CONTINENTAL SHELF DELIMITATION IN THE TIMOR GAP

By Sarah Worthington*

INTRODUCTION

In 1989, Australia and Indonesia signed the Timor Gap Treaty.[1] This notable political and legal achievement[2] enables the joint exploration and exploitation of petroleum resources in the Timor Gap region between East Timor and northern Australia. Despite its significance, the agreement does not bring to a close 20 years of negotiations aimed at settling a seabed boundary between the two countries. The Treaty is only an interim solution:[3] it specifically provides that joint efforts to reach agreement on a permanent continental shelf delimitation will continue.[4] Furthermore, the Treaty is specifically without prejudice to the sovereign rights of each country and the position each country takes on those rights.[5] In addition, Portugal's legal proceedings against Australia before the International Court of Justice make the future of even this interim solution somewhat uncertain. With this in mind, this article seeks to determine Australia's entitlement, under international law, to the continental shelf in the Timor Gap region.

Broadly speaking, the continental shelf between two countries may be divided in two ways. The first depends on the geomorphology or physical features of the seabed itself: it involves looking for some physical discontinuity which marks the end of the continental shelf of one country and the beginning of the continental shelf of the other. Alternatively, the seabed may be divided equally between the two countries by a line which is equidistant from the coastlines of both countries. The preliminary boundary line obtained using either of these methods may then be adjusted and fine-tuned to take into account any special features of the particular area.

The choice of method can produce startlingly different results. The Timor Gap region is an area almost straddled by a fundamental geological discontinuity, the Timor Trough. If delimitation of the continental shelf were based on this discontinuity, Australia would obtain rights over approximately 70 per cent of the seabed in the region. On the other hand, if delimitation were based on equidistance from the coastlines of the two countries, Australia would have rights over only 50 per cent of the area.

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1 *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 (Timor Gap Treaty)*; signed over the Timor Sea, 11 December 1989. *Department of Foreign Affairs and Trade Treaty Series* 1991 No.9.

2 H. Burmester, 'The Timor Gap Treaty' [1990] *AMPLA Yearbook* 233, 247.

3 It is for an initial term of 40 years with provision for extension for successive 20 year periods: Timor Gap Treaty, Art.33.

4 Timor Gap Treaty, Art.2(4).

5 Ibid. Art.2(3).

Since the area is perceived as one rich in petroleum resources, the debate over the preferred method is not academic.

This article puts a viewpoint which is contrary to that currently accepted.[6] It suggests that geomorphology remains the primary determinant of entitlement to the continental shelf. It suggests that there is no directly applicable State practice for continental shelf delimitation in the Timor Gap and that judicial and arbitral determinations support the primacy of geomorphology. If correct, such a viewpoint has important political and economic ramifications for Australia.

POLITICAL BACKGROUND: AUSTRALIA AND INDONESIA

In 1971 and 1972, Australia and Indonesia settled seabed boundaries in the Arafura and Timor Seas.[7] These Agreements left a gap, the Timor Gap, of approximately 129 nautical miles between longitudes 126°00′ East and 127°56′ East. This gap arose because, at the time of negotiating and signing the Agreements, the eastern part of Timor island was still under Portuguese administration.

The means of arriving at these agreed boundary lines is not indicated in either of the Agreements. Nevertheless, discussions prior to their signing reveal that the significance of the Timor Trough was a major point of disagreement. This disagreement reflected the widely differing views held by the Australian and Indonesian parties on the legal basis of entitlement to the continental shelf. The Australians asserted[8] that natural prolongation, as a geological concept, was the legal basis of title to the continental shelf; that the distance criterion was not a rule of positive international law; and that, where a genuine natural seabed boundary exists, application of any criterion of distance or the equidistance method in delimitation was inappropriate. Further, they considered that the concept of natural prolongation was expressly preserved in Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS).[9] They

6 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Reports 13; J.R.V. Prescott, 'Australia's Maritime Boundaries' (1983) 10(1) *Dyason House Papers* 24, 27; D.H. Anderson, 'Some Recent Developments in the Law Relating to the Continental Shelf' (1988) *Journal of Energy and Natural Resources Law* 95.

7 *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing certain Seabed Boundaries*; signed at Canberra, 18 May 1971, ratifications exchanged 8 Nov. 1973, *Department of Foreign Affairs Treaty Series* 1973 No.31.
Agreement Establishing certain Sea-bed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971; signed at Jakarta, 9 Oct. 1972, ratifications exchanged 8 Nov. 1973, *Department of Foreign Affairs Treaty Series* 1973 No.32.

8 There are suggestions of a weakening in this stance. See J.V.R. Prescott, 'Australia's Maritime Boundaries' (1983) 10(1) *Dyason House Papers* 24, 27; M. Richardson, 'Timor Gap Rift Remains' *Far Eastern Economic Review*, 19 April 1984, 40–42. The stance has received some scathing criticism: Professor O'Connell reportedly described Australia's grant of exploration permits in areas beyond the median line as 'totally unsupported by any other country in the world', *Australian Financial Review*, (Syd.) 16 Oct. 1970.

9 *United Nations Convention on the Law of the Continental Shelf* (1958) Art. 1, defines the continental shelf as

> the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the

were of the opinion that the Trough divided the area into two continental shelves, a narrow Timor shelf and a very wide Australian shelf.[10]

By contrast, the Indonesians considered that the concept of natural prolongation had ceased to be a geomorphological concept defined by reference to physical features; they were of the opinion that the concept was now defined by reference to distance from the coast, although they conceded that geomorphology resumed significance at distances beyond 200 nautical miles from the coast. They found support for this view in the same Article 76 of UNCLOS referred to by the Australians. They further contended that for delimitations between opposite coasts the equidistance method was now a genuine rule of law or, at the very least, had primacy as a method.[11] They were thus of the view that there was only one continental shelf, the Timor Trough being merely an accidental depression in the sea floor,[12] and that the agreed boundary should be the equidistance line.

