

Associate Paper

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Thou Shalt Not Covet Thy Neighbour's Continental Shelf: Australia's Timor Sea Maritime Boundary

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Key Points

- Australia and Timor-Leste are both Parties to the 1982 United Nations Law of the Sea Convention, which came into force between them on 2 February 2013.
- An Agreement to formalise the maritime boundaries alignment in the Timor Sea was signed by the two countries on 6 March 2018.
- The alignment of the maritime boundary is only partially determined by that Agreement, Article 7(1) of which makes provision for the establishment of the "Greater Sunrise Special Regime".
- As of July 2019, the Agreement is yet to enter into force.
- The development plans for the Greater Sunrise hydrocarbon reserve, of which the Timor-Leste Government now has a controlling share, raise concerns for potential operators.

Summary

Coveting a neighbour's continental shelf is a trend that has caused diplomatic rifts and become a contentious issue since the early 1960s. There are some recent cases where coastal and/or island States have experienced the problem in regional seas, for example, in the Arctic Ocean, the East and South China Seas, the Falklands Basin and the Timor Sea. Perhaps this ruffling of diplomatic feathers relating to the continental shelf may be partially attributed to select provisions contained in the Third United Nations Law of the Sea Convention 1982 (the 1982 Convention), in particular, the delimitation of a maritime boundary for the purpose of allocating jurisdictional limits to access marine resources.

This narrative focuses on the Timor Sea and the sovereignty issue over the part of the continental shelf that is adjacent to Australia's northern coast and which has been coveted by both Indonesia and Timor-Leste.

This study opines that the Government of Australia was pressured to forfeit its 'seabed rights' in the name of 'equitable principles' and 'social justice', regardless of the fact that geographical reality and the 'special circumstances of the case' that are perceived to apply in this instance were totally disregarded. That said, Australia had apparently nailed itself into the "coffin-shaped" Timor Gap Treaty's Zone of Co-operation over the continental shelf issue in 1989 and again on 14 March 1997, when it signed in Perth an Agreement with Indonesia relating to certain maritime boundaries. Finally, successive governments were persuaded, even pressured, to accede to demands from Timor-Leste for a larger proportion of Australia's continental shelf and access to the hydrocarbon reserves contained therein, in agreements during 2002, 2006, 2013 and 2018.

Analysis

The Continental Shelf

The natural continental shelf (CS) is a portion of submerged land that extends from, and is adjacent to, the coastline. Water depth along the continental shelf varies; however, an arbitrary value of 200 metres (the 200-m isobath as depicted on nautical charts) is generally considered the limiting depth. The shelf usually ends at a point of increasing slope. It is part of a coastal/island State's continental margin. The width of the natural continental shelf varies. The Siberian Shelf in the Arctic Ocean stretches to 1,500 kilometres. The South China Sea lies over an extensive area of continental shelf, as do the Arafura and Timor Seas over the Australian continental shelf. For the purpose of this narrative, our attention is directed to the natural continental shelf (or what is generally considered the *inner continental shelf*). In the context of this study, the width of natural continental shelf in question ranges from 170 nautical miles (M) in the east (just north of Bathurst Island) to 180M from Cape Londonderry, along the northern West Australian coast.

The natural continental shelf is covered by sediment derived from erosion of the continent, which is mostly transported by rivers. Continental shelves generally teem with life due to the amount of sunlight penetrating the relatively shallow waters. On certain continental shelves, however, marine life has been harvested to such an extent that fish stocks have been depleted, such as in the South China Sea. Indeed, overfishing in the Timor Sea within Australia's continental shelf during the 1970s, by foreign-flagged deep-sea trawlers, prompted Australian fishery authorities to take necessary steps towards the sustainable development of the marine biotic resources.

Most commercial exploitation of marine mineral resources, such as hydrocarbon extraction and the mining of diamonds and metallic and non-metallic ores takes place on the continental shelf, as for example, in the Persian Gulf, the Red Sea, off the Namibian and Western Australian coasts and along the rim of the South China Sea. Such activities in these

regional seas commenced during the 1950s in an era when sovereign rights over a State's continental shelf up to depth of 200 metres (or 100 fathoms), or to a distance where the depth of water admitted the exploitation of the resource, were claimed by coastal States that were party to the 1958 *Convention on the Continental Shelf* (the 1958 Convention).

