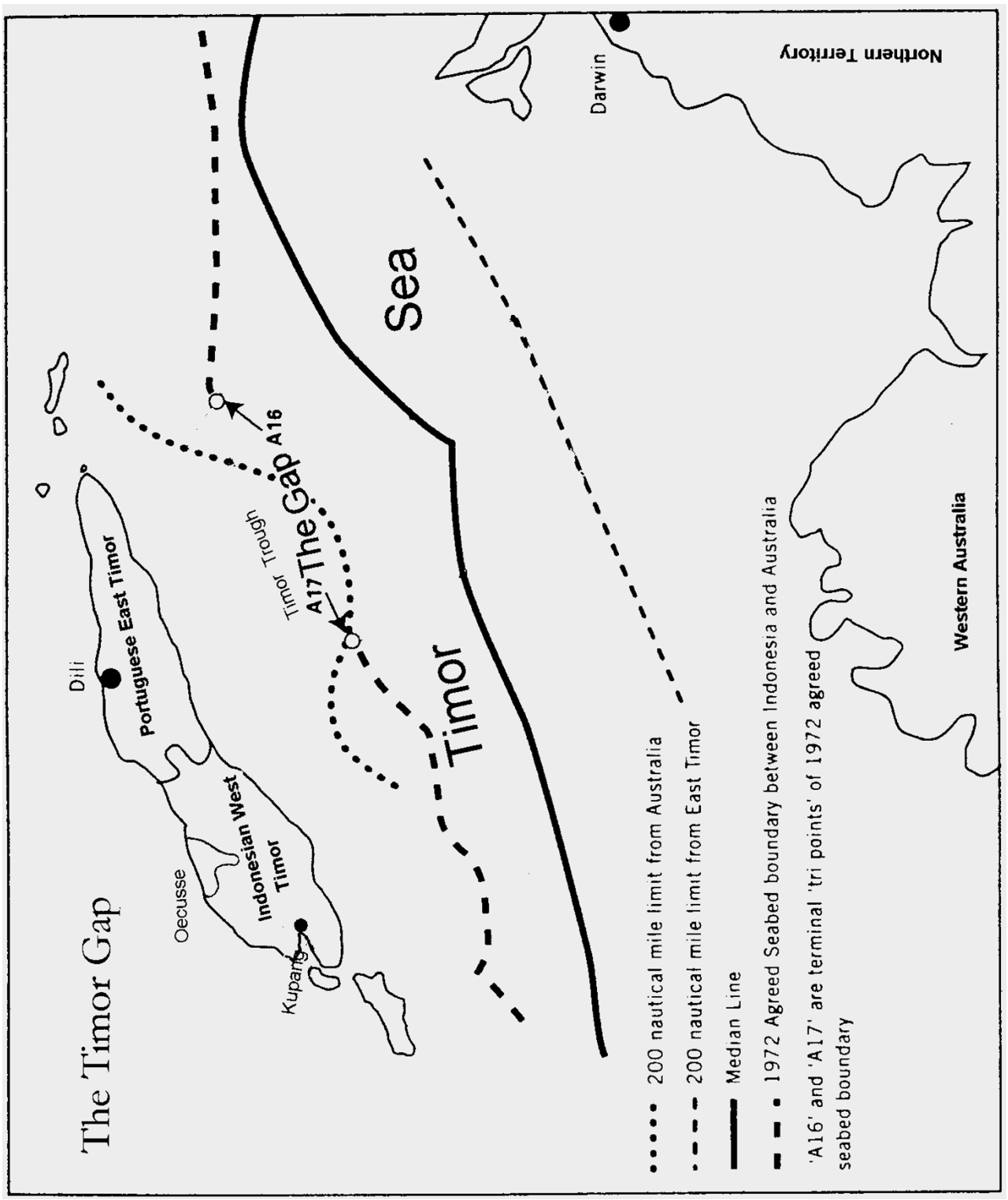
Robert J. King

The Timor Gap, 1972-2018

Submission to the Joint Standing Committee on Treaties on the Australia-Timor Leste *Treaty Establishing Their Maritime Boundaries in the Timor Sea,* 2018


The Timor Gap
Dili
Portuguese East Timor
Oecusse
Indonesian West Timor
Kupang
Timor Trough
A16
A17
The Gap
Timor Sea
Darwin
Northern Territory
Western Australia
200 nautical mile limit from Australia
200 nautical mile limit from East Timor
Median Line
1972 Agreed Seabed boundary between Indonesia and Australia
'A16' and 'A17' are terminal 'tri points' of 1972 agreed seabed boundary

April 2018

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Introduction

The 2018 Australia-Timor Leste *Treaty Establishing Their Maritime Boundaries in the Timor Sea* represents the latest stage in an attempt to reach agreement on an international boundary in the area covered by the Treaty. Between 1965 and 2017, Australian governments pursued the goals of a maritime border facing the island of Timor along the line of the Timor Trough and a concomitant share of the seabed resources of the Timor Sea. A significant first step toward achieving this was gained when Indonesia agreed to a seabed treaty in 1972. In the succeeding forty-five years the trend set very much against Australia gaining its desired outcome. The successive rulers of East Timor—Portugal, Indonesia, the United Nations, and the elected government of an independent country—all insisted on a maritime boundary along lines of equidistance. Australia was successful to the extent of achieving, in the 1989 Timor Gap Treaty and in the 2002 Timor Sea Treaty, an interim arrangement which would have allowed exploitation of the under-sea oil and gas resources to proceed. This was at the cost of having an unresolved dispute with East Timor/Timor Leste. The Certain Maritime Arrangements in the Timor Sea (CMATS), signed in January 2006, put on hold the two countries' claims to jurisdiction and maritime boundaries in the Timor Sea for fifty years. Under the terms of the treaty, Australia agreed to share upstream revenues from the Greater Sunrise oil and gas field equally with Timor-Leste. The CMATS Treaty was complemented by the Sunrise International Unitization Agreement (IUA) The IUA, first agreed in March 2003, would have enabled the development of the Sunrise fields which straddled the eastern border of the Joint Petroleum Development Area in the Timor Sea. The Joint Petroleum Development Area (JPDA) was jointly administered by Australia and East Timor and was established by the 2002 Timor Sea Treaty, under which Dili received 90% of government revenue from the production of petroleum resources in the area.[1] The Timor Sea Treaty replaced the 1989 Timor Gap (Zone of Cooperation) Treaty between Australia and Indonesia, which lapsed when East Timor ceased to be a province of Indonesia following a United Nations supervised act of self-determination on 30 August 1999. The Joint Petroleum Development Area created by the Timor Sea Treaty covered Zone of Cooperation Area A established by the Timor Gap Treaty. The Timor Gap Treaty was hopefully described as a unique arrangement for enabling petroleum exploration and exploitation in offshore areas subject to competing claims by two countries, and for the sharing of the benefits between those countries.[2] It was signed in December 1989 to deal provisionally with the gap in the seabed area not covered by the 1972 Seabed Agreement between Australia and Indonesia, the seabed area between Australia and East Timor. When the 1972 Seabed Agreement was negotiated, a 'gap' was left between the eastern and western parts of the Australia-Indonesia seabed boundary in the area to the south of Portuguese Timor: the 'Timor Gap'.

The creation of the Timor Gap

The necessity for seeking agreement with Australia's neighbours on national seabed boundaries emerged in the 1960s as exploration began to reveal the existence of exploitable deposits of gas and petroleum on the seabed contiguous to the Australian continent. A consortium consisting of Arco Australia Ltd, Australian Aquitaine Pty. Ltd. and Esso Austra1ia Ltd. had begun geophysical exploration in the Timor Sea and Bonaparte Gulf in

1. 'Australia, Timor-Leste bring Sunrise gas treaties into force', *PLATT,* 26 February 2007.
2. Mr Payne. *Senate Foreign Affairs, Defence and Trade References Committee Hansard* (hereafter *Committee Hansard),* 11 November 1999, p.873.

1962.[3] A second consortium comprising Woodside Petroleum, Burmah Oil Company and the Anglo-Dutch Shell Oil Company conducted an aeromagnetic survey in 1963, followed by seismic surveys in each of the years 1964-1968.[4] At the annual conference of the Australian Petroleum Exploration Association in Brisbane in March 1963, Nicholas Boutakoff, Chief Geologist of Woodside and Mid-Eastern Oil companies, delivered a paper in which he noted presciently:

> Most Alpine-type mountain belts have, ahead of the main compression zone of nappes, a folded fore-deep…. On the outer side of this folded fore-deep, moderately vigorous folds usually occur and it is on these folds that oil fields have consistently been discovered in front of Alpine-type overthrust belts. In the present instance, the Alpine belt of Timor and Roti is flanked on the south-east by a fore-deep trough [the Timor Trough] and it is on the southern edge of the latter, that the tectonically active folds here discussed occur. They could be petroliferous.[5]

The extensive exploration efforts undertaken by both consortiums in the Timor Sea/Bonaparte Gulf/Browse Basin area from 1962 had by 1970 revealed the region to be petroliferous, and specifically, 'certain parts of the Bonaparte Gulf-Timor Sea area prospective in the search for viable oil and gas reserves'.[6] Delimitation of respective national claims to the seabed was necessary for exploitation of these reserves to proceed.

Sea-bed negotiations with Indonesia commenced in March 1970, following informal discussions between Australian and Indonesian delegates to the fourth ECAFE (Economic Commission of Asia and the Far East) symposium on the development of regional petroleum resources held in Canberra in November 1969.[7] The Australian government had developed its position on maritime boundaries since 1953 when it laid formal claim to its continental shelf.[8] Australia developed two interpretations of the 1958 Geneva Convention on the Law of the Sea. Article 6.1 of the Convention stated, regarding delimitation of international boundaries:

> Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In absence of agreement, and unless another boundary line is justified by special circumstances, the boundary line is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

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3. R. Laws and C. Kraus, 'The Regional Geology of the Bonaparte Gulf-Timor Sea Area', *APEA (Australian Petroleum Exploration) Journal,* 1974, p.77.
4. R. Mollan *et al.,* 'Geological Framework of the Continental Shelf of North West Australia', *APEA Journal,* 1969, p.49.
5. N. Boutakoff, 'Geology of the off-shore areas of North-Western Australia ', *The APEA Journal,* 1963, pp.10-18, pp.17-18.
6. R. Laws and C. Kraus, 'The Regional Geology of the Bonaparte Gulf-Timor Sea Area', *APEA Journal,* vol.71, part 1, 1974, p.77; also in *Oil and Gas Journal,* vol.72, 18 November 1974, no.46, pp.98-101, no.47, 25 November 1974, pp.160-161. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.60.
7. R. Sorby, 'Indo-Aust. Talks on who owns Off-shore Oil', *The Australian Financial Review,* 4 November 1969; Reply by External Affairs Minister William McMahon to Question Upon Notice, *House of Representatives Debates,* Vol. 71, 1971, p. 546.
8. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours,* No.82, 1972.

The first interpretation by Australia concerned that area of the Arafura Sea, east of longitude 133°14' East, where petroleum exploration permits were granted as far north as the line of equidistance between Australia and West Irian and the Aru Islands. According to the Australian interpretation, the shelf in this area was judged to be common to both Australia and Indonesia.[9] This interpretation provided for the drawing, with relative ease, of an equitable boundary on the equidistance principle.[10]

The second Australian interpretation concerned the area west of that longitude, where permits were granted for areas as far north as the Timor Trough.[11] In a definitive statement in the House of Representatives on 30 October 1970, Minister for External Affairs William McMahon described the Timor Trough as a 'huge steep cleft or declivity, extending in an east-west direction, considerably near[er] to the coast of Timor than to the northern coast of Australia. It is more than 550 nautical miles long and on the average 40 miles wide, and the sea-bed slopes down on opposite sides to a depth of over 10,000 feet [2 miles]'.[12] The significance of the Timor Trough to this second interpretation lay in the development of what McMahon called an 'unmistakably morphological' basis for the Australian claim to this area:

> The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves, separating the two opposite coasts.[13]

For the Australian government, therefore, the Timor Trough separated two distinct continental shelves: a narrow shelf extending from Timor, and a wide shelf extending from the Australian coastline to the base of the Timor Trough. Since the 1958 Geneva Convention did not explicitly address a situation where there were two continental shelves, the Australian government deemed the 'special circumstances' of Article 6.1 of the Convention to apply, while as McMahon explained, 'the fall-back median between the 2 coasts provided for in the absence of agreement, would not apply for there is no common area to delimit'.[14] This view had become encapsulated in the drawing of the Mackay Line. The Mackay Line, or Green Line, was drawn by and named after F.L. (Deric) McCay, First Assistant Secretary, Policy Division, Department of National Development. It followed the foot of Australia's continental slope, and while its precise location was according to journalist Peter Hastings, 'hard to pinpoint, it is known to follow the Timor Trough between 11 degrees South and eight degrees South'.[15]

The Minister for National Development, David Fairbairn, had unsuccessfully argued in a November 1965 Cabinet submission in favour of falling back to the median line, on the ground that the time would soon come when it would be possible to argue that there was a

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9. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours,* No.82, 1972.
10. M.F. Glaessner, 'Legal, Logical and Geological Boundaries of the Australian Continent', *APEA Journal,* 1971, p.34.
11. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours,* No.82, 1972.
12. Minister for External Affairs William McMahon, *House of Representatives Hansard,* Vo1.70, 30 October 1970, p.3108.
13. Minister for External Affairs William McMahon, *House of Representatives Hansard,* Vo1.70, 30 October 1970, p.3108.
14. Minister for External Affairs William McMahon, *House of Representatives Hansard,* Vo1.70, 30 October 1970, p.3108.
15. Peter Hastings, 'Whose Riches Under the Sea?', *The Sydney Morning Herald,* 3 June 1972; J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours,* No.82, 1972. It is not known what Mr McCay thought of the miss-spelling of his name.

common continental shelf between Australia and Timor and that therefore the applicable international rule was the median line. Fairbairn reasoned:

> The time will almost certainly come (and probably quite soon) when depths as great as those of the Timor Trough will be exploitable. It will then be possible to argue that there is a common continental shelf between Australia and Timor and that therefore the applicable international rule is the median line. Whether or not this claim would be legally correct is not the critical matter. Such a claim could nevertheless be maintained by Indonesia. And it could be supported by a 'confrontation' policy consisting of the issue of permits and authorities either to Indonesian or foreign oil search organizations, and the physical implementation of those permits and authorities. Such a situation could thus face us with a decision whether to go to war with Indonesia over a doubtful claim (perhaps for the benefit of a foreign oil company) or whether to repudiate our responsibilities to the people who had taken action and incurred great expenditure in good faith under our grant.[16]

Fairbairn was overruled, the Cabinet preferring the advice of the Attorney-General, B.M. Snedden, to the effect that it was more advantageous to stake a claim in the disputed area and then defend it against any challenges. Snedden observed that Australia's claim had not been challenged in the two years since it had first been asserted and that 'jurisdiction asserted without challenge constitutes a powerful claim in international law'.

A plea for an Australian position based on a wider consideration of national interests was made in June 1971 by C.R. (Robin) Ashwin, Minister at the Australian Mission to the United Nations, who wrote: 'I do not think it can be other than a source of great irritation to the Indonesians in the future if we are extracting oil and other minerals to our great economic advantage only some 30 or so miles from the Indonesian coast but well over 100 miles from Australia'. Keith Brennan, Senior Assistant Secretary, International Legal Division, replied to Ashwin that the Australian position reflected 'a recent and quite uncompromising reaffirmation by Ministers of the Government's stand on the matter. The fact that the Department of National Development believes the Timor Sea to hold particular promise for seabed exploitation makes any concession in the area more than usually difficult'.[17]

Australia's sense of urgency with regard to settling a seabed boundary was heightened by the presumption of vast hydrocarbon reserves in the Timor Sea referred to by Brennan. This was the only area in which Australia faced direct competition to its continental shelf claims or, as Ashwin put it in his letter: 'this is the only point in the whole of our enormous continental shelf where we have this problem'. Since the precise location and extent of these reserves was unknown, and those international laws applicable were in no sense definitive, Australia pursued a claim consistent with securing as much of the Timor Sea seabed as was possible. It appears that in order to secure a favourable settlement of the entire boundary in the Timor Sea, the Australian government first sought to negotiate a favourable settlement with the Indonesian government. Having achieved such a settlement (which implicitly recognized the legitimacy of

16. Cabinet submission No.1165, 'Off-Shore Petroleum', 25 November 1965, National Archives of Australia, NAA A1838/1, 752/1/23, pt.1, pp.8-9.
17. Ashwin to Brennan, 29 June 1971 and Brennan to Ashwin, 12 July 1971, NAA A1838/1, 752/1/23, pt.8, pp.155-6, 163.

Australia's perspective of the sea-floor), the Australian government could then present Portugal with a *fait accompli* in terms of the relevant applicable customary international law.[18]

External Affairs Minister McMahon explained to Parliament on 30 October 1970 that the Australian view 'is, of course well known to Indonesia, [there having] been a recent exchange of views, still incomplete, between Indonesian and Australian officials'.[19] From these preparatory discussions, it became clear that Indonesia did not share the Australian view, counter-arguing that the Timor Trough was merely 'an incidental depression in the sea-floor, not the definitive edge of two shelves'.[20] The *Australian Financial Review* of 16 October 1970 reported: 'Indonesia has already prepared maps showing the boundary of its own 'continental shelf' as the median line between Australia and Timor'.[21]

The sea-bed boundary in the Arafura and eastern part of the Timor Seas proved comparatively easy to negotiate. The agreement signed on 18 May 1971 defined the boundary for 520 nautical miles from the southern terminus of the land boundary between Indonesia and Papua New Guinea as far as meridian 133° 23' East, and was fixed by reference to 13 defined points.[22] This agreement, reached after some fifteen months of negotiations, could only be concluded at this time by distinguishing the basis on which agreement had been reached from that applying to the remainder of the boundary, *i.e*. this boundary approximated the line of equidistance for most of its length.[23]

During the visit of Indonesia's President Soeharto to Australia in February 1972, it was agreed with McMahon (now Prime Minister) 'that all outstanding issues [relating to the sea-bed boundary] should be negotiated at an early date'.[24] *The Canberra Times* reported on 2 May 1972 that the line Australia's negotiators would take was 'likely to involve an attempt at compromise, possibly by drawing a line half-way between where Australia believes the boundary should be, and where the Indonesians would choose to draw it'.[25] After a preliminary conference in September, delegates attended formal negotiations in Jakarta between 2 and 7 October which culminated in the signing of an Agreement on 9 October 1972.[26] The agreement

18. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.69.
19. Minister for External Affairs William McMahon, House of Representatives *Hansard*, Vo1.70, 30 October 1970, pp.3107-3109.
20. Peter Hastings, 'Whose Riches Under The Sea?', *The Sydney Morning Herald,* 3 June 1972; J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours,* No.82, 1972; cited in Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.70.
21. Peter Robinson, 'Aust's 'expanding rim' offshore minerals doctrine in question', *Australian Financial Review,* 16 October 1970.
22. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours,* No.82, 1972; 'Signing of the Sea Bed Agreement with Indonesia', *Current Notes on International Affairs,* Vo1.42, No.5, 1971, p.283.
23. 'Signing of the Sea Bed Agreement with Indonesia', *Current Notes on International Affairs,* Vo1.42, No.5, 1971. p.283.
24. W. McMahon, reply to question, *House of Representatives Hansard*, Vol.78, 1972, pp. 3314-3315; cited in Andrew Mills, *Australian-Indonesian Relations A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.78.
25. Bruce Juddery, 'Jakarta talks on sea boundaries', *The Canberra Times,* 2 May 1972.
26. 'Seabed pact: oil areas lost', *The Age,* 10 October 1972; 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs,*Vo1.43, No.10, 1972, p.509; and Andrew Mills, *Australian-Indonesian Relations A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis,

embodied the compromise suggested by Australia, with the boundary being fixed 'roughly one third of the way down the southern side of the Trough', between the Mackay Line and the median line, but closer to the former.[27]

Article 7 of the agreement provided for a situation arising where a 'single accumulation of liquid hydrocarbons or natural gas, or any other mineral deposit, extends across any of the [border] lines'. In such a case, the two governments were to consult, and seek 'to reach agreement on the manner in which the accumulation or deposit shall be most effectively exploited and in the equitable sharing of the benefits arising from such exploitation'.[28] This article provided a basis for establishing a joint development zone under the 1989 Timor Gap Treaty.

Article 3 of the agreement dealt with the potential need for adjustments to be made, by consultation, to those portions of the boundary lines between points A15 and A16 and between points A17 and A18, should this become necessary in the event of a delimitation of that gap in the boundary created by the Agreement (the 'Timor Gap'). This was an unspoken reference to Portugal (or its successor as ruler of East Timor) as a party to such a future settlement. Points A16 and A17 (at 9°28' South and 127°56' East, and 10°28' South and 126° East) were putatively the junction points of Australian-Indonesian-Portuguese Timor boundaries, but in the absence of tripartite negotiations they had not been agreed to by Portugal. They were the points of intersection of the compromise line agreed by Australia and Indonesia with lines following the shortest distance between the eastern and western points of Portuguese territory on the island of Timor and the nearest points on the opposite Australian coast. Alternative points of intersection along lines drawn at right angles to the coasts were farther apart, and these points would have left a wider gap: as such, the narrower gap left by the agreement represented an encroachment by Australia and Indonesia on the area that could be claimed by Portugal.

Article 3 of the 2018 treaty on maritime boundaries between Australia and Timor-Leste provides for adjustment of the continental shelf boundary between the two countries following settlement of that boundary between Indonesia and Timor-Leste. If those countries agree to an endpoint to their continental shelf boundary west of point A18 on the 1972 Seabed Treaty Boundary, the continental shelf boundary between Australia and Timor-Leste shall be adjusted so that it proceeds in a geodesic line from point TA-2 in the 2018 Treaty (at 11° 24' 00.61" South and 126° 18' 22.48" East), to point A18 (at 18 10° 37' South and 125° 41' East). But this shall not come into force before the commercial depletion of the Laminaria and Corallina Fields. In the event that a continental shelf boundary agreed between Timor-Leste and Indonesia meets the 1972 Seabed Treaty boundary at a point to the west of point A18 on the 1972 Seabed Treaty Boundary, the continental shelf boundary shall be adjusted so that it proceeds in a geodesic line from point TA-11 in the 2018 Treaty (at 9° 42' 21.49" South and 128° 28' 35.97" East), to point A18. But this shall not come into force before the commercial depletion of the Greater Sunrise Fields.

University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.78. The text of the treaty is at the Australian Treaty Series website:
http://www.austlii.edu.au/au/other/dfat/treaties/1973/32.html

27. C. Cook, 'The Australia-Indonesia Maritime Boundary', unpublished Master of International Law sub-thesis, ANU, Sept. 1984, p.32; Andrew Mills, *Australian-Indonesian Relations A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.78.

28. 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs,* vo1.43, no.10, 1972, p.509.

Why Indonesia agreed to a compromise line in 1972

In 1977 the Indonesian Foreign Minister, Dr. Mochtar Kusamaatmadja, a law of the sea expert who had played a prominent part in the 1971 and 1972 negotiations, claimed that Australia had 'taken Indonesia to the cleaners' in these negotiations.[29] Given that 'both parties welcomed the agreement as a tribute to the spirit of reasonableness and good neighbourliness which had marked the negotiations',[30] there are two areas in which Indonesia could have regarded itself as having been 'taken to the cleaners' in the 1972 negotiations. The first concerned the relevance to the negotiations of plate tectonics theory, or at least the distinction between a single and separate continental shelves. In this regard, 'the Indonesian position has always been [based] on morphological evidence that the shared Continental Shelf ...extends north of Timor'.[31] Yet, according to Dr. Mochtar, 'The Australians were able to talk us into [accepting] that the Timor Trench constituted a natural boundary between the two shelves, which is not true'.[32] He could have drawn support for his view from a definition of the Timor Trough given in a paper published in the *APEA Journal* for 1974, which stated:

> The Timor Trough is a modern bathymetric trench in which water depths exceed 10,000 ft (3000m) ….The formation of the trough is probably due to isostatic adjustment following the collision in the Early Miocene of the Australian and Asian Plates in the region immediately north of the island of Timor.[33]

If the plates collided *north* of Timor then the Trough/Trench was indeed merely 'an incidental depression in the sea-floor, not the definitive edge of two shelves'.[34] In this context, it is notable that there are no volcanoes on the island of Timor. As noted by Burmah Oil's geologist, Angelo Crostella: 'Igneous and earthquake activity occur along the Inner Banda arc, northwest of Timor'.[35] There are volcanoes, usually associated with a continental shelf subduction zone, on the islands to the north of Timor, on the other side of the Ombai-Wetar Strait, in Flores and the other Lesser Sundas islands. The article in the *APEA Journal* drew on a consensus among geologists that had been formed during the 1960s and 1970s. For example, M.G. Audley-Charles, D.J. Carter and J.S. Milsom found in 1972 that Timor had 'formed part of the Australian continental margin since at least the early Permian' and the 'at present, the northern edge of the Australian continent, represented by Timor, is separated across the Wetar

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29. Richard Woolcott, 'Fixed Relations', *The Australian,* 15-16 March 1997. Dr. Mochtar expressed this view again in 1978: Michael Richardson, 'Jakarta's Tough Sea Boundary Claim', *The Australian Financial Review,* 20 December 1978; 'Boundary threat to seabed leases', *The Sydney Morning Herald,* 21 December 1978; and Peter Hastings, 'Re-arranging The Sea Bed A Task For Diplomacy', *Sydney Morning Herald,* 22 December 1978; see also 'Visit of Indonesian Foreign Minister', *Australian Foreign Affairs Record [AFAR],* December 1978, p. 591.
30. 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs,*Vo1.43, No.10, 1972, p.510.
31. P. Hastings, 'Re-arranging the sea bed a task for diplomacy', *Sydney Morning Herald,* 22 December 1978.
32. Dr. Mochtar, in Michael Richardson, 'Jakarta's Tough Sea Boundary Claim', *The Australian Financial Review,* 20 December 1978, and Michael Richardson, 'Tying up Timor's loose ends', *Far Eastern Economic Review,* 5 January 1979, p.45.
33. R. Laws and C. Kraus, 'The Regional Geology of the Bonaparte Gulf-Timor Sea Area', *APEA Journal,* 1974, p.80. In the version of their paper in the 18 November 1974 issue of *Oil and Gas Journal,* Laws and Kraus described the Timor Trough as a 'Plio-Pleistocene downwarp' in the Australian continental shelf southeast of the island of Timor; *Oil and Gas Journal,* vol.72, 1974, no.46, pp.98-99. 'Downwarping' is subsidence of a regional area of the Earth's crust, as in an orogenic belt or a centrocline. See also M. G. Audley-Charles 'Mesozoic Palaeogeography of Australasia', *Palaeogeography, Palaeoclimatology, Palaeoecology,* vol.2, 1966, pp.1-25.
34. Peter Hastings, 'Whose riches under the sea?' *The Sydney Morning Herald,* 3 June 1972.
35. A. Crostella, 'Panel Discussion: Exploration in the Far East outside of Japan', Ninth World Petroleum Congress, Tokyo, 1975, *Proceedings,* Vol.3, *Exploration and Transportation,* London, Applied Science Publishers, 1975, p. 124.

Strait from the pre-Pliocene volcanic arc by a minimum of only 40 km'. With regard to the Timor Trough, Audley-Charles *et al.* stated that Timor had formed part of the Australian continental margin since at least the early Permian period, and concluded: 'In an attempt to accommodate the continuing drift of Australia the continental crust south of Timor began to downbuckle, deepening the Timor Trough, with perhaps incipient underthrusting'.[36] The southern edge of the Timor Trough has been defined as a hingeline in the Australian continental shelf.[37] Geologically, a hingeline is a line or boundary between a stable region and a region undergoing upward or downward movement.[38] At the World Petroleum Congress in Tokyo in May 1975, Angelo Crostella presented a comprehensive set of reasons for placing the Timor subduction zone to the north of the Lesser Sundas rather than regarding the Timor Trough as the site of the north dipping subduction zone, including that, 'Gravity data indicate that the Australian continental crust is continuous under the Timor Sea and Timor itself'.[39]

As later explained by Professor Gordon Lister, Director of the Australian Crustal Research Centre at Monash University, with regard to the tectonic movements along the line of impact between north-west Australia and the Sunda archipelago, the geological trend was for Timor to be ultimately absorbed by the Australian continent: 'Timor is pretty well on board now, it'll be further on board as time goes by. As Java rides over the Australian plate it will push the sediments up, and that's why we have oil in the Timor Gap now'.[40]

Had they so wished, the Indonesians could have pursued avenues other than that chosen to place greater pressure on Australia to reduce or alter its claim. These included waiting, like Portugal, for the forthcoming United Nations Conference on the Law of the Sea (UNCLOS) to determine appropriate guidelines; international arbitration; or waiting for scientific confirmation of its claim. All of these options would probably have involved a period of several years waiting, and the implementation of such action could hardly be interpreted as 'good neighbourly' behaviour in circumstances where the Soeharto Government felt under a compulsion to reciprocate Australian gestures of goodwill. The 1972 Agreement reflected the prevailing pressures to add substance to bilateral relations.[41] Both Prime Minister McMahon and President Soeharto had at their meeting in Canberra in February 1972 'expressed the belief that the relationship.…was moving into a phase where it was possible to put more substance and content into that relationship'.[42]

Australian gestures in this regard included its involvement since 1966 in the Inter-Government Group on Indonesia (IGGI), the proportional increase in the amount of

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36. M.G. Audley-Charles, D.J. Carter and J.S. Milsom, 'Tectonic Development of Eastern Indonesia in Relation to Gondwanaland Dispersal', *Nature Physical Science,* vol.239, 18 September 1972, pp.35-39. "Downbuckling" refers to compressional downfolding of sialic crust, associated with oceanic trenches. "Sialic crust" is the upper layer of the Earth's crust, rich in silica and alumina, characteristic of the upper continental crust.
37. Warren Hamilton, *Tectonics of the Indonesian Region,* Geological Survey Professional Paper 1078, Washington, U.S. Government Printing Office, 1979, p.144.
38. Klaus K. E. Neuendorf, Julia A. Jackson and James P. Mehl, *Glossary of Geology,* 5th edn., Alexandria, Va, Springer Science & Business Media, 2005, p.302.
39. A. Crostella, 'Panel Discussion: Exploration in the Far East outside of Japan', Ninth World Petroleum Congress, Tokyo, 1975, *Proceedings,* Vol.3, *Exploration and Transportation,* London, Applied Science Publishers, 1975, p. 124.
40. Simon Grose, 'Australia adrift in global shift', *The Canberra Times,* 8 June 2001.
41. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.86.
42. 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs,*Vo1.43, No.10, 1972, p.510.

foreign aid directed to Indonesia from 1966, the commencement of a formal Defence Co-operation Program in June 1972 (the Program provided $20m for the period July 1972 to June 1975, including the transfer of Sabre jets [$6.lm] and mapping in Indonesia [$2m]), and preparations for Indonesia to become a 'most favoured nation' under the terms of a trade treaty. In addition, business links had become increasingly strong since 1966, although by 1972, these had not resulted in the creation of any significant bilateral economic ties. As noted by Andrew Mills, this factor by itself is indicative of Indonesia's position of deficit in the development of bilateral relations, in that economic co-operation was very much 'one way traffic' to Indonesia, in the form of Australian investment and a trade imbalance in favour of Australia.

