

# LEGAL AND COMMERCIAL RISKS OF INVESTMENT IN THE TIMOR GAP

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*[This paper examines the legal and commercial risks for investors and contractors in the Zone of Cooperation of the Timor Gap, both during the transitional period under the administration of the United Nations Transitional Administration in East Timor ('UNTAET') and after East Timor gains independence. It is argued that while the Exchange of Notes between Australia and the UNTAET provides stability during the transitional period, there are significant risks to production sharing contractors once East Timor gains independence. The paper also considers the consequences of a possible application by East Timor to the International Court of Justice for the determination of a permanent seabed boundary. While international law indicates that the natural prolongation theory will apply to protect Australia's claim to the continental shelf, there is a risk that the International Court of Justice will apply the equidistance principle, which would place Area A of the Zone of Cooperation on the East Timorese side of a notional median line. It is suggested that, if a final boundary is neither agreed by Australia and East Timor nor imposed by the International Court of Justice, respective sovereign and commercial interests are best served by some form of joint development regime. A new agreement could provide the foundation for fruitful, long-term relations between East Timor and Australia, by protecting the juridical positions of both states, enabling access to petroleum resources and providing training, employment and technology to an independent East Timor.]*

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## I INTRODUCTION

The United Nations Transitional Administration in East Timor ('UNTAET'),<sup>1</sup> acting on behalf of the peoples of East Timor, has just completed the first round of negotiations with the Australian Government regarding new arrangements to govern the exploitation of resources in the Timor Gap.<sup>2</sup> The aim is to ensure a smooth transition from the period of administration by the United Nations to the full independence of East Timor.<sup>3</sup> At present, little is publicly known about the nature of these negotiations. The first round of negotiations ended inconclusively and a new round of negotiations has yet to be scheduled.<sup>4</sup>

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<sup>1</sup> UNTAET was established by the United Nations Security Council on 25 October 1999, the date on which Indonesian jurisdiction over East Timor ended: SC Res 1272 (4057<sup>th</sup> mtg), UN Doc S/RES/1272 (1999), 39 ILM 240. East Timor was a Portuguese colony in the process of decolonisation when on 7 December 1975 Indonesia invaded East Timor. Its illegal annexation of the territory the following year was recognised, in defiance of world opinion, by Australia. The struggle for East Timorese independence continued, and a UN-sponsored referendum on moves toward greater autonomy was held on 30 August 1999. Widespread violence followed the massive vote in favour of the moves, and under increasing international pressure Indonesia renounced its claims to the territory on 20 October 1999. The United Nations took over transitional administration in the territory of East Timor and is currently preparing East Timor for independence.

<sup>2</sup> UNTAET, *First Round of Timor Gap Talks Ends*, Daily Briefing (12 October 2000). The Timor Gap, an area rich in petroleum and gas resources, refers to the undefined boundary lying between the seabed agreements negotiated in 1971 and 1972 by Australia and Indonesia: *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries*, 18 May 1971, 974 UNTS 307, 10 ILM 830 (entered into force 8 November 1973); *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*, 9 October 1972, 974 UNTS 319, 11 ILM 1272 (Agreement), 12 ILM 357 (annex) (entered into force 8 November 1973) ('1972 Agreements'). The area between East Timor and Australia was left unresolved until the negotiation 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*, 11 December 1989, [1991] ATS No 3, 29 ILM 469, arts 3, 4 (entered into force 9 February 1991) ('*Timor Gap Treaty*'). Under this treaty, exploitation of the Timor Gap was managed jointly by Australia and Indonesia until the *Timor Gap Treaty* was terminated by the secession of East Timor. The *Timor Gap Treaty* is likely to be renegotiated in the future: see, eg, the comments of Mari Alkatiri of the National Council of Timorese Resistance in Peter Alford and Robert Garran, 'East Timor Wants New Gap Treaty', *The Australian* (Sydney) 15 June 2000, 2, and those of the head of UNTAET, Sergio Vieira de Mello, in UNTAET, *East Timor Receives First Royalty Payment from Oil Exploitation in Timor Gap*, Press Release (24 October 2000).

<sup>3</sup> Minister for Foreign Affairs and Minister for Industry, Science and Resources, Commonwealth of Australia, *Timor Gap Agreement Reached with UNTAET*, Joint Media Release, FA10 (10 February 2000) [5] ('Joint Media Release').

<sup>4</sup> UNTAET, *First Round of Timor Gap Talks Ends*, above n 2.

The success of these negotiations will be crucial to continued investment in Area A of the Zone of Cooperation ('ZOC').<sup>5</sup> The first commercial production of petroleum from Area A began in July 1998 in the Elang–Kakatua group of oilfields.<sup>6</sup> If development of the Bayu–Undan<sup>7</sup> and Sunrise–Troubadour<sup>8</sup> gas-condensate fields proceeds, capital expenditure on these developments is estimated at AUD\$15 billion, 'bringing revenues of "tens of millions of dollars per annum" for East Timor and Australia.'<sup>9</sup> A prerequisite for continued investment in the area is, however, a stable legal, fiscal and administrative regime governing the ZOC.<sup>10</sup> The benefits of exploitation, including the development of institutions and infrastructure in East Timor, underlie the political determination of both Australia and UNTAET to build confidence and stability for further investment in petroleum exploitation.

Thus on 10 February 2000 UNTAET and Australia, by an *Exchange of Notes*,<sup>11</sup> agreed to 'practical arrangements for the continuity of the terms'<sup>12</sup> of the *Timor Gap Treaty* throughout the transitional period.<sup>13</sup> It was also agreed

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<sup>5</sup> The ZOC is approximately 60,000 square kilometres comprising Areas A, B and C. Only Area A is under cooperative development, although revenue-sharing arrangements exist in relation to Areas B and C. A different regime applies for each area: see *Timor Gap Treaty*, above n 2, arts 3, 4.

<sup>6</sup> Office of Resource Development, Northern Territory, 'Elang/Kakatua', *Northern Territory Oil & Gas Fact Sheet* <[http://www.dme.nt.gov.au/ord/oil&gas/fact\\_sheets2/elang.html](http://www.dme.nt.gov.au/ord/oil&gas/fact_sheets2/elang.html)> at 1 December 2000. This oilfield is currently producing 16,000 barrels of oil per day according to the Second Reading speech of the *Timor Gap Treaty (Transitional Arrangements) Bill 2000* (Cth): Commonwealth, *Parliamentary Debates*, Senate, 16 March 2000, 13004 (Senator Trish Crossin) ('Second Reading'). UNTAET has received its first royalty of more than AUD\$3 million from the Australian-operated oilfield in the Timor Gap, the sum representing 50 per cent of the revenue collected from production between 25 October 1999 and 25 September 2000: UNTAET, *East Timor Receives First Royalty Payment*, above n 2.

<sup>7</sup> The Bayu–Undan field, discovered in 1995, is located about 500 km north-west of Darwin and 250 km south of Suai, East Timor. It is estimated 400 million barrels worth of valuable liquids will be recoverable from the field. For more information see Phillips Petroleum, *Bayu–Undan Gas Recycle Project* <<http://bayuundan.phillips66.com/>> at 1 December 2000.

<sup>8</sup> The Sunrise–Troubadour field, discovered in 1974, is located about 450 km north-east of Darwin. It is estimated the field contains over nine trillion cubic feet of gas. For more information see Woodside Australian Energy <<http://www.woodside.com.au/timorsea/sunrise.htm>> at 1 December 2000.

<sup>9</sup> Jim Godlove, 'Practical Implications of East Timor's Transition to the Timor Gap Treaty' (Paper presented at the 24<sup>th</sup> Annual Conference of the Australian Mining and Petroleum Law Association, Fremantle, 26–29 July 2000) 1; Second Reading, above n 6.

<sup>10</sup> Godlove, above n 9, 2.

<sup>11</sup> *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*, 10 February 2000, [2000] ATS No 9 (with effect from 25 October 1999) ('*Exchange of Notes*').

<sup>12</sup> Note from the United Nations Transitional Administration in East Timor, Dili, to the Australian Mission in East Timor, Dili, in *Exchange of Notes*, above n 11, [3] ('UNTAET Note').

<sup>13</sup> Namely from the date of the takeover by UNTAET, 25 October 1999, to the date East Timor gains independence.

that during this transitional period UNTAET would assume all the rights and obligations under the *Timor Gap Treaty* that previously had been exercised and performed by Indonesia.<sup>14</sup> The commercial and legal stability achieved through the *Exchange of Notes* nonetheless remains at risk, because it is expected that East Timor will achieve statehood as early as 2001.<sup>15</sup> On independence, East Timor has the right to terminate the *Exchange of Notes*, which would consequently nullify the terms of the *Timor Gap Treaty*.<sup>16</sup> In the absence of a new agreement, therefore, the Timor Gap could resume its pre-1991 status as an area without any agreed seabed or maritime boundaries. It is highly unlikely that resource exploitation could continue in such a legal vacuum. The current round of treaty negotiations is thus intended to create a new legal regime for resource exploitation and to ensure political stability that will encourage continued investment in the area.

While the *Exchange of Notes* provides some comfort to investors in the Timor Gap, the transitional period is likely to be short. Investors remain concerned about the long-term viability of projects in the ZOC. For example, the joint venture in the Bayu–Undan gas-condensate field in the Timor Gap has been reported to be treading water.<sup>17</sup> Banks are reluctant to provide funding for resource projects due to the continuing uncertainties regarding the negotiation of a new agreement once East Timor gains independence.<sup>18</sup>

This paper examines the legal and commercial risks for investors and contractors in the ZOC both during the transitional period under the authority of UNTAET and once East Timor gains independence. The possible consequences of an application to the International Court of Justice ('ICJ') by East Timor to determine a permanent seabed boundary are considered. In the event that a final boundary is neither agreed by Australia and East Timor nor imposed by the ICJ, the paper also examines how the respective sovereign and commercial interests might be protected by the negotiation of some form of joint development regime. It is suggested that a new agreement could provide the foundation for fruitful, long-term relations between East Timor and Australia by protecting the juridical positions of both states, unlocking petroleum resources and providing training, employment and the transferral of technology to an independent East Timor.

## II TRANSITIONAL PERIOD

### A Exchange of Notes

On 25 October 1999, Indonesian representatives agreed with Australia that the area covered by the *Timor Gap Treaty* is now outside Indonesia's

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<sup>14</sup> UNTAET Note, above n 12, [4].

<sup>15</sup> Evelyn Leopold, 'Late 2001 Timor's Goal for Declaration', *The Australian* (Sydney) 30 November 2000, 14.

<sup>16</sup> See below Part III(B).