The 1982 Convention

The 1958 Convention was partly superseded by the 1982 Convention. Likened to a constitution of the oceans, the 1982 Convention has gained nearly universal acceptance since it came into force on 16 November 1994.

A significant aspect of the 1982 Convention is that it gives coastal and island States the right to explore and exploit marine biotic and mineral resources adjacent to their territorial sea in two jurisdictional zones: the Exclusive Economic Zone (EEZ), which can extend 200 nautical miles (M) from the State's territorial sea baseline system, and in the instance of the "legal" or *outer continental shelf* (OCS), which can extend to as much 350M where circumstances permit.

Articles 74(1) and 83(1) of the 1982 Convention, which are identical, indicate however that: 'The delimitation of the (EEZ/CS) between States with opposite or adjacent coasts shall be created by agreement on the basis of international law ... in order to achieve an equitable solution'. Further provision is made in Articles 74(3) and 83(3) that:

Pending agreement (on the delimitation of the EEZ/CS), the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangement of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of a final agreement. Such arrangements shall be without prejudice to the final delimitation.

The above provision has introduced varied interpretations as to the application of the international law. It is just one of many aspects of the 1982 Convention that has caused confusion and brought about many bilateral disputes, for example, between the Bahamas and the United States, and in the Arafura and Timor Seas between Australia and its northern neighbours, Indonesia and Timor-Leste; not to mention the multilateral dispute between China and the littoral States of the South China Sea. The rather ambiguous or vaguely ideological (and idealistic) phrases such as 'equitable principles', 'special circumstances of the case', 'general configuration of the coastline' and 'modified equidistance' offer a plethora of legal options that are open to interpretation.