While this was of comparatively little significance in relation to Australian civilian and military aid, as well as Australian diplomatic initiatives, together these factors pointed to a situation in which Australia was providing greater input into the substance of bilateral relations than was Indonesia. This was symptomatic of the asymmetry already implicit in bilateral relations at this time but, for diplomatic reasons if for no other, Indonesia needed to demonstrate its commitment to them. Agreement to the compromise suggested by Australia at the seabed negotiations offered Indonesia the opportunity to make a pragmatic reciprocatory gesture for accumulated Australian 'goodwill'. That reciprocation should occur in the seabed negotiations is demonstration of the limited options available to Indonesia in its choice of mechanisms to substantiate its claim of fostering better bilateral relations.[43]

While this in large part explains Indonesia's being in as much a 'hurry' as Australia to reach an agreement, it does not explain Dr. Mochtar's second claim concerning the 'fairness', or otherwise of the actual Agreement. This may be explained by the extent of Indonesia's knowledge of the region's hydrocarbon potential at the time of the negotiations. There is some doubt as to whether or not Indonesia knew of those prospective areas in the vicinity of the median line, and between it and the Timor Trough, which on the basis of extrapolation from seismic data Australia presumed to exist. No exploration had been carried out in the Timor Sea by Indonesian concessionaries. The wells discovered to 1972 were all on the Australian side of the median line. If the Indonesian negotiators were fully cognizant of these details, then it would appear that Indonesia's agreement to the Australian compromise was an act of even greater largesse.[44] Mochtar's complaint could also have been a reference to Australian knowledge of the Indonesian negotiating position, illicitly obtained.[45]

East Timor’s Foreign Minister José Ramos Horta said in May 2004 that when he asked his Indonesian counterpart, Hassan Wirajuda, why Indonesia had accepted Australia’s claim in 1972, Wirajuda replied that Indonesia was politically very weak at that time, and was also especially concerned to gain recognition of its archipelagic concept of treating the area between its islands as internal territorial waters.[46] Senior Indonesian diplomat Hashim Djalal, who participated in the seabed boundary talks with Australia, said in July 2004 his delegation sought to argue for a median line under the then 1958 UN Continental Shelf Convention because of its contention that the meeting point of the two plates was actually north of Timor.

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43. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.85.
44. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.87.
45. Hamish McDonald, ‘Sounding the gap’, *The Sydney Morning Herald,* 21 October 2000; Hamish McDonald, ‘It’s tiny, poor, and very possibly not going to take it anymore’, *The Global Mail,* March 28, 2013; Brian Toohey, ‘Brandis wades into troubled waters’, *The Australian Financial Review,* 7 December 2013.
46. Rowan Callick, ‘Tiny Timor treads warily among giants’, *The Australian Financial Review,* 31 May 2004.

He explained that Jakarta, a signatory to the 1958 convention, could not produce sufficient evidence to prove its theory, while Australia was able to 'bombard' the Indonesians with a mass of data collected by oceanographic-research vessels and navy submarines to back its claim. Djalal said the Indonesians were unaware of the Timor Sea's oil-and-gas potential at that time. But he also acknowledged that regional politics could have been one reason why Jakarta spurned Portugal's suggestion to form a united front against the Australians: 'Indonesia wanted to be a good neighbour after *Konfrontasi* [the armed confrontation in the early 1960s between Indonesia and Malaysia, in which Malaysia was supported by Britain, Australia and New Zealand]'.[47] It is also noteworthy that Indonesia declined to have border talks with Portugal for fear, as Dr Mochtar said, that these would imply endorsement of the colonial regime in Timor.[48]

Negotiations with Portugal to close the Timor Gap, 1970-1974

Initially, Australia was unwilling to negotiate at all with Portugal. A Cabinet submission of 25 November 1965 noted that the difficulty in negotiating a seabed agreement with Portugal was that it would imply a degree of acceptance of Portugal's right to share in decisions permanently affecting the future of the area and, referring to the view expressed by Cabinet in February 1963 that 'no practicable alternative to eventual Indonesian sovereignty over Portuguese Timor presented itself', concluded: 'as a consequence, it would seem preferable not to seek negotiations with Portugal'.[49]

In November 1970, the Portuguese Ministry of Foreign Affairs took note of the concessions granted by Australia in the Timor Sea in areas where Portugal itself intended to grant concessions, and therefore considered it desirable that urgent consultations take place, preferably in December 1970.[50] This did not happen, and on 20 April 1971 the Portuguese Ambassador in Canberra, Carlos Empis Wemans, renewed the request for negotiations at a meeting with Department of External Affairs Deputy Secretary Ralph Harry. He was informed that Australia preferred to conclude the negotiations then taking place with Indonesia on a seabed boundary before entering into negotiations with Portugal. Wemans protested that in that case Portugal would be presented with a position on the boundary which had already been agreed with a third country.[51] Apparently Australia and Indonesia saw fit to hold negotiations on what was in fact a boundary between three countries without including Portugal: the terminal points of the Australia-Indonesia-Portuguese Timor boundaries did require the agreement of Portugal, which was not obtained.

Harry drew to the attention of Wemans an announcement in the *Boletim Oficial de Timor* of 24 October 1970 of a request from Oceanic Exploration Company for an exploration concession in an area of the Timor Sea which overlapped an area claimed by Australia. Oceanic had written to the Ministro do Ultramar on 31 December 1968 applying for an oil and gas exploration lease. In describing the area of the Timor Sea for which it was applying,

47. John McBeth, 'Canberra's Sea of Troubles', *Far Eastern Economic Review,* 8 July, 2004.
48. Australian Embassy, Jakarta, to Canberra, 6 January 1971, NAA A1838, 756/1/4, pt.1, f.54.
49. Cabinet submission No.1165, 'Off-Shore Petroleum', 25 November 1965, NAA A1838/1, 752/1/23, pt.1, f.7.
50. Note verbale no 5191 du 2 novembre 1970 du Ministère des Affaires Etrangères portugais à l'Ambassade de l'Australie à Lisbonne, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, Vol.V, Annexe IV.4, p.280.
51. Télégramme de l'Ambassade du Portugal à Camberra au Ministre des Affaires Etrangères portugais en date du 20 avril 1971, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, Vol.V, Annexe IV.5, p.283.

Oceanic noted that there were two ways of deciding the eastern and western division points between Portuguese Timor and Australia: 'If one uses perpendicular lines to shore between the Island of Timor and Northwestern Australia, the larger area prevails. If one, however, applies diagonal lines to establish the median point, then the smaller area prevails'.[52] In the 1972 Australia-Indonesia seabed agreement, the terminal points of the Timor Gap (A16 and A17) were established using the diagonal lines, thus encroaching on the Portuguese area.

The Department of External Affairs replied to Wemans in a note of 25 May 1971, drawing his attention to the statement made in Parliament by External Affairs Minister McMahon on 30 October 1970, and stating Australia's claim that the whole of the area of the Timor Sea specified in the *Petroleum (Submerged Lands) Act 1967* formed part of the continental shelf belonging to Australia. The specified area was bounded by the Timor Trough. This being so, 'no question of negotiating a common boundary will arise where an area of ocean floor [*i.e.,* the Timor Trough] lies between the two shelves'.[53] An editorial in *The Age* of 11 October 1972 anticipated 'agreement with the Portuguese Government on the area lying off eastern Timor should follow the line already established'.[54]

In a statement that verged on the disingenuous, Minister for National Development Reginald Schwartz advised the Parliament on 26 October 1972 that the Portuguese Government had not made known its position.[55] Although the Australian Government was officially informed of Portugal's view only after the signing of the treaty with Indonesia in October 1972, it was known unofficially long before: the Australian embassy in Lisbon advised in a letter of 21 August 1971 that, 'Surprising as it may seem, they [the Portuguese authorities] take the view that there is one shelf there, not two, and that the Timor trough does not constitute a division between one shelf and another'.[56] A 'special correspondent' writing in *The West Australian* of 3 June 1972 reported that Portugal was expected to support Indonesia's view that the shelf was continuous and the Trough just an indentation in the shelf's surface, while Peter Hastings wrote in *The Sydney Morning Herald* of the same date: 'Obviously the Indonesian view is now shared by Portugal'.[57] The *Far Eastern Economic Review* of 15 July 1972 reported:

> It is understood Portugal will align itself with Indonesia in seeking a share of the rich, shallow sea-bed between Timor and the Australian coast… Indonesia—and now Portugal—will seek a dividing line which would run half-way between Timor and the Australian mainland and cut across a dozen oil lease tenements granted by the Western Australian Government.[58]

On 5 March 1973, the Department of Foreign Affairs wrote to Ambassador Wemans noting that Australia and Indonesia had negotiated seabed boundaries in the Timor Sea, and proposed that negotiations between Australia and Portugal commence in May or June 1973:

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52. Lettre de 'Oceanic Exploration Company' au Directeur-Général de l'économie, Ministère portugais d'Outre-mer, 31 décembre 1968, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, Vol.V, Annexe IV.3, p.277.
53. Note du Ministère des Affaires Etrangères australien à l'Ambassade du Portugal à Camberra du 25 mai 1971, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, Vol.V, Annexe IV.6, p.286.
54. 'Room for two in a seabed', *The Age,* 11 October 1972.
55. *House of Representatives Hansard,* 26 October 1972, p. 3381.
56. T.V. Holland to Secretary, 21 August 1970, NAA A1838/1, 756/1/4, pt.1, f.120.
57. 'Sea-bed row looms over oil-gas field', *The West Australian,* 3 June 1972; Peter Hastings, 'Whose Riches Under The Sea?', *The Sydney Morning Herald,* 3 June 1972.
58. Purita Go and Kingsley Wood, 'Timor: Border problems', *Far Eastern Economic Review,* 15 July 1972, p.21.

'the Australian Government would be grateful to be informed as soon as possible of the response of the Portuguese Government'.[59]

Australian eagerness to conclude a boundary agreement in relation to Portuguese Timor was indicated in a speech by Senate Government Whip Justin O'Byrne on 23 May 1973:

> It can only be to our advantage to have this matter settled amicably. We have the very good fortune to possess a defined area that is potentially rich. It has been stated that this area could become the richest hydrocarbon empire in the world. It contains gas and oil in quantities that could match even the fabulous riches of the Middle East. The future of Australia, at a time when a fuel crisis is developing in the United States of America and when the traditional source of supply of hydrocarbons is the subject of very delicate arrangements, with certain traditional practices being changed and the prices being under barter, is bright. We are extremely fortunate that at this time we are emerging into an era of self-sufficiency or near self-sufficiency in the supply of hydrocarbons.[60]

The optimism expressed by Senator O'Byrne was based on the information gained by Australian exploration companies. Seismic work carried out by Burmah Oil in 1969 and 1970 had given rise to an estimate that the so-called 'Kelp Structure', the most prospective area in the Timor Sea and subsequently part of the Sunrise field, contained between 500 million and 5 billion barrels of oil, and gas reserves of some 65 trillion cubic feet of gas.[61] The Timor Sea, virtually in its entirety, was viewed as a highly prospective area.[62]

Subsequent exploration confirmed estimates of the size and value of the Kelp Structure.[63] In January 2012, Mateus da Costa, Director of Exploration and Acreage Release at the National Petroleum Authority (ANP) of Timor Leste, said that the Kelp Deep was estimated by the ANP to hold about 65 trillion cubic feet of gas, of which 13 tcf was potentially recoverable. The field was discovered by Mobil in 1998 but had lain undeveloped due to the challenging nature of its 'tight, Permian reservoir', said Mr da Costa. If such estimates were firmed up, Kelp Deep would be the country's largest discovery.[64] Mobil discovered Kelp Deep with a wildcat well in 1998, which was plugged and abandoned. The prospect lies in the Permian Hyland Bay petroleum system on the structural Kelp High in the Bonaparte basin. The field's highly mature dry gas was assessed to be very tight and non-producible under conventional conditions at the time. But the discovery did signal that the petroleum system was prospective.[65]

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59. Note 756/1/4 du Ministère des Affaires étrangères australien à l'Ambassade du Portugal, 5 mars 1973, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, Vol.V, Annexe IV.7, p.289. The Department of External Affairs became the Department of Foreign Affairs following the December 1972 change of government.
60. Senator J. O'Byrne, *Senate Hansard,* Vol S 56, 23 May 1973, p.1838. Senator Wriedt, *Senate Hansard,* Vol.56, 23 May 1973, p.1840.
61. Mark Westfield, 'Showdown at Timor Gap', *Australian Business,* 28 March 1984, pp.44-45. 'Into the Timor Gap', *Energy Economist,* 1 August 1992.
62. Addressing the APPEA Conference in Hobart on 9 April 2001, Peter Galbraith, Cabinet Member for Political Affairs and the Timor Sea in the East Timor Transitional Government, said: 'The scale of the resources in the Timor Sea is vast: Bayu-Undan holds 3TCF of gas, Greater Sunrise nearly 10 TCF, Laminaria, Buffalo and Elang Kakatua are producing more than 220,000 barrels per day' (*Maritime Studies,* May/June 2001, p.2).
63. Paul Cleary, *Shakedown: Australia's Grab for Timor Oil,* Crows Nest, Allen & Unwin, 2007, pp.155-6.
64. Iain Esau, 'Timor Leste gets set for offshore round drive', *Upstream,* 6 January 2012. Damon Evans, 'Oil flows and deep-water hope for Timor Leste', Petroleum Economist, 11 October 2011).).
65. Damon Evans, 'Oil flows and deep-water hope for Timor Leste', *Petroleum Economist,* 11 October 2011.

Portugal had claimed sovereignty since 1956 over the seabed in accordance with current international law, subsequently codified in the 1958 Geneva Convention. It was known that for the Timor Sea the Portuguese preference had been a median line determination.[66] Yet, it seemed that the Australian government was reluctant to test the relevance of its prior settlement with Indonesia to that of the remainder of the boundary with Portugal. When asked in the Senate on 23 May 1973 if it was the Australian government's intention to seek international adjudication, Senator Wriedt replied on behalf of the Government that Australia intended to proceed with direct negotiations 'in the hope that we can arrive at some definitive position'.[67] Minister for Minerals and Energy Rex Connor advised the Parliament on 2 May 1973 that Australia had been in contact with the Portuguese Government and expected discussions relating to the seabed to commence later that year (a tacit reference to the letter of 5 March 1973 to the Portuguese Ambassador).[68] The Whitlam Government was reported in July 1973 to be insisting on a seabed boundary along the edge of the Timor Trough (*i.e.* the Mackay Line), even closer to Portuguese Timor than that with Indonesian Timor. Richard Ackland wrote in *The Australian Financial Review*: 'The Whitlam Government has made a particular point of condemning Portuguese colonial activities, and it is only logical to reinforce that position with a hard-nosed approach to a border... However, it is not appropriate for a Timor that someday may be independent'.[69] The Portuguese government indicated in November 1973 that 'they did not wish to begin negotiations until after the United Nations Law of the Sea Conference [UNCLOS], the first session of which was due to open in Caracas in June 1974'.[70]

In January 1974, Portugal granted exploration permits in the Timor Sea to the United States company, Oceanic Exploration.[71] The permit area covered 23,192 square miles (60,700 square kilometres) extending from a point not far from the south coast of Timor to the median line with Australia, and overlapped exploration permits granted by the Australian and Western Australian governments. The Kelp Structure lay within the area of overlap. Portugal thus implemented the ‘confrontation’ style policy that had been foreseen by National Development Minister Fairbairn in 1965. The grant of the permit brought 'a strong diplomatic protest from Canberra'.[72] Portugal ignored the protest and in December 1974 the Ministry of Overseas Territories signed an agreement with Petrotimor, a consortium which grouped Oceanic Exploration with 'Portuguese interests'.[73] The Portuguese action represented a direct challenge to the Australian licenced exploration in the region. It also struck at Australian confidence in

66. 'Sea-bed row looms over oil-gas field', The West-Australian, 3 June 1972; Ian Sinclair, House *of Representatives Hansard,* Vol.105, 2 June 1977, p.2589; P.G. Ross, *The Impact of Geomorphology, Distance and Other Criteria as Determinants in Maritime Boundary Delimitation in the Timor Sea,* MA (Law) thesis, Australian National University, 1984, p. 7.
67. *Senate Hansard,* Vol 56, 23 May 1973, p.1840.
68. *House of Representatives Hansard,* 2 May 1973, p. 1586; also in *Senate Hansard,* 17 May 1973, p.1740.
69. Richard Ackland, 'Australia’s tough stance on Timor sea border', *The Australian Financial Review,* 20 July 1973.
70. Ian Sinclair, *House of Representatives Hansard,* Vol. 105, 2 June 1977, p.2589; Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.87; P.G. Ross, *The Impact of Geomorphology, Distance and Other Criteria as Determinants in Maritime Boundary Delimitation in the Timor Sea,* MA (Law) thesis, Australian National University, 1984, p. 7; 'Whip-crack at Portuguese', *The Age,* 28 March 1974.
71. The lease was first published in the *Diário do Governo* of 31 January 1974, and the notice was reprinted in Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, Vol.V, Annexe IV.8, pp. 291-320.
72. Brian Toohey, 'Oil: Portuguese tail-twisting could backfire', *The Australian Financial Review,* 26 March 1974; 'Whip-crack at Portuguese', *The Age,* 28 March 1974.
73. 'Australia calls for report on oil leases', *The Age,* 14 December 1974.

obtaining a settlement which joined boundaries established with Indonesia in a neat straight line, as had been hoped. This expectation was expressed during debates in both Houses during 1973, and partly arose from the optimism held by the Minister for Minerals and Energy, Rex Connor, that negotiations with Portugal would effect a settlement.[74] Also, Portugal had pre-empted its stated position that it would await the outcome of the impending UNCLOS deliberations, and while the Australian government knew Portugal's preference was for a median line settlement, the granting of the exploration permit to Oceanic Exploration/Petrotimor came as a shock to both the Australian government and its licensed exploration companies.[75]

This shock would have been doubly significant given the confirmation of the region's hydrocarbon potential provided by recent exploration activity in the region. The Woodside-Burmah consortium,[76] whose permits were affected by the Portuguese overlap, had expanded its exploration operations since 1972. From October 1973 it sought to overcome some of the logistic problems of operating in the Timor Sea by basing part of its well servicing operations in Kupang, in Indonesian Timor.[77] The 'Big John' drilling rig was used to drill several wells, first in an area to the west of the Portuguese claim, and then in the Troubadour Shoals area, where it drilled several wells which indicated the presence of gas condensate.[78] Burmah Oil advised the Department of Minerals and Energy on 18 February 1974 that the concession granted to Oceanic Petroleum by the Portuguese government cut across the company's own permit NT/P12, and that 'drilling of Troubadour location in NT/P12 appears to have become more important; we will spud soonest'.[79] Confirmation of the prospectivity of the Timor Sea came when Troubadour No.1 well was drilled in June 1974 on the Troubadour Shoals about 200 kilometres southeast of Timor, and intersected 83 metres of hydrocarbons.[80]

Prime Minister Whitlam's irritation with Portugal over the question of the Timor Sea was expressed in Perth on 25 March 1974, when he revealed to the press during the recording of a television interview that the Australian Government had formally protested to Portugal about its encroachment into offshore resources areas claimed by Australia south of Timor by giving a concession to Oceanic Exploration. Mr Whitlam told an interviewer from Perth's Channel Seven that Portugal had given rights to big sections of the North-West Shelf to an American oil company, and said that in the previous two days the Australian Government had protested to

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74. Mr Connor, *House of Representatives Hansard,* 2 May 1973, p. 1586; Senator O'Byrne, *Senate Hansard,* Vol S 56, 23 May 1973, p.1838.
75. Andrew Mills, Australian-Indonesian Relations: A Study of the Timor Sea Maritime *Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.89.
76. The Woodside consortium comprised: Woodside Burmah Oil NL, 50%; Shell Development (Aust.) Pty. Ltd., 16.66%; BP Development Australia Pty Ltd, 16.66; & Cal-Asiatic Oil Co., 16.66%.
77. R. Murray, 'Woodside to Service Shelf Well from Timor', *The Australian Financial Review,* 10 October 1973; John McIlwraith, ''Continental drift' theory given a run by Woodside-Burmah', *The Australian Financial Review,* 5 July 1974.
78. R. Murray, 'Woodside To Service Shelf Well From Timor', *The Australian Financial Review,* 10 October 1973; Peter Ellery, 'Portuguese Timor; a challenging *new* frontier', *Burmah International,* no.21, January 1975, pp.28-29 (photograph: 'The *Big John* drilling on Troubadour No.1'); and R. Murray, 'Sunrise No.1 Points to New Gas Fields', *The Australian Financial Review,* 5 February 1975.
79. Burmah Oil to Sir Lenox Hewitt, Department of Minerals and Energy, 18 February 1974, Australian Archives A1838/1, 756/1/4 Australia-Portugal – Negotiations on Portuguese Timor – Continental shelf, PART 3, 1974, f.2.
80. John McIlwraith, 'Drilling under way on remote Troubadour Shoals off Timor', *The Australian Financial Review,* 4 July 1974; Nigel Wilson, 'Keep hope fires burning', *The Australian,* 4 October 2000. By 1999 it was estimated that the Sunrise-Troubadour field could probably produce ten trillion cubic feet of gas (John Akehurst, Managing Director, Woodside Petroleum Ltd, quoted in 'Australia's Woodside Sees No Threat from Timor Gas Rivalry', *Asia Pulse,* 6 December 1999).

the Portuguese Government. He was now free to speak on the matter, he said, because the protest to Portugal had been lodged.[81] The article in *The Australian Financial Review* which reported this[82] provoked a protest from the Portuguese Ambassador, Carlos Empis Wemans, that the Prime Minister had made public the dispute with Portugal. A subsequent note from the Ambassador said:

> Whilst regretting the fact of the Australian Prime Minister having made public declarations on the subject, the Portuguese Government maintain their willingness to enter into negotiations with the Australian Government. However, since a conference on the Law of the Sea is scheduled to take place in Caracas, in June next, the Portuguese Government are of the opinion that immediate negotiations would be ill-timed and would therefore prefer to await the results of that Conference.[83]

Political developments in Portugal added to the uncertainty regarding the settlement of the seabed boundary between Australia and Portuguese Timor. On 25 April 1974 the so-called 'Carnation Revolution' *(Revolução dos Cravos)* took place in Lisbon, overthrowing the 'Estado Novo' which had been established over forty years earlier by António de Oliveira Salazar. The new Portuguese Government was committed to decolonisation.[84] 'At that time', Gough Whitlam said, 'there was a change: they decided to get out of all their colonies'.[85] In Timor, the decolonisation policy was to be implemented by a team led by Colonel Mário Lemos Pires, who took up his appointment as Governor on 18 November 1974.[86]

A Department of Foreign Affairs policy planning paper drawn up following the Lisbon coup of 25 April stated that Australia should 'bear in mind that the Indonesians would probably be prepared to accept the same compromise as they did in the negotiations already completed on the seabed boundary between our two countries. Such a compromise would be more acceptable to us than the present Portuguese position.' The paper advised caution to prevent Australia being seen as motivated by its own self-interest in pushing either for independence or incorporation of the territory.[87] This approach was endorsed at a 3 May 1974 meeting of a departmental *ad hoc* task force on Portugal.[88] This caution was subsequently manifested in the insistence consistently maintained by the Australian Government that the question of the territory's political status was quite distinct from that of the maritime boundary in the Timor Sea. By the artifice of 'compartmentalizing' the two issues, public consideration of the bearing of the Timor Gap on Australia's policy toward East Timor was 'defined out'.[89]

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81. 'N-W Shelf centre of dispute', *Daily News,* 25 March 1974; 'Big oil area off NW in dispute', *The West Australian,* 26 March 1974.
82. Brian Toohey, 'Oil: Portuguese tail-twisting could backfire', *The Australian Financial Review,* 26 March 1974.
83. 25 March and 18 April 1974; Cour internationale de justice, Affaire relative au Timor oriental *(Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, pp. 321-6, Vol.V, Annexes IV.9-10.
84. Gough Whitlam, submission to Senate inquiry, 26 March 1999, pp.7.
85. Gough Whitlam, *Committee Hansard,* 6 December 1999, p.976.
86. Mário Lemos Pires, *Descolonização de Timor: Missão imposível?* Lisboa, Publicações Dom Quixote, 1991.
87. Wendy Way, Damien Browne and Vivianne Johnson (eds.), *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-76*, Melbourne University Press, 2000, p.52.
88. Wendy Way, Damien Browne and Vivianne Johnson (eds.), *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-76*, Melbourne University Press, 2000, p.53.
89. Minister for Foreign Affairs Gareth Evans stated in the Senate on 1 November 1989: 'Australia has consistently supported discussions between Portugal and Indonesia under the auspices of the United Nations Secretary-General to resolve the lingering East Timor issue as it exists between those two countries. That is a

On 29 November 1974, the Department of Foreign Affairs again wrote to the Portuguese ambassador, setting out the basis of Australia's claims in the Timor Sea, and asking 'that the Portuguese Government not permit any activities, relating in any way to exploration or exploitation of the sea-bed or subsoil in the areas concerned by the established Australian permits'.[90] This letter, a response to the Portuguese letter of 18 April, had been discussed at an interdepartmental meeting convened by the Department of Foreign Affairs on 25 September.[91] That meeting had concluded that in light of the Australian Government's established policy toward Portuguese Timor, talks should not be proposed with Portugal on seabed delimitation but that Australia should take issue with them on the legality of their claims and set out the basis of Australia's claim.[92] The stalemate as of January 1975 was described by the journalist, Bruce Juddery:

> the Portuguese have so far insisted that the true border is halfway between Australia and their part of Timor while Australia has held that the trough itself is the true boundary. The problem is exacerbated by the prospect of major oil and gas finds beneath the intervening shelf or shelves. Portugal and Australia have both given exploration leases in the area, over seabed territory claimed by the other. The most recent lease, let by Portugal recently, is reported to extend over the political 'compromise line'.[93]

Australian petroleum exploration in and off Timor

The Australian company Timor Oil NL had been active on Timor since 1956.[94] However, its lack of success, and its lack of resources, prompted it to enter into a 'farm in' arrangement in 1972 with International Oils Exploration NL and Amalgamated Petroleum. All three companies had an interlocking directorate, the same office, and the same company secretary, Mr. P.M. Allen.[95] Subsequently, the new group undertook the drilling of two exploration wells in the Betano Structure off the south coast of Portuguese Timor. One of the partners also undertook a marine seismic reflection survey of the Kolbano Structure off the south coast of Indonesian Timor.[96]

The reason for this growth in interest in Timor and its surrounding shelf area. was linked to the establishment of a relationship between those Jurassic-Triassic sediments on Australia's North West Shelf and relatively similar sediments present in Timor. In addition, the presence of oil and gas seeps on the island would appear to have provided further encouraging possibilities. However, this small consortium did not have the capital to undertake a major

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matter that relates to the dispute between Portugal and Indonesia, to which Australia is not a party, and is quite separate from the Timor Gap negotiations.'

90. Note du Ministère des Affaires étrangères australien à l'Ambassade du Portugal à Camberra, 29 novembre 1974 (Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, Vol.V, Annexe IV.11, p.327).

91. 'Portuguese Timor–Seabed Boundary', Wendy Way, Damien Browne and Vivianne Johnson (eds.), *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-76*, Melbourne University Press, 2000, pp.111-12.

