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## Mexico–US transboundary oil and gas reservoirs

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**US exploitation of hydrocarbon reserves in the Gulf of Mexico may contravene international law. David Enríquez of Goodrich Riquelme y Asociados examines the possibility and explores international practice to frame a future joint project.**

Underneath the Gulf of Mexico lies a vast reservoir of hydrocarbon reserves, traversing the marine border between the US and Mexico. A number of treaties and agreements delineate the reservoir, the most recent of which is a bilateral treaty from 2000. However, that treaty does not encompass the whole area of potential reserves, meaning there is a possibility the US is exploiting resources not in its sovereign waters.

Meanwhile, Pemex's oil reserves are declining, and it must explore new areas to keep up production. This article examines the US's international legal responsibility when unilaterally exploiting the reservoir in areas outside the buffer zone established by the 2000 Mexico–US treaty on the delimitation of the continental shelf, international practice to implement mechanisms for joint development of oil and gas fields, and the next steps diplomatically for the two nations.

### The law of the sea

A number of international instruments relate to the US-Mexico maritime boundary, including bilateral treaties from 1978 and 2000 (see table). Yet the 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 both an international treaty and a codification of customary international law, 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

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10 United Nations Conventions on the Law of the Sea  
December  
1982

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.

When considering transboundary reservoirs, each country's exclusive economic zone must be given particular weight. The rules governing it are similar to that of the continental shelf, as coastal states exercise, in both areas, sovereign rights with respect to the exploration, exploitation, conservation and administration of energy resources.

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.

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 recognised 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 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 two instruments in the International Maritime Organisation 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 UNCLOS, since it has been recognised as customary international law.

### **The story now – lack of 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 codified in UNCLOS, independently of the other international instruments relevant to their relationship.

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.

The State Responsibility for International Wrongful Acts was codified in 2001 by the UN general assembly, following decisions by the ICJ. Although not yet mandatory, this codification may be relevant for addressing the responsibility that the US might have before Mexico in case of unilateral exploitation of transboundary reservoirs. 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.

### **What could be – cooperation**

There are many examples of joint development of transboundary reservoirs, where states cooperate to explore and exploit. Successful joint development depends upon the geopolitics, economic and juridical conditions in each region. There are more than 20 cases around the world of transboundary reservoirs, and the mechanisms implemented are designed on a case-by-case basis. Thus, the simplicity and complexity of each one is reflected in the joint development agreements, the establishment of supranational entities and the rules set by the interested states.

In the simplest cases, both states are considered owners of at least half of the natural resources found (such as Malaysia–Vietnam, 1992). However, since the simplicity of this mechanism does not include the execution of an agreement, legal certainty is considered

as one of the main problems faced by states, including the possibility of unilateral appropriation by one of the governments and the potential environmental disaster which could be caused.

In more complex cases, one of the states concerned conducts the exploration and exploitation. The other state is considered as an associate and is entitled to receive royalties from the profits obtained by the operative state from the transboundary reservoir (such as Bahrain–Saudi Arabia, 1958).

Finally, there are highly complex mechanisms as to the establishment of a zone for joint development (such as Nigeria–São Tomé and Príncipe, 2001). The components of such a zone are usually the following: the existence of constitutive instruments, the establishment of competent bodies and the ancillary regulatory instruments, and the organisational structure for developing the reservoirs.

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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 of a potential claim before the ICJ, there is an urgent need for adequate diplomatic cooperation to tackle such a sensitive issue.

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