<sup>17</sup> Kate Askew, 'Prices Down but Prosperity Beckons in These Fields of Fortune', *Sydney Morning Herald* (Sydney), 27 February 1999, 23.

<sup>18</sup> *Ibid.*

jurisdiction.<sup>19</sup> The inevitable legal consequence was that the *Timor Gap Treaty* ceased to be in force between them.<sup>20</sup> A practical consequence of termination of the treaty was that, if resource exploitation under existing production sharing contracts ('PSCs')<sup>21</sup> in the ZOC was to be secure, it was necessary to preserve the regime created by the *Timor Gap Treaty*. There were, however, some impediments to maintaining the treaty in its original form. First, representatives of East Timor, such as Mari Alkatiri, a spokesman for the National Council of Timorese Resistance, had declared that 'we are not going to be a successor to an illegal treaty'.<sup>22</sup> The *Timor Gap Treaty* has also been challenged by Portugal in the ICJ, albeit unsuccessfully.<sup>23</sup> Secondly, Australia could not enter a treaty with East Timor, as East Timor as yet has neither been recognised as a state with international legal personality nor has any official representatives.

These difficulties were resolved by the grant of a treaty-making power to UNTAET by the United Nations Security Council, authorising 'UNTAET to take all necessary measures to fulfil its mandate.'<sup>24</sup> East Timor's lack of status in international law was thus avoided by providing UNTAET with a power to enter into treaties, such as the *Exchange of Notes* with Australia.

The more fundamental concerns of East Timorese representatives that an independent East Timor should not be a successor to an illegal or tainted treaty<sup>25</sup> were also sidestepped by establishing a practical arrangement to continue the terms of the treaty rather than the treaty itself. UNTAET, on behalf of the peoples of East Timor, has now become Australia's partner in the treaty, the terms of which continue to apply under the *Exchange of Notes* throughout the transitional period.<sup>26</sup>

The rights of East Timor on independence are recognised by providing that the *Exchange of Notes* 'is without prejudice to the position of the future

<sup>19</sup> In Joint Media Release, above n 3, [6], Indonesian representatives are reported as confirming this loss of jurisdiction to Australian representatives in February 2000.

<sup>20</sup> Ibid. This follows from the fact that Indonesia has no power to enter into treaties relating to a territory outside its jurisdiction.

<sup>21</sup> PSCs are private contracts between contractors and the Joint Authority (the administrative organ of the regime created by the *Timor Gap Treaty*, above n 2) which run for a 30-year term: *Timor Gap Treaty*, above n 2, annex B (Petroleum Mining Code for Area A of the Zone of Cooperation), art 7 ('PMC'). The first PSC was awarded over Area A in 1991: Industry Science Resources, *History of ZOCA Areas and Production Sharing Contracts (PSCs)* <[http://www.isr.gov.au/resources/timor-gap/History\\_of\\_ZOCA\\_areas.pdf](http://www.isr.gov.au/resources/timor-gap/History_of_ZOCA_areas.pdf)> at 1 December 2000.

<sup>22</sup> Karen Polglaze, 'Timor Gap Treaty in Doubt', *The Canberra Times* (Canberra), 30 November 1999, 2.

<sup>23</sup> *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90. The claim was unsuccessful because the ICJ decided it had no jurisdiction to decide the case in the absence of Indonesia.

<sup>24</sup> SC Res 1272, above n 1, [4]. This resolution refers to the *Report of the Secretary-General on the Situation in East Timor*, S/1999/1024, 4 October 1999 <<http://www.un.org/peace/etimor/docs/sg1024.htm>> at 1 December 2000 which recommends this power at [35].

<sup>25</sup> The *Timor Gap Treaty*, above n 2, could be considered illegal or tainted for several reasons: its conclusion signalled an acceptance by Australia of the illegal annexation of East Timor; it deprived the East Timorese of the revenue from ventures in the Timor Gap; and it compromised on the principle of a median line to the detriment of East Timor.

<sup>26</sup> Joint Media Release, above n 3, [3].

government of an independent East Timor with regard to the Treaty.<sup>27</sup> As a further precaution, the agreement stresses that, by continuing the terms of the treaty, the United Nations has not recognised the validity of the prior so-called integration of East Timor into Indonesia.<sup>28</sup>

At first glance, it might be questioned whether there is any significant legal distinction between the *Timor Gap Treaty* itself and the ‘terms of the Treaty’ which are, of course, substantively identical.<sup>29</sup> What the *Exchange of Notes* does, however, is provide a creative solution to the alleged invalidity of the *Timor Gap Treaty* by creating a new treaty between Australia and UNTAET which is legally independent of the *Timor Gap Treaty* itself, while incorporating its terms. In this way, it has been possible to sidestep the vexed question of the rights and duties of states under the international law of succession.<sup>30</sup> In these circumstances, UNTAET, on behalf of the peoples of East Timor, can more readily agree to maintain the terms of the treaty.

By continuing the terms of the *Timor Gap Treaty*, it has also proved possible to maintain the legal status quo for Australia, UNTAET and all contractors under PSCs negotiated under the *Timor Gap Treaty*. The rights and obligations of all stakeholders are thus preserved, except that UNTAET, acting on behalf of the peoples of East Timor, has assumed Indonesia’s sovereign rights in the ZOC.

## B Memorandum of Understanding

The *Exchange of Notes* provides the legal basis for the *Memorandum of Understanding* (‘MOU’)<sup>31</sup> between Australia and UNTAET, under which practical arrangements are put in place to continue the terms of the *Timor Gap Treaty*. To ensure that there is no gap in responsibility in the period between the transfer of authority to UNTAET on 25 October 1999 and the *Exchange of Notes* on 10 February 2000, the *MOU* provides that all the laws that applied in East Timor prior to the transitional period will continue to apply.<sup>32</sup> So too, all existing PSCs<sup>33</sup> and all ‘rules, regulations, directions, decisions, guidelines, procedures, approvals, authorisations and other determinations’ made by the decision-making

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<sup>27</sup> UNTAET Note, above n 12, [2].

<sup>28</sup> Ibid [3]. The United Nations never recognised Indonesia’s annexation of East Timor. Mere incorporation of the terms of an invalid treaty are thus expressly said not to confer validity on the legality of the treaty itself.

<sup>29</sup> This could be seen as an example of the municipal law technique of incorporation by reference.

<sup>30</sup> See discussion of the law of state succession below Part III(A).

<sup>31</sup> *Memorandum of Understanding between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET), Acting on Behalf of East Timor, on Arrangements Relating to the Timor Gap Treaty*, in *Exchange of Notes*, above n 11.

<sup>32</sup> Ibid art 2(a).

<sup>33</sup> Ibid art 2(c).

organs created by the *Timor Gap Treaty* (namely the Ministerial Council and the Joint Authority)<sup>34</sup> will continue to apply.<sup>35</sup>

In addition to certain administrative details,<sup>36</sup> the *MOU* recognises that it is important to ‘facilitate, as a matter of priority,’ employment opportunities for the East Timorese.<sup>37</sup> Indeed, any new regime agreed by Australia and UNTAET is likely to include an obligation to provide for further training programs and transfers of technology to East Timor.<sup>38</sup> The *MOU* also confirms that, until the head office of the Joint Authority is established in East Timor, its offices will be consolidated in Darwin.<sup>39</sup> The East Timor office is to be established as soon as possible ‘having regard to ensuring the continued efficient operation of the Joint Authority’.<sup>40</sup> Finally, UNTAET is to designate its representative on the Ministerial Council and to make appointments to the Joint Authority as soon as possible.<sup>41</sup>

In these ways, the *MOU* enables a smooth transfer of authority to UNTAET and at the same time maintains the existing rights and obligations of the Joint Authority, the Ministerial Council and all contractors under current PSCs. Thus, the respective interests of the peoples of East Timor, Australia and private contractors and investors have been preserved, at least during the transitional period. It has also been encouraging for contractors that the National Council for Timorese Resistance has proclaimed their support for continuing the terms of the *Timor Gap Treaty* and honouring existing contracts.<sup>42</sup>

Both the *Exchange of Notes* and *MOU* have been given domestic legal effect in Australia by the *Timor Gap Treaty (Transitional Arrangements) Act 2000* (Cth). The Act makes consequential amendments to the *Petroleum (Australia–Indonesia Zone of Cooperation) Act 1990* (Cth) and other Acts,<sup>43</sup> ensures the

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<sup>34</sup> The Ministerial Council, composed equally of representatives from Australia and Indonesia, is the executive organ of the regime created by the *Timor Gap Treaty*, while the Joint Authority is the administrative organ: see *Timor Gap Treaty*, above n 2, pts III, IV.

<sup>35</sup> *MOU*, above n 31, art 2(b).

<sup>36</sup> *Ibid* arts 4(d)–(g).

<sup>37</sup> *Ibid* art 2(d).

<sup>38</sup> See discussion below Part III(F)(4).

<sup>39</sup> *MOU*, above n 31, art 4(c).

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid* arts 4(a), (b).

<sup>42</sup> National Council of Timorese Resistance, *On the “Timor Gap Treaty”*, Press Release (20 October 1999) 1.

<sup>43</sup> See *Timor Gap Treaty (Transitional Arrangements Act) 2000* (Cth) sch 2, which lists the following acts: *Crimes at Sea Act 1979* (Cth); *Crimes at Sea Act 2000* (Cth); *Customs Act 1901* (Cth); *Fringe Benefits Tax Assessment Act 1986* (Cth); *Income Tax Assessment Act 1936* (Cth); *Migration Act 1958* (Cth); *Passenger Movement Charge Act 1978* (Cth); *Passenger Movement Charge Collection Act 1978* (Cth); *Petroleum (Submerged Lands) Act 1967* (Cth); *Quarantine Act 1908* (Cth); *Workplace Relations Act 1996* (Cth).

continuation of a range of related laws,<sup>44</sup> and clarifies the legal status of activities in the ZOC.<sup>45</sup>

### C Legal and Commercial Risks

The grant of a treaty-making power to UNTAET, and the subsequent *Exchange of Notes* and *MOU*, provide a relatively secure legal foundation for all existing rights of the Joint Authority, the Ministerial Council and contractors during the transitional period. From the point of view of investors and contractors under PSCs, the new arrangements have not significantly altered their existing rights. This can be explained in the following way. The *Timor Gap Treaty* was an agreement between sovereign states, so it created ‘first tier’ rights between the states. The PSCs, however, are negotiated between private contractors and the Joint Authority under the *Timor Gap Treaty* and its annexes, the Petroleum Mining Code (‘PMC’)<sup>46</sup> and the Model Production Sharing Contract (‘MPSC’),<sup>47</sup> and hence create only private or ‘second tier’ rights. Although the ‘first tier’ obligations of Indonesia have now been assumed by UNTAET, the ‘second tier’ rights of both the Joint Authority, as an international legal person, and the contractors, remain unaffected. Whether such rights can survive any renegotiation of the terms of the treaty will be critically important if a new regime is agreed either by or for an independent East Timor. For the present, the transitional arrangements have both ensured continuation of the terms of the treaty in the interests of contractors and overcome the reluctance of certain representatives of the peoples of East Timor to take part in an allegedly tainted treaty.

