Conciliation is provided for in Article 284 of UNCLOS. States may either adopt their own procedure or use the model procedural rules set out in Annex V of the convention. It is optional rather than mandatory under UNCLOS. A commission is established to examine the parties' claims and to propose terms for a settlement. It is different from a formal judicial process in that states can accept or decline the commission's proposals.

## 6.2 Binding: ICJ, ITLOS and ad hoc

Governments have agreed to use binding adjudication to resolve their boundary disputes in a lot of cases. There are a number of advantages in using a binding process. It sets a clear timeframe for governments to make their case and obtain a final resolution. Some governments prefer to have a judicial body make the decision for them for political reasons. If the case goes in the wrong direction for them, they can blame someone else rather than take responsibility themselves. States can usually predict the final outcome with some confidence if they make a reasonable claim based upon the principles established in prior boundary cases. However in comparison to a negotiated solution, this can be a high-risk strategy since one never knows what a third party will decide. UNCLOS provides a number of binding resolution methods from which states can choose.

The International Court of Justice (ICJ) is the primary judicial body of the United Nations. It was established in 1945 under the Charter of the United Nations. It has the responsibility to resolve legal disputes submitted by states and to give advisory opinions on legal questions submitted to it by United Nations organizations and agencies. It is one of the alternatives for providing a final, binding decision on maritime disputes in Part XV of UNCLOS and has been used to resolve more than a dozen maritime boundaries around the world.

Annex VI of UNCLOS established a specialized tribunal to resolve maritime disputes between states. The International Tribunal for the Law of the Sea (ITLOS) is responsible for adjudicating disputes arising out of the convention. After many years of being idle, it recently began addressing maritime boundary disputes.

A third alternative is *ad hoc* arbitration, which states can establish by special agreement or they can choose the arbitration procedures set out in Annex VII of UNCLOS. *Ad hoc* arbitration is more flexible than using the ICJ or ITLOS since states are able to nominate and appoint their own arbitrators, select the venue and determine the procedural rules and timeframe for the arbitration. Unlike the ICJ or ITLOS, the proceedings can be confidential and the decision will probably be issued earlier. However, the costs of an *ad hoc* arbitration are borne by the states, while the costs of the venue, judges and registry of the ICJ and ITLOS are paid by the United Nations.

A basic principle of international law is that a state can only be taken to court if it has consented to jurisdiction. Consent can take a number of forms when there is a boundary dispute. The first, of course, is when states specifically consent to a binding dispute resolution process for that particular boundary dispute. However, ratifying or acceding to UNCLOS also includes an acceptance of the jurisdiction of a tribunal formed in accordance with Annex VII to resolve disputes arising out of the convention. States can however make a written declaration excluding boundary disputes from the range of

disputes subject to compulsory dispute resolution procedures.<sup>18</sup> States may also accept the compulsory jurisdiction of the ICJ for disputes relating to the interpretation of a treaty or a question of international law.<sup>19</sup> Thus, a state can initiate a dispute resolution process unilaterally against another state if both of them are signatories to UNCLOS. It is better that governments agree on their dispute resolution procedure, but if all else fails, it is possible under certain circumstances for a state to take unilateral action and force another state into binding dispute resolution.

## **7. Boundary challenges to IOCs**

An IOC encounters a number of challenges when acquiring a concession that is on or near an international boundary, whether the boundary has been agreed upon or it is in dispute.

### **7.1 Confirming a defined boundary**

Companies need to confirm the technical definition of the boundary lines in their concession and how they impact their concession area, even where there is no dispute. Boundaries need to be precisely defined with a list of turning-point coordinates referred to as geodetic datum, along with an indication of the nature of the lines that run between those turning points. That is not always the case for every international boundary line. Alarming, nearly 50% of the world's boundary agreements do not specify reference datum, around a third do not define the nature of the line segments and more than 25% of the boundaries define coordinates only to the nearest second of an arc.

The regularity of such imprecise international boundaries means that IOCs with concessions that extend up to a border cannot assume that the boundary of their concession perfectly aligns with the actual boundary with the adjacent country, even if the concession says it does and even if the two governments claim to have agreed on that boundary.