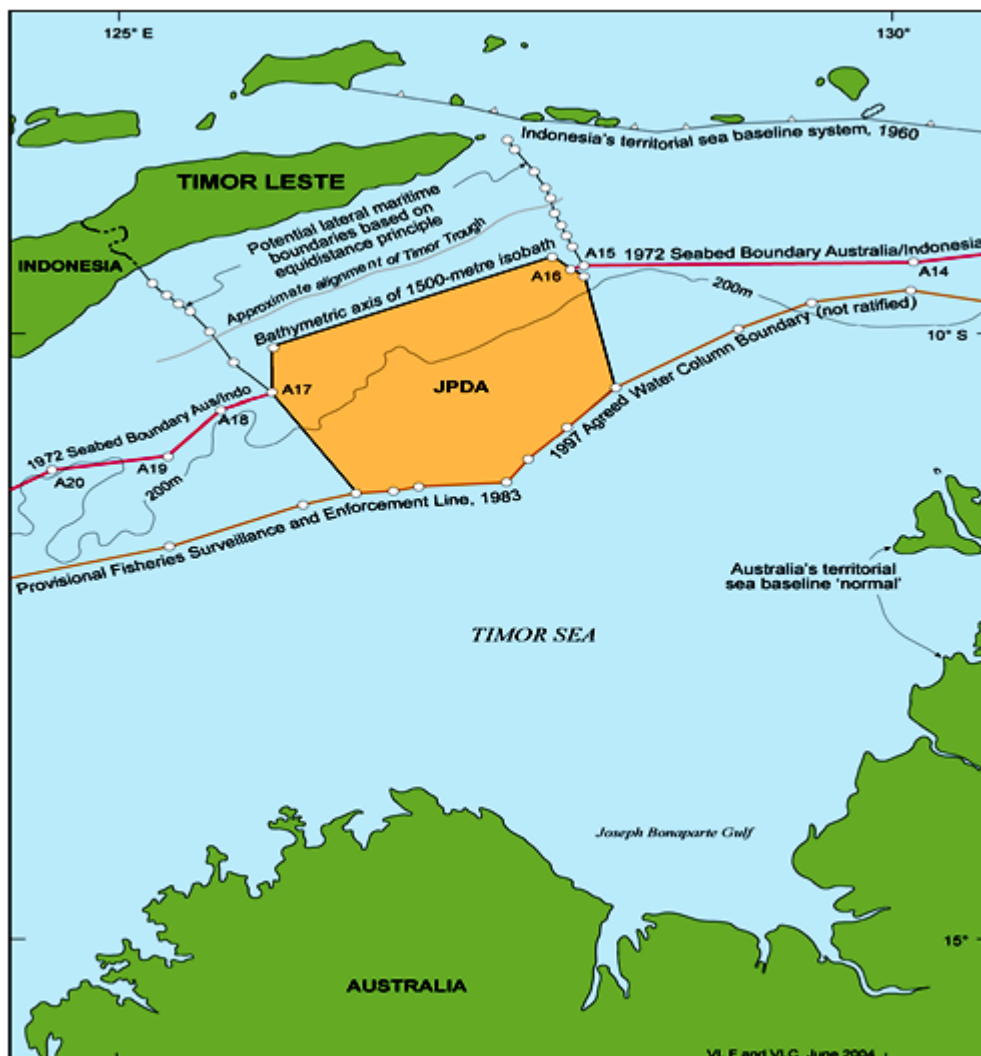
Background

The Timor Trough, with a depth of about 3,500 metres, has a bathymetric axis that extends nearly parallel to Timor Island at a distance of 150M in a north-northeast/south-southwest alignment. Earth scientists consider the bathymetric axis of the Timor Trough to be the tectonic boundary of the Australian/Asian plates. Indeed, it is a subduction-related folded belt and is part of the Sunda Trench. Timor-Leste officials take a fundamentally contradictory

attitude on this matter, inferring that the trough is a mere “crumple” of the seafloor and that Timor-Leste’s continental shelf is thus one with that of Australia.

The Government of Australia enacted the *Seas and Submerged Lands Act* 1963 in accordance with the provisions of the 1958 Convention. The alignment of a maritime boundary in the Timor Sea via the negotiating process has been in dispute since the 1970s. The enabling legislation was the basis upon which Australia and Indonesia established two segments of seabed boundaries in the Arafura and Timor Seas in 1971 and 1972, respectively. Portugal, at that time the coloniser of Timor-Leste, showed little or no interest in the negotiations, contrary to what some recent commentators may suggest.

After the then Governments of Australia and Indonesia negotiated the *Timor Gap Treaty* in 1989 that established the Zone of Co-operation and lines of resource allocation, Portugal, which had apparently relinquished its role as administrator of Timor-Leste, challenged Australia’s motives for the 1989 Treaty at the International Court of Justice in 1995. At that time, Timor-Leste was the twenty-eighth province of Indonesia. The Court failed to hand down a decision because Indonesia was not represented at the Hearing. Indonesia was not a signatory to the 1958 Geneva Convention on the Continental Shelf. The 1989 Treaty and Zone of Co-operation became null and void when superseded by the 1997 Certain Maritime Boundaries Agreement between Australia and Indonesia.



The 1997 Certain Maritime Boundaries Agreement

On 14 March 1997, Australia and Indonesia signed an Agreement that re-defined, or modified, the maritime boundary alignments – thereby creating two regimes – to conform to the provisions of the 1982 Convention. In essence, this Agreement established Certain Maritime Boundaries as a “package deal”, which, 23 years later, is still to be ratified by the respective governments. It created a dual regime for the management of the ocean resources of the Arafura and Timor Seas. It was intended to have water column (EEZ) and seabed (CS) regimes in an area of overlapping claims. In principle, that may be easy to implement; in practical terms, however, the regimes are fraught with problems for administrators, despite what may be claimed by the present-day Government of Australia, and presumably that of Indonesia. Hence, the prolonged delay in entry into force.

For example, within a “Legal Grey Area” [this author’s words], only Indonesian fishers may harvest marine biotic resources in the water column and on the seabed. If, however, Australian companies were to engage in exploring and exploiting the hydrocarbon reserves in the substratum of the seabed, they would first require permission from the Indonesian authority before drilling operations could take place. As an aside, perhaps this was reason enough for one major exploration company to relinquish its operations in that area in May 2019.

In the 30 August 1999 UN-sponsored referendum, the citizens of Timor-Leste voted in favour of independence from Indonesia, and the Zone of Co-operation became null and void. On the Exchange of Notes of 19 February 2000, the floating polygon in the sea was given a new label: the Joint Petroleum Development Area (JPDA), to be operated by Australia and UNTAET (United Nations Transitional Administration in East Timor on behalf of Timor-Leste). The arrangement was formalised on 5 July 2001 in a Memorandum of Understanding in what was termed the 2001 Timor Sea Arrangement. The JPDA corresponded to Area “A” of the 1989 Zone of Co-operation. The JPDA evidently had the blessing of the UN.

