

Timor Sea Treaty and Related Agreements
Joint Petroleum Development Area
Issues and Implications

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GEOPOLITICAL EXPEDIENCY

That Australia is committed to a strong and productive relationship with East Timor is admirable especially in the context of the traumas that the East Timorese have experienced over the past three decades. Australia has established a substantial post-independence aid programme for East Timor that includes projects which cover education, health, infrastructure and governance, water supply and sanitation and rural development. The Australian Federal Police is providing assistance as part of the Civilian Police Force and the Australia Department of Defence is providing support to East Timor's Defence Force.

The *Timor Sea Treaty* (TST) and Related Agreements are a significant milestone in the development of this relationship. The related documents are a *Memorandum of Understanding* concerning an internationalisation unitisation agreement for the Greater Sunrise Field and an *Exchange of Notes Constituting an Agreement*. The Treaty and the two documents were signed on 20 May 2002 within about twelve hours of East Timor becoming a sovereign state, the first in the 21st century.

The TST will enter into force once Australia and East Timor ratify the document. The TST establishes a Joint Petroleum Development Area (JPDA) that replaces Zone of Cooperation 'A' (ZOCA) which was established in the Timor Gap Treaty between Australia and Indonesia in 1989. Australia and East Timor (at Government levels) have commenced their ratification processes and are committed to expeditious entry into force of the TST.

That being said, it is suggested that:

- political expediency has been paramount in initialling the TST;
- the TST is far too generous;
- due process of consultation with user groups is a shortcoming of the Government; and
- the text of the TST is vague on a number of issues, in particular on sovereign rights to the marine biotic resources within the confines of the JPDA.

There are many issues and implications that need to be discussed before Australia takes the next step, namely that of ratification of the TST. However, events behind the scene may force Australia to reconsider the terms of the TST and indeed, those of the *Perth Treaty* of March 1997 between Australia and Indonesia.

FACTORS

Let us consider what factors were taken into account in drafting the TST. They include:

- Application of Article 83 of the 1982 *Law of the Sea Convention* that makes provision for "... the delimitation of the continental shelf between two states ... shall be effected by agreement on the basis of international law in order to achieve an equitable solution";
- A desirability of Australia and East Timor to enter into a Treaty;
- A desire to promote East Timor's economic development;
- Maintaining security of investment for existing and planned petroleum activities;
- Perceived benefits to flow to both countries by providing a continuing basis for hydrocarbon exploitation activities;
- Importance of developing hydrocarbon resources;
- Minimising damage to the marine environment;
- Maintaining economic sustainability of hydrocarbon resources;

- Promoting further investment;
- Contribution to the long-term development of both countries; and
- To provide an arrangement of a practical nature that does not prejudice a final determination of the seabed delimitation (TST, Article 2).

SUMMARY OF THE TREATY

The key elements of the *Timor Sea Treaty* are:

- The new treaty will have a duration of 30 years; it may be renewed; activities may continue even if TST is no longer in force (Article 22);
- Deferral of delimitation of a permanent seabed boundary without prejudice to Australia's and East Timor's rights or entitlements in international law (Article 2)
- Joint control, manage and facilitate the exploration, development and exploitation of petroleum resources of the JPDA (Article 3);
- A revenue split of 90 per cent for East Timor and 10 per cent for Australia from petroleum development activities in the Joint Petroleum Development Area (JPDA) [Article 4];
- Agree on a joint fiscal scheme (Article 5);
- Regulatory bodies will include Designated Authority (DA), a joint Commission (JC) and a Ministerial Council (MC) [Article 6];
- Australian jurisdiction over the planned pipeline from the JPDA to Australia (Article 8);
- Maintenance of the contractual terms of the existing petroleum/gas projects (*Bayu-Undan, Greater Sunrise and Elang-Kakatua*) [Article 9];
- Unitisation of the *Greater Sunrise* field (which straddles the JPDA and an area under Australian jurisdiction) on the basis that 20 percent of the field lies within the JPDA and 80 percent of the field lies within Australian jurisdiction (Article 9); and
- Australia has also agreed to provide additional financial support to East Timor of A\$8 million per year with effect from 2005, to assist with petroleum resource development.
- East Timor will realise financial benefits (six billion dollars) from 2003.