In the light of these fundamental disagreements, the final position of the agreed boundary line, manifestly favouring Australia, is significant.[13] First, it indicates that the Indonesians were eventually sufficiently persuaded to accept almost totally Australia's claim, and this when there was little pressure for a rapid settlement and when the Portuguese in East Timor could have been relied upon to support a claim for a median line. Second, it suggests that had Australia recognized Indonesia's annexation of East Timor earlier, the Timor Gap would have been delimited on precisely the same basis as these other boundaries, no doubt by a line joining their two end-points.[14] The issue now, however, is how this gap should be delimited according to currently accepted rules of international law.

SOURCES OF APPLICABLE INTERNATIONAL LAW

The principles and rules of international law which govern any maritime delimitation between Australia and Indonesia in the Timor Gap region may be ascertained from several sources, all subject to overriding principles of equity and justice and to any relevant forms of *jus cogens*.[15] These sources are:

territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said area.

10 E. Willheim, 'Australia and the Law of the Sea' Seminar Sydney, 28 Feb. 1987.

11 Ibid.

12 J.V.R. Prescott, *The Political Geography of the Oceans* (1975) 191–192.

13 The settlements in 1971 and 1972 saw Australia conceding roughly 1,545 square nautical miles, but nevertheless retaining control of approximately three-quarters of the Shelf: ibid.

14 Australia and Indonesia agreed in Art. 3 of their 1972 Agreement that the last legs of the delimited boundaries on either side of the gap would indicate the direction of the boundary in the event of further delimitation agreements, unless the parties agreed to adjust those last legs.

15 *Statute of the International Court of Justice*, Art. 38; D.P. O'Connell, *International Law* Vol.1, Chapters 1–2 (2nd edn 1982); P. Bravender-Coyle, 'The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries Between States' (1988) 19(3) *Ocean Development and International Law* 171.

- bilateral or multilateral treaties and conventions binding on the two countries;
- customary international law: this law is primarily discovered by looking at the actual practice and *opinio juris* of States, although it may also be contained in certain general conventions which record and define existing or emergent rules of customary international law;
- general principles of law recognized by civilized nations as precepts demonstrably necessary to achieve justice, or as concepts of universal currency;
- judicial and arbitral decisions; and
- academic writings.

These sources are listed in their order of application to any delimitation dispute. It is pertinent to stress this order of priority; many contemporary analyses, both judicial and academic, appear to place undue emphasis on judicial and arbitral decisions to the detriment of a rigorous examination of State practice and *opinio juris*. To this extent such attempts to postulate customary law are flawed.

It is theoretically possible for the application of rules and principles from these sources of law to be thwarted by the conduct of either Australia or Indonesia. This would be so if their conduct evidenced either an acquiescence or an estoppel which would prevent one party from advancing an inconsistent claim for delimitation of the boundary in the Timor Gap. Any such conduct must, however, be sufficiently 'clear, sustained and consistent'.[16] Between Australia and Indonesia, there seems no doubt that the evidence would be considered inconclusive. The history of Indonesia's legislative and exploratory activities in the region might indicate acquiescence in Australia's granting of petroleum permits in the Timor Sea, and hence implied acquiescence in the delimitation methods which concede to Australia such areas of the continental shelf.[17] Australia's suspension of the renewal of these permits, however, may equally be regarded as an implied recognition by Australia of the illegal basis of its actions.

This being the case, the several sources of international law must be considered in detail to determine whether they provide the rules and principles for continental shelf delimitation in the Timor Gap region.

RELEVANT TREATY LAW

There are no treaties binding on Australia and Indonesia which govern either the rights of the parties to the continental shelf in the Timor Gap region or the methods which ought to be adopted in any delimitation process.

16 *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA)* [1984] ICJ Reports 246, para.144 *et. seq.*

17 This is because these permits give 'the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims [and which should therefore be taken into account as indicating] the line or lines which the parties themselves may have considered equitable or acted upon as such': *Continental Shelf (Tunisia v. Libya) Case* [1982] ICJ Reports 6, paras 117–118.

Neither the 1958 United Nations Convention on the Continental Shelf (the Geneva Convention) nor the as yet unratified 1982 United Nations Convention on the Law of the Sea (UNCLOS) is applicable in the relations between Australia and Indonesia. Australia is a party to the Geneva Convention, but Indonesia is not. In addition, while both parties have signed UNCLOS and Indonesia has ratified it, the required number of ratifications has not yet been received for it to become operative as treaty law.

Furthermore, the 1971 and 1972 Agreements between Australia and Indonesia which delimit the continental shelf outside the Timor Gap region provide neither principles nor rules which must be applied to a delimitation within the Timor Gap region. The 1971 Agreement, in Article 2, simply leaves the matter 'for discussion at further talks to be held at a mutually convenient date'. The 1972 Agreement is no more specific. In Article 3 it provides that the two countries shall consult with a view to agreeing on 'such adjustment or adjustments, if any, as may be necessary' to the final legs of the boundary lines on either side of the Gap to accommodate any delimitation agreement reached in the Timor Gap area. The implication may be that these final legs indicate the direction of any boundary in the Gap, but this is not certain. There is no express reference to the principles or methods to be used, nor any suggestion that those used in reaching the 1971 and 1972 Agreements (whatever they were) should also apply to a future delimitation.

Since none of these treaties determines the rights of the parties or the procedure to be followed in delimiting the continental shelf in the Timor Gap, any delimitation must follow the rules of customary international law. In applying customary international law, the Agreements between Australia and Indonesia will be significant as relevant circumstances to be considered in achieving an equitable result.

