return to AMPLA 2000 Table of Contents

An Independent East Timor: The Timor Gap Treaty and International Law

Christopher J Ward*

SUMMARY

The aim of this work is to outline the public international law implications of an independent East Timor on the Timor Gap Treaty. In particular, the affects on the form and operation of the Timor Gap Treaty and associated international laws are considered.

THE PAST

International Law Background for the Treaty

The reasons for and the framework for commercial agreements in the Timor Gap exist in international law. International law remains crucial to those involved with the commercial and practical arrangements relating to the exploitation of oil and gas deposits in the Timor Gap.

The sudden shift in the position of the United Nations and Indonesia on East Timor during 1999 was unlikely to have been foreseen when the Timor Gap Treaty was signed by the Foreign Ministers of Australia and Indonesia. The Foreign Ministers signed the Timor Gap Treaty while flying over the Zone of Cooperation in 1989. At that time the questions of the sovereignty, independence or self-determination of East Timor were not high on their agenda. They now are.

Indonesia issued a *Declaration of Integration of East Timor with Indonesia* in November 1975. Australia had granted oil exploration permits in the Timor Sea since the early 1970s. In the wake of an overwhelming vote for independence by the people of East Timor, on 10 September 1999, the Indonesian Minister responsible for oil

* LLB (UWA).

production announced that East Timor would continue the treaty.[1] This paper points to why only short-term comfort can be gained from such assurances. Public international law developments will remain relevant to commercial interests. This paper outlines some of the most recent changes and highlights some likely future developments.

This de jure recognition by Australia and the conclusion of the Timor Gap Treaty was challenged unsuccessfully by Portugal in the International Court of Justice in 1991.[2] The challenge was unsuccessful as the International Court of Justice held that it could not proceed to determine Portugal's claim in the absence of Indonesia as a party to the proceedings.[3]

The expression "Timor Gap" denotes the area between points A16 and A17, illustrated at Figure One below.[4] Prior to de facto recognition of Indonesian sovereignty in East Timor by Australia, Australia had not agreed on any maritime boundaries with Portugal. As most of the maritime boundary between Australia and Indonesia had been concluded, this unsettled portion of Australia's northern maritime boundary became known as the "Timor Gap". The de facto recognition by Australia, of Indonesia's sovereignty over East Timor, was required for Australia to conclude the Timor Gap Treaty.

The Timor Gap Treaty

In separating its reservations about the incorporation of East Timor into Indonesia in 1975, from the realistic need to delimit its maritime boundaries, Australia and Indonesia concluded the:

> "Treaty between the two Parties on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia done over the Zone of Cooperation on 11 December 1989 ('the Timor Gap Treaty')."[5]

The Timor Gap Treaty was a way around competing territorial claims and the uncertainty that would dissuade mineral deposit exploration. It begs the most difficult questions so that these questions do not prevent the economic exploitation of the area known as the Zone of Cooperation (ZOC). The need for clear answers to these questions is more acute now because of the

[1] P Ham, "Paying the Price of Principle", *The Bulletin*, 12 October, 1999.
[2] *East Timor Case* (*Portugal v Australia*) [1995] ICJ Reports 32.
[3] H Reicher, ed, *Australian International Law, Cases and Materials*, LBC Casebooks 1995, at p 946.
[4] F Auburn, D Ong and V Forbes, *Dispute Resolution and the Timor Gap Treaty*, The Indian Ocean Centre for Peace Studies, The University of Western Australia, IOCPS Occasional Paper No 35, 1994, p 20. Map by V Forbes.
[5] Australian Treaty Series (1991) No 9. This treaty entered into force on 9 February 1991. Hereinafter the "Timor Gap Treaty".

financial and political commitments made by both countries and commercial entities in relation to this ZOC. Not surprisingly, the Timor Gap Treaty is silent on what happens if the "province of Indonesia" became an independent nation state. The inclusion of such a treaty provision would have been antithetical to the recognition of Indonesian sovereignty over East Timor and thus the adjoining Timor Sea.

The oil and gas industries in Australia have now committed many millions of dollars and contemplate operations costing billions.[6] For the time being, commercial confidence has been restored somewhat by the agreement. They have achieved significant momentum for huge and long-term commercial commitment in various Timor Sea projects. Area A has been the most explored and drilled and is where the biggest fields and ambitions presently exist.[7]

The Timor Gap Treaty concerns the continental shelf in this area and does *not* generally cover the superjacent water column. The concept of an Exclusive Economic Zone (EEZ) gives the *sovereign right* to the exploitation of the living and non-living resources out to 200 nautical miles from baseline of the coastal state.[8] UNCLOS also provides that the coastal state enjoys *sovereign jurisdiction* with regards to the establishment and use of artificial islands, installations and structures.[9] Sovereign jurisdiction is enjoyed also in relation to marine scientific research.[10] The notion of an EEZ gained further international acceptance after the entry into force of the United Nations Convention on the Law of the Sea in November 1994.[11] Both Australia and Indonesia have claimed a 200nm EEZ.[12]

The Timor Gap Treaty concerns the continental shelf underlying the Timor Sea between northern Australia and southern East Timor. The continental shelf is one part of the submerged prolongation of land territory offshore of that territory. Article 76(1) of UNCLOS defines the continental shelf:

[6] "Timor Sea – Northern Australia's energy arc", *The Australian Gas Journal*, June 2000, p 15. The Laminaria/Corallina project, which started production late 1999, is listed as being a $1.3 billion project.

[7] Spokesmen for Woodside Petroleum Ltd told the Senate Inquiry into East Timor that the transition could have a negative effect on plans for its $10 billion investment "Concerns over Timor gas deal", by Michael Day of the *West Australian* newspaper, September 1999.

