



DILI INTERNATIONAL CONFERENCE: MARITIME BOUNDARIES AND THE LAW OF THE SEA

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CONFERENCE PAPER



**The Dili International Conference:
Maritime Boundaries and the
Law of the Sea** coincides with the
20th anniversary of the establishment
of the International Tribunal for the
Law of the Sea (**ITLOS**).

Introduction

All coastal States, however large or small, have sovereign rights to the seas that surround them. International tribunals, such as ITLOS, play an important role in resolving maritime boundary disputes and restoring certainty and security to the seas. Maritime disputes are becoming increasingly significant across the world, particularly in light of the ability of States to assert their sovereign interests well beyond their exclusive economic zone, improvements in offshore mining technology, the ever-increasing value in sea trade routes and the need to sustainably manage fishing stocks. The law of the sea sets the internationally agreed framework for coordinating these maritime activities and resolving any problems between nations.

With this conference, the Timor-Leste Government aims to raise international awareness of the law of the sea and the role of international tribunals, and to provide a forum for discussion of current and emerging maritime boundary issues.

The three-stage test for delimiting overlapping exclusive economic zones

The 1982 United Nations Convention on the Law of the Sea (**UNCLOS**) provides a framework for the resolution of maritime boundaries where there is an overlap of maritime zones between two States.

One of the fundamental principles under UNCLOS is that any maritime boundary agreement must reach an equitable solution. What constitutes an 'equitable solution' is the subject of a series of important cases and raises interesting questions of international law.

In 2009, the International Court of Justice delivered its judgment in the *Black Sea Case (Romania v Ukraine)*, which has become the authoritative statement of international law on the issue, requiring neighbouring states to:

1. **Draw a provisional 'equidistance line'** (also known as a 'median line') half-way between neighbouring coasts (whether opposite or adjacent), using appropriate physical base points along the low-water line of the coasts;
2. **Make adjustments for 'relevant circumstances'** which may otherwise have a distorting effect, such as the presence of islands (less significant islands are generally given a lesser weighting), concave or convex coasts, which lead to a 'cut-off' or 'pinching' effect, among other circumstances; and
3. **Apply a 'proportionality' test** to ensure an equitable solution has been reached. This involves comparing the respective maritime areas and the length of each States' coastline. This final step has rarely been invoked in past cases.



The Black Sea Case (2009) included a concise summary of prior case law and delimitation approaches that evolved as international law before and after the introduction of UNCLOS (see, for instance, *Libya v Malta* (1985), *Norway v Denmark (Jan Mayen)* (1993) and *Qatar v Bahrain* (2001)). The approach arguably has its roots in the 1958 Geneva Convention on the Delimitation of the Continental Shelf, which called for delimitations to be based on the median line, unless justified by “special circumstances” (Article 6.1).

The 2009 decision was subsequently endorsed by ITLOS in *Bangladesh v Myanmar* (2012), confirmed again by the International Court of Justice in *Nicaragua v Colombia* (2012) and *Peru v Chile* (2014), and also used by the Arbitral Tribunal in *Bangladesh v India* (2014).

The three-stage approach allows for a range of circumstances to be taken into account, and offers a broad framework for jurists to operate in to reach an equitable solution. The law in this area has developed at a rapid pace and represents a departure from the previous approach that emphasised the geology and geomorphology of the seabed, which had relevance until the 1970s.

Global perspectives on maritime boundaries

UNCLOS is one of the most widely signed and ratified treaties in history, with 167 State parties across the world. Despite the strong jurisprudence on the significance of the three-stage equidistance/relevant circumstances approach, a number of topical issues remain, including:

- **Islands and rocks:** Is there a more accurate 'test' for determining the weighting for islands and rocks, and their role in delimitations and in generating a territorial sea or exclusive economic zone? Are the legal ramifications resulting from distinguishing between islands and rocks fair?
- **Guidance in the three-stage test:** Does the framework offered by the three-stage test provide certainty in the process of maritime boundary delimitation?
- **Alternative delimitation approaches:** What is the role of alternative delimitation methodologies, such as the bisector and perpendicular approaches?
- **Base points** (*i.e. the low-water mark of the coast from which point the boundary is measured*): A key issue in dispute in the *Black Sea Case*, are there circumstances when normal base points should not be used in delimitations?
- **Negotiating parties:** How much weight do negotiating parties give to UNCLOS and the three-stage equidistance/relevant circumstances approach? What other factors have been considered during negotiations?
- **Consent to jurisdiction:** Have exceptions to the coverage of UNCLOS ('carve-outs') undermined the effectiveness of the treaty? If negotiating parties have recourse to a dispute settlement body should they fail to reach agreement, does this change the dynamic of bilateral negotiations and place greater weight on the role of international law?

