

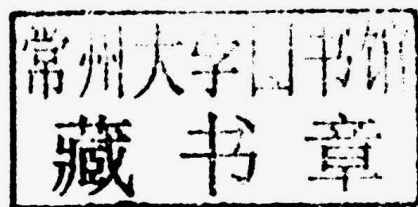
International Max Planck Research School for Maritime Affairs
at the University of Hamburg

Vasco Becker-Weinberg

Joint Development of Hydrocarbon Deposits in the Law of the Sea

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To my family

Preface

This book corresponds to the doctoral dissertation submitted to the Faculty of Law of the University of Hamburg in 2013, under the supervision of Professor Dr. Rainer Lagoni.

The completion of this study was only possible due to the generous conditions provided by the International Max Planck Research School for Maritime Affairs at the University of Hamburg (IMPRS), where I was a fulltime scholar from 2008 to 2012. I am thankful to Professor Dr. Jürgen Basedow, Director of the IMPRS and the Max Planck Institute for Comparative and International Private Law (MPI-Hamburg), and Professor Dr. Anatol Dutta and Mrs. Barbara Schröder, Coordinators of the IMPRS. I am particularly grateful to Professor Dr. Peter Ehlers and Professor Dr. Marian Pascke for their support and also for their dedication to the IMPRS, and all my colleagues for the passionate and wide-ranging debates. Appreciation is also owed to the administrative and library staff at the MPI-Hamburg, the Max Planck Institute for Public International Law (Heidelberg) and the Institute of the Law of the Sea and of Maritime Law at the University of Hamburg. I am moreover thankful to the Faculty of Law of the University of Hamburg and especially Professor Dr. Peter Wetzels, as well as Professor Dr. Markus Kotzur for accepting to act as second reviewer (*Zweitgutachter*) and Professor Dr. Stefan Oeter for taking part in the doctoral examination.

Writing the doctoral dissertation was an individual undertaking, but not a solitary one. During the years that I have had the pleasure and privilege of working with Professor Dr. Rainer Lagoni, I have vastly benefited from his immeasurable knowledge of the law of the sea and his wisdom in dealing with many of its complexities. In addition to being a leading authority on joint development agreements of offshore hydrocarbon deposits and having written some of the most significant and landmark works on the subject, Prof. Lagoni is an exceptional person and mentor, always available to listen and genuinely interested in debating

new ideas and to question established ones. I am extremely fortunate that Prof. Lagoni accepted to be my supervisor and shall remain forever indebted to him. This work was brought to completion greatly because of his encouragement and enthusiasm.

July 2014

Vasco Becker-Weinberg

Abbreviations

ASEAN	Association of Southeast Asian Nations
Authority	International Seabed Authority
BIICL	British Institute of International and Comparative Law
CLCS	Commission on the Limits of the Continental Shelf
Convention on Biological Diversity	Convention on Biological Diversity, 1992
EEZ	Exclusive Economic Zone
FPSOs	Floating Production, Storage and Offloading Facilities
FSU	Floating Storage Units
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
L.N.T.S.	League of Nations Treaty Series
MARPOL 73/78	International Convention for the Preservation of Pollution from Ships, 1973, as amended by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973
MODU	Mobile Offshore Drilling Units
MoU	Memorandum of Understanding
Nm	Nautical miles
OPRC 1990	International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992
P.C.A.	Permanent Court of Arbitration
P.C.I.J.	Permanent Court of International Justice
Seabed Disputes Chambers	Seabed Disputed Chambers of the International Tribunal for the Law of the Sea
U.N.T.S.	United Nations Treaties Series

UN Charter	Charter of the United Nations, 1945
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNESCO	United Nations Economic and Social Council
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
Vienna Convention	Vienna Convention on the Law of Treaties, 1969
Vienna Convention on Succession of States	Vienna Convention on Succession of States in respect of Treaties, 1978
1958 Convention on the Continental Shelf	Geneva Convention on the Continental Shelf, 1958
1958 Convention on the High Seas	Geneva Convention on the High Seas, 1958
1958 Convention on the Territorial Sea and Contiguous Zone	Geneva Convention on the Territorial Sea and Contiguous Zone, 1958
1972 London Convention	Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 1972
1989 MODU Code	Code for the Construction and Equipment of Mobile Offshore Drilling Units, 1989
1995 Fish Stocks Agreement	Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Manage- ment of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995

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Chapter 1

Introduction

The increase of claims by coastal States to extend jurisdiction over adjacent maritime areas may be partly attributed to the advancement and availability of the technology that allows for the exploration and exploitation of resources at depths that until a few years ago were unreachable to mankind. While most of the earth is covered by water, States' aspiration to secure and control access to mineral resources has resulted, on many occasions, in conflict between different coastal States regarding the delimitation of maritime boundaries, as well as the sovereignty over islands and other features and their respective adjacent maritime areas. This background is particularly prevailing in emerging economies with a growing population rate and consequential increase of urban centres. Living resources are likewise valuable for these regions as an important source of protein and, therefore, aggravate the complexity of the overall context. Many of these intricate and potentially irreconcilable situations have contributed towards several of the existing conflicts regarding the delimitation of maritime boundaries and are amongst the main reasons for enduring disputes in certain parts of the world.

When mineral resources straddle a maritime boundary line or are found in areas of overlapping claims, States are subject to certain obligations and to act in accordance with the principles of cooperation and to act in good faith. In the case of maritime areas that are claimed by two or more States, the legal regime requires that States make every effort to enter into interim measures, lacking, however, clarification as to the extent or content of these efforts. Also, in the case of mineral resources that straddle a maritime boundary, coastal States are not required by the *United Nations Convention on the Law of the Sea* (UNCLOS)¹ to enter into an agreement regarding the exploration and exploitation of these resources, similarly as they are not bound to share with the International Seabed Authority (Authority)

¹ *United Nations Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982 and entered into force on 16 November 1994, published at 1833 U.N.T.S. 3 [UNCLOS].

the mineral resources that lie across the Area and areas subject to national jurisdiction.

