

THE NEW *TIMOR SEA TREATY* AND INTERIM ARRANGEMENTS FOR JOINT DEVELOPMENT OF PETROLEUM RESOURCES OF THE TIMOR GAP

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[Under the Timor Sea Treaty of 2002, Australia and the newly independent East Timor have agreed upon joint development of the petroleum resources of the disputed Timor Gap. Until this treaty comes into force, an Exchange of Notes applies the terms of the 1989 Timor Gap Treaty, with Australia and East Timor as the implementing parties. Since gaining independence, East Timor has argued that under current principles of international law, it is entitled to a greater share of the Timor Sea's oil and gas resources than is suggested by the boundaries of the Timor Sea Treaty's Joint Petroleum Development Area ('JPDA'). Principally, East Timor asserts that the western and eastern lines defining the JPDA are ill-founded at international law, a claim that has immediate implications for the joint venture partners in the Greater Sunrise fields that straddle the JPDA's eastern boundary. This paper examines the legal background to the Timor Gap dispute, the agreements that have regulated resource exploitation of the area since 1989, the validity of the respective seabed rights of Indonesia, Australia and East Timor and finally, the impact of Australia's recent withdrawal of maritime boundary disputes from the jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea.]

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I INTRODUCTION

On 20 May 2002 Australia and the newly independent East Timor 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*,² also of 20 May 2002, 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.³ Despite an apparent willingness to regulate petroleum activities in the Timor Gap jointly, the two agreements mask significant legal and policy issues that remain to be resolved.⁴ This paper considers the following issues:

- the legal background to the Timor Gap dispute;
- the *Exchange of Notes* of 2002;
- the *Timor Sea Treaty* of 2002 and its protection of respective sovereign neutrality;
- challenges by East Timor to the validity of the western and eastern lateral boundaries of the Joint Petroleum Development Area ('JPDA') under the *Timor Sea Treaty* and to the boundaries agreed between Indonesia and Australia in the *1972 Seabed Agreement*;
- legal issues posed by the Greater Sunrise fields straddling the JPDA and Australia's continental shelf; and
- compulsory dispute settlement by the International Court of Justice ('ICJ') and the International Tribunal for the Law of the Sea ('ITLOS').

II LEGAL BACKGROUND TO THE TIMOR GAP DISPUTE

Fundamental to an understanding of the legal issues raised by the Timor Gap dispute is the reality that no issue strikes so profoundly at the heart of a nation's sovereignty as threats to its territory or non-renewable resources. The legal history of events giving rise to the dispute over access to resources in the Timor Gap dates from the agreement between Australia and Indonesia in 1972 on

¹ *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, opened for signature 20 May 2002, [2002] ATNIF 11 (not yet in force) ('*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*, [2002] ATS No 11 (entered into force 20 May 2002) ('*Exchange of Notes*').

³ *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, opened for signature 11 December 1989, [1991] ATS No 9 (entered into force 9 February 1991) ('*Timor Gap Treaty*').

⁴ Robert Gottlieb, 'Walking an Oily Tightrope over a Melting Pot', *The Australian* (Sydney, Australia), 3 June 2002, 36; Don Greenlees, 'Leaders Hint at Legal Push for Bigger Share of Seabed Riches', *The Australian* (Sydney, Australia), 21 May 2002, 6; Jill Jolliffe, 'US Challenge to East Timor Oil Pact', *The Age* (Melbourne, Australia), 21 March 2002, 5.

seabed boundaries in the Arafura and western Timor Seas.⁵ A glance at these boundaries, described by Map A (see below page 4), will demonstrate the problem; the seabed delimitations on either side of the Timor Gap are significantly closer to the coast of Indonesia than that of Australia.

Under international law as it was recognised in the early 1970s, a coastal state had (without the need to make any formal claim) sovereign rights over the continental shelf as the natural prolongation of its land territory up to a depth of 200 metres or 'to where the depth of the superjacent waters admits of the exploitation of the natural resources' of the area.⁶ Australia has consistently argued that the natural prolongation of its north-western continental shelf extends, as a geomorphological fact, up to the Timor Trough. The Timor Trough is approximately 40 nautical miles from East Timor and 250–350 nautical miles from the closest part of Australia (Melville Island), and is up to 3000 metres deep in places.⁷ The *1972 Seabed Agreement* reflects Indonesia's explicit acceptance at the time that the Timor Trough differentiates the Australian continental shelf from the seabed claimed by Indonesia. Indeed, the *1972 Seabed Agreement* was founded on the *Convention on the Continental Shelf* that employs the limits of exploitability and the 200 metre isobath as tests of the outer limit of the shelf, and upon the dicta of the ICJ in the *North Sea Continental Shelf Cases*.

When the *1972 Seabed Agreement* was negotiated, the territory of East Timor remained under the administrative authority of Portugal through the United Nations.⁸ After the withdrawal of Portugal in 1975, civil war broke out,

⁵ *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of 18 May 1971*, opened for signature 9 October 1972, 974 UNTS 319 (entered into force 8 November 1973) ('*1972 Seabed Agreement*').

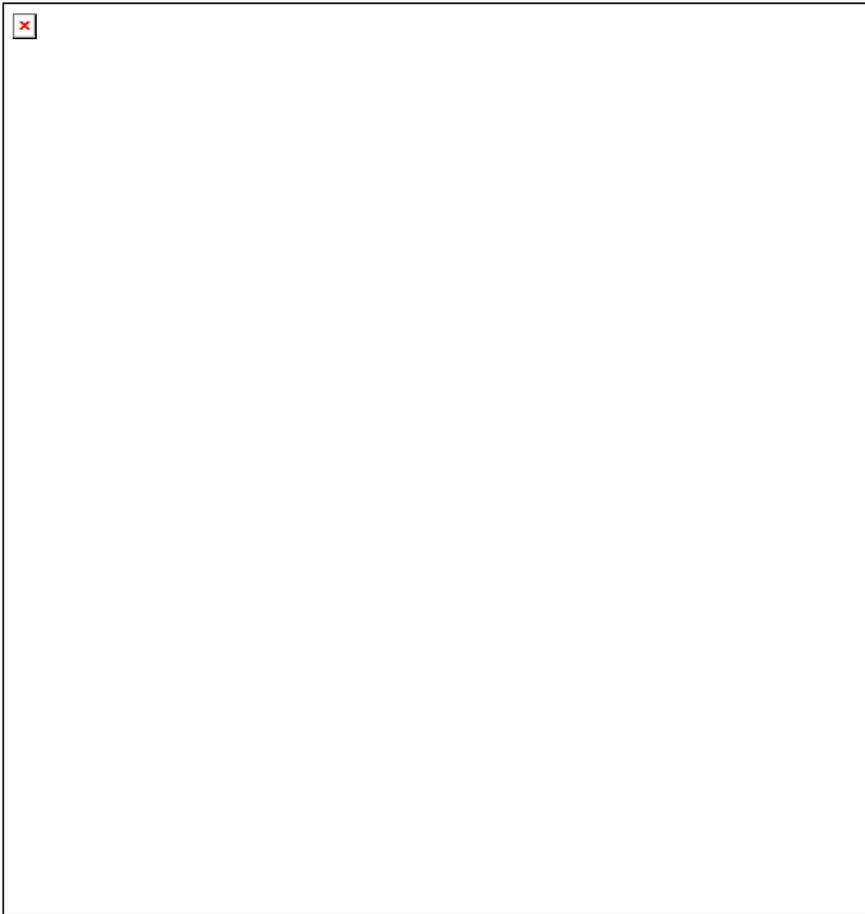
⁶ *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311, art 1 (entered into force 10 June 1964); *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits)* [1969] ICJ Rep 4, [19] ('*North Sea Continental Shelf Cases*').

⁷ Troughs are common throughout the world, particularly in the Pacific Basin. The Okinawa Trough provides a useful parallel with the Timor Trough, as it lies between China and Japan and is a significant geological feature of the broad continental shelf between them. Similarly, the Okinawa Trough has proved to be an impediment to agreement on a seabed boundary in the area and a delimitation remains to be resolved: see Victor Prescott and Clive Schofield, 'Undelimited Maritime Boundaries of the Asian Rim in the Pacific Ocean' 3(1) *Maritime Briefing* 1; Jonathan Charney, 'Central East Asian Maritime Boundaries and the Law of the Sea' (1995) 89 *American Journal of International Law* 724, 739.

⁸ East Timor has been on the agenda of the UN for over 40 years as a Non-Self-Governing Territory subject to Chapter XI of the *Charter of the United Nations*, with Portugal as the administering nation. Only in 1974 did Portugal accept the obligations under the *Charter of the UN*, stating its intention on 17 July 1975 to establish a provisional government and constitute a popular assembly with universal suffrage: Department of Foreign Affairs and Trade ('DFAT'), *East Timor in Transition 1998–2000* (2001) 1–2. For a discussion of the role of the UN in East Timor, see 1–5.

MAP A: 1989 *TIMOR GAP TREATY* BOUNDARIES

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prompting the illegal invasion of East Timor by Indonesia in December 1975.⁹ After a vote of the People's Assembly, convened by the 'Provisional Government of East Timor' on 31 May 1976, the Indonesian Parliament was asked to integrate East Timor into Indonesia.¹⁰ During this period of unrest and instability, no agreement upon a seabed boundary between Australia and the coast of Indonesian controlled East Timor proved possible. The result is the 'Timor Gap' — the distance between the eastern and western terminal points describing the limits of the 1972 seabed boundaries of respective Indonesian and Australian maritime jurisdiction. The Timor Gap described by the terminal points was not, however, intended to define any future border of an independent East Timor, nor could it have done so without the agreement of Portugal.¹¹

Believing that the effective control of East Timor by Indonesia was unlikely to be reversed, Australia recognised Indonesia as the de facto sovereign over East Timor in January 1978¹² and the de jure sovereign on 14 February 1979.¹³ Recognition facilitated renewed attempts to close the Timor Gap through negotiations with Indonesia. By this time, however, the international law of the sea had been consolidated and progressively developed by the 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS').¹⁴ New concepts and principles had evolved, including the 200 nautical mile Exclusive Economic Zone ('EEZ') and the equitable delimitation of overlapping claims to an EEZ and continental shelf.¹⁵ During the years following 1982, state and juridical practice increasingly adopted the technique of drawing a median line between opposite coasts with less than 400 nautical miles between them where there was a common continental shelf, at least as a starting point for negotiations. Such practices have arguably formed the basis for a new rule of customary law, a possibility that is examined below.

Indonesia, seeking to benefit from the dynamic nature of international law, argued that, while it has no significant continental shelf in the Timor Sea, it has gained rights to an EEZ, including seabed rights, in the maritime area between it

⁹ Ibid 3. The UN Security Council adopted a resolution on 22 December 1975 deploring the intervention and calling on Indonesia to withdraw: *Resolution of 22 December 1975*, SC Res 384, UN SCOR, 30th sess, 1869th mtg, UN Doc S/Res/384 (1975). Note also a series of General Assembly Resolutions from 1975–82 along similar lines: GA Res 3485, UN GAOR, 30th sess, 3485th mtg, UN Doc A/Res/3485 (1975); GA Res 31/53, UN GAOR, 31st sess, 85th plen mtg, UN Doc S/Res/31/53 (1976); GA Res 32/34, UN GAOR, 32nd sess, 83rd plen mtg, UN Doc A/Res/32/34 (1977); GA Res 33/39, UN GAOR, 33rd sess, 81st plen mtg, UN Doc A/Res/33/39 (1978); GA Res 34/40, UN GAOR, 34th sess, 75th plen mtg, UN Doc A/Res/34/40 (1979); GA Res 35/27, UN GAOR, 35th sess, 57th plen mtg, UN Doc A/Res/35/27 (1980); GA Res 36/50, UN GAOR, 36th sess, 70th plen mtg, UN Doc A/Res/36/50 (1981); GA Res 37/30, UN GAOR, 37th sess, 77th plen mtg, UN Doc A/Res/37/30 (1982).

¹⁰ This was achieved with the signature of the *Statute of Integration* by President Soeharto on 17 July 1976, creating East Timor as the 27th province of Indonesia: DFAT, above n 8, 3.

¹¹ Portugal did not play a part in the 1972 boundary negotiations, possibly because it had a diminishing capacity to control events in the territory.

¹² DFAT, above n 8, 11.

¹³ For a list of the states that explicitly or implicitly recognised Indonesian control over East Timor, see above n 8, 12.

¹⁴ Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

¹⁵ See *ibid* arts 55, 74, 83.

and Australia. While Indonesia did not seek to renegotiate the 1972 *Seabed Agreement*, it argued that the new equidistance principle should apply to seabed delimitation in the Timor Gap and thus that it was no longer appropriate simply to draw a line joining the eastern and western terminal points of the 1972 seabed boundaries. As Australia maintained its juridical position claiming the full extent of the Australian continental shelf to the Timor Trough, negotiations reached an impasse. Thus the legal effect of this geophysical feature continued to pose an intractable problem for seabed delimitation.

Early 1980s exploratory surveys, few and limited though they were, located kelp structures in the Timor Sea that indicated possible oil and gas reserves in the area.¹⁶ The prospect of receiving revenues from petroleum exploitation, coupled with the relatively stable, though illegal, occupation of East Timor, prompted further attempts to establish a regime for resource exploitation.

By 1989 Indonesia and Australia had agreed upon the conceptually innovative *Timor Gap Treaty*, under which jointly regulated resource exploitation could go forward without prejudice to the legal positions of either State. While it is beyond the scope of this paper to consider the *Timor Gap Treaty* in detail, its central provisions provide the foundations for the recent *Exchange of Notes* and proposed *Timor Sea Treaty*. The most notable feature of the *Timor Gap Treaty* was the establishment of a Zone of Cooperation ('ZOC') within which exploitation of petroleum resources could take place (see Map A, above page 4). In Area A of the ZOC, the benefits of exploitation were to be shared equally by Indonesia and Australia, the aim being to achieve 'optimum commercial utilization' of the petroleum resources.¹⁷ An organisational structure was created comprising a Ministerial Council with overall policy responsibility and a Joint Authority with responsibility for day-to-day management of resource activities.¹⁸ The Joint Authority was granted legal personality and the capacity to enter into production sharing contracts with private corporations.¹⁹ Annexed to the *Timor Gap Treaty* was a *Petroleum Mining Code for Area A of the Zone of Cooperation*,²⁰ a *Model Production Sharing Contract between the Joint Authority and (Contractors)*,²¹ which set out the terms of each contract, and a *Taxation Code for the Avoidance of Double Taxation in Respect of Activities Connected with Area A of the Zone of Cooperation*.²² Of fundamental significance to the agreement were the provisions intended to ensure the non-prejudice of the respective juridical positions of Indonesia and Australia on a permanent delimitation of the continental shelf between them.²³

The *Timor Gap Treaty* proved to be successful in facilitating petroleum activities over the following 10 years, with revenue from the shared product first

¹⁶ Victor Prescott, 'Report Number 6-2(5): Australia-Indonesia (Timor Gap)' in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vol 2, 1245, 1249.