[8] Articles 55 and 56 of the United Nations Convention on the Law of the Sea (hereinafter UNCLOS) (1982) 21 ILM 1261.

[9] UNCLOS, Art 60.

[10] UNCLOS, Pt XIII.

[11] S Kaye, *Australia's Maritime Boundaries*, Wollongong Papers on Maritime Policy No 4, 1995, p 2.

[12] M Calder, *Implications for the Legal Profession in Australia*. Table at Attachment 1. A paper contained in *The United Nations Convention on the Law of the Sea: What it means to Australia and Australia's Marine Industry*, Wollongong Papers on Maritime Policy No 3, edited by M Tsamenyi, S Bateman, and J Delaney, The Centre of Maritime Policy, University of Wollongong, 1996.

> "The continental shelf of a coastal State comprises 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 for which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

Continental shelf rights of the coastal state allow it the exclusive right to govern petroleum operations in respect of that shelf. Under Art 77 of UNCLOS, the coastal state has sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. Rights of the coastal state to its continental shelf do not affect the legal status of the water column above it. The physical limits of Australia's continental shelf continue to be scientifically measured.[13] The legal regime of UNCLOS providing for the delineation of the end of the continental shelf is complex and uncertain.

The three Areas that comprise the zone of cooperation are illustrated at Figure One. The line separating Areas A and C of the ZOC represents the 200m isobath on the southern side of the bathometric axis of the trough.[14] Sovereignty of the continental shelf between the line of equidistance (boundary between Areas A and B) and the 200m isobath on the southern side of the bathometric axis (boundary between Areas A and C) is unresolved.

The median line delimiting the Exclusive Economic Zones of both countries is the boundary between Areas A and B. As the Exclusive Economic Zone (EEZ) includes the water column, the seabed and the subsoil,[15] there is some overlap in relation to the seabed and the subsoil within area A because both the EEZ and the continental shelf are said to include the seabed and subsoil. This duplication of rights for parties claiming the continental shelf and EEZ is likely to be a drafting error in the convention. The EEZ has not generally been considered to include the subsoil, rather it has been concerned with the superjacent water column. This confusion could have very real implications for states trying to reconcile competing continental shelf and EEZ rights and this point is expanded upon under the heading "The Future" below in this paper.

The Joint Authority

The Timor Gap Treaty established the Joint Authority. It is responsible for the management of the petroleum resources of Area

[13] N Conolly, *The Law of the Sea*, GIS User, Number 40, June-July 2000, p 34.
[14] S Kaye, "The Timor Gap Treaty: Creative Solutions and International Conflict" [1994] 6 *Sydney Law Review* 72 at 73.
[15] UNCLOS, Art 55(1)(a).

A.[16] In Area A, the Joint Authority and Ministerial Council, both established by the Act to oversee the joint exploitation of the ZOC, have powers in relation to, inter alia:

(a) employment of personnel and their terms and conditions;[17]
(b) health and safety standards and procedures;[18] and
(c) permits, most types of reports and other requirements relating to the exploitation of the most fertile part of the ZOC.

Permits are granted by, charges are levied by and Area A is completely administered by the Ministerial Council and the Joint Authority. Both of these bodies have staffing levels which carefully maintain a balance between Australian and Indonesian personnel and interests. United Nations Transitional Administration in East Timor (UNTAET) personnel (and eventually East Timorese) will fill the positions formerly occupied by Indonesian nominees.

Area A is the middle area of three within the entire zone of cooperation. It is the most important, mineral rich and largest section of the 60,000 square kilometre area. The authority regulates all aspects of exploration and exploitation[19] in Area A. Although both parties are free to exploit Areas B and C unimpeded by the administrative overlays of Area A. Such is the need for cooperation in relation to the whole of the ZOC that practical difficulties could arise through trying to exploit just one Area of the ZOC. Accordingly, cooperation is a vital ingredient for all Areas of the ZOC.

Despite the relative autonomy enjoyed by Australia and UNTAET[20] in Areas B and C respectively, there are several aspects of what makes a workable zone of cooperation which, if not agreed upon and coordinated by the two nations, would present obstacles to the efficient exploitation of the zone. Requirements to cooperate on security and environmental matters are but two examples.

For instance, cooperative measures between UNTAET and Australia necessarily exist and apply outside of Area A in relation to areas including:

(a) criminal jurisdiction, especially of nationals of third States;[21]
(b) customs, quarantine and immigration;[22] and
(c) taxation.[23]

16 Article 8.
17 Article 24.
18 Article 25.
19 Kaye, op cit n 11, at p 87.
20 Or, in place of UNTAET and as appears likely in the future, an independent East Timor.
21 Article 27(1).
22 Article 23.
23 Article 29.

THE PRESENT

Diplomatic Exchange of Notes

The continuation of the terms of the Timor Gap Treaty was confirmed on 10 February 2000 in an:

> "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."

The UNTAET was established by United Nations Security Council Resolution 1272 of 1999 of 25 October 1999. This date marks the start of the end of Indonesian involvement in East Timor and the creation of the UN body charged with facilitating the self-determination of East Timor. UNTAET is entrusted with transitional authority, the obvious corollary of this being that it is planned for the UN "nation building" to give rise to an independent East Timor in the future.

In the Exchange of Notes of 10 February 2000, UNTAET, acting on behalf of East Timor, sought to provide "practical arrangements for the continuity of the terms" of the Timor Gap Treaty, UNTAET assumed "all rights and obligations" under the Timor Gap Treaty previously exercised by Indonesia, until the date of independence of East Timor. Importantly, as East Timor does not have international legal personality, it was reliant on the UN to conclude these transitional arrangements.