RELEVANT CUSTOMARY INTERNATIONAL LAW

It is universally agreed that 'usages generally accepted as expressing principles of law'[18] or, in a similar spirit, 'international custom, as evidence of a general practice accepted as law'[19] constitute the main sources of customary international law. Ordinarily a rule is considered 'generally accepted' when it is supported by the constant practice of States acting on the conviction that the practice is obligatory (*opinio juris*).[20] Not only must State practice be examined: existing international agreements may state relevant principles of customary international law.

Furthermore, some commentators suggest that new and different rules for determining customary international law have been adopted and these, too, may provide further relevant principles.

International agreements may be relevant to finding customary international law: according to the International Court of Justice, such agreements may codify existing law, cause the law to crystallize or,

18 *S.S. Lotus (France v. Turkey)* PCIJ Series No.10, 1927, 18.
19 *Statute of the International Court of Justice*, Art.38.
20 J.L. Brierly, *The Law of Nations* (6th edn 1963) 61.

alternatively, indicate the progressive development of new law.[21] In each of these cases, however, the Court has been clear that State practice *dehors* the agreements and *opinio juris* were the principal considerations in concluding the existence of customary international law.[22] This is important in determining Australia's and Indonesia's entitlement to the continental shelf according to customary law: it becomes necessary to consider not only what State practice reveals, but also whether the Geneva Convention or UNCLOS has been incorporated as customary international law.

As part of customary law, it is theoretically possible that either convention might directly provide delimitation methods or, alternatively, definitions of the continental shelf which indicate the legal basis of title to the continental shelf and hence, indirectly, the appropriate methods of delimitation. In practice, however, even if these two treaties were regarded as statements of customary international law, it seems they would not assist in resolving the delimitation problems in the Timor Gap region. The two Conventions define the continental shelf in different ways: the Geneva Convention adopts an exploitability test,[23] limiting a State's rights to the area of the continental shelf which can be exploited for its natural resources. UNCLOS adopts a double-barrelled definition of the continental shelf based either on geomorphology or on distance, whichever gives a State more extensive rights.[24] Arguably, neither definition indicates the legal basis title to the continental shelf: neither definition applies where there are competing State claims,[25] yet it is only then that the legal basis of entitlement is important. In delimitation of continental shelf boundaries between States, the Geneva Convention provides an equidistance-special circumstances rule;[26] UNCLOS, on the other hand, indicates that the delimitation 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 soultion.[27] UNCLOS thus requires recourse to precisely those sources of international law listed earlier and under consideration at present,[28] with the express provision that the treaty definition of the continental shelf is without prejudice to the determination.[29]

It follows that, even if the Geneva Convention or UNCLOS is applicable as customary law in a delimitation dispute, both are of little

21 *North Sea Continental Shelf Cases (F.R.G. v. Denmark) (F.R.G. v. Netherlands)* [1969] ICJ Reports 3, paras 71–81.

22 Ibid.

23 *United Nations Convention on the Law of the Continental Shelf* (1958) Art.1; for definition of continental shelf contained therein, see *supra* n.9.

24 *United Nations Convention on the Law of the Sea* (1982) Art. 76(1), defines the continental shelf of a coastal State as —

> 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.

25 Geneva Convention, Art.6; UNCLOS Art.76(1).

26 Geneva Convention Art.6.

27 UNCLOS Art.83(1). Note that also existing delimitation agreements between the parties have paramountcy: UNCLOS Art.83(4).

28 See fn.15 and accompanying text.

29 UNCLOS, Art.76(10).

practical assistance. The Geneva Convention, whilst advocating an equidistance delimitation, leaves open the possibility that any particular matter, including a fundamental geological discontinuity on the seabed, will provide a 'special circumstance'. Accordingly, it is necessary to resort to customary law to clarify the Convention directive. There is also a suggestion that any pre-eminence which the equidistance rule ever had, as conventional law, has been removed by the omission from UNCLOS of any reference to it.[30] As already noted, UNCLOS itself gives very little guidance on continental shelf delimitation, merely directing a return to the sources of law which would be relevant in the absence of a treaty.

A further factor exists, one of vital significance to both Australia and Indonesia in determining the customary law relevant to any Timor Gap delimitation: certain academic writing suggests that there has been a change in the methods of developing new rules of customary international law. These writers are of the view that principles which are generally accepted at international conferences, usually through consensus, can often with little more emerge as rules of customary international law.[31] They argue that this change has been voluntarily accepted by States in recognition of the need to adapt methods of law-creation to the needs of a rapidly growing and changing world community. They also argue that the rules in Article 38 of the Statute of the International Court of Justice are flexible enough to accommodate such a change.[32] Adoption of these new rules would lead to the conclusion that an examination of past State practice has lost its primacy in methodology; correspondingly, *opinio juris* would no longer be a consciousness that slowly emerges over time, but would instead be a conviction that instantaneously attaches to a rule believed to be socially necessary or desirable.[33]

Adherents of this new view argue that proof of the change is to be found, for example, in the changing view of UNCLOS taken by the International Court of Justice. In 1974, the Court refused to examine proposals submitted to the Conference on the Law of the Sea. It held that they were merely manifestations of the views and opinions of individual States and vehicles for their aspirations, rather than expressions of principles of existing law.[34] Specifically, the Court held that it could not 'anticipate the law before the legislator has laid it down.'[35] Eleven years later, in 1985, the Court said that the 1982 Convention was undoubtedly of major import-

30 S. Beaglehole, 'Equitable Delimitation of the Continental Shelf' (1984) *Victoria University at Wellington Law Review* 415, 422.

31 P. Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 438–40; L.B. Sohn, 'Generally Accepted' International Rules' (1986) 61 *Washington Law Review* 1073; L.C. Green, 'Is there a universal International Law Today?' (1985) 23 *Canadian YearBook of International Law* 3; L.B. Sohn, 'The Law of the Sea: Customary International Law Developments' (1985) 34 *American University Law Review* 271.