92. Department of Foreign Affairs to UN Delegation, New York, 26 September 1974, NAA A1838, 756/1/4, pt.4, f.258.

93. Bruce Juddery, 'Portuguese envoy arrives today', *The Canberra Times,* 10 January 1975.

94. J. Jolliffe, *East Timor: Nationalism and Colonialism,* Brisbane, University of Queensland Press, 1978, p.58.

95. *Oil and Gas International Year Book,* 1979, p.570.

96. International Oils Exploration NL, *Director's Report,* 1972, p. I; *Retrieval,* Feb/March, 1976, p. 6.; cited in Mills, p.91.

exploration program in their concession area.[97] Consequently, during 1973 negotiations were conducted with an oil company which had expressed interest in the area, resulting in 'farm in' arrangements being concluded between Woodside-Burmah and International Oils and Timor Oil.[98] The first of these earned Woodside the right to 65% of a contract International had with Pertamina to carry out a marine seismic survey and an on-shore geological survey, including the drilling of two to four wells.[99] The second earned Woodside-Burmah a 30% interest in Timor Oil's contract to similar work. Prior to this, the Portuguese extended Timor Oil's rights for two further years, and re-affirmed production rights for thirty years after that time.[100] Also, in 1972, BHP obtained from the Portuguese government 'a concession to prospect for minerals for an initial period of four years ....renewable for a further three years with an option at the end of that time of an extra twenty years'.[101]

The initial success of the Mola No.1 Well off the south west corner of Portuguese Timor, caused 'frenzied trading in the shares of Timor Oil and its senior partner Woodside Burmah'. This well encountered high gas readings, but subsequent testing showed no commercial hydrocarbon accumulations.[102] The strategic significance of potential oil reserves in the Timor Sea generally, but specifically in the Timor Gap, had risen in response to the OPEC induced world oil price 'hikes' since 1972.[103] Apart from the apparent abundance of hydrocarbons, an attraction for investors was that '...any oil discovered can be sold at world parity price, which is four times higher than the Australian crude price'.[104] The disparity between the price of oil produced outside Australia and that within had resulted from Minister for Minerals and Energy Rex Connor's plan to apply a fixed price to all Australian oil discovered from this time. The development during 1974 and early 1975 of Australia's commercial and national interests on and off Indonesian and Portuguese Timor had added an economic dimension to the political relationship between Indonesia, Australia and Portugal regarding the political future of Portuguese Timor.[105]

Woodside-Burmah withdrew from both its 'farm in' arrangements on completion of the contract requirements. This withdrawa1 was attributed by the company to be for reasons associated with the need to 'concentrate resources on the development of the North West Shelf'.[106] However, the reasons for this abrupt withdrawal 'were more political than geological, according to oil industry sources in Jakarta'.[107] This conclusion would appear to be substantiated by Woodside's eagerness to fulfil the obligations entailed in its 'farm in'

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97. International Oils Exploration NL, *Director's Report,*1972, pp.1,2; *Retrieval,* Feb/March, 1976, p.6.
98. The Woodside consortium comprised Woodside Burmah Oil NL, 50%; Shell Development (Aust) Pty Ltd, 16.66%; BP Development Australia Pty Ltd, 16.66; and Cal-Asiatic Oil Co, 16.66%.
99. Woodside-Burmah's 1974 *Annual Report,* p.6, and International Oil's Letter to Shareholders, March, 1974.
100. Woodside's total concessions on Timor and in the Timor Sea as of mid-1974 are described in Woodside Burmah's 1974 Annual Report, p.4, 'Chairman's address to the Members of Timor Oil. Ltd.', 5 December 1973, and Joint Statement issued by Woodside and Timor Oil, May 1974.
101. Jolliffe, *East Timor: Nationalism and Colonialism,* Brisbane, University of Queensland Press, 1978, p.58.
102. Woodside Burmah Oil NI., 1974 and 1975 *Annual Reports,* pp.4-5 & p.6 respectively.
103. Whilst Australia was insulated from the immediate effects of those hikes (77% in Oct. 1973, followed by a further 50% in December, or a per barrel price increase, from US$3 to US11, (Hallwood and Sinclair, *Oil, Debt and Development,* Allen and Unwin, 1981, Ch.5), any diminution of domestic supplies had negative implications for Australia's future economic situation (Mills, p.94).
104. 'Speculator's Diary', *The Bulletin,* 22 February 1975, p.63.
105. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.95.
106. Woodside-Burmah Oil NL, *1975 Annual Report,* p.6.
107. Hamish McDonald, 'Indonesia cool on Timor Oil Search', *The Australian Financial Review,* 29 December 1975.

arrangements, and subsequent sharp market reactions to these activities. These included the drilling of the Mola No.1 well from 5 February 1975 off Portuguese Timor, and the Savu No.1 well off Savu Island in October 1975. In addition, the company acquired 2,129km and 504 kms of 'high quality seismic data' in Indonesian and Portuguese Timor respectively, during 1974.[108] The precise nature of any minerals exploration undertaken by BHP in Portuguese Timor is unclear; however, the development of Timor's uncertain political situation from mid-1974 effectively halted the implementation of any long term plans it may have had.[109] Hamish McDonald reported in December 1975 that Indonesia had reached a 'suitable understanding' with those oil companies involved whereby, 'the companies agreed to delay exploration without protest in return for a guarantee of their present positions in the future'.[110] The belief that Timor Oil (representing Woodside-Burmah and BP Australia) was waiting for a coup or invasion to re-negotiate its leases, as Indonesia would give much better conditions than the Portuguese or Fretilin were likely to offer, was held by the Portuguese negotiator from the Inspeção Geral da Minas, Alexandre Avelar Barbosa, who said so in Darwin after he had been evacuated from Dili following the 11 August 1975 coup.[111]

The civil war in Timor following the August 1975 coup forced Petrotimor to abandon its offices in Dili and the exploration activity it had been carrying out in the Timor Sea. On 14 April 1976, the Inspeção Geral da Minas wrote to Petrotimor giving an assurance from the Secretary of State for Inter-territorial Co-operation that the terms and contractual obligations granted to Petrotimor would 'become entirely effective and in force again, as soon as the general situation in the territory of Timor is stabilized at a minimum level of normality allowing the concessionary to proceed with its activity' .[112]

Negotiations with Indonesia on the Timor Gap

No further negotiation over the Timor Gap took place between Australia and Portugal as the situation in Portuguese Timor became increasingly unstable, culminating in Indonesia's invasion and occupation of the territory in October-December 1975. As Indonesia's intentions became more evident, Ambassador Richard Woolcott sent a cable from Jakarta on 17 August 1975 to Secretary of the Department of Foreign Affairs Alan Renouf, in which he said:

> We are all aware of the Australian defence interest in the Portuguese Timor situation but I wonder whether the Department has ascertained the interest of the Minister or the Department of Minerals and Energy in the Timor situation. It would seem to me that this Department might well have an interest in closing the present gap in the agreed sea border and this could be much more

108. Woodside Burmah Oil NI., *Annual Reports* for 1974 and 1975, pp.4-5 & p.6 respectively.
109. International Oils Exploration NL, *Director's Report,* 1972, p.1, *Retrieval,* Feb/March, 1976, p. 6. p. l00; cited in Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.92.
110. Hamish McDonald, 'Indonesia cool on Timor Oil Search', *The Australian Financial Review,* 29 December 1975.
111. Statement by Senator Cyril Primmer, *Senate Hansard,* 24 February 1976, p.150.
112. Lettre du Directeur du service juridique de l'Inspection générale portugaise des mines, 14 avril 1976, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise,* La Haye, 1991, Vol.V, Annexe IV.14, p. 336.

> readily negotiated with Indonesia by closing the present gap than with Portugal or independent Portuguese Timor.[113]

Implicit in Woolcott's suggestion was the implication that Australia had a vested interest in an Indonesian takeover of Portuguese Timor. Given that this suggestion was made in the context of' an intra-department discussion over the 'wisdom', or otherwise, of the Prime Minister's intention of expressing Australia's 'concern' with the 'settled Indonesian policy to incorporate Timor', it has a further connotation: Woolcott was apparently arguing that since Timor's incorporation was 'settled policy' as far as Indonesia was concerned, further attempts by Australia to deflect Indonesia from this objective would incur the latter's hostility. Hence, in his opinion, Australia should reconcile itself to this *fait accompli,* and attempt to maximise its own interests in terms of extracting a favourable maritime settlement. Whilst not expressed in terms of a quid pro quo, Woolcott was apparently urging Australian acquiescence on this basis. There is no explicit evidence of a *quid pro quo* agreement with Indonesia but this was unnecessary as, given the circumstances, it was implied in Australia's acquiescence to Indonesia's incorporation.

Following the Indonesian invasion, Ambassador Woolcott briefed the press at the Australian embassy in Jakarta, saying that if Australia had helped in the formation of an independent East Timor, it could have become 'a constant source of reproach to Canberra... It would probably have held out for a less generous seabed agreement than Indonesia had given off West Timor'.[114]

In October 1976 Indonesian Justice Minister, Professor Mochtar Kusumaatmadja, confirmed that Indonesia was prepared to negotiate a settlement of the seabed boundary to close the Timor Gap on the same favourable terms as the 1972 Indonesia-Australia seabed treaty, in return for recognition of Indonesia sovereignty over East Timor. Professor Mochtar had been a senior member of the Indonesian team which had negotiated the the Australia-Indonesia seabed boundaries in 1971 and 1972. General Ali Moertopo said that Australian petroleum and mineral exploration companies with leases in East Timor granted by the Portuguese Government, such as Timor Oil Ltd and Woodside-Burmah, were 'welcome' to resume operations, provided they re-negotiated their rights with Indonesian authorities.[115] Woodside-Burmah's Troubadour No.1 well, drilled in June 1974 in the Timor Sea, had produced hydrocarbon findings that had raised hopes of commercial deposits.[116] The question of whether Indonesia had promised agreement on a seabed boundary closing the Timor Gap in return for Australian recognition of its incorporation of East Timor was reportedly discussed at a meeting of the Australia Indonesia Business Co-operation Committee on 15 October 1976.[117] Those in the business community who felt their trade investments in with Indonesia would be jeopardised by continuance of the policy of non-recognition of Indonesia’s incorporation of

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113. *Documents on Australian Defence and Foreign policy, 1968-1975,* Munster and Walsh, Angus and Robertson.1980, p.200.
114. Hamish McDonald, 'Australia supports Indonesia takeover of East Timor', *The National Times,* 15-20 December 1975.
115. Michael Richardson, 'Indonesia's Timor carrot', *The Australian Financial Review,* 19 October 1976.
116. ‘Hydrocarbon encounter by Woodside’, *The Australian Financial Review,* 3 July 1974; Hamish McDonald, 'Indonesia cool on Timor oil search', *The Sydney Morning Herald,* 29 December 1979.
117. Russell Skelton, ‘"Recognise takeover’ — Companies in approach to Canberra', *The Age,* 23 October 1976; 'Timor Sold for Oil', *Tribune,* 27 October 1976.

East Timor enunciated by Foreign Minister Andrew Peacock on 4 March urged the Government to reverse its stance on Timor.[118]

Reports that talks on completing a border in the Timor Gap were held during Prime Minister Malcolm Fraser's visit to Jakarta in October 1976 provoked Fretilin's information officer, Mr Chris Santos, to issue a statement in Canberra saying: 'If Australia does not recognise the Indonesian takeover of East Timor, then it follows that such talks are illegal and contrary to the wishes of the East Timorese people. Fretilin and the Government of the Democratic Republic of East Timor reject such talks'.[119] However, the Fraser Government did not consider it opportune to pursue negotiations on a seabed boundary at that time, when Australia's official position was still not to acknowledge Indonesian sovereignty over East Timor.[120] A modification of Australia's stance was signalled when Mr Peacock said in a statement to Parliament on 20 October 1976 that the Government had not recognised Indonesia's incorporation of East Timor, but had to accept 'certain realities'. Australia had to take into account 'Indonesia's view that East Timor is now part of Indonesia and that this situation is not likely to change'.[121]

A further modification of Australia's position was announced on 20 January 1978, when Foreign Minister Peacock said that the Government had decided to 'recognise de facto' that East Timor was part of Indonesia, even though Australia remained 'critical of the means by which integration was brought about'. Mr Peacock asserted that it would be unrealistic not to recognise effective Indonesian control. The Government presented the recognition as a measure that would speed up the processing of family reunion requests.[122] Senator Cyril Primmer commented that the decision to recognise integration was made in order to settle the seabed border between Australia and East Timor.[123]

Labor Party leader Bill Hayden, in his first statement on Indonesia as Leader of the Opposition, called Indonesia's occupation of East Timor unjustifiable, illegal, immoral and inexcusable and recognition inconceivable. 'It is inconceivable,' he said, 'that the Australian people who have built their nation on a firm belief in the rights and freedoms of people would in the circumstances endorse the Government's action in recognising Indonesia's seizure of East Timor'.[124]

In March 1978, it was announced that Australia and Indonesia had agreed to negotiate a permanent seabed boundary south of East Timor. The question of the seabed boundary had been discussed at the annual meeting of senior Australian and Indonesian foreign ministry officers on 7-8 February. The Australian and Western Australian Governments had by this time granted a total of six petroleum exploration permits in the area of dispute, although no exploration work had been conducted in the area since 1975. Under the terms of its permit, at least one of the exploration consortia was obliged to begin drilling before September 1979. In granting or renewing permits, it had been assumed by the Australian authorities that when a permanent boundary was determined it would be drawn more or less as a straight line linking

118. Michael Richardson, 'Timor: one year later', *The Age,* 7 December 1976.
119. 'PM accused of 'illegal' talks on sea border', *The Canberra Times,* 18 October 1976.
120. Mike Steketee, 'Seabed border plan shelved,' *The Sydney Morning Herald,* 19 October 1976.
121. *House of Representatives Hansard,* 20 October 1976, pp.2015-6.
122. Stephen Nisbet, 'Timor is Indonesian now: takeover reality: Peacock,' *The Age,* 21 January 1978.
123. *Senate Hansard,* 22 February 1978, p79; ''Scramble for oil' led to Timor recognition', *The Canberra Times,* 23 February 1978.
124. Michelle Grattan, 'Timor: sense or just a sellout?,' *The Age,* 23 January 1978, p. 8.

the eastern and western ends of the 1972 boundary.[125] In November 1973 a Foreign Affairs Department memorandum to its Minister said that Indonesia had given no indication that the drawing of a boundary line connecting the two extremities of the agreed Australian-Indonesian border would be unacceptable to it: 'The indications, if any, are to the contrary'.[126] Aquitaine-Elf was one of the permit-holders. That company's Australian exploration manager, Mr G. Dailly, expressed the common hope on 20 February 1978:

> No one would want to find oil there without knowing who owns it. But we are not expecting any major problems over the border now because of the border lines already agreed to by Indonesia on either side of the disputed area. If these two lines are just joined together, there will be no trouble at all.[127]

It was at this point that the complicating factor of the lease granted in January 1974 by Portugal to Oceanic Exploration came into play. Oceanic's lease extended to the median line between Timor and northern Australia, cutting across the leases which had been granted by Australian authorities. The President of Oceanic, Wesley N. Farmer, declared in May 1977 that the company regarded East Timor as part of the Indonesian Republic. The company looked to the Indonesian Government to safeguard the integrity of its investment. In December 1978, Oceanic announced it was trying to reactivate its East Timor offshore lease. The company's chief exploration geophysicist Alvin Hoffman said there did not appear to be any problem in gaining Indonesian endorsement of the block originally granted by Portugal. The outstanding question for Indonesia was 'just making sure that the offshore boundaries with Australia are in order'.[128]

On 15 December 1978, Foreign Minister Peacock announced to a press conference after meeting with Professor Mochtar Kusumaatmadja, now Indonesian Foreign Minister, that Australia would give *de jure* recognition of Indonesia's sovereignty over East Timor early in 1979 when talks on delineating the seabed boundary between the province and Australia began: 'The negotiations when they start, will signify *de jure* recognition by Australia of the Indonesian incorporation of East Timor'. Australia had to 'face the realities' of international law in negotiating the seabed boundaries, he said, but this did not mean the Australian Government accepted the way in which Indonesia had 'incorporated' East Timor.[129]

In contrast to the compliant stance he had intimated in October 1976, Foreign Minister Mochtar complained to Ambassador Woolcott in 1977 that Australia had 'taken Indonesia to the cleaners' in 1972.[130] Dr. Mochtar expressed this view again in media interviews in December 1978 and said Jakarta wanted to ensure this did not happen again when detailed negotiations on closing the Timor Gap began. He said as 'a basic start' Indonesia would 'take the Portuguese position' in seeking to have the boundary put at the line of equidistance: 'Our general principle is the median line everywhere. Where possible we make adjustments. Now these adjustments have been a little bit too large in the Australian case. We were in a hurry in

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125. Michael Richardson, 'Drawing the seabed line, *Far Eastern Economic Review,* 10 March 1978.
126. Memorandum to Minister for Foreign Affairs, 28 November 1973, Australian Archives A1838/1, 756/1/4 Australia-Portugal – Negotiations on Portuguese Timor – Continental shelf, PART 3, 1974, f.17.
127. Peter Terry, 'Way opens for Timor oil hunt', *The Australian Financial Review,* 21 February 1978. 'Drawing the seabed line, *Far Eastern Economic Review,* 10 March 1978.
128. Michael Richardson, 'Tying up Timor's loose ends', *Far Eastern Economic Review,* 5 January 1979, and 'Aust-Indonesia talks on seabed boundaries', *The Australian Financial Review,* 6 March 1978; Peter Hastings, 'Rearranging the sea bed a task of diplomacy', *The Sydney Morning Herald,* 22 December 1978.
129. *The Canberra Times,* 16 December 1978.
130. Richard Woolcott, 'Fixed Relations', *The Australian,* 15-16 March 1997.

1971 and 1972'. He said that in 1972 there was some uncertainty about where the point of equidistance should lie:

> The Australians were able to talk us into [accepting] that the Timor Trench constituted a natural boundary between two continental shelves, which is not true. The latest evidence shows that the Trench does not represent a natural boundary, that the continental shelf edge is really north of Timor, and that the Trench is really a depression. Any number of geologists would confirm this. If it is only a depression and not a shelf edge, then we think we are entitled to the median line. There is another argument for the median line in that the recent developments in the continental shelf concept in the Law of the Sea Conference do not pay any attention to depressions in the shelf, of whatever depth, within the 200-mile limit.[131]

On 8 March 1979, Mr Peacock said in an answer to a question on the seabed negotiations with Indonesia:

> In accordance with the agreement I reached with the Indonesian Foreign Minister in December 1978, Australian and Indonesian officials met in Canberra from 14 to 16 February to commence negotiations on the delineation of the seabed between Australia and East Timor.[132]

The talks on the maritime boundary of 14-16 February 1979 in Canberra were followed by a further round of talks in Jakarta in May, another round in November 1980, and a fourth round in October 1981 which resulted in a Provisional Fisheries Surveillance and Enforcement Agreement, that divided respective national responsibilities along a median line boundary.[133] Thereafter there was a hiatus in negotiations until after the change of government in Australia as a result of the March 1983 election. The fifth round of talks between Indonesia and Australia on maritime boundaries in the Timor Sea took place in Canberra in the first week of February 1984, but ended without resolution. Added urgency was given to the talks by the success of a test well, Jabiru 1a, drilled in October 1983 by a consortium led by BHP, which struck an oil flow of 7,500 per day.[134] In March 1984, Professor Mochtar commented:

> The Indonesian position is based squarely on the law existing at present. The Australian position is that we should just draw a line connecting the old lines. In effect it is saying, 'Negotiate in 1984 on the basis of the 1958 convention, which has already been revised.' It's an untenable position… When the need for a solution becomes really great, paramount, then a political decision can be made overriding the technical arguments.[135]

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131. Michael Richardson, 'Jakarta's Tough Sea Boundary Claim', *The Australian Financial Review,* 20 December 1978; 'Boundary threat to seabed leases', *The Sydney Morning Herald,* 21 December 1978; and Peter Hastings, 'Re-arranging The Sea Bed A Task For Diplomacy', *Sydney Morning Herald,* 22 December 1978; Michael Richardson, 'Tying up Timor's loose ends', *Far Eastern Economic Review,* 5 January 1979, pp.44-5. Norwegian geologist Geir Ytreland has described the Timor Trench as constituting a 'continental sag', not a 'subduction zone', and that it 'does not represent any material change in geology when trevelling from the JPDA northwards' (Paul Cleary, *Shakedown: Australia's grab for Timor oil,* Crows Nest, Allen & Unwin, 2007, p.270).
132. *Senate Hansard,* 8 March 1979, p.720; quoted in *The Australian Year Book of International Law,* vol.10, p.273.
133. P.G. Bassett, 'Australia's Maritime Boundaries', *Australian Foreign Affairs Record,* vol.55, no.3, March 1984, p.188.
134. 'Timor talks unresolved', *The Australian,* 6 February 1984.
135. Michael Richardson, 'Australian claims to oil area untenable, says Indonesia', *The Age,* 31 March 1984.

In April 1984, the importance of concluding an agreement with Indonesia to close the Timor Gap was given by Foreign Minister Bill Hayden as a reason for recognizing Indonesian sovereignty over East Timor. In a speech to the Joint Services Staff College in Canberra, Mr Hayden referred to the 'extraordinarily complex and difficult and demanding' negotiations going on over the seabed boundary, and said:

> There is, as you know, a large gap off East Timor in that boundary. In that gap is positioned the natural gas fields and probably oil fields. We would not be regarded with great public celebration if we were to make a mess of those negotiations.[136]

In the lead-up to the July 1984 ALP Federal Conference, Dr Mochtar Kusumaatmadja implied in an interview that an anti-Indonesian resolution on East Timor at the conference could lead to a major break between the two countries. In answer to a question on negotiations over the Timor Gap, Dr Mochtar said: 'We can only negotiate if Australia recognises Indonesian sovereignty over East Timor. If it doesn't then it should negotiate with Portugal or Fretelin, whichever it recognises'.[137]

At the Federal Conference of the Australian Labor Party on 11 July 1984, a resolution moved by Minister for Science and Technology Barry Jones was passed, stating that the ALP expressed 'its continuing concern at the situation in East Timor, particularly its officially stated objection to the fact that the former Portuguese colony was incorporated without the East Timorese people being given an opportunity to express their own wishes through an internationally supervised act of self-determination.' This was somewhat more conciliatory toward Indonesia than the 1982 policy it replaced, which 'condemned and rejected the Fraser Government's recognition of the Indonesian annexation of East Timor', and opposed all defence aid to Indonesia 'until there is a complete withdrawal of occupation forces from East Timor.'[138] It represented a victory for Mr Hayden over those in the ALP who wanted a return to the wording of the resolution approved at the National Conference in Perth in 1977, which 'noted the establishment of the Democratic Republic of East Timor on 28 November 1975.' In arguing for a more conciliatory policy, Mr Hayden had been able to draw to the attention of Mr Jones and his supporters a recent change in policy by Fretilin, which had abandoned its claim to be 'the sole legitimate representative of the Timorese people' embodied in the 1975 constitution of the Democratic Republic of East Timor. Fretilin had declared the DRET and its constitution to be 'suspended', and was seeking a peace conference with the participation of Indonesia, Portugal, the Timorese Catholic Church, and Timorese parties which supported self-determination.[139]

Dr Mochtar Kusumaatmadja commented on the resolution on 17 July, saying, 'Considering the ALP resolution does not question the integration of East Timor, I take it… this means that the former Fraser policy is being continued.' During talks in Jakarta immediately following the Federal Conference, Mr Hayden and Dr Mochtar agreed to continue negotiations on the Timor Gap boundary. However, Dr Mochtar dismissed Australia's argument that the boundary should follow the Timor Trough rather than the mid-line, as 'untenable'.[140]

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136. Teresa Mannix, 'Recognising East Timor 'hard reality'', *The Canberra Times,* 18 April 1984.
137. Peter Hastings, '‘Cool it’, Jakarta tells Australia', *The Sydney Morning Herald,* 29 June 1984.
138. Pat Walsh, 'ALP Conference: A requiem for Timor?', *Inside Indonesia,* no.3, October 1984, pp.18-22.
139. Jill Jolliffe, 'Fretilin drops demand', *The Age,* 7 November 1984.
140. 'Talks likely on ‘Timor gap’', *The Australian Financial Review,* 20 July 1984.

A quite different reaction to the resolution came from Portugal. Mr Hayden met with the Portuguese Foreign Minister, Dr Jaime Gama, in Lisbon on 6 August 1984. Dr Gama said that Australia should respect Portugal as the administering power of East Timor, recognised as such by the United Nations.[141] Dr Gama said that Portugal harboured 'the greatest reservations' over the Hawke Government's attempts to legalise Australia's territorial boundaries with East Timor in talks with Indonesia. He said the talks did 'not respect the resolutions of the United Nations or international law'.[142] On 7 July 1976, Opposition Leader Gough Whitlam had been told in Lisbon by Socialist Party Leader Mario Soares that Portugal would continue to look to the United Nations for a solution, and could not adopt a position contrary to the United Nations. Ambassador Frank Cooper commented in his report on the meeting: 'As we have previously reported, there seems no disposition either in the Provisional Government or the Foreign Ministry to abandon the self-determination principle'.[143]

At the November 1984 maritime boundary talks in Jakarta the Australian side raised the option of a joint development zone in the disputed area, with any commercial resources to be shared equally. In subsequent separate discussions with Foreign Minister Hayden and Minister for Resources and Energy Gareth Evans, the Indonesian Foreign Minister, Professor Mochtar, and the Mining and Energy Minister, Professor Subroto, reacted favourably to the suggestion.[144]

Prime Minister Hawke gave an interview on Indonesian television broadcast on Indonesia's National Day, 17 August 1985, during which he unequivocally said, regarding East Timor, 'We recognise the sovereign authority of Indonesia.'[145] Foreign Minister Mochtar commented on Mr Hawke's statement, saying it 'was a welcome statement, of course, in fact expressing Australian Government policy as conducted for some time, although unstated'.[146]

President Eanes of Portugal said that Mr Hawke had given an interview on Indonesian television about the international status of East Timor, a territory under Portuguese administration. The President said that Australian-Portuguese relations were 'of such a nature to assume that no official attitude which might jeopardise national interests would be taken without the prior knowledge of the other party.'[147] The Portuguese Government claimed Mr Hawke's open statement of Australia's recognition of Timorese incorporation would jeopardise Portugal's attempt to bring about an agreement, under United Nations auspices, between Indonesia and the people of East Timor for an act of self-determination. Portugal expressed its displeasure by recalling Ambassador Inácio Rebello de Andrade to Lisbon for consultations.[148] Before he left Canberra, Dr Rebello de Andrade lodged a protest on behalf of his Government against the proposed Australian-Indonesian joint development zone in the Timor Gap. 'The Portuguese Government,' said Dr Rebello de Andrade, 'cannot but express to the Australian Government its vehement protest for the manifest lack of respect for international law'.[149]

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141. Nikki Savva, 'Portugal unhappy with Hayden over Timor talks', *The Australian,* 10 September 1984.
142. Jill Jolliffe, 'Hayden, Eanes gloss over differences', *The Age,* 10 September 1984.
143. Cooper to DFA, 7 July 1976, NAA, CRS A6364/4 LB1975/12.
144. 'Joint exploration plan for Timor oilfields', *The Age,* 16 August 1985.
145. 'Sovereignty over Timor recognised, PM says', *The Canberra Times,* 19 August 1985.
146. 'Mochtar says PM's view on Timor is policy', *The Age,* 22 August 1985.
147. Jill Jolliffe, 'Portuguese rebuke to Hawke on East Timor', The Canberra Times, 21 August 1985.
148. Hugh White, 'Hawke shrugs off Portugal's Timor protest', *The Sydney Morning Herald,* 23 August 1985.
149. Bill Goodall, 'Portugal protests at zone', *The Canberra Times,* 21 September 1985. The Portuguese perceived Australia to be motivated by 'crass opportunism in signing away Timorese human rights in exchange for expected access to the oil-rich seabed' (Jill Jolliffe, 'Why Portugal is so angry over Timor', *The Age,* 4 September 1985).