What is abundantly clear is that Australia will have to renegotiate the continuation of the Timor Gap Treaty in time for the independence of East Timor. Because of the composition of the National Consultative Council of East Timor, East Timorese influence should be obvious even before any handover date from the UN to a newly independent East Timor. Australian governments and commercial interests wanting to ensure that the transition from UN to independent rule provides no obstacles to their ventures in the Timor Sea will need to continue dialogue with UNTAET and eventually with the representatives of a newly independent East Timor.

As stated, the transition from UN to independent rule will be a crucial. The agreement between UNTAET and Australia warrants further examination, particularly for what clues it gives to the likely attitude of UN and East Timorese representatives in future negotiations.

In the Exchange of Notes, UNTAET reserved the right to enter into subsidiary agreements relating to the Timor Gap Treaty on behalf of East Timor. The Note also states that: "In agreeing to continue the arrangements under the terms of the Treaty, the United Nations does not thereby recognise the validity of the 'integration' of East Timor into Indonesia."

Further, the Exchange of Notes provides that: "The conclusion of this agreement, however, is without prejudice to the position of the future government of an independent East Timor with regard to the Treaty."

Memorandum of Understanding

Subsequently, but on the same day, details not contained in the Exchange of Notes were agreed upon in the: "Memorandum of Understanding between the Government of Australia and UNTAET, acting of behalf of East Timor, on arrangements relating to the Timor Gap Treaty."

The key provisions of this Memorandum of Understanding (MOU) are contained in cll 2(b) and (c). The combined effect of these is to provide for the continued applicability of all rules, regulations, directions, decisions, guidelines, procedures, approvals, authorisations and other determinations made by either the Ministerial Council or the Joint Authority for the Zone of Cooperation for Area A from 25 October 1999. Additionally, all existing Production Sharing Contracts under the Treaty will continue to apply.

There is no new treaty between Australia and another country, just an agreement between Australia and UNTAET to continue the legal regime of the Treaty. UNTAET has not technically become party to the Timor Gap Treaty, rather it has agreed to abide by the provisions contained in the Timor Gap Treaty, for the time being. This offers oil and gas interests much less permanency than was previously the case where the term of the Treaty between Australia and Indonesia was 40 years.[24] Amendments to the MOU may be made at any time by agreement in writing between UNTAET and Australia.

The MOU provides for the head office of the Joint Authority to be established in East Timor as soon as possible. It also provides for the introduction of UNTAET representatives in place of Indonesian representatives in the Joint Authority and Ministerial Council. The Joint Authority is also required to pay the proceeds collected from production sharing arrangements under the Treaty from 25 October 1999, to a fund managed by UNTAET for the future government of

[24] Article 33 of the Timor Gap Treaty.

East Timor. The Australian Gas Journal has reported that "early this year new Timor Gap Treaty arrangements were concluded between Australia and East Timor – with the blessing of Indonesia – and it was once again 'business as usual' in the Timor Sea".[25]

This statement requires some qualifications. First, East Timor is not a party to any new arrangement. The without prejudice nature of the agreement between UNTAET and Australia was noted in the text of the Exchange of Notes, which runs only until the independence of East Timor. Current indications are that the independence of East Timor is likely to be formalised by end of year 2001 and there are significant pressures to bring this date forward. At the time of writing, the person thought to be the most likely Minister responsible for oil and gas projects including the Timor Sea for an independent East Timor, Mr Marie Alkatiri, had recently been involved in high level talks with Australian officials in Canberra. Peter Galbraith, the Director of Political Affairs for UNTAET and one of the two Executive Directors of the Joint Authority, was party to these talks. Mr Alkatiri was reported as saying:

> "We are not thinking of [Timor Gap Treaty] negotiation but a new treaty. Of course, some of the terms will be the same but the starting point needs to be the drawing of a maritime boundary between the countries and that means the [Timor Gap] treaty would not have effect any more."[26]

Commercial interests in the ZOC cannot ignore this sort of sentiment. The second qualification that when ones business partner changes and has different aspirations than ones former partner and the term and content of an agreement are altered, it is not quite "business as usual". Difficulties presented by the Timor Gap Treaty in relation to taxation, particularly of straddling deposits, are examined in Triggs' article "Timor Gap Treaty Between Australia-Indonesia: Straddle Deposits Expose Legal Issues".[27] These are complex matters beyond the scope of this paper. However, in looking at the potential for these sorts of issues to become disputes and affect the operation of the Timor Gap Treaty, Triggs' notes that: "Political will is the single most important determinant of success."[28]

The problem for companies dealing with these tricky issues is that now they are working within the confines of an agreement which might last no longer than until the independence of East Timor. This is in contrast to the Timor Gap Treaty concluded between Australia and Indonesia that was to run until 9 February 2031. In addition,

[25] "Timor Sea – Northern Australia's energy arc", *The Australian Gas Journal*, June 2000, p 15.
[26] "East Timor wants new gap treaty", *The Australian* newspaper, 15 June 2000, p 2.
[27] G Triggs, "Timor Gap Treaty Between Australia – Indonesia: Straddle Deposits Expose Legal Issues" [1998] LAWASIA Journal 117.
[28] Ibid at 118.

there is little guarantee that the political will which characterised dealings between Australia and Indonesia on this point will assist dealings between East Timor and Australia.