ISSUES AND IMPLICATIONS

Australia over-generous in 1989, 1997 and 2002

Australia has not adopted a firm stand over its rights to the resources of the continental shelf in the northern waters of Australia evident in the suite of Treaties that Australia has initialled with Indonesia, since the late-1980s and most recently with East Timor. Yet Australia allocates vast sums of money, expertise and time on research in the southern waters, in particular, to the southeast sector of its maritime domain.

The provisions of the TST offer enormous concessions to East Timor in addition to foreign aid. The generosity is akin to that of the 1958 Agreement between Bahrain and Saudi Arabia, in which the latter oversees much of the administration of the Joint Development Zone and the former receives the benefits accrued from the exploitation of the hydrocarbons within the Zone in the Gulf.

The JPDA includes the *Bayu-Undan Gas and Oil Field* and portion of the *Greater Sunrise Gas Field*. The latter is also the subject of dispute between two rivals, Shell and Phillips. Shell wants to use a floating platform to export oil and gas and Phillips want to pump the product to Darwin. Development of the Bayu-Undan has begun. If these and the other fields are put on hold for an extended period, it could shift the focus to the hydrocarbon developments in Papua New Guinea or elsewhere further away.

Indonesia and Australia signed the 1997 "Perth Treaty" to delimit maritime boundaries in the Timor Sea and in the northeast sector of the Indian Ocean. Both countries, pending its entry into force are observing the 1997 Treaty's terms. Ratification/entry into force is not "imminent" but should occur in the foreseeable future (Personal communication with DFAT, 17 June 2002). In this Treaty, Australia determined seabed and water column boundaries, delineated an extensive 'grey area' (in colour coding and in reality) and defined a maritime boundary that lies much closer to

Christmas Island which is much too close for comfort. The vast 'grey area' now excludes Australian fishing industry from operating therein.

The Perth March 1997 Treaty delimiting a seabed boundary and a water column boundary with Indonesia is unusual and has created anxiety, insurmountable problems and uncertainty for the future for those in the fishing industry and in the exploration and exploitation of the hydrocarbon resources in the Timor Sea.

Have the politicians given away our seabed rights?

The TST is similar in content to the *Timor Gap Treaty* except that in the former there is a 90/10 ratio whereas with the latter the royalties were to be split 50/50.

There is good argument on this basis alone that Australia has been generous. It now appears that East Timor is seeking complete control of the JPDA and indeed, goes further with claims for larger areas, east and west of the JPDA, than is defined in the TST.

Who has rights to the biotic resources in the water column of the JPDA?

The TST is silent on this matter. Likewise the Australian Government is silent and dismisses any questions on the issue. This matter raises concerns to those engaged in the practicalities of the fishing industry.

Has precedence been set?

The Zone of Cooperation created precedence that was different from the conventional thinking of the continental shelf principle that governed much of the Arafura Sea and parts of the Timor Sea and indeed in the Coral Sea and elsewhere that Australia had delimited its maritime boundaries.

If Australia agreed to extend the limits of the JPDA at some later stage or caves in to East Timor's demands, it would have to revise a whole suite of its maritime boundary negotiations. One could not envisage Indonesia accepting the terms of the 1997 Treaty. There could also be claims from Papua New Guinea and the Solomon Islands. What will New Zealand demand when it negotiates its maritime boundary with Australia in the Tasman Sea?

Will the provisions of the Treaty create a problem for our future negotiations?

If Australia compromises its stand it runs the risk of placing the giant *Laminaria Gas and Oil Field* into the quagmire of the Australian/Indonesian 'grey zone'.

Have the geoscientist given their input and is the information on the geology of the substratum and geomorphology of the seabed fully understood? Is the Government heeding the advice of the geoscientists and political geographers?

It is hoped that in both instances the answers are positive and that the negotiations were not based purely on political expediency. There are areas in the world where similar cases exist and generally one Government will not submit so easily to another.