32 Sohn, 'Generally Accepted International Rules', op. cit. 1073, 1079.

33 T.L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *Harvard International Law Journal* 457.

34 *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* [1974] ICJ Reports 3, 23–24.

35 Ibid.

ance, having been adopted by an overwhelming majority of States.[36] It concluded that customary law had developed such that Article 76(1) of UNCLOS stated a rule of customary law. This conclusion was reached with little examination of State practice and, seemingly, no evidence of *opinio juris*. Notwithstanding this, the Court cited with approval the traditional test for determining customary law.[37] The Court's conclusion seemed to be based largely on the growing practice of States to declare 200 nautical mile continental shelf boundaries. In reality, this says nothing of changing State practice where delimitation is required.

It is strongly argued that this development in the creation of customary international law has not yet, and should not, take place. Admittedly, in cases where widespread adherence to an agreement exists, evidence of State practice *dehors* the agreement may be difficult to obtain. Nevertheless, equating acceptance of an agreement in its entirety, or even acceptance of particular provisions, with support for every isolated rule contained in the agreement presents a number of difficulties:[38] first, a particular provision may be included in the agreement for functional or political reasons arising out of trade-offs negotiated during development of the agreement; second, acceptance of the agreement and adherence to it by any number of States is not a reliable basis for concluding that a specific rule is accepted outside the context of the agreement; and, third, adherence to the agreement as a whole has little relevance to the conclusion that there exists *opinio juris* in respect of any one of its specific and isolated provisions.

These difficulties should not be allowed to result in the use of tenuous evidence to support new norms of customary international law according to traditional analysis. But still less should they lead to the adoption of a theory that generalizable international agreements may give rise to customary international law. The Court, even where it has accepted tenuous evidence of State practice and *opinio juris*, still clings, in theory at least, to their necessary presence in the proof of customary law.[39] It has not yet accepted that a new rule for the creation of customary law exists.

In the context of rights to the continental shelf, it is submitted that there is no proof of State practice or *opinio juris* to support the contention that the provisions of UNCLOS relating to the continental shelf have become customary law. This is so whether one considers unilateral declarations or delimitation agreements of continental shelf boundaries. In addition, continental shelf delimitations almost invariably take place in circumstances where the seabed is uniform. This prevents any conclusions being drawn concerning State practice or *opinio juris* in circumstances where the seabed is discontinuous. Thus, the existing facts of State practice are not yet adequate to support the adoption of distance as the

36 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Reports 13, para.27.

37 Ibid.

38 J.I. Charney, 'International Agreements and the Developments of Customary International Law' (1986) 61 *Washington Law Review* 971.

39 *Libya/Malta Case* [1985] ICJ Reports 13, para. 27, despite the comments of the court in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (1985) ILM 215.

customary law determinant of the legal basis of title to the continental shelf.

RELEVANT PRINCIPLES OF LAW DEMONSTRABLY NECESSARY TO ACHIEVE JUSTICE

The next principle of international law requires continental shelf delimitation to be based on the application of equitable principles and the use of practical methods capable of ensuring an equitable result. This is both an overriding principle of equity and justice and a minor source of applicable international law. The traditional formulation of this principle is contained in the Truman Proclamation of 1945,[40] which states the basic concepts of delimitation which have underlain all subsequent developments in this area: that delimitation should be effected by mutual agreement and in accordance with equitable principles. The currently developed customary law restatement of this idea is recognized without dispute as the fundamental norm governing maritime delimitation.[41] Nevertheless, despite its wide acceptance, it provides little practical assistance in any delimitation dispute. It thus remains necessary to consider judicial and arbitral decisions as potential sources of international law.

RELEVANT JUDICIAL AND ARBITRAL DECISIONS INDICATING THE LEGAL BASIS OF TITLE TO THE CONTINENTAL SHELF

The relevant cases are considered chronologically in order more clearly to examine developments in the law. Such an examination leads to the conclusion that geomorphology, not distance, is the primary determinant of the legal basis of title to the continental shelf, and thus the primary determinant of the appropriate delimitation methods. Admittedly, the geomorphology of an area is frequently too uniform to permit discrimination between continental shelves. In the Timor Gap area, however, it seems that Australia could mount a forceful argument for delimitation based primarily on geomorphology. This would result in an initial boundary lying along the Timor Trough which would then be subject to minor adjustments on the basis of equitable considerations.

North Sea Continental Shelf Cases[42]

The judgment in the *North Sea Continental Shelf Cases* is recognized as having made the greatest contribution to the statement of customary law in this area. It emphasizes, perhaps more than any subsequent case, the principle of natural prolongation, or geomorphology, as the basis for

40 (1945) 10 Fed. Reg. 12303.

41 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Reports 13, para 30, requiring that —

> delimitation is to be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances in order to achieve an equitable result.

42 *North Sea Continental Shelf Cases (FRG v. Denmark) (FRG v. Netherlands)* [1969] ICJ Reports 3.

legal title to the continental shelf. In situations where there is a conflict between principles of natural prolongation and notions of distance or proximity, it grants the former supremacy.[43] The cases concerned disputed title to the continental shelf between the Federal Republic of Germany, the Netherlands and Denmark. The shelf to be delimited was off the North Sea coasts of the three countries, forming a reverse L-shaped configuration, thus giving the countries an adjacent-State relationship. The determination of entitlement was made on the basis of customary international law.

