

**The Maritime Boundaries of East Timor:
the Role of International Law.**

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The maritime boundary between Australia and East Timor has been a significant and unresolved issue since the late 1960's. Despite the conclusion of the Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (the CMATS Treaty) it is now clear that the underlying issues remain a source of tension between the two states. The dispute has involved four states, Indonesia, Australia, Portugal and now East Timor. East Timor has initiated arbitration proceedings seeking to have set aside the CMATS Treaty on the basis that it was concluded in breach of Australia's obligations of good faith.

In this speech I do not discuss the merits or otherwise of the application to set aside the CMATS Treaty. Instead, I discuss some of the historical issues that have given rise to today's maritime boundary positions, as well as the international legal principles that will, if CMATS is no longer to govern the relationship, frame the determination of the boundaries between Australia, east Timor and Indonesia.

Much of this presentation is based upon, and is consistent with, the 2002 opinion prepared by Professor Vaughan Lowe, Commander Christopher Carleton and myself, known as the 'Petrotimor Opinion'. As I describe below, the Petrotimor Opinion continues to describe the parameters of East Timor's entitlement to Exclusive Economic

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Zone rights within the Timor Sea, and its conclusions are now strengthened in light of more recent ICJ decisions.

The legal entitlement to rights over the continental shelf

Historically, the continental shelf was a zone of maritime jurisdiction. It first came to attention following the Truman Proclamation of 28 September 1945 which declared that the United States had jurisdiction and control over "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the United States".

The concept was one which involved analysis of the extent of the 'continental shelf', being an extension of the landmass of the continental state. As matters developed over the next decade, attention turned to the limits of the continental shelf. Outer limits were defined in terms of the depth within which practical exploitation of the continental shelf was possible.

Thus, in 1958 the United Nations Convention on the Continental Shelf was concluded. By Article 1 of the 1958 Convention coastal State rights were said to extend over the seabed "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation" of the sea-bed resources.

The 1958 Convention superseded earlier customary international legal doctrines. When the doctrine was considered by the ICJ in 1969 in the North Sea Continental Shelf (ICJ Reports 1969, 3) the Court concluded that international law was clear and the outer limits of the continental shelf were defined by reference to the physical extension of the landmass below the adjacent sea and the depth to which it was possible to exploit the resources of the continental shelf.

Importantly, the 1958 Convention made express provision for the situation in which two or more States shared the same continental shelf. Then, the Convention provided that the boundaries of the opposing shelves were to be determined by agreement, failing

which the boundary would be "the median line". The median line is a line of equidistance, drawn from the baselines (usually the low water mark) of the opposing state coastlines.

Each of Portugal and Australia were parties to the 1958 Convention. Significantly, Indonesia was not.

During the 1960's Australia negotiated with Indonesia in relation to the maritime and continental shelf boundaries between them. Indonesia was not a party to the 1958 Convention (although, following the North Sea Continental Shelf Cases this was of limited significance). Maritime and continental shelf boundaries were agreed between Australia and Indonesia in 1972.

At the time, Portugal was the colonial power exercising legal and de facto sovereignty over the territory of East Timor. Portugal did not agree to enter into formal boundary negotiations with Australia, intending to wait until the law of the sea negotiations (which led to UNCLOS) were concluded.

As a result, the 'Timor Gap' was generated. Australia and Indonesia identified the lateral limits of their agreement, and expressly noted that the lateral limits were subject to adjustment if required by Portugal.

Australia's position was consistently to the effect that the Timor Trough represented the northern boundary of Australia's continental shelf. Australia relied upon geological evidence as well as the simple depth of the Timor Trough to support its view that the shelf north of the Timor Trough was independent to its own. Portugal maintained the opposite view, to the effect that there was but one continental shelf which should be delimited on the basis of equidistance.

Interestingly, by the early 1970's each of Portugal and Australia had issued competing exploration concessions to corporations in respect of the disputed area of the Timor Sea.

Even in the 1970's Australia's position in relation to the north/south boundary was questionable. The Timor Trough is similar to other significant depressions including the Tripolitanian Furrow between Libya & Malta, the Cayman Trench, and the Aruba Gap between Venezuela, Colombia and the Dominican Republic. In each of those cases the depression was not treated as creating independent shelves. The ICJ in the North Sea Continental Shelf cases had placed significant emphasis upon equity and fairness, although it had also acknowledged the significance of natural prolongation.