The law of the sea merely requires the delimitation of maritime boundaries by agreement and does not address issues pertaining to territorial disputes. Additionally, States are often reluctant to submit disputes to International Courts and Tribunals, partly due to the uncertainty of its outcome, particularly as the presence of mineral resources is not given specific relevance by international jurisprudence when drawing a maritime boundary. States further complicate matters by adopting a nationalistic rhetoric, which may be difficult to retract from in order to achieve a resolution of the dispute, and also because of their ambition to guarantee exclusive control over maritime areas with great mineral resource-potential.

The concept of joint development is not regulated in UNCLOS or in related international legal instruments, or for that matter in the *Geneva Conventions on the Law of the Sea*.² UNCLOS also does not include any rules regarding seabed activities in disputed maritime areas. Notwithstanding, several States have considered joint development a valuable alternative that allows for the development of mineral resources in areas of overlapping claims pending the delimitation of maritime boundaries without hindering their claims, including in areas of the continental shelf beyond 200 nautical miles (nm). Likewise, States have resorted to joint development agreements after the delimitation of maritime boundaries regarding transboundary mineral resources, even though mineral resources clauses included in delimitation treaties have, in most cases, a mere programmatic character, without predicting the sharing of resources. Similar joint development agreements could eventually be considered for the purpose of developing mineral resources in the Area that lie across limits of national jurisdiction.

It remains, therefore, to be seen whether the law of the sea has developed a rule requiring States to cooperate in the exploration and exploitation of mineral resources in the situations mentioned before, or to adopt conservation measures ensuring the efficient development of mineral resources and the avoidance of waste.

This dissertation analyses the joint development of hydrocarbon deposits in the law of the sea as a particular example of cooperation between States. It will begin, in Chap. 2, by examining the origin and concept of joint development and the relevant distinctions between agreements signed before and after the delimitation

² *Convention on the High Seas*, done at Geneva on 29 April 1958 and entered into force on 30 September 1962, published at 450 U.N.T.S. 11 [1958 Convention on the High Seas]; *Convention on the Continental Shelf*, done at Geneva on 29 April 1958 and entered into force on 10 June 1964, published at 499 U.N.T.S. 311 [1958 Convention of the Continental Shelf]; *Convention on the Territorial Sea and Contiguous Zone*, done at Geneva on 29 April 1958 and entered into force 10 September 1964, published at 516 U.N.T.S. 205 [1958 Convention on the Territorial Sea and Contiguous Zone]; *Convention on Fishing and Conservation of the Living Resources of the High Seas*, done at Geneva on 29 April 1958 and entered into force on 20 March 1966, published at 559 U.N.T.S. 285; *Optional Protocol of Signature concerning the Compulsory Settlement of Disputes*, done at Geneva on 29 April 1958 and entered into force on 30 September 1962, published at 450 U.N.T.S. 169.

of maritime boundaries. This Chapter will then refer to the purpose of joint development, taking into consideration the characteristics of hydrocarbon deposits, particularly in what concerns the efficient development of these and the adoption of conservation measures, such as unitization. The dissertation will subsequently make in Chap. 3 an assessment of the legal regime applicable to the different maritime areas considering, foremost, the rights of coastal States to explore and exploit mineral resources and the rights of other States in these areas. Since the practice of joint development is conventional in its legal nature and, therefore, is subject to international law, Chap. 3 will also consider the power of coastal States to negotiate and enter into joint development agreements before and after the delimitation of maritime boundaries. It will also take into account the efforts made to harmonize State practice regarding joint development of mineral resources. The relevance and legal nature of mineral resources included in delimitation treaties and joint development agreements will be studied in Chap. 4, together with States' obligation regarding transboundary mineral resources in the absence of such clauses. Additionally, the dissertation will also examine in Chap. 7 the role that international jurisprudence has given to mineral resources in maritime delimitation and what it has considered as being States' obligations in situations where two or more States share common mineral resources.

Chapters 5–7 will examine the legal regime and nature of State practice on joint development before and after the delimitation maritime boundaries, while Chap. 9 will consider the possibility of joint development being applicable to mineral resources in the Area that lie across limits of national jurisdiction. In particular, Chap. 5 will look into State practice regarding joint development agreements signed after the delimitation of maritime boundaries and the relevant applicable legal regime, mostly concerning coastal States' jurisdiction and enforcement over installations and structures, including their removal and decommissioning, as well as their liability for pollution caused from seabed activities.

The legal regime applicable to joint development in areas of overlapping claims is examined in Chaps. 6 and 7. Whilst Chap. 7 looks specifically into the Asia-Pacific region as a valuable case-study of maritime areas of overlapping claims and where the (potential) presence of mineral resources has a fundamental influence on current disputes, Chap. 6 examines the essential legal and functional aspects of joint development before the delimitation of maritime boundaries. Chapter 6 also studies the relevant aspects of States' entitlement to establish a joint development regime in disputed maritime areas and the identification of the joint development area, as well as the rights of coastal States to carry out seabed activities and their obligation to protect and preserve the marine environment in disputed maritime areas.

The dissertation will end with its conclusions in Chap. 10, being the ensuing legal question whether the treaty practice produced by joint development agreements thus far is sufficiently consistent and uniform and what legal assumptions can be drawn from it. It will also make an assessment of the adequacy of the law of the sea regarding the exploration and exploitation of mineral resources found in maritime areas of overlapping claims or that straddle maritime boundaries.