The sudden decision of Portugal to withdraw its Ambassador put the Australian Government in a position where it was compelled to confirm to Parliament the policy of recognition which Mr Hawke had stated in his interview on Indonesian television.[150] On 22 August 1985 the Minister for Resources and Energy, Senator Gareth Evans, stated in an answer to a question in the Senate, where he represented the Minister for Foreign Affairs, that the *de jure* recognition of Indonesian sovereignty over East Timor which the Fraser Government had given in 1979 had not been revoked by any subsequent government. He said:

> The negotiations between Australia and Indonesia over the unresolved seabed boundary adjacent to East Timor have continued with the Indonesian Government. These negotiations, whose successful conclusion is of importance to Australia, can in practice only be conducted with the Indonesian Government.[151]

Talks on the Gap between Senator Evans and Professor Subroto took place on 19 September 1985, and concluded with a further session in October with agreement in principle being reached on the establishment of a joint development zone.[152] Further talks took place in December 1985, March, May and June 1986. On 30 April 1986, Senator Evans stated: 'It is important for Australia's long term liquid fuels energy future that we be able to explore and hopefully then develop the oil fields which are reasonably thought to exist in the Timor Gap area.'[153]

At its National Conference on 10 July 1986, the ALP formally recognised Indonesia's incorporation of East Timor. The new policy, formulated by Minister for Science Barry Jones, noted the Prime Minister's statement of 22 August 1985 that the Australian Government had given *de jure* recognition of the incorporation, 'regretted' that there was not an internationally supervised act of self-determination, and supported United Nations moves for a settlement. Mr Jones said 'We know that in 1979 the Fraser Government conferred *de jure* recognition on the incorporation of East Timor—I do not think in practise that this is now reversible.'[154]

On 5 September 1988 Senator Evans, now Foreign Affairs and Trade Minister, and his successor as Minister for Resources, Senator Peter Cook, announced that agreement in principle had been reached by Australian and Indonesian officials for a Zone of Cooperation in the Timor Gap. Their statement said: 'the proposal to establish a Zone of Cooperation in the area between Timor and Northern Australia was the best possible means to ensure that both countries shared in the potential petroleum resources of the region until it became possible for a permanent seabed boundary to be delimited.'[155] It was reported from Australian Government sources that success in reaching the agreement had resulted from an Indonesian decision 'at the highest level that this matter should be settled and as quickly as practicable'.[156]

The Portuguese Ambassador to Australia, José Luiz Gomez, described the agreement as a 'blatant and serious breach of international law'. Mr Gomez recalled Portugal's 1985

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150. Deborah Snow, 'Hawke confirms recognition of East Timor takeover', *The Australian Financial Review,* 23 August 1985.
151. *Senate Hansard,* 22 August 1985, p.169; quoted in *The Australian Year Book of International Law,* vol.11, pp.239-40. A statement in the same terms was also made by Prime Minister Hawke on that day in the House of Representatives.
152. Michael Byrnes, 'Timor-gap talks show ice has melted', *The Australian Financial Review,* 29 October 1985.
153. *Senate Hansard,* 30 April 1986, p.2078.
154. 'Indonesian rule in East Timor formally recognised', *The Sydney Morning Herald,* 10 July 1986.
155. Quoted in *The Australian Year Book of International Law,* vol.12, p.380.
156. Paul Grigson, 'Sea dispute settled: now hope for oil', *The Sydney Morning Herald,* 6 September 1989.

protest at Australian negotiations with Indonesia over a Timor Sea boundary, on the grounds that Portugal was the internationally recognised administrative power for East Timor and said, 'So far, no qualitative change has occurred regarding the legal status of East Timor.'[157]

Addressing the United Nations General Assembly on 5 October 1988, Portuguese Foreign Minister João de Deus Pinheiro again called for an act of self-determination by the people of East Timor. 'East Timor' he said, 'is for us a moral, historical and legal responsibility', as well as a collective responsibility for all UN members. 'We cannot ignore the drama of East Timor unless we become the accomplices of an intolerable policy of *fait accompli* imposed by force'. He said Portugal would do its utmost to find a just and comprehensive solution acceptable to the international community. It was committed to work with United Nations Secretary-General Javier Perez de Cuellar in a mediation effort, and hoped that Indonesia would act in the same spirit.[158]

By August 1989, confirmed reserves of petroleum in the Timor Sea fields amounted to 214 million barrels, with production of 42,000 barrels per day from the Jabiru field.[159]

The Timor Gap (Zone of Cooperation) Treaty

Senator Evans and Senator Cook announced on 27 October 1989 that agreement had been reached with Indonesia on a treaty on a zone of cooperation in the Timor Gap. 'The agreement embodies in a real and practical way the strong mutual political will that now exists between Australia and Indonesia to work together as friends, neighbours and economic partners,' said Senator Evans. He said the treaty would be the most substantial bilateral agreement in the history of the relations between the two countries.[160] On 11 December 1989 Senator Evans and Indonesian Foreign Minister Ali Alatas (who had succeeded Professor Mochtar Kusumaatmadja) issued a joint statement informing that they had signed the Timor Gap (Zone of Cooperation) Treaty in a ceremony held in an aircraft flying over the area of the Zone in the Timor Sea. They noted that conclusion of the Treaty, 'while establishing a long-term stable environment for petroleum exploration and exploitation, would not prejudice the claims of either country to sovereign rights over the continental shelf, nor would it preclude continuing efforts to reach final agreement on permanent seabed boundary delimitation.'[161] The Timor Gap Treaty established a Zone of Cooperation in the area of the continental shelf between Australia and East Timor, comprising three distinct areas or zones of jurisdiction: Areas A, B and C. It created a regime that allowed for the exploration and development of hydrocarbon resources in the Zone. Area B lay at the southern end of the Zone and was administered by Australia. Area C lay at the northern end of the Zone and was administered by Indonesia. Area A was the largest area and lay in the centre of the Zone. The rights and responsibilities of Australia and Indonesia in relation to Area A were exercised by a Ministerial Council and a Joint Authority which was responsible to the Ministerial Council.[162]

The west-to-east lines defining the zones in the Timor Gap Treaty reflected the earlier arguments of Australia based upon the natural prolongation of the Australian continental shelf

157. Anna Grutzner, 'Portugal challenges Timor Gap oil pact', *The Australian*, 12 September 1988.
158. 'Portugal calls for Timorese independence', *The Age,* 5 October 1988.
159. Chris Milne, 'Wildcatting for the big one', *The Courier-Mail,* 5 August 1989.
160. 'Australia and Indonesia settle Timor Gap Treaty', *The Canberra Times,* 28 October 1989; 'Australia, Indonesia plan Timor oil search' *The Sydney Morning Herald,* 28 October 1989.
161. Quoted in *The Australian Year Book of International Law,* vol.12, p.3802.
162. Attorney-General's Department, submission no.65, p.3.

northwards, up to the Timor Trough. The three zones were bounded on the west and east by what were loosely described as lateral median lines. The three zones were delimited by the following west-east lines (in order, starting with the most northerly, Area C):

a. a simplified line representing the northern edge of the Timor Trough, being the furthest limit of Australia's diplomatic claims to the area);

b. a simplified line along the 1500 metre isobath, representing the deepest part of the Timor Trough (which lies close to the line that would join the terminal points of the Australia-Indonesia agreements);

c. the median line between Australia and East Timor; and

d. a line 200 miles from East Timor, representing the maximum possible extent of an East Timorese Exclusive Economic Zone.

The lateral or side lines defining of the Zone of Co-operation were drawn by taking so-called ‘simplified equidistance lines’ between East Timor and Indonesia. They were based substantially on the location of the termini of the 1971 and 1972 seabed limits agreed between Australia and Indonesia. Each of the lateral lines has two segments, resulting in the 'coffin' shape of the Zone of Cooperation. On the western side, the northerly segment was drawn by taking a line from the end of the Timor Trough to the point known as A17, which was the eastern end of the boundary drawn in the 1972 agreement. This had the effect of bringing within the Zone of Co-operation the maximum extent of Australia's claim to a continental shelf, extending right up to the Timor Trough. The second, southerly, part of the western boundary of the Zone of Co-operation seems to have been determined by taking a line from point A17 and extending it to the southern boundary of the Zone of Co-operation, in the direction of a line drawn from Cabo Tafara in East Timor to Point A17.

On the eastern side the longest, southerly, segment of the lateral line was drawn by taking a line perpendicular to the Indonesian island of Leti and extending it to the southernmost boundary of the Zone of Co-operation.[163]

The Treaty was entered into for an initial term of forty years, with provision being made for successive terms of twenty years, unless by the end of each term, including the initial term of forty years, the contracting states had concluded an agreement on the permanent delimitation of the continental shelf between Australia and East Timor—a seabed treaty. [164]

Portugal registered an immediate protest against the Treaty, recalling its ambassador from Canberra for consultations. Foreign Minister João de Deus Pinheiro issued a statement in Lisbon declaring the Treaty 'a clear and flagrant violation of international law and the United Nations Charter'. Not only was it a violation 'of the legitimate right of the Timorese people to self-determination and sovereignty over its own resources, but it also disrespects Portugal's status in the matter', the statement said. Dr Deus Pinheiro said that Portugal would be prepared to take the matter to the International Court of Justice.[165]

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163. ‘In the Matter of East Timor's Maritime Boundaries Opinion’, by Vaughan Lowe, Chichele Professor of Public International Law, Oxford University; Barrister, Essex Court Chambers, London, Christopher Carleton, Head, Law of the Sea Division, UK Hydrographic Office, Christopher Ward, Barrister-at-Law, Wentworth Chambers, Australia, 11 April 2002, http://www.gat.com/Timor_Site/lglop.html
164. Attorney-General's Department, submission no.65, p.2.
165. 'Ambassador recalled as Timor treaty protest', *The Canberra Times,* 14 December 1989.

East Timorese resistance spokesman José Ramos Horta wrote in October 1990 concerning the Treaty:

> Australian oil companies would be well advised not to jump into the Timor Gap area. A future government of an independent East Timor would certainly review all oil exploration agreements in the area and will not be bound by any agreement signed by third parties. Australian oil companies that join in the violation of the Timorese maritime resources might see their licences revoked and the exploration and drilling rights transferred to American companies such as Oceanic Exploration of Denver, Colorado. A good advice to Australian business: wait and see how things develop in the next 5 to 10 years.[166]

Oceanic Exploration whose subsidiary, Petrotimor which had been granted an exploration concession in the Timor Sea by the Portuguese administration in 1974, was invited by the Indonesian-Australian Joint Authority along with several other companies to bid for exploration permits for the Timor Sea after the Timor Gap Treaty was finalised. The company refused to bid, arguing that it already held a claim to much of the Zone A area where several promising oil and gas discoveries were subsequently made by other companies, including those forming the basis of the Bayu-Undan gas project developed by Phillips Petroleum.[167]

A letter to Prime Minister Hawke from Xanana Gusmão, the leader of the Timorese Resistance, was passed to an Australian Parliamentary delegation which was visiting East Timor in early February 1991. The letter condemned the Treaty as 'a total betrayal' by Australia of the Timorese people.[168] The letter reinforced the point Gusmão had made previously in an interview broadcast on ABC Radio National:

> Australia has been an accomplice in the genocide perpetrated by the occupation forces, because the interests which Australia wanted to secure with the annexation of East Timor to Indonesia are so evident. The best proof is the Timor Gap Agreement.[169]

Richard Woolcott sought to refute the charge that Timorese blood had been sacrificed so that Australia could benefit from any oil in the Timor Gap which rightly belonged to the East Timorese by writing in March 1997: ‘The fact is, however, that the northern boundary of the Zone of Co-operation established under the treaty is based on Australia’s long-held claim to this area of the seabed’.[170] He seemed unaware that this claim had been established in the first place, in the form of the MacKay Line, to secure the resources of the seabed for Australia.[171]

Commenting in March 2011 on his role in drawing up the Timor Gap Treaty, Gareth Evans said: ‘We knew there was a big pot of oil there in that area, but neither Indonesia nor Australia, nor East Timor, was able to get access to it, because there was no agreed resolution of the boundary; and we drew a box around it: that was the agreement, we agreed to share the costs, to share the proceeds respectively. The point about it is that that did absolutely no

166. Sasha Stepan, *Credibility Gap,* ACFOA Development Dossier No.28, October 1990, Preface p.iv.
167. Jane Counsel, 'Americans threaten to derail Timor oil talks', *The Sydney Morning Herald,* 26 June 2001.
168. 'Oil treaty to bring ‘era of cooperation’', *The Canberra Times,* 10 October 1991; *House of Representatives Hansard,* 10 October 1991, p.1748.
169. Robert Domm, 'Report from the Mountains of East Timor', *Background Briefing*, 28 October 1990.
170. Richard Woolcott, 'Fixed Relations', *The Australian,* 15-16 March 1997.
171. Peter Hastings, 'Whose Riches Under The Sea?', *The Sydney Morning Herald,* 3 June 1972.

damage at all to the longer term position of the East Timorese in the event that they were ever to gain independence'.[172]

The Timor Gap Zone of Cooperation Treaty entered into effect in February 1991. On 9 February, the inaugural meeting of the Ministerial Council established under the Treaty was held in Denpasar, Bali. Addressing the meeting, Senator Evans said the Treaty would lead to new areas of cooperation between Australia and Indonesia, mentioning in particular practical arrangements to cooperate in relation to security and terrorism, and for surveillance measures in the Zone of Cooperation.

Soon after the ratification of the Treaty, Portugal notified Australia that an action would be brought against it in the International Court of Justice. The Portuguese Ambassador to Australia, José Luiz Gomez, said on 25 February the ICJ action was linked to Australia's recognition of Indonesia's sovereignty over East Timor, and aimed at forcing Australia to recognise East Timor as a non-self-governing territory under Portuguese administration.[173]

Paul Keating succeeded Bob Hawke as Prime Minister in December 1991. The Keating Government faced the task of responding to the consequences of the Dili massacre which had occurred on 12 November, when a large number of unarmed Timorese civilians had been killed by Indonesian military during a funeral at the Santa Cruz cemetery. By 11 December, Foreign Minister Evans was using the formula that had been arrived at to define the Government's response to the massacre. Ignoring the fact that the Indonesian government did nothing to condemn those who carried out the massacre or bring them to justice, he said in answer to a question he had been asked in the Senate that the Government did not believe what had happened in Dili, 'deplorable as it was, was something that could be construed as an act of state: a calculated or deliberate act of the Government as such'. It was not an act of state but 'the product of aberrant behaviour by a subgroup within the country,' and therefore did not justify a change in policy that would involve a refusal to sign an agreement with Indonesia to award Timor Gap production sharing contracts to oil exploration companies.[174] The agreement was signed on 11 December by the Minister for Resources, Alan Griffiths, and Indonesia's Minister for Mines, Ginandjar Kartasasmita, at what was announced, to avoid protesters, as an 'undisclosed location' (it took place in Cairns).[175] Mr Griffiths reiterated during the meeting at which the agreement was signed that the Australian Government 'was deeply concerned by the recent killings in Dili', and that it had condemned the killings in strong terms and had called on the Indonesian Government to conduct a credible inquiry and punish any wrongdoers.[176]

The agreement brought forth a further protest from Portugal. A note delivered by the Portuguese Embassy in Canberra stated that the signing of the agreement aggravated Portugal's dispute with Australia over East Timor. It 'confirmed and worsened' the illicit nature of the facts denounced by Portugal in its application to the International Court of Justice. It occurred at a time of increased criticism and condemnation of Indonesia's 'brutal and repressive' policy toward East Timor.[177] Foreign Minister João de Deus Pinheiro said in Lisbon that Portugal would 'take action and ask for compensation'. He said Indonesia and Portugal must resolve the

172. Gareth Evans, *Enlargers, Straiteners and the Making of Australian Foreign Policy,* 12th Annual Manning Clark Lecture, National Library of Australia, 20 March 2011.
173. David Lague, 'Portugal sues over Timor treaty', *The Australian Financial Review,* 26 February 1991.
174. *Senate Hansard,* 11 December 1991, p.4618.
175. David Lague, 'Timor oil deal signed', *The Australian Financial Review,* 12 December 1991.
176. John Loizou, 'Secret talks herald oil boom', *Sunday Territorian,* 15 December 1991.
177. Robert Garran, 'Portugal slams Timor oil pact', *The Australian Financial Review,* 19 December 1991.

East Timor question through United Nations supervised negotiations: 'I hope the Indonesian Government will leave the military solution behind and be willing to negotiate'.[178] Soon after this, the Keating Government took the decision to close the Australian embassy in Lisbon, as a 'cost-cutting measure'. The embassy was re-opened by the Howard Government in April 2000.[179]

Decision of the International Court of Justice

In putting Australia's case to the International Court of Justice at a hearing on 6 February 1995, The Hon. Michael Tate, Australia's Ambassador to The Hague, stated: 'It remains the firm policy of the Australian Government that the people of the territory should exercise freely and effectively their right to self-determination'.[180]

The International Court made its decision on the case brought by Portugal in June 1995, when it found that because 'the very subject matter' of the case related to the rights and obligations of a third State, namely Indonesia which did not recognise the jurisdiction of the Court, it could not adjudicate on the dispute. Therefore, it could not rule on the merits of the case, 'whatever the importance of the questions raised by those claims and the rules of international law which they bring into play'.[181] Foreign Minister Evans commented on the Court's decision on 30 June:

> It is difficult to see how Portugal's action could have assisted the East Timorese people. The Indonesian Government, which is in control of the territory, could not have been bound by it. For Australia's part, we will continue our substantial program of development assistance to the people of East Timor, and continue to make every diplomatic effort we can to improve the human rights situation there.[182]

Portugal took comfort from the Court's observation that the right of peoples to self-determination was 'irreproachable' in international law and usage, and that consequently 'the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination'.[183] Portugal saw no reason in the Court's decision to change its view of the Treaty as an infringement of the rights of the people of East Timor and of Portugal's status as the territory's administering power recognised by the United Nations. On these grounds Portugal lodged a protest on 28 August 1997 against the subsequent Australian agreement with Indonesia on demarcation of respective exclusive economic zones in the Timor Gap.[184]

1997 Delimitation Treaty

The Delimitation Treaty between Indonesia and Australia, signed in Perth on 14 March 1997 by Foreign Ministers Alexander Downer and Ali Alatas, was a treaty which was

178. 'Portugal to take issue on Timor oil', *The Canberra Times,* 17 December 1991.
179. Minister for Foreign Affairs, Alexander Downer, 'Diplomatic Appointment—Ambassador to Portugal', media release, 26 April 2000.
180. Quoted in *The Australian Year Book of International Law,* vol.17, p.680.
181. Opinion of the International Court of Justice, *Case Concerning East Timor (Portugal v. Australia),* 30 June 1995. General List No. 84, 30 June 1995 .
182. Quoted in *The Australian Year Book of International Law,* vol.17, p.683.
183. Opinion of the International Court of Justice, *Case Concerning East Timor (Portugal v. Australia),* 30 June 1995. General List No. 84, 30 June 1995 .
184. 'Portugal denounces new Australia-Indonesia agreement on exclusive economic zone in East Timor', *Lusa,* 11 September 1997.

intended to complete the negotiation of maritime boundaries between Australia and Indonesia. The Treaty delimited the exclusive economic zone boundary between East Timor and Australia, along the median line between the two countries. Under this treaty, in a zone to the north of the line delimited by the 1972 seabed treaty, Australia had sovereignty over the seabed while Indonesia held sovereignty over the waters of the overlying sea. The challenge to the Treaty circulated at the United Nations by Portugal on 2 September 1997 disputed the right of the Treaty to set a water-column line running through the Timor Gap, on the same grounds as Portugal's earlier challenge to the Timor Gap Treaty.[185] Richard Woolcott commented at the time, 'The maritime treaty has yet to be ratified by the Australian and Indonesian parliaments but I do not anticipate any problems with this process',[186] but ratification had not been achieved before East Timor secured its independence from Indonesia in 1999. Hasjim Djalal, a senior adviser to the Minister for Maritime Affairs and Fisheries, commenting in August 2015 at a forum on foreign policy in Jakarta on why Indonesia had still not ratified the Maritime Boundary Agreement, said: 'Indonesia apparently has difficulty in ratifying the agreement because some of them feel they have been outsmarted by Australia and given too much to Australia beyond what they feel should have been the agreement. The agreement has been signed in 1997 but no one is willing to submit it to parliament and parliamentarians are likely to raise some kind of difficulties with it'.[187]

Following the signing of the Australia-Timor Leste *Treaty Establishing Their Maritime Boundaries in the Timor Sea* on 6 March 2018, the governments of Indonesia and Australia agreed to revisit the maritime border between the two countries stipulated in the 1997 Perth Treaty. Foreign Ministry Director General for Legal Affairs and Treaties Damos Agusman said that, even though the March 2018 reconciliation between Australia and Timor Leste on maritime borders was aligned with the 1972 treaty on the seabed boundary, it crossed the boundary set out in the 1997 Perth Treaty on exclusive economic zones (EEZ): 'Australia has agreed to work with us to revisit the Perth Treaty, and a technical team will meet to discuss the matter', Damos said during a press conference at the Four Seasons Hotel in Sydney after a meeting with Australian Foreign Ministry officials. Damos further said the Perth Treaty had been negotiated when East Timor was still part of Indonesia. In 1999, East Timor declared its independence and became Timor Leste; however, the treaty had not been ratified by the Indonesian parliament because the country had then been at the start of the reform era. 'The reconciliation between Australia and Timor Leste marks a clear border in the Timor Gap, so this is the right moment to talk about revisiting the treaty', he said. The meeting with authorities of the Australian Foreign Ministry was attended by Foreign Minister Julie Bishop and the newly appointed Australian Ambassador to Indonesia Gary Francis Quinlan, who was Australia's chief negotiator in the East Timor maritime boundary discussion.[188] Foreign Affairs Minister Julie Bishop said Australia did not 'believe that the conclusion of permanent boundaries between Australia and Timor-Leste requires Australia to renegotiate boundaries with Indonesia. We have a settled understanding of boundaries with Indonesia, which has served both countries well for several decades'.[189]

185. 'Australia's sea boundary challenged', *ABC News,* 2 September 1997.
186. Richard Woolcott, 'Fixed Relations', *The Australian,* 15-16 March 1997.
187. Jewel Topsfield, 'Australia and Indonesia 'like two porcupines'', *The Sydney Morning Herald.,* 19 August 2015.
188. Anton Hermansyah, 'Indonesia, Australia to revisit maritime border agreement', *The Jakarta Post,* 16 March 2018.
189. James Massola, 'Bishop cool on call from Indonesia for new deal', *The Sydney Morning Herald,* 9 March 2018.

East Timor during the period of UNTAET

Following the vote of the people of East Timor for independence in the UN supervised referendum on 30 August 1999, the United Nations Transitional Administration for East Timor (UNTAET) was established on 25 October 1999 by Security Council resolution 1272. Resolution 1272 and the related report of the Secretary-General on the situation in East Timor provided the foundation for East Timor's transition to an independent state. UNTAET had overall authority for the administration of East Timor.[190] Under paragraph 35 of the UN Secretary-General's report, which was incorporated by specific reference into the Security Council resolution, the UN would 'conclude such international agreements with states and international organisations as may be necessary for the carrying out of the functions of UNTAET in East Timor'. This gave UNTAET a wide treaty making power, providing the basis for the UN to enter into an agreement with Australia to confirm the continued operation of the Treaty, and to negotiate a replacement treaty. The UN through UNTAET was Australia's treaty party until the independent state of East Timor emerged.[191] Resolution 1272 stressed the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate, including the question of keeping the Treaty on foot.[192] The Secretary-General nominated the transitional administrator, Sérgio Viera de Mello, who took up duties in East Timor on 16 November 1999.

The perception of the UN was that it was a trustee for the interim phase and that the Timorese needed to be associated at all levels of the administration. On 26 November 1999, agreement was reached between the East Timorese leadership and UNTAET to set up a National Consultative Council (NCC) that would determine policy during the transitional period.[193] The Council would assist UNTAET to hold national elections in East Timor for a constituent assembly to write a new constitution, and to constitute the first government which would lead East Timor into actual independence.[194] Over the duration of UNTAET, the East Timorese came to be associated more and more with it in the administration.[195] A further stage in this process was reached when on 14 July 2000 the NCC approved regulations by which it was replaced by a National Council of 33 East Timorese members selected from the political, religious and private sectors, and establishing a Cabinet of the East Timor Transitional Administration (ETTA), consisting of four East Timorese and four UNTAET members.[196]

Just a month after production began from the Elang-Kakatua field, BHP's senior representative in Indonesia, Peter Cockcroft, had a secret meeting with Xanana Gusmão in his Cipinang Prison cell in Jakarta. Gusmão gave Cockcroft an assurance that an independent East Timor would honour, during an interim period, the rights awarded to mining companies under the Timor Gap Treaty. Gusmão said: 'We encourage them to stay on, looking to help the Timorese with the proceeds of the oil until a resolution is reached'.[197]

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190. Mr Campbell, *Senate Committee Hansard,* 11 November 1999, pp.869, 882.
191. Mr Michael Potts, *Senate Committee Hansard,* 11 November 1999, p.872.
192. Mr Campbell, *Senate Committee Hansard,* 11 November 1999, p.881.
193. Sérgio Viera de Mello, UNTAET Administrator, *Lusa,* 26 November 1999; Ian Timberlake, 'UN administration lays groundwork for governing East Timor', *Agence France-Presse,* 27 November 1999.
194. The constitution of the Democratic Republic of East Timor, proclaimed on 28 November 1978, was suspended in 1984. (Jill Jolliffe, 'Fretilin drops demand', *The Age,* 7 November 1984).
195. Mr Michael Potts, *Senate Committee Hansard,* 11 November 1999, p.880.
196. UNTAET daily briefings, 12, 13, 14 and 17 July 2000; SRSG Sérgio Viera de Mello's press briefing of 15 July 2000.
197. David Jenkins, 'BHP talks to jailed E Timor leader', *The Sydney Morning Herald,* 20 August 1998.

The Australian Government developed and implemented a strategy aimed at ensuring the smooth transition of the Timor Gap Treaty. Following the moves towards East Timorese independence, officers from the departments of Foreign Affairs and Trade, Attorney-General's, and Industry, Science and Resources liaised with officials from the United Nations and East Timorese representatives and consulted with the petroleum industry to enable a smooth transition of operations under the Treaty. Transition arrangements needed to cover issues such as the location of the headquarters of the Joint Authority, originally in Jakarta, subsequently moved to Darwin; appointment by the United Nations of appropriate representatives on the Ministerial Council and of people to participate on the Joint Authority; and the status of the existing production sharing contracts as well as the existing regulations, directions and other matters resolved to date by the Ministerial Council and the Joint Authority.[198]

The Australian Government also had discussions with East Timorese representatives, particularly Xanana Gusmão, José Ramos Horta, and the spokesman on Timor Gap matters, Mari Alkatiri. They confirmed both publicly and in discussion with Foreign Minister Alexander Downer and Australian officials their willingness to see the Treaty continue in its current form. The United Nations indicated a similar view. The Department of Foreign Affairs and Trade consulted closely with industry, ensuring that their views were taken into account in the government strategy.[199] In the meantime the Joint Authority arrangements continued on a business as usual basis. Revenues continued to be paid to Indonesia until February 2000, regardless of the vote on 19 October 1999 of the Indonesian People's Consultative Assembly (MPR) to formally renounce Indonesian sovereignty over East Timor. The Joint Authority held an executive board meeting on 9 November 1999 in Jakarta at which several important issues were addressed, including matters relating to the Bayu-Undan project. Industry confidence in the continued workability of the Treaty under the transitional arrangements was demonstrated by the decision on 25 October 1999 by the Bayu-Undan consortium to proceed with their major liquids extraction project in Area A of the Zone of Cooperation.[200]

Bayu-Undan Liquids Recovery and Gas Recycle Project

After the signing of the 1989 Timor Gap Treaty, there was an active exploration program within the Zone of Cooperation that involved the drilling of forty-two wells. The successful exploration program resulted in the discovery of hydrocarbons in thirty-six of the wells and the identification in Area A of about 400 million barrels of condensate and LPG and three trillion cubic feet of gas. These resources were discovered in some medium to small oilfields, including at Elang-Kakatua and Jahal, and some large gas fields at Bayu-Undan and Sunrise Troubadour.[201] There was no exploration carried out in Area C, which was not seen as prospective, partly because of its depth, but also because of the geology of the area; because of its depth and the seismic movement in the Timor Trough it was a difficult area to work in. In Area B, the Australian area of jurisdiction, there was some exploration, both seismic and drilling of wells, but no hydrocarbons were found.[202] Commencement of commercial production from the Elang-Kakatua field began in mid-1998 with a value of production to November 1999 of around $250 million, returning to each contracting state around $5 million

198. Mr Payne, *Senate Committee Hansard,* 11 November 1999, p.874.
199. Mr Michael Potts, *Senate Committee Hansard,* 11 November 1999, p.871-2.
200. Mr Payne, *Senate Committee Hansard,* 11 November 1999, p.874.
201. Mr Payne, *Senate Committee Hansard,* 11 November 1999, p.873.
202. Mr Kjar, *Senate Committee Hansard,* 11 November 1999, pp.87-9.

in revenues from the production sharing arrangements.[203] The Elang/Kakatua/Kakatua North oil fields, which produced around 17,000 barrels of oil a day from 1998, were closed down as the much larger Phillips-led venture started producing liquids and then natural gas from its Bayu-Undan fields.[204]

The Bayu-Undan field, developed at a cost of about $3 billion, contained estimated reserves of 400 million barrels of condensate and liquefied petroleum gas and 96.3 billion cubic meters (3.4 trillion cubic feet) of gas.[205] A consortium led by Ohio-based Phillips Petroleum announced on 25 October 1999 that it would proceed with the first stage of the development of the Bayu-Undan field, in Area A of the Timor Gap Zone of Cooperation. This would involve the extraction of gas, stripping of the condensate and LPG liquids from the gas, and re-injection of the dry gas. The project would involve a capital expenditure of around $US1.6 billion. It would provide significant employment opportunities to Australians and East Timorese. The press release that Phillips put out announcing their decision to proceed with Bayu-Undan made a reference to their having had substantive and encouraging discussions with all relevant parties involved in East Timor's transition to independence.[206] They had received a letter signed by Xanana Gusmão, José Ramos Horta and Mari Alkatiri, saying the East Timorese would honour Timor Gap petroleum zone arrangements.[207] Phillips' Australian area manager, Jim Godlove, said that revenues of 'many tens of millions of US dollars' a year were likely to flow to both Australia and East Timor.[208]

Santos Ltd, which held an 11.8 per cent share of the Bayu-Undan gas project, confirmed on 18 November 1999 that it had opted to participate in the project.[209] Santos was the last of the six partners in the project to publicly confirm its continuing participation, opening the way for the development plan to be submitted to the Joint Authority for final approval.[210] The United Nations Transitional Administrator in East Timor, Sérgio Vieira de Mello, and the Australian Minister for Industry, Science and Resources, Senator Nick Minchin, announced on 28 February 2000 that approval had been given by the Joint Authority for the first phase of the Bayu-Undan petroleum project in Area A of the Timor Gap Zone of Co-operation.[211] The project was expected to produce 110,000 barrels of condensate and LPG from 2004. The second stage of the project proposed construction of a gas pipeline to a LNG production facility in Darwin, which would then sell the product to overseas customers.[212] The Timor Gap Zone of Cooperation was replaced by the Joint Petroleum Development Area (JPDA) following an agreement in July 2001 between Australia and East Timor.