International Law on Succession of States

State succession refers to the process by which one state replaces another in the responsibility for the international relations of a territory.[29] Presumably, this would be the case with the Timor Gap Treaty with an independent East Timor. This would be because the maritime boundary in the Timor Sea would lie between Australian and a newly independent East Timor and not Australia and Indonesia. Australia had not delimited this boundary with Portugal.

The status of the law of state succession has aptly been described as chaotic.[30] The International Law Commission has made an attempt to codify the major areas of the law of state succession and this formed the basis of the 1978 Vienna Convention on Succession of States in Respect of Treaties.[31] It is likely that some of the rules laid down in the State Succession Convention represent customary international law and thus are binding on states that have not ratified to the convention.[32]

The State Succession Convention, whilst the most comprehensive attempt at articulating the international law relating to treaty succession, is not exhaustive but is a useful starting point. As such, the treaty does provide some general rules and to these there are exceptions of contentious scope.

An independent East Timor would be bound by customary international law on state succession.[33] The State Succession Convention would only apply to those States that have ratified it and it is not exclusive of customary international law anyway. State practice varies greatly and this is probably due in part to the infinite array of circumstances that might precede state succession. This makes the identification of state practice, which can evidence customary international law, difficult. Further difficulty arises because it is not always obvious whether state practice is accompanied with

[29] D Mazjub, "Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Quebec" (1999) 24 Queen's LJ 413.
[30] P Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Revised Edition, p 164.
[31] United Nations General Assembly, Vienna Convention on Succession of States in Respect of Treaties, UN GA, 1978, UN Doc A/Conf 80/31 (1978) (hereinafter the Treaty Succession Convention*)* as cited in Mazjub, op cit n 29, p 418.
[32] Australia has not ratified this Convention.
[33] Customary International Law is one of the fundamental sources of international law listed in Art 38(1)(b) of the Statute of the International Court of Justice.

the requisite opinio juris.[34] The importance of classifying the situation (as different rules of law are said to apply to different situation) is exceeded only by the difficulty in doing so.[35]

The Treaty Succession Convention provides that newly independent states that have relied upon a colonial power for the previous exercise of its foreign relations can get a clean slate.[36] East Timor would be classified as one such state, despite the difficulty in saying which other state has been the colonial power. Clearly Indonesia has, in the case of East Timor and the Timor Gap Treaty, made representations in relation to the land that is East Timor, as its sovereign power.

The law relating to the succession of states will provide few obstacles to the United Nations led administration or any subsequent representative body for East Timor, in negotiating on the continuation or otherwise of the Timor Gap Treaty.

International Law of Treaties

Importantly, with bilateral treaties, the other party to a treaty (in the case of the Timor Gap Treaty, Australia) must agree to the continuation of the treaty with the successor state.[37]

The main treaty on this point in international law provides only general rules, some of which arguably represent customary international law. The 1969 Vienna Convention on the Law of Treaties[38] provides little guidance in its Art 74(1) in which it states:

> "The provisions of the present convention shall not prejudge any question that may arise in regard to a treaty between one or more States … from a succession of States …."

Recent state practice has shown that states are afforded a *clean slate* with respect to treaties.[39] This is reflective of Art 16 of the Vienna Convention of the Law of Treaties as it provides essentially that newly independent States are not bound to a treaty, just because the treaty

[34] The notion that a state acts a certain way because it is legally obliged to do so, rather than out of choice. This is an essential ingredient of state practice if that practice is claimed to be evidence of the existence of a customary international law.

[35] Malanczuk, op cit n 30, at p 161.

[36] Mazjub, op cit n 29, at p 426.

[37] Article 24 of the Vienna Convention on the Law of Treaties (1969) 8 International Legal Materials 679. Taken from Appendix One of P Reuter, *Introduction to the Law of Treaties* – A Publication of the Graduate Institute of International Studies, Geneva, 1995. The treaty is hereinafter referred to as the Treaties Convention.

[38] (1969) 8 International Legal Materials 679. Taken from Appendix One of P Reuter, *Introduction to the Law of Treaties* – A Publication of the Graduate Institute of International Studies, Geneva, 1995. The treaty is hereinafter referred to as the Treaties Convention.

[39] Mazjub, op cit n 29, p 433. The author gives numerous examples and also quotes a report of the 1974 International Law Commission Report to the United Nations General Assembly.

applied to the territory of the successor state. This is in essence a rule of non-succession, not succession.[40]

Some authority exists for the proposition that it is customary international law that treaties that deal with rights over territory are always succeeded to by the successor state.[41] However several writers advocate the "clean slate approach" for all states, which means that there is no automatic continuation of the treaty without an agreement to that effect. If customary international law binding successor states to treaties concerning boundaries did exist, it wouldn't bind East Timor in this instance anyway. This is because the Timor Gap Treaty does not delimit any permanent boundaries. If consultations with representatives of the East Timor people had been a bona fide part of the negotiation process for the treaty, it may well be that there would be some obligation on the part of a newly independent East Timor, to honour its obligations. This was not and therefore is not the case.

Thus, no certainty is provided by the international law of treaties other than that either East Timor or Australia would have ample justification in international law to withdraw from the treaty upon East Timor becoming an independent nation state. In plain international law terms, none of the Timor Gap Treaty, the Exchange of Notes or Memorandum of Understanding serve to oblige East Timor to continue with the treaty once independent.

THE FUTURE

Applicable Legal Regime Governing Interim Arrangements

The Memorandum of Understanding provides that the laws applied in East Timor prior to 25 October 1999, to the extent necessary to give effect to the Treaty, will continue to apply. UNTAET and Australia will therefore continue to apply Indonesian law to their relationship until such time as UNTAET provides new laws for East Timor. In time, these laws will change, be repealed or adapted to suit East Timor and there may be implications for Australian industry as a result. Representatives of the Australian Government and corporations with financial interests in the Timor Sea have started adapting to dealing with East Timorese leaders and United Nations officials.

