

**Submission to the
Joint Standing Committee on Treaties
Review of treaties
Timor Sea Treaties**

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Note on the author

The author has expertise in international law and environmental law, and is currently doing research towards a PhD on the joint development of offshore oil and gas, with a particular focus on Australia's current practice. He is the co-author (with Prof. Gillian Triggs) of two refereed journal articles on the new Timor Sea Treaty in the *International Journal of Marine and Coastal Law* and the *Melbourne Journal of International Law*, both forthcoming (September 2002).

The author would welcome the opportunity to further explain the contents of this paper to the Committee in person.

Introduction

On 20 May 2002, the newly independent East Timor and Australia signed the Timor Sea Treaty for the joint development of petroleum resources of the Timor Sea.¹ Until the new agreement comes into effect, an Exchange of Notes ensures that, for the interim, the terms of the original Timor Gap Treaty remain in force to ensure legal stability for existing and new petroleum ventures in the area.²

One of the major obstacles to the conclusion of the Timor Sea Treaty in May 2002 was the assertion by East Timorese negotiators that the Greater Sunrise deposit, which straddles the easterly lateral boundary of the proposed JPDA, is subject to the exclusive sovereignty of East Timor under international law.³ The Timor Sea Treaty provides for the unitisation of straddling deposits.⁴ Annex E deals specifically with the Greater Sunrise deposit, granting East Timor only 18% of production, (being 90% of the 20% of Greater Sunrise that lies within the JPDA).

The Annex E agreement on unitisation is stated to be “without prejudice” to a future delimitation of boundaries, despite the fact that no explicit or secure method is specified to assure adjustment of the production sharing formula in order to reflect future boundaries that may vary from those of the JPDA. Either party may *request* a review of the formula, but there is no obligation to *agree* to a revision. It is therefore open to Australia to refuse to vary the unitisation formula, even where a boundary delimitation delivered most or all of Greater Sunrise to East Timor.

This submission argues that despite the likely ratification and entry into force of the Timor Sea Treaty, Australia must respect its “without prejudice” clauses, and remain open to the negotiation of permanent boundaries. It should also remain agreeable to the possible expansion of the JPDA, and alteration of the Greater Sunrise unitisation formula, if East Timor’s maritime entitlements are shown, in negotiations with Indonesia, to be beyond those reflected by the boundaries of the JPDA.

The JPDA under the Timor Sea Treaty

The new Timor Sea Treaty applies only in the area of the Timor Sea that was described by the coordinates for Area A of the Zone of Cooperation (ZOCA) under the previous 1989 Timor Gap Treaty. Areas B and C are now under the full sovereignty of East Timor and Australia, respectively, and will no longer be subject to joint development.

The Timor Sea Treaty recognizes that Australia and East Timor have, for the moment, agreed to disagree on their respective seabed entitlements in the Timor Gap. The disagreement lies not only in differing juridical positions on the east-west delimitation of the continental shelf, but also in recent concerns that East Timor should not be constrained in its maritime claims by coordinates agreed in the Timor Sea many years prior to its emergence as an independent state.

In particular, East Timor questions the validity of Points A16 and A17, marking the eastern and western edges of the ‘Timor Gap’ left in the 1972 Australia-Indonesia seabed boundary so as to

¹ Timor Sea Treaty Between The Government Of East Timor And The Government Of Australia, Dili, 20 May 2002, available at http://www.austlii.edu.au/au/other/dfat/special/etimor/Timor_Sea_Treaty.html. (‘*Timor Sea Treaty*’)

² Exchange of Notes Constituting an Agreement between the Government of the Democratic Republic of East Timor and the Government of Australia Concerning Arrangements for Exploration and Exploitation of Petroleum in an area of the Timor Sea Between East Timor and Australia, 20 May 2002 (‘*Exchange of Notes*’).

³ Mari Alkatiri, Prime Minister of East Timor, Interview on *Insight*, SBS, 23 May 2002.

⁴ *Timor Sea Treaty*, article 9.

avoid areas which could be claimed by Portugal as the colonial authority in East Timor.⁵ The Senate Foreign Affairs, Defence and Trade References Committee on East Timor considered this issue in its December 2000 Final Report:

[t]he 1972 seabed treaty noted in Article 3 that...negotiations with other governments that claimed sovereign rights to the seabed (then Portugal, now East Timor) might require adjustments to points 16 and 17.⁶

Hence, Article 3 of the 1972 Seabed Agreement acknowledges the possibility that the establishment of Points A16 and A17 may have the effect of limiting the full shelf entitlements of an independent East Timor. This reflects the concept of 'non-encroachment' in international law, which requires that maritime boundary agreements must be limited to a geographical area in which there are no third party claims.⁷

The East Timorese National Parliament formally adopted the *Maritime Zones Act* on 23 July 2002, purporting to create EEZ and continental shelf rights out to at least 200 nautical miles. This has the effect of creating overlapping continental shelf claims with both Indonesia and Australia, including areas of known hydrocarbon reservoirs, and in particular, Greater Sunrise. East Timor has indicated that it will seek to negotiate maritime boundaries with both Indonesia and Australia.⁸ For East Timor to assert sovereign rights over the Greater Sunrise deposit beyond the 18% promised under Annex E would require recognition of East Timorese EEZ or shelf rights to the south-east of Point A16 on the 1972 Seabed line.