Phillips Petroleum announced on 13 March 2002 that it had decided to go ahead with a $US3 billion project to develop the Bayu-Undan field and pipe its gas ashore to Darwin where

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203. Mr Payne, *Senate Committee Hansard,* 11 November 1999, p.873.
204. 'Oil and gas fields in the Timor Treaty area', *Reuters,* 6 March 2003; Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune,* 17 May 2002.
205. Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune,* 17 May 2002.
206. Mr Payne, *Senate Committee Hansard,* 11 November 1999, p.885.
207. Paul Tait, 'East Timor backs gas project but warns on treaty', *Reuters*, 10 November 1999
208. Mr Godlove, *Senate Committee Hansard*, 8 September 1999, p. 421.
209. Mr Ross Adler, Managing Director, Santos Ltd, *Asia Pulse,* 18 November 1999.
210. The partners were: Phillips Petroleum Company, 50.29%, Santos Ltd, 11.83%, Inpex, 11.71%, Kerr McGee Corporation, 11.2%, Petroz NL, 8.26%, British Borneo, 6.72%.
211. Senator Nick Minchin, 'World Scale Petroleum Project for Timor Sea', Media Release 00/49, 28 February 2000.
212. *Asia Pulse,* 18 November 1999.

it would build one of the world's biggest liquefied natural gas processing plants. The move followed the signing of an agreement by Phillips (subsequently ConocoPhillips) and its partners (Inpex of Japan, Kerr McGee Corp and Eni unit Agip and Santos of Australia) with Tokyo Electric Power and Tokyo Gas to buy nearly all of the field's proven reserves under a 17-year contract due to begin in 2006. Phillips had also agreed to sell the two Japanese companies a 10 per cent stake in the field, reducing its own holding to 48 per cent.[213] Drilling of a batch of six wells from Wellhead Platform-1, the first of three offshore platforms to be constructed on the Bayu-Undan reservoirs, began as East Timor celebrated its independence on 20 May 2002. With this production drilling program, the first major development of the Timor Sea gas fields was under way. Phillips Petroleum's $US1.6 billion Bayu-Undan gas recycling operation was scheduled to be in production by early 2004, producing about 100,000 barrels a day of condensate, propane and butane from a permanent floating storage and offloading facility. The product was expected to be sold on the international market. Development of the Bayu-Undan project went ahead despite domestic pressure on the East Timorese leadership to renegotiate the maritime boundary with Australia. Phillips' Darwin area manager, Blair Murphy, said on 2 June 2002 the LNG phase of Bayu-Undan needed early ratification of the Timor Sea treaty by the two countries' parliaments so markets could be met on time. Mr Murphy said the LNG project would take gas from Bayu-Undan and process it for sale under the 17-year contracts with Tokyo Electric Power Co and Tokyo Gas, with shipments scheduled to begin in 2006.[214] The Timor Sea Designated Authority (the joint Australian and East Timorese authority) granted approval on 15 June 2003 to the Bayu-Undan partnership to proceed with the $2.24 billion liquefied natural gas export project. This was in addition to the $2.7 billion already invested by the partners on the liquids (condensate and liquefied petroleum gas) stripping project scheduled to start production early in 2004.

The Timor Sea Office announced on 13 February 2004 that production had begun with operator ConocoPhillips confirming a regular flow of 'wet gas' from the wells of the Bayu-Undan field. 'The start of production is an historic milestone in Timor-Leste's struggle for economic independence,' Prime Minister Mari Alkatiri was quoted as saying. 'The Bayu-Undan project is expected to provide a significant source of revenue to our economy over the next 20 years, averaging more than $US100 million ($A127.11 million) a year.' The statement said Bayu-Undan contained estimated recoverable reserves of 400 million barrels of condensate (light oil) and liquefied petroleum gas, and 102 billion cubic metres of natural gas. Platforms would process 'wet gas' in the first development phase. Condensate, together with propane and butane, would be separated and shipped while dry gas would be re-injected into the reservoir. The dry gas would be recovered and piped to Darwin during the second phase expected to begin in early 2006. The statement said ConocoPhillips and its partners had signed contracts for the sale of nearly all the natural gas reserves with Tokyo Gas and Tokyo Electric.[215] ConocoPhillips confirmed on 12 August 2005 that dry gas had been released into the undersea pipeline to the processing plant at Wickham Point, Darwin harbour, in readiness for production to commence in early 2006. The Bayu-Undan LNG project partnership was ConocoPhillips of the US (operator, with 56.72 per cent, having bought out Kerr-McGee and, earlier, Petroz), Eni of Italy (12.04 per cent), Santos of Australia (10.54 per cent) and Japan's

213. Virginia Marsh, 'East Timor set for bonanza as gas project gets go-ahead', *Financial Times*, 14 March 2002; Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune,* 17 May 2002; 'Oil and gas fields in the Timor Treaty area', *Reuters,* 6 March 2003.
214. The venturers were Phillips (58.6 per cent), Santos (1.8 per cent), Inpex (11.7 per cent), Kerr-McGee (11.2 per cent) and Agip (6.7 per cent); Nigel Wilson, 'Drilling begins at $1.6bn project,' *The Australian,* 3 June 2002.
215. 'Start of gasfield production welcomed', *AFP,* 13 February 2004.

Inpex (10.52 per cent) and Tokyo Electric with Tokyo Gas (10.52 per cent).[216] In February 2006, the first shipment of liquid natural gas left Darwin from the newly commissioned $1.75 billion, 3.24 million tonne per annum Wickham Point plant. LNG was sold from this plant to the Japanese energy companies under a 17-year contract. The plant was geared for new gas developments in the Timor Sea, with approval for expansion of up to 10 million tonnes per annum of LNG production.[217] Bayu-Undan's production peaked in 2011 and is likely to end around 2020, while oil prices have fallen sharply since late 2014.[218]

Indonesia's interest subsequent to its renunciation of sovereignty

On 10 February 2000, diplomatic notes were exchanged in Dili by the UN Transitional Administrator, Sérgio Viera de Mello, and Australia's representative in East Timor, James Batley, to give effect to a new agreement whereby UNTAET replaced Indonesia as Australia's partner in the Treaty. Under the agreement, which was negotiated in close consultation with East Timorese representatives, the terms of the Treaty would continue to apply. In talks in Jakarta preceding the agreement, Indonesian representatives had agreed that following the separation of East Timor from Indonesia, the area covered by the Treaty was now outside Indonesia's jurisdiction and that the Treaty ceased to be in force as between Australia and Indonesia when Indonesian authority over East Timor transferred to the United Nations.[219] This position was formalised for Australia by the *Timor Gap Treaty (Transitional Arrangements) Act 2000*.

Indonesia's remaining legal interest in the location of the boundaries of the Zone of Cooperation following the movement of East Timor out of Indonesian sovereignty related to points A16 and A17.[220] These points are at the eastern and western extremities of the Timor Gap Joint Petroleum Development Area (the former Zone of Cooperation Area A). Points A16 and A17 (at 9°28' South and 127°56' East, and 10°28' South and 126° East) are the points at which the Australia-Indonesia seabed boundary joins the JPDA (the Zone of Cooperation under the 1989 treaty) on each side. It is those two points, termed *tripoints* or *tri-junction points*, where the interests of Australia, independent East Timor and Indonesia would meet, and it is in the location of those points where Indonesia has a continuing interest.[221] The 1972 seabed treaty noted in Article 3 that the lines connecting points A15 and A16 and points A17 and A18 identified in the treaty indicated the direction of the boundary and that negotiations with other governments that claimed sovereign rights to the seabed (then Portugal, now Timor Leste) might require adjustments to points A16 and A17.[222]

The two tripoints, A16 and A17, are closer to the island of Timor than the mid-points between the island and Australia. In 1972, Indonesia conceded the Australian contention that the seabed boundary between the two countries should lie along the deepest part of the seabed, the Timor Trough, to the extent that the seabed boundary agreed at that time followed a line mid-way between the line preferred by Australia and the line preferred by Indonesia.

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216. 'ConocoPhillips clinches sale for its Bayu-Undan LNG', *Upstream,* 12 August 2005.
217. David Tollner, *House of Representatives Hansard,* Wednesday, 28 February 2007, p.106.
218. Hamish Mcdonald, 'East Timor: Boundary row escalates as finances deteriorate', *Nikkei Report,* 19 November 2015.
219. Minister for Foreign Affairs and Minister for Industry, Science and Resources Joint Media Release, 10 February 2000.
220. Mr Campbell, *Committee Hansard,* 11 November 1999, p.869.
221. Mr Campbell, *Committee Hansard,* 11 November 1999, p.870.
222. Department of Foreign Affairs, *Agreement between… Australia and… Indonesia Establishing Certain Seabed Boundaries,* Treaty Series 1973, No.31.

Negotiations on a seabed treaty with Portugal failed at that time because Portugal argued for a boundary along the mid-line between Australia and Portuguese Timor.[223] On two occasions subsequent to the 1972 seabed boundary agreement Indonesia accepted points A16 and A17 as being reasonable and in the proper location: first, in the negotiation of the 1989 Timor Gap Treaty, where it continued to recognise those points; and secondly, it recognised those points in the 1997 agreement between Australia and Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries.[224]

If the line of equidistance was adopted as the basis for delimitation purposes in a seabed boundary between Australia and East Timor, the Joint Petroleum Development Area would be located in East Timorese territory. It could also have implications for the boundary between Australia and Indonesia as the new Australia-East Timor boundary would be south of the two tripoints marking the Timor Gap in the Australia-Indonesia boundary. Indonesia might be prompted to seek re-negotiation of its seabed boundary with Australia.[225] Dr Gillian Triggs, Associate Dean of the University of Melbourne's Law Faculty, commented: 'There is no doubt Indonesia will feel quite aggrieved if we have unequal boundaries in certain areas with Indonesia and we suddenly blow the boundary out and make a more equidistant one in relation to East Timor'.[226] This view was shared by legal journalist, Richard Ackland, who commented in May 2004: 'If we were to suddenly adopt an equidistant line approach with East Timor, Indonesia would be bound to jump up and down and threaten our vital economic interests secured in the early 1970s'.[227]

Speaking at the announcement of an agreement between East Timor and Indonesia to begin work on defining maritime boundaries, Indonesia's Foreign Minister, Hassan Wirajuda, observed on 26 February 2002 that it should give Indonesia the right to be part of a three-way process in redefining the boundaries of the Timor Gap:

> Of course, there is a possibility of the two lines left and right of the formerly East Timor Gap that might touch the area under Australian jurisdiction. So there is a possibility and in fact we have discussed of the possibility in the future for three of us to agree on tri-junction points somewhere in the Timor Sea.[228]

Foreign Minister Downer said at the Timor Sea Treaty ministerial meeting in Dili on 27 November 2002: 'The boundaries East–West, it is relevant that Indonesia be included'.[229] In an article in *The Australian Financial Review* of 16 April 2003, Prime Minister Alkatiri wrote:

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223. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours,* vol.82, September-October 1972, pp.1-2. Richard Ackland, 'Aust tough stance on Timor sea border', *The Australian Financial Review,* 20 July 1973. Brian Toohey, 'Oil: Portuguese tail-twisting could backfire', *The Australian Financial Review,* 26 March 1974; 'Canberra, Lisbon head for row', *The Age,* 26 March 1974; 'Australia calls for report on oil leases', *The Sydney Morning Herald,* 14 December 1974. Portuguese Ambassador Carlos Empis Wemans to Lisbon, 25 March 1974, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie): mémoire du gouvernement de la république Portugaise,* La Haye, 1991, Annexe IV.9, pp. 321-3.
224. Mr Campbell, *Committee Hansard,* 11 November 1999, p.870.
225. Michael Richardson, 'Oil Reserves are Sensitive Independence Issue', *International Herald Tribune,* 15 December 1999.
226. Wendy Pugh, 'Australia seeks to avoid East Timor border dispute', *Reuters,* 6 October 2000.
227. Richard Ackland, 'Ungrateful Timor gets the Downer treatment', *The Sydney Morning Herald,* 28 May 2004.
228. 'Trilateral talks in Bali', *AM,* 26 February 2002.
229. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics

> Timor-Leste has already made great progress with Indonesia in plotting boundaries. But no progress has yet been made with Australia.[230]

East Timor's Foreign Minister, José Ramos Horta, confirmed that progress had been made with Indonesia in an interview in May 2003: 'the Indonesian authorities have shown statesmanship, openness and cooperation. We have made progress in the negotiations on our maritime border, which I hope to see concluded this year, perhaps in June or July'.[231]

The border alongside the JPDA was a sensitive issue as several major gas and oil deposits lay just outside Indonesian territory in Australian waters, including the 140,000 barrels per day Laminaria project. In August 1999 Australia defined the south-western maritime boundary for the Interfet operational area in East Timor by drawing a line perpendicular to the general direction of the coastline starting from the mouth of the Massin River which separates West and East Timor: a similar projection of East Timor's maritime claims, if adopted as part of settlement of Timor Gap maritime boundaries, would bring the Laminaria/Corallina fields which are just outside the current western boundary of the JPDA within the sovereignty of East Timor.[232]

The line on the eastern side of the Gap appeared to have been drawn from the eastern tip of the East Timor mainland, not the small outlying island of Jaco. If the eastern boundary were rectified to take this into account, the adjustment would put more of the Sunrise-Troubadour gas fields, found by Woodside Petroleum and partners, into the Timor Gap (north of the median line) rather than the Australian exclusive zone. Under the Treaty, this group of gas reservoirs extends about 20 per cent under the shared zone.[233] It was estimated that Sunrise-Troubadour could probably produce ten trillion cubic feet of gas, as opposed to three to four trillion cubic feet from Bayu-Undan.[234]

Article 3 of the 2018 treaty on maritime boundaries between Australia and Timor-Leste provides for adjustment of the continental shelf boundary between the two countries following settlement of that boundary between Indonesia and Timor-Leste. If those countries agree to an endpoint to their continental shelf boundary west of point A18 on the 1972 Seabed Treaty Boundary, the continental shelf boundary between Australia and Timor-Leste shall be adjusted so that it proceeds in a geodesic line from point TA-2 in the 2018 Treaty (at 11° 24' 00.61" South and 126° 18' 22.48" East), to point A18 (at 18 10° 37' South and 125° 41' East). The Treaty provides that this shall not come into force before the commercial depletion of the Laminaria and Corallina Fields. In the event that a continental shelf boundary agreed between Timor-Leste and Indonesia meets the 1972 Seabed Treaty boundary at a point to the west of point A18 on the 1972 Seabed Treaty Boundary, the continental shelf boundary shall be adjusted so that it proceeds in a geodesic line from point TA-11 in the 2018 Treaty (at 9° 42' 21.49" South and 128° 28' 35.97" East), to point A18. But this shall not come into force before the commercial depletion of the Greater Sunrise Fields.

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230. Mari Alkatiri, 'War-weary East Timor knows no boundaries', *The Australian Financial Review,* 16 April 2003.
231. Carlos Albino, 'Notas altas para Xanana e Governo, juizes chumbam', *Diário de Noticias,* 20 de Maio de 2003; *BBC Monitoring*.
232. Cmdr. Robin Warner, RAN, 'Law of the Sea Issues for the Timor Sea: A Defence perspective', *East Timor and its Maritime Dimensions: Law and Policy Implications for Australia,* Canberra, Australian Institute of International Affairs, 14 June 2000.
233. Hamish McDonald, 'Sounding the gap', *The Sydney Morning Herald,* 21 October 2000.
234. Mr John Akehurst, Managing Director, Woodside Petroleum Ltd, quoted in 'Australia's Woodside Sees No Threat from Timor Gas Rivalry', *Asia Pulse,* 6 December 1999.

Position of the East Timorese leading up to independence

A 'Statement on Timor Gap Oil' dated 22 July 1998, signed by José Ramos Horta, Mari Alkatiri and João Carrascalão, said:

> The National Council of Timorese Resistance [CNRT] will endeavour to show the Australian Government and the Timor Gap contractors that their commercial interests will not be adversely affected by East Timorese self-determination. The CNRT supports the rights of the existing Timor Gap contractors and those of the Australian Government to jointly develop East Timor's offshore oil reserves in cooperation with the people of East Timor.

At his first meeting with Foreign Minister Downer on 23 February 1999 while still in Indonesian custody, Xanana Gusmão said that an independent East Timor would honour the Timor Gap Treaty and would be happy to share the resources of the Timor Sea on an equitable basis with Australia. East Timor would expect to take over Indonesia's obligations under the Treaty.[235]

The East Timorese spokesman on Timor Gap matters, Mari Alkatiri, stated on 10 November 1999 in reference to the letter signed by Xanana Gusmão, José Ramos Horta and himself sent to Phillips Petroleum giving an assurance that they would honour the Treaty arrangements:

> Yes, it was sent… but that doesn't mean we have already accepted the Treaty as it is. It's not a problem of oil and gas, it's a problem of maritime borders… I think we have to redefine, renegotiate the border later on when East Timor becomes independent.[236]

In a further statement in Jakarta on 29 November 1999, Mr Alkatiri said:

> We still consider the Timor Gap Treaty an illegal treaty. This is a point of principle. We are not going to be a successor to an illegal treaty.

Mr Alkatiri said the East Timorese were willing to make transitional arrangements so that existing operators could continue their projects, and referred to negotiations that were under way between the United Nations, Portugal and Australia to sort out intermediate arrangements.[237]

José Ramos Horta declared on 7 May 2000 that East Timor was entitled to up to 90 per cent of the revenues:

> What I'm saying is that so far we are happy to continue to live with the terms of the agreement for the next year or two or three years. However, at the same time we must begin negotiations to review some of the terms... For instance, if you look into the Timor Sea map and if you notice where the gas and oil findings are located, I

235. Greg Earl, 'Gusmao assures Gap treaty is safe', *The Australian Financial Review,* 27 February 1999.
236. Paul Tait, 'East Timor backs gas project but warns on treaty', *Reuters*, 10 November 1999.
237. Karen Polglaze, 'Future of Timor Gap Treaty thrown into doubt', *Australian Associated Press,* 29 November, *The Sydney Morning Herald,* 30 November 1999.

> would dare to say that up to 90 per cent of the revenues from there could go to East Timor if we have a fair deal.[238]

In Canberra on 15 June 2000, Mr Alkatiri announced CNRT policy on the Treaty. The CNRT would be seeking, prior to UNTAET relinquishing its mandate, a new seabed boundary drawn an equal distance between East Timor and Australia as the starting point for negotiations on a new oil and gas revenue-sharing agreement. He said:

> We are not thinking of renegotiation 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 our countries and that means the Treaty would not have any effect any more.[239]

Mr Alkatiri was visiting Canberra as part of an UNTAET team to negotiate with Australia on a new treaty. Another member of the team, UNTAET's Director of Political Affairs Peter Galbraith, made a statement following the talks, saying:

> What UNTAET seeks is what the East Timorese seek. The East Timorese leadership has made it clear that the critical issue for them is to maximise the revenues of the Timor Gap. The legal situation is this: UNTAET has to continue the terms, but only the terms of the old Timor Gap Treaty and only until independence. Therefore, a new regime will have to be in place on the date of independence.[240]

The Australian Government's position was stated by a spokesman for Foreign Minister Alexander Downer on 11 July 2000, who said that Australia 'understands the discussion or debate is about the share of revenue; it's not delimitation of the seabed'.[241]

The Australian Opposition defined its policy in a resolution moved by Foreign Affairs Shadow Minister Laurie Brereton at the Australian Labor Party National Conference on 3 August 2000. The resolution stated:

> Labor is prepared to support the negotiation and conclusion of a permanent maritime boundary in the Timor Gap based on lines of equidistance between Australia and East Timor. Such a settlement would see major gas and petroleum reserves within East Timor's maritime boundaries and would be a just outcome consistent with the Law of the Sea.[242]

Speaking at a CNRT congress in Dili on 26 August 2000, Dr Alkatiri said East Timor wanted its maritime boundary with Australia to be equidistant between the two countries, which would put all the current oil and gas activity in the Timor Gap on East Timor's side. He stressed the need for a new legal instrument so as not to retroactively legitimise the 1989 Treaty: 'We refuse to accept that East Timor be the successor to Indonesia to the Treaty'.[243] Mr Galbraith said in a radio interview on 10 October 2000:

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238. *Background Briefing,* 7 May 2000.
239. Peter Alford and Robert Garran, 'East Timor wants new gap treaty', *The Australian,* 15 June 2000; Rod McGuirk, 'Downer stresses need for stability in Timor Gap', *AAP,* 15 June 2000.
240. Mark Dodd, 'Timor Gap deal set to deliver windfall for Dili', *The Sydney Morning Herald,* 21 June 2000.
241. Ray Brindal, 'Australia says revenue, not border, focus of Timor talks', *Dow Jones Newswires,* 14 July 2000.
242. Laurie Brereton, 'Labor Party policy on the future of the Timor Gap', media release, 3 August 2000.
243. 'Dili & Canberra to begin sea boundary talks in October', *Kyodo,* 28 August 2000; 'East Timor: Oil Negotiations with Australia to begin in October', *Lusa,* 28 August 2000.

> UNTAET's position, acting on behalf of the East Timorese people, is that the royalties and the tax revenue from the area north of the mid-point should come to East Timor, and if there is not going to be a maritime delimitation East Timor, however, should have the same benefit as if there were a maritime delimitation. That, after all is what East Timor is entitled to under international law.[244]

In the same interview, Mr Galbraith said that any state, including the independent country of East Timor, had the option of going to the International Court of Justice to seek a maritime delimitation. 'Hopefully', he said, 'it won't come to that because an agreement acceptable to the East Timorese will be negotiated and in place by independence'.

Negotiations with UNTAET/ETTA

On 18 September 2000, Foreign Minister Alexander Downer, Resources Minister Nick Minchin and Attorney General Daryl Williams announced that Australian officials would travel to Dili for a preliminary round of negotiations over three days from 9 October with UNTAET and East Timorese representatives on rights for future exploration and exploitation for petroleum in the Timor Gap. The ministers said the aim of the talks was to reach agreement on a replacement for the Timor Gap Treaty to enter into force on East Timor's independence. 'Australia currently has an agreement with UNTAET which provides for the continued operation of the terms of the Timor Gap Treaty originally negotiated with Indonesia', they said. 'It will expire on the date East Timor becomes independent.' The Ministers said it was necessary to avoid a legal vacuum and to provide commercial certainty for the petroleum industry operating in the gap: 'The eventual export of petroleum by pipeline from the Timor Gap to Darwin would bring considerable benefits in terms of Australian regional development. It is very important that there is a seamless transition of arrangements governing petroleum exploitation in the Timor Gap'.[245]

In its response on 5 April 2001 to the December 2000 report on East Timor of the Senate Foreign Affairs, Defence and Trade Committee, the Australian Government restated the position held since William McMahon's statement in the House of Representatives of 30 October 1970:

> It remains the Government's position that, under international law, Australia's seabed rights extend from its coastline throughout the natural prolongation of its continental shelf to the deepest part of the Timor Trough. East Timor has a different position. Under international law, it is for both parties to work to achieve an equitable solution.[246]

Attorney-General Senator George Brandis reaffirmed this geological interpretation on 1 September 2014: 'the Australian continental shelf to the north-west of Western Australia runs beneath the Timor Sea very close to the southern coastline of East Timor'.[247] It was again confirmed by the Department of Foreign Affairs and Trade in March 2017 that in the negotiations on the maritime boundary Australia maintained its position on the principle of

244. *Asia Pacific,* 10 October 2000.
245. Minister for Foreign Affairs, 'Timor Gap Treaty negotiations to begin', media release, 18 September 2000; 'Renegotiation of Timor Gap treaty to begin', *AAP,* 18 September 2000.
246. *Senate Hansard,* 5 April 2001.
247. *Senate Hansard,* 1 September 2014, p.43.

natural prolongation of the continental shelf.[248] In contrast, the consensus of professional geologists is that the seabed of the Timor Sea and the island of Timor form the northern part of the Australian continental shelf. The Australia government's insistence, despite this, that there are two continental shelves on either side of the Timor Trough has raised this belief to the status of an article of faith, beyond rational argument based on scientifically verifiable fact.

East Timor Cabinet Member for Economic Affairs Mari Alkatiri and Cabinet Member for Political Affairs and Timor Sea Peter Galbraith jointly led the UNTAET/ETTA delegation at the second round of talks on the Timor Sea in Melbourne on 4-6 April 2001. The talks failed to secure agreement on the location of the boundary. Speaking to the media upon his return to East Timor, Alkatiri described the talks as a 'setback'. He said that UNTAET/ETTA's position on the Timor Sea was that if East Timor would apply current international law, one hundred per cent of the resources of the cooperation zone would belong to East Timor. 'But since there is an overlapping of claims, international law advises that a solution be found through negotiations', he said. Alkatiri said on 12 April 2001 that UNTAET and the East Timor Transitional Administration were 'flexible in the Timor Sea negotiations', but that the strength of East Timor, being a small country, was international law.[249]

In a speech on 9 April 2001 to an Australian Petroleum Production and Exploration Association annual meeting in Hobart, Peter Galbraith said without a treaty based on international law, East Timorese were prepared to wait patiently for their rights and risk losing important markets. East Timorese negotiators could not return with a treaty 'that would give East Timor less economic benefit than that which it is entitled under international law', he said.[250]

International Law on the resolution of maritime boundary disputes

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), which entered into force in 1994, is not prescriptive about the basis for delimitation.[251] Article 83 (1) reads:

> The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Article 38 of the Statute of the International Court of Justice reads:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;

248. Katrina Cooper, Senior Legal Adviser, Department of Foreign Affairs and Trade, *Joint Standing Committee on Treaties Committee Hansard,* 30 March 2017, p. 57.
249. 'According to Cabinet Member, 'East Timor flexible on Timor Sea'', *UNTAET News Briefing,* Dili, 12 April 2001.
250. 'Australia, E Timor To Resume Timor Gap Treaty Talks In May', *Dow Jones Newswires,* 11 April 2001.
251. UNCLOS is on-line at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The Latin term, *'ex aequo et bono'* may be translated 'in justice and fairness'. Something to be decided *ex aequo et bono* is something that is to be decided by principles of what is fair and just. Most legal cases are decided on the strict rule of law. For example, a contract will be normally upheld and enforced by the legal system no matter how 'unfair' it may prove to be. But a case to be decided *ex aequo et bono*, overrides the strict rule of law and requires instead a decision based on what is fair and just given the circumstances.[252]

The International Court of Justice concluded in its 1993 judgement on delimiting the maritime boundary between Greenland and Jan Mayen Land that 'it is in accord with precedents to begin with the median line as a provisional line and then to ask whether 'special circumstances' require any adjustment or shifting of that line'.[253]

In 1985, in a ruling on the continental shelf between Libya and Malta, the International Court of Justice confirmed that under UNCLOS geological or geophysical factors, such as the Timor Trough, have no relevance to a boundary delimitation where states are less that 400 nautical miles apart.[254]

Although the Law of the Sea Convention does not prescribe the median point for delimitation purposes, the median point is now generally accepted as the basis for delimitation. It should be noted that Australia adopted the median line in 1981 as the fisheries boundary, and in 1997 for the Australia-Indonesia Delimitation Treaty as it related to exclusive economic zones. And when in 2004 Australia negotiated a maritime boundary with New Zealand, agreement was reached on the basis of the median line.[255] The Treaty 'confirms the median line boundary between the overlapping EEZs that has been observed de facto by the two countries for more than two decades'.[256]

There is provision under Article 298 of the UNCLOS Convention for a state to seek compulsory arbitration of a dispute concerning maritime boundary delimitation in accordance with the non-binding conciliation procedures set out in Annex V of the Convention, providing certain conditions are met. Article 11 of Section 2 of Annex V, 'Compulsory Submission to Conciliation Procedure Pursuant to Section 3 of Part XV', says:

> 1. Any party to a dispute which, in accordance with Part XV, section 3, [Article 298] may be submitted to conciliation under this section, may institute the proceedings by written notification addressed to the other party or parties to the dispute.

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252. *The WWLIA Legal Dictionary*.
253. *International Court of Justice Reports,* 38, 1993, *Maritime Delimitation in the Area Greenland and Jan Mayen (Denmark v. Norway),* paras, 49-51; cited in Kathryn Khamsi, 'A Settlement to the Timor Sea Dispute?', *Harvard Asia Quarterly,* vol.IX, no.4 , Fall 2005, n.35.
254. *International Court of Justice Reports,* 13, 1985, *Case Concerning the Continental Shelf (Lybian Arab Jamahiriya v. Malta),* paras, 39-40; cited in Kathryn Khamsi, 'A Settlement to the Timor Sea Dispute?', *Harvard Asia Quarterly,* vol.IX, no.4 , Fall 2005, n.42.
255. Jonathan I. Charney *et al,. International Maritime Boundaries,* 2005, pp. 3759–3777.
256. Land Information New Zealand (LINZ) - Toitū te whenua, 'The New Zealand-Australia Maritime Treaty', at http://www.linz.govt.nz/hydro/projects-programmes/continental-shelf/treaty/index.aspx (as at 4 March 2013).