The 2002 Timor Sea Treaty

Immediately after Timor-Leste formally declared independence on 20 May 2002, it signed a Timor Sea Treaty which retained the terms of the 2001 arrangements stipulating that the royalties from the hydrocarbons produced from the wells in the JPDA would accrue in favour of Timor-Leste at a ratio of 90:10, with Australia to receive an approximate 80:20 split from royalties from the Greater Sunrise Area. There was also a substantial financial handout from Australia. The latter is documented but rarely mentioned by the media and many commenters. There was international approval for the goodwill shown by Australia and for its commitment to ensure that Timor-Leste would benefit from the equitable sharing of the resources. There was, however, a minority of “do-gooders”, both in and outside Australia, who advised the Government of Timor-Leste that the arrangements were not to their advantage. The Treaty would be in force for 30 years, unless a permanent maritime boundary was established earlier. The Treaty was silent on the sharing of the marine biotic resources and the responsibilities for ocean management.

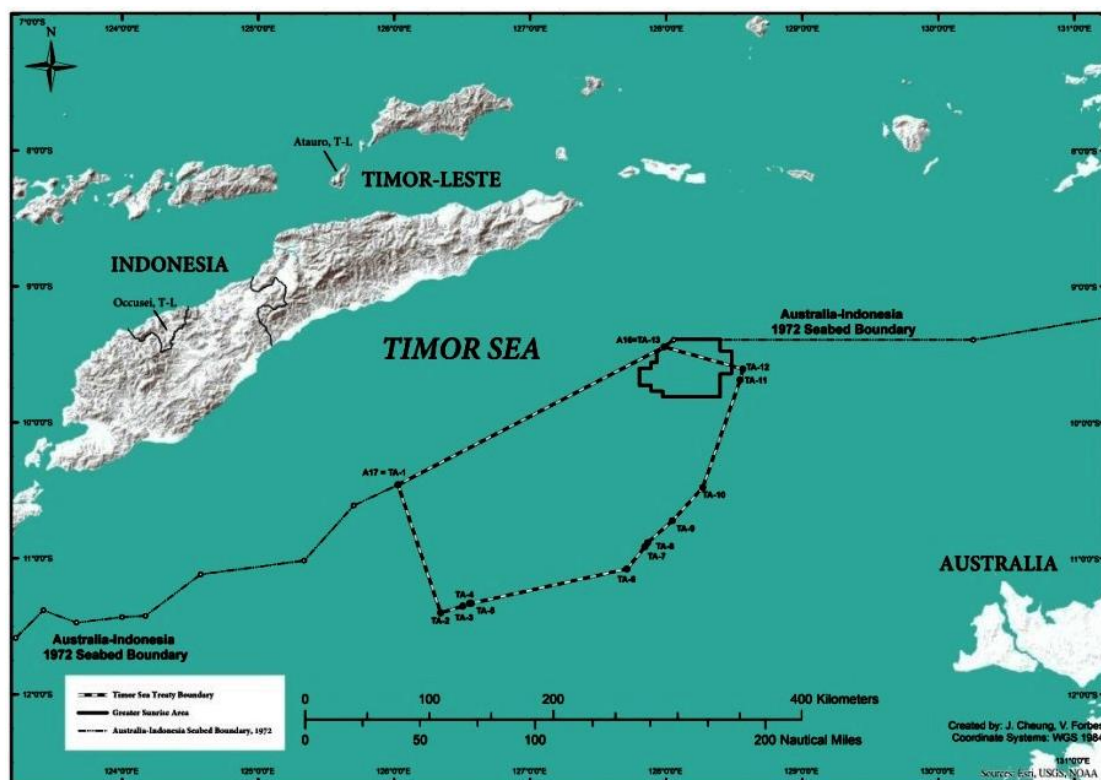
The 2003 Unitisation Agreement

To implement their commitment, one year later, the Parties agreed on the Unitisation of the Greater Sunrise hydrocarbon reserve, which is located at the north-eastern corner of the JPDA and straddles the eastern lateral boundary. The agreement covered administrative matters and carried the proviso that production from the field would not commence unless a development plan was reviewed and approved in accordance with the Agreement. One of the sticking points was the direction to be taken by the pipeline: should it lead to Darwin or to the south coast of Timor-Leste? An existing pipeline connects the Bayu-Undan gas-condensate field to Darwin. In Timor-Leste, the site for downstream processing and which country would gain the greater financial benefit was cause for much angst and debate, perhaps even to the extent of a coveting of the southern neighbour's partial continental shelf.