(i) Rights to the east of Point A16

East Timor needs to negotiate a boundary to its east with Indonesia, north of the 1972 Seabed agreement. By declaring respective 200 nm EEZs, these countries have competing claims in the area. Indonesian legislation provides that in areas of overlapping EEZ claims, the boundary line 'shall be established by agreement between the Republic of Indonesia and the State concerned'.⁹ However, in the absence of agreement, the legislation mandates that where 'no special conditions need to be considered, the boundary line...shall be the median line or a line that is equidistant' from Indonesian baselines or territorial base points, and those of the other State, unless a provisional arrangement has been reached with the State concerned.¹⁰ The East Timorese *Maritime Zones Act* requires the peaceful settlement of questions of maritime delimitation, 'taking into account the relevant principles and rules of international law'.¹¹

Under international law, Article 83 UNCLOS favours delimitation 'by agreement on the basis of international law...in order to achieve an equitable solution'. The most recent state practice and international jurisprudence supports the conclusion that 'the appropriate methodology for

⁵ Victor Prescott, 'East Timor's Potential Maritime Boundaries', Ch.5 in D. Rothwell and M. Tsamenyi, *The Maritime Dimensions of an Independent East Timor*, (Centre for Maritime Policy, University of Woolongong, 2000), 89.

⁶ Senate Foreign Affairs, Defence and Trade References Committee, *Final Report on East Timor*, December 2000, para. 4.12.

⁷ Masahiro Miyoshi, 'International Maritime Boundaries and Joint Development: A Quest for a Multilateral Approach', Chapter 21 in G.H. Blake *et al.* (eds.), *Boundaries and Energy: Problems and Prospects*, (Kluwer Law International, 1998), p.455, referring to Judge Jennings in the *North Sea Continental Shelf Cases*, [1969] ICJ Reports, at 47, para. 85; the separate opinion of Judge Shigeru Oda in the *Tunisia-Malta Continental Shelf: Application to Intervene Case*, [1981] ICJ Reports, at 33-34, para.22, and

⁸ Democratic Republic of East Timor Press Release, *Maritime boundary legislation passed by National Parliament of East Timor*, 9 July 2002.

⁹ *Act No.5 of 1983 on the Indonesian Exclusive Economic Zone*, 18 October 1983, article 3(1).

¹⁰ *Act No.5 of 1983 on the Indonesian Exclusive Economic Zone*, 18 October 1983, article 3(2)

¹¹ *Maritime Zones Act*, Article 10.

delimiting the EEZ and continental shelf is first to determine the median or equidistant line and then to consider whether there are *any relevant factors required to be taken into account in order to achieve an equitable result*.¹²

A study by Prescott shows that a strict line of equidistance, as measured from East Timorese basepoints and Indonesia's Leti Island, begins at a midpoint between the two islands, tends south through Point A16 on the 1972 boundary and then approximates the eastern lateral line of the JPDA. Prescott concludes that "it is hard to see what arguments might be used to justify a divergence from the line of equidistance".¹³

The East Timorese position is that the coordinates of Point A16 are ill-founded at international law because they give full effect to Indonesian islands that should have been given a lesser effect in determining the course of the seaward line from the midpoint between the coast of East Timor and the Indonesian island of Leti. According to a recent legal opinion on the matter

[m]odern international law...does not permit small islands to have a disproportionate effect on maritime boundaries. The law requires that small islands that would disproportionately affect a maritime delimitation be given only a proportional effect – perhaps one-half or three-quarters effect, depending on the size of the island and its relationship to the coastline.

....

*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. This would have the practical effect of placing most of all of the Greater Sunrise field within East Timorese jurisdiction...*¹⁴

There is a significant body of state practice and international jurisprudence which favours reducing the effect of islands within the general framework of an approach based on equidistance.¹⁵ Much of this precedent may, however, be of lesser significance where one of the opposite or adjacent states is 'archipelagic'. This because Part IV UNCLOS allows archipelagic states to draw baselines by linking the outermost points of the outermost archipelagic islands.¹⁶ The baselines may then serve as points from which seaward maritime zones are measured.