> 2. Any party to the dispute, notified under paragraph 1, shall be obliged to submit to such proceedings.

Thereupon, by agreement of the states, a Conciliation Commission shall be constituted by the Permanent Court of Arbitration which, as an administrative body rather than a court, would act as Registry in the proceedings. The Commission will hear the states' positions on the maritime boundary, examine their claims, and make proposals to the states for an amicable settlement. If the states party can reach an amicable settlement, they can agree to terminate the conciliation proceedings. Failing an agreement, the Commission is to issue a report on its conclusions on all questions of fact and law relevant to the dispute as well as appropriate recommendations for an amicable settlement. This report of the Conciliation Commission, including its conclusions and recommendations, is not be binding on the states party. This distinguishes this UNCLOS proceeding from a judgment of the International Tribunal for the Law of the Sea. The two states party are, however, obliged to attempt to negotiate an agreement on the basis of the Commission's report. If the negotiations fail, they 'shall, by mutual consent', submit their maritime boundary dispute to binding adjudication or arbitration.[257]

Petrotimor

On 21 June 2001, Petrotimor (owned 80 per cent by Colorado-based Oceanic Exploration and 20 per cent by East Timorese interests) presented the United Nations Transitional Administration in East Timor with its claim to own a concession over the sea bed resources granted by the Portuguese administration in 1974.[258] UN administrator Sérgio Vieira de Mello reacted to the company's claim by issuing a memo forbidding UN employees to have contact with its staff.[259] Petrotimor's chief executive, Mr Charles Haas, said on 26 June 2001 the company planned to lodge a statement of claim in the Australian Federal Court seeking legal recognition of the 1974 exploration concession granted by Portugal. Petrotimor's action in the Federal Court against the Australian Government, Phillips Petroleum Company and the Timor Gap Joint Authority was launched on 22 August 2001.[260] It sought orders for compensation of up to $2.85 billion in damages, a declaration that the Timor Gap Treaty was void and that all decisions by the Australian and Indonesian Joint Authority over the Timor Sea concerning the issue of production sharing contracts were invalid and of no effect. The action focussed on section 51(xxxi) of the Constitution, which states that the Commonwealth cannot 'acquire property other than by just means'. United Nations legal experts advising the East Timor Government said Petrotimor's claim was unlikely to succeed. 'Petrotimor is engaged in exploration by litigation', one adviser said.[261] The full bench of the Federal Court ruled on 3 February 2003 it could not hear Petrotimor's claim as the issue could require interference in Australia's international relations and foreign policy and so the court did not have the power to act. In their ruling, Justices Black and Hill said: 'We are of the view that ... the court would simply have no jurisdiction to adjudicate on the application of the law of Portugal in granting to the applicants (Petrotimor) the concessions to which they claim to be entitled.'[262]

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257. Hao Duy Phan, 'The Precedent-Setting Timor-Leste and Australia UNCLOS Case', *The Diplomat*, 29 September 2016.
258. 'US company claims rights to Timor Sea resources', AAP, 21 June 2001.
259. Gavin Lower, 'Timor Sea $2bn compo claim', *The Australian,* 16 May 2002.
260. Jane Counsel, 'Damages bid hits Timor Gap talks', *The Sydney Morning Herald,* 23 August 2001.
261. Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune,* 17 May 2002.
262. Sarah Crichton, 'Timor oil hearing ruled out by court', *The Sydney Morning Herald,* 4 February 2003.

On 3 March 2004, Oceanic Exploration began an action against Australia, Indonesia and Conoco Phillips in the Columbia District Court in Washington, DC, claiming up to $30 billion in compensation, an amount equivalent to ConocoPhillips' earnings from the Bayu Undan oil and gas development.[263] The case was lodged under the RICO (Racketeer Influenced and Corrupt Organisations) Act.[264] The case moved slowly through the US court system for three years. In September 2006, the District Court of Columbia dismissed some legal grounds upon which Oceanic had lodged its claim but denied ConocoPhillips' motion to dismiss the case. In February 2007, the court brought the case closer to conclusion when it ruled that the case should be heard in the District Court of Southern Texas near ConocoPhillips' Houston headquarters. Judge Emmet Sullivan said that he decided to order the transfer, which ConocoPhillips requested, in part because 'any alleged wrongdoing that occurred in the United States emanated from the Houston headquarters'.[265] In May 2008, the US District Court in Texas dismissed the claim brought by Oceanic and its Petrotimor subsidiary. In 1972, according to the judgment, Australia and Indonesia agreed to jointly exploit undersea oil and gas. In 1974, Portugal, then in control of East Timor, independently granted Petrotimor—of which Oceanic owned 80 per cent—the right to explore and produce in the same area, later to become known as Timor Gap. Petrotimor lost its purported interests when Indonesia invaded East Timor in 1975. By 1989 Australia and Indonesia had formalised their arrangement and in 1991 ConocoPhillips successfully bid to develop seabed blocks. It would go on to become the biggest operator in the petroleum field. In 2001, Oceanic asked the UN—which held transitional power in Timor—to honour the concessions it had been awarded by Portugal in the 70s. This was refused. Upon winning independence, Dr Alkatiri, East Timor's first prime minister, confirmed the ConocoPhillips contracts and ratified the Timor Gap Treaty. Houston judge Lynn Hughes said Oceanic's case amounted to '50 pages of trivia'. The judge said: 'Oceanic may well have been the victim of international politics when it lost its Portuguese concession to the Indonesian invasion. It cannot recover for its losses to political risk 30 years ago—not from Indonesia, not from ConocoPhillips'.[266]

The July 2001 Interim Agreement

On 6 July 2001 Australia and East Timor signed an interim agreement to share the management and revenue from oil and gas production in the Timor Gap. Foreign Minister Alexander Downer said: 'We have a quite clear national interest in ensuring as best we can that East Timor is a stable and prosperous society. There is no point in us taking a parsimonious approach to East Timor and plunging it into economic difficulties. It is in our interests to be generous to East Timor.' East Timor negotiator Peter Galbraith commented that Australia would also benefit greatly, with an estimated $80 billion in earnings over the two decades for downstream processing of gas at a major new plant to be built in Darwin.

The need for the agreement on petroleum production arose because Australia and East Timor could not reach agreement on a maritime boundary. Under the agreement they agreed to share the management and revenue from oil and gas production in an area of 75,000 sq km between East Timor and northern Australia, the area of disputed sovereignty. The agreement abolished the three zones that existed in the 1989 Timor Gap Treaty between Indonesia and Australia. In the 1989 treaty, revenue from the main, central zone was split evenly, but under

263. Nigel Wilson, 'Timor oil bribe probe,' *The Australian,* 4 March 2004.
264. Anne Barker, 'Company disputes Timor Sea oil rights', *AM,* 3 March 2004.
265. Lindsay Murdoch, 'Way cleared for Timor oil challenge', *The Age,* 27 February 2007.
266. Paul Toohey, 'Timor's Alkatiri to sue over `false allegations' of oil and gas bribes', *The Australian,* 5 June 2008.

the 2001 agreement revenue from 90 per cent of production in the whole zone would be paid to East Timor.[267] The agreement gave an estimated $7 billion to East Timor over 20 years and nearly $1 billion to the Australian Government, down $3 billion on the previous arrangement with Indonesia. Gas and oil in the Australia/East Timor Joint Petroleum Development Area was valued at $22 billion. East Timor would also get royalties from 20 per cent of the adjoining $27 billion dollar Greater Sunrise Field. Planned infrastructure worth more than $6 billion included pipelines and gas processing facilities in the Northern Territory. Australia would give $8 million a year to East Timor for petroleum-related industry projects.[268]

At a news conference after the signing, Mr Galbraith described the negotiations as 'surprisingly difficult', and said it was the first time in UN history the world body had negotiated a bilateral treaty on behalf of another country: 'This treaty will be one of the most important legacies of the transitional period'. Proceeds from the Timor Sea would not make East Timor a rich country but it would give it an escape from aid dependency if used wisely, he said.[269]

East Timor's Foreign Minister José Ramos Horta said in Sydney on 2 April 2002 he did not expect any problems to arise over the signing into treaty by an independent East Timor of the interim agreement reached with Australia to share oil and gas production in the Timor Sea. However, he brought up the possibility of later opening negotiations with Australia and Indonesia on the new country's maritime boundaries: 'We can open negotiations with Australia and Indonesia to redefine our maritime boundaries'. He said the treaty with Australia would nevertheless be ratified on or shortly after East Timor officially gained full independence 20 May 2002:

> I hope...on May 20, or 21, or within days, that East Timor and Australia would sign the interim arrangements we have reached. I am the Foreign Secretary, and one of the sacred principles is you negotiate something in good faith, you sign it, you honour it. It would be very bad for East Timor's international standing if on day one of independence the very first thing we did as a major foreign policy act was to breach, fail to ratify, an international agreement that we had negotiated for two years between the United Nations and the Australian Government.…Australia is still the main beneficiary, but we reached agreement in good faith with Australia and we must honour it.[270]

Australia's rejection of international arbitration

Speaking at a seminar on maritime boundaries in the Timor Sea on 14 June 2000, Mr Bill Campbell, First Assistant Secretary, International Law Office, Attorney-General's Department, said he favoured a negotiated settlement of the Timor Gap dispute rather than arbitration by an international court or tribunal: 'States lose a degree of control over maritime delimitation where the matter is placed in the hands of a court or tribunal. The resulting boundary/arrangements may not satisfy some or all of the parties'.[271] Mr Campbell's speech

267. Robert Garran and Don Greenlees 'Downer signs Gap deal with Dili', *The Australian,* 6 July 2001.
268. Mark Dodd, 'Oil deal sealed with champagne', *The Sydney Morning Herald,* 6 July 2001.
269. Robert Garran and Don Greenlees 'Downer signs Gap deal with Dili', *The Australian,* 6 July 2001.
270. 'East Timor to ratify Timor Gap Treaty', *Asia Times,* 4 April 2002; 'Timor Sea Treaty To Be Ratified', 2 April 2002, http://www.rigzone.com/news/article.asp?a_id=2975
271. Mr Campbell spoke at 'East Timor and its Maritime Dimensions: Legal and Policy Implications for Australia', Canberra, Australian Institute of International Affairs, 14 June 2000; Bill Campbell, 'Maritime

foreshadowed a decision announced on 25 March 2002 in a joint statement by Attorney-General Daryl Williams and Foreign Minister Alexander Downer that Australia would henceforth exclude maritime boundaries from compulsory dispute settlements in the International Court of Justice and the International Tribunal for the Law of the Sea. 'Australia's strong view is that any maritime boundary dispute is best settled by negotiation rather than litigation', Foreign Minister Alexander Downer said. Mari Alkatiri, East Timor's chief minister, described the move as 'an unfriendly act'.[272]

Mr Downer denied the decision was linked to the Timor Sea issue but the announcement was made after a seminar held under Petrotimor auspices in Dili on 23-24 March 2002, during which experts advised that East Timor should own most of the biggest natural gas fields so far discovered in the Sea, including the Greater Sunrise resource being developed by Woodside, Shell, Phillips and Osaka Gas.[273] The seminar heard advice from two international law experts, Professor Vaughan Lowe of Oxford University and Sydney barrister Christopher Ward, that current maritime law would swing the lateral boundaries of East Timor's offshore zone to the east and west, giving it at least 80 per cent of the Greater Sunrise fields and potentially 100 per cent, as opposed to the 20 per cent under present boundaries.[274]

On 17 June 2002, Dr Ramos Horta said East Timor respected Australia's sovereign right to make the unilateral withdrawal from the jurisdiction of the International Court of Justice in relation to some maritime boundary issues. But East Timor, he said, had no intention of taking legal action as a first step: 'It was never an intention on the part of the East Timor side to seek International Court of Justice intervention as a first measure'.[275]

The 2002 Timor Sea Treaty

The Timor Sea Treaty was signed in Dili on 20 May 2002, the first day of East Timor's existence as an internationally recognized independent state. The Timor Sea Treaty was to remain in force until there was a permanent seabed delimitation between Australia and East Timor, or for thirty years from the date of its entry into force, whichever was the sooner (article 22). The Treaty confirmed the creation by the July 2001 interim agreement of a Joint Petroleum Development Area (JPDA), with 90 per cent of revenue going to East Timor and 10 per cent to Australia. East Timor was expected to get $6 billion in revenue from the Bayu-Undan oil and gas field in the joint area over 20 years. Dr Alkatiri said signing the treaty did not prejudice East Timor's boundary claim, while Foreign Minister José Ramos Horta said he expected Australia would eventually concede a bigger share of Greater Sunrise revenue.[276]

In his maiden speech to the first session of East Timor's parliament on its first day as an independent nation, Prime Minister Mari Alkatiri declared that his government would be seeking a greater share of Timor Sea oil and gas revenue. The warning was given just an hour

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boundary arrangements in the Timor Sea', *International Trade & Business Law,* vol.1, no.5, June-July 2000, pp.61-68, p.72.

272. Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune,* 17 May 2002.

273. Attorney-General Daryl Williams and Minister for Foreign Affairs Alexander Downer, 'Changes to International Dispute Resolution', joint media release, 25 March 2002; Hamish McDonald, 'Timor gas billions all at sea', *The Sydney Morning Herald,* 27 March 2002; 'Dispute Over Timor Sea Resources Intensifies', *Xinhuanet,* 27 March 2002.

274. Hamish McDonald, 'Timor gas billions all at sea', *The Sydney Morning Herald,* 27 March 2002.

275. Karen Polglaze, 'Maritime boundary talks will press Australia', *AAP,* 17 June 2002.

276. Tom Hyland, 'Brace for fight over oil, Australia told', *The Sydney Morning Herald,* 21 May 2002.

before he signed the Timor Sea Treaty with Prime Minister John Howard: '[The treaty] does not represent, under no circumstances does it represent, a maritime border', he said. The Government of East Timor 'will use all available instruments and international mechanisms to search for a solution'.[277] He later described the Treaty as 'an administrative contract, a framework for the two countries to solve their problems, such as the difficulty over maritime boundaries, which is the principal difference which divides us'.[278]

After Australian and East Timorese government leaders signed the Timor Gap Treaty in Dili on 20 May 2002, East Timorese Foreign Minister José Ramos Horta said he believed Australia would concede a larger share of Greater Sunrise—a gas field three times larger than Bayu-Undan—through negotiation. 'It's only fair and Australia is a fair-minded country', Dr Ramos Horta said. 'I dread the thought we will have to go to court. It would be a failure of leadership if the two neighbours, friendly countries, can't reach agreement through negotiation on new boundaries to replace those struck with Indonesia'.[279] But Prime Minister John Howard said while Australia was open to discussion, the boundaries on which the original treaty with Indonesia was based, which put 80 per cent of Greater Sunrise in Australian territory, were fair: 'We believe that the approach we have taken to date has been very fair; has been generous'. He denied that Australia's withdrawal from the ICJ and from dispute settlement under the United Nations Convention on the Law of the Sea was unfriendly: 'That is a legitimate protection of a national interest'.[280]

Foreign Minister Alexander Downer signalled on 25 May 2002 that Australia would dismiss any proposals from East Timor to radically change seabed boundaries because it would risk unravelling thousands of kilometres of boundaries that had already been settled with Indonesia. Responding to calls from East Timorese leaders for Australia to provide a greater share of oil and gas reserves currently within Australian territory, Mr Downer said Canberra was obliged to consider any proposals put forward, but a radical change to delimitation of the boundaries was unacceptable:

> As I explained to the East Timorese some time ago, we are happy to hear what they have to say but we don't want to start renegotiating all of our boundaries, not just with East Timor, but with Indonesia. It has enormous implications. As I have explained to them, our maritime boundaries with Indonesia cover several thousand kilometres. That is a very, very big issue for us and we are not in the game of renegotiating them.[281]

In response, Prime Minister Alkatiri said that the Timor Sea Treaty was 'nothing to do with boundaries and we would like to negotiate maritime boundaries,' and that Mr Downer had assured him 'that they are prepared, they are ready to negotiate the maritime boundaries'.[282] Interviewed on 28 May 2002, Mari Alkatiri denied that Australia's position made negotiations on maritime boundaries a waste of time, and left East Timor no alternative but to go directly to the International Court:

> No, I think the International Court is really out of the question. Australia has already withdrawn from the jurisdiction of the International Court. This was

277. Tom Hyland, 'Brace for fight over oil, Australia told', *The Sydney Morning Herald,* 21 May 2002.
278. Jill Jolliffe, 'Dili still contesting sea treaty', *The Age,* 23 June 2002.
279. 'East Timor Considers Court Action Against Australia', *Asia Pulse,* 20 May 2002.
280. 'East Timor Considers Court Action Against Australia', *Asia Pulse,* 20 May 2002.
281. Don Greenlees, 'Downer: no change to Timor borders' *The Australian,* 25 May 2002.
282. 'Alkatiri says Australia has promised to renegotiate seabed boundary', *Asia Pacific,* 28 May 2002.

> classified by me at the time as an unfriendly act from the Australian government. Now I'm realising that this act is linked to the maritime boundaries. I hope not. But I'm realising that this is really linked to the maritime boundaries—a way to tighten [tie] our hands. We are looking to apply international law in the zone and we would like, really to have friendly discussions, friendly negotiations between the two friendly countries.…I still have a lot of instruments to be used even in the treaty itself. I think the signing of this treaty was the right move.[283]

Dr Alkatiri may have taken comfort from Australia's continued adherence to the Law of the Sea Convention, article 83(1) of which requires adherent states to observe international law and custom when reaching agreement on the delimitation of the continental shelf between them—as acknowledged by the Australian Government in its April 2001 response to the Senate Foreign Affairs, Defence and Trade Committee report on East Timor: 'Under international law, it is for both parties to work to achieve an equitable solution'.[284] Current international law and custom would appear to favour division along a line of equidistance.

Negotiations on a unitisation agreement for Greater Sunrise

Despite the breakthrough on Bayu-Undan, negotiations on the other large project in the Timor Sea remained deadlocked. In contention were two large oil and gas fields known as Greater Sunrise. About 80 per cent of this resource lay on the Australian side of the 1972 seabed boundary. The remainder was within the JPDA. These reservoirs were subject to a so-called 'unitisation' agreement between the oil companies and the East Timorese Government, which was in the process of being negotiated (unitisation meant treating the field as a unit or whole).[285] East Timorese and Australian officials held the first round of negotiations on reaching an international standardization agreement in the Greater Sunrise gas field on 18 July 2002. After the meeting, Prime Minister Alkatiri said: 'We now have a clear negotiating timetable and are in a good position to conclude a standardization accord by the end of the year'.[286]

Woodside Petroleum (owning 33.44 per cent) favoured a proposal by Royal Dutch/Shell to develop substantial resources in the Timor Sea via the world's first floating liquefied natural gas facility. The decision reversed the original plan to bring the gas onshore through a pipeline and dealt a blow to Phillips Petroleum, the other partner in the Greater Sunrise project, and to the Northern Territory government that had hoped to use the offshore energy reserves to develop an industrial base in Darwin. Under the original plans, one option was for Sunrise to share Bayu-Undan's pipeline and for gas from the two fields to be marketed jointly, with El Paso Corporation signing a letter of intent, later expired, to be a cornerstone customer. Woodside, which as operator of Sunrise was asked in 2001 to evaluate the competing proposals, said on 13 March 2002 it had decided on Shell's plan because it involved lower costs. 'The fundamental economics of a floating LNG facility at Sunrise are significantly better than bringing the gas to shore', said John Akehurst, Shell's managing director. Phillips favoured a pipeline partly because this would enable it to share infrastructure with its Bayu-Undan project, the first Timor Sea field being developed. Under Shell's proposal, the gas would

283. 'Alkatiri says Australia has promised to renegotiate seabed boundary', *Asia Pacific,* 28 May 2002.
284. *Senate Hansard,* 5 April 2001.
285. Nigel Wilson, 'Drilling begins at $1.6bn project,' *The Australian,* 3 June 2002; 'With Independence, What Changes for the Timor Gap?' *The La'o Hamutuk Bulletin,* vol.3, no.4, May 2002. 'Talks begin with Canberra on Greater Sunrise gas field', *Lusa,* 19 July 2002.
286. 'Talks begin with Canberra on Greater Sunrise gas field', *Lusa,* 19 July 2002.

be processed, liquefied and stored on the facility before being loaded on to tankers and exported without ever entering Australia.[287] Phillips said on 14 March 2002 it was still not convinced that the floating LNG (FLNG) facility proposed by its partners, Royal Dutch/Shell and Woodside, was the best way to proceed.[288]

Australia had insisted, as a condition for the Timor Sea Treaty going ahead, on an annex to it involving the Greater Sunrise field, a richer deposit with reserves worth about $30 billion that straddled the eastern corner of the joint area. East Timor would get 18 per cent of revenues from Greater Sunrise, but its Government had legal advice that the entire area could be within its maritime boundaries.[289] In Darwin on 16 June 2002, Prime Minister Mari Alkatiri said East Timor would demand Australia's 80 per cent share of Greater Sunrise. Dr Alkatiri told the South East Asia-Australia Offshore Conference in Darwin that Canberra had agreed to discuss new maritime boundaries between the two countries which were not settled by the Timor Sea Treaty. He said: 'Sunrise should be 100 per cent East Timorese'. He added that East Timor's claim was 'open to negotiations'.[290] He said that existing arrangements covered by the treaty signed on 20 May would not limit East Timor's ambitions for its maritime boundary with Australia. He said both the Laminaria oilfield, operated by Woodside and producing more than 100,000 barrels of oil a day, and the Sunrise gas reservoir, which was being studied for a $5 billion development project, would come under East Timorese control if the nation's argument for the location of maritime boundaries succeeded. In 2001 Laminaria provided $81 million to the Australian Government. Dr Alkatiri said that, as a new nation, East Timor did not have legal boundaries with other countries, which meant it could reach a new boundary with Australia. He said:

> The main issues still are the lateral boundaries. Our claim is very clear. Under current international law Sunrise should be 100 per cent East Timorese, Laminaria should be 100 per cent East Timorese. We're open to negotiation. We're not going to push for a quick and tidy solution.[291]

At talks in Canberra on 17 June 2002, East Timor's Foreign Minister, José Ramos Horta, asked his Australian counterpart, Alexander Downer, to agree to start maritime boundary negotiations as soon as possible. 'There is no timetable as yet', an East Timorese source said.[292] Dr Ramos Horta said that East Timor would soon enter negotiations with Indonesia over maritime boundaries, putting pressure on Australia to begin talks to resolve its sea frontiers with East Timor: 'Our position has been made very clear. We intend to start negotiations with Indonesia very soon'.[293] He said that East Timor accepted that it was Australia's sovereign decision to 'make reservations' on the jurisdiction of the ICJ. However, he said it was up to both Indonesia and Australia as 'neighbours and friends' to negotiate with East Timor on boundaries. He did not rule out a legal battle with Australia if negotiations broke down.[294]

On 9 July 2002, East Timor's parliament approved draft legislation outlining a maritime boundaries claim extending 200 nautical miles from the nation's coastline. The claim made

287. Virginia Marsh, 'Woodside opts for Shell plan over Phillips', *Financial Times*, 21 February 2002.
288. Virginia Marsh, 'East Timor set for bonanza as gas project gets go-ahead', *Financial Times*, 14 March 2002.
289. Don Greenlees, 'Downer: no change to Timor borders' *The Australian,* 25 May 2002.
290. Karen Polglaze, 'Maritime boundary talks will press Australia', *AAP,* 17 June 2002.
291. Nigel Wilson, 'East Timor to extend sea oilfield', *The Australian,* 18 June 2002.
292. Craig Skehan, 'Timor stakes claim for bigger slice of gas field', *The Sydney Morning Herald,* June 18 2002.
293. Karen Polglaze, 'Maritime boundary talks will press Australia', *AAP,* 17 June 2002.
294. Craig Skehan, 'Timor stakes claim for bigger slice of gas field', *The Sydney Morning Herald,* 18 June 2002.

under the Maritime Zones Act took in oil and gas deposits and fishing zones in waters claimed by Australia and Indonesia. It claimed all of the JPDA, and all of the Greater Sunrise gas field. Prime Minister Mari Alkatiri said the legislation should not been seen as aggressive towards Australia and that he looked forward to peaceful negotiations:

> In areas where there could be overlapping, we hope to begin calm and swift negotiations with the parties involved. East Timor is a small country, recovering after decades of occupation, and our neighbours are strong and rich. However, I believe that Indonesia and Australia will be fair in the negotiations.[295]

Reporting at a conference in Melbourne in October 2002 on the course of negotiations, Dr Ramos Horta complained that Australia was insisting that the ratification of the Timor Sea Treaty await agreement on unitisation of excise and royalties from the Greater Sunrise field. He said: 'Australia want to impose a fait accompli on its claims on the maritime boundary negotiated in 1972, over which East Timor had no say'.[296]

The Joint Standing Committee on Treaties of the Australian Parliament reported on the Timor Sea Treaty on 11 November 2002 and recommended it be ratified. On unitisation, the Committee considered that there was an urgent need to progress negotiations to 'provide the necessary certainty to allow the substantial investment required for the development of the Greater Sunrise fields', and recommended that the Australian Government use its best endeavours to 'conclude the International Unitisation Agreement for the Greater Sunrise fields on or before the date on which the Timor Sea Treaty is ratified and in any event before 31 December 2002 as this would serve the best interests of both nations'.[297] Speaking at the presentation of the report, the Deputy Chair of the Committee, Mr Kim Wilkie, said:

> It is vitally important that the treaty be ratified, but it is also vitally important that we get the unitisation process happening as quickly as possible. If we do not do that, we could end up losing Bayu-Undan as a project and not getting Greater Sunrise developed in the future. I want to know what the foreign minister is doing and what his counterpart in developing projects, Minister Macfarlane, is up to in relation to getting these projects happening—that is, getting in there and getting unitisation happening before the end of the year, as per the memorandum of understanding. If they do not get that happening, Australia stands to lose billions of dollars.[298]

Foreign Minister Downer said at the Timor Sea Treaty ministerial meeting in Dili on 27 November 2002, 'for Greater Sunrise we definitely want to go ahead with offshore [processing]. The Northern Territory government is not very pleased'.[299] Woodside said in December 2002 that neither option was viable but highlighted the potential of a FLNG facility at Greater Sunrise supplying LNG to both the Asia Pacific and North America.[300] Northern Territory Chief Minister Clare Martin said on 27 March 2003 she was lobbying hard for gas to be brought from the Sunrise field onshore to Darwin: 'I believe it is in their best interests; I

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295. 'Parlamento aprova proposta de lei sobre fronteiras marítimas'/'Dili aims to claim full maritime boundaries in Timor Sea', *Lusa,* 9 July 2002.
296. Rowan Callick, 'Delay jeopardises East Timor gas', *The Australian Financial Review,* 23 October 2002.
297. Australia Parliament Joint Standing Committee on Treaties, *Report 49,* Canberra, 2002, p.35.
298. *House of Representatives Hansard,* 11 November 2002, p.8655.
299. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council Of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics
300. Nigel Wilson, 'Sunrise development in tatters', *The Australian,* 27 November 2002; Nigel Wilson, 'Sunrise development ends', *The Australian,* 6 December 2002.

believe there are profits to be made and certainly we are encouraging the joint venturers… to bring the gas from Sunrise onshore'.[301] On April 30, an open letter to Woodside shareholders published in *The Australian Financial Review,* signed by Ms Martin and the NT's Opposition Leader, Denis Burke, as well as leading business and community groups, urged Woodside to support the national interest by bringing the Greater Sunrise gas ashore rather than developing it on a floating plant at the wellhead and shipping it overseas. In response, Mr Gary Gray, Woodside's Director of Corporate Affairs, flew to Darwin from Perth to see Martin and voice, among other things, Woodside's 'concerns' the letter had very pointedly singled out their company.[302]

The negotiations over unitization were accompanied by tension in relations between Canberra and Dili. Timorese officials said there had been an angry outburst by Foreign Minister Alexander Downer during a meeting in Dili on 27 November 2002 with Dr Alkatiri and senior Timorese negotiators. Mr Downer had thumped the table and abused Dr Alkatiri and his officials for insisting that they would not give up potential resources claims before a formal maritime boundary was agreed between the countries.[303] Mr Downer described it as a 'good and boisterous discussion'. At that meeting, he proposed the establishment of a Joint Maritime Commission which would start to examine the seabed and EEZ issues in 2003. He said: 'We will negotiate boundaries'. He made clear that Australia would not agree to the East Timorese demand for an expansion of the Joint Petroleum Development Area to include the Greater Sunrise field: 'We worry about negotiations on the TST [Timor Sea Treaty] and the implications for our relations with other countries, especially Indonesia. We have a massive boundary—with France—New Caledonia, New Zealand, Papua New Guinea'. He pointed out that acceptance of the Timor Sea Treaty was 'without prejudice to maritime boundaries'.[304]

The Australian Government adopted the tactic of delaying ratification of the Timor Sea Treaty until East Timor assented to the terms it set for the unitisation agreement although, as was made clear by Dr Geoff Raby, Acting Secretary, Department of Foreign Affairs and Trade, there was 'no technical dependency' between finalising the IUA and ratification of the Treaty.[305] Northern Territory Minister for Asian Relations and Trade Paul Henderson said on 11 February 2003 that the Commonwealth Government was linking ratification with separate negotiations over the Greater Sunrise oilfield in a bid to increase its bargaining power.[306]

On 28 February 2003, Prime Minister Mari Alkatiri accused the Howard Government of stalling ratification of the Bayu-Undan project in an attempt to force the Timorese to accept a smaller share of royalties for the neighbouring Sunrise fields, which were estimated to hold reserves at least twice as large. While Australia had proposed that East Timor receive 90 per cent of revenues from the 20 per cent of the Sunrise field within the Timor Gap treaty zone—the same sharing formula as for Bayu-Undan—the Australian Government was insisting all reserves outside the zone belonged to Australia. Dr Alkatiri said that unless the Timor Gap Treaty was approved by the Australian Parliament by 11 March, the contract deadline for

301. 'NT still pushing onshore option for Greater Sunrise gas', *AAP*, 27 March 2003.
302. Alan Ramsey, 'Sunrise—a New Dawn for the Territory', *The Sydney Morning Herald,* 10 August 2002.
303. Nigel Wilson, 'Downer 'abuse' claims', *The Australian,* 13 December 2002.
304. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics
305. Dr Raby, *Senate Foreign Affairs, Defence and Trade Legislation Committee Hansard,* 13 February 2003, p.299; Senator Crossin, *Senate Hansard,* 6 March 2003, p.9228.
306. Jill Jolliffe, 'NT offers to help save E Timor gas deal', *The Sydney Morning Herald,* 11 February 2003.

project operators ConocoPhillips, and the Japanese companies which had agreed to buy the entire output of Bayu-Undan might quit the deal:

> The Japanese will seek a better price or they may go elsewhere to find a more secure supplier. If Australia wants to retain its credibility and honour, this treaty must be ratified within the next week. Is Australia governed by the rule of law or not? The Australians are trying to force us to give up on our claims on Sunrise. Their tactics are very clear. Australia knows that these revenues are vital for us. I am very surprised by their attitude. I never thought a democratic country like Australia would play this kind of role with a poor neighbour.[307]

A spokesman for Resources Minister Ian Macfarlane confirmed that 'priority' was being given to concluding the Sunrise negotiations, but said the treaty could still be ratified in the near future: 'Our priority is now finalising the agreement on Sunrise. The treaty is in the queue to go to the House. Both countries are aware of the deadlines, but deadlines have to be moved sometimes'.[308] Dr Geoff Raby, Acting Secretary, Department of Foreign Affairs and Trade, explained on 13 February 2003, 'The unitisation agreement is a factor in the consideration of our national interest in this whole area', and that 'ministers will make the decision on what they wish to do with this in the fullness of consideration of what advances Australia's national interest'.[309] Australia was prepared to refuse to sign the IUA by the 11 March contract deadline for the Bayu-Undan project unless East Timor accepted the Australian demand for more than an 80 percent share of revenues from Greater Sunrise, even at the risk that the Bayu-Undan project would be abandoned by the venturers.[310] Mr Downer said to the Timorese at the ministerial meeting in Dili on 27 November 2002:

> You have to face reality. If you are going to demand that all resources are Timor-Leste's—your claim almost goes to Alice Springs—you can demand that for ever for all I care, you can continue to demand, but if you want to make money, you should conclude an agreement quickly.[311]

The decision of the Government of East Timor to agree on 5 March to the terms of the IUA followed a telephone call from Prime Minister Howard to Prime Minister Alkatiri in which he explained the 'formal processes' for Australian ratification. 'It was an ultimatum. Howard said that unless we agreed to sign the new deal immediately, he would stop the Senate approving the treaty', a senior official close to Dr Alkatiri said.[312]

The International Unitisation Agreement (IUA)

The IUA (International Unitisation Agreement) between Australia and East Timor relating to the Sunrise and Troubadour oil and gas fields in the Timor Sea was signed in Dili on

307. Mark Baker, 'Timor resents Australian tactics', *The Sydney Morning Herald,* 28 February 2003.
308. Mark Baker, 'Timor resents Australian tactics', *The Sydney Morning Herald,* 28 February 2003.
309. Dr Raby, *Senate Foreign Affairs, Defence and Trade Legislation Committee Hansard),* 13 February 2003, p.303.
310. Tim Colebatch, 'How they fooled us on East Timor', *The Age,* 11 March 2003; 'Australia promised secret aid to seal Timor gas deal', *Agence France Presse,* 12 March 2003.
311. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics
312. Mark Baker and Mark Riley, 'Howard accused of bullying Timor into treaty', *The Sydney Morning Herald,* 6 March 2003; Steve Lewis and Nigel Wilson, 'Gas deal widens gap in relations', *The Australian,* 7 March 2003.