Criminal, taxation and civil laws relating to East Timorese nationals or residents working in Area A, will be Indonesian-introduced laws

[40] I A Shearer, *Starke's International Law, 11th ed* (1994), p 299.
[41] Malanczuk, op cit n 30, at p 162.

until such time as UNTAET or an independent East Timor provide new laws on point. When these laws are changed, there will be implications for corporations and the people working for them. The incorporation of the phrase "to the extent necessary to give effect to the terms of the Treaty" in the MOU is likely to give rise to uncertainties. For instance, can Indonesian-introduced laws be applied in conjunction with new laws provided for by UNTAET? Which law will prevail if they give varying levels of effect to the terms of the treaty? Can an East Timorese national properly be subjected to Indonesian law after the independence of East Timor? This juggling of laws could have very real fiscal implications for commercial operators in the Timor Sea. It will present a real challenge to the contract and other lawyers of the corporations operating in the ZOC. The contracts might need to provide for the replacement of Indonesian-introduced laws with East Timorese laws as they are passed and come into effect if the new laws are inconsistent with the earlier law.

Customs and Immigration Laws

Article 23(1) of the Timor Gap Treaty will allow UNTAET to apply new customs and immigration regulations to Australian people and vessels entering or leaving Area A. The oil and gas industry may want to trace the development of (and perhaps provide input to) the drafting of UNTAET regulations/East Timor legislation in this area.

Employment

This may prove to be an important issue for a variety of reasons. Article 24 (1) of the Timor Gap Treaty will now require that Australians and East Timorese are given preference for employment in Area A. Further, they should be employed in equal numbers, taking into account "good oilfield practices". This term is not defined but is taken to mean that equal numbers are not to be sought at the expense of safety, efficiency, cleanliness or the like. If corporations choose to employ more Australians than East Timorese they will need to be in a position to justify this. As East Timor has no pre-existing oil and gas industry base, it will be very difficult to find skilled employees. Corporations will be unable to use the absence of an East Timorese skill base as an excuse for long or at all. The MOU provides that: "The government of Australia and UNTAET recognise that it will be important to facilitate, as a matter of priority, training and employment opportunities for East Timorese nationals and permanent residents."

Corporations will need to adapt quickly and invest efforts in this area. The extent to which East Timorese nationals and residents are incorporated into the workings of Area A will have a bearing on the attitude brought to the negotiating table by East Timorese leaders in the future. Whilst this might take time and money on behalf of corporate planners, they would be well advised to consider it an investment. Corporations may find themselves being criticised on this score if training and opportunities are not provided for East Timorese nationals and residents.

Corporations need to ensure that the political representatives that they ultimately rely upon to conclude subsidiary agreements with UNTAET or an independent East Timor do not face public pressures which are at odds with the interests of the oil and gas industry. Renegotiation of the terms of the Timor Gap Treaty is likely to be a political issue at some stage. Little public sympathy exists for the corporations who can simplistically and easily be portrayed as having preyed on natural resources which were never Australia's, in concert with Indonesia. An environmental or safety disaster or proven inequitable treatment of other nations nationals compared to Australia's, could provide political pressure to favour East Timor when renegotiating terms to allow for the continued exploitation of the Timor Sea.

The Ability of UNTAET and East Timor to Fulfil its Treaty Obligations

Whilst UNTAET assumed the responsibilities of Indonesia on behalf of East Timor, it is likely that neither UNTAET nor a fledgling East Timor will have the same capacity as Indonesia to fulfil its treaty obligations. One obvious public international law effect of the new arrangement is that Australia now has duties to UNTAET and in the future to East Timor, whereas they were previously owed to Indonesia and vice versa.

For instance, Art 12 of the Timor Gap Treaty provides that the parties have a right to conduct surveillance activities and it also provides that there should be cooperation and coordination of such surveillance. There should also be an exchange of information gathered from any surveillance carried out. Thus, Australia is now required to cooperate with UNTAET and provide them with information gathered. UNTAET lacks the surveillance capability of Indonesia and thus Australia may be forced to provide an extra effort, at extra expense, on this matter. If neither Australia nor UNTAET pick up the slack caused by Indonesian withdrawal from these functions, this might have implications for the safety of the platforms in the

Timor Sea. The onus on Australia in relation to controlling movement into, within and out of Area A, establishing safety and restricted zones and disaster response will increase. It might be tempting for this cost to be passed onto the companies who stand to gain from the surveillance, movement control and other functions required to be performed. It might be argued that, as the main reason for and beneficiary of Australia performing these functions is the oil and gas industry, that the user should be paying.

The Need to Re-Evaluate Current Commercial Estimates

There exists a fundamental problem for the oil and gas industries operating in the Timor Gap presently for which there is no "quick fix". The current forecasts of multi-million dollar investments and profits to share amongst those who commit to the ambitious projects are premised on a continuation of the same or similar terms in relation to the ZOC. What seems increasingly likely is that East Timor will press for a better deal. What is not unlikely is that commercial operations could be delayed pending settlement of a dispute between East Timor and Australia. The treaty may fall into disuse. The Timor Gap Treaty obligations contemplate the continuation of a cooperative relationship of mutual benefit to both countries. If there is insufficient economic exploitation of the zone, Australia and East Timor will be forced to consider the future of the Joint Authority and question whether its continued operation is financially justifiable.