The Court made three points worth emphasizing. First, the idea already noted, that geomorphology is the basis of legal entitlement to the continental shelf: the Court held that a State had sovereignty over its land domain, including the prolongation of that land into and under the sea.[44] Secondly, and as a consequence of their first finding, the Court held that a coastal State's right to the continental shelf exists *ipso facto* and *ab initio.* Consequently there was no question of a State having to make good a claim to the areas concerned, nor of any apportionment between different States.[45] This *ipso jure* title was held to be conferred because the continental shelf was a continuation of the land territory under the sea, not as a consequence of any idea of proximity.[46] Thirdly, the Court provided useful practical guidelines clarifying the accepted fundamental norm that delimitation be in accordance with equitable principles, taking account of all relevant circumstances to achieve an equitable result. It specified that any delimitation was to be effected, 'in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other'.[47]

Clearly such guidelines can only be based on the idea that geomorphology provides the basis of legal title to the continental shelf.

This case is therefore strong support for the proposition that legal title to the continental shelf is, according to customary law, based on geomorphology.

43 Ibid. paras 41–2.
44 Ibid. para.39.
45 Ibid.
46 Ibid. para.43.
47 Ibid. para.101(C)(1).

Tunisia/Libya Case[48]

The next relevant case is the 1982 decision of the Court in the *Continental Shelf Delimitation (Tunisia v. Libya)*. The configuration of the coast in question was broadly similar to that in the *North Sea* cases, with three important differences: the presence of islands, the lack of territorial symmetry at the apex of the L-shaped coast, and the disproportionate length of the coastlines. The Court was specifically asked to take account of newly accepted trends in UNCLOS.

This case demonstrates a less rigorous approach to the law: it has a stated emphasis on the solution,[49] perhaps to the detriment of the method of reaching that solution. This is representative of a trend, reflected in more recent cases, which makes decisions of the Court less reliable as guides to the specific principles which ought to be applied in future disputes. Nonetheless, the Court did make some comments on the legal basis of title to the continental shelf. First, the Court reiterated that the satisfaction of equitable principles was of cardinal importance,[50] overriding all other rules and principles relevant to delimitation. Second, the Court noted that the legal and geographical concepts of the continental shelf, while linked, were not identical.[51] While this is obvious, it is of little assistance in delimitation disputes. Finally, and most importantly, the Court recognized that natural prolongation, if it indicates distinct continental shelves, is of primary importance in effecting delimitation.[52] The statement was *obiter* and the qualification noted by the Court is an obvious one: where the States are linked by one uniform continental shelf, no matter how significant the concept of natural prolongation, it will afford no assistance in the delimitation.[53] This case, therefore, can also be said to support the concept of geomorphology as the basis of legal entitlement to the continental shelf.

This was also the first case in which the Court commented on whether UNCLOS evidenced new and accepted trends in customary international law. Regrettably, the Court's comments are inconclusive: the Court stated that the definition of the continental shelf in Article 76(1) could not be ignored in a question of delimitation,[54] that the definition imported two different criteria,[55] natural prolongation and distance; but that neither of these were relevant to the case, the former because it intro-

48 *Continental Shelf Delimitation (Tunisia v. Libya)* [1982] ICJ Reports 6.
49 Ibid. para.70.
50 Ibid. para.44.
51 Ibid. para.42. The truth of this is obvious from a consideration of two examples: the legal definition of the continental shelf in the 1958 Geneva Convention, Art.1 provides for an 'exploitability' limit to a State's continental shelf: this need not be related to, and may exceed, the geological extent of the shelf; on the other hand, a State will be limited to less than its geological continental shelf where it shares that shelf with another State.
52 Ibid. para.66, and also see para.80. The Court held that a marked disruption or discontinuance of the sea-bed may constitute, 'an *indisputable* indication of the limits of the two separate continental shelves, or two separate natural prolongations'. (emphasis added)
53 Ibid. para.80.
54 Ibid. para.47.
55 Ibid.

duced no new element, and the latter because the parties did not advance any argument based on the 'trend' towards the distance principle.[56] The Court gave no indication of how it would have applied Article 76(1) if the distance argument had been put.

Gulf of Maine Case[57]

In 1984, the Court was asked to effect the delimitation of a single maritime boundary between the United States of America and Canada to divide both the seabed and the superadjacent waters. The concept of a single maritime boundary critically influenced the decision of the Court. It caused it to clarify and adapt the law of maritime delimitation in a way which makes the decision of less relevance to the question of continental shelf delimitation. This is because the Court went to great lengths to rule out the application of any criteria they considered related exclusively to either the continental shelf or the water column.[58] The logical necessity for this is debatable. In the process of discussing criteria, however, the Court commented, *obiter*, that 'where distinctive geological characteristics can be observed in the continental shelf, such . . . might have special effect in determining the division of that shelf and the resources of its subsoil.'[59]

The Court noted that the mere fact of adjacency does not produce legal consequences.[60] Both these comments offer some support for the argument that the legal basis of title to the continental shelf is based on the geomorphology of the region.

Guinea/Guinea-Bissau Arbitration[61]

The *Guinea/Guinea-Bissau Arbitration* was another single maritime boundary dispute occurring a year later. The parties expressly recognized UNCLOS Articles 76 and 83 as rules of international law.[62] Accordingly, no argument was devoted to the possible incorporation of these Articles as modern rules of customary law; to this extent the case is not helpful.