6 March 2003 by Foreign Minister Downer and Minister of State Ana Pessoa.[313] As a condition of assent to the IUA, Australia and East Timor made a separate agreement under which East Timor would receive $US1 million ($A1.6 million) a year for at least five years. In addition, East Timor would receive $US10 million a year from the Australian Government, over and above its share of revenues, once production from the Greater Sunrise reservoir began.[314] The separate agreement on payments was to provide East Timor with an equitable share of upstream earnings from developing the reservoir through a floating liquified natural gas plant (FLNG).[315] 'In reality, it represents our share of the gas product that will be sold from the FLNG plant', according to an East Timorese official.[316] The preamble to the IUA contained a reference to the fact that both countries were in disagreement over the location of maritime boundaries in the Greater Sunrise area, noting:

> Australia and Timor-Leste have, at the date of this agreement, made maritime claims, and not yet delimited their maritime boundaries, including in an area of the Timor Sea where Greater Sunrise lies.

For the Timorese the inclusion of this clause was crucial, as Prime Minister Mari Alkatiri explained at the press conference following the signing of the agreement. He said that neither country had abandoned its claims and said that if current international law had been applied, one hundred per cent of Sunrise would belong to East Timor. At the same time, East Timor's Council of Ministers issued a statement insisting on the 'vital importance of a definitive delimitation of the maritime boundaries between East Timor and Australia, so as to guarantee the stability of the Timor Sea zone'. The process of negotiation should be 'begun and concluded speedily'.[317]

As soon as agreement had been reached on the terms of the IUA, the Timor Sea Treaty was presented to the Australian Parliament for ratification on 5 March 2003. It had been ratified by the Parliament of East Timor on 17 December 2002. Following Australian ratification, it came into force on 2 April 2003. In welcoming this development, Prime Minister Alkatiri announced that significant work had already been carried out by investors and by the two governments to bring into production petroleum fields in the treaty area, including the Bayu-Undan, Jahal and Kuda Tasi fields, and Greater Sunrise reservoirs lying partly within the JPDA. But he emphasized that the Treaty, while providing a clear legal framework for investment, did not provide a permanent or comprehensive framework: 'A permanent framework can only be provided by permanent maritime boundaries, which unfortunately East Timor does not yet have,' he said. 'But as a temporary revenue sharing arrangement, the Treaty represents a good interim measure until maritime boundaries are agreed'.[318]

Negotiations on maritime boundaries, 2003-2006

313. Nigel Wilson, 'East Timor to extend sea oilfield', *The Australian,* 18 June 2002.
314. Nigel Wilson, 'Dili's Timor Sea gas deal sweetener', *The Australian,* 12 March 2003.
315. Nigel Wilson, 'Timor gas treaty papers for scrutiny', *The Australian,* 14 March 2003.
316. Nigel Wilson, 'Timor writes us a hefty gas bill', *The Australian,* 13 March 2003.
317. Antonio Sampaio, 'Díli e Camberra assinam acordo técnico sobre poço de gas natural', *Lusa,* 6 Março 2003.
318. 'Australia-E.Timor treaty on oil, gas comes into force', *Kyodo News,* 2 April 2003.

'There are not one but two areas of unfinished business,' Foreign Minister Alexander Downer said at the Timor Sea Treaty Ministerial Meeting on 27 November 2002, 'the IUA and the renegotiation of maritime boundaries'.[319]

At the press conference following the signing of the IUA in Dili on 6 March 2003, Mr Downer reaffirmed that Australia was interested in concluding the negotiations on frontiers, although no date for beginning the process had been set.[320] On the occasion of the Timor Sea Treaty's entry into effect on 2 April, Australia's ambassador to Dili, Paul Foley, remarked that the negotiations on boundaries could begin soon and be concluded in less time than those which Australia had been conducting with New Zealand, which had been going on for a hundred years.[321] Dr Alkatiri's response was to say, 'This is a question of self-determination for the country. I am waiting for a serious commitment to negotiate maritime boundaries and not talk about 100 years of negotiations', and to reaffirm that he would not present the IUA to parliament for ratification until Australia agreed to delimit the maritime boundaries within three or four years. 'If I table it now it will certainly be rejected', he said.[322]

Dr Alkatiri said on 11 March 2003 that the accord on unitisation of the Sunrise fields would be sent to the parliament for ratification only after Australia had agreed to a timetable for negotiations on maritime boundaries. The timetable would have to include a termination date for negotiations. 'The agreement on unitisation was signed, but it still has to go to the parliament and if there is not found to be good faith on the part of the Australian Government on negotiating maritime boundaries, with dates set for beginning and ending, the agreement will not go to the parliament', he said. 'If they delay, the resources will stay in the sea. We are in no hurry.'[323] He reiterated this stance when East Timor's parliament approved two fiscal bills covering oil and gas exploration in the Timor Sea on 26 May, warning that his government would delay ratification of the IUA until Australia accepted negotiation over maritime borders: 'My government will not rest until we obtain our territorial integrity—until we have permanent borders. Just as we fought to protect our right to our land, we must fight to preserve our right to our sea'.[324]

The Australian position was that ratification of the IUA was a pre-condition for boundary negotiations, as Chris Moraitis, Senior Legal Adviser, Department of Foreign Affairs and Trade, explained on 23 June 2003: 'it has always been understood that once the Timor Sea treaty and the IUA are finalised and ratified… hopefully we will have it ratified in the near future—we can then start on permanent boundary delimitation'.[325] Prime Minister John Howard wrote to his East Timor counterpart, Mari Alkatiri, on 1 August, saying that Australia would agree to the maritime boundary talks beginning before the end of the year. He did not specify a time frame for the negotiations to conclude and in response, Dr Alkatiri said he wanted to see the issue resolved 'in a maximum of three to five years'.[326] Preliminary talks were held in Darwin on 13 November 2003.[327]

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319. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics
320. 'Dili e Camberra assinam acordo técnico sobre poço de gás natural', *Lusa,* 6 Março 2003.
321. 'Tratado de Mar de Timor entra hoje em vigor', *Lusa,* 2 Abril 2003.
322. Carl Mortished, 'Wrangles beset development of gasfield', *The Times,* 21 June 2003.
323. 'Timor-Leste exige à Austrália calendário negociações sobre fronteiras marítimas', *Lusa,* 13 Março 2003.
324. 'Tax bill 'just beginning' of Dili 'control'over oil, gas–Alkatiri', *Lusa,* 26 May 2003.
325. Mr Moraitis, *Joint Standing Committee on Treaties [Proof] Committee Hansard,* 23 June 2003, p.78.
326. Nigel Wilson, 'East Timor sea boundaries may change', *The Australian,* 11 August 2003; 'Five-year deadline to settle sea border with Australia—Alkatiri', *Lusa,* 11 August 2003.

Foreign Minister José Ramos Horta said in Canberra on 11 December 2003 that delays in talks were allowing Australia to exploit, under current licences, the Buffalo, Laminaria and Corallina oil fields which East Timor claimed were rightfully its own under international law. Speaking at the National Press Club he said those fields 'that have been under Australian licences are rightfully part of East Timor sovereign rights. What I believe firmly is that our claims are solidly grounded in international law—that's our only strength. Look at East Timor. What can we do against the giant of Australia, when we go to negotiations our side has two or three people, Australia always brings 10 times more.' A spokesman for Foreign Minister Alexander Downer said: 'We're operating under international law and in accordance with international law and at the same time we're negotiating in good faith under this issue.' [328]

The Australian Government included areas of the Timor Sea claimed by East Timor among 31 new offshore petroleum exploration areas released on 29 March 2004. The new exploration leases covered areas off the Northern Territory, Western Australia, Victoria, Tasmania, and the Ashmore and Cartier Islands. Although claimed by East Timor, Australia had a long history of sovereignty over the area said Resources Minister Ian Macfarlane and the leases had been released in accordance with Australia's established practice. 'We can't leave these resources unexplored and undeveloped,' he said. Mr Macfarlane said he did not expect an early settlement of the boundary dispute with East Timor. He expected long and robust negotiations but refused to indicate any timetable. Mr Macfarlane said successful bidders for the new Timor Sea acreage should not be alarmed because their rights would be protected.[329] Dr Alkatiri commented:

> There is widespread lack of support for the IUA in Timor-Leste. The facts that Australia is issuing licenses in disputed areas; has not committed to a timeframe to determine our maritime boundaries; claims to have insufficient resources to enter into more than bi-annual meetings to negotiate our boundaries; has withdrawn from the International Court of Justice on maritime boundaries and continues to exploit the Laminaria, Corallina and Buffalo oil fields which lie in an area of sea claimed by Timor-Leste and which are nearing the end of their lives despite our official objections, does not help Timor-Leste's trust in Australia to abide by any legally binding agreement entered into. If permanent maritime boundaries were agreed expeditiously and in accordance with international law, many of these issues would dissolve.[330]

The first round of talks on the maritime border was held in Dili, 19-22 April 2004, but ended without any apparent agreement. Peter Galbraith, head of Dili's negotiating team, said on 23 April that Canberra had proposed the next meeting be held in Australia in September even though East Timor wanted monthly meetings. East Timor claimed it was losing a million dollars a day due to what it called Australia's illegal exploitation of resources in a disputed area of the Greater Sunrise field. 'What is unfair is that is Australia has so far refused to negotiate in a manner that will bring a conclusion any time soon,' Galbraith told a press conference. 'It has tried to block a court from considering it, and continued to take resources found in the disputed area.' He urged Canberra either to reverse its refusal to accept international arbitration or to stop the exploitation until a final agreement was reached. 'I can promise you that there is only

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327. 'Australia refuses to set border talks deadline', *Asia Pacific,* 13 November 2003.
328. Cynthia Banham, 'Fair play demanded in oil talks', *The Sydney Morning Herald,* 11 December 2003.
329. Nigel Wilson, 'Release taunts East Timor', *The Australian,* 30 March 2004.
330. 'Prime Minister Alkatiri voices concerns over ALP support for the International Unitisation Agreement bill', Office of the Prime Minister Media Release, 26 March 2004.

one reason you try to stay out of a court, and that is because you think you will lose in court,' Galbraith said.[331]

Indicating that his views on Australia's stance on the Timor Sea had not changed since he expressed them in his 1990 interview with Robert Domm, President Xanana Gusmão declared in Portugal: 'We have a rich sea which Australia is trying to rob us of, and which would guarantee the future of generations of our country'.[332] The President was speaking at a dinner in his honour in Aveiro on 20 April 2004.[333] Two days later addressing a conference at Lisbon University, he said: 'Today, with the ending of occupation by Indonesia, we come up against the wrongful seizure of our natural resources by Australia'.[334]

Mr Downer sent the Deputy Secretary of his Department, Doug Chester, to Dili on 6-7 May 2004 to tell the East Timorese leadership that some of the comments they had made on the issue were 'over the top and inflammatory', and that it would be naïve to think that comments like that would not have some impact on their relationship with Australia. Such comments, said Mr Chester, could run the risk of developing anti-Australian sentiment within the East Timorese community.[335]

Towards a 'Creative Solution'

In an interview published in *The Australian Financial Review* on 31 May 2004, Foreign Minister José Ramos Horta said: 'We are sympathetic to Australia's dilemma. We have a very solid confidence in our legal claims, but we are also prepared to explore creative ideas to reach a satisfactory agreement. However, right now I absolutely have concerns about the poisoning of our relationship.[336]

On 30 July 2004, Don Voelte, chief executive officer of Woodside Petroleum, which headed the Greater Sunrise development joint venture, met East Timor Prime Minister Mari Alkatiri in Dili. Mr Voelte was understood to have told Dr Alkatiri the project would not proceed unless East Timor ratified the IUA. At the same time, the Australian Government told East Timor it would get no revenue from the Bayu Undan and Greater Sunrise gas fields if it pursued its claim for a maritime boundary set at the median point between the two countries. Australian officials warned that even if the East Timor claim were accepted and the boundary changed from the edge of the continental shelf 80km from the East Timor coast, the new border would probably be established north of the two gas fields. This would mean the billions of dollars in revenue from the fields would flow exclusively to Australia rather than be shared with East Timor. A boundary re-drawn to the midpoint might not deliver the benefits hoped for by the East Timorese because, for technical and geophysical reasons, the known gas reserves in the Timor Sea were clearly associated with the Australian landmass and not East Timor. This meant that even if the continental shelf was not accepted as the boundary, a mid-point would

331. 'East Timor, Australia still far apart after first round of sea border talks', *Agence France-Presse,* 23 April 2004.
332. See above, n.161.
333. 'Xanana Gusmão acusa Austrália de tentar roubar riquezas marítimas', *Lusa,* 20 April 2004.
334. 'Enfrentamos luta desigual com Austrália - Xanana Gusmão ', *Lusa,* 22 April 2004.
335. Dennis Shanahan, 'Secret Canberra envoy turns up heat on Timor oil critics', *The Australian,* 26 May 2004; Doug Chester, *Senate Foreign Affairs, Defence and Trade Legislation Committee Hansard,* 2 June 2004.
336. Rowan Callick, 'Tiny Timor Treads Warily Among Giants', *The Australian Financial Review,* 31 May 2004.

not result in the gas reserves at Bayu-Undan and Greater Sunrise being under East Timor's control.[337]

Australian Opposition Leader Mark Latham said on 22 July 2004 that the Government was failing to negotiate in good faith with East Timor and that a Labor government would re-start talks. 'We have an Australian interest in the viability of East Timor so I think we've got to conduct these negotiations in good faith', he said. 'If we come into government, I think we'll have to start again because, from what I can gather, there's been a lot of bad blood across the negotiating table and you never get it right in these sensitive areas unless you're there doing things in good faith'.[338] Mr Downer claimed Mr Latham was threatening the national interest by suggesting negotiations on the boundary should begin afresh because of 'bad blood' in earlier talks between the two countries.[339]

Alexander Downer said on 11 August 2004 he hoped to wind up negotiations by Christmas on the outstanding Timor Sea issues. 'It will be an agreement that I am sure will be very beneficial to the Government and people of East Timor,' he said after meeting with José Ramos Horta. 'I feel we have made extremely good progress today and we are absolutely heading in the right direction.' He said both parties had adopted a 'creative solution' to the maritime boundary.[340] Dr Ramos Horta said he shared Mr Downer's optimism that a comprehensive agreement could be achieved by the end of the year. 'We have the basic ideas ... I think we can meet halfway, and now we just need to work out the details,' he said. Mr Downer declined to spell out the detail of the previous day's negotiation but clearly signalled a more generous approach by Canberra to the existing shares in the Greater Sunrise field. It was reported that Ramos Horta and Downer had agreed, "in principle" to a framework for resolving the dispute. The basic parameters of the agreement, dubbed the "Hong Kong solution", involved the following exchange: East Timor would agree to put the issue of permanent maritime boundary delimitation on hold for the next 100 years and in return Australia would accept changes to the current system of revenue sharing from offshore oil and gas development, in East Timor's favour.[341] The breakthrough followed comments by Mark Latham that he would restart negotiations over the Timor Sea if he won the coming poll. 'Our concerns are less with the revenue that we can extract from the Timor Sea than with the broader questions of sovereignty,' Dr Ramos Horta said. Before the meeting, sources in Dili had flagged that East Timor wanted a 50-50 split on Greater Sunrise. Dr Ramos Horta said he had discussed the issue with both President Xanana Gusmão and Dr Alkatiri before leaving Dili. 'Both leaders have asked me to convey to Alexander Downer our firm commitment to find a solution that is satisfactory to the two sides.' Mr Downer hoped that the talks would determine the maritime boundary between Australia and East Timor, confirming Canberra's legal position based on the continental shelf.[342]

On 22 September 2004, the Australian government announced that maritime boundary talks with East Timor would resume in Darwin following 'productive' discussions between the two nations.[343] Following the Darwin talks, the next round of negotiations was held in Dili, but broke down in acrimonious circumstances on 27 October 2004. Australian Government

337. Nigel Wilson, 'Australia warns Timor on gas claim', *The Australian,* 30 July 2004.
338. 'Labor shifts stance on Timor gas', *AAP,* 23 July 2004.
339. Dennis Shanahan and Nigel Wilson, 'Latham 'threat' to East Timor', *The Australian,* 28 July 2004.
340. 'as duas partes tinham garantido uma 'leitura criativa' relativamente a um acordo fronteriço' ('Possivel acordo sobre fronteira marítima até ao Natal', *Lusa,* 12 August 2004).
341. Alex Munton, 'E. Timor plays a waiting game over oil and gas', *The Canberra Times,* 2 December 2004.
342. Nigel Wilson and Patrick Walters, 'More gas cash for East Timor', *The Australian,* 12 August 2004.
343. 'East Timor Boundary Talks Productive', *Dow Jones International News,* 22 September 2004.

sources said East Timor was offered 'billions' (believed to be about $3 billion in additional tax revenue) in exchange for deferring discussions for 100 years over the sea boundary between the two nations. But East Timor refused to budge on the offer, which would have given it almost half of the estimated $10 billion in oil royalties from the Greater Sunrise project. East Timor also wanted the $3 billion gas processing plant and pipeline servicing Greater Sunrise to be built on its land, rather than at Darwin, Australia's preferred location. The spin-off benefits of the processing plant could amount to $22 billion over 30 years, East Timor argued. 'We were talking about Timor-Leste participation in the development of the disputed resources; they were talking about money,' said East Timor's Prime Minister Mari Alkatiri. 'We were too far apart to reach agreement.' A senior Australian official said that East Timor had 'backtracked' on a tentative agreement made at talks the previous month in Darwin.[344]

In Perth on 29 October 2004, Prime Minister Mari Alkatiri said he would not be rushed into a maritime border agreement vital to the development of the Sunrise gas project, and dismissed a warning from Woodside Petroleum that the Sunrise project would stall if Australia and East Timor failed to resolve their dispute by the end of the year. Woodside said it wanted the East Timorese to provide legal and fiscal certainty by the end of the year. Speaking in Perth ahead of a meeting with Woodside and joint venture partner ConocoPhillips, Mr Alkatiri said he did not believe the December deadline was real. 'We are not rushing,' he told reporters. 'If you can really get into a solution, agreement by December—good. It's good for all of us. But we are not rushing because we do believe that this timeframe is not (a) real one. It was an event timeframe.' Mr Alkatiri said the sticking point was the way the maritime border issue was being approached. 'What the Australian government is looking for is money for everything,' he said. 'We are not looking for money only. We would like to participate in a way to develop our own knowledge on this.' He said Australia's approach was not unfair, but East Timor felt there was a better way of doing things. 'For Australia it is much easier because they have already developed their own knowledge on these areas of exploration, exploitation of oil and gas...But we do believe it is much better for us if we can get an agreement on the resource sharing and of course the participation on the exploration and exploitation.'

Woodside Petroleum was looking at three alternatives for Sunrise consisting of a floating liquefied natural gas (FLNG) facility, piping gas to a LNG facility in East Timor, or a pipeline to a Darwin-based plant. Talks with Mr Alkatiri focussed on the feasibility of a pipeline to East Timor. 'We have done our own study assisted by credible people and the results are really positive,' Mr Alkatiri said. 'That's why we think that technically this is possible and commercially this is feasible too'.[345]

In Melbourne on 14 December 2004, Dr. Ramos Horta, warned that his country would ask the UN to intervene in the dispute with Australia over the shared seabed boundary and ownership of seabed oil and gas deposits. He said that at the negotiations in October Australia had issued an ultimatum to Timor-Leste to accept a permanent maritime boundary on its terms and had also lowered its offer of compensation to US$3 billion over 30 years. He said that when leaving Dili airport, Mr. Doug Chester, the chief negotiator for Australia departed with these words: 'Take it or leave it.'

Dr. Ramos Horta announced that in 2005 an international campaign on the maritime issue would commence: 'We will mobilize Nobel peace prize winners around the world to talk about this issue, people in Hollywood, in LA, Nelson Mandela, Desmond Tutu, everyone that I

344. Tom Allard, 'Talks on Timor Gap reserves collapse', *The Sydney Morning Herald,* 28 October 2004.
345. Holly Nott, 'Sunrise deadline dismissed by East Timor's PM', *Australian Associated Press General News,* 29 October 2004.

have been in touch with already! It will be one of the most intense campaigns the world has seen since the apartheid campaign! We are prepared to do it! And with enormous respect for Australia! Still with enormous gratitude for Australia.'[346] He subsequently told ABC Radio: 'It will be Australia that has to explain to the international community why it refuses as a western democracy that lectures other countries about international law, about human rights… Australia will have to explain why it refuses to accept jurisdiction on the international court of justice…We have tremendous international support, the European Union, Commonwealth countries, Non Aligned Movement, I do not know of a single country that is not sympathetic to the East Timorese situation'.[347]

Woodside carried out its threat to halt work on Sunrise after the East Timorese Government refused to present to its parliament for ratification the agreement it signed with Australia in 2003 covering legal and fiscal terms for the Greater Sunrise development. The company announced on 13 January 2005 that no more money was being committed to the Greater Sunrise gas project and that employees working on Sunrise had been reassigned. This meant that gas reserves were unlikely to be developed for at least a decade. East Timor's desire for the Sunrise LNG facility to be built on its territory required constructing a large under-sea pipeline under the Timor Trough. More than $200 million had been invested in exploration and marketing, both overseas and within Australia, and on development planning on Greater Sunrise. But without an agreement with the East Timorese—as Woodside described it, legal and fiscal certainty—the project partners could not organise long-term supply contracts that would underpin development costs.[348]

Doug Chester, Australia's chief negotiator, said Australia was happy to focus on formal legal negotiations to settle a permanent maritime boundary but it was also open to 'creative solutions' that would allow development of oil and gas projects pending a permanent boundary.[349] At a briefing on 24 February, journalists were told that Australia's position was that 'the permanent boundaries should be put off for quite some considerable time, at least until the resources have been exploited'.[350] Australia was prepared to hold out for up to 99 years—referring to a 'Hong Kong' scenario—if East Timor maintained its demand that the maritime boundaries be settled according to international law.[351]

The next round of maritime boundary talks between Australia and East Timor in Canberra ended on 10 March 2005 with the possibility of an agreement that would allow the Greater Sunrise gas development to go ahead. Officials from both governments said they were happy with progress that had been made on a range of issues. East Timor chief negotiator José Teixeira declined to comment on the detail. But Australian sources said it was significant the East Timor team again included Peter Galbraith, a member of the former UN cabinet in Timor in the run up to independence. Dr Galbraith, one of the architects of the Timor Sea Treaty signed in 2002, did not attend talks in Dili in October 2004 that collapsed after East Timor insisted on linking the maritime boundary issue with the Greater Sunrise gas development

346. Maria-Gabriela Carrascalao Heard, 'Dr. Ramos Horta in Melbourne', *SBS Portuguese Radio Program,* 15 December 2004.
347. Anne Barker, 'East Timor ups ante in oil and gas fight', *The World Today*, 16 December 2004.
348. The Sunrise project joint venture partners are Woodside (33.44%), ConocoPhillips (30%), Shell (26.56%) and Osaka Gas (10%); Russell Searancke, 'Ministers agree pact for Sunrise', *Upstream,* 20 January 2006.
349. Veronica Brooks, 'Timor Positive Ahead of Fresh Boundary Talks', *Dow Jones,* 8 February 2005.
350. Jon Lamb, 'Howard's attempted bribery to steal Timor Oil', *Green Left Weekly,* 16 March 2005.
351. 'Tussle over Timor Sea Oil and Gas Resumes', *Inter Press Service* via *Asia Times,* 8 March 2005.

issue.[352] Alexander Downer said on 27 April that Australia remained opposed to any agreement to change the maritime boundary: 'What Australia doesn't want is to unravel all of our maritime boundaries which have been laboriously negotiated over many years with all our neighbours. If we can find a suitable settlement that keeps our principles intact but ensures that East Timor gets a steady flow of revenue, then there should be honour on all sides'.[353]

On 29 April 2005, Australia and East Timor reached an agreement on Timor Sea gas and oil resources. The consensus came after Australia agreed to make what one East Timorese Government source described as a 'quantum shift'. Canberra gave in to Dili's demand for a percentage of revenues from the gas and oil resources from the Greater Sunrise field, not a fixed-dollar payment from Australia, which it had offered at previous rounds of talks. In exchange for the revenue sharing, which Foreign Minister Downer said could be worth $2-5 billion, East Timor agreed to defer the issue of a maritime boundary between the two for between 50 and 60 years. Neither Australia nor East Timor would disclose what percentage share was agreed, but it was rumoured to be in the vicinity of a 50-50 split. Mr Downer said there had been 'substantial agreement on all major issues', which had been incorporated into a draft text. 'There are still some minor issues to be agreed, but all the major issues have been agreed,' he said. Mr Downer praised his East Timorese counterpart, José Ramos Horta, and said his personal relationship with the East Timorese Foreign Minister had played an important role in the talks.[354] The months of negotiations leading up to the agreement had been little more than a waiting game, according to Stratfor, a private intelligence provider based in Austin, Texas. 'Australia had the bargaining position and financial resources to stall until the smaller country buckled under financial strain', it said. 'The Timorese, needing fast cash flow, were forced to accept the Australians' offer in order to survive, regardless of their position in the sea boundary dispute'.[355]