¹⁷ *Timor Gap Treaty*, above n 3, art 2(2)(a).

¹⁸ *Ibid* arts 5-9.

¹⁹ *Ibid* arts 7(2), 8(b).

²⁰ *Ibid* annex B ('*Petroleum Mining Code*').

²¹ *Ibid* annex C ('*Production Sharing Contract*').

²² *Ibid* annex D ('*Taxation Code*').

²³ *Ibid* art 2(3).

becoming available in July 1998.²⁴ Nonetheless the unavoidable fact remained that the agreement was founded on Indonesia's illegal annexation. The *Timor Gap Treaty* was thus rejected by Portugal, and also by representatives of the people of East Timor, as tainted and unacceptable. Indeed Portugal attempted unsuccessfully to challenge the validity of the *Timor Gap Treaty* before the ICJ.²⁵

When Indonesian control over East Timor ended 10 years later on 25 October 1999, the United Nations Transitional Administration in East Timor ('UNTAET') assumed authority over the area. This was the first time that a UN body had sole responsibility for managing a territory during its transition to nationhood. The mandate for UNTAET also included the power to conclude international agreements.²⁶ One of many concerns of UNTAET during the interim period was to ensure legal security for investments in petroleum activities in the Timor Gap. Representatives of the East Timorese people maintained their view that the *Timor Gap Treaty* was an illegal agreement and sought some other method of resolving the boundary issue.²⁷ UNTAET and Australia agreed to continue the 'terms' of the *Timor Gap Treaty*, so that while the *Timor Gap Treaty* itself was at an end, its basic provisions would continue to apply.²⁸ As an interim arrangement, the agreement enabled the Joint Authority to continue to regulate petroleum activities in the area, thereby securing current investments and encouraging further exploration.

As full independence for East Timor grew closer, it became necessary to make legal preparations for post-independence management of the resources of the Timor Sea. Australia began negotiations with the East Timor Transitional Administration ('ETTA'), a body which included representatives of the people of East Timor. As ETTA was not able to bind the future Government, it was possible only to negotiate an agreement that might be adopted by an independent East Timor in due course. Under a *Memorandum of Understanding* ('MOU') of 5 July 2001, the parties agreed that the attached '*Timor Sea Arrangement*' would be

suitable for adoption as an agreement between Australia and East Timor upon East Timor's independence, embodying arrangements for the exploration and

²⁴ Gillian Triggs, 'Legal and Commercial Risks of Investment in the Timor Gap' (2000) 1 *Melbourne Journal of International Law* 98, 100.

²⁵ *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90.

²⁶ See SC Res 1272, UN SCOR, 54th sess, 4057th mtg, UN Doc S/RES/1272 (1999) [1], which provides that UNTAET is 'empowered to exercise all legislative and executive authority'. Also, the *Report of the Secretary-General on the Situation in East Timor* recommends that the UN 'conclude such international agreements with States and international organizations as may be necessary for the carrying out of the functions of UNTAET in East Timor': UN Doc S/1999/1024 (1999). There are scant precedents for such a treaty making power.

²⁷ Mari Alkatiri is reported to have said 'we are not going to be a successor to an illegal treaty': Karen Polglaze, 'Timor Gap Treaty in Doubt', *The Canberra Times* (Canberra, Australia), 30 November 1999, 2.

²⁸ *Exchange of Notes Constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) Concerning the Continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989*, [2000] ATS No 9 (entered into force 10 February 2000, with effect from 25 October 1999).

exploitation of the Joint Petroleum Development Area pending a final delimitation of the Seabed between Australia and East Timor.²⁹

The *Timor Sea Arrangement* (now the *Timor Sea Treaty*) is discussed below. The most outstanding feature of the proposed new agreement is that in the future, the benefits of continued joint exploitation in the JPDA (that is, Area A of the ZOC under the *Timor Gap Treaty*) are to be split on the basis that East Timor receives 90 per cent of the product, with Australia receiving 10 per cent; a notable departure from the earlier position of sovereign neutrality based in part on a 50/50 share of production.

As East Timor could assume full legal personality at international law only upon independence, the *MOU* was intended to nominate terms for the joint development of the Timor Sea, subject to the conclusion and ratification of a new treaty between the parties. In the weeks prior to 20 May 2002, however, speculation mounted regarding the potential costs and benefits of the proposed *Timor Sea Arrangement*. Concerns were voiced that the *Timor Sea Arrangement* would not ensure the best possible outcomes for either East Timor or Australia. Moreover, debate shifted focus to the respective rights of East Timor and Australia over the straddling deposit known as Greater Sunrise.³⁰ Under the *MOU*, approximately 20 per cent of the reserves lie within the joint development area, leaving the remaining 80 per cent of the oil and gas resources entirely under the sovereignty of Australia.³¹ Putative Prime Minister Mari Alkatiri rejected the 20/80 share of the deposit, arguing that under current principles of international law, the Greater Sunrise fields should lie entirely within the seabed jurisdiction of East Timor.³²

The tensions generated by public discussion surrounding the Timor Sea prompted speculation that an independent East Timor would reject the proposed *Timor Sea Arrangement* and institute proceedings against Australia before the ICJ or the ITLOS for judicial determination of a final maritime boundary.

²⁹ *Memorandum of Understanding of Timor Sea Arrangement*, 5 July 2001 <<http://www.austlii.edu.au/au/other/dfat/special/MOUTSA.html>> at 23 September 2002.

³⁰ The Greater Sunrise reserves are estimated to contain recoverable gas reserves of about 8.5 trillion cubic feet and condensate reserves of around 335 million barrels, valued at approximately A\$30 billion: *Government Press Kit: Timor Sea Treaty*, 20 May 2002; see also Northern Territory Office of Territory Development, *Greater Sunrise Northern Territory Oil and Gas Fact Sheet* (2002) <http://www.otd.nt.gov.au/dcm/otd/otd/Fact%20Sheets/greater_sunrise.html> at 23 September 2002.

³¹ In the interests of clarity, the following are the respective arrangements for sharing the benefits of joint production in the Timor Sea:

- *Timor Gap Treaty*: 50/50 Indonesia and Australia
- *Exchange of Notes*: 50/50 UNTAET and Australia
- *Timor Sea Arrangement* and the 2002 *Timor Sea Treaty*: 90 per cent East Timor/10 per cent Australia
- Greater Sunrise (2002 *Timor Sea Treaty*, annex E): Only 20 per cent (agreed to be 20.1 per cent) of Greater Sunrise lies in the JPDA. The remaining 80 per cent (now agreed to be 79.9 per cent) lies in the Australian seabed area as agreed in the 1972 *Seabed Agreement* between Australia and Indonesia. Of the 20 per cent in the JPDA, the new *Timor Sea Treaty* provides that it will be shared on the basis that Australia will receive 10 per cent and East Timor 90 per cent. If the *Timor Sea Treaty* does not come into effect, the share will be the 50/50 split agreed under the terms of the *Timor Gap Treaty*, still in effect as between Australia and East Timor pursuant to the 2002 *Exchange of Notes*.

³² Greenlees, above n 4.

Stimulating debate was the institution on 21 August 2001 of legal proceedings in the Federal Court of Australia by Oceanic Exploration Company (a United States company) and Petrotimor Companhia de Petroleos SARL (a Portuguese company, now 20 per cent owned by the Government of East Timor, hereafter 'Petrotimor') against Australia, the Joint Authority and subsidiaries of the Phillips Petroleum Group.³³ A further stimulant to discussion and an intriguing 'footnote' to continuing legal uncertainty over the future of the Timor Gap, was the decision by Petrotimor to post a supportive, but factually and legally flawed, opinion on the internet.³⁴ The opinion considers the validity of the coordinates of the Timor Gap and of Australia's claim to a continental shelf to the geological limit of the Timor Trough. More specifically, the opinion argues that the eastern and western lateral lines of the proposed JPDA, and the terminal points of the 1972 *Seabed Agreement* on which they are based, encroach on the seabed rights of East Timor.³⁵

In this charged political climate, Australia announced on 21 March 2002 that henceforth it would exclude from the compulsory jurisdiction of the ICJ and ITLOS all disputes relating to the delimitation of maritime zones, a move described by putative Prime Minister Mari Alkatiri as reflecting 'a lack of confidence in us and an unfriendly act'.³⁶

³³ The action seeks compensation for alleged expropriation of a concession granted in the continental shelf between the province of Timor, as it then was, and Australia in 1974. In essence, the applicants argue that the entry by Australia into the *Timor Gap Treaty* was an acquisition of a property right other than on just terms under s 51(xxxi) of the *Australian Constitution* and an expropriation of alien property in breach of customary international law. The claims against the Phillips Companies allege wrongful interference with the contractual relations of the applicants and the Government of Portugal and the misuse of confidential information: see *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2002] FCA 18, [2]–[23]. The Federal Court has yet to hand down its decision, though hearings on various matters have been held: see *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2001] FCA 1883; *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2002] FCA 1029. The claims appear to be unfounded both at international law and Australian constitutional law and are unlikely to succeed. Portugal had no mandate to create a property right in the disputed seabed and its good faith in purporting to do so a few months before civil unrest began in East Timor in August 1975 may be doubted. Australia strenuously protested against the Portuguese concession at the time because it overlapped with pre-existing Australian concessions in the area. The *Timor Gap Treaty* was an interim regime to facilitate petroleum exploration and exploitation, not an attempt to exploit any property interest. Moreover Portugal made no protests against proposals for joint development until 1985, seven years after negotiations on the *Timor Gap Treaty* began. Finally, the applicants made no attempt to mitigate their alleged damages. See also Gillian Triggs, 'Proposed Timor Sea Arrangements between Australia and the East Timor Transitional Administration' (2002) 20 *Journal of Energy and Natural Resources Law* 40, 48.

³⁴ Vaughan Lowe, Christopher Carleton and Christopher Ward, *Opinion in the Matter of East Timor's Maritime Boundaries*, 11 April 2002 <http://www.gat.com/Timor_Site/1glop.html> at 23 September 2002.

³⁵ *Ibid* [45].

³⁶ AAP, 'Doubt on the Timor Gap Treaty', *The Sunday Times* (Perth, Australia), 12 April 2002. For a discussion of the terms of Australia's new declaration under art 36(2) of the *Statute of the ICJ*, see Gillian Triggs and Dean Bialek, 'Australia's Withdrawal of Maritime Disputes from the Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea' (2002) 17 *International Journal of Marine and Coastal Law* (forthcoming).

In early May 2002 prospects for acceptance by East Timor of the *Timor Sea Arrangement* looked bleak, as pressure mounted for Australia to agree to a larger share of Greater Sunrise for East Timor than that set out in the *MOU*.³⁷ It was, therefore, a significant development that, on East Timorese independence day, Australia and East Timor signed the *Timor Sea Treaty*, effectively adopting the *Timor Sea Arrangement* in its entirety, including the 20/80 split of Greater Sunrise in Australia's favour.

For the present, and despite signature by East Timor and Australia of the *Timor Sea Treaty*, the joint development of petroleum resources will continue under an interim regime. The *Timor Sea Treaty* will not enter into force until Australia and East Timor 'have notified each other in writing that their respective requirements for entry into force ... have been complied with.'³⁸

In practice, the legal force of the *Timor Sea Treaty* depends upon ratification by both States. It is for this reason that it became necessary to agree not only on joint development for the longer term pending final delimitation of a seabed boundary, but also that some further interim arrangements be agreed to protect petroleum activities until the *Timor Sea Treaty* comes into force.

III THE EXCHANGE OF NOTES

The *Exchange of Notes*, also of 20 May 2002, is intended to provide a bridge between the continued terms of the old *Timor Gap Treaty* and the new provisions of the *Timor Sea Treaty*. It provides that future exploration and exploitation of petroleum in the area defined in annex A 'shall take place in accordance with the arrangements in place on 19 May 2002, with Australia and the Democratic Republic of East Timor being the implementing parties.'³⁹

The area defined in annex A replicates the coordinates of Area A of the ZOC under the previous *Timor Gap Treaty*.

The *Exchange of Notes* thus leaves in place, for the present, the terms of the original *Timor Gap Treaty*. The text expressly acknowledges that East Timor does not recognise the validity of the *Timor Gap Treaty*, nor the validity of the 'integration' of East Timor into Indonesia.⁴⁰ Nonetheless the original agreement has demonstrated a certain tenacity as an equitable arrangement in the circumstances. It has survived the withdrawal of Indonesia, the period of the UN administration and pre-independence administration by representatives of East Timor, and will continue to determine the regime for an independent East Timor until the *Timor Sea Treaty* comes into force, if that is to occur. The *Exchange of Notes* also adopts a 'sovereignty neutral' position, so that all acts taking place under it are not to prejudice or affect the positions of the parties on 'a seabed

³⁷ Under annex E, the proposed arrangement gave East Timor 90 per cent of the 20 per cent of the Greater Sunrise deposits that lie within the JPDA.

³⁸ *Timor Sea Treaty*, above n 1, art 25. At a press conference in Dili, 2 July 2002, Mari Alkatiri announced that East Timor will not ratify until Australia does so. Under Australian procedures, the *Timor Sea Treaty* has been tabled before Parliament and is the subject of an examination by the Joint Standing Committee on Treaties, to which submissions were due by 31 July 2002.

³⁹ *Exchange of Notes*, above n 2, art 3.

⁴⁰ *Ibid* art 8.

delimitation or their respective entitlements ... [or] any previous agreements relating to the area.⁴¹

In addition, the parties undertake to work 'expeditiously and in good faith' towards ratification of the new *Timor Sea Treaty*.⁴²

It has been noted that the *Timor Gap Treaty* provides for a 50/50 share of production. The *Exchange of Notes* provides that, if the *Timor Sea Treaty* comes into effect, all its provisions, including the share of benefits on a 90/10 basis, will apply as from the date of East Timorese independence. The revenue from the Elang-Kakatua deposit will, for example, be placed in an interest bearing escrow account held by the Joint Authority, pending the entry into force of the new agreement.⁴³ The effect of such provisions will be that the 90/10 split of production in the proposed JPDA will apply as from 20 May 2002, but only if the *Timor Sea Treaty* is accepted by both parties. Therein lie both the 'catch' and the 'carrot'.

In defined respects, the interim regime adopts provisions of the *Timor Sea Treaty* pending its entry into force. For example, East Timor may apply its Value Added Tax and Income Tax laws in relation to tax withheld monthly.⁴⁴ Also, tax levied by Australia on income received by a contractor from joint petroleum production that East Timor would otherwise have collected had the *Timor Sea Treaty* been in force from 20 May 2002, is to be placed in an account, the monies from which are to be paid to East Timor once it comes into force.⁴⁵ In these ways, East Timor will gain the benefit of the *Timor Sea Treaty* from the date it was signed, but only if it eventually comes into effect.