If there is any potential risk to PSCs during the transitional period, it lies in the risk that UNTAET may appoint less cooperative personnel to the Joint Authority and Ministerial Council. In light of the minimal effects of previous internal disagreements, however, it is unlikely that any such appointments will have a significant practical impact on petroleum activities in the ZOC.

### III AFTER EAST TIMOR GAINS INDEPENDENCE

By contrast with the present stability of the transitional period, significant legal and commercial risks to contractors and PSCs are likely to arise once East Timor gains full independence. An independent East Timor has several options. It could:

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<sup>44</sup> Second Reading, above n 6, 13,006. This includes the application of the criminal law of the Northern Territory in Area A: *Timor Gap Treaty (Transitional Arrangements Act) 2000* (Cth) sch 2, s 23.

<sup>45</sup> This includes the creation of a framework for law enforcement cooperation between Australia and UNTAET: *Timor Gap Treaty (Transitional Arrangements Act) 2000* (Cth) sch 2, s 23. It also includes the retrospective operation of the Act from the time the Security Council adopted SC Res 1272, above n 1: s 4, qualified by sections regarding retrospective criminal offences: ss 6–7.

<sup>46</sup> PMC, above n 21.

<sup>47</sup> *Timor Gap Treaty*, above n 2, annex C (Model Production Sharing Contract between the Joint Authority and Contractors).



- reject any new regime negotiated on its behalf;
- terminate the terms of the *Timor Gap Treaty* and deny any obligations to contractors under existing PSCs;
- interfere negatively with petroleum-related activities in the ZOC;
- accept the ‘optional clause’ under article 36(2) of the *Statute of the International Court of Justice* and bring an application against Australia to the court for a final delimitation of the seabed boundary between them, or;
- adopt on independence a new regime for resource exploitation that has been negotiated either on its behalf by UNTAET or directly with Australia.

The legal and commercial risks associated with each of these possible strategies by East Timor are considered below.

#### A *Rejection of a New UNTAET Negotiated Regime*

In the event that UNTAET and Australia successfully negotiate a new regime for the Timor Gap, the question arises whether East Timor can reject the agreement once it gains independence. In other words, can UNTAET bind East Timor to the terms of an agreement made on its behalf? There are no international precedents in which a UN body, representing a peoples prior to their independence, has legally bound them to an agreement with a third state once those peoples achieve statehood. The closest analogy lies with laws regulating the succession of states to treaties, a complex area of international law that has been described as appearing ‘paradoxical and inconsistent’.<sup>48</sup>

A starting point for analysis of the legal ramifications of a possible rejection by an independent East Timor of any agreement negotiated on its behalf is the *Vienna Convention on the Succession of States in Respect of Treaties* (‘*Succession Treaty*’).<sup>49</sup> The *Succession Treaty* has not been ratified by Australia,<sup>50</sup> nor, obviously, by East Timor, which as an embryonic state currently has no legal capacity to accede to treaties. In the absence of a treaty-based rule, the obligations of East Timor will depend on customary international law. Customary international law is formed by state practice, evidence of which includes the *Succession Treaty*. While only a few states have ratified the *Succession Treaty*,<sup>51</sup> it nonetheless provides some guidance on such customary

law as exists on the issue. Article 16 of the *Succession Treaty* provides that a newly independent state

is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

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<sup>48</sup> Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7<sup>th</sup> ed, 1997) 164.

<sup>49</sup> Opened for signature 23 August 1978, 17 ILM 1488 (entered into force 6 November 1996).

<sup>50</sup> As at 1 December 2000.

<sup>51</sup> As at 1 December 2000, there were 20 signatories and 17 parties.

In short, under the *Succession Treaty*, a newly independent state can begin with a 'clean slate' in respect of all pre-existing multilateral and bilateral treaty rights and obligations of its predecessor.<sup>52</sup> The 'predecessor' in this case will be UNTAET as the administrator of the territory during the transitional period. On the basis of the clean slate analysis, East Timor will be free to repudiate any new regime negotiated on its behalf.

Not all commentators agree, however, that the clean slate approach has the status of customary law. Some argue that the complete erasure of all previous rights would be contrary to the principle of effectiveness, which dictates the need for stability of legal relationships.<sup>53</sup> A newly independent state, in any event, is bound by international law principles of good faith, unjust enrichment and abuse of right.<sup>54</sup> Further, the *Succession Treaty* does not allow a clean slate approach where a treaty relates to a boundary or other territorial regime because its effects would be too disruptive.<sup>55</sup> It is, however, unlikely that either the *Timor Gap Treaty* or *Exchange of Notes* creates a boundary or territorial regime within the meaning of the *Succession Treaty*, as both agreements provide that they do not prejudice the parties reaching a final agreement on the continental shelf.<sup>56</sup>

Despite the uncertain state of the law, it is probable that East Timor may begin its life as an independent state by deciding whether to succeed to multilateral treaties to which Indonesia was a party and which would have applied to the territory of East Timor. It does not, however, have this freedom in relation to bilateral agreements, as the bilateral nature of the relationship necessarily requires the consent of the other state to any change in parties.<sup>57</sup> The future of the terms of the *Timor Gap Treaty* or of any subsequent regime will thus depend on the political will and the assessment of national interests of both Australia and East Timor.

As Matthew Craven points out, any attempt to rely on an asserted principle of state succession flounders when applied to practical issues which emerge on succession.<sup>58</sup> In particular, the illegal annexation and impoverished circumstances of East Timor render it probable that the international community will accept sympathetically any decision to reject treaties negotiated on its behalf

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<sup>52</sup> See generally Diba Majzub, 'Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Quebec' (1999) 24 *Queen's Law Journal* 411.

<sup>53</sup> See generally David Ong, 'The Legal Status of the Timor Gap Treaty Post-Referendum: Is Joint Development Mandated by International Law?' (Paper presented at 'International Legal Challenges for the 21<sup>st</sup> Century', Joint Conference of the Australian and New Zealand Society of International Law and the American Society of International Law, Sydney and Canberra, 26–29 June 2000) 14.

<sup>54</sup> See generally J F O'Connor, *Good Faith in International Law* (1991); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) pt 2; D P O'Connell, *State Succession in Municipal Law and International Law* (1967) vol 1, 266–8.

<sup>55</sup> *Succession Treaty*, above n 49, arts 11, 12.

<sup>56</sup> *Timor Gap Treaty*, above n 2, preamble, arts 2(3)–(4); UNTAET Note, above n 12, [2].

<sup>57</sup> *Succession Treaty*, above n 49, art 24.

<sup>58</sup> Matthew Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 *European Journal of International Law* 142, 148–50.

by Indonesia. There will also be, doubtless, some tolerance in relation to any subsequent rejection by East Timor of an agreement made on its behalf by UNTAET. The consequence, on practical and legal grounds, is that East Timor is unlikely to be bound by any agreement made by UNTAET with Australia. Contractors will thus look to the provisions of the *Timor Gap Treaty* that stipulate the consequences of its termination or any denial of subsisting rights, and also to principles of international law for protection.

If East Timor has a capacity to reject any new regime for the Timor Gap, there will be, nonetheless, attempts to encourage it to accept a new regime on independence. If the rejection of such an agreement is to be avoided, it will be necessary to ensure that negotiations include those representatives of East Timor who are most likely to be elected to government on independence. If these representatives understand the financial and other benefits of ensuring investor confidence in the region, it becomes more likely that the agreement will be endorsed on independence. The challenge for negotiators is to ensure that the interests of all stakeholders are addressed fairly. If good fences make good neighbours, Australia will need to satisfy the reasonable demands of the peoples of East Timor, while at the same time protecting its own juridical interests in the area.

#### B *Termination of the Timor Gap Treaty and Denial of PSC Rights*

An independent East Timor clearly will not be bound either by the *Timor Gap Treaty*, which was terminated when Indonesia's jurisdiction over East Timor ended, or by the terms of the *Timor Gap Treaty* as agreed in the *Exchange of Notes*, since the agreement was 'without prejudice' to East Timor. As no arrangements have yet been made in regard to the Timor Gap upon the independence of East Timor, efforts are now being made to achieve security for petroleum investments in the Timor Gap once the transition period comes to an end. Contractors and investors remain concerned about the viability of current and future projects in the disputed area, for oil and gas projects must be secure for significant periods before they become profitable. Assurances by UNTAET and Australia during the transitional period do not satisfy the long-term need for legal stability. For example, contractors under existing PSCs are concerned about the possibility of East Timor terminating these PSCs.

Both the terms of the *Timor Gap Treaty* and customary international law provide some — though inadequate — protection for contractors upon any termination of the treaty or any denial of existing rights under PSCs. Article 34 of the *Timor Gap Treaty* protects contractors if the treaty ceases to be in force following the conclusion of an agreement on permanent seabed delimitation. However no protection is provided if — as was the case — the treaty is terminated for any other reason. The holders of PSCs, therefore, can find little comfort in the terms of the agreement itself if the terms of the treaty are terminated other than through a permanent delimitation.

Since there is no guiding provision in the *Timor Gap Treaty*, the provisions of the *Vienna Convention on the Law of Treaties* ('VCLT')<sup>59</sup> become relevant. Australia has ratified this treaty,<sup>60</sup> which, since it merely codifies the rules of customary law in relevant respects,<sup>61</sup> also describes rules binding on an independent East Timor. The VCLT recognises the right of states to terminate a treaty mutually, upon the termination of which they are released from any further obligation to perform it.<sup>62</sup> Under article 70(1)(b), however, a right to terminate a treaty 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.'

Both Indonesia and Australia are bound to protect rights that were created by the *Timor Gap Treaty* prior to its termination. The 'prior' rights subject to protection are, however, those of 'the parties' as sovereigns, not necessarily the 'second tier' rights of contractors under existing PSCs. Nonetheless, as Indonesia and Australia have obligations under PSCs to contractors through the Joint Authority,<sup>63</sup> it is probable that Indonesia and Australia are also bound to protect the rights of contractors created by the *Timor Gap Treaty*.