The 2006 Certain Maritime Arrangements (CMATS)

A second issue was whether Timor-Leste would be entitled to more revenues from Greater Sunrise if the pipeline were aligned towards Darwin. After several meetings, on 12 January 2006, the two countries signed yet another agreement on Certain Maritime Arrangements.

A protracted legal battle with Australia over the Greater Sunrise hydrocarbon deposits ensued, which ran counter to the economic and security interests of Timor-Leste. The domestic security and economic development of Timor-Leste would be better served by giving exploration companies the confidence that they are dealing with stable political entities in which taxation rules are applied transparently and impartially, and ethical business practices are maintained.



The Greater Sunrise field and the Joint Petroleum Development Area (JPDA).
Source: Author

The 2018 Maritime Boundary Treaty

The Governments of Australia and the Democratic Republic of Timor-Leste successfully re-defined their maritime boundaries in the Timor Sea with the signing at UN Headquarters in New York of the Maritime Boundary Treaty, on 6 March 2018.

The 2018 Treaty is an historic agreement for Australia and Timor-Leste that further cements the foundation for the relationship between the two close neighbours and which will benefit both countries. Australia recognised the significance of it for Timor-Leste and is committed to finding an outcome that would best support Timor-Leste's future.

The 2018 Treaty is a testament to the way in which international law, in particular the 1982 Convention, reinforces stability and allows countries to resolve disputes peacefully without coercion. It is an example of the rules-based order in action.

Australia and Timor-Leste acknowledge their continued commitment to their close relationship and that they will continue to work together on their shared economic, developmental and regional interests. Australia, through its actions, supported the international rules-based order and the 1982 Convention. Even so, there are a number of inherent problems with the 2018 Treaty, including:

- The fact that Indonesia and Timor-Leste have not defined or delimited their lateral maritime boundaries in the Timor Sea;
- After 22 years, the 1997 Agreement between Australia and Indonesia still awaits ratification;
- Indonesia has since indicated that it would like to revisit the terms of the 1997 Agreement.

The Government of Australia is aware that before ratification, technical amendments will be required to reflect the agreed boundaries between Australia, Indonesia and Timor-Leste to determine where the three countries' maritime boundaries intersect (the Common Points or Tri-Points). As of July 2019, Indonesia and Timor-Leste have not delimited their common maritime boundaries and, for that matter, are yet to finalise their terrestrial international political boundary. It stands to reason that the final agreed Common Points will have an impact on Australia's maritime boundary in the Timor Sea.

The reactions of the oil and gas exploration companies involved in this regional sea are difficult to obtain, as are those of fishers and the administrators. Indeed, the economic prospects of the reserves are not fully understood and the hoped-for hydrocarbon bonanza may not live up to expectations.

On 22 November 2018, the Government of Timor-Leste announced that it had bought Shell's stake in the Greater Sunrise oil and gas fields for the sum of for US\$300 million and stated that it would proceed with its contentious plan to pipe the natural resources to its proposed south coast processing plant at Beaço. On 16 April 2019, the Timor-Leste Government

acquired a controlling share in Greater Sunrise with the US\$350 million purchase of the 30 per cent share held by ConocoPhillips.

In retrospect, the Australian Government should have leased to Timor-Leste the Greater Sunrise Field and other prospective hydrocarbon fields for the duration of the economically productive lives of those fields on a peppercorn rental basis and thereby retained sovereignty over the portion of the continental shelf which appears to have been forfeited.

Australia may have led by example and the treaty's model could be used in other disputes in neighbouring regional seas. Exactly how many States would be willing, in an instance like this, to forfeit their seabed rights as, for example, in the South China Sea, is, however, certainly not clear.

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