The 1989 Australia-Indonesia Timor Gap Treaty

The position changed after the Indonesian invasion of East Timor. As the Petrotimor Opinion concluded, the Indonesian invasion was unlawful, and Indonesia had no legal right to dispose of the seabed off East Timor. Although the Petrotimor Opinion did not canvass the legality of the 1989 Treaty, in my view it was clearly unlawful and in breach of Australia's international legal obligation not to recognise the unlawful invasion.

Although no longer in force, the Timor Gap Treaty remains significant because it established (as between Australia and Indonesia) a series of lines which demarcated the 'Timor Gap'. East Timor was not a party to the establishment of those lines. The northernmost line reflected the earlier arguments of Australia based upon the natural prolongation of the Australian continental shelf northwards, up to the Timor Trough.

The other boundaries were bounded on the west and east by simplified equidistance lines. These lines commenced at points in East Timor and extended towards Australia. The points of commencement reflected the location of the lines agreed between Australia and Indonesia. The lines were then drawn to pass through the points A17 (to the west) and A16 (to the east). Point A17 appears to be equidistant from Indonesia's

Tanjong We Toh and East Timor's Cabo Tafara and Ponta Laletec. Point 16 appears to be equidistant from Ponta De Lore in East Timor and Pulau Moa in Indonesia.²

The Modern Position: North/South Boundary

Whatever the questionable legitimacy of Australia's claim to the majority of the bed of the disputed Timor Sea in the 1970's, that claim is now untenable. The fundamental change has been the recognition of an entitlement of all states under customary international law to claim an Exclusive Economic Zone.

Article 57 of UNCLOS entitles States to declare the existence of an EEZ up to a distance of 200 nautical miles from the coast. By Article 56, the declaration of an EEZ grants to the coastal state the sovereign rights to explore, exploit, conserve and manage the natural resources, whether living or non-living, of the sea-bed and sub-soil.

It follows that within 200 miles of the coast, it is no longer possible for concepts of natural prolongation of the continental shelf to have any role to play.

Although the right to an EEZ exists both at customary international law³ and under UNCLOS, East Timor acceded to UNCLOS on 8 January 2013.

In any event, additionally, UNCLOS⁴ defines the continental shelf as extending either (a) out to the edge of the physical continental margin, or (b) out to 200 miles from the coast where the continental margin does not extend that far. It follows inexorably that East Timor would, in the absence of overlap, be entitled to exploit sea bed resources to a distance of 200 miles from its coastal base lines.

As the Petrotimor Opinion notes, the irrelevance of 'natural prolongation' and the physical characteristics of the seabed in these circumstances was recognized in the

² Prescott *The Question of East Timor's Maritime Boundaries IBRU Boundary and Security Bulletin, Winter 1999-2000* at 73-74.

³ See *Libya / Malta Continental Shelf case* (ICJ Reports 1985, 13 at 33

⁴ See Article 76, UNCLOS

decision of the ICJ in the case of Libya / Malta Continental Shelf case (ICJ Reports 1985, at 35). The ICJ accepted that delimitation by reference to distance had replaced principles of natural prolongation in areas of continental shelf within 200 nautical miles of the coast of one or other State. The Court said that, within the 200 nautical mile zones, "there is no reason to ascribe any role to geological or geophysical factors".

Because Australia and East Timor are less than 400 miles apart, their north/south sea-bed boundary remains to be delimited. Both UNCLOS⁵ and customary international law require opposing States either to negotiate an agreed boundary between their EEZs on the basis of international law, or alternatively to settle the dispute by some peaceful means of their own choosing, in either case "in order to reach an equitable solution". An equivalent rule exists in relation to opposing continental shelves.⁶

The ICJ has now developed very clear jurisprudence in relation to the delimitation of opposing sea-bed claims.

In the Black Sea case (Ukraine v Romania) the Court developed a three stage process. First, a provisional median line of equidistance is drawn (unless there are any compelling reasons to adopt another provisional line). Next, the Court considered whether any factors existed that required an adjustment of the equidistance line. Finally, the Court considered the possibility that the result was unfairly disproportionate or inequitable.

This approach built on the earlier decisions of the Court in the 1980's and 1990's which also gave primacy to equity.⁷

In the present case, there is no obvious reason to depart from the line of equidistance between Australia and East Timor. It follows that in my opinion the north/south

⁵ See Article 74, UNCLOS

⁶ See Article 83, UNCLOS.