IV *TIMOR SEA TREATY*⁴⁶

The primary goal of a joint approach to the development of disputed non-renewable resources is to provide states with a key to access resources that would otherwise be locked up by apparently irreconcilable claims to sovereignty. The need to open up such resources is all the more urgent for a developing nation such as East Timor. While the *Timor Sea Treaty* retains a joint development approach to resource exploitation in the JPDA, it does so on terms that differ significantly from those applicable in Area A of the ZOC of the original *Timor Gap Treaty*.

A *Sovereignty and Governance*

The most striking feature of the new *Timor Sea Treaty* is the 90/10 split of petroleum produced in the JPDA in favour of East Timor. Of crucial legal import, however, is the possibility that the agreement no longer adopts a 'sovereignty neutral' stance and thus fails to preserve the respective claims of

⁴¹ Ibid art 7.

⁴² Ibid art 9.

⁴³ Ibid art 4(c).

⁴⁴ Ibid arts 4(a), (b).

⁴⁵ Ibid art 4(d).

⁴⁶ Part IV of this paper is also printed in Gillian Triggs, 'The New Timor Sea Treaty between East Timor and Australia' (2002) *Australian Journal of Asian Law* (forthcoming). See generally Triggs, 'Proposed Timor Sea Arrangements', above n 33, 49.

Australia and East Timor — juridical positions that were so meticulously preserved under the *Timor Gap Treaty*. The *Timor Sea Treaty* sails as close to recognition of East Timor's sovereignty over the disputed seabed as it is possible to manoeuvre without conceding the point entirely.

The usual 'without prejudice' clause has been included to the effect that:

Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting Australia's or East Timor's position on or rights relating to a seabed delimitation or their respective seabed entitlements.⁴⁷

Were it not for this saving provision, an implication to be drawn from the *Timor Sea Treaty* is that Australia's claim to the full extent of the continental shelf up to the Timor Trough is seriously prejudiced. Such an implication is strengthened in light of the three-tiered administrative structure created by the *Timor Sea Treaty* that appears to give East Timor the greater level of control.

The *Timor Sea Treaty* will create a Designated Authority to carry out the day-to-day regulation and management of petroleum activities,⁴⁸ a Joint Commission to establish policies and regulations and to oversee the work of the Designated Authority⁴⁹ and a Ministerial Council to consider any matter referred to it by Australia or East Timor.⁵⁰ Though the Ministerial Council will consist of equal numbers of Ministers from Australia and East Timor, the Joint Commission will comprise one more Commissioner to be appointed by East Timor. While there is no provision for voting procedures of the Joint Commission, it is reasonable to assume that the Joint Commission will act on a majority vote, potentially to the prejudice of Australia. The Designated Authority, to be nominated by the Joint Commission for at least the first three years of the life of the *Timor Sea Treaty*, is thereafter to be the East Timor Government Ministry responsible for petroleum activities.⁵¹ As petroleum activities are to be regulated through a contract between the Designated Authority and a private entity, the East Timor appointed members of the Joint Commission will have a controlling role in those activities. In these ways, the *Timor Sea Treaty* appears not to ensure sovereign neutrality and thus may fail to protect Australian interests in the area.

There are, however, two safeguards of Australian interests. First, as noted above, it is open to either party to refer a matter to the Ministerial Council, including any decision of the Joint Commission. Secondly, the 'without prejudice' clause is likely to be afforded its full legal effect in international law. On this ground, Australia correctly maintains that its juridical position has been protected.⁵² Finally, for a state to agree to exploit resources jointly and to give a partner state the lion's share of the product is in itself a sovereign act that does

⁴⁷ *Timor Sea Treaty*, above n 1, art 2(b).

⁴⁸ *Ibid* art 6(b)(iv).

⁴⁹ *Ibid* art 6(c)(i).

⁵⁰ *Ibid* art 6(d)(i).

⁵¹ *Ibid* art 6(b).

⁵² Views expressed by officials of the Australian Attorney-General's Department, Office of International Law, at the 2002 Conference of the Australian and New Zealand Society of International Law ('ANZSIL'), Canberra, 14–16 June 2002.

not necessarily imply a diminution of its long-term territorial or seabed rights, either specifically or more generally.

B *Joint Petroleum Development Area*

The *Timor Sea Treaty* applies only in the area of the Timor Sea that is described by the coordinates for Area A of the ZOC under the 1989 *Timor Gap Treaty* (see Map B, below page 14). Areas B and C will come under the full sovereignty of East Timor and Australia respectively, and will no longer be subject to joint development. Australia and East Timor shall ‘jointly control, manage and facilitate the exploration, development and exploitation of the petroleum resources of the JPDA for the benefit of [their] peoples.’⁵³

Within the JPDA, all petroleum activities are to be carried out through a contract between the Designated Authority and a limited liability corporation or other such entity. In this respect, the new agreement is similar to the terms currently applicable under the *Timor Gap Treaty*.

By adopting the coordinates of Area A of the ZOC under the *Timor Gap Treaty* for the JPDA, there is a risk that, if they are not already entrenched after 12 years, they will become so, particularly if the new agreement were to regulate petroleum activities in the area for the next 30 years. Certainly, the *Timor Sea Treaty* is ‘without prejudice’ to the parties’ positions on a permanent delimitation.⁵⁴ However, a ‘sovereignty neutral’ clause may not be completely successful in preserving intact the juridical positions of the parties.⁵⁵ Concerns that ratification of the *Timor Sea Treaty* will be interpreted as acceptance of the coordinates have prompted calls for East Timor to negotiate new permanent boundaries before it agrees to ratify.⁵⁶

There are few international legal precedents regarding the capacity of ‘without prejudice’ clauses to protect sovereign interests once a joint development agreement comes to an end. In practice, ‘sovereignty neutral’ entities or regimes tend to assume something approaching an objective status.⁵⁷ There is also a tendency for international tribunals to accept that the ‘state of things which actually exists and has continued to exist for a long time should be changed as little as possible’.⁵⁸ While adoption of coordinates for the purposes of an interim agreement does not necessarily amount to tacit agreement or an estoppel, ‘it serves as a useful piece of evidence of what the states concerned may consider as an equitable solution in the future, unless there is any evidence to the contrary’.⁵⁹ The lines of demarcation the parties themselves had drawn

⁵³ *Timor Sea Treaty*, above n 1, art 3(b).

⁵⁴ *Ibid* art 2(b).

⁵⁵ See Lowe, Carleton and Ward, above n 34, [47].

⁵⁶ *Ibid* [48]–[49].

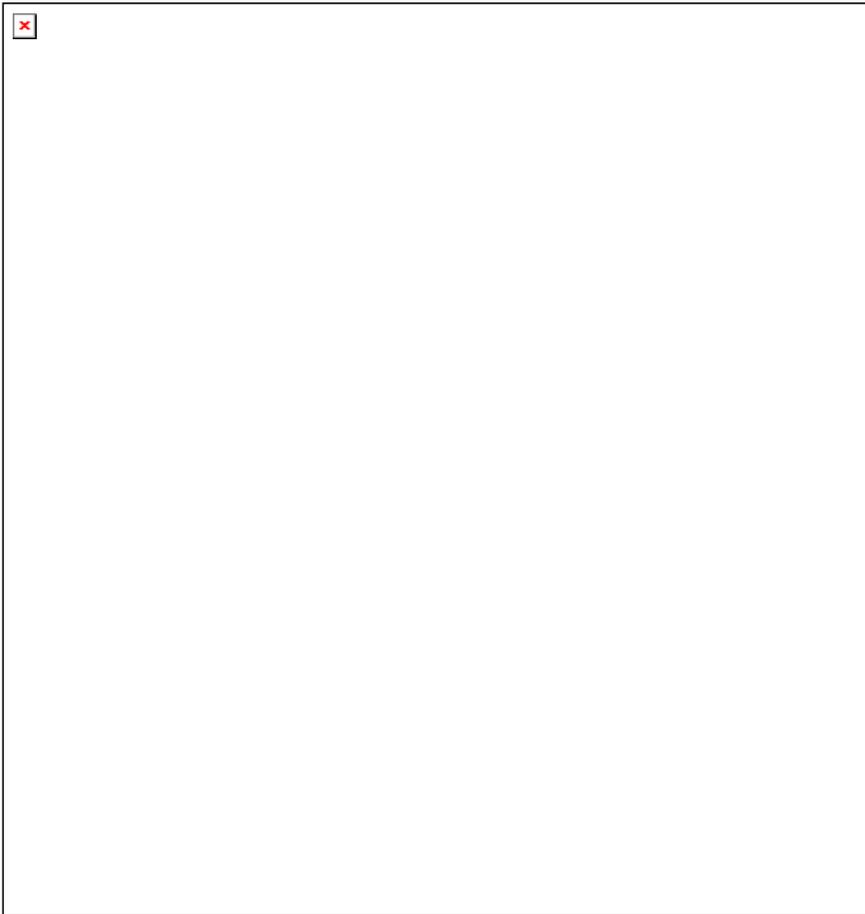
⁵⁷ It is possible for a treaty to create rights for non-party states, but it remains doubtful that a ‘without prejudice’ clause could be overridden against the views of one of the parties to a bilateral agreement; Daniel Patrick O’Connell, *International Law* (2nd ed, 1970) 543; Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (1986) 140–50.

⁵⁸ Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (1987) 99.

⁵⁹ *Ibid*.

MAP B: 2002 *TIMOR SEA TREATY* BOUNDARIES

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were significant, for example, to the ICJ in the 1982 *Tunisia–Libya Case*.⁶⁰ For the present, and for future treaty-making, it is important that ‘without prejudice’ clauses are given their fullest possible effect, consistently with the intentions of the parties.

C *Powers of the Joint Commission in Relation to Pipelines*

In addition to its general responsibility for policies and regulations on petroleum activities in the JPDA, the Joint Commission has special powers in relation to pipelines.⁶¹ Of immediate relevance is the proposed pipeline from the Bayu-Undan project. The construction and operation of a pipeline within the JPDA is subject to the approval of the Joint Commission.⁶² By contrast, the terms and conditions of pipelines exporting petroleum to the ‘point of landing’ are subject only to consultations between East Timor and Australia.⁶³ The potential consequence of these powers is that control over pipelines lies with the Joint Commission, the majority of members of which will have been appointed by East Timor, thereby rendering pipeline proposals vulnerable to political will.

A further apparent concession to East Timor lies in the provision that if a pipeline is constructed from the JPDA to Australia, as is the more likely alternative to one traversing the Timor Trough to East Timor, Australia may not thereafter object to, or impede, decisions of the Joint Commission regarding a pipeline to East Timor.⁶⁴ Curiously, any decisions of the Joint Commission regarding the construction of a second pipeline are not subject to review or change by the Ministerial Council.⁶⁵

The *Timor Sea Treaty* also provides that neither Australia nor East Timor may object to, or impede, a proposal to use floating gas to liquids processing and take-off in the JPDA if it will provide higher revenues from activities in the JPDA than would be earned if the gas were to be transported by pipeline.⁶⁶ This obligation does not apply if the effect of floating gas to liquids processing and take-off is to deny gas to an entity that has prior consent to obtain gas from the JPDA in order to meet supply contracts.⁶⁷ It seems that the priority will lie with a pipeline if that ensures both higher revenue and is necessary to satisfy existing gas contracts. If neither of these situations eventuates, a proposal for a floating gas to liquids processing and take-off can proceed.⁶⁸

⁶⁰ *Continental Shelf (Tunisia v Libya) (Merits)* [1982] ICJ Rep 18, [95], [118] (‘*Tunisia–Libya Case*’).

⁶¹ *Timor Sea Treaty*, above n 1, art 8.

⁶² *Ibid* art 8(a).

⁶³ *Ibid*.

⁶⁴ *Ibid* art 8(c).

⁶⁵ *Ibid*.

⁶⁶ *Ibid* art 8(e).

⁶⁷ *Ibid* art 8(f).

⁶⁸ Shell, as the major joint venture partner, proposes an A\$5 billion floating liquefied natural gas (‘FLNG’) development of the Greater Sunrise gas reservoir for exports to lucrative Asian markets, while Northern Territory Chief Minister, Clare Martin, is currently lobbying for the gas to be brought onshore: see Nigel Wilson, ‘Timor Sea Gas No Shoo-In: Shell’, *The Australian* (Sydney, Australia), 18 June 2002, 22.

D *Dispute Resolution*

As was the case under the *Timor Gap Treaty*, executive power under the new *Timor Sea Treaty* remains ultimately with the two States. Exceptionally for sovereign nations, however, Australia and East Timor have agreed upon a compulsory and binding process for dispute resolution. Any dispute or unresolved matter relating to the operation of the new *Timor Sea Treaty* must, at the request of either State, be submitted to an Arbitral Tribunal established under annex B to the treaty.⁶⁹ Also, if the Ministerial Council is unable to resolve a matter, either Australia or East Timor may invoke the dispute resolution procedures.

The Arbitral Tribunal is to consist of three persons. Australia and East Timor are each to nominate one person, and these two are to agree on a third arbitrator. If they are unable to agree, the President of the ICJ is to appoint the third arbitrator. All awards are to be reached by majority vote within six months of being convened, 'taking into account the provisions of this treaty and relevant international law.'⁷⁰ Importantly, in any compulsory system of dispute resolution the Arbitral Tribunal may render a judgment if necessary in the absence of either State and the award is final and binding on both.⁷¹

Such opportunities to resolve issues in dispute are a major advance on the relatively weak procedures agreed by Indonesia and Australia under the *Timor Gap Treaty*. They offer some comfort to investors in providing a means of resolving disputes through the rule of law.

E *Fiscal Matters*

The *Timor Sea Treaty* does not resolve uncertainties regarding fiscal matters; that is, respective shares of petroleum revenue. The continued failure to agree on fiscal arrangements raises inevitable questions about the financial risks involved in investment in the JPDA. Australia and East Timor agree to 'make every possible effort' to agree on a joint fiscal scheme for each petroleum project in the JPDA.⁷² If they fail to do so, they are to appoint an independent expert to recommend an appropriate joint fiscal scheme for the project in issue.⁷³ If either State rejects the scheme proposed by the expert, they may apply their own scheme to their proportion of production.⁷⁴ In relation to all petroleum activities within the JPDA, including exploration and exploitation, Australia and East Timor are at liberty to impose taxes on their share of the revenue as though the JPDA was part of their country.⁷⁵

While the fiscal provisions remained impossible for the States to negotiate, they were able to agree upon a *Taxation Code*, an essential element of a joint development agreement by which double tax and fiscal evasion in the JPDA can

⁶⁹ *Timor Sea Treaty*, above n 1, art 23.

⁷⁰ *Ibid* annex B, art g.

⁷¹ *Ibid* annex B, art j.

⁷² *Ibid* art 5(a)(i).

⁷³ *Ibid* art 5(a)(ii).

⁷⁴ *Ibid* art 5(a)(iii).