Regional perspectives on maritime boundaries

Clearly defined maritime boundaries support regional stability, which is crucial for economic development. International law is a key avenue for resolving maritime disputes peacefully and for maintaining regional strength and security.

Much has been written in recent years about maritime boundaries and territorial claims in the South China Sea. The disputes in the South China Sea involve a number of countries and are a test of the importance of UNCLOS in determining maritime disputes between States. Many of the topical issues listed above are contested in the South China Sea, including the classification of rocks vis-à-vis islands and the role of historical evidence in justifying maritime claims. The geopolitical factors at play, and the various militaries in the region, underlie the importance of international law in guiding States to resolve their differences peacefully.

In response to the disputes in the South China Sea, the United States has invoked the right to freedom of navigation by conducting flyovers in disputed parts of the South China Sea, while the Philippines has commenced an international arbitration. The issues in the South China Sea have led to a renewed focus on the need for agreed, clearly defined maritime boundaries.

Also in this region, Indonesia, under His Excellency President Joko Widodo, is continuing its efforts to define its maritime boundaries. Most recently, Indonesia achieved resolution on the exclusive economic zone boundary with the Philippines and territorial sea boundary with Singapore. Indonesia has on-going maritime boundary discussions with Malaysia, Palau and Timor-Leste.

With so many competing interests in the region, the role of UNCLOS and the international law methodology for resolving maritime boundaries is highly topical.



The Timor Sea case study

The recent developments between Timor-Leste and Australia offer interesting material for international maritime boundary lawyers and those with a focus on international law. Most of the issues centre on the Timor Sea.

Timor-Leste and Australia have agreed to provisional arrangements to divide oil and gas resources in the Timor Sea, but they have not agreed to a permanent maritime boundary. There is a maritime (seabed) boundary either side of Timor-Leste negotiated between Australia and Indonesia in 1972. At that time Australia rejected approaches from the Portuguese Government of Timor-Leste to join the negotiations as Portugal was seeking a median line boundary. The Australia-Indonesia 1972 seabed boundary thus left an area south of Timor-Leste known as the 'Timor Gap'.

During the subsequent occupation of Timor-Leste, Australia and Indonesia could not agree on a maritime boundary in the Timor Gap. Instead, in 1989, Australia and Indonesia agreed to a joint petroleum development zone in the Timor Gap.

On the first day of Timor-Leste's restoration of independence in 2002, Timor-Leste and Australia signed the Timor Sea Treaty. This treaty continued the joint petroleum development zone approach from the 1989 treaty between Australia and Indonesia. In 2006, Australia and Timor-Leste then agreed to the Treaty on Certain Maritime Arrangements in the Timor Sea (known as CMATS), which increased Timor-Leste's entitlements to revenue from the largest oil and gas field in the Timor Sea, Greater Sunrise, but it did not delimit a maritime boundary between the two countries.

In addition to the recent commencement of maritime boundary negotiations between Timor-Leste and Indonesia, the historical and current arrangements between Timor-Leste and Australia have ignited much debate. Some of the common discussion points include:

- How effective are **joint petroleum development zones** as provisional arrangements under UNCLOS?
- **The interpretation of UNCLOS Articles 74 and 83:** What is the significance of the wording: "States should enter into provisional arrangements of a practical nature, and during this transitional period, not to jeopardise or hamper the reaching of the final agreement"?
- **Politics and the law of the sea:** Does UNCLOS establish effective dispute resolution mechanisms between smaller and larger nations, particularly when geopolitical and commercial interests are at stake?
- **Bilateral treaties:** How do third-party States deal with historical bilateral treaties and to what extent should they bind a third-party State?
- **Enclaves:** Should different rules apply to delimiting the maritime boundary of a small enclave?



Compulsory conciliation

In international law, there are different pathways for dispute resolution. One option is conciliation.