Despite the fact that Indonesian legislation makes equidistance the presumed method of delimitation, a 1969 Indonesia-Malaysia seabed delimitation in the Natuna Sea offers some support for the discounting of the effect of Pulau Leti in a maritime delimitation between Indonesia and East Timor in the eastern Timor Sea, and increasingly so as the boundary tends south

¹² *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v Bahrain), [2001] ICJ Reports, paras. 230 and 247; and *Eritrea v Yemen Phase II*, Award of the *ad hoc* Arbitral Tribunal in the Second Stage - (Maritime Delimitation), 17 December 1999, available at <http://pca-cpa.org/RPC/#Eritrea>, paras 131-132

¹³ Victor Prescott, 'East Timor's Potential Maritime Boundaries', Ch.5 in D. Rothwell and M. Tsamenyi, *The Maritime Dimensions of an Independent East Timor*, (Centre for Maritime Policy, University of Woolongong, 2000), 90.

¹⁴ V. Lowe *et al.*, *Opinion in the Matter of East Timor's Maritime Boundaries*, 11 April 2002, available for download at http://www.gat.com/Timor_Site/lglop.html, paras. 40-42.

¹⁵ *Anglo-French Award*, 18 ILM 397 (1979), para. 251; the decisions in the *Gulf of Maine* ([1982] ICJ Reports 18) and *Libya-Tunisia* ([1984] ICJ Reports 246) cases, where the ICJ applied 'half effects' to Canadian Seal Island and the Kerkennah Islands, respectively; and the very recent *Qatar-Bahrain* case ([2001] ICJ Reports, para 219), where the Court observed that the small and uninhabited offshore island of Qit'at Jaradah was an 'insignificant maritime feature' whose use as a base point would amount to a 'disproportionate effect'.

¹⁶ UNCLOS, article 47(1).

(seawards).¹⁷ This precedent is also significant as it provides evidence of a willingness on the part of Indonesia to accept a partial effect for its islands, even where those islands lie within archipelagic baselines.

In summary, it is possible that East Timor might achieve a negotiated delimitation that gives less than “full effect” to Pulau Leti. This would have the effect of invalidating Point A16 as an accurate reflection of the eastern extent of East Timor’s rightful maritime claims. It would then be incumbent upon Indonesia and Australia to activate Article 3 of the 1972 Seabed Agreement, so as to “consult with each other with a view to agreeing on such adjustment or adjustments...as may be necessary”.

Fears that a reconsideration of Point A16 might jeopardize Australia’s position in the 1972 boundary appear misplaced.¹⁸ Such consultations are provided for in a long-standing treaty between Australia and Indonesia from which neither country can unilaterally withdraw. Article 3 only calls for a revisiting of the validity of Points A16 and A17 as lateral extremities of the 1972 boundary and makes no reference whatsoever to the question of the latitudinal positioning of those lines.

Even so, Australia is under no obligation to accept that a line of “partial effect” delimiting the shelf between East Timor and Indonesia north of the 1972 boundary should form the basis for adjustments south of the line. However, any shift of Point A16 would significantly bolster East Timor’s position that the 1972 boundary ‘encroached’ upon its shelf entitlements under international law, and that an Australia-East Timor delimitation south of the 1972 boundary ought to reflect this.

(ii) Rights to the south of Point A16

By concluding a 90/10 joint development agreement with East Timor, Australia has, in part, acknowledged the validity of East Timor’s claim to sovereign rights over the continental shelf south-west of A16. While the principle of natural prolongation remains valid at international law to support Australia’s claim of a shelf out to the Timor Trough, it is increasingly subject to the preference for a median line where there is less than 400 nm between opposite states.

Hence, the negotiation and settlement of a permanent shelf boundary would most likely result in a horizontal line somewhere between the equidistant line and the Timor Trough (the south and north extremities of the JPDA). This would have the effect of depriving East Timor of the 90% of Bayu-Undan production it is now promised, and might also jeopardize Australia’s long-standing reliance on the natural prolongation argument, thereby compromising its position in current boundary negotiations with New Zealand. More likely, therefore, is the ratification by both

¹⁷ The 1969 agreement included a delimitation between the Malaysian province of Sarawak and the Indonesian Natuna islands.¹⁷ Like East Timor, Sarawak is an enclave within the Indonesian archipelago, and also has a land boundary with Indonesia (Borneo). The boundary agreed in 1969 is significantly east of a strict equidistant line between the Indonesian and Malaysian (Sarawak) baselines, increasingly so as the boundary tends seaward. The partial effect varies over the boundary from nearly full value (86%) onshore to approximately half effect (56%) at the seaward terminus,¹⁷ even though the seaward islands are larger in size than those closer to the mainland. By denying full effect to the Natunas, Indonesia has conceded part of the shelf area that would otherwise have been ascribed to the islands.