THE GEOGRAPHY

- A distinct trough – Timor Trough – separates the Australian continent and the island of Timor. The two landmasses **do not** share a natural continental shelf. The continental shelf – out to the 200-metre isobath – is a narrow strip along the southern sector of Timor Island whilst being broad off the northern coast of Australia. The legal continental shelves of Australia, as indeed of East Timor and Indonesia, have yet to be defined in accordance with the 1982 Law of the Sea Convention.
- The substratum of the Timor Sea is regarded as a highly prospective hydrocarbon reserve region containing substantial condensate and gas reserves.
- Geological features are the Bonaparte (main) and Browse Basins.

- The area of the Timor Sea is administered by the Northern Territory, Western Australia and the Joint Petroleum Development Authority (JPDA) on behalf of Australia and East Timor.
- The Northern Territory Government administers the Ashmore/Cartier Islands Adjacent Area (on behalf of the Commonwealth Government) and the NT Adjacent Area.
- The Timor Sea is the focus of attention. *Bayu-Undan*, *Sunrise* and *Evans Shoal* gas projects and recently completed major oil developments include the *Elang/Kakatua*, *Laminaria/Corallina* and *Buffalo* projects have the potential to generate wealth to the sovereign state.
- Exploration commitments offshore are high, with the expectation of further oil and gas discoveries in the future which would be stimulated by gas markets in Australia and overseas.

HISTORY

- Exploration commenced in the early 1960s
- Thirty-two wildcat wells (rank exploration wells) were drilled to 1975. There were several oil and gas strikes although no commercial developments resulted.
- Seabed boundaries delimited in the Arafura and Timor Seas in 1971 and 1972.
- Exploration in the Timor Gap area was suspended in 1975 due to the unresolved seabed boundary between Australia and Indonesia.
- A Provisional Fisheries and Surveillance Enforcement Line (PFSEL) aligned approximately on a median-line principle was defined and incorporated in 1981.
- Signing of *Timor Gap Treaty* in 1991 that established the Zone of Cooperation and award of production sharing contract areas in 1992 hailed the start of the exploration ‘boom’ in the region.
- Portugal takes Australia to the ICJ in 1995; sought Treaty as void; Indonesia not a party to the ICJ.
- East Timor opts out of Indonesia in September 1999; becomes an independent state in May 2002; and
- Zone of Cooperation extinguished and ZOC Area ‘A’ replaced by Joint Petroleum Development Area (JPDA). ZOC ‘B’ and ‘C’ have been abolished.

The Arafura and Timor Seas are marine regions that are ‘over-the horizon’ for Canberra-based politicians to gain an appreciation of the potential problems that have been created by Australian Governments, both past and present, in signing the 2002 *Timor Sea Treaty*, the *Perth Treaty* March 1997 and the *Timor Gap Treaty* of 1989. If the intentions were honourable at the time of signature, so be it. However, the process of consultation prior to signing the treaties leaves a lot to be desired. The adverse comments raised in the Joint Senate Standing Committee into the 1997 Treaty speak volumes.

On geographical reality, historical facts, and traditional and conventional international law alone Australia must insist on its inherent rights to harvest the marine biotic and exploit the mineral resources of the Timor and Arafura Seas and to manage the marine environment of the region. A cooperative approach is welcomed but administration must at all times be seen to be even-handed.

It may be too late to suggest that Australia should not ratify the TST. It would appear that Australia will be open to criticism if it ratified the TST or sought to draft another Agreement with East Timor. There is no doubt that there is pressure from East Timor to re-negotiate on terms that best suits that country, but that could be a short-term solution. If Australia permitted East Timor, and later Indonesia, to dictate the alignment of maritime boundaries – lines of resource allocation – in the Timor Sea it will create many more problems than could be suggested in this brief submission.

The Australian Government has been warned, in the past, that our northern waters are open to abuse by aliens; that it has taken a softly-softly approach to a number of major issues, such as illegal fishing and illegal trade in people smuggling; and has had a weak policy on so called ‘traditional mode of fishing’.