Nonetheless, the Tribunal's comments on the dual definition of the continental shelf in UNICLOS are worth noting. The Tribunal stated that the distance rule in Article 76(1) exists without derogating from the rule of natural prolongation[63] and, more significantly, that neither rule has priority or precedence.[64] Australia is unlikely to accept this interpretation of Article 76(1) without argument. Furthermore, the potential problems raised by this interpretation can be briefly stated. If customary law adopts

56 Ibid. para.48.
57 *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA)* [1984] ICJ Reports 246.
58 Ibid. para.193.
59 Ibid.
60 Ibid. para.102.
61 *Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary* (1985) 25 ILM 251.
62 Ibid. para.88.
63 Ibid. para.115.
64 Ibid. para.116.

the double-barrelled UNCLOS definition, with the Tribunal's statement that neither limb has priority or precedence, then delimitation will become impossible in some situations: delimitation according to customary law can only be effected by considering the legal basis of title to the continental shelf, which ought to be reflected in the customary law definition of the continental shelf; both limbs of the definition cannot provide the legal basis of title to the continental shelf, since the outcome of delimitation may differ depending upon the choice.[65] Resolution of the deadlock by an equitable division of the area of overlap of the competing claims seems logically inelegant, even if practically feasible.[66]

Libya/Malta Case[67]

The final and most important case is the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*. This case was decided on the basis of customary international law at a time when UNCLOS had been signed but was not in force; it is also the most recent decision of the International Court of Justice on the subject of continental shelf delimitation.

This decision appears to overturn completely the principles established and espoused in the earlier cases. It gives no relevance at all to geomorphology, either as a basis of entitlement or as a relevant criterion in making adjustments to achieve an equitable result,[68] where the distance between the coasts of opposite States is less than 400 nautical miles.[69] It regarded such jurisprudence as belonging to the past.[70] The Court considered that customary law had evolved to incorporate the dual definition of the continental shelf contained in Article 76(1) of UNCLOS. Further, where the coasts of two opposite States are less than 400 nautical miles apart, the Court held that title depended *solely* on distance from the coast. This was rationalized on the basis that UNCLOS, and thus also customary law, allows a State to claim a continental shelf extending to a distance of 200 nautical miles from its coast, regardless of the geological characteristics of the corresponding seabed and subsoil.[71] In addition, the Court suggested that such a change in customary law, incorporating a distance basis to the legal definition of the continental shelf, followed as a logical necessity, regardless of Article 76(1), from the definition of the exclusive economic zone (the 'EEZ') in UNCLOS, since this had now become part of customary international law.[72] The Court noted that the concepts of natural prolongation and distance were not opposed, but were

65 Consider the different outcomes of a delimitation based on distance and one based on geomorphology in the Timor Gap region between Australia and Indonesia.

66 If this approach were taken in the Timor Gap region, the result for Australia would be preferable to the outright adoption of the equidistance method, but not as favourable as outright adoption of the geomorphology method.

67 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Reports 13.

68 Ibid. para.77.

69 Ibid. para.39.

70 Ibid. para.40.

71 Ibid. para.39.

72 Ibid. paras 33–4.

complementary, and that both remained essential elements in the juridical concept of the continental shelf.[73] This was on the basis, however, that natural prolongation is now 'in part defined by distance from the shore',[74] which, with respect, seems difficult to comprehend.

The principles of customary international law laid down in this case not only contradict earlier decisions, but were not essential for the resolution of the dispute: had the Court simply found, as it justifiably did, that the "rift zone" between the States did not constitute a fundamental discontinuity, it could have proceeded to delimit the boundary on the basis of principles espoused in earlier cases without in any way altering its final conclusion.[75] Regrettably, this does not indicate that the principles advocated are *obiter*; those principles were expressed strongly, in clear terms, and were without doubt the basis for the decision. Notwithstanding this, it is submitted that strong arguments may be mounted against any future application of this decision.

First, there is insufficient evidence of State practice and *opinio juris* to supplant the notion of natural prolongation where the coasts of opposite States are within 400 nautical miles of each other. Thus, the distance principle as expressed in Article 76(1) of UNCLOS has *not* become part of customary international law. The State practice relied on by the Court was of States declaring 200 nautical mile boundaries where delimitation was not an issue, or effecting delimitation of uniform continental shelves largely on the basis of equidistance. Neither practice necessitates the Court's propoed new rule of customary law.

Second, the link with the EEZ as a customary law concept does not necessitate the adoption of the distance principle. Article 57 of UNCLOS states that the EEZ 'shall not extend beyond 200 nautical miles'. This provides a maximum breadth for the EEZ, with the implication that other considerations may limit this maximum. This may be contrasted with Article 76(1), defining the continental shelf. This allows States to claim to a distance of 200 nautical miles, or to the limits of the State's natural prolongation, whichever is greater. The rights which the EEZ entails over the seabed are then defined by the regime laid down for the continental shelf.

It appears logically consistent that the continental shelf boundary should set the limit on the extent of the EEZ, although the opposite view was urged by the Court in the *Libya/Malta* case. If the continental shelf can exist where there is no EEZ, but not *vice versa*, and if title to the continental shelf exists *ipso jure*, whereas, at least in customary law, an EEZ does not exist without some declaration by the State, then it seems that principles of continental shelf delimitation should have primacy in the delimitation of the EEZ rather than *vice versa*. It would then follow that, whatever the customary law relating to the EEZ, that law cannot be determinative of the law relating to the continental shelf.

Indonesia's unilaterally declared EEZ, valid according to customary law it seems, cannot have supremacy over treaties already existing

73 Ibid. para.34.
74 Ibid.
75 Ibid.; see separate opinion of Vice-President Sette-Camara.

between Australia and Indonesia; nor, it seems, could it have supremacy over any future delimitation agreement in the Timor Gap region.

Third, there seems to be a logical inconsistency in finding that the UNCLOS treaty definition of the continental shelf expresses customary law, but only to the extent of the second limb of the definition if the coasts of States are within 400 nautical miles of one another. If both limbs are incorporated as customary law, there is no reason for restricting a State to the application of the second limb merely because the disputing States are within 400 nautical miles of each other.