⁷⁵ *Ibid* art 13(a).

be avoided.⁷⁶ The Treaty's compulsory dispute mechanism will not apply to taxation matters.⁷⁷ Instead, the *Taxation Code* adopts a 'mutual agreement procedure' whereby complaints by operators are to be dealt with or resolved by agreement between the taxation authorities of East Timor and Australia.⁷⁸

F Petroleum Mining Code

Unlike the *Timor Gap Treaty*, the *Timor Sea Treaty* does not include a *Petroleum Mining Code*. Rather, Australia and East Timor are bound only to negotiate to agree upon a code to cover all petroleum activities in the JPDA, including the export of petroleum from the area.⁷⁹ If it does not prove possible to agree upon a code before the *Timor Sea Treaty* comes into force, the Joint Commission is to adopt an interim code until such time as the parties agree upon acceptable terms.⁸⁰ This power could prove to be significant, given that East Timor can control the composition, and thus determinations, of the Joint Commission. As the code is intended to achieve best mining practice, however, it should be primarily technical rather than political in nature.

G Unitisation of Greater Sunrise

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.⁸¹ As the deposit is estimated to be worth A\$30 billion, the issue became a focus for negotiations prior to independence. Questioning the validity of the arguments put on behalf of the representatives of East Timor requires complex international legal and geographical analysis, and will be considered below.

Despite the political statements of some East Timorese politicians prior to independence, the 2001 *MOU* provisions relating to Greater Sunrise were repeated, virtually unaltered, in the *Timor Sea Treaty*.⁸² The Greater Sunrise and Troubadour deposits are to be unitised on the basis that 20.1 per cent lies within the JPDA. The balance of the deposit, being 79.9 per cent, lies on the Australian side of the eastern lateral of the JPDA and is therefore subject to Australian sovereignty.⁸³ Production from the JPDA is then to be shared on the usual 90/10 basis. It is agreed, however, that either State can request a review of the production sharing formula in relation to Greater Sunrise and that unitisation of

⁷⁶ Ibid annex G.

⁷⁷ Ibid art 13(c).

⁷⁸ Ibid annex G, art 20.

⁷⁹ Ibid art 7(a).

⁸⁰ Ibid art 7(b).

⁸¹ SBS Television, 'Mari Alkatiri Interview', *Insight*, 23 May 2002 <<http://www.sbs.com.au/insight/transcript.php3?date=2002-05-23&title=Mari+Alkatiri+Interview>> at 23 September 2002.

⁸² *Timor Sea Treaty*, above n 1, annex E.

⁸³ The 20.1/79.9 apportionment is a slight adjustment from the 20/80 ratio in the 5 July 2001 *Timor Sea Arrangement*. The adjustment was made at the behest of East Timor, on the basis that the 20/80 ratio in the Arrangement was intended as an approximation only, and that the 20.1 figure reflected the position of the Sunrise commercial venturers on the location of gas.

the deposit 'shall be without prejudice to a permanent delimitation of the seabed between Australia and East Timor.'⁸⁴

The *Timor Sea Treaty* therefore leaves open the possibility of further negotiations on sharing the product from Greater Sunrise, on a permanent seabed boundary and presumably also on the eastern lateral boundary of the JPDA. These issues are likely to be considered in negotiations between East Timor and Australia towards the conclusion of an International Unitisation Agreement ('IUA') for the Greater Sunrise field.⁸⁵

H *Laws Applicable in the JPDA*

The *Timor Sea Treaty* provides for the application of domestic laws in the JPDA in much the same way as they applied under the *Timor Gap Treaty*. Criminal acts relating to petroleum activities by a national or permanent resident of Australia or East Timor are subject to the law of their State.⁸⁶ Nationals of third states are subject to the laws of both Australia and East Timor, on the basis that Australia and East Timor will consult to decide which laws are to be applied.⁸⁷ Both States may apply their customs, migration, and quarantine laws to persons, goods and equipment entering or leaving the JPDA and can cooperate in exercising these rights.⁸⁸ Vessels with the nationality of Australia or East Timor are subject to the laws of their nationality regarding safety and operating standards and crewing regulations.⁸⁹

I *Cooperation*

An aspect of both the *Timor Gap Treaty* and *Timor Sea Treaty* that is of potential long term value in fostering good neighbourly relations is the provisions that require or encourage cooperation. Australia and East Timor are bound to cooperate to protect the marine environment of the JPDA and to minimise environmental harm.⁹⁰ Both States are to ensure that preference in employment in the JPDA is given to East Timorese nationals or permanent residents,⁹¹ and the Designated Authority is required to develop occupational health and safety standards no less effective than would apply in Australia and East Timor.⁹² States Parties are bound to cooperate on hydrographic and seismic

⁸⁴ Ibid annex E, art (c).

⁸⁵ The desire of the parties to conclude an IUA for Greater Sunrise is reiterated in the *Memorandum of Understanding between the Government of Australia and the Government of the Democratic Republic of East Timor Concerning an International Unitisation Agreement for the Greater Sunrise Field*, opened for signature 20 May 2002, art 1 <http://www.austlii.edu.au/au/other/dfat/special/etimor/MOU-EastTimor_17_May_02.html> at 23 September 2002. The first round of negotiations on an IUA concluded on 19 July 2002. See República Democrática de Timor-Leste, *Talks with Australia on Sunrise Unitisation Begin* (Media Release, 19 July 2002).

⁸⁶ *Timor Sea Treaty*, above n 1, art 14(a).

⁸⁷ Ibid arts 14(b), (c).

⁸⁸ Ibid art 15(a).

⁸⁹ Ibid art 17.

⁹⁰ Ibid art 10.

⁹¹ Ibid art 11.

⁹² Ibid art 12.

surveys and surveillance activities.⁹³ They are required to exchange information on any security threats to petroleum activities in the JPDA and to assist with search and rescue operations.⁹⁴ Cooperation is required in relation to air traffic services and air accident investigations, in accordance with generally accepted international rules.⁹⁵ In these ways, and through the Joint Commission's administration of the petroleum activities themselves, it should be possible to develop cooperation and effective political relations in the future.

V VALIDITY OF THE LATERAL AND SOUTHERN BOUNDARIES OF THE JPDA

The *Timor Sea Treaty* recognises that Australia and East Timor have, for the moment, agreed to disagree on their respective seabed rights in the Timor Gap. The disagreement lies not only in the predictably differing juridical positions on the international law regulating 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. The following section considers the legal issues that arise in relation to delimitation of the Timor Gap and to the coordinates that define the lateral boundaries of the existing joint development area and the proposed JPDA.

A *General Principles for the Delimitation of the Continental Shelf*

When assessing the legal validity of the respective positions of East Timor and Australia on continental shelf delimitation, it is difficult either to state the rules with clarity or to apply general principles predictably to resolution of the disputed claims. The ICJ found in *Tunisia–Libya* that ‘each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances’.⁹⁶ The unique geographical, geological, historical, political and economic characteristics of each disputed boundary preclude the formulation of hard and fast rules for delimitation. Each case is regarded as a *unicum*.⁹⁷

A complicating factor in applying the principles of delimitation is that the primary aim of agreements on delimitation under contemporary international law, as set out in article 83(1) of *UNCLOS*, is ‘to achieve an equitable solution.’ *UNCLOS* offers no further clarification on this point. As a matter of practice, equity will often be tantamount to equality. Indeed, the practice of states in seeking to agree on maritime delimitation has been to begin negotiations with an equidistant or median line to delineate opposite or adjacent continental shelf

⁹³ *Ibid* art 18.

⁹⁴ *Ibid* art 20.

⁹⁵ *Ibid* art 21.

⁹⁶ *Tunisia–Libya Case* [1982] ICJ Rep 18, [132].

⁹⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Merits)* [1984] ICJ Rep 246, [81] (*‘Gulf of Maine Case’*).

claims.⁹⁸ The equidistant line can then be adjusted to achieve a more equitable result where appropriate. The most recent decisions of international courts and tribunals strongly support this two-step approach.⁹⁹

B *The Lateral Boundaries of the JPDA and the Greater Sunrise Deposit*

The richest known prize to be gained from the Timor Sea is the Greater Sunrise gas reservoir that straddles the JPDA and the Australian continental shelf. The deposit is estimated to hold in excess of nine trillion cubic feet of gas and dwarfs by comparison the Bayu-Undan reserves, which are within the boundaries of the JPDA.¹⁰⁰ The *Timor Sea Treaty* provides for the unitisation of straddling deposits.¹⁰¹ Annex E deals specifically with the Greater Sunrise deposit, granting East Timor 18 per cent of production (being 90 per cent of the 20 per cent of Greater Sunrise within the JPDA). Also subject to debate is the exercise of sovereign rights over the Laminaria/Corallina deposits, lying slightly to the west of the proposed JPDA. These deposits are estimated to contain 200 million barrels of oil and, at current rates of production, this project provides an estimated US\$300 million per annum in royalties and other revenues to Australia.¹⁰²

The prospect of significant financial benefits from a larger share of production has prompted some East Timorese representatives to call for reconsideration of the eastern and western laterals of the JPDA. In particular, they question the validity of Points A16 and A17, marking the eastern and western edges of the gap left in the 1972 Australia-Indonesia seabed boundary so as to avoid areas that could be claimed by Portugal as the colonial authority over the non-self-governing territory of East Timor.¹⁰³ Both of these lateral boundaries comprise two divisions, north and south of the 1972 line (see Map B, above page 14). In essence, the East Timorese position is that Indonesia and Australia should have left a larger 'Timor Gap' in which an independent East

⁹⁸ The Court of Arbitration in *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (United Kingdom v France)* (1977 and 1978) 18 RIAA 3, [249] ('*Anglo-French Award*'), observed that 'in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been [at most] some modification or variant of the equidistance principle rather than its total rejection', quoted with approval in *Tunisia-Libya Case* [1982] ICJ Rep 18 (Dissenting opinion of Judge Eversen) [12].

⁹⁹ See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38, [49]–[51] ('*Jan Mayen Case*'); and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits)*, Judgment of 16 March 2001, [230] <<http://www.icj-cij.org>> at 23 September 2002 ('*Qatar-Bahrain Case*').

¹⁰⁰ The Bayu-Undan field is estimated to contain approximately 3.4 trillion cubic feet of gas and 400 million cubic metres of liquid hydrocarbons (LPG and condensate); see Northern Territory Office of Territory Development, *Bayu-Undan Northern Territory Oil and Gas Fact Sheet* (2002) <http://www.otd.nt.gov.au/dcm/otd/otd/Fact%20Sheets/greater_sunrise.html> at 23 September 2002.

¹⁰¹ *Timor Sea Treaty*, above n 1, art 9.

¹⁰² Andrew McNaughtan, *A Middle Road in Timor's Oil and Gas Options* (2002) <<http://www.etan.org/et2002b/may/05-11/10amidle.htm>> at 23 September 2002.

¹⁰³ Victor Prescott, 'East Timor's Potential Maritime Boundaries' in Don Rothwell and Martin Tsamenyi (eds), *The Maritime Dimensions of an Independent East Timor* (2000) 79, 89.

Timor might exercise sovereign rights over the seabed. The *1972 Seabed Agreement* appears to contemplate the possibility of amending the coordinates that created the Timor Gap by requiring the parties to consult on any necessary adjustments of Points A16 and A17 as are required to take into account further exploitation or delimitation agreements 'in the area of the Timor Sea'.¹⁰⁴ No such amendment has in fact taken place.

The East Timor position is that the coordinates for Point A16, and for the JPDA's *eastern* lateral boundary that passes through that point, 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 Leti group of islands.¹⁰⁵ On the *western* side, East Timorese negotiators have in the past suggested that Point A17 should be adjusted to reflect a line, drawn from the terminus of the land boundary between East and West Timor, that is perpendicular to the general direction of the Timorese coast.¹⁰⁶ Any lateral extension of the JPDA to the west could include the Laminaria/Corallina deposits, described above.

Of general relevance to the legal validity of the eastern and western laterals of the JPDA is the concept of 'non-encroachment' in international law.¹⁰⁷ East Timor might question the *1972 Seabed Agreement* between Indonesia and Australia establishing the eastern and western terminal coordinates on the basis that they do not reflect the full extent of the potential maritime claims of an independent East Timor. In the *Libya-Malta Case*, Judge Jennings states that:

In determining any continental shelf boundary it is necessary to draw attention to all the relevant circumstances, and it is difficult to imagine a more relevant circumstance than the legal rights of a geographically immediate neighbor.¹⁰⁸

Judge Oda similarly argued that a bilateral delimitation 'ought not to intrude upon the area-to-be of the continental shelf of any third State.'¹⁰⁹ He questioned whether it is at all possible to assume that when account is taken of the characteristics of the area as a whole, there will be no legal interest of a third state that may have some claim to a portion of the continental shelf in question.¹¹⁰ The ICJ echoed the concern to protect third party rights. On rejecting Italy's application to intervene, the ICJ concluded that it was not in a

¹⁰⁴ *1972 Seabed Agreement*, above n 5, art 3.

¹⁰⁵ Lowe, Carleton and Ward, above n 34, [40]–[42].

¹⁰⁶ Peter Galbraith, UNTAET Cabinet Minister for Political Affairs, 'Temporary Administration in East Timor' (Keynote address delivered at the Australian Petroleum Production and Exploration Association Conference and Exhibition, Hobart, 9–11 April 2001), published in (2001) 41(2) *Australian Petroleum Production and Exploration Association Journal* 16, 18.

¹⁰⁷ See generally Masahiro Miyoshi, 'International Maritime Boundaries and Joint Development: A Quest for a Multilateral Approach' in Gerald Blake et al (eds), *Boundaries and Energy: Problems and Prospects* (1998) 453, 455.

¹⁰⁸ *Continental Shelf (Libya v Malta) (Application by Italy for Permission to Intervene)* [1984] ICJ Rep 3 (Dissenting Opinion of Judge Jennings) [21].

¹⁰⁹ *Continental Shelf (Tunisia v Libya) (Application by Malta for Permission to Intervene)* [1981] ICJ Rep 4 (Separate Opinion of Judge Oda) [22].

¹¹⁰ *Ibid.*

position to define the legal principles and rules applicable to any delimitation between one or other of the parties and any third state.¹¹¹ In its judgment on the merits of the case, the Court decided that any decision as to boundaries must be limited to a geographical area in which there are no third party claims.¹¹²

The point is thus well made that the *1972 Seabed Agreement* could not validly prejudice the rights of a third state nor arguably those of the non-self-governing territory of East Timor. An examination of the geographical and legal principles, however, indicates that the *1972 Seabed Agreement* does not raise any significant issue of encroachment on the rights of Portugal in East Timor.

A final and possibly obvious point arising from the principle of non-encroachment is that any renegotiation of the eastern and western laterals of the JPDA requires the inclusion of Indonesia. This may prove to be an insurmountable hurdle for East Timor in pursuing its claims.

1 *The Eastern Lateral Boundary of the JPDA*

The eastern boundary of the JPDA was drawn by giving ‘full effect’ to the small Indonesian islands of Leti, Moa and Lakor that lie to the east of the island of Timor. Lowe, Carleton and Ward argue that:

Modern international law ... does not permit small islands to have a disproportionate and inequitable 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 [sic] or three-quarters effect, depending on the size of the island and its relationship to the coastline.¹¹³

...