No Security of Tenure for Contractors

When concluded between Australia and Indonesia, the Timor Gap Treaty was to run for an initial period of 40 years and could be extended for another 20 years if negotiations on a permanent delimitation were not successful.[42] The agreement between UNTAET and Australia lasts only until East Timorese independence and is without prejudice to the position of an independent East Timor. The fact that the treaty has been kept on foot presently provides no guarantee that it will remain so. Further, the current agreement between UNTAET and Australia allows for the continuation of extant Production Sharing Contracts but provides no guarantees that they will be honoured in the future.

Although the Joint Authority is vested with legal status via the Timor Gap Treaty, contractors contemplating specific performance actions would be well advised not to bother. The *International*

[42] Article 33.

Organizations (Privileges and Immunities) Act 1963 applies to the Joint Authority by the *Petroleum (Australia-Indonesia Zone of Cooperation Consequential Provisions) Act* 1990. Part 1 of the first schedule of the former Act provides full immunity from suit to a protected organisation such as the Joint Authority.[43]

Reliance on Cohesion within Joint Decision-Making Bodies

Because of the consensual nature of decision making by both the Ministerial Council and the Joint Authority, if East Timorese and Australian views became polarised, this may paralyse the decision-making capacity of these bodies. For instance, approval of the Joint Authority is required for entry into Production Sharing Contracts, controlling movement in and out of the Area,[44] and the construction of petroleum structures and pipelines.[45] There is no mechanism to require arbitration; instead the Joint Authority is expected to decide. Contractors risk an agreement that suits neither contractor being imposed by a divided Joint Authority.

The model Production Sharing Contract does not allow for the long term holding of rights to exploit a block without production taking place. A contractor has six years to discover commercial quantities of petroleum,[46] and after three and then six years of the licence, 25 percent of the blocks allocated to the company in the contract must be relinquished back to the Joint Authority.[47] After 10 years, all blocks must be relinquished.[48] Large companies are unlikely to tie up capital if they are not free to "sit" on their investment. These time constraints make such an investment less attractive because companies need to be sure of the existence of the deposit and have the time to exploit it to pay for a licence. In view of the current political uncertainty surrounding the zone and the treaty – in this author's view – there is a real likelihood that the treaty will become moribund, at least until the larger issues associated with East Timor and its maritime claims are settled. If it is then rejuvenated, it is unlikely to be entirely in its current form.

[43] Triggs, op cit n 27 at p 127.
[44] Article 8.
[45] Articles 17 and 18 of the Petroleum Mining Code, which provide rules applicable to Production Sharing Contracts agreed in accordance with the Treaty.
[46] Kaye, op cit n 14, p 89. He cites s 2.2, Annex C, Model Production Sharing Contract (PSC).
[47] Ibid.
[48] Ibid.

Unitisation Issues

The complexities of unitisation agreements generally are beyond the scope of this paper,[49] but the following prospect looms for commercial operators. A polarised Joint Authority is likely to fail to reach agreement on unitisation when deposits extend beyond the boundaries of Area A. The commercial operator is actually dependent on the states party to the treaty reaching agreement because the loosely worded obligations in the treaty relate to states vis-a-vis states only. Several of the most optimistic of current commercial forecasts relate to the exploitation of deposits straddling boundaries. Some straddle two of the three Areas within the ZOC. Other deposits straddle the ZOC and the continental shelf beyond the limits of the ZOC. These latter deposits could see Australian interests needing to negotiate with both Indonesian and East Timorese interests.

Article 20 of the Timor Gap Treaty encourages States to seek to reach an agreement on effective exploitation of the straddling deposit, which involves the "equitable sharing of the benefits arising from such exploitation". Scant guidance is given to the parties on how to give effect to broadly worded treaty obligations when faced with straddling deposits. In addition, where oil deposits straddle either of Area B or C, as well as part of Area A, the combined affect of Arts 20 and 21 encourages a negotiated and equitable settlement with both States assisting in the exploitation of the area.[50] There is no mention of the equitable sharing of benefits being based on the effort, expertise or cost of exploitation, nor is the term "equitable" defined. It is unclear whether the previous exploitation of the ZOC by Australia and Indonesia influences what constitutes an equitable settlement.

Absent agreement, and leaving aside practical difficulties this would cause, operators would be forced to resort to competitive drilling. This means higher costs and lower returns for each competitor.[51]

Reconciling Overlapping Continental Shelf and EEZ Rights

The overlap between states entitled to exercise sovereign rights in relation to their continental shelf and the sovereign jurisdiction of a state who has proclaimed its Exclusive Economic Zone is significant. Both states are afforded the right to authorise the construction of oil

[49] See for instance, J L Freeman, "Resource Development and Unitisation Issues in the Zone Of Cooperation", International Law News, Journal of the International Law Section of the Law Council of Australia, (copy on file with author), and Triggs, op cit n 27, at p 117.
[50] Kaye, op cit n 14, at p 90.
[51] Freeman, op cit 49, at p 11.

and gas production facilities in their respective overlapping zones. UNCLOS does not provide for how competing claims should be resolved. The potential for conflict is obvious. In seeking to avert any conflicts because of these overlapping rights, Australia and Indonesia concluded the: "Treaty between the Government of Australia and the Republic of Indonesia establishing an Exclusive Economic Boundary and Certain Seabed Boundaries[52] ('the 1997 treaty')."