Fourth, even had the distance principle become a rule of customary international law, the rule would not be applicable to States who have expressed clear, consistent and sustained objection to such a rule.[76] Australia would be in this category: there is ample evidence of its opposition to the concept of the distance principle, either as a rule of customary or treaty law, and these objections have been made known to the international community generally and to Indonesia specifically.[77] There is some suggestion that if customary international law can be more readily and easily made, as suggested in the *Libya/Malta* case, then it can also be more readily and easily avoided by objection.[78]

Fifth, even if none of the above is accepted, the *Libya/Malta* case should be limited to its particular facts: there the coasts were only 180 nautical miles apart, so that neither State could claim even the 200 nautical mile minimum shelf provided for in Article 76 without encroaching on the land territory of the opposite State. The situation between Australia and Indonesia is completely different. If State coasts are more than 200 nautical miles apart, as in the Timor Gap region, it is possible for competing claims to be based on different limbs of the UNCLOS definition: either natural prolongation or distance.[79] This is where problems in assessing the merits of the dispute arise. The simple practical solution is to divide equally the area of overlap of competing claims. This, however, avoids the issue of delimitation based on the legal basis of a proprietary right to the continental shelf in favour of a rule which says equality is equity. This is intrinsically less than satisfactory. On the basis of the historical development of both customary and conventional law, the concept of natural prolongation still dominates the resolution of the problem, at least until convincing evidence to the contrary is produced.

Sixth, an application of the *Libya/Malta* case to delimit the Timor

76 *Fisheries Jurisdiction Case* [1974] ICJ Reports 3.

77 This opposition has a long and consistent history: the existing delimitation Agreements between Australia and Indonesia are the result of Australia's objection to the application of distance considerations as a method; still less has it consented to their application as a rule; e.g. Mr Keith Brennan, Chairman of the Australian Delegation, said 'any proposal which depended on distance or depth . . . was unacceptable . . . [as] it contradicted the governing principle of law . . . that the continental shelf was the natural prolongation of the land territory.' Summary Record of the 104th Plenary Meeting (Seventh Session), 18 May 1978, *Official Records* v. IX, 70.

78 T.L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *Harvard International Law Journal* 457.

79 This is on the basis that geomorphology cannot be entirely ignored, despite the *Libya/Malta* decision. It assumes, however, that according to customary law geomorphology and distance are equally relevant, contrary to the view of this article.

Gap would ignore the accepted primacy of customary law over judicial decisions in determining applicable international law principles. The Timor Gap delimitation contains so many features unique to it that many cases, including this one, can be clearly distinguished.

In summary, then, it is suggested that these judicial and arbitral decisions support the contention that the legal basis of title of the continental shelf continues to rest on the principle of geomorphology. It follows that when a delimitation of the continental shelf boundaries between States is to be effected, resort should first be had to any natural boundary indicated by a fundamental discontinuity in the seabed. The Timor Trough is just such a discontinuity. It is orders of magnitude larger than the discontinuities rejected as irrelevant in the *Libya/Malta, Tunisia/Libya* and *North Sea* cases and in the *Anglo-French Arbitration*. It is also a situation where both parties agree on the geology, although admittedly not on the significance of that geology. Consequently, the Timor Trough should indicate the initial delimitation boundary of the continental shelf.

RELEVANT EQUITABLE PRINCIPLES

An initial delimitation line following the Timor Trough may not mark the final continental shelf boundary between Australia and Indonesia. Adjustments may have to be made to achieve an equitable result. Reference to the fundamental norm of maritime delimitation indicates that the delimitation must be in accordance with equitable principles, taking account of relevant circumstances in order to achieve an equitable result.[80]

The *Libya/Malta Case*[81] contains the most recent and comprehensive statement of the equitable principles to be applied in any delimitation effected according to general rules of international law. These principles are stated to govern not only delimitation by adjudication or arbitration, but also the duty of the parties to first seek a delimitation by agreement. They include:[82]

- the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature;
- the related principle of non-encroachment by one party on the natural prolongation of the other;
- the principle of giving due respect to 'all relevant circumstances'.[83] The circumstances which both Courts and Arbitration Tribunals

80 *Libya/Malta Case* [1985] ICJ Reports 13, para.30.
81 Ibid.
82 Ibid. para.46.
83 In this context, note the statement in the *Libya/Malta Case* that, since geology and geography no longer have any part to play in the legal basis of title to the continental shelf, then nor should they be taken into account as relevant circumstances: this relegates natural prolongation from its earlier position of supremacy to a position of total irrelevance, even in marginal adjustments to the initial choice of boundary line: *Libya/Malta Case* [1985] ICJ Reports 13, para.40.

have consistently found to be relevant are: the presence of islands;[84] the proportionality of coastlines;[85] natural deposits;[86] security and defence interests;[87] any existing or proposed delimitation agreements with third parties;[88] and the necessity for correction for any cut-off effects.[89] The following factors, on the other hand, are not considered to be 'relevant circumstances': landmass;[90] economic factors;[91] and historic rights;[92]

- the principle that equity does not necessarily imply equality, nor does it seek to make equal what nature itself has made unequal; and
- the principle that there can be no question of distributive justice.

Whatever the earlier criticisms of the *Libya/Malta* case, there can be no doubt that these five principles have achieved the status of rules of cus-

84 *Anglo-French Arbitration* (1979) 18 ILM 397, paras 194–6, 249; *Tunisia/Libya Case* [1982] ICJ Reports 6, para.89.

85 *North Sea Cases* [1969] ICJ Reports 3, para.98, and further elaborated in *Libya/Malta Case* [1985] ICJ Reports 13, paras 55–8. Traditionally a comparison is made of the relative lengths of States' coastlines, and an adjustment is made to the equidistance line to give a larger shelf area to the State with the longer coastline. It is doubtful whether equity would require this adjustment where the initial line is drawn not on the basis of equidistance but on the basis of natural prolongation. The adjustment is made on the assumption that a longer coastline generates a larger continental shelf, and this effect should already be achieved by a boundary line drawn on the basis of natural prolongation. If, contrary to this, some adjustment is deemed necessary, it would be to Australia's benefit since the ratio of coastline lengths is approximately 2:1 in Australia's favour.