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.¹¹⁴

Conversely, Prescott concludes that ‘[i]t is hard to see what arguments might be used to justify a divergence from the line of equidistance.’¹¹⁵ His study shows that an unaffected line of equidistance, drawn on the basis of base points on Jaco Island (East Timor) and the Leti group of islands (Indonesia), begins at a midpoint between the two islands and tends south so that south of Point A16 on the 1972 boundary, the line approximates the eastern lateral line of the JPDA.¹¹⁶ In the region south of A16, the line ‘separates the seabed between Australia and East Timor and the water column between East Timor and Indonesia.’¹¹⁷ The regularity of East Timor’s coastline means that lines of equidistance drawn

¹¹¹ *Continental Shelf (Libya v Malta) (Application by Italy for Permission to Intervene)* [1984] ICJ Rep 3, [41].

¹¹² *Continental Shelf (Libya v Malta) (Merits)* [1985] ICJ Rep 13, [21] (*‘Libya–Malta Case’*).

¹¹³ See Lowe, Carleton and Ward, above n 34, [40].

¹¹⁴ *Ibid* [42].

¹¹⁵ Prescott, ‘East Timor’s Potential Maritime Boundaries’, above n 103, 90.

¹¹⁶ *Ibid* 89–90.

¹¹⁷ *Ibid* 88.

between the adjacent East Timorese and Indonesian territories produce ‘lines which lay close to constant, converging bearings.’¹¹⁸ It is this geographical reality that gives the JPDA its coffin-like shape, thereby leaving much of Greater Sunrise outside the joint zone.

There are, however, a number of examples where the legal effect of islands has been reduced when seeking delimitation on the basis of the principle of equidistance. State practice and jurisprudence suggest that certain circumstances require giving less than full effect to the presence of islands in pursuit of an equitable solution in the delimitation of maritime areas. This is because ‘islands are a well-known example of special circumstances warranting an amelioration of the inequities which may result from an equidistance line.’¹¹⁹

It is common for a discounted effect to be applied to islands so as to avoid disproportion or an inequitable outcome in situations of small islands lying in the water *between two opposite states*. As the extent of distortion flowing from the consideration of islands increases with its distance from the major land territories of the territorial sovereign, the practice of states has been to make a distinction between islands within the territorial sea and those outside. Fringing islands lying within the territorial sea, such as East Timor’s Jaco Island, will be given full effect as base points for the measurement of seaward maritime areas, whereas off-lying islands are often discounted in their effect on the final delimitation.

In the *Anglo–French Award*, the Court of Arbitration sought to abate the inequitable distortion caused by giving full effect to the off-lying Scilly Isles by reference to the ‘half-angle technique’.¹²⁰ According to the Court, the granting of a partial effect ‘[a]ppears to be an appropriate and practical method of abating the disproportion and inequity which otherwise results from giving full effect to the Scilly Isles as a base-point for determining the course of the boundary’.¹²¹ In the recent *Yemen–Eritrea Award*,¹²² the Arbitral Tribunal applied partial effect to mid-sea islands, but was prepared to treat smaller coastal islands as relevant basepoints for the construction of a provisional median line. In general, the Tribunal considered ‘whether giving the islands a certain effect (full or partial) would produce a disproportionate effect on the maritime boundary, depending on their size, importance and like considerations in the general geographical context’.¹²³

Other examples include the flexible approach adopted in a 1977 agreement between Greece and Italy, where the effect given to the relevant Greek islands was reduced proportionately with their size, suggesting that ‘size may affect the

¹¹⁸ Prescott remarks that if, on the other hand, ‘such lines had been diverging, so they cut into areas south of the shelf boundary agreed [between Australia and Indonesia] in 1971, they would have presented serious difficulties for the Australian authorities’: Prescott, ‘Report Number 6–2(5)’, above n 17, 1250.

¹¹⁹ Hiran Jayewardene, *The Regime of Islands in International Law* (1990) 349.

¹²⁰ *Anglo–French Award* 18 RIAA 3, [251].

¹²¹ *Ibid.*

¹²² Permanent Court of Arbitration, *Eritrea v Yemen Phase II: Award of the Arbitral Tribunal in the Second Stage — (Maritime Delimitation)* (1999) <<http://pca-cpa.org/RPC/#Eritrea>> at 23 September 2002.

¹²³ *Ibid* [117], [131]–[132].

weight ... given to an island';¹²⁴ the decisions in the *Gulf of Maine Case*¹²⁵ and the *Libya–Tunisia Case*,¹²⁶ where the ICJ applied 'half effects' to Canadian Seal Island and the Kerkennah Islands respectively; the small 'semicircular modified enclave' solution in the western sector of the delimitation between Canada and the French islands of Saint-Pierre-et-Miquelon;¹²⁷ and the very recent *Qatar–Bahrain Case*, 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'.¹²⁸

In sum, the extent of the effect accorded to an island in interstate maritime delimitation depends on its specific qualities as follows:

if the island is big or small, has few or many inhabitants, is situated at a distance of more or less than double the breadth of the territorial sea, from the mainland coast, if it is morphologically coherent to the mother country or if it is an independent state or not.¹²⁹

These factors may, however, be of lesser significance where one of the opposite or adjacent states is 'archipelagic'.¹³⁰ This is because Part IV of *UNCLOS* allows archipelagic states to draw baselines by linking the outermost points of the outermost archipelagic islands.¹³¹ The baselines may then serve as points from which seaward maritime zones are measured.

¹²⁴ Derek Bowett, 'Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations' in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vol 1, 131, 139.

¹²⁵ *Gulf of Maine Case* [1984] ICJ Rep 246.

¹²⁶ *Tunisia–Libya Case* [1982] ICJ Rep 18, [129].

¹²⁷ Court of Arbitration for the Delimitation of Maritime Areas between Canada and France, *Case Concerning Delimitation of Maritime Areas between Canada and the French Republic*, 31 ILM 1145 (1992) [68]–[69]. See Keith Highet, 'International Decisions: Delimitation of the Maritime Areas between Canada and France' (1993) 87 *American Journal of International Law* 452, 460.

¹²⁸ *Qatar–Bahrain Case*, above n 99, [219].

¹²⁹ Jayewardene, above n 119, 337.

¹³⁰ In the *Qatar–Bahrain Case*, the ICJ refused to recognize Bahrain as an archipelago, despite the fact that its territory is constituted by over 30 islands in the Gulf of Bahrain: *Qatar–Bahrain Case*, above n 128, [212]–[215]. The ICJ thus avoided consideration of archipelagic baselines that would have robbed the Court of its discretion to 'engage in creative delimitation': Robert Volterra, 'Recent Developments in Maritime Boundary Delimitations: Brief Reflections on Certain Aspects of the Two UNCLOS Cases (*Eritrea/Yemen* and *Qatar/Bahrain*)' (Paper presented at the 2001 Advisory Board on the Law of the Sea Conference: Accuracies and Uncertainties in Maritime Boundaries and Outer Limits, Monaco, 18–19 October 2001) 14 <<http://www.gmat.unsw.edu.au/ablos/VOLTERRA.PDF>> at 23 September 2002. Indonesia, on the other hand, has formally claimed archipelagic status under Part IV of *UNCLOS: Act No 6 of 1996 Regarding Indonesian Waters* (Indonesia) art 2(1).

¹³¹ *UNCLOS*, above n 14, art 47(1).

Indonesia is an outlying or mid-ocean archipelago,¹³² composed of 13 677 islands (3000 of which are inhabited). Indonesia ratified *UNCLOS* in 1985,¹³³ and declared a 200 nautical mile EEZ, including both sea-bed and water column jurisdictions, as measured from the 'baseline of the Indonesian territorial sea'.¹³⁴ Indonesia formally claimed archipelagic status via legislation in 1996,¹³⁵ and is currently in the process of updating its 1960 archipelagic baselines so as to conform with *UNCLOS* provisions on archipelagic states. In the meantime, the 1960 baselines continue to apply.¹³⁶ These baselines follow very closely the contours of the Leti group of islands, and therefore do not appear to replace the low water mark of Leti island, at Tanjong Tutpateh, as the relevant base point for the measurement of points of equidistance with East Timor's eastern tip (Jaco Island). These islands are separated by less than 25 nautical miles, creating the potential for overlapping maritime claims.

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'.¹³⁷ 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.¹³⁸

While this legislation makes equidistance the presumed method of delimitation, the 1969 Indonesia–Malaysia seabed delimitation in the Natuna Sea provides an example of delimitation where Indonesia was willing to accept a partial effect for its islands, even where those islands lie within archipelagic baselines. The 1969 agreement included a delimitation between the Malaysian province of Sarawak and the Indonesian Natuna islands.¹³⁹ 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 west 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 per cent) onshore to

¹³² An 'outlying' or 'mid-ocean' archipelago refers to 'groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole'. This should be distinguished from 'coastal' archipelagos, which are situated 'so close to a mainland that they maybe reasonably considered part and parcel thereof, forming more or less an outer coastline from which it is natural to measure the marginal seas': Jens Evensen, 'Certain Legal Aspects Concerning the Delimitation of Territorial Waters of Archipelagos', UN Doc A/CONF.13/18, *United Nations Conference on the Law of the Sea*, Official Records (vol 1), 290.

¹³³ *Act No 17 of 1985 on Ratification of the United Nations Convention on the Law of the Sea* (Indonesia).

¹³⁴ *Act No 5 of 1983 on the Indonesian Exclusive Economic Zone* (Indonesia) art 2.

¹³⁵ *Act No 6 of 1996 Regarding Indonesian Waters* (Indonesia) art 2(1).

¹³⁶ *Ibid* art 25(2).

¹³⁷ *Act No 5 of 1983 on the Indonesian Exclusive Economic Zone* (Indonesia) art 3(1).

¹³⁸ *Ibid* art 3(2).

¹³⁹ *Agreement between the Government of the Republic of Indonesia and the Government of Malaysia Relating to the Delimitation of the Continental Shelves between the Two Countries*, opened for signature 27 October 1969, 9 ILM 1173 (1970) (entered into force 7 November 1969).

approximately half effect (56 per cent) at the seaward terminus,¹⁴⁰ even though the seaward islands are larger in size than those closer to the mainland. By denying full effect to the Natunas, Indonesia conceded part of the shelf area that would otherwise have been ascribed to the islands.¹⁴¹

Indonesian practice on boundary delimitation with its neighbours thus suggests that it could agree with East Timor upon a delimitation that gives less than full effect to the Leti islands north of the delimitation under the *1972 Seabed Agreement*. There are, however, some powerful reasons why Indonesia may not do so. First, a boundary to the east of the line of equidistance would reduce the area of seabed over which Indonesia could exercise sovereign rights, including rights over non-renewable resources. Second, Leti is nine times larger than the 'opposite' East Timorese island of Jaco and is, unlike Jaco, populated. Third, Indonesia is an archipelagic state and, under *UNCLOS*, is entitled to full effect for the islands around which it draws its baselines. Most of the boundaries drawn between Pacific archipelagic states are lines of equidistance giving full effect to all islands.¹⁴² In these circumstances, Indonesia will argue that the Leti islands should be given a full legal effect in determining a line of equidistance with East Timor. For all these reasons, Indonesian support for an easterly move of the eastern lateral of the JPDA is unlikely.

If, for the purpose of analysis, Indonesia agreed to a 'less than full effect' boundary with East Timor, Australia would have no obligation to accept that a new line delimiting the seabed between East Timor and Indonesia north of the *1972 Seabed Agreement* has any effect south of the 1972 boundary, for this is exclusively within Australian sovereignty. East Timor could ask Australia to reconsider Point A16 and its claim to the area south-east of that point, thus enabling East Timor to gain a larger portion of the Greater Sunrise field than that implied by annex E to the *Timor Sea Treaty*. Again, any change to the *1972 Seabed Agreement* will require the concurrence of Indonesia. By contrast with any attempt to amend the eastern lateral of the proposed JPDA, Indonesia has every reason to agree that the *1972 Seabed Agreement* should be amended to move the boundary further south in accordance with the equidistance approach. Australia, of course, is highly unlikely to agree to any such diminution of its seabed sovereignty. For reasons of national interest, East Timor will find it difficult to gain the necessary agreement of both Indonesia and Australia to boundary changes that afford a greater share of the benefits of the Greater Sunrise fields than are currently recognised.

¹⁴⁰ Jayewardene, above n 119, 419.

¹⁴¹ Some observers suggest that Indonesia's concession was motivated by a desire to secure Malaysia's acceptance of Indonesia's archipelagic baselines. See, eg, Choon-Ho Park, 'Report Number 5-9(1): Indonesia-Malaysia (Continental Shelf)' in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vol 1, 1019, 1022. On the other hand, Jayewardene argues that the small size and relative insignificance of the Natuna islands as a proportion of the Indonesian territory might have been decisive. In particular, the considerable distance between the Natuna islands and the nearest major constituents of the Indonesian archipelago (Sumatra and Borneo) 'appears to have been a factor of considerable significance'. Similarly, Pulau Leti and its neighbouring islands lie in an almost isolated position north of the Timor Sea as part of the Lesser Sunda Islands. They have little, if any, connection with larger components of Indonesian territory and constitute a tiny proportion of Indonesian territory as a whole: Jayewardene, above n 119, 418-19.

¹⁴² Personal communication from Victor Prescott to the author, 28 August 2002.

It is also possible that Australia and East Timor could agree to permanent delimitation of the Timor Gap. This would automatically terminate the *Timor Sea Treaty*,¹⁴³ whereupon a new unitisation agreement would be required to reflect the proportions of the Greater Sunrise deposit situated on the respective sides of the new boundary. The prospect of renegotiating the division of proceeds from Greater Sunrise has raised concern amongst the project's joint venture partners. Investors are keen to ensure that the fiscal and regulatory conditions in existence at the time the Greater Sunrise project is sanctioned for investment will continue to be applied for the life of the project.¹⁴⁴ Fiscal certainty could be achieved via provisions in an IUA that protected investors from financial or jurisdictional impact, even where Australia and East Timor agreed to share income in different proportions.¹⁴⁵

The National Parliament of East Timor passed the *Maritime Zones Act 2002* (East Timor) on 23 July 2002 ('*Maritime Zones Act*'). The legislation claims a 200 nautical mile EEZ, but does not specify any geographic coordinates. When in force, the new zone may overlap with existing claims by Australia and Indonesia, depending upon the exact coordinates claimed by East Timor. The recent release by Australia of offshore petroleum exploration areas elevates the risk of further dispute with East Timor because of the close proximity of the exploration areas to the reserves discovered in the Greater Sunrise fields and the possible inclusion in the East Timor EEZ.¹⁴⁶

One question that arises in relation to Australia's new exploration areas is whether a grant of an exploration permit close to the Greater Sunrise fields, after entry into force of the *Maritime Zones Act*, is an infringement of East Timor's

¹⁴³ *Timor Sea Treaty*, above n 1, art 22.