Apart from the protection afforded by the VCLT, customary international law will also protect certain proprietary interests, described as 'acquired rights'. In *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*,<sup>64</sup> the Permanent Court of International Justice described acquired rights as

private rights acquired either by nationals or aliens under the existing law of a given State, which, according to traditional international law, do not cease on changes of sovereignty, and in the event of State succession must be respected by the successor State.<sup>65</sup>

The concept of acquired rights has been adopted by many international and municipal tribunals<sup>66</sup> and is supported by commentators.<sup>67</sup> To survive changes to

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<sup>59</sup> Opened for signature 23 May 1969, 1155 UNTS 533, 8 ILM 6790 (entered into force 27 January 1980).

<sup>60</sup> Instrument of accession deposited for Australia 13 June 1974.

<sup>61</sup> See, eg, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16, 47, where the ICJ concluded that the provisions on termination in the VCLT 'may in many respects be considered as a codification of existing customary international law on the subject.'

<sup>62</sup> VCLT, above n 59, art 54(b).

<sup>63</sup> See MPSC, above n 47, s 5.5, which imposes an obligation on the Joint Authority to comply with the *Timor Gap Treaty* and the PMC.

<sup>64</sup> (*Advisory Opinion*) [1923] PCIJ (ser B), No 6, 36. See also Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9<sup>th</sup> ed, 1992) vol 1.

<sup>65</sup> *Ibid* 926-7.

<sup>66</sup> See, eg, *BP Exploration Co (Libya) Ltd v Libya* 53 ILR 297; *Occidental of Umm al Qaywayn Inc v Cities Services Oil Co* 66 ILR 174, 184; *Texaco Overseas Petroleum Co v Libya* 53 ILR 389; *Libyan American Oil Co v Libya* 62 ILR 14, 169-71; *Hunt v Coastal States Gas Producing Co* 66 ILR 38, 361.

<sup>67</sup> See, eg, Ko Swan Sik, 'The Concept of Acquired Rights at International Law' (1977) 24 *Netherlands International Law Review* 120; D P O'Connell, 'Economic Concessions in the Law of State Succession' (1950) 22 *British Yearbook of International Law* 97.

sovereignty, the right must be proprietary in nature. Article 34 of the *Timor Gap Treaty* suggests that rights under PSCs survive termination of the treaty, thereby implying that these rights are proprietary interests. Indeed, the High Court of Australia in *Australia v Western Mining Resources Ltd*<sup>68</sup> recognised that the permits granted under the *Petroleum (Submerged Lands) Act 1967* (Cth) created proprietary rights. Moreover, the PSCs have a 30-year term,<sup>69</sup> create an exclusive interest<sup>70</sup> and are capable of transfer to successors and assignees of contractors.<sup>71</sup> For all these reasons, the rights of contractors under PSCs are appropriately described as ‘acquired rights’ and would be therefore enforceable if the terms of the *Timor Gap Treaty* were to be terminated by East Timor on independence. It also should be noted that there may be some responsibility on the part of UNTAET and Australia to ensure that all such acquired rights are protected if the terms of the treaty come to an end.<sup>72</sup>

The doctrine of acquired rights is supplemented by other general considerations of equity, including unjust enrichment, abuse of right and good faith at international law.<sup>73</sup> At a minimum, East Timor cannot lawfully benefit from petroleum activities in the ZOC without properly compensating contractors under existing PSCs.

### C *Interference with Petroleum-Related Activities*

East Timor might unilaterally attempt to alter the terms of existing PSCs or of an agreed development plan. However, East Timor will have no right to do so if it decides to continue the terms of the *Timor Gap Treaty* in some form upon independence. Under section 13 of the MPSC, a PSC may not be terminated during the first three years, but thereafter it may be terminated by agreement of the parties or in accordance with article 48 of the PMC. East Timor, however, will be bound by these provisions only if there is an agreement between it and Australia to maintain the terms of the *Timor Gap Treaty* on independence. If East Timor rejects a proposal to continue its terms, as it has indicated it might,<sup>74</sup> legal protection for contractors will depend, as a last resort, upon the concepts of acquired rights, good faith and unjust enrichment.

In addition to general equitable considerations, an independent East Timor will be a sovereign state and, as such, responsible at customary international law for any wrongful act. If East Timor were, for example, to confiscate the assets of

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<sup>68</sup> (1998) 194 CLR 1.

<sup>69</sup> PMC, above n 21, art 7.

<sup>70</sup> Ibid art 4(1).

<sup>71</sup> MPSC, above n 47, s 5.3(b).

<sup>72</sup> This is because UNTAET and Australia have agreed to be bound by the terms of the treaty and are bound by art 70(1)(6) of the *VCLT*, above n 59.

<sup>73</sup> The modern application of these concepts is described in Gillian Triggs, ‘Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?’ (2000) 5 *Asia Pacific Journal of Environmental Law* 33, 37–41. Under art 300 of *UNCLOS*, below n 100, parties are bound to ‘fulfil in good faith the obligations assumed under this Convention and shall exercise the rights ... in a manner which would not constitute an abuse of right.’

<sup>74</sup> See the remarks of Mari Alkatiri, above n 2.

contractors within the ZOC, it would attract direct responsibility for the wrongful taking of foreign property under the international law of state responsibility and may be required by a court or arbitral tribunal to pay adequate compensation for all losses.<sup>75</sup>

Yet another commercial and legal risk for contractors lies in the wide discretionary powers of the Ministerial Council and Joint Authority under the *Timor Gap Treaty*.<sup>76</sup> In practice, Indonesia and Australia have exercised these powers in a reasonable manner, with the possible exception of a threat to impose a unitisation agreement on joint venture parties in relation to a straddling deposit.<sup>77</sup> There is no assurance that an independent East Timor will work cooperatively with Australia in the future.

An example of the vulnerability of contractors to the exercise of these discretionary powers is the capacity of the Ministerial Council to block an assignment of interests under a PSC. Under section 5.3(b) of the MPSC, a contractor has a right to transfer its interest under a PSC to another corporation with the approval of the Joint Authority. The Joint Authority is bound not to withhold its approval unreasonably if the corporation has the necessary financial capability and technical skills.<sup>78</sup> If the Joint Authority is not able to reach a consensus, the matter can be referred to the Ministerial Council which also has a power to approve the transfer.<sup>79</sup> However, if the Ministerial Council cannot reach a consensus,<sup>80</sup> it seems there is no capacity to break the resulting deadlock. At this stage, resolution depends upon political will and cooperation between Australia and East Timor.

In summary, unilateral attempts by an independent East Timor to interfere with petroleum activities under PSCs in Area A will attract general responsibility at international law.

#### D Resolution of Disputes

It is premature to consider in detail the various permutations of risks to existing PSCs if East Timor were to repudiate or impair the rights of production sharing contractors created by the *Timor Gap Treaty*. It suffices to observe that,

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<sup>75</sup> For a general discussion of the law of state responsibility see Ivan Shearer, *Starke's International Law* (11<sup>th</sup> ed, 1994) ch 10; see also *Amoco International Finance Corporation v The Government of the Islamic Republic of Iran* (1987) 15 Iran-US CI Trib Rep 189; *Texaco Overseas Petroleum Co v The Government of the Libyan Arab Republic* (1977) 53 ILR 389.

<sup>76</sup> *Timor Gap Treaty*, above n 2, arts 6, 8.

<sup>77</sup> See Letter from the Australia-Indonesia Joint Authority to the President of Phillips Petroleum and the Vice-President of BHP Petroleum, 20 December 1996 ('Letter to Phillips and BHP') nominating the date on which a unitisation agreement should be in place for the Bayu-Undan project. Straddling deposits are resource deposits which 'straddle' areas allotted to different production sharing contractors. A unitisation agreement is an agreement between production sharing contractors with claims to the same deposit in relation to the operations of that deposit.

<sup>78</sup> MPSC, above n 47, s 5.3(b).

<sup>79</sup> *Timor Gap Treaty*, above n 2, arts 7(4), 9(e), 6(1)(i).

<sup>80</sup> *Ibid* art 5(5).

in the absence of the goodwill of East Timor, the terms of the *Timor Gap Treaty* provide little legal assurance to contractors. This is because, while it is one thing to affirm the international law principles of state responsibility and equity, it is quite another to enforce international law against a state. Rights to compensation for international wrongs can be pursued in the following ways:

- state to state negotiations under article 30 of the *Timor Gap Treaty*;
- a claim by a contractor against the Joint Authority under the *Timor Gap Treaty*; or
- a claim against East Timor (or possibly Australia) by a contractor through the state of which it is a national, under the general principles of state responsibility.

These methods of obtaining compensation are considered in turn.

### 1 *State to State*

Disputes between Australia and either UNTAET or an independent East Timor over the interpretation and application of the terms of the *Timor Gap Treaty* can be resolved only at the diplomatic level. The *Timor Gap Treaty* provides that disputes between the state parties are to be resolved by consultation or negotiation.<sup>81</sup> Such a limited provision is to be expected as it is unusual to have any form of compulsory settlement for sovereign and equal states.

The lack of recourse by one state against another is compounded by the fact that a contractor under a PSC has no legal standing against UNTAET. UNTAET is an international organisation with legal personality and a capacity to sue and be sued.<sup>82</sup> However, any breach of the terms of the *Timor Gap Treaty* by UNTAET during the transitional period cannot be the subject of legal action under the PSC. This is because contractors have legal relations with the Joint Authority, not UNTAET. Any breach of the terms of the *Timor Gap Treaty* by UNTAET will be thus amenable only to diplomatic initiatives by Australia and non-binding consultation and negotiation.

### 2 *Contractor to Joint Authority*

If a legal dispute were to arise, for example, where the Joint Authority varied certain provisions of a PSC contrary to the wishes of a contractor,<sup>83</sup> the PSC provides for dispute resolution by binding commercial arbitration.<sup>84</sup> The Joint Authority is an international legal person with the capacity to institute and be a party to legal proceedings.<sup>85</sup> The state parties are bound to ensure that any award against the Joint Authority is capable of enforcement within their respective

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<sup>81</sup> Ibid art 30.

<sup>82</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

<sup>83</sup> The Ministerial Council, of its own volition or on the recommendation of the Joint Authority, may amend the PMC, modify the MPSC, approve termination of the PSC and approve variation of certain provisions of the PSC: *Timor Gap Treaty*, above n 2, art 6.

<sup>84</sup> MPSC, above n 47, ss 12.2–12.6.

<sup>85</sup> *Timor Gap Treaty*, above n 2, art 7(2).

jurisdictions.<sup>86</sup> This obligation under the *Timor Gap Treaty* has been transformed into Australian law by section 13 of the *Petroleum (Australia–Indonesia Zone of Cooperation) Act 1990* (Cth). Contractors can thus institute proceedings to enforce the terms of a PSC and can enforce any judgment against it within Australia.