Article 8 provides that no acts or activities pursuant to the treaty shall be interpreted as prejudicing the position of either Party on a permanent delimitation of the seabed boundary. The 1997 treaty addresses this issue in its Art 7, by providing that in areas where Australian claimed continental shelf underlies Indonesian EEZ water column, the EEZ rights accruing to Indonesia relate only to the water column. The coastal state for EEZ purposes can authorise construction for the purposes of exploiting the EEZ and the coastal state for continental shelf purposes has the same right in relation to exploiting the continental shelf. However, as access to and within the water column is practically necessary to exploit the subsoil, "the goodwill and cooperative atmosphere that gave rise to the Treaty will have to be maintained into the future to ensure its success".[53]

Rules relating to notice of construction, exploration, research and pollution are agreed and importantly para 7(m) provides that: "[N]either party shall exercise its rights and jurisdiction in a manner which unduly inhibits the exercise of the rights and jurisdiction of the other Party."

Article 11 of the treaty requires ratification for entry into force and neither state has yet done so. But in light of East Timor's impending independence, this treaty will need to be renegotiated. More importantly for the oil and gas industries, there are no agreed measures between Australia and East Timor to ensure that the exercise of their respective rights do not interfere with each other, as could easily be the case. Agreement on environmental measures and responsibilities contained in the 1997 treaty[54] will now also fall away unless they are incorporated within a new agreement between Australia and UNTAET or East Timor.

The practical difficulties associated with the concurrent exercise of rights to the continental shelf and the EEZ by different interests are numerous. Disagreements over navigation rights and what is

[52] Signed on 14 March 1997.

[53] Cooperation is required of Australia and Indonesia in Art 7(n) of the 1997 treaty. The italicised statement is from an article by Stuart Kaye, "Australia and Indonesia tie the maritime knot" (1997) 71 ALJR 916 at 917.

[54] Article 7 of the 1997 treaty requires states to take effective measures that are necessary to prevent, reduce and control pollution of the marine environment and that states are liable in accordance with international law for pollution caused by their activities.

permissible under the regime of innocent passage in another's EEZ could be made more acute by the increased use of floating platforms. These are more mobile, reduce capital costs and demonstrate the potential viability of small offshore fields.[55] Access to and through the EEZ is practically necessary to exploit the continental shelf, especially for floating platforms.

What is possible is that East Timor could seek a ruling from the International Court of Justice on the delimitation of the continental shelf in the Timor Sea region. As UNCLOS would be very relevant to a settlement of such a dispute, some relevant provisions of UNCLOS and an outline of the potential for an application to the International Court of Justice by East Timor are outlined below.

What UNCLOS Provides for Delimitation of a Continental Shelf

Article 76 of UNCLOS defines the continental shelf. The focus shifted from the 1958 Convention, which drew heavily on natural prolongation and the ability of a state to exploit the shelf, to a complicated definition allowing for a variety of methods of measurement. As scientists charged with measuring Australia's continental shelf have stated, the Art 76 definition is vague.[56] This uncertainty is compounded by Art 76(10) of UNCLOS. It provides that the convention provisions are without prejudice in delimiting the continental shelf between States with opposite coasts! This would be the case with an independent East Timor and Australia.

The Timor Gap Treaty preamble confirms that the treaty accords with the duty of states to enter provisional arrangements of a practical nature pending the final settlement of territorial claims and without prejudice to such claims.[57]

Article 83 of UNCLOS provides that continental shelf delimitation shall be effected by agreement, on the basis of international law, in order to achieve an equitable solution. State practice does little to lend any certainty to this obtuse provision. Several leading authorities in the area opine that there are no normative principles of international law that would require the specific location of any boundary line.[58]

[55] J Phaceas, "AUSTRALIA: Tapping Timor's little fields", *The Australian*, 26 May 2000, p 28.
[56] Conolly, op cit n 13, at p 34.
[57] Article 83 of UNCLOS provides the international legal obligation and Art 33 of the Timor Gap Treaty is the substantive treaty provision reflected in the preamble.
[58] G Triggs, "Confucius and Consensus: International Law in the Asian Pacific" [1997] 2 MULR 650. Triggs quotes the findings of Charney and Alexander in *International Maritime Boundaries* (1993), 1455.

The International Court of Justice

In its decision in the case bought by Portugal against Australia in 1995, the International Court of Justice did not rule on what such a continental shelf boundary should be. Portugal alleged that Australia breached international law as a result of Australia concluding the Timor Gap Treaty with Indonesia. The court refused to adjudicate on the Portuguese claim because it necessarily questioned the capacity of Indonesia to conclude the treaty and Indonesia was thus a third party not before the court. The court held that it could not rule on the lawfulness of the conduct of a state when its judgment would imply an evaluation of the lawfulness of the conduct of another state that is not a party to the case.[59] Indonesia refused to accept the jurisdiction of the court in relation to Portugal's claim, as it was entitled to do so at international law.

Importantly, the grounds for the failure of the Indonesian action are largely irrelevant to the merits of a case that might be bought by East Timor against Australia. East Timor might make an application to the court for compensation arguing that Australia has appropriated East Timorese resources. Alternatively or in addition, East Timor might seek a ruling delimiting the continental shelf between Australia and East Timor. Interim orders might be sought preventing the continuation of mining in the Timor Sea, pending the resolution of an East Timorese claim, which could take a long time. Admittedly, the author is being speculative, but not unrealistic.

East Timor could point to Resolution III taken at the Final Session of UNCLOS III. Resolution 3(a) provides that: "Rights and interests flowing to a non-self-governing territory or territory under colonial domination under the Convention shall be preserved for the people of that territory."

In its 1995 judgment, the court noted that East Timor was a non-self-governing territory and retained a right to self-determination. United Nations General Assembly Resolution[60] 1803 concerns the right of peoples and nations to permanent sovereignty over their natural wealth and resources. This resolution has been held to reflect customary international law regarding territorial sovereignty.[61]

[59] Reicher, ed, op cit n 3, at p 948.