Compulsory conciliation is a procedure under UNCLOS (Annex V, Section 2) in which a panel of conciliators assists State parties to settle a dispute. This procedure can be used in circumstances where no agreement has been reached between neighbouring States and one State has withdrawn from the jurisdiction of binding dispute settlement bodies on maritime boundaries.

On 11 April 2016, the Government of Timor-Leste initiated the first-ever compulsory conciliation under UNCLOS with the aim of achieving permanent maritime boundaries with Australia. If Australia and Timor-Leste cannot reach an agreement, the conciliation commission will provide a report to the Secretary-General of the United Nations with recommendations to assist resolution. Australia and Timor-Leste would then be obliged to negotiate in good faith on the basis of the commission's report.



Final word

Today's conference will explore the above issues and many others. Through a series of expert presentations and panels, attendees will come to appreciate the important role of international law in determining maritime boundaries and gain insights into the current challenges and controversies, both global and regional, that are emerging in the law of the sea.

Speaker profiles

President Vladimir Golitsyn

Dr. Vladimir Golitsyn has been a Member of ITLOS since 2008 and President since 1 October 2014. President Golitsyn is a graduate of the Moscow State Institute of International Relations and has previously worked for the Soviet Foreign Ministry as well as the United Nations. He specialises in seabed and continental shelf disputes, environmental issues and the Arctic. He was Head of the Division of Public International Law in the Ministry for Foreign Affairs of the former USSR and served as head or member of delegations at various negotiations on fisheries, navigation and maritime boundary matters.

His Excellency Dr. Rui Maria de Araújo

His Excellency Dr. Rui Maria de Araújo is the Prime Minister of Timor-Leste. He is also Chair of the Council for the Final Delimitation of Maritime Boundaries, which is responsible for the negotiation of permanent maritime boundaries with Indonesia and Australia. His Excellency was sworn into office on the 16th of February 2015 and leads the 6th Constitutional Government. His Excellency was an active member of the resistance during the Occupation, later graduating as a General Practitioner and Medical Doctor in July 1994.

His Excellency Dr. Mari Alkatiri

His Excellency Dr. Mari Alkatiri served as Prime Minister of Timor-Leste from the restoration of independence in May 2002 to June 2006. Dr. Alkatiri was a co-founder of FRETILIN, the Revolutionary Front for the Independence of Timor-Leste and currently serves as its Secretary-General. In 2014, Dr. Alkatiri was appointed the President of the Authority for Special Administrative Region of Oe-Cusse Ambeno and Special Zones for Social Market Economy of Timor-Leste. Dr Alkatiri studied law and economics at Eduardo Mondlane University, Maputo, Mozambique.

His Excellency Minister Agio Pereira

His Excellency Minister Agio Pereira is the Minister for State and of the Presidency of the Council of Ministers. Prior to his current position, Minister Agio held numerous roles in the Government of Timor-Leste, including as Deputy Speaker of the National Legislative Council, Chief of Staff for the first elected President of Timor-Leste, His Excellency Xanana Gusmão and Chief of Staff to former President, Dr. José Ramos-Horta. In the days after the 1999 vote for independence, Minister Pereira was appointed as the Coordinator of the National Emergency Commission. He holds Masters Degrees in Criminology and Criminal Justice, Policing, Intelligence and Counterterrorism, and in International Relations.

His Excellency Dr. Dionísio Babo Soares

His Excellency Dr. Dionísio Babo Soares is the Minister for State, Coordinator of State Administration Affairs and Justice and Minister for State Administration. Minister Soares has previously served as Member of the Superior Council of Defence and Security, and also as Minister for Justice. He has held the title of President of the Supreme Council of Public Defenders and was a member of the National Security Reform Committee. Minister Soares holds a Degree in Constitutional Law, a Master of Philosophy Development Studies and a Doctor of Philosophy in Anthropology. Minister Soares has also lectured in law at the Universidade Dili and the Universidade da Paz.

Professor Vaughan Lowe QC

Professor Vaughan Lowe QC is a practising Barrister at Essex Court Chambers, mainly in the field of international law. He is Emeritus Chichele Professor of Public International Law and an Emeritus Fellow of All Souls College at the University of Oxford. Professor Lowe has sat as an arbitrator in many investment arbitrations under the auspices of the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration, and on the tribunals addressing boundaries between Trinidad and Barbados, and between Croatia and Slovenia. Professor Lowe sat as an ad hoc judge on the European Court of Human Rights and is the United Kingdom-nominated judge on the European Nuclear Energy Tribunal.