### 3 Claim to East Timor

A contractor can pursue its rights against the Joint Authority, but not directly against East Timor, as East Timor is not a party to the *Timor Gap Treaty*. If, for example, on independence, East Timor were to refuse to give effect to acquired or pre-existing rights under PSCs, an option is for Australia or any other state to exercise its discretion to take the issue up at the diplomatic level. The outcome of such a strategy is highly uncertain and depends upon whether the contractor is considered a national and whether the relevant state is willing to pursue the matter on its behalf. Another possibility for redress is for the contractor to seek compensation for any losses arising from breaches of the PSC directly against the Australian government, as the other party to the *Timor Gap Treaty*. To maintain such an action, it would be necessary to demonstrate that Australia has committed a wrong against the contractor under international law. A denial by East Timor of rights under a private contract amounting to expropriation could be such a breach of international law. However, it would be difficult to demonstrate any responsibility on Australia's part, unless, for example, there was collusion of both states in the Ministerial Council to deny contractual rights.

In summary, the principles of international law protect the rights of contractors in the event of a dispute. If a permanent seabed delimitation is agreed, the terms of the *Timor Gap Treaty* will also protect these rights. Enforcing these rights against an independent East Timor is, however, entrapped by numerous practical and legal difficulties.

#### E Application to the ICJ for Final Determination

Australia, along with relatively few other states in the international community, has accepted unreservedly the compulsory jurisdiction of the ICJ under the so-called 'optional clause' of the *Statute of the International Court of Justice*.<sup>87</sup> Australia

recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International

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<sup>86</sup> Ibid art 30(2), which provides that parties are to 'facilitate the enforcement in their respective courts of arbitral awards made pursuant to such arbitration.'

<sup>87</sup> Art 36(2). Twenty-two states have accepted unreservedly the jurisdiction of the Court: <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapter1/treaty4.asp>> at 1 December 2000.



Court of Justice ... until such time as notice may be given to withdraw this declaration.<sup>88</sup>

If, on independence, East Timor accepts the jurisdiction of the court on the same terms, Australia will be vulnerable to an application against it by East Timor for delimitation by the court of a seabed boundary in the Timor Gap. Any application brings with it the risk that the ICJ will delimit the boundary to the detriment of Australia. Australia can avoid this possibility by withdrawing its current declaration of acceptance. Any such withdrawal, however, must be with reasonable notice, as required by the ICJ in the *Nicaragua* case.<sup>89</sup>

Australia is likely to be extremely reluctant to withdraw from the automatic jurisdiction of the ICJ for several historical and political reasons. Australia's declaration of acceptance enabled it to take France to the ICJ in the *Nuclear Tests* cases<sup>90</sup> in 1974 and reflected its confidence as an active member of the international legal community during the years under the Whitlam Government. Any withdrawal will attract negative community and media responses within Australia, particularly in light of the recently revised Commonwealth Government policy to review the United Nations human rights committee system.<sup>91</sup> It is, nonetheless, possible that the Australian Government may canvass the possibility of withdrawal in order to encourage East Timor to seek resolution of a boundary or agreement upon joint development in a more conciliatory way. Moreover, as in all litigation, the results of an application to a court or tribunal are unpredictable: one state must lose; sometimes there is a risk that both will lose in certain respects.<sup>92</sup>

The risk in this case is that East Timor could gain a delimitation in its favour. If the ICJ were to apply an equidistant line in the Timor Gap, the whole of Area A, including the Bayu–Undan field, would be on the side of East Timor. While the possibility of withdrawal from the compulsory jurisdiction of the ICJ is thus important to protect Australia's interests, it remains probable, nonetheless, that Australia will choose not to do so. In any event, the court might find, that any purported withdrawal can take effect only after a reasonable time, thereby giving East Timor the opportunity to make an application in the interim.

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<sup>88</sup> Australia, *Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 961 UNTS 183 (deposited 17 March 1975).

<sup>89</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14.

<sup>90</sup> *Nuclear Test Cases (Australia v France; New Zealand v France)* [1974] ICJ Rep 253.

<sup>91</sup> See generally Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs, Commonwealth of Australia, *Improving the Effectiveness of United Nations Committees*, Joint Media Release, FA97 (29 August 2000).

<sup>92</sup> See, eg. *Affaire de la Délimitation des Espaces Maritimes entre le Canada et la République Française* (1992) 21 RIAA 267, 289, where neither of the boundaries proposed by the parties were upheld in full. For an English translation of the original French decision, see *Delimitation of Maritime Areas between Canada and the French Republic (St Pierre and Miquelon)* (1992) 31 ILM 1145, 1169. All subsequent references are to the English translation.

Another opportunity for Australia to avoid the jurisdiction of the ICJ could occur if Australia declared the terms of the *Timor Gap Treaty* no longer in force. The *Timor Gap Treaty* is a bilateral agreement. Just as East Timor has a right to repudiate the treaty on independence, Australia is free to insist that the treaty only applied to Indonesia, and later to UNTAET under the *Exchange of Notes*. If Australia were to terminate the treaty, all lines of the ZOC — including the lateral lines that run between Indonesia and East Timor and Indonesia and Australia — would disappear. The effect of these lines disappearing on an application to the ICJ would be dramatic. East Timor would find itself in the awkward position of having to negotiate with Indonesia to re-establish these lateral lines. Certainly, East Timor cannot ‘have its cake and eat it too’ by claiming a median line boundary while attempting to maintain the lateral lines. If East Timor were to press for a delimitation of its boundary with Australia in this situation, it would necessarily involve its boundaries with Indonesia. In that case, it would be critical to a successful application by East Timor to the ICJ to ensure Indonesia is also before the court. As Indonesia has long resisted any suggestion that its boundaries be resolved by litigation, it is unlikely it will agree to accept jurisdiction. The likely absence of Indonesia would enable Australia to avoid the jurisdiction of the court, as occurred in the *East Timor* case.<sup>93</sup>

### 1 *Likely Nature of Claims*

Assuming Australia remains subject to the jurisdiction of the court, an independent East Timor is likely to assess the merits of its claim to the seabed up to a median line for the purposes of an application to the ICJ. It is beyond the scope of this paper to consider the international legal principles of continental shelf delimitation in any depth. However, the strength of the juridical positions of UNTAET on behalf of East Timor and Australia on the issue will determine the success of attempts to negotiate a new joint development regime for the Timor Gap. In particular, legal advice on the approach of the ICJ to delimitation will influence the strategies of an independent East Timor. For these reasons the central legal arguments are considered below.

The legal weight of claims made by Australia and UNTAET depends, at least initially, upon the geophysical nature of the seabed. In geomorphological terms, the continental shelf of Australia ends at the Timor Trough, 50 nautical miles (nm) from the coast of East Timor and significantly closer to East Timor than to any notional median line. The Timor Trough is 2,350 metres deep in the western part and 3,306 metres deep in the eastern part and forms a striking geological feature 45 nm from East Timor’s coast. It is not surprising, therefore, that Australia should argue that its continental shelf, as a natural prolongation of its land territory, extends to the Timor Trough which forms the natural seabed boundary between it and East Timor.<sup>94</sup> If this argument is correct, Australia

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<sup>93</sup> *East Timor Case (Portugal v Australia) (Merits)* [1995] ICJ Rep 90.

<sup>94</sup> Note the views of the Labour Foreign Affairs spokesman Laurie Brereton that Australia should settle on an equidistant line: ‘Solidarity Without Border’, *AAP Newsfeed*, 21 September 2000.

would possess sovereign rights over the claimed territory. Australia's claim is thus based on the physical aspects of the shelf and upon the earlier jurisprudence of the ICJ in decisions such as the *North Sea Continental Shelf* cases,<sup>95</sup> which applied the concept of natural prolongation. It will also be remembered that the seabed and maritime boundaries agreed with Indonesia in 1971 and 1972<sup>96</sup> were also based on the concept of natural prolongation.<sup>97</sup> The 1972 Agreements are thus a precedent for future delimitation in similar physical circumstances.

During negotiations to 'close' the Timor Gap through the 1980s, Indonesia rejected Australia's view of international law and argued that the law requires that delimitation be based on equitable principles, a median line being the most obviously equitable result for opposite states.<sup>98</sup> It was the failure to agree upon the principles for delimitation that led, after nearly 10 years of negotiations, to the creative solution of a regime of exploitation administered jointly by both countries. Reports indicate that UNTAET is adopting a juridical position on delimitation similar to that of Indonesia.<sup>99</sup> If so, the legal impasse remains.

## 2 *Relevant Principles of Delimitation*

### (a) *The United Nations Convention on the Law of the Sea*

The principles of delimitation of the continental shelf between opposite states are vague and depend upon evidence of norms of international law. A starting point for assessing the merits of the opposing views is the *United Nations Convention on the Law of the Sea* ('*UNCLOS*').<sup>100</sup> Australia is a party to *UNCLOS*,<sup>101</sup> but as noted before, East Timor cannot be a party. The provisions of *UNCLOS* on the continental shelf, therefore, are not strictly binding on East Timor, unless and until it ratifies the agreement once independent. Whether or not East Timor becomes bound by *UNCLOS*, many provisions of the treaty that govern the definition and jurisdiction over the continental shelf and Exclusive Economic Zone ('*EEZ*') state norms of customary international law, so that they

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<sup>95</sup> *North Sea Continental Shelf Cases (FRG v Denmark; FRG v Netherlands) (Merits)* [1969] ICJ Rep 3.

<sup>96</sup> 1972 Agreements, above n 2.

<sup>97</sup> Department of Foreign Affairs and Trade, Commonwealth of Australia, *Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries: National Interest Analysis* (1997).

<sup>98</sup> Department of Industry, Science and Resources, *Submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into East Timor* <[http://www.isr.gov.au/resources/timor-gap/sub\\_may199.pdf](http://www.isr.gov.au/resources/timor-gap/sub_may199.pdf)> at 1 December 2000, [1.2].

<sup>99</sup> UNTAET, *UN Mission in East Timor Opens Talks with Australia on Marine Resources*, Press Release (9 October 2000); Hamish McDonald, 'Testing the Waters with Timor', *The Age* (Melbourne), 21 October 2000, News Extra 5.

<sup>100</sup> Opened for signature 10 December 1982, 183 UNTS 3, 21 ILM 1261, art 56(1)(a) (entered into force 16 November 1994).