86 *North Sea Cases* [1969] ICJ Reports 3, para.97; *Tunisia/Libya Case* [1982] ICJ Reports 6, paras 117, 125. There seems to be no suggestion that, as a rule, unity of deposits should be preserved. It is a factor to be considered, but alternative solutions to the problem are available. However, the *Libya/Malta Case* suggests, without reasons, that the existence of natural resources might well constitute a relevant circumstance. It gives no indication of what sort of adjustments might be made, or even in whose favour they would operate. It would be open for both parties to argue the relevance: *Libya/Malta Case* [1985] ICJ Reports 13, para. 50. The existence of the Kelp structure, therefore, may impact on adjustments to the initial delimitation line.

87 *Libya/Malta Case* [1985] ICJ Reports 13, para.51.

88 There are none of relevance in the Timor Gap region. However, there are major delimitation agreements between the two parties concerned. This fact should *add* to the significance or relevance which usually attaches to neighbouring delimitation agreements. These agreements are an indication of what, in the past, the parties considered to be an equitable solution in all the circumstances. Those circumstances do not appear to have changed.

89 This would be relevant if a median boundary line were adopted initially to delimit the Timor Gap. Such a line would result in an Indonesian area of continental shelf being almost encompassed by the Australian Shelf. Judicial determinations show that such a result is to be avoided by appropriate adjustment of the boundary. Perhaps, in the case of the Timor Gap, this would entail joining the existing boundaries by a more direct line of delimitation.

90 Continental shelf rights are dependent on a State having a coastline; a larger landmass is irrelevant.

91 *Libya/Malta Case* [1985] ICJ Reports 13, para.50. Economic factors are considered irrelevant for two reasons: they are liable to fluctuate and will then make any original boundary adjustment inappropriate; in addition, one of the equitable principles governing delimitation states that there is to be no question of distributive justice.

92 *Tunisia/Libya Case* [1982] ICJ Reports 6, para.102.

tomary law as elucidated in earlier cases. *In toto*, including the third principle concerning 'relevant circumstances', they suggest that Indonesia is not legally entitled to any adjustment aimed at giving it a larger share of the continental shelf than it acquires on the basis of the initial delimitation. Indonesia does not need to receive 'compensation' for any natural inequalities it suffers compared with Australia in, for example, its more limited natural prolongation and its shorter coastline.

In conclusion, because of the particular and unique geology in the Timor Gap, it is suggested that the initial delimitation line should follow the line of the geological discontinuity. This is a direct consequence of the importance of natural prolongation as the legal basis of title to the continental shelf. The particular geology of the area allows this legal basis to be used to both define *and* delimit the continental shelf. Any adjustments made to this line on the basis of equitable principles or relevant circumstances would be in Australia's favour, moving the boundary even further towards Indonesia. It is suggested that the existing delimitation agreements between the two countries constitute a new and very important 'relevant circumstance'.

THE POSSIBLE IMPACT OF THE RATIFICATION OF UNCLOS

Australia has signed but not yet ratified UNCLOS. Since Australia is a party to the Vienna Convention on the Law of Treaties, it is bound by Article 18 to refrain from any acts which would defeat the object or purpose of any treaties to which it is a signatory, at least until it makes plain that it does not intend to ratify them. Any attempt by Australia to effect a resolution of the Timor Gap boundary on the basis of customary law would not offend this Article, particularly in view of the interpretation adopted here of the treaty law contained in Articles 76 and 83 of UNCLOS.

Article 83(4) retains the primacy of existing agreements between parties. This is so whether or not they contain provisions in conflict with the provisions of UNCLOS. This strongly supports the continued operation of the 1971 and 1972 Agreements between Australia and Indonesia, and also the influence they can legitimately have on the boundary delimitation in the Timor Gap.

CONCLUSION

In discovering the rules of international law applicable to continental shelf delimitation, the aim is not to look for more detailed rules, but to look for better formulations of those rules.[93] In this article, no attempt has been made to refine the uncontroversial first and fundamental norm of both customary and conventional law. Continental shelf delimitation must be based on the application of equitable principles and the use of practical methods capable of ensuring an equitable result.[94] The primary

93 *Gulf of Maine Case* [1984] ICJ Reports 246, para.111.
94 *Libya/Malta Case* [1985] ICJ Reports 13, para.30.

area of disagreement, and the focus of this article, is the legal basis of title to the continental shelf.

The sources of the rules and principles of international law, including treaty law and cases on continental shelf delimitation, indicate that the legal basis of title to the continental shelf rests on geomorphology, or on the principle of natural prolongation. Furthermore, this legal basis should form the foundation for effecting any delimitation where the States have distinct and recognizable continental shelves. This is the case between Australia and Indonesia in the Timor Gap.

The distance principle, it is suggested, has not become part of customary international law. It may well be that delimitations governed by the distance principle would be preferable to those govered by existing customary law: the outcomes would be easily defined, predictable and consistent; lengthy and costly negotiations and protracted scientific disputes concerning the geomorphology of the seabed would be avoided; and, not least, the result would generally be an equitable delimitation. Notwithstanding this, none of these advantages is sufficient to convert the principle of distance into a rule of customary law unless also supported by State practice and *opinio juris*. It is important to heed Kelsen's warning against confusing desirable law with existing law.[95]

This view of the current state of the law has important ramifications for Australia: Australia could mount strong legal arguments in support of a claim for the larger share of the continental shelf in the Timor Gap region; it should use these strong arguments to its political and economic advantage in reaching an agreement on its continental shelf boundaries with Indonesia.

95 H. Kelsen, *On the Issue of the Continental Shelf: Two Legal Opinions* (1986) 46.