Ambassador Eddy Pratomo

Eddy Pratomo is the Ambassador, Special Envoy of the President of the Republic of Indonesia for Maritime Delimitation between Indonesia and Malaysia. He joined the Indonesian Foreign Service in 1983 and held various positions including the Deputy Director for Territorial Treaties, the Director for Economic and Social-Cultural Treaties, the Director General for Law and Treaties of the Ministry of Foreign Affairs, and the Indonesian Ambassador to the Federal Republic of Germany. Eddy Pratomo earned his Master of Arts in International Law from St. John's University, New York, in 1989, and his Doctoral Degree in Law from the University of Padjadjaran, Bandung, in 2011.

Ms. Janelle Saffin

Ms. Janelle Saffin is a lawyer, politician, educator and human rights advocate who has lectured and published on constitutional law. Working for the United Nations Development Program, Ms. Saffin was Special Adviser to His Excellency Mr. Sukehiro Hasegawa, the Special Representative of the Secretary-General to Timor-Leste. Between 2004 and 2007, she served as Principal Policy Adviser to President, Prime Minister, Minister for Foreign Affairs & Cooperation, and Minister for Defence His Excellency Jose Ramos-Horta. From November 2007 until September 2013, Ms. Saffin represented the federal electorate of Page for the Australian Labor Party, and previously served as a Labor member of the New South Wales Legislative Council from 1995 to 2003. Ms. Saffin is re-contesting the seat of Page at the 2016 Australian federal election.

Mr. I Made Andi Arsana

Mr. I Made Andi Arsana is a surveyor by profession and a lecturer in the Department of Geodetic and Geomatic Engineering at Gadjah Mada University in Indonesia. Mr. Arsana obtained his Bachelor's degree in Surveying and a Masters degree in Surveying and Spatial Information Systems from the University of New South Wales. Since 2004, Mr. Arsana has focused his research on technical aspects of the law of the sea, especially maritime boundary delimitation. He has published more than 60 publications including newspaper articles, journal papers, conference papers and books.

Ms. Jalila Abdul Jalil

Ms. Jalila Abdul Jalil is a Senior Researcher at the Maritime Institute of Malaysia and has previously served with the Malaysian Ministry of Foreign Affairs. Ms. Jalil graduated with a Bachelor of Laws (Honours) from the University of Glamorgan in Wales, United Kingdom and is an alumni of the Rhodes Academy of Oceans Law and Policy. Ms. Jalil is also a Member of the Honourable Society of the Middle Temple, Inns of Court, London and part of the Malaysia Interim-Committee on Deep Seabed Mining. Her research interests include public international law, the law of the sea, maritime boundary issues, dispute settlement and legal matters pertaining to the International Maritime Organisation Conventions.

Dr. Hao Duy Phan

Dr. Hao Duy Phan is a Senior Research Fellow at the Centre for International Law in Singapore. Previously, Dr. Hao worked as Assistant Director-General of the Department of International Law and Treaties, Ministry of Foreign Affairs of Vietnam and was a visiting fellow at the East-West Centre in Washington D.C., and the Institute of Southeast Asian Studies in Singapore. His early professional experience included an internship at the Office of the United Nations High Commissioner for Human Rights. Dr. Hao received a Bachelor of Arts from the Institute for International Relations of Vietnam, a Master of Laws summa cum laude from the University of Notre Dame Law School, and a Doctor of Juridical Science from the American University Washington College of Law.

Ms. Elizabeth Exposto

Ms. Exposto is the Chief Executive Officer of the Timor-Leste Maritime Boundary Office (MBO). The MBO is the Secretariat of the Council for the Final Delimitation of Maritime Boundaries. Ms. Exposto was born in Timor-Leste but grew up in Melbourne, having fled Timor-Leste with her family when civil war broke out in 1975. Ms. Exposto returned to Dili soon after the vote for independence in 1999. She later became a member of His Excellency Xanana Gusmão's staff after he was elected as Timor-Leste's first President. On the appointment of Dr. Rui de Araújo as Prime Minister in February 2015, Ms. Exposto continued as a Senior Adviser to the new Prime Minister, before being appointed Chief Executive Officer of the Maritime Boundary Office.



Government of Timor-Leste

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