<sup>101</sup> Signed for Australia 10 December 1982; instrument of ratification deposited for Australia 5 October 1994.

are binding within the international community.<sup>102</sup> It is thus appropriate to analyse the persuasiveness of the overlapping claims in the Timor Gap by reference, initially, to *UNCLOS*.

The continental shelf is defined by article 76(1) of *UNCLOS* to comprise

the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Article 76(3) provides that the continental margin includes the slope and rise, but not the deep ocean floor. The outer edge of the shelf is not to exceed 350 nm from the baselines.<sup>103</sup> Australia's claim to a continental shelf extending to the outer edge of the Timor Trough satisfies this condition, given that the Timor Trough is 50 nm from East Timor and the distance between East Timor and Australia is less than 400 nm.

However, the complex and much-debated article 76 is 'without prejudice to the question of delimitation of the continental shelf between states with opposite or adjacent coasts.'<sup>104</sup> It is clear on this basis that article 76 is concerned only with defining the continental shelf, and not with providing a basis for its delimitation. Delimitation is governed by article 83(1), which provides that:

[D]elimitation of the continental shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the *Statute of the International Court of Justice*, in order to achieve an equitable solution.

*UNCLOS* thus requires delimitation by reference to the principles of international law, as evidenced by general state practice. Australia's position is that, as this provision applies only to cases in which opposite states share a continental shelf, it has no application to East Timor because the Australian shelf ends at the Timor Trough. There is, in other words, no common shelf between them. The argument that article 83 has no application to the Timor Gap is convincing to the extent that the Australian continental shelf conforms to the definition of a continental shelf in article 76. Article 83 is, in any event, not as helpful as it might have been because it fails to determine which principles of international law are relevant and how they are to be moderated by equitable considerations.

(b) *The Relevance of the EEZ*

Before assessing state practice as evidence of international law on delimitation, it is important to consider the impact of sovereign rights in the

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<sup>102</sup> In *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Merits)* [1985] ICJ Rep 13, 29–34, the ICJ accepted certain provisions of *UNCLOS* as evidence of customary international law; see also Ian Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed, 1998) 214.

<sup>103</sup> *UNCLOS*, above n 100, art 76(5).

<sup>104</sup> *Ibid* art 76(10).

200 nm EEZ.<sup>105</sup> The concept of an EEZ was first elaborated during negotiations for *UNCLOS*. It was, indeed, a crucial component of the package of rights and obligations agreed to in the final agreement.<sup>106</sup> The EEZ is defined as a ‘specific legal regime’<sup>107</sup> governed by *UNCLOS*, within which the coastal state has

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the *sea-bed and its subsoil*, and with regard to the other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds<sup>108</sup>

As is the case for the geological structure of the continental shelf, it was inevitable that there would be overlapping claims to an EEZ between opposite and adjacent states. *UNCLOS* provides for delimitation of the EEZ on the same basis as for the continental shelf — namely, delimitation is to be effected on the basis of international law in order to achieve an equitable solution.<sup>109</sup>

During negotiations to close the Timor Gap, Indonesia developed and maintained its juridical position, now apparently adopted by UNTAET, that natural prolongation of the continental shelf is no longer the primary criterion at international law for delimitation of overlapping claims in cases where the disputed area is less than 400 nm, as is the case for the Timor Gap. Indonesia argued it was entitled to an EEZ including the seabed and that, where there is an overlap, the equitable solution is a median line between the opposite states. The Australian position has been that the concept of an EEZ cannot be employed by Indonesia to encroach on Australian sovereign rights over its continental shelf.<sup>110</sup> Moreover, article 77(2) of *UNCLOS* confirms that continental shelf rights are exclusive to the coastal state ‘in the sense that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal state.’

Nonetheless it is difficult to argue that a coastal state is entitled to an equitable delimitation of an overlapping EEZ unless that EEZ purports to include the continental shelf of the opposite state. It is curious that *UNCLOS* does not address the interrelationship between the EEZ and continental shelf and provides no hierarchy of rights. The status of the EEZ may, however, be more clearly understood when it is considered in light of its history. The EEZ was not conceived in order to replace the concept of the continental shelf, but in order to give states with no continental shelf or a narrow shelf a more equitable share of

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<sup>105</sup> See generally David Attard, *The Exclusive Economic Zone in International Law* (1987). The concept of the EEZ is now a settled part of international law: Shearer, *Starke’s International Law*, above n 75, 241, fn 3, citing *Continental Shelf (Tunisia v Libya) (Merits)* [1982] ICJ Rep 18.

<sup>106</sup> See generally Attard, above n 105, ch 2.

<sup>107</sup> *UNCLOS*, above n 100, art 55.

<sup>108</sup> *Ibid* art 56(1)(a) (emphasis added).

<sup>109</sup> *Ibid* art 74(1). If agreement is not reached within a reasonable time, the state parties are bound to resort to the procedures provided for in pt XV of *UNCLOS*: art 74(2).

<sup>110</sup> Department of Industry, Science and Resources, above n 98.

seabed resources. The EEZ was granted to coastal states at the expense of the concept of the ‘common heritage of mankind’<sup>111</sup> that would otherwise have applied to an area beyond the limits of national jurisdiction.<sup>112</sup> The EEZ was thus not intended to change, or impinge on, continental shelf rights.<sup>113</sup>

(c) *Decisions of International Courts and Tribunals*

Delimitation of both the EEZ and continental shelf is to be achieved by reference to the same principles of customary international law under article 38(b) of the *Statute of the International Court of Justice*. This requires an assessment of the evidence of state practice when delimiting the seabed and water column boundaries.

Jonathan Charney and Lewis Alexander have conducted extensive research on state practice in relation to the negotiation of international maritime boundaries.<sup>114</sup> They demonstrate that, since 1940, coastal states have settled more than 130 maritime boundaries, with nearly 20 disputes being submitted for resolution by international courts, conciliators or arbitrators.<sup>115</sup> Despite the capacity of states to resolve their boundaries in practice, Charney and Alexander conclude that ‘no normative principle of international law has developed that would mandate the specific location of any maritime boundary line.’<sup>116</sup>

Regrettably this remains true, despite the fact that there have been more awards and judgments dealing with maritime delimitation than with any other aspect of international law.<sup>117</sup> However, it would appear that the developing jurisprudence of the ICJ leans toward the concept of an ‘equitable solution’ in cases of continental shelf delimitation, with a median line preferred as a fair means of delimitation. In the *Jan Mayen* case, the court said that:

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<sup>111</sup> UNCLOS, above n 100, art 136.

<sup>112</sup> Ibid pt XI.

<sup>113</sup> Attard, above n 105, 136–45.

<sup>114</sup> Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vols 1 and 2.

<sup>115</sup> Jonathan Charney, ‘Introduction and Conclusions’, in Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (1993) vol 1, xxvii. Examples of boundary dispute resolution include: *North Sea Continental Shelf (FRG v Denmark; FRG v Netherlands) (Merits)* [1969] ICJ Rep 3; *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf* (1978) 18 RIAA 3, 18 ILM 397; *Affaire de la Délimitation de la Frontière Maritime entre la Guinée et la Guinée-Bissau* (1985) 19 RIAA 149, translated into English in *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, 25 ILM 252 (subsequent references to the English translation); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA) (Merits)* [1984] ICJ Rep 246; *Continental Shelf (Libya v Malta) (Merits)* [1985] ICJ Rep 13 (‘*Libya v Malta*’); *Continental Shelf (Tunisia v Libya) (Merits)* [1982] ICJ Rep 18 (‘*Tunisia v Libya*’); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Merits)* [1993] ICJ Rep 38; *Delimitation of Maritime Areas between Canada and the French Republic (St Pierre and Miquelon)* (1992) 31 ILM 1145.

<sup>116</sup> Charney, ‘Introduction and Conclusions’, above n 115, xlii.

<sup>117</sup> Ibid xxvii.

Judicial decisions on the basis of the customary law governing continental shelf delimitation between opposite coasts have ... regarded the median line as a provisional line that may then be adjusted or shifted in order to ensure an equitable result.<sup>118</sup>

Further, since 1978, arbitral tribunals and the ICJ have ‘moved steadily away from natural prolongation’.<sup>119</sup> In the *Libya v Malta* case of 1985, the ICJ found that the principle of natural prolongation has been overtaken entirely by the regime for an EEZ where that concept applies.<sup>120</sup> The court concluded that there is no role for geological or geophysical factors in delimitation where opposite coasts are at a distance from each other of less than 400 nm.<sup>121</sup> Similarly, in the *Tunisia v Libya* case of 1982, the ICJ found that the physical structure of the continental shelf does not assist in determining an equitable line of delimitation and that no criteria for delimitation can be deduced from the principle of prolongation.<sup>122</sup> Only where the ‘essential continuity of the continental shelf’ is disrupted and the disunity is beyond 200 nm of the coasts in question, will natural prolongation be a test of what is equitable.<sup>123</sup>

The international judicial and arbitral decisions have, however, little persuasive value as precedents for the Timor Gap as they concern disputes where the states share a single continental shelf. As has been observed, there is no common continental shelf in the Timor Gap as defined by the geomorphological criterion. Australia has a strong legal case that a median line solution does not apply where the continental shelf is exclusively conjoined to one state. An opposite state is unlikely to be able to successfully claim seabed rights by asserting EEZ rights over that continental shelf.

(d) *State Practice*

One of the few examples of state practice with direct bearing on the Timor Gap is the Okinawa Trough between China and Japan. While Charney stresses that international tribunals and state practices have discarded geomorphology as a basis for delimitation, he recognises that the ‘Okinawa Trough might arguably be relevant to the location of the maritime boundaries of Japan.’<sup>124</sup> Like the Timor Trough, the Okinawa Trough is over 2,000 metres deep lying substantially east of an equidistant line between the Japanese chain of Ryukyu islands and China.<sup>125</sup> The Okinawa Trough is thus a major geological feature that China

<sup>118</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Merits)* [1993] ICJ Rep 38, 60.

<sup>119</sup> Shearer, *Starke’s International Law*, above n 75, 244–5.

<sup>120</sup> *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Merits)* [1985] ICJ Rep 13, 23–7.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Merits)* [1982] ICJ Rep 18, 32–3.

<sup>123</sup> *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf* (1978) 18 RIAA 3, 60; 18 ILM 397, 428; see also *ibid* 43–4, 50.

<sup>124</sup> Jonathan Charney, ‘Central East Asian Maritime Boundaries and the Law of the Sea’ (1995) 89 *American Journal of International Law* 724, 739.

