

The Australian and Timor-Leste mar

By Dr Michael White QC*

This article is a summary of a Continuing Legal Education presentation Dr White gave in Darwin on Tuesday 25 January 2005. This event was organised by the Charles Darwin University Law School and the Law Society Northern Territory.

Introduction

After almost three years since Timor-Leste (East Timor) achieved its independence, there is still uncertainty over the maritime boundary between Timor-Leste and Australia and, importantly, which country has the rights to the Greater Sunrise oil and gas fields¹ in the Timor Sea. The Timor Sea Treaty was agreed in 2003 about the Joint Petroleum Development Area which settled many aspects. However, negotiations to settle the other aspects have not been successful but are expected to resume in April 2005. Both governments view these oil and gas resources as very lucrative sources of revenue for their respective nations. This summary of the presentation given to the Northern Territory Law Society and Charles Darwin University Law School on 25 January 2005 outlines the principal arguments by the two governments and the position of the relevant oil companies.

Background

In May 2002, Australia and Timor-Leste signed the Timor Sea Treaty. This Treaty was enacted into Australian law in 2003,² and into the law of Timor-Leste in 2002.³ The Treaty outlined the arrangements for the Joint Petroleum Development Area (JPDA).⁴ Under the Treaty, the JPDA is jointly managed and controlled by Timor-Leste and Australia,⁵ and the taxing rights to approximately 90 percent of the petroleum produced in the JPDA belongs to Timor-Leste and ten percent belongs to Australia.⁶ The regime created by the Treaty is to last for 30 years, or until the settlement of a permanent maritime boundary, whichever is sooner.⁷

The principal point of controversy in the discussions between Australia and Timor-Leste relates to petroleum reserves that straddle the boundaries

of the JPDA. Under the Treaty, any such reserves that straddle the border of the JPDA must be the subject of a unitization agreement.⁸ One such unitization agreement, dealing with the Greater Sunrise field, was included as an Annex to the Treaty,⁹ and was the subject of the subsequent *International Unitisation Agreement for Greater Sunrise* (IUA).¹⁰ Under the Greater Sunrise unitization agreement Timor-Leste's entitlement is 18 percent¹¹. While the Timor-Leste Government agreed to this allocation in the Timor Sea Treaty and in the IUA, it has subsequently expressed reservations about the arrangement and has not yet enacted the IUA. Australia has called on Timor-Leste "to do what is necessary on its part to ensure the IUA's entry into force."¹²

The Greater Sunrise controversy is linked to the broader debate over the appropriate placement of the permanent maritime boundary between Australia and Timor-Leste. Ordinarily, a dispute over maritime boundaries could be compulsorily resolved by the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS). This option is now unavailable, however, because Australia withdrew its recognition of this compulsory jurisdiction in March 2002. Accordingly, the permanent maritime boundary can only be settled by negotiations. Talks between Australia and Timor-Leste over a permanent boundary were conducted in various stages throughout 2004, but no agreement was reached. The Australian Government has invited the Timor-Leste Government to re-commence talks in the first quarter of 2005.¹³

The position of the Australian Government

The Australian Government argues that maritime boundaries are best

settled by negotiation rather than by arbitration before the ICJ or ITLOS.¹⁴ In determining the boundaries on either side of the JPDA, the Australian Government argues that international law supports an Australian claim extending to the end of the continental shelf.¹⁵ The location of the Timor Trough, which marks the end of the continental shelf for both countries lies close to Timor-Leste. Moreover, the areas to the east and west of the JPDA and south of the 1972 Australia-Indonesia boundary are said to be areas of exclusive Australian seabed jurisdiction.¹⁶ Crucially, these eastern and western areas include parts of the Greater Sunrise field and the Buffalo, Corallina and Laminiara fields respectively. The Buffalo, Corallina and Laminiara fields are currently being exploited under Australian Government license¹⁷ and all revenue accrues to Australia from them. The Australian Government also states that socio-economic factors – such as the differing living standards in Australia and Timor-Leste – are not relevant in determining permanent maritime boundaries.¹⁸

The position of the Timor-Leste Government

The Timor-Leste Government bases its argument on the maritime boundary lines of equidistance.¹⁹ Timor-Leste argues that the entire Timor Sea Treaty area and the Greater Sunrise, Buffalo, Corallina and Laminiara fields are all on the Timor-Leste side of the lines of equidistance.²⁰ Accordingly, Timor-Leste is entitled to exploit these

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itime boundary & oil and gas treaty

resources; which come to US\$12 billion in revenue over the life of the fields as opposed to the US\$4 billion it will receive under the current regime.²¹ Timor-Leste advances that these revenues could improve the lives of the citizens of "one of the poorest nations in the world" and that a wealthy developed nation like Australia has a lesser need for such income.²² Timor-Leste also implicitly criticizes the Australian decision to withdraw from the compulsory dispute resolution mechanisms of the ICJ and ITLOS.²³ It emphasizes that it has never agreed to the maritime boundary that Australia and Indonesia agreed, which is the boundary that Australia now wishes to impose on it.