If the concession does not include geodetic datum, the IOC should request the government to provide it and confirm that the boundary line is where it is supposed to be. Sometimes a concession defines its boundary as a line marked on a chart. If that is the case, it is likely that the chart either does not have geodetic datum or it is not sufficiently large enough for the positions of the turning points to be identified to the nearest second of an arc. One needs to research the source data for the chart in such circumstances. But there is no guarantee that will confirm the precise positions on the chart. When that happens, the IOC will need to request the governments to review and agree upon the technical definition of their boundary.

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<sup>18</sup> UNCLOS Article 298.

<sup>19</sup> Statute of the International Court of Justice, Article 36.

## 7.2 Encountering a boundary dispute

Most IOCs do not encounter boundary disputes on a regular basis. Even though IOCs deal with many kinds of risk that they are able to manage, loss of access to a resource due to a sovereign's loss of title is not a typical risk or one that most companies will typically accept. Therefore companies need to include boundary risk in their due diligence process and when known, should be structured into their investment contract with the government.

In general, there are three possible results when an IOC enters into a host government contract located in a boundary dispute: (a) confirmation that the contract area belongs to the host state; (b) a prolonged dispute and continued uncertainty; or (c) a determination that some or all of the contract area is not under the authority of the host state, but that of its neighbor and a resulting loss of rights to the area.<sup>20</sup> An IOC faces a number of risks in that situation, including incurring expenditures during the boundary dispute, the possible loss of the host government contract and the failure of the sovereign state's ownership claim.

The typical kinds of expenditures that IOCs face during the dispute can include legal costs, the study of existing data, seismic acquisition and processing, exploration drilling, development and production. Companies are usually comfortable with the first two kinds of expenditures, may consider the third, start balking at the fourth and usually do not proceed with the last two until the boundary uncertainty has been definitively removed.

## 7.3 Managing a boundary dispute

It should always be kept in mind with boundary disputes that only a sovereign state can settle the boundaries with its neighbor nations. The IOC has no standing to attack the claims of a sovereign, absent a contractual relationship that allows such (which almost never occurs). The IOC's role should therefore be neutral. It should not and cannot participate directly in the dispute. It may provide funding for the activities listed above and carry out some of the operations, but that is as far as it can go.

Despite those limitations, there are a number of ways that IOCs can manage boundary risks and limit its exposure:

1. Host Government Contract Terms – The IOC can negotiate a number of terms into its host government contract including: indemnities from the host government, a limitation on the IOC's obligations in regard to the boundary risk, and a *force majeure* provision that includes non-host government claims.

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<sup>20</sup> *Supra*, Smith and Pratt, at 25-26.

2. Operate in Disputed Waters – The IOC can carry out limited operations on its concession. This is a risky strategy as the equipment and operations become more permanent in nature.

3. Assist Government – Many developing countries have neither the funds nor the legal expertise to deal with an international boundary dispute. They often turn to the companies that have been awarded concessions within the disputed territories for such assistance. This presents challenges to an IOC, but can be effectively managed if the proper parameters are set up front and maintained throughout the dispute. The IOC should not attempt to be a participant in the dispute, because amongst other reasons, governments do not want them there. Developing nations with little financial resources may ask IOCs for funding. Under certain circumstances, it may make sense for an IOC to do so. And there are various ways to legitimately structure that funding. IOCs can also provide both existing and future data covering the disputed area. IOCs can also provide information and advice on boundary experts and legal counsel. This provides interesting challenges, especially when the IOC is funding counsel who are taking their instructions from the state who is their client.

4. Ownership on Both Sides of Boundary – One solution is for all governments to accept a single investor or consortium on both sides of the boundary dispute by issuing matching concessions and then work towards settling the sovereignty issue. Or the governments can accept a single investor or consortium and then enter into a joint sharing arrangement, such as a Joint Development Zone.

## **8. Conclusion**

International boundaries are an ongoing challenge for the energy industry, especially where they have not been established and agreed upon by adjacent states. They need to be addressed in the due diligence process when a concession is acquired on or near a border. They then need to be proactively managed from the IOCs perspective to ensure that they are not unduly exposed to unacceptable risk and that their investment is protected properly at the various stages of a maritime boundary dispute. All of this is doable under UNCLOS and international law.