¹⁴⁴ Woodside Energy Ltd, Australia, *Submission to Joint Standing Committee on Treaties* (July 2002) 3–4 <<http://www.aph.gov.au/house/committee/jsct/timor/subs/sub21.pdf>> at 23 September 2002.

¹⁴⁵ According to project operator Woodside Energy Ltd, all installations and production facilities (ie platforms) for Greater Sunrise will be located to the east of the JPDA. See Sinclair Knight Merz, *Sunrise Gas Project: Draft Environmental Impact Assessment for Woodside Energy Ltd* (2001) s 1.9 <<http://www.woodside.com.au/OUR+BUSINESS/GAS/SUNRISE+GAS+PROJECT.HTM>> at 23 September 2002. This area, to the south-east of Point A16 will be subject to overlapping Australian seabed jurisdiction and Indonesian EEZ (water column) jurisdiction upon entry into force of the 1997 *Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries*, opened for signature 14 March 1997, [1997] ATNIF No 4 (not yet in force) ('1997 Treaty'). While there is no requirement that either party seek the approval of the other before progressing with marine activities, art 7(d) obliges Australia to provide Indonesia with three months notice of 'proposed' grants of exploration or exploitation rights. See generally Max Herriman and Martin Tsamenyi, 'The 1997 Australia–Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?' (1998) 29 *Ocean Development and International Law* 361. Questions may arise as to which of Australia and Indonesia will have jurisdiction over installations and platforms that have a presence both on the seabed and in the superadjacent water column. Article 7(h) of the 1997 *Treaty*, provides that 'the Party constructing an ... installation ... shall have exclusive jurisdiction over it'. The legal question as to whether Australia, the JPDA's Designated Authority, or some other entity, will authorise such construction will need to be settled in the IUA currently under negotiation.

¹⁴⁶ Commonwealth of Australia Department of Industry, Tourism and Resources, 'Geology and Data Availability: Release Area NT02 — Sahul Platform, Bonaparte Basin, Northern Territory', *Release of Offshore Petroleum Exploration Areas 2002 CD Rom* (2002).

sovereign rights to exploit the seabed resources of its proclaimed and delineated EEZ. International law imposes a good faith requirement for Australia to seek to discuss a proposal to explore an area subject to conflicting or overlapping sovereignty claims.¹⁴⁷ There is, however, a legal difference between exploration and exploitation. Australia would be required to refrain from granting a *production* permit, but mere *exploration* for gas and condensate potential does not necessarily create a risk of irreparable prejudice to East Timorese interests.¹⁴⁸ Nonetheless, it would be prudent for East Timor, following the entry into force of its *Maritime Zones Act*, to protect its claims by reaffirming its non-recognition of any interests granted by Australia that are inconsistent with East Timor's rights to an EEZ under international law.¹⁴⁹

2 Western Lateral Boundary of the JPDA: *Laminaria/Corallina*

It has been argued in the past that the western lateral boundary of a potential East Timorese EEZ should be one that is perpendicular to the general direction of the coast in the vicinity of the terminus of the land boundary between East Timor and the Indonesian territory of West Timor.¹⁵⁰ Such an approach differs from the equidistance approach adopted in determining the western lateral boundary of Area A of the ZOC, now the JPDA.

A maritime boundary between East Timor and the Indonesian territory of West Timor should proceed from the terminus of the land boundary between them. Professor Prescott argues that the terminus lies at the mouth of the Massin River (Mota Masin).¹⁵¹ The line of equidistance that proceeds south from that point towards Point A17 on the 1972 Australia–Indonesia delimitation relies on the base points of Tonjong We Toh in Indonesia and Cabo Tafara on the East Timorese coast.¹⁵²

As was discussed in relation to the eastern lateral, the accepted methodology for delimiting maritime zones between adjacent states is adjustment of a

¹⁴⁷ David Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: Mere State Practice or Customary International Law?' (1999) 93 *American Journal of International Law* 771, 802.

¹⁴⁸ *Ibid*, referring to *Aegean Sea Continental Shelf (Greece v Turkey) (Request for the Indication of Interim Measures of Protection) (Order of 11 September 1976)* [1976] ICJ Rep 3, [30].

¹⁴⁹ Precedent for such an action includes the US's notice to Canada in 1969 regarding the exploration and exploitation of seabed resources of the then contested Georges Bank continental shelf. See *United States–Canadian Continental Shelf Boundary Question: Notice of Reservation of Exploration and Exploitation Rights of United States and its Nationals*, (1970) 35 *Federal Register*, which provided:

the United States Government has refrained from authorizing geological exploration or mineral exploitation in the area of the Georges Bank continental shelf. Pending agreement on the delimitation of the continental shelf in the Gulf of Maine, the United States Government does not acquiesce in or recognize the validity of permits or other authorizations issued by the government of Canada to explore or exploit the natural resources of any part of the Georges Bank continental shelf, and reserves its rights and those of its nationals in that area.

¹⁵⁰ See, eg, Galbraith, above n 106.

¹⁵¹ Prescott, 'East Timor's Potential Maritime Boundaries' in Rothwell and Tsamenyi (eds), above n 103, 82.

¹⁵² *Ibid* 84.

provisional line of equidistance. Only if such a line gives rise to inequity might states consider adopting a line perpendicular to the general direction of the coast. The adoption of equidistance-based boundaries not only reflects the general status of international law, but is also consistent with regional practice in South East Asia¹⁵³ and, more specifically, Indonesian legislation on maritime delimitation.

Generally, lines of equidistance are suitable for the delimitation of maritime areas between adjacent states where the pertinent section of coast is relatively 'smooth, symmetrical on either side of the land boundary's terminus and devoid of intervening offshore features.'¹⁵⁴ The stretch of coast either side of the terminus of the land boundary between East Timor and Indonesian West Timor appears to lend itself to the adoption of an equidistant line. Moreover, Indonesia has adopted this approach in similar circumstances by agreeing to equidistant lines extending from the terminus of the land boundaries between Indonesia and the then Australian Territory of Papua New Guinea in 1973,¹⁵⁵ and between Indonesia and an independent Papua New Guinea in 1980.¹⁵⁶ Indonesia is the only South-East Asian State that regards lines of equidistance or median lines as presumptive in boundary delimitations¹⁵⁷ and does not appear to have utilised perpendicular lines in any of its reported maritime delimitations.

Lines that are perpendicular to the coast are an exception to the general approach of equidistance, and appear to have found favour almost exclusively in delimitations in Central and South America and West and Northern Africa. For example, perpendicular lines have been employed in the Costa Rica–Panama agreement in the Pacific Ocean,¹⁵⁸ by the ICJ in the *Tunisia–Libya Case*,¹⁵⁹ and by the Arbitral Tribunal in the *Guinea/Guinea-Bissau Maritime Boundary Case*.¹⁶⁰ However, these cases all involved circumstances in which historical agreements curbed the flexibility of negotiations, or where the application of an equidistant line led to an inequitable outcome, due primarily to the peculiar

¹⁵³ See Charney, 'Central East Asian Maritime Boundaries and the Law of the Sea', above n 7, 724; Choon-Ho Park, 'Region V: Central Pacific and East Asian Maritime Boundaries' in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vol 1, 297, 301; Victor Prescott, 'Region VI: Indian Ocean and South East Asian Maritime Boundaries' in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vol 1, 305, 310.

¹⁵⁴ Victor Prescott, 'Report Number 6–2(3): Australia (Papua New Guinea)–Indonesia' in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vol 2, 1219, 1221.

¹⁵⁵ *Agreement between Australia and Indonesia Concerning Certain Boundaries between Papua New Guinea and Indonesia*, opened for signature 12 February 1973, 975 UNTS 4 (entered into force 26 November 1974).

¹⁵⁶ *Agreement between the Government of the Republic of Indonesia and the Government of Papua New Guinea Concerning the Maritime Boundary between the Republic of Indonesia and Papua New Guinea and Cooperation of Related Matters*, opened for signature 13 December 1980 (entered into force 10 July 1982).

¹⁵⁷ See Kittichaisaree, above n 58, 84.

¹⁵⁸ *Treaty Concerning Delimitation of Maritime Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama*, opened for signature 2 February 1980 (in force 11 February 1982) <<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/CRI-PAN1980MC.PDF>> at 23 September 2002.

¹⁵⁹ *Tunisia–Libya Case* [1982] ICJ Rep 18, [93].

¹⁶⁰ Arbitral Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, *Award of 14 February 1985*, 25 ILM 252 (1986).

characteristics of the relevant coastlines and the potential repercussions for other delimitations in the region. Hence, contrary to earlier suggestions by East Timorese negotiators, one cannot conclude that there is a 'generally accepted principle that lateral boundaries should be perpendicular to the general direction of the coast.'¹⁶¹ Taking these factors into account, there appears little justification for the adoption of a perpendicular line on East Timor's western maritime boundary with Indonesia. A line of equidistance, as reflected in Point A17 and the western lateral boundary of Area A of the ZOC and the proposed JPDA, appears likely to be adopted by Indonesia and Australia in any boundary negotiations with East Timor.

C *Permanent Delimitation of the Timor Gap and the 1972 Seabed Agreement*

In addition to arguments concerning the validity of the JPDA's lateral lines is the well-aided view that under the current principles of international law, East Timor is entitled to an EEZ, including seabed jurisdiction, that extends to the median line between the opposite coasts of Australia and East Timor.¹⁶² As noted above, recent state practice and international jurisprudence support, as a starting point, the drawing of a line of equidistance that can then be adjusted to achieve a more equitable result where appropriate.¹⁶³ An East Timorese EEZ that extends in the south to the current southern boundary of the JPDA would give East Timor exclusive rights to the resources north of that line, including Elang-Kakatua and Bayu-Undan. Only if East Timor's arguments were to prevail on both the lateral *and* southern boundaries — in the context of a permanent delimitation — would the Greater Sunrise and Laminaria/Corallina reservoirs fall *entirely* within the maritime jurisdiction of East Timor.

The Australian Government has expressed concern that a median line solution with East Timor in the Timor Gap would cast doubt over the validity of the *1972 Seabed Agreement* between Australia and Indonesia.¹⁶⁴ Relevant to the validity of the *1972 Seabed Agreement* is the international law principle of intertemporal law. Huber J adopted the principle in the context of territorial claims in the *Island of Palmas Case*. He considered that 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled.'¹⁶⁵

If international law has changed in such a way that a claim to a 200 nautical mile EEZ can encroach upon the claim of an opposite state to a continental shelf based on the theory of natural prolongation (a view that is challenged below), the asserted new law cannot invalidate the *1972 Seabed Agreement*. The *1972*

¹⁶¹ Galbraith, above n 106.

¹⁶² See Lowe, Carleton and Ward, above n 34, [35].

¹⁶³ See Part V(A) above.

¹⁶⁴ Don Greenlees, 'Downer Rules E Timor Seabed Border Changes out of Bounds', *The Weekend Australian* (Sydney, Australia), 25–26 May 2002, 12.

¹⁶⁵ *Award of the Tribunal of Arbitration Rendered in Conformity with the Special Agreement Concluded on 23 January 1925 between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas* (1928) 2 RIAA 829, 845 ('*Island of Palmas Case*'). For a discussion of the principle of intertemporal law in territorial sovereignty cases see Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (1986) 52–61.

Seabed Agreement was negotiated, apparently in good faith, by Indonesia and Australia and founded upon mutually recognised rules described by the 1958 *Convention on the Continental Shelf* and the ICJ in the *North Sea Continental Shelf Cases*. Certainly the parties may elect to renegotiate the agreement, but a seabed boundary treaty is not subject to invalidation on the ground that the law upon which it was based may have changed. In short, the principle of intertemporal law preserves the legal validity of the 1972 *Seabed Agreement*.

It has been argued above in relation to the eastern and lateral lines of the JPDA that, as they are based on an equidistance approach, they reflect accepted practice in international law. By contrast, it is Australia's argument that adoption of a line of equidistance to a seabed delimitation between East Timor and Australia in the Timor Gap does not apply to opposite states where there is no common shelf. Does Australia approbate and reprobate or is there a legally significant distinction between delimitation of boundaries between adjacent states and states that are opposite?

The international law applicable to continental shelf delimitation between opposite coasts has been considered by several commentators, both generally and specifically in relation to the possibility of a permanent boundary in the Timor Gap.¹⁶⁶ Triggs considers the relevant treaties, case law and state practice as it applies to the Timor Sea in a previous volume of this journal.¹⁶⁷ It is concluded that, while the ICJ is likely to recognise sovereign rights over the continental shelf as the natural prolongation of the land territory, there is a possibility that for the purposes of delimitation, an international tribunal will ignore the geological feature of the Timor Trough in favour of the apparent equity of a median line. While it is not intended to revisit the legal arguments on continental shelf delimitation, it may be useful to make some additional points.

Central to Australia's position that it is entitled to the full extent of its continental shelf ending at the Timor Trough, is that it does not share a common shelf with East Timor. Australia contends that, as a matter of geomorphology, East Timor either has no continental shelf or a very narrow one. For this reason, it is argued that the jurisprudence of international courts and state practice on the

¹⁶⁶ See generally Malcolm Evans, *Relevant Circumstances and Maritime Delimitation* (1989) 51; Giampiero Francalanci and Tullio Scovazzi (eds), *Lines in the Sea* (1994) 211–55; David Anderson, 'Maritime Boundaries and Limits: Some Basic Legal Principles' (Paper presented at the 2001 Advisory Board on the Law of the Sea Conference: Accuracies and Uncertainties in Maritime Boundaries and Outer Limits, Monaco, 18–19 October 2001); Gerard Tanja, *The Legal Determination of International Maritime Boundaries* (1990). More specifically on the Timor Gap, see William Martin and Dianne Pickersgill, 'Recent Developments: The Timor Gap Treaty' (1991) 32 *Harvard International Law Journal* 566, 566–7; Garrie Moloney, 'Australian–Indonesian Timor Gap Zone of Cooperation Treaty: A New Offshore Petroleum Regime' (1990) 8 *Journal of Energy and Natural Resources Law* 128; David Ong, 'Alternative Joint Development Regimes: A Comparison between the Malaysia/Thailand Joint Development Agreement and the Australia/Indonesia Timor Gap Zone of Co-operation Treaty' (1992) 8 *Oil and Gas Law and Taxation Review* 221; Brandi Pummell, 'The Timor Gap: Who Decides Who Is In Control?' (1998) 26 *Denver Journal of International Law and Policy* 655, 662–5; Peter Reid and Catherine Nolan, 'Issues Arising in Relation to the Treaty between Australia and Indonesia Establishing a Zone of Co-operation in the Timor Gap' (1992) 8 *Oil and Gas Law and Taxation Review* 183; Ernst Wilhelm, 'Australia–Indonesia Sea-Bed Boundary Negotiations: Proposals for a Joint Development Zone in the "Timor Gap"' (1989) 29 *Natural Resources Journal* 821, 827–31.