The position of the oil companies

The ongoing uncertainty over the Greater Sunrise field, and the maritime boundary generally, has jeopardized the willingness of the relevant oil companies to invest the huge sums of money required to exploit the Greater Sunrise field. Woodside Petroleum, which is the project operator for the multi-billion dollar Greater Sunrise gas project, announced in January 2005 that it had suspended work on the project due to a lack of "legal and fiscal certainty."²⁴ Woodside has stated publicly that the venture, which also includes the Royal Dutch/Shell Group, ConocoPhillips and Osaka Gas Co, may now be stalled for up to a decade.²⁵ On the western side of the JPDA, the oil companies operating the Buffalo, Corallina and Laminiara fields would be most unhappy to see the stability under which they operate these fields undermined.

Conclusions

It is desirable that the ongoing uncertainty over the maritime boundary be resolved as soon as possible. Achieving such a resolution has been made difficult by the refusal of the Australian Government to accept a decision by an independent court or tribunal. Until the negotiations

achieve a resolution, or Australia agrees to an independent decision, neither country will benefit from the revenue from exploiting the Timor Sea's Greater Sunrise resources. The negotiations between Australia and Timor-Leste will be a developing issue in 2005.^①

Endnotes

- ¹ 'Greater Sunrise' is comprised of Sunrise and Troubador fields.
- ² Petroleum (Timor Sea Treaty) Act 2003 (Cth)
- ³ Timor-Leste Timor Sea Office. Timor Sea Treaty fact sheet. 2003-2004. Accessible at <http://www.timorseaoffice.gov.tp/tstfacts.htm>.
- ⁴ Map available from: Australian Department of Foreign Affairs and Trade, 'Australia-East Timor Maritime Boundaries: Finding an Equitable Solution' http://www.dfat.gov.au/geo/east_timor/a_et_nov_bound.pdf last accessed 2 February 2005.
- ⁵ Timor Sea Treaty, Article 3.
- ⁶ Timor Sea Treaty, Article 4.
- ⁷ Timor Sea Treaty, Article 22.
- ⁸ Timor Sea Treaty, Article 9. 'Unitization' is desirable where a field lies underground partly in one party's exploitation area and partly in another's. If they both exploit in a race against each other they both lose. Agreement avoids this situation.
- ⁹ Timor Sea Treaty, Annex E (under Article 9(b)).
- ¹⁰ The IUA was implemented into Australian law as the Greater Sunrise Unitisation Agreement Implementation Act 2004 (Cth).
- ¹¹ Timor-Leste's entitlement is 90 percent of 20.1 percent = 18.09 percent.
- ¹² Department of Foreign Affairs and Trade. Australia-East Timor Maritime Boundaries: Finding an Equitable Solution. November 2004. Accessible at http://www.dfat.gov.au/geo/east_timor/a_et_nov_bound.pdf
- ¹³ MacDonald-Smith, Angela. "Australia Invites East Timor to Resume Talks on Sea Boundaries." Bloomberg, 17 January 2005. Accessible at <http://www.bloomberg.com/apps/news?pid=71000001>

&refer= australia&sid=av.dX7HfB0Zc. Last accessed 2 February 2005.

¹⁴ Note 12

¹⁵ Note 12

¹⁶ Note 12

¹⁷ Timor-Leste Timor Sea Office Fact Sheet: Summary. 2003-2004. Accessible at <http://www.timorseaoffice.gov.tp/summary.htm>

¹⁸ Note 12

¹⁹ Note 17

²⁰ Note 17

²¹ Note 17

²² Note 17

²³ Note 17

²⁴ Dyer, Paul. "\$7bn gas project shelved." Northern Territory News, 15 January 2005. Accessible at <http://www.ntnews.news.com.au/printpage/0,5942,11946005,00.html>. Last accessed 2 February 2005.

²⁵ Note 13.

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