[60] B Crocker, "The Timor Gap Treaty – Petroleum Industry Concerns in Post-Suharto Indonesia", International Law Notes, Journal of the International Law Section of the Law Council of Australia (copy on file with author), at p 23 and cited as 17 UN GAOR Supp (No 17), UN Doc A/5217 (1962). Whilst not binding in themselves, Resolutions of the United Nations General Assembly may reflect existing customary international law or contribute to the development of such a law.

[61] *Texaco Overseas Petroleum Co and California Asiatic Oil Co v Libya* (1978) 17 ILM 1 at 30.

In the *Aegean Sea Continental Shelf Case*,[62] the International Court of Justice provided judicial support for the view that a state may not develop resources which are subject to competing sovereignty claims where this will risk irreparable prejudice to existing rights or physical damage to the seabed or subsoil.[63] This would mean that in the absence of an agreement in the Timor Gap, Australia might be prevented from exploiting the resources there.

The Timor Gap Treaty might fall away, even temporarily. This will highlight the uncertain and contentious limits of Australia's continental shelf in the Timor Sea. Whilst this remains unsettled, there would be considerable moral, legal, political and public pressure on Australian commercial interests not to exploit Area A of the ZOC. Many commentators have pointed to the economic benefits accruing to Australia by virtue of the access it has to Area A in the Timor Gap Treaty. With the relative demise in the importance of the principle of natural prolongation in international law, and in light of other relevant factors, a redrawn maritime boundary is likely to exclude the most lucrative part of Area A, from Australian sovereign rights.[64]

One danger of going to the International Court of Justice is that a decision will be handed down which suits neither of the parties to the dispute. Australia has unconditionally accepted the jurisdiction of the International Court of Justice and as such cannot refuse to accept the court's jurisdiction as Indonesia had done with Portugal's challenge.[65]

CONCLUSION

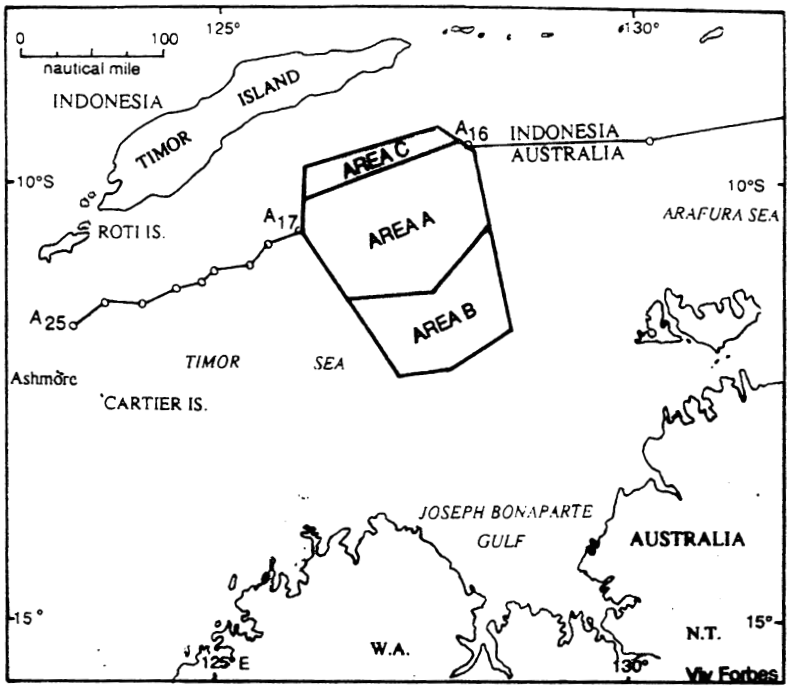
Whilst it is likely that the shared financial interest of both East Timor and Australia will ensure that current oil and gas projects in the Timor Sea continue, the terms of the treaty governing this exploitation are likely to be varied. A case before the International Court of Justice to delineate the Australian continental shelf boundary might also occur. This is likely to present difficulties for oil and gas interests in the Timor Sea who have Production Sharing Contracts predicated on quick exploitation of the contract area. Cooperative measures will need to be agreed between East Timor and Australia in

[62] [1976] ICJ Reports 3.
[63] Triggs, op cit n 27, at p 122.
[64] This is the view argued convincingly by Auburn et al, op cit n 5, p 17. Croker, op cit n 51, also makes this point. A good summary of the shift in international legal opinion and practice away from giving primacy to natural prolongation is contained in Shearer, op cit n 40, pp 244-245. The increased importance of geographic, economic and political factors is also outlined.
[65] Kaye, op cit n 11, at p 97. Kaye's footnote 176 refers.

many areas and failing these, the consensual nature of the Ministerial Council and Joint Authority decision-making bodies might prove to be ineffective.

International law provides few sure indications of changes, which will occur to the terms of any agreement reached on the joint exploitation of Area A. Commercial interests have obtained some guarantees with the agreement between UNTAET and Australia, but only for the short term. Current indications are that East Timor will press for more favourable terms, if not maritime boundaries.

However, under the current international law framework allowing for exploitation of the Timor Sea, time is money and investor confidence is a crucial ingredient in long-term projects. Conflicting rights to the continental shelf and EEZ have the potential to be sources of conflict between those exercising conflicting rights. International politics may thwart economic interests and international law provides little security against this.



Authors note: See footnote 4 for map reference. My thanks to Dr Vivian Forbes for allowing use of this map.

return to AMPLA 2000 Table of Contents