¹⁶⁷ Triggs, 'Legal and Commercial Risks', above n 24, 98.

delimitation of a single, common continental shelf have little bearing on the sui generis nature of the Timor Gap. However, much of that jurisprudence is to the effect that geological features should be disregarded where opposite coasts are fewer than 400 nautical miles apart. The ICJ in the *Libya–Malta Case*, for example, said that in areas situated at a distance of under 200 miles from the coasts in question,

title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of [the] areas are completely immaterial.¹⁶⁸

Underpinning the views of the Court is article 76(1) of *UNCLOS*,¹⁶⁹ which defines the continental shelf by reference to *both* the ‘natural prolongation of the land territory to the outer edge of the continental margin’ *and* by reference to a distance criterion. Article 76 thus recognizes the right of a state with no continental shelf up to 200 nautical miles to claim one on the basis of ‘distance’. In this way, *UNCLOS* enables East Timor to claim seabed resources beyond the Timor Trough up to a distance of 200 nautical miles, a claim that is limited only by Australia’s sovereignty over its continental shelf.

It has been observed that international courts have generally disregarded geological features when considering the delimitation of continental shelves between states less than 400 nautical miles apart. In a statement with direct relevance for the Timor Sea dispute, the Court in the *Libya–Malta Case* said that

since the distance between the coasts of the Parties is less than [sic] 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the ‘rift zone’ cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan [shelf] as if it were some natural boundary.¹⁷⁰

In sharp contrast to the views of the majority, Vice-President Sette-Camara argued that ‘the Timor Trough seems to be the only indisputable example of a geomorphological phenomenon governing a line of delimitation.’¹⁷¹

Most bilateral agreements on continental shelf delimitation have disregarded geological features, some involving troughs and trenches equivalent to, or even deeper than, the Timor Trough. Examples include the continental shelf delimitation between France and Spain, which at one point traverses the Cape Breton Trough;¹⁷² the agreement between the Dominican Republic and Venezuela, which disregards the 5000 metre Muertos Trough;¹⁷³ and most significantly, the equidistance-oriented delimitation between the island States of

¹⁶⁸ *Libya–Malta Case* [1985] ICJ Rep 13, [39].

¹⁶⁹ *Ibid* [34].

¹⁷⁰ *Ibid* [39].

¹⁷¹ *Ibid* (Separate Opinion of Vice-President Sette-Camara) 61.

¹⁷² *Conventions between France and Spain (1) Concerning the Delimitation of the Territorial Sea and Contiguous Zone and (2) Concerning the Delimitation of the Continental Shelf in the Bay of Biscay*, 29 January 1974, [1980] *United Nations Legislative Series* 445, UN Doc ST/LEG/SER.B/19 (entered into force 5 April 1975).

¹⁷³ *Treaty on the Delimitation of Marine and Submarine Areas between the Dominican Republic and the Republic of Venezuela*, opened for signature 3 March 1979 (entered into force 15 January 1982) <<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/VEN-DOM1979SA.PDF>> at 23 September 2002.

Cuba and Haiti, which completely overlooks the Cayman Trench, a significant tectonic feature that descends sharply to a depth of more than 6200 metres. The Okinawa Trough in the East China Sea and the Aruba Gap between Venezuela, Colombia and the Dominican Republic remain, however, subject to negotiations.

UNCLOS does not address the relationship between the EEZ and continental shelf and provides no hierarchy of rights.¹⁷⁴ There is, however, one provision that appears to protect continental shelf rights from encroachment by competing EEZ claims. Article 56(3) requires that the EEZ rights created by article 56 with respect to the seabed and subsoil shall be exercised 'in accordance with' the continental shelf regime under Part VI. There is no similar reciprocal protection of EEZ rights, suggesting that a state cannot claim EEZ rights in an area over which another state already exercises continental shelf rights. As a principle of treaty interpretation, article 56 should be given its ordinary and contextual meaning to preserve continental shelf rights.¹⁷⁵ It is legally relevant that Australia made a general claim to its surrounding continental shelf in 1953.¹⁷⁶ Were East Timor to declare an EEZ in such a way as to ignore Australia's continental shelf claim, it is arguable that this would breach both *UNCLOS* and customary law. At a minimum, East Timor is bound to act in good faith to negotiate with Australia to settle their respective rights.

State practice increasingly supports the negotiation and fixing of a single seabed and water column boundary, reflecting the emergence of the concept of an EEZ that creates sovereign rights over the resources of both the water column and the seabed.¹⁷⁷ Recently, the ICJ noted that 'an increasing demand for single delimitation was foreseeable in order to avoid the disadvantages inherent in a plurality of separate delimitation'.¹⁷⁸ In a variation on this trend, the *1997 Treaty* between Indonesia and Australia establishes differing seabed and EEZ rights in overlapping areas of the Timor Sea.¹⁷⁹ To the extent that this agreement would have applied to the water column in the Timor Gap, the agreement will no longer apply now that East Timor is independent.¹⁸⁰ As a consequence, the water column between Australia and East Timor remains to be negotiated. It would be possible, and consistent with state practice, to establish a single maritime line delimiting the EEZ and seabed between Australia and East Timor in the Timor Gap. Indeed, the negotiation of a single line would 'strengthen East Timor's juridical position that an equitable solution should be a median line'.¹⁸¹ However, the *1997 Treaty* itself suggests that it is entirely possible to negotiate differing legal rights for the seabed and water column, respectively. Australia

¹⁷⁴ Triggs, 'Legal and Commercial Risks', above n 24, 119.

¹⁷⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31 (entered into force 27 January 1980).

¹⁷⁶ *Commonwealth of Australia Gazette* No 53 (11 September 1953).

¹⁷⁷ Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd ed, 1999) 196.

¹⁷⁸ *Qatar-Bahrain Case*, above n 99, [225].

¹⁷⁹ *1997 Treaty*, above n 145.

¹⁸⁰ According to Australian Government officials, the Timor Gap section of the 1997 EEZ line will be excised from the treaty upon its ratification and entry into force, expected to occur in 2003.

¹⁸¹ Triggs, 'Legal and Commercial Risks', above n 24, 124.

can be expected to favour a distinction between the two bases of maritime jurisdiction in order to ensure that it preserves its continental shelf rights.

Finally, considerations of 'proportionality' are likely to play a role in an independent determination of an 'equitable' boundary in the Timor Gap.¹⁸² Where circumstances permit, proportionality is 'relevant at the final stage of the delimitation process, as a means of assessing the equitability of the result achieved'.¹⁸³ This process 'aims at a correspondence between the ratio of the lengths of the parties' coasts [abutting on the delimitation area] and the ratio of the respective maritime areas attributed to each of them.'¹⁸⁴ In both the *Gulf of Maine Case* and *Libya–Malta Case*, the 'difference in the lengths of the parties' coasts was taken into account by shifting the boundary, initially constructed as a median line, closer to the shorter coast.¹⁸⁵ A similar approach was adopted in the 1993 *Jan Mayen Case*.¹⁸⁶ According to Ong,

[g]iven the large disparity in coastal lengths and land masses facing each other across the Timor Gap between Australia and ... East Timor ... a similar readjustment to the proposed median line continental shelf boundary is eminently possible by any tribunal tasked with adjudicating the matter. A putative median line boundary between ... East Timor and Australia would thereby also be moved northwards like in the *Libya v Malta* case to compensate for the disparity between the opposing coastal lengths.¹⁸⁷

These supplementary points relating to delimitation of the Timor Gap serve to emphasise the unpredictability of an independent arbitration or judicial determination of the Timor Sea dispute. Australia would find it difficult to maintain its claim to sovereignty over the full extent of its continental shelf. While the principle of natural prolongation remains valid at international law, it could be displaced by a sympathetic court where the distance between opposite states is fewer than 400 nautical miles and where a perception of equity indicates delimitation by a median line. Contrary considerations include the long-standing claim by Australia to the shelf, the significance of the Timor Trough as a geological termination of the shelf and the disproportionality of the relative lengths of the opposite coastlines of East Timor and Australia. Were the outcome of submission to an international tribunal or judicial body reasonably predictable, either East Timor or Australia would be keen to pursue judicial settlement. There are, however, significant risks to both States were a court or tribunal to have jurisdiction over permanent delimitation of the Timor Gap. East Timor is currently seeking further negotiations on a final boundary, a strategy

¹⁸² See generally Tanaka Yoshifumi, 'Reflections on the Concept of Proportionality in the Law of Maritime Delimitation' (2001) 16 *International Journal of Marine and Coastal Law* 433.

¹⁸³ Evans, above n 166, 231.

¹⁸⁴ Günther Jaenicke, 'The Role of Proportionality in the Delimitation of Maritime Zones' in Adriaan Bos and Hugo Siblesz (eds), *Realism in Law-Making: Essays in International Law in Honour of Willem Riphagen* (1986) 51, 52.

¹⁸⁵ *Ibid* 64.

¹⁸⁶ *Jan Mayen Case* [1993] ICJ Rep 38, [66]–[69].

¹⁸⁷ David Ong, 'The Legal Status of the 1989 Australia–Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor' (2000) 31 *Netherlands Yearbook of International Law* 67, 117.

dictated in part by Australia's recent declarations limiting the jurisdiction of the ICJ and the ITLOS.

VI DELIMITATION OF THE TIMOR GAP SEABED BOUNDARY BY THE ICJ OR THE ITLOS

The sovereign independence of East Timor brings with it the opportunity to apply to international tribunals for resolution of disputes with other states. It is, for example, open to Australia and East Timor to agree upon some form of ad hoc arbitration to delimit the seabed boundary in the Timor Gap on the basis of international law. Such a way forward seems unlikely at present in light of Australia's stated preference for maritime boundaries to be achieved by negotiation.¹⁸⁸ In the absence of agreement between the States, it remains possible for East Timor unilaterally to apply to the ICJ or the ITLOS on the basis of the capacity of these courts to assert a compulsory jurisdiction over a non-consenting state. East Timor would have, however, some hurdles to jump before it could purport to take advantage of these possibilities for dispute resolution. East Timor must first be admitted as a member of the UN. This process is likely to be finalised by September 2002,¹⁸⁹ with the consequence that East Timor will become ipso facto a party to *Statute of the ICJ*.¹⁹⁰ If East Timor wants to take advantage of the provisions for compulsory settlement of disputes under *UNCLOS*, it would also need to ratify this agreement and to nominate the ITLOS and/or the ICJ as its choice for compulsory dispute settlement under *UNCLOS* pursuant to article 287.

A *Compulsory Jurisdiction of the ICJ*

It is a fundamental principle of international law that a state is not amenable to the jurisdiction of another state, nor to the jurisdiction of international judicial bodies, without its prior consent. The *Statute of the ICJ* makes special provision, however, for states to make a declaration accepting the jurisdiction of the Court for all future disputes. Under article 36(2), states may 'recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes'.

¹⁸⁸ Daryl Williams (Attorney-General) and Alexander Downer (Minister for Foreign Affairs), Commonwealth of Australia, 'Changes to International Dispute Resolution' (Joint Media Release, 25 March 2002) <http://www.foreignminister.gov.au/releases/2002/fa039j_02.html> at 23 September 2002.

¹⁸⁹ Under art 4 of the *Charter of the UN*, membership of the UN is open to all 'peace-loving' states willing to accept the obligations of the *Charter of the UN*, and is effected by a decision of the General Assembly upon the recommendation of the Security Council. The East Timorese Parliament, holding its first sitting just hours after independence, ratified an application to join the UN: see Agence France Presse, *Parliament Ratifies East Timor's Application for UN Membership* (2002) <<http://www.easttimorelections.org/news/2002/020520-application.html>> at 23 September 2002. A request for UN membership was conveyed to the UN Security Council, which recommended on 23 May 2002 that East Timor be admitted to the UN in the course of the 57th session of the General Assembly, during the last week of September 2002.

¹⁹⁰ *Charter of the UN* art 93(1).

Such declarations may be made ‘unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time’.¹⁹¹ Australia accepted the compulsory jurisdiction of the Court under the so called ‘optional clause’ on the basis of reciprocity in 1975.¹⁹² Unlike most other states, Australia did so unequivocally; that is, without making any reservations to qualify its obligation. Indeed, it was on this jurisdictional basis that Portugal was able to bring its application against Australia in 1995.¹⁹³ The application failed at the procedural stage because Indonesia, as an interested third state, was not within the jurisdiction of the Court.¹⁹⁴

Australia’s acceptance of the ICJ’s jurisdiction might appear to give the newly independent East Timor an opportunity to bring an application against Australia by asking the ICJ to determine the seabed boundary according to contemporary principles of international law. In fact, this option is no longer available. On 25 March 2002 Australia announced its revocation of the earlier declaration, and replaced it with a declaration that excluded from the realm of its general consent

any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the EEZ and the continental shelf, or arising out of, concerning or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.¹⁹⁵

Australia’s declaration was stated to be ‘effective immediately’. Australia added one further qualification to the future jurisdiction of the ICJ. It will no longer allow the ICJ to consider an application by a state that has accepted the compulsory jurisdiction of the ICJ for a ‘particular purpose or for a period of less than one year’.

It now seems that, were East Timor to make a declaration under article 36(2) accepting the compulsory jurisdiction of the ICJ, it could not bring a claim against Australia within the first year of doing so. Of greater significance, East Timor could not ask the ICJ to settle the Timor Sea dispute because it relates to the delimitation of a maritime zone and hence falls within the scope of reservations limiting Australia’s acceptance of the jurisdiction of the ICJ.

It might, nonetheless, be possible for East Timor to challenge the validity of Australia’s revocation of its *1975 Declaration*. Under article 36(6) of the *Statute of the ICJ*, any dispute as to the competence of the ICJ is to be settled by a decision of the ICJ itself. East Timor, on becoming a party to the *Statute of the ICJ* and on making a declaration under article 36(2), could bring an application against Australia challenging the validity of its withdrawal. A legal challenge could be made on two grounds. The first is that the withdrawal was made,

¹⁹¹ *Statute of the ICJ* art 36(3).

¹⁹² Commonwealth of Australia, *Declaration under Article 36(2) of the Statute of the International Court of Justice*, 17 March 1975, <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>> at 23 September 2002 (‘*1975 Declaration*’).

¹⁹³ *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90.

¹⁹⁴ *Ibid* [34]–[35].

¹⁹⁵ *Declaration under the Statute of the International Court of Justice Concerning Australia’s Acceptance of the Jurisdiction of the International Court of Justice*, 21 March 2002, [2002] ATS No 5.

apparently cynically, in the face of a probable or possible application against Australia six weeks before East Timor became fully independent. The second basis for a challenge is that the withdrawal may be found to be in breach of the general obligation to act in good faith.

In the past, the ICJ has taken a tolerant view of withdrawals or qualifications to declarations accepting the ICJ's compulsory jurisdiction. In *Fisheries Jurisdiction (Spain v Canada)*, the ICJ upheld Canada's reservation to the jurisdiction in relation to disputes concerning conservation measures applicable to vessels fishing in the Northwest Atlantic Fisheries Organisation Regulatory Area.¹⁹⁶ The reservation had been made 10 months prior to an application by Spain and was found effective to exclude the jurisdiction of the ICJ. Of greater factual relevance to a possible application by East Timor are the obiter dicta findings of the ICJ in *Nicaragua*.¹⁹⁷ Here the US purported to withdraw its declaration under article 36(2) with immediate effect. The ICJ rejected the withdrawal on the ground that the US was bound to give six months notice as it had undertaken to do in its original declaration.