<sup>125</sup> *Ibid.*

believes marks the end of its continental shelf, placing almost all the sediments of the basin area within its sovereignty.<sup>126</sup> Unlike the Timor Trough, there has been no successful attempt to create a joint development agreement in the Okinawa Trough and no final seabed boundary has been negotiated. While it is true that state practice favours median line delimitation modified by coastal geography, the troughs of Timor and Okinawa appear to be 'truly exceptional' variants<sup>127</sup> requiring reference back to traditional principles of natural prolongation.

An important regional example of state practice is the recent *Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries* ('1997 Treaty').<sup>128</sup> While settling certain boundaries, the agreement creates an area of overlap between the Australian seabed and continental shelf jurisdiction, and Indonesian EEZ or water column jurisdiction.<sup>129</sup> These overlapping areas reflect the differing juridical positions held by these states. Australia maintained its now familiar position that, although international law has developed to encompass a distance-based criterion for water column boundaries, the natural prolongation principle remains the guiding legal criterion for seabed boundaries.<sup>130</sup> As the outer limit of Australia's continental shelf extends further than a line equidistant between Australia and Indonesia, the EEZ boundary will be necessarily different from the seabed boundary.

The 1997 Treaty has been particularly creative in recognising the differing legal status of the seabed and water column. Article 7 provides that Indonesia may exercise EEZ rights in the water column<sup>131</sup> while, at the same time, Australia may exercise continental shelf rights to explore and exploit the resources of the seabed.<sup>132</sup> The resulting overlapping zones are persuasive examples of state practice in which continental shelf rights have priority over the sovereign rights of a state in an EEZ in relation to the resources of the seabed. Indonesia may exploit the resources of the water column, but does not have rights to the non-renewable resources of the shelf.

The 1997 Treaty may prove to be a significant contribution to international law as it provides an example of an agreement to a distribution of powers between states where their maritime claims overlap, one state having the seabed rights and other the water column rights. Any such compromise will not,

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<sup>126</sup> Mark Valencia, *Northeast Asia: Petroleum Potential, Jurisdictional Claims, and International Relations* (1989) 20 *Ocean Development and International Law* 35, 48.

<sup>127</sup> Charney, 'Central East Asian Maritime Boundaries', above n 124, 738.

<sup>128</sup> 14 March 1997, 36 ILM 1055 (not yet in force).

<sup>129</sup> Ibid art 7. The water column is the part of the sea which forms the habitat of the marine creatures, as opposed to the bottom of the ocean or the surface of the water.

<sup>130</sup> Department of Foreign Affairs and Trade, Commonwealth of Australia, *Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries — National Interest Analysis* (tabled 26 August 1997).

<sup>131</sup> 1997 Treaty, above n 128, art 7(a).

<sup>132</sup> Ibid art 7(b).



however, assist in relation to the Timor Gap because it is the resources of the shelf that are claimed by UNTAET on behalf of East Timor, not the resources of the water column. The 1997 *Treaty* remains, nonetheless, an indication of the hierarchy of rights adopted in state practice where EEZ and continental shelf rights overlap.

(e) *Conclusions*

It is probable that the ICJ would recognise the strength of the juridical principle that a state has sovereign rights over the continental shelf as a natural prolongation of its land territory, in Australia's case regarding the Timor Trough. There is a significant risk, however, that the court may also be influenced by the failure of a strictly geomorphological solution to take into account the circumstances of East Timor, along with the preponderant evidence of state practice favouring equidistance and the apparent equity of a median line. It is not clear, for example, whether the ICJ would be influenced by the fact that the Bayu–Undan project, and other prospective hydrocarbon resources in Area A, would lie on the East Timorese side of any notional median line. In Australia's favour, however, is the belief of the court that its job is not to re-fashion nature, nor to resolve problems of geographical or social injustices.<sup>133</sup>

By contrast, the location of seabed resources has long been accepted as being a potentially relevant factor in seabed and EEZ delimitation.<sup>134</sup> In the *North Sea Continental Shelf* cases, for example, the ICJ observed that to ignore the consequences of a strict application of the equidistance principle, under which the Federal Republic of Germany would be 'squeezed out' of access to resources, would be inequitable.<sup>135</sup> More recently, in *Jan Mayen*, the court recognised that access to resources is a special circumstance justifying moving the median line of a fisheries zone 'to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned.'<sup>136</sup> The

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<sup>133</sup> In *Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Merits)* [1982] ICJ Rep 18, 63, the ICJ held that the relative poverty of Tunisia was not a factor to be taken into account for the purposes of delimitation of the continental shelf. In *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Merits)* [1993] ICJ Rep 38, 74, the court said that the 'attribution of maritime areas to the territory of a State ... is a legal process based solely on the possession by the territory concerned of a coastline.' In the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (1985) 25 ILM 252, 302, an ad hoc arbitral tribunal, consisting of three members of the ICJ, also rejected the role of economic factors and stressed that parties should consider 'mutually advantageous cooperation with a view to achieving their objective, which is the development of their countries.'

<sup>134</sup> *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Merits)* [1985] ICJ Rep 13, 41; *Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Merits)* [1982] ICJ Rep 18, 117–18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA) (Merits)* [1984] ICJ Rep 246, 317; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Merits)* [1993] ICJ Rep 38, 70.

<sup>135</sup> *North Sea Continental Shelf (FRG v Denmark; FRG v Netherlands) (Merits)* [1969] ICJ Rep 3, 143–4.

<sup>136</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Merits)* [1993] ICJ Rep 38, 72.

court also correspondingly moved the continental shelf boundary.<sup>137</sup> In *Continental Shelf (Tunisia v Libya)*, the ICJ found that the presence of oilwells may be a relevant factor to be considered in attempting to achieve an equitable result.<sup>138</sup> If applied to the Timor Gap, these decisions might favour Australia's position because the known resources would be on the East Timorese side of a median line. Too much emphasis should not, however, be placed on these decisions because the location of resources has not been, in practice, a significant influence on final delimitation.<sup>139</sup>

Moreover, international decisions indicate that, where a tribunal has the task of delimiting a single line for both the EEZ and a continental shelf, it will not be governed by the application of criteria linked with only one of these regimes.<sup>140</sup> Rather, courts have applied the same principles of delimitation to all maritime zones. In the *Guinea-Bissau* case in 1986, for example, the tribunal was asked to delimit the 'maritime territories' of France and Portugal.<sup>141</sup> It characterised the request as one for a single line without reference to the separate legal characteristics of the territorial sea, continental shelf or EEZ.<sup>142</sup> While the *Timor Gap Treaty* is concerned only with the hydrocarbon resources of the seabed, it is probable that, if East Timor applies to the ICJ, it would ask the court to delimit both the EEZ and continental shelf. This strategy would strengthen its juridical position that an equitable solution should be a median line. Using this strategy runs the risk, however, that the ICJ may conclude the EEZ is an artificial concept to apply where there is no common continental shelf, so that shelf rights prevail.

In summary, evidence of state practice supports the adoption of a single median line of delimitation where there are overlapping claims to a common continental shelf and EEZ. However in all these decisions the unity of the continental shelf between disputing states has been fundamental. Australia's juridical position that the Timor Gap is part of the natural prolongation of its land territory and that there is no common shelf between it and East Timor is supported by *UNCLOS* and earlier case law. There is no legal authority to support a claim to an EEZ if the claim will intrude upon the sovereign rights over a continental shelf. It is true that a median line is typically adopted where a court is required to delimit both the continental shelf and EEZ; but in all such cases there has been a common shelf. It is thus probable that the ICJ would apply the

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<sup>137</sup> Ibid 79.

<sup>138</sup> *Continental Shelf (Tunisia v Libyan Arab Jamahiriya) (Merits)* [1982] ICJ Rep 18, 63–4.

<sup>139</sup> Shane Kyriakou, *Issues in Relation to the Delimitation of the Gulf of Thailand* (Research in progress for an LL.M., The University of Melbourne, 2000) (copy on file with author); Barbara Kwiatkowska, 'Economic and Environmental Considerations in Maritime Boundary Delimitations' in Jonathan Charney and Lewis Alexander, *International Maritime Boundaries* (1993) vol 1, 75.

<sup>140</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA) (Merits)* [1984] ICJ Rep 246, 326. Brownlie, above n 102, 228 observes that the Chamber in that case emphasised 'the need to use criteria suited to a multi-purpose delimitation involving both the shelf and the superjacent water column.'

<sup>141</sup> *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (1985) 25 ILM 252, 256.

<sup>142</sup> Ibid 272.

law in Australia's favour were an application to be made by East Timor for delimitation. There remains a risk, nonetheless, that the court could also be influenced by equitable concerns to put aside the geomorphological criterion in favour of a median line for both EEZ and continental shelf delimitation.

If Area A were to be placed by the ICJ on the East Timor side of a median line, East Timor would then be free to negotiate with petroleum resource companies for exploitation upon an entirely new legal basis. Companies may see this as an opportunity to avoid the relative complexity of dealing with the Joint Authority under a joint development regime. Joint venturers could agree to provide support for efforts by East Timor to build its institutional capacity to regulate the oil and gas industry. It remains to be seen whether East Timor alone is able to ensure the legal, administrative and political stability required for continued investment.

Another serious consequence of a decision to delimit the Timor Gap by a median line is that Indonesia may demand that all boundaries between it and Australia, which were based on natural prolongation, should be renegotiated. A political campaign in favour of redrawing the boundaries could be damaging to both Australia and petroleum activities not only in the ZOC but also in maritime areas that were agreed in 1971 and 1972.<sup>143</sup>

#### F *Adoption of a UNTAET New Negotiated Regime*

Current negotiations between UNTAET and Australia include discussions on a final seabed boundary for the Timor Gap.<sup>144</sup> The chief negotiator for East Timor is reported to have argued that the Timor Trough is not a fault line between tectonic plates,<sup>145</sup> thus denying a role to the concept of natural prolongation. Rather, he argues that a median line will provide an equitable solution, the implication being that the regime for joint development will end when East Timor gains independence.<sup>146</sup> The outcome of such a strategy is, however, doubtful. The legal arguments today are identical to those which dogged negotiations between Australia and Indonesia when negotiating the *Timor Gap Treaty* in the 1980s. Australia considers its legal views on the continental shelf fundamental to its national interest. If UNTAET and representatives of East Timor maintain their attempts to gain a median line delimitation, there is every chance a further period of unproductive exchanges will ensue.

The negotiation of a new regime, therefore, is likely to be the most productive option for both parties. Indeed, *UNCLOS* requires, as an interim solution to

<sup>143</sup> See the previously agreed boundaries shown in the map in Appendix I.

<sup>144</sup> Much of the following information and judgments are based on the author's communications with officials of the Department of Foreign Affairs and Trade. Little information has been publicly released on the nature of the first round of negotiations and at this stage all assessments of future action based on the first round of negotiations are necessarily speculative.