¹⁸ Australia’s Minister for Foreign Affairs, Alexander Downer, has argued:

[i]f we get into the game of renegotiating all of our boundaries with Indonesia, I think that would be a deeply unsettling development in our relationship with Indonesia, and for our foreign policy generally... (interview on Insight, SBS, 23 May 2002).

countries of the Timor Sea Treaty, an 'agreement to disagree' that provides legal security for the development of resources in the area of overlapping claims.

The potential conclusion of a "partial effect" boundary by East Timor with Indonesia would appear to warrant the lateral extension of the JPDA to reflect the full extent of overlapping claims as between Australia and East Timor. Such an extension would obviously alter the proportion of Greater Sunrise lying within the JPDA, and would require an adjustment of the unitisation formula in Annex E to reflect the new geographic reality. In consideration for such concessions, Australia might seek a readjustment of the JPDA split of production to, perhaps 80/20 or 70/30, so as to offset some of the financial loss incurred by the reduction of the proportion of Greater Sunrise falling under its exclusive jurisdiction.

Release of offshore acreage

The Australian government must also consider the repercussions of its recent release of offshore petroleum exploration areas in close proximity to the reserves discovered in the Greater Sunrise/Troubadour area. Release Area NT-02¹⁹ lies in an area of continental shelf currently subject to overlapping claims, and may therefore elevate the risk of further conflict.

To grant an exploration permit in such an area, after entry into force of the East Timorese *Maritime Zones Act*, would not amount to an infringement of East Timor's sovereign rights to exploit the natural seabed resources of its claimed EEZ. However, there is at least a good faith requirement to seek to discuss a proposal to explore an area subject to conflicting claims.²⁰ Australia is required only to refrain from granting a *production* permit, since mere *exploration* for gas and condensate potential does not create a risk of irreparable prejudice to East Timorese interests.²¹ However, movement to a production phase in NT-02 would be inconsistent with East Timor's rights under international law.

Conclusion

In ratifying the Timor Sea Treaty, the Australian Government should remain mindful of the need to engage meaningfully in negotiations for the settlement of permanent maritime boundaries with East Timor. An agreement between East Timor and Indonesia is the only relevant test for the accuracy of Point A16, and it would be inappropriate for Australia to refuse to engage on the repositioning of this point if East Timor succeeds in negotiating a less than full effect boundary with Indonesia in the eastern Timor Sea.

Australia should not regard the JPDA as reflecting lines suitable for a permanent delimitation of the continental shelf between East Timor and Australia. Nor should the JPDA be regarded as reflecting the limits of the area "under dispute". The Timor Sea Treaty and associated unitisation agreements are stated to be "without prejudice" to a permanent delimitation, as required under international law.

A permanent delimitation between Australia and East Timor would automatically terminate the Timor Sea Treaty, and depending on the course of a new eastern lateral boundary, might require the conclusion of a new unitisation agreement that reflected the proportions of Greater Sunrise

¹⁹ Department of Industry, Tourism and Resources, 'Geology & Data Availability: Release Area NT02-, Sahul Platform, Bonaparte Basin, Northern Territory', *Release of Offshore Petroleum Exploration Areas 2002 CD Rom*, (Commonwealth of Australia, Canberra: 2002).

²⁰ David Ong, "Joint Development of Common Offshore Oil and Gas Deposits: Mere State Practice or Customary International Law ?", 93 *American Journal of International Law* 771(1999), 802.

²¹ *Ibid.*, referring to *Aegean Sea Continental Shelf* (Greece v Turkey), Interim Protection, [1976] ICJ Reports 3 (Order of 11 September), at 10, para.30.

situated either side of the new boundary. Assuming that the parties favour, in the interim, the terms of the new Timor Sea Treaty, Australia might wish to consider:

(i) a shift to the east of the eastern JPDA boundary so as to reflect or “continue”, below the 1972 line, a new delimitation between Indonesia and East Timor that accorded a less than full effect to the Indonesian island of Leti; or

(ii) a simple readjustment of the Annex E unitisation formula, without making any geographical adjustment to the current JPDA. The current arrangement only contemplates an 18% interest in this deposit for East Timor, but importantly, Annex E provides that ‘[e]ither East Timor or Australia may request a review of the production sharing formula’.

Finally, Australia should avoid the unilateral pursuit of petroleum development in areas now known to be subject to overlapping maritime claims. Such action would only serve to heighten diplomatic unease that complicates the movement forward of plans to exploit the lucrative resources of the Timor Sea for the mutual benefit of Australia and East Timor.