However, the ICJ in *Nicaragua* went on to suggest that prior declarations which contain no termination clause may not be terminable instantly but only on 'reasonable notice':

the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.¹⁹⁸

The ICJ in *Nicaragua* did not specify what 'a reasonable time for withdrawal' would be, but indicated that the three days which had elapsed between the attempt by the US to terminate its declaration and Nicaragua's application to the ICJ would not provide sufficient notice. On this basis, inter alia, the ICJ asserted jurisdiction over the matter and considered the dispute on its merits.¹⁹⁹

Australia's *1975 Declaration* accepting the jurisdiction of the ICJ under the 'optional clause' was expressed to apply 'until such time as notice may be given to withdraw this declaration'. It is unclear whether the ICJ would interpret the *1975 Declaration* as tantamount to 'silence' on the issue of notice so that the *1975 Declaration* could be regarded as of 'indefinite duration' and subject to reasonable notice. It is suggested that Australia's revocation of the *1975 Declaration* constitutes a notice of withdrawal, effective immediately, and is not subject to any requirement of reasonable notice. The validity of immediate notice is supported by Brownlie, who accepts that the power to terminate a declaration

¹⁹⁶ *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)* [1998] ICJ Rep 432. See also ICJ, 'Case Concerning Fisheries Jurisdiction (Spain v Canada): Court Declares that it has No Jurisdiction to Adjudicate upon the Dispute' (Press Communiqué 41/1998, 4 December 1998) <<http://www.icj-cij.org/icjwww/idocket/iec/iecframe.htm>> at 23 September 2002.

¹⁹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction)* [1984] ICJ Rep 392

¹⁹⁸ *Ibid* 420.

¹⁹⁹ Note also that the ICJ has confirmed the validity of declarations that include a right to terminate on notice with immediate effect: *Right of Passage over Indian Territory (Portugal v India) (Preliminary Objections)* [1957] ICJ Rep 125, 142–4.

immediately upon notice appears to be compatible with the *Statute of the ICJ*, despite the fact that it ‘weakens the system of compulsory jurisdiction’.²⁰⁰

The circumstances in *Nicaragua* were exceptional and it may be unwise to build too much on the passing dicta of the ICJ. Moreover, as a practical matter, East Timor is unlikely to have the legal capacity to make a declaration under article 36(2) to enable it to make an application against Australia before October 2002 at the earliest. It is at least probable that the ICJ will find that the six months that will have elapsed between Australia’s withdrawal of its *1975 Declaration* and any possible application by East Timor satisfies any criterion of reasonable notice.

Another challenge to the validity of Australia’s purported withdrawal is the argument that East Timor has been denied access to the ICJ in a way that amounts to a lack of good faith and an abuse of rights. The doctrine of ‘abuse of right’ was adopted by article 300 of *UNCLOS* to the effect that States Parties are obliged to exercise and fulfil their rights and obligations under the Convention in good faith and ‘in a manner which would not constitute an abuse of right’. The general status of this doctrine in international law is far from clear and, as yet, does not appear to have been directly applied by an international tribunal in the context of a dispute between states.²⁰¹ The doctrine of ‘abuse of right’ and the related principles of ‘good faith’ and ‘equity’ overlap considerably and can only be recognised, with any degree of certainty, as falling within the category of ‘general principles of law recognized by civilized nations’ within the meaning of article 38(1)(c) of the *Statute of the ICJ*. According to Iluyomade,

[t]he decisions of some international tribunals and the practice of a number of states reveal that the principle of abuse of right has become accepted as part of international law and that states may, and often do, invoke the principle as the basis of an international claim.²⁰²

East Timor would find it difficult to convince the ICJ that Australia’s exercise of a right under article 36(2) of the *Statute of the ICJ* amounted to the exercise of a power for a reason ‘contrary to the purpose ... for which international law contemplates the power will be used’.²⁰³ A further legal obstacle to challenge based on good faith is the fact that declarations made under article 36(2) apply only as between parties to the *Statute of the ICJ*,²⁰⁴ and are voluntary in nature. Recent references to the ‘abuse of right’ doctrine by international courts and tribunals appear to have contemplated its operation as between states party to a treaty, based on the doctrine’s close relationship with the general obligation of

²⁰⁰ Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 723.

²⁰¹ Gillian Triggs, ‘Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation’ (2000) 5 *Asia Pacific Journal of Environmental Law* 33, 39.

²⁰² B O Iluyomade, ‘The Scope and Content of a Complaint of Abuse of Right in International Law’ (1975) 16 *Harvard Journal of International Law* 47, 72.

²⁰³ G D S Taylor, ‘The Content of the Rule against Abuse of Rights in International Law’ (1972–3) 46 *British Yearbook of International Law* 322, 352.

²⁰⁴ *Statute of the ICJ* art 36(3).

'good faith', enshrined in the *Vienna Convention on the Law of Treaties*.²⁰⁵ At the time of Australia's withdrawal of its 1975 *Declaration*, East Timor did not have legal personality at international law and, arguably, Australia owed no obligations of good faith to an entity under UN control prior to its independence. The better view, however, is that such an obligation will be found to exist in relation to a pre-independence entity at international law.

It is, in any event, difficult to demonstrate that a state has acted with *mala fides*. There is a legal presumption in favour of the 'regularity and necessity of an act of state' and a lack of good faith on behalf of a sovereign state 'should not be lightly imputed'.²⁰⁶ Moreover, Australia's declaration may be seen to have been motivated by various considerations, most notably an entirely acceptable belief that all its outstanding maritime boundary disputes should be settled by negotiation rather than by an international court or tribunal where the outcome is unpredictable. Upon making its declaration, for example, the Australian Government denied that its reservation was linked exclusively to the Timor Sea issue, and contended that it had been considering this course of action 'for quite some time'.²⁰⁷ Proving that Australia's motive was the removal of Timor Sea delimitation from the jurisdiction of the ICJ would be a significant hurdle as 'the distinction between negligent or reckless conduct and acts done with improper motive very frequently becomes blurred'.²⁰⁸ Finally, there does not yet appear to be any precedent in which an international judicial body has found a state responsible for a delict on the basis of an abuse of right.

B Compulsory Dispute Settlement under UNCLOS

When a dispute arises between States Parties to *UNCLOS*, they are under an obligation to 'proceed expeditiously to an exchange of views' as to the means of settlement to be adopted.²⁰⁹ States Parties are first to resort to any means that are agreed between them,²¹⁰ including the possibility of conciliation.²¹¹ Where they cannot agree upon a means of settlement, or if they choose a means that proves unsuccessful, it becomes possible to activate the compulsory dispute resolution

²⁰⁵ Above n 175, art 26. See, eg, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)* [1997] ICJ Rep 1, [142], where the ICJ required of Slovakia and Hungary 'a mutual willingness to discuss in good faith actual and potential environmental risks', and *Report of the Appellate Body: United States — Importation of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) (Report of the Appellate Body), where the WTO Appellate Body regards the 'abuse of right' as prohibiting 'the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting': at [158].

²⁰⁶ *Tacna-Arica Question (Chile v Peru)* (1925) 2 RIAA 930, cited in Ilyomade, 'The Scope and Content of a Complaint of Abuse of Right in International Law', above n 202, 79.

²⁰⁷ Hamish McDonald, 'Timor Gas Billions All at Sea', *Sydney Morning Herald* (Sydney, Australia), 27 March 2002, 6.

²⁰⁸ Ilyomade, 'The Scope and Content of a Complaint of Abuse of Right in International Law', above n 202, 91.

²⁰⁹ *UNCLOS*, above n 14, art 283(1).

²¹⁰ *Ibid* art 281.

²¹¹ *Ibid* art 284.

procedures. When signing, ratifying or acceding to *UNCLOS*, or at any time thereafter, a state may choose one or more of the following means for the settlement of disputes by written declaration:

- (a) The International Tribunal for the Law Of the Sea
- (b) The International Court of Justice
- (c) An arbitral tribunal constituted in accordance with Annex VII;
- (d) A special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.²¹²

If the parties to a dispute have accepted the same procedure, it may be submitted only to that procedure unless the parties otherwise agree. Where the parties have not accepted the same procedure, or where one or more parties to the dispute has not selected a procedure at all, the dispute can be submitted only to arbitration in accordance with annex VII.²¹³ While *UNCLOS* was successful in requiring states to accept some form of compulsory dispute resolution, it provides a significant exception. Under article 298(1), a state may declare that it does not accept the compulsory procedures where, among other things, the dispute concerns articles 15, 74 and 83 relating to sea boundary delimitations.

In its declaration of 21 March 2002, Australia selected both the ICJ and the ITLOS as the means of compulsory dispute settlement, without declaring a preference for either, and also excluded from the jurisdiction of these bodies '[d]isputes concerning the interpretation or application of articles 15, 74 and 83 relating to the sea boundary delimitation as well as those involving historic bays or titles.'

In any particular dispute, the question as to whether a state may rely on a declaration under article 298 to avoid compulsory jurisdiction is a matter for the relevant court or tribunal. It remains possible for East Timor in the future to apply to the ITLOS or the ICJ for a determination as to whether Australia's declaration is effective to exclude the jurisdiction of these bodies in the circumstances of the dispute.²¹⁴

Where a state has effectively excluded the compulsory settlement of a dispute under *UNCLOS*, there remains one further procedure. If no agreement is reached between the parties to a dispute within a reasonable time, either party may submit the matter to conciliation under annex V, article 11.²¹⁵ The other party to the dispute is obliged to accept such a submission.

²¹² Ibid art 287(1).

²¹³ Ibid arts 287(3)–(5); John Merrills, *International Dispute Settlement* (3rd ed, 1998) 173–4.

²¹⁴ Where a dispute has been excluded under art 298, the following art 299 permits the parties to submit a matter to the procedures by agreement if they choose to do so, leaving open the opportunity for Australia and East Timor to agree to use a dispute settlement procedure to resolve the dispute.

²¹⁵ A conciliation commission under annex V comprises five members, two of which are appointed by each party to the dispute. These four appointees then select the fifth member as the chairperson. To facilitate this process, each country is encouraged to nominate four conciliators to a list compiled by the UN Secretary-General. Under annex V, art 6, the functions of a conciliation commission are to hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement. Any disagreement as to the competence of the commission is to be decided by the commission itself.

While the compulsory conciliation procedure is not binding on the parties, legal and factual issues can be examined and would form part of the commission's report which, under article 7, must include 'such recommendations as the commission may deem appropriate for an amicable settlement'. Once the commission has presented its report, stating the reasons upon which it is based, the parties are under an obligation to negotiate an agreement on the basis of that report. If such negotiations fail, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2 of Part XV. Nonetheless, annex V, article 8 provides for the termination of conciliation proceedings upon the rejection of the commission's recommendations by one of the parties to the dispute. While it is possible the report could provide the foundations for future negotiations between Australia and East Timor, termination of conciliation presents yet another 'dead end' for East Timor in its quest to achieve a favourable permanent seabed delimitation.

In summary, the prospects for employing compulsory dispute settlement procedures under *UNCLOS* or the *Statute of the ICJ* seem bleak. It is an option for East Timor, on becoming a party to the *Statute of the ICJ* and *UNCLOS*, to bring applications to the ICJ and the ITLOS challenging the validity of Australia's declarations on the grounds of a lack of good faith and failure to provide proper notice. Neither ground is entirely convincing at international law and there is a significant risk that any such application would fail. In any event, representatives of East Timor have recently emphasised the importance of negotiations to resolve the seabed and boundary disputes, rather than some form of judicial resolution.

VII CONCLUSIONS

Ratification by Australia and East Timor of the *Timor Sea Treaty* will not preclude the parallel pursuit of a final delimitation of the Timor Sea. While providing security for investments in the oil and gas resources of the Elang-Kakatua, Bayu Undan, Greater Sunrise and other projects, the *Exchange of Notes* and the *Timor Sea Treaty* are without prejudice to the respective positions of Australia and East Timor on delimitation. Despite this legal protection, East Timor may choose not to ratify the *Timor Sea Treaty*. Instead, it could pursue negotiations with Australia on a permanent delimitation of the Timor Sea and respectively, with Indonesia and Australia on achieving wider coordinates for the JPDA. It is also possible for East Timor to challenge the legal validity of Australia's withdrawal of maritime disputes from the jurisdiction of the ICJ and the ITLOS. In the unlikely event that an international tribunal were to assert jurisdiction over Australia without its consent, there remains a risk that the court would delimit the seabed by drawing a line somewhere between a median line and the Timor Trough, thereby depriving East Timor of the 90 per cent share of production it would otherwise receive under the *Timor Sea Treaty* from projects lying south of that line. The Bayu-Undan reserves, for example, fall squarely into this category.

In the event that the *Timor Sea Treaty* does not come into force, East Timor cannot gain access to the promised 90 per cent of production from the JPDA. In place of the *Timor Sea Treaty* will be the *Exchange of Notes* which, by

continuing the terms of the *Timor Gap Treaty*, applies a 50/50 split of petroleum production. East Timor should thus determine how its national interests are best protected and assess the strength of its legal position.

It is unlikely that Australia will depart from its long maintained position on the Timor Sea continental shelf. Were Australia to agree to a median line in the Timor Sea, it could undermine the legal validity of Australia's 1972 *Seabed Agreement* with Indonesia and possibly jeopardise its boundary delimitations with New Zealand and in Antarctica. As Australia's Foreign Minister, Alexander Downer, has pointed out, '[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.'²¹⁶

For Australia, the *Timor Sea Treaty* ensures it a 'seat at the table' for negotiation of contractual terms and administrative arrangements governing the exploitation of the Bayu-Undan reserves and other projects in the JPDA. The importance of continued involvement in joint management of resources is highlighted by the downstream benefits expected from the second phase of the Bayu-Undan project in 2006, including an undersea pipeline connected to a liquefied natural gas processing plant in Darwin.

In light of these legal and policy considerations, the interests of both States appear to lie with ratification of the *Timor Sea Treaty*, thereby enabling trust to develop, revenues to come on stream and quiet diplomacy on the drawing of boundaries to continue. At the very least, the new *Timor Sea Treaty* ensures the movement forward of development plans and the strengthening of a cooperative environment that may, in time, prove to be a 'useful prelude' to a final delimitation agreement in the Timor Sea.²¹⁷

²¹⁶ SBS Television, 'Alexander Downer Interview', *Insight*, 23 May 2002 <<http://www.sbs.com.au/insight/transcript.php3?date=2002-05-23&title=Alexander+Downer+Interview>> at 23 September 2002.

²¹⁷ Ibrahim Shihata and William Onorato, 'Joint Development of International Petroleum Resources in Undefined and Disputed Areas' in Gerald Blake et al (eds), *Boundaries and Energy: Problems and Prospects* (1998) 433, 433.