<sup>145</sup> *Ibid.*

<sup>146</sup> Ivan Shearer, 'A Pope, Two Presidents and a Prime Minister' (Paper presented to the United States Naval War College, New York, 27 October 2000).

delimitation, that states ‘shall make every effort to enter into provisional arrangements of a practical nature’.<sup>147</sup> The *Timor Gap Treaty* was just such a provisional arrangement for joint development of petroleum resources in the ZOC, pending agreement upon a final boundary. If Australia and East Timor do not agree upon a seabed boundary, either during the transitional period of *UNCLOS* or upon the independence of East Timor, cooperative arrangements for joint development are a sensible means of unlocking resources to the benefit of all stakeholders. Certainly, the prospect of discussions for a new regime opens up an excellent opportunity to clarify and expand upon some of the troublesome provisions of the *Timor Gap Treaty*. The following points explore some of the issues that may be under consideration.

### 1 *Zone of Cooperation*

The ZOC contains Areas A, B and C. Cooperative development applies only in Area A. For Areas B and C there are fiscal obligations to pay a percentage of the gross Resource Rent Tax, in the case of Australia, or the gross Income Tax, in the case of Indonesia.<sup>148</sup> The three areas within the ZOC reflect differing legal views on sovereign rights. The top line of Area C, which represents the deepest part of the Timor Trough, is the furthest extent of Australia’s claim to the continental shelf. The lines at the top of Area A and the bottom of Area C represent the limits of the area which can be practicably exploited and broadly join the fisheries lines established in 1972. The bottom of Area A is a median line, and the bottom of Area C is the furthest extent of a 200 nm EEZ for Indonesia. Area C was created to encourage Indonesia to accept joint development in Area A and may have little to contribute to a new arrangement. By comparison with other joint development agreements,<sup>149</sup> the regime established by the *Timor Gap Treaty* is complex. It may be that the new round of discussions will explore the possibility of eliminating Areas B and C, thereby confining administration to Area A.

Revision of the lines defining a future ZOC is also required in light of the 1981 *Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Australia concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement*<sup>150</sup> and the recent 1997 Treaty. These agreements provide, inter alia, for a median line for fisheries and other EEZ jurisdictions between Indonesian-controlled East Timor and Australia in the Timor Gap.<sup>151</sup> While this median line will presumably be acceptable to both an independent East Timor and Australia, negotiations in

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<sup>147</sup> *UNCLOS*, above n 100, arts 74(3), 83(3).

<sup>148</sup> *Timor Gap Treaty*, above n 2, art 4(1)(b).

<sup>149</sup> See, eg, Gillian Triggs, ‘Joint Development Agreements in the Asian Region: A Creative Response to Maritime Boundary Disputes’ (1997) 33 *International Law News* 9, 11.

<sup>150</sup> 29 October 1981 (entered into force 1 February 1982), reproduced in Charney and Alexander, above n 114, vol 2, 1238.

<sup>151</sup> There is approximately 30 per cent variation from the median line: Charney and Alexander, above n 114, vol 2, 1229–35.

relation to a future ZOC may also include a revision of the lines perpendicular to the coasts of Indonesia and East Timor up to the median line. Any discussion on these lines clearly will need to include Indonesia. Indeed, were East Timor to insist on renegotiation of the perpendicular lines in an application to the ICJ, East Timor should be mindful that all interested and affected states are properly before the court, as required by the *East Timor* case.<sup>152</sup>

## 2 *Sharing Benefits and Costs*

The *Timor Gap Treaty* adopts the principle of equal sharing between Indonesia and Australia of the benefits of resource exploitation in Area A.<sup>153</sup> A 50–50 percentage share of production is not only an obvious split where there are overlapping claims to resources, but is also an important protection of the juridical positions of each state. If, for example, Australia were to agree to a share for East Timor of 70 per cent, the implication would be that its claim to full sovereignty over the continental shelf up to the Timor Trough is weak. Suggestions that a new agreement might give East Timor a share as high as 90 per cent of production<sup>154</sup> create a dilemma for Australia. Domestic sympathy for the needs of East Timor might be better met through financial and technical aid, as agreeing to vary the share of benefits may prejudice Australia's claims in the future. It is probable that there will be no similar variation in obligations to share equally the burdens and costs of exploitation. Rather, it is likely that the current provision will be reconsidered, probably by requiring Australia to accept a higher proportion of the burdens.

## 3 *Management Structure*

The consensual regime for management under the *Timor Gap Treaty* has been effective in regulating petroleum activities in Area A. The sovereign rights of Australia and Indonesia have been protected adequately through the Ministerial Council, and the day-to-day management of petroleum activities, including the grant of licenses, has been regulated by the Joint Authority. It may be useful to retain this structure in future arrangements. Although political goodwill between Australia and Indonesia in the past ensured that consensus decisions could be reached, it is reasonable to assume that cooperation will be maintained if new arrangements were to be agreed with East Timor. The proposed movement of the head office of the Joint Authority to East Timor may, however, create practical difficulties in the short term, considering the lack of infrastructure and personnel in East Timor. As well, it may be useful to revise the aspects of the powers of the Joint Authority which create difficulties for contractors, in particular their wide discretionary nature. For example, difficulties have arisen over the unitisation of

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<sup>152</sup> *East Timor Case (Portugal v Australia) (Merits)* [1995] ICJ Rep 90.

<sup>153</sup> *Timor Gap Treaty*, above n 2, art 2(2)(a).

<sup>154</sup> David Lague, 'Timor's Oil and Gas Share "Must Be Seen to Be Fair"', *Sydney Morning Herald* (Sydney), 17 October 2000, 3.

straddling deposits.<sup>155</sup> It would be helpful if more effective procedures were established to encourage speedy negotiation of unitisation agreements. However, as both East Timor and Australia are likely to prefer to maintain the wide scope of the discretionary powers of the Joint Authority in order to preserve their sovereign interests in the resources, the petroleum industry may not be successful in seeking changes.

#### 4 *Employment and Training*

The creation of employment and the training of employees under the *Timor Gap Treaty* have been successful outcomes of the joint development regime. Under article 24 of the treaty, preference is to be given in employment in Area A to the nationals and permanent residents of Australia and Indonesia in equivalent numbers. While Indonesians never achieved parity in employment with Australians, significant numbers of Indonesians were employed within Area A.<sup>156</sup> By contrast, under any future regime, it may prove difficult to find and train employees, as East Timor has no established oil and gas industry. It will be therefore particularly important to East Timor that efforts are made to train its nationals for employment under PSCs. Transfer of technology is critical for all developing economies, and East Timor also will be concerned to ensure its nationals have access to new technology. The *MOU* between UNTAET and Australia provides that 'it will be important to facilitate, as a matter of priority, training and employment opportunities for East Timorese nationals and permanent residents.'<sup>157</sup> Any new regime will be likely to make a similar commitment.

#### 5 *Revision of Other Provisions*

Uncertainties regarding the fiscal provisions of the *Timor Gap Treaty* have been exposed by the development of the Bayu–Undan project, in which it is unclear whether the existing arrangements cover the export of gas.<sup>158</sup> It would be helpful if, in future, cooperative arrangements of the fiscal provisions are clarified.

Revision of criminal jurisdiction has been considered under the *Exchange of Notes* and can be expected to be repeated in any future joint development arrangements. The oil and gas industry may want to influence any new customs and immigration regulations as they apply to Australian nationals and other foreigners. Issues in the *Timor Gap Treaty* such as surveillance and jurisdiction, search and rescue, air traffic services, safety of navigation and safety zones will all need to be revisited because of the increased responsibilities Australia may need to accept in light of its resources and experience. Indeed, as Christopher

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<sup>155</sup> See above n 77 and accompanying text.

<sup>156</sup> Department of Industry, Science and Resources, above n 98, [4.12].

<sup>157</sup> *MOU*, above n 31, art 2(d).

<sup>158</sup> See above fn 144.

Ward suggests, there may also be pressure on the petroleum industry to make a contribution to these additional expenses.<sup>159</sup>

In addition, since the negotiation of the *Timor Gap Treaty* in the late 1980s, concerns for sound environmental management have increased. Any reconsideration of resource exploitation in Area A might usefully include more detailed regulations concerning the pollution of the marine environment, the disposal of oil and gas installations and also in relation to the proposed pipeline to Darwin.

There will also be some provisions of the annexations to the *Timor Gap Treaty*, namely the PMC, the MPSC and the Taxation Code<sup>160</sup> that will require consequent revision.

#### IV CONCLUSION

Little progress has yet been made in the negotiations for a new regime for the Timor Gap and it remains unclear when the next round will begin. Many legal issues are under discussion. East Timor appears to have little enthusiasm for the concept of joint development, particularly as it explores the possibility of negotiating a final boundary to its significant advantage. East Timor has also raised the issue of modifying lateral lines that were settled between Indonesia and Australia, including those of the ZOC. Any reconsideration of these boundaries will necessarily involve Indonesia, a legal fact that may complicate and hinder prospects of agreement between Australia and East Timor.

A further difficulty for current discussions is that it is not at all certain who will emerge as the leaders of East Timor on independence. For this reason, it is not possible to predict whether the new state will endorse any agreements reached between UNTAET and Australia. There are significant legal and commercial risks for investors and joint venturers in the ZOC once East Timor gains independence, which may occur as soon as 2001. Such risks are, however, well-known to the oil and gas industry, though they are avoided by the banks.

The challenge for Australia is to maintain its juridical position on sovereignty over the continental shelf while building confidence in its relations with East Timor so that negotiations can proceed either upon a final boundary or on a joint management or joint development regime. Australia will need to convince an independent East Timor that cooperation is necessary if the peoples of East Timor are to gain the benefits of exploitation, including employment, training, technology transfer, the development of institutions and infrastructure and an income flow. UNTAET is presently pursuing its claim to a median line delimitation of the seabed in negotiations with Australia, a claim Australia is unlikely to accept. A renegotiated regime of joint development, in contrast, would provide benefits to all stakeholders. This more productive arrangement,

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<sup>159</sup> Christopher Ward, 'An Independent East Timor, the Timor Gap Treaty and International Law' (Paper presented at the 24<sup>th</sup> Annual Conference of the Australian Mining and Petroleum Law Association, Fremantle, 26–29 July 2000) 10.

<sup>160</sup> *Timor Gap Treaty*, above n 2, annex D (Taxation Code for the Avoidance of Double Taxation in Respect of Activities Connected with Area A of the Zone of Cooperation).

however, may have to wait until UNTAET has departed, and resource exploitation has been brought to a standstill.