⁷ See the Gulf of Maine Case (ICJ Reports 1984, 246 at 300, 312-313); Tunisia / Libya Continental Shelf (ICJ Reports 1982, 18 at 59-61); Jan Mayen (ICJ Reports 1993, 37 at 58-59, 63

boundary of the disputed sea-bed would be determined by any international tribunal to be the line of equidistance.

It necessarily follows that East Timor would have exclusive rights to exploit any resources to the north of the line of equidistance and any suggestion to the contrary by Australia is incorrect.

The Modern Position: Eastern & Western Lateral Boundaries

The Petrotimor Opinion concluded that the eastern and western lateral lines of the 1989 Australia-Indonesia Timor Gap treaty (which are reflected in the 5 July 2001 Memorandum of Understanding) are indefensible in modern international law. That remains the correct statement of international law. The precise correct location of the lateral lines is subject to some ambiguity, although the present location is clearly wrong.

This is for two reasons. The lateral lines arguably start at the wrong points within East Timor, and they are drawn through points A17 (to the west) and A16 (to the east) which are in the wrong places.

As the Petrotimor Opinion concluded, the western lateral line proceeds from the wrong starting point in the land mass of Timor. There are strong arguments to support the proposition that it should commence at the thalweg of the Moti Masin. A move to the west would affect the Laminaria fields.

Equally, as the Petrotimor Opinion concluded the eastern line was drawn from a point between East Timor and the small Indonesian island of Leti, and connects with Point A16 in the 1972 Australia-Indonesia treaty. The eastern lateral line was drawn giving full weight to the island of Leti.

There are strong arguments that giving full equidistant weight to Leti is inappropriate. It is a small island which has a disproportionate effect upon the location of a line of

equidistance. Decisions of the ICJ suggest that small islands should be given only a proportional effect.⁸

The Petrotimor Opinion concluded that Leti ought be given perhaps one half or three quarters effect. My opinion remains that at most it would be given three quarter's effect in any line of equidistance.

As the Petrotimor Opinion concludes, if half or three-quarters effect were given to the island of Leti, the eastern lateral line dividing East Timor's EEZ from the EEZs of Australia and Indonesia would move significantly to the east. That would have the practical effect of placing most or all of the Greater Sunrise field within East Timorese jurisdiction.

Dispute Settlement

Assuming that East Timor is successful in setting aside the CMATS Treaty and then sought to re-open delimitation issues with Australia, it is important to recognise that there are limited pathways to dispute settlement. This is largely because Australia has made reservations to dispute settlement under UNCLOS, and to its acceptance of ICJ jurisdiction.

On 21 March 2002 Australia made a declaration pursuant to Article 287 of UNCLOS to the effect that it chose the International Tribunal for the Law of the Sea ("ITLOS") and the ICJ as the bodies to settle disputes arising under the UNCLOS and involving Australia. However that declaration was made subject to an express reservation in respect of sea boundary delimitations, in respect of which Australia declined to accept the jurisdiction of any of the tribunals to which disputes might be submitted under Part XV, Section 2 of UNCLOS.

On 25 March 2002, Australia further announced that it had modified the terms of its acceptance of the jurisdiction of the ICJ. In 1975, Australia had made a declaration

⁸ For example, the Western Approaches case (1977) between France and the United Kingdom, Tunisia/Libya case (ICJ Rep 1982), Qatar/Bahrain case (ICJ Rep 2001).

under Article 36(2) of the Statute of the ICJ to the effect that it accepted the jurisdiction of the ICJ in relation to any States accepting the same obligation. The 2002 modification purports to exclude from that acceptance of ICJ jurisdiction all maritime boundary delimitation disputes, and all disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute.

Australia does however remain under a continuing obligation to resolve maritime boundary disputes peacefully.⁹ Conciliation of disputes, either informally or through formal processes of conciliation, remains a real possibility. Equally, it is not out of the question that Australia may conclude that its national interest could best be served by waiving its reservation and allowing an ICJ process of delimitation to take its course.

It is beyond doubt that the resolution of the tensions are in the best interests of both States. Australia's long held positions lack legal merit and should no longer be asserted. The position is capable of resolution according to law, and the time is now appropriate for a process of legal resolution to take place.

⁹ See, e.g. Article 74, UNCLOS.