Following talks which ended in Sydney on 13 May 2005, the terms of the revenue-sharing agreement covering proceeds from the Timor Sea appeared to be almost resolved and ready for final examination and endorsement by the two governments. Under the deal, East Timor agreed to shelve for 50 years its demand for a maritime boundary with Australia in exchange for a bigger revenue share from Greater Sunrise. It was understood that East Timor's stake in the field had increased from 18 to 50 per cent. Foreign Minister Alexander Downer said almost all key issues had been settled. 'We feel the discussions were very successful. There will probably be no further need for negotiations,' he said. 'Assuming that the East Timor Government, as well as our Government is happy with the conclusion reached at this round ... then we will be able to move towards signing an agreement'.[356] Mari Alkatiri said in Dili on 13 May that negotiations were continuing and that he could only guarantee that 'the position of Timor-Leste remains unchanged'.[357]

The agreement between Australia and East Timor that had appeared to be concluded in Sydney on 13 May 2005 was not immediately signed off by East Timor's Prime Minister, Mari Alkatiri. He told the London *Financial Times* on 17 May: 'I do believe that we are close to a deal. But we do not have a deal yet. We still have some details, some very important details that are going to guarantee our cloims on maritime boundaries, and Australia's also, during the life

352. Nigel Wilson, 'Sunrise hopes as talks end', *The Australian,* 11 March 2005.
353. Mark Dodd, 'East Timor hopes for break in oil talks', *The Australian,* 27 April 2005.
354. Cynthia Banham, 'Reported Deal reached on Timor Sea oil', *The Sydney Morning Herald,* 30 April 2005.
355. 'Stratfor says Australia managed to out-wait cash-strapped Timor', *Australian Associated Press,* 3 May 2005.
356. Mark Dodd, 'E Timor to receive bigger gas stake', *The Australian,* 14 May 2005.
357. 'Alkatiri labels report of Timor Sea accord an 'absolute lie'', *Lusa,* 13 May 2005.

of the project'.[358] Dr Alkatiri indicated that he might wish to reopen fundamental issues that had appeared resolved at that sixth round of talks. In an interview with Timorese newspaper *Publico* he said that yet another round of negotiations or possibly two would be needed in order to find a 'creative solution'. He told the paper, 'It is said that the devil is in the details. It would be good if we do not allow this space to be occupied by the devil'. Dr Alkatiri said that if his country gained any revenues from Sunrise within six or seven years 'we would be very lucky'. East Timor's Foreign Minister, José Ramos Horta, said that 'we are on the cusp of securing for the people of East Timor the fairest agreement possible'. But the issue of where the pipeline should go had still to be resolved with Woodside, he said.[359]

A spokesman for Woodside Petroleum, Sunrise's operator, said the project would remain stalled, with staff reassigned 'until we get the legal, regulatory and fiscal stability necessary for us to proceed'. 'We haven't seen the agreement they are negotiating, but when we have done we would then as a joint venture reconsider restarting the project,' he said. The issues that the joint venture would need resolved were the location of the boundary between the countries, the map of the approvals process and the details of the tax structure and revenue-sharing arrangement. Once those were made clear and accepted by the project partners, Woodside would then seek to start or resume negotiations with potential customers, followed by heads of agreement, letters of intent and sales agreements. Only then could construction start. The Woodside spokesman said: 'We think that during the 2011-2014 period the liquefied natural gas market will provide a significant opportunity for Australian producers, before everyone else starts to catch up' with global demand, and thus probably prices, running high. One of the major outstanding issues at Sunrise was the location of the LNG processing plant. East Timor wanted the plant to be built there, but Canberra's view was that such decisions should be left to the commercial operators. The Woodside spokesman said: 'The joint venture did a feasibility study last year and found the option of taking the pipeline to East Timor was not viable'.[360]

Writing in *The Age* of 30 May 2005*,* José Ramos Horta outlined what he referred to as the salient elements of the draft agreement reached at the fifth round of talks held in Sydney, which were to be discussed by the respective cabinets:

> The possible treaty would be 'without prejudice' to Timor-Leste and Australia's sovereign maritime boundary claims. No acts or activities by either side under the treaty could be relied upon to assert, support, deny or further the legal position of either country. A 50-year moratorium would be agreed to for the duration of the treaty. In return for the moratorium on maritime boundaries, the parties would agree to share equally the total tax and royalty revenues from petroleum produced in the Greater Sunrise area. The Timor Sea Treaty of 2002 will continue to be observed and Timor-Leste will continue to receive 90 per cent of income from that area. The revenue split could mean more than $US7 billion ($A9.23 billion) to our impoverished country. Other fields underlying Greater Sunrise field either wholly or partly would be treated in the same manner as the Greater Sunrise field.[361]

In June 2005, the Timor Leste government conceded that the location of processing facilities for the Greater Sunrise gas development was a matter for the project's owners and not

358. Shawn Donnan and Lachlan Colquhon, 'East Timor says no energy deal yet', *The Financial Times,* 17 May 2005.
359. Rowan Callick, 'East Timor gas deal may be on backburner', *The Australian Financial Review,* 3 June 2005.
360. Rowan Callick, 'East Timor gas deal may be on backburner', *The Australian Financial Review,* 3 June 2005.
361. Jose Ramos Horta, 'The shape of a fair deal for East Timor', *The Age,* 30 May 2005.

for the Australian and East Timor governments.[362] In September it emerged that a technical argument about what activities might occur between the sea bed and the surface of the Joint Petroleum Development Area in the Timor Sea was delaying a revenue-sharing agreement. Officials on both sides were confident an agreement was close after Australia rejected an East Timor 'clarification' that could have resulted in a maritime border being established as a result of international action on fishing reserves.[363] At talks in Canberra on 9 November with Foreign Minister Alexander Downer, East Timor's Foreign Minister José Ramos Horta said a boundary deal with Australia over the oil and gas reserves of the Timor Sea should be completed by the end of the year. He said the deal with Australia was more than 90 per cent agreed. The remaining difference was over any future mediation or arbitration if disputes arose over security, fisheries, new oil and gas discoveries or environmental problems. Dr Ramos Horta predicted full agreement within weeks. 'I remain very optimistic that by the end of the year we should be able to clinch the deal,' he said. Signing of the agreement reached in Sydney in May was delayed by a tortuous process of establishing the exact meaning and consequences of each clause. Another cause of delay was East Timor's discussions with Woodside on bringing Greater Sunrise onshore across the Timor Trough. Woodside claimed such a proposition was not commercially viable.[364] Dr Ramos Horta told Radio Australia that East Timor now accepted the revenue sharing agreement would not include reference to the location of Greater Sunrise processing facilities. 'We are in discussions with Woodside,' he said. 'It is up to them to make a credible case that the gas should be shipped to Darwin rather than East Timor. The advice to me is that it makes more commercial sense to come to East Timor'.[365]

Alexander Downer said on 1 December 2005 that Australia and East Timor had reached agreement over energy resources in the Timor Sea, after officials from the two countries had agreed on the accord during talks in Darwin on 30 November, and that the prime ministers of Australia and East Timor would sign the new agreement by mid-January. 'This is a deal which is a good one for Australia and East Timor,' Downer told Parliament. 'It safeguards Australia's sovereign interests, and it will provide investors with the certainty needed for large-scale resource projects to go ahead.' Mr Downer would not comment on details of the new revenue-sharing arrangement until the two governments formally signed the deal. He said arrangements under the May 2002 Timor Sea treaty would remain in place, ensuring East Timor would continue to receive 90 percent of the revenues of the JPDA.[366]

Prime Minister Mari Alkatiri said on 9 December 2005 that his country's revenue-sharing deal with Australia covering the Sunrise natural gas project would be signed in Sydney on 12 January 2006. He said the pact was a 'very positive' outcome and did not prejudice the positions and claims of both countries in relation to maritime boundaries in the Timor Sea. 'Timor-Leste has not compromised its legal claim and legal position in respect of the question of maritime boundaries. This agreement takes account of the essential interests of both Timor-Leste and Australia,' he said in a statement. 'This agreement also opens the way for the construction of a pipeline between Greater Sunrise and Timor-Leste and for the installation of a refining facility that will be the start of petroleum activities on Timorese soil,' he said. Dr Alkatiri said Sunrise was crucial in terms of government revenues from the petroleum sector. 'At the moment, Timor-Leste is dependent almost exclusively on only one project—Bayu-Undan.…Under this deal, it is expected that the Greater Sunrise will go ahead and start

362. Nigel Wilson, 'Hope for Sunrise after Timor changes its tune', *The Australian,* 29 June 2005.
363. Nigel Wilson, 'Agreement close on E Timor revenue', *The Australian,* 6 September 2005.
364. Nigel Wilson, 'Timor talk back minus LNG plant', *The Australian,* 14 November 2005.
365. 'Hopes for Timor Sea deal by year's end', *Australian Broadcasting Corporation (ABC) News* 9 November 2005.
366. James Grubel, 'Australia, East Timor agree Sunrise gas field deal', *Reuters News,* 1 December 2005.

producing approximately halfway through the production cycle of Bayu-Undan,' he said. Following the scheduled signing in Sydney, the Sunrise agreement needed to be ratified by the parliaments of both nations.[367] He dismissed criticism that the accord would long postpone negotiations over sovereignty in the Timor Sea, saying, 'If we had chosen to define the frontiers first, at this time the only beneficiary would have been Australia, nor would we have received at this moment a single centimo for East Timor's coffers; now we have hundreds of millions of dollars'.[368]

The Treaty on Certain Maritime Arrangements in the Timor Sea

The Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) was signed in Sydney on 12 January 2006 by the two countries' Foreign Ministers—José Ramos Horta for the Timorese and Alexander Downer for Australia, in the presence of their respective Prime Ministers Mari Alkatiri and John Howard. The treaty would see the equal sharing of upstream government revenues flowing from the Sunrise project, and put on hold the two parties' claims to jurisdiction and maritime boundaries in the Timor Sea for fifty years. The Woodside-operated Greater Sunrise fields held an estimated 8 trillion cubic feet of gas and up to 300 million barrels of condensate. Australia would pay East Timor an agreed fee to cover 50 per cent of royalties and all other taxes the government collected from companies that developed the oil and gas fields. But to achieve the full $25 billion, the Greater Sunrise gas project would have to go ahead within ten years: either country could terminate it in February 2013 if by then there was still no jointly approved development plan. The treaty would also lapse if production did not begin by 2017. Under the previous IUA agreement, East Timor was entitled to 18 per cent of royalties compared to the 82 per cent flowing to Australia. Mr Downer said: 'The new maritime arrangements agreed with East Timor under this treaty are on top of the already very generous sharing arrangements within the Joint Petroleum Development Area, where East Timor received 90% of revenue from production of petroleum resources, which may be worth as much as $15 billion.' Prime Minister Howard said it would provide 'a very important addition to the revenue stream coming to a tiny independent country'.[369] Mr Howard believed the deal was a fair and just outcome and would strengthen relations between the two countries: 'It means that the very close relationship between our two countries can not only continue but become even closer,' he said.[370]

East Timor government spokesman, the Director of the Darwin-based Timor Sea Office, Manuel de Lemos said that, while the deal would deliver 'significant benefits to the people of Australia and East Timor', his country had 'given up more than $2.5 billion in revenue from the Buffalo, Laminaria and Corallina fields, which were claimed by East Timor. This was part of the negotiation process'. He added: 'It is inappropriate to characterise the result of these negotiations as a 'very generous' gesture on the part of Australia. The resources at stake in these negotiations were claimed under international law'.[371] East Timor's Foreign Minister, José Ramos Horta, described the agreement as fair and just: 'While we do not renounce our sovereign claims to a maritime boundary, we proceed with this type of

367. Veronica Brooks, 'Timor Plans Jan 12 Signing of Australia Oil Revenue Pact' *Dow Jones Commodities Service,* 10 December 2005.
368. 'Assinatura de acordo com Austrália é a 12 Janeiro—PM Mari Alkatiri', *Lusa,* 12 December 2005.
369. Nigel Wilson, 'Treaty to pump $25bn to E Timor', *The Australian,* 13 January 2006.
370. Sandra O'Malley, 'E Timor stand to reap windfall from new energy pact', *Australian Associated Press General News,* 12 January 2006.
371. Nigel Wilson, 'Treaty to pump $25bn to E Timor', *The Australian,* 13 January 2006; Russell Searancke, 'Ministers agree pact for Sunrise', *Upstream,* 20 January 2006.

arrangement, which is very much a fair and just deal.…the legal opinion of one side is valid as far as that side is concerned. It doesn't mean necessarily that in a court of law, if we were to go to an international jurisdiction we would prevail'.[372] Dr Alkatiri said the agreement would provide a major boost to his nation's revenues, while protecting its territorial sovereignty. 'I am confident this is for the benefit of the people,' he said. Dr Alkatiri said East Timor was 'fighting' to have the processing plant built in his country. But this option had been rejected by the Sunrise partners—Woodside, ConocoPhillips, Shell and Osaka Gas—as too difficult and too expensive. Dr Alkatiri predicted production could be up to ten years away.[373]

Woodside gave no indication the project, which had been stalled since December 2004, would proceed. A spokesman congratulated the two governments in signing the agreement but reiterated Woodside's position that it needed the agreement to be ratified by the parliaments of both countries before considering whether to proceed with Sunrise.[374] Company spokesman Roger Martin said there were still a few steps to go before the Greater Sunrise joint venture partners would be making any decisions on how to proceed.[375] East Timor continued to press Woodside to consider locating processing facilities for the development in Dili rather than Darwin. Dr Alkatiri said that a pipeline to Dili and an onshore liquefied natural gas (LNG) plant were technically feasible and economically viable. Woodside gave little indication it planned to budge on its preference for a Darwin plant.[376] In an article in *The Australian Financial Review* of 18 January 2006, Mari Alkatiri wrote:

> The next step for us is to bring the gas from Greater Sunrise to an onshore LNG plant. Some say that it only makes sense to build it to Darwin. We would be pragmatic enough to accept this solution, should there be no other economically and commercially viable alternative. But today we are certain that that is not the case. From an economic and commercial standpoint, preliminary data indicates that bringing the pipeline to East Timor is a perfectly credible alternative, if only because the distance to East Timor is about a half the distance to Darwin....From an equity standpoint, it does not seem reasonable that the petroleum resources of the Timor Sea, which we are sharing with Australia, generate only one development pole, precisely in the country that, at the start, is already the more developed one. This would be another way of denying our people the benefits from the resources to which they are entitled, or a new form of exploitation. For this reason, we understand the deal on Greater Sunrise within a package that includes the pipeline to East Timor and the processing of the gas in our country.[377]

The Australian Minister for Industry and Resources Ian Macfarlane and the Prime Minister of East Timor Mari Alkatiri signed agreements in March 2006 that put in place the legal framework and production sharing agreements required by oil companies to operate with certainty in the disputed waters of the Timor Sea. Mr Macfarlane later said:

> Already significant investment has been made in the joint area, and I would expect that to continue given the amounts of proven reserves identified in,

372. Peta Donald, 'Australia and East Timor reach agreement on oil field', *Australian Broadcasting Corporation Transcripts,* 12 January 2006.
373. Nigel Wilson, 'Treaty to pump $25bn to E Timor', *The Australian,* 13 January 2006.
374. Nigel Wilson, 'Treaty to pump $25bn to E Timor', *The Australian,* 13 January 2006.
375. Sandra O'Malley, 'E Timor stand to reap windfall from new energy pact', *Australian Associated Press General News,* 12 January 2006.
376. Sandra O'Malley, 'E Timor stand to reap windfall from new energy pact', *Australian Associated Press General News,* 12 January 2006.
377. Mari Alkatiri, 'Equity flows in pipeline to East Timor', *Australian Financial Review,* 18 January 2006.

> and close to, the region. Last month's exploration and production agreements were agreed by both governments in recognition of the fact companies require this certainty before they can even begin to weigh the commercial considerations of investing in the JPDA. Given the successful negotiation of these operational instruments, Australia looks to East Timor to soon ratify the 2003 Greater Sunrise International Unitisation Agreement and progress ratification of the recently signed Treaty on Certain Maritime Arrangements in the Timor Sea to enable the Greater Sunrise project to proceed.[378]

Mari Alkatiri resigned in July 2006 following a political crisis and outbreak of civil unrest. His successor, José Ramos Horta, said on 10 July that the issue of whether natural gas from the Timor Sea was pumped to Darwin or Timor 'must not be an insurmountable obstacle' to ratifying an agreement on the deal: 'We never said the pipeline was a life and death thing, only that we prefer an independent study on the pros and cons'. He also warned: 'If it has to go to Darwin, I will do everything to milk every extra cent out of Woodside and Australia before agreeing to it.' He said he hoped to put the Greater Sunrise ratification bill before parliament 'quite soon', and that he expected it to pass, despite his predecessor Mari Alkatiri's belief the house would not accept the agreement signed in Sydney the previous January.[379]

On 20 February 2007, East Timor's parliament agreed to ratify the agreement with Australia over the management of oil and gas resources in the Greater Sunrise field in the Timor Sea. During the debate in the national assembly in Díli on 20 February, Minister for Natural Resources and Energy Policy, José Teixeira, emphasized the necessity of not further delaying the process of ratification. Deputy Prime Minister Estanislau da Silva commented: 'Nothing in this world is perfect. We would prefer that Australia give us all of the Bayu-Undan, all of the Sunrise, in sum, all of the Timor Sea. But the world does not work like that'. He said that the terms of the accord and of the treaty, which gave continuity to the Timor Sea Treaty signed in 2002, 'were the most just possible for Timor-Leste'. Estanislau da Silva emphasized that the country 'had not abdicated the delimitation of its frontiers' in accordance with the median line criterion. 'There are not two separate continental shelves' in the Timor Sea, said Estanislau da Silva: 'Our shelf is the continuation of the Australian continental shelf'. Prime Minister José Ramos Horta told reporters after the vote: 'I am glad because after one year, the parliament finally has approved this agreement. With this agreement, large investors such as Woodside, can start to invest in the Greater Sunrise (field) to manage oil and gas'. Dr Ramos Horta conceded that many technical details remained to be settled before such investment could actually take place, such as the pipeline from the field.[380]

The Australian and East Timor governments formally exchanged notes in Dili on 23 February 2007 to bring into force the two treaties that provided the legal and fiscal framework for the development of the Greater Sunrise gas field in the Timor Sea. The notes covered the Sunrise international unitization agreement (IUA) and the Certain Maritime Arrangements in the Timor Sea (CMATS) Treaty.[381] Foreign Minister Alexander Downer, using a power invoked only six times in its history, invoked a 'national interest' exemption clause to fast-track ratification of the CMATS treaty through the Parliament without scrutiny by its Joint Standing Committee on Treaties.[382] Mr Downer referred to the forthcoming presidential and parliamentary election in East Timor, and said it was 'uncertain when an opportunity would

378. Damon Frith, 'Pacts clears legal fog to let Timor Sea operations take off', *The Australian,* 1 April 2006.
379. Stephen Fitzpatrick, 'Timor to push on with gas deal', *The Australian,* 12 July 2006.
380. 'East Timor approves oil agreement with Australia', *Agence France Presse,* 20 February 2007.
381. 'Australia, Timor-Leste bring Sunrise gas treaties into force', *PLATT,* 26 February 2007.
382. Mark Dodd ,''Downer rushes on Timor deal', *The Australian,* 6 February 2007.

arise after the East Timor elections period' to finalize the arrangements agreed for the Timor Sea.[383] At a hearing of the Committee on 26 February 2007, the Acting Chair, Mr Kim Wilkie, stated: 'I think it is outrageous that this committee was not given the opportunity to examine the treaty in due time, and it is a failing on behalf of both the minister and the department which I find totally unacceptable'.[384]

In its June 2007 report on the CMATS Treaty, the Joint Standing Committee on Treaties noted that under Articles 74 and 83 of UNCLOS, in the absence of agreed exclusive economic zone and continental shelf delimitation, Australia was obliged to make every effort to enter into provisional arrangements of a practical nature which were without prejudice to the final delimitation, and considered 'that this has been achieved by through the CMATS Treaty'.[385]

The Australian Parliament passed legislation to enable implementation of the Treaty on 28 February 2007. Speaking for the Opposition, Mr Bob McMullan noted that the parliament of Timor-Leste had voted on 20 February to accept the Treaty by a vote of 48 to five, with three abstentions. 'Given this emphatic support for the treaty', he said, 'Labor is satisfied with that treaty arrangement...Accordingly, the Opposition will be supporting these bills'.[386]

The Australian Labor Party policy on the Timor Sea Treaty adopted in April 2007 stated:

> Labor recognises the Treaty signed by Australia and Timor Leste on Certain Maritime Arrangements in the Timor Sea and the provision of the Treaty that neither party will pursue its claims to sovereign rights and jurisdiction and maritime boundaries for the period of the Treaty. Labor recognises that the people of Timor Leste have the right to secure, internationally recognised borders with all neighbouring countries. Labor will negotiate in good faith with the Government of Timor Leste, in full accordance with international law and all its applications, including the United Nations Convention on the Law of the Sea. Labor believes that the conclusion of the maritime boundary should be based on the joint aspirations of both countries.

In accordance with this resolution, and the terms of the CMATS Treaty, there was no negotiation on maritime boundaries during the term of the Rudd-Gillard-Rudd Labor governments between December 2007 and September 2013.

Non-implementation of the CMATS Treaty, 2007-2013

Following ratification of the CMATS accord by the East Timor national assembly on 20 February 2007, Woodside's chief executive officer Don Voelte said that the ratification could enable Sunrise to compete for development with the company's Browse LNG project in Western Australia, which had been targeting a market window of 2012-2014.[387] Woodside announced the re-staffing of the Greater Sunrise project on 15 November 2007, and said that production through a gas liquefaction plant on a floating platform over the field was now the favoured option over pipelines either to Darwin or across the Timor Trough to the Timorese

383. Mr Downer to Dr Andrew Southcott, Chair, Joint Standing Committee on Treaties, 22 February 2007.
384. Mr Wilkie, *Joint Standing Committee on Treaties [Proof] Committee Hansard,* 26 February 2007, p.33.
385. Australian Parliament Joint Standing Committee on Treaties, *Report 85,* Canberra, 2007, p.43.
386. Bob McMullan, *House of Representatives Hansard,* 28 February 2007, p.157.
387. 'Australia, Timor-Leste bring Sunrise gas treaties into force', *PLATT,* 26 February 2007.

mainland.[388] This was unacceptable to East Timor. State Secretary for Natural Resources and Petroleum Minister Alfredo Pires said in November 2008: 'It has become very difficult for us to accept any other alternative than bringing the plant to East Timor. We would like to see the field developed but we are not in a hurry. We have money and so we can wait'.[389] He said that his government had concluded agreements with the South Korean government and a consortium of Korean companies to secure financial and technical backing for a potential LNG project.[390]

The Timor Leste government confirmed on 6 May 2009 that it did not intend to approve plans that Woodside Petroleum Ltd. had said it would put forward to develop the Sunrise field in the Timor Sea. 'We have made clear to Woodside our position', the government said in the statement. 'We have not, and do not intend to approve their development plans, no further engagement or negotiations will be entertained as stands'. Secretary of State for Natural Resources Alfredo Pires said: 'The fact that one pipeline has gone already to Australia, we feel that it's only fair that the other one comes to Timor-Leste. We also have studies that confirm that the Timor-Leste option is much more viable than we had been led to believe.'[391] This position was confirmed in November 2009 by Francisco da Costa Monteiro, special adviser to Alfredo Pires, during talks in Canberra with Australian Resources Minister Martin Ferguson. Mr Da Costa said the Government in Dili would not accept sending the gas abroad and accused Woodside of ignoring the interests of the Timorese people: 'For us, the best outcome is development of Greater Sunrise on the shores of Timor Leste that can underpin the overall economic and social development of the country.' He said establishing the project was expected to cost $8 billion to $10 billion and that investment would drive the development of other services in the country of one million. 'That's the reason why we see that for Australia this is one drop in a big ocean, but for Timor Leste this is almost the single biggest and you can imagine how much attention we put into this', he said. A spokesman for Mr Ferguson issued a statement saying the destination of the pipeline was a commercial matter to be determined by the project partners. But Mr Da Costa said that under the terms of various treaties dividing the oil and gas fields between Australia and Timor-Leste, the two governments should be left alone to decide how to develop the fields. He said Timor-Leste was willing to leave the resources in the ground for future generations rather than rushing into a deal. 'They should start to realise that Timor today is very different from Timor in 2002 and 1999 or before,' Mr Da Costa said. He pointed out that Timor-Leste's substantial national savings from other resource projects came to a total of more than $5 billion. 'If it's [Greater Sunrise] to be developed, then it's to be developed to Timor Leste', he said. 'If it's not coming to Timor Leste, then we will not approve anything.' [392]

On 13 March 2010, President Jose Ramos Horta said his country was serious about making sure its interests were not ignored in the development of the Greater Sunrise Gas field. Timor-Leste's government wanted the gas processing plant built in Timor-Leste. The field's developer Woodside said it would soon make a choice between building a floating plant in the

388. Nigel Wilson, 'Backflip: Woodside praises floating LNG platform as best Greater Sunrise option', *The Australian,* 16 November 2007.
389. Angus Grigg, 'East Timor Talks Tough', *The Australian Financial Review,* 14 November 2008.
390. Russell Searancke, 'Timor hits out at Sunrise plans', *Upstream,* 14 November 2008; Lindsay Murdoch, 'Survey backs East Timor pipeline bid', *The Sydney Morning Herald,* 14 November 2008.
391. Angela Macdonald-Smith, 'East Timor Says It Won't Approve Woodside LNG Plan', *Bloomberg,* 6 May 2009.
392. Daniel Flitton, 'Argument over pipeline clouds Timor gas deal', *The Age,* 26 November 2009.

Timor Sea or a pipeline to Darwin. Dr Ramos Horta said it was possible Timor-Leste would not allow the development to go ahead:

> If it's an arbitrary decision that we know is politically motivated, based on prejudices about a small developing country—if the decision is based on that and seems like it's based on that rather than technical and commercial considerations—then obviously we can not agree. For Australia, one pipeline more, one pipeline less to Darwin—it wouldn't make a terrible difference. But to Timor, it would ensure its prosperity into the future. So this is a political question. It's a moral, ethical question besides the commercial consideration.[393]

Woodside and its partners, Shell, ConocoPhillips and Osaka Gas, confirmed on 29 April 2010 that they had chosen a floating liquid natural gas (FLNG) plant as the best option to develop the Sunrise field.[394] Woodside's chief executive officer Don Voelte said East Timor's opposition to this option was merely a negotiating tactic; he claimed the FLNG plant was the biggest revenue-raising option for the East Timor and Australian governments.[395] In response, Prime Minister Xanana Gusmão said the Woodside-led consortium was trying to steal his country's natural resources. 'I don't believe Woodside company because it is a liar,' Gusmão said. 'They intend to steal our oil and gas in the Timor Sea as they don't want to bring the pipeline to East Timor.' He said the consortium had broken its promise to provide training for East Timorese engineers and had only hired thirty local people in its Timor Sea exploration. 'I call on the people of East Timor and the country's leaders, we must be united to defend our wealth in the Timor Sea and the pipeline must come to East Timor, not to Darwin or floating as Woodside desires,' he said.[396] Timor-Leste subsequently allocated $US12.4 million for research into an LNG processing plant at Beaço Beach. It also planned to spend at least $US36 million to develop a south-coast petroleum infrastructure corridor. The government said it wanted the LNG plant at Beaço Beach to have a production capacity of up to 20 million tonnes of LNG a year.[397]

The Sunrise Commission represented both Timor-Leste and Australia in the development of the production area shared by both countries. The December 2010 Sunrise Commission meeting broke down when Timor-Leste asked for suspension of consideration of Woodside's proposals while rights over the 'downstream' project were clarified. A statement released to the media on 24 January 2011 by Secretary of State Agio Pereira, said that the National Petroleum Authority (the ANP) had been asked by the Sunrise Commission on December 16 to 'cease their evaluation on Woodside's development concepts due to the content of the proposals submitted'. The statement added that Woodside's proposals included both upstream and downstream components, but that Woodside 'has no license or permit to carry out downstream activities nor have the States given the right to the National Petroleum Authority to assess downstream activities which are not covered in the Timor Sea Treaty'. The ANP had not been given the right by the government to assess downstream activities: 'Therefore, neither Woodside nor regulators will proceed with the proposals until the

393. 'East Timor threatens to scuttle gas development', Australian Broadcasting Corporation, *ABC News,* 13 March 2010.
394. Matt Chambers and Paul Cleary, 'Timor hurdle next for Sunrise', *The Australian,* 30 April 2010.
395. Peter Klinger, 'Woodside chief convinced floating LNG will win out', *The West Australian,* 1 May 2010.
396. Guido Goulart, 'East Timor PM claims Australian-led oil consortium is trying to steal its natural resources', *Associated Press Newswires,* 26 May 2010.
397. Lindsay Murdoch, 'Move to break impasse over Timor Sea gas supply', *The Sydney Morning Herald,* 3 January 2011.

downstream title issue is resolved'. The statement concluded: 'This effectively means that Woodside's operations on Greater Sunrise have been suspended.[398]

Manuel Mendonça, director of communications in the Natural Resources Ministry, announced that Timor-Leste had invited Malaysia's Petronas to develop the field. The move was designed to increase pressure on Woodside to accept the onshore development option or risk losing its field-development rights. However, Petronas would not be allowed to develop the field without the approval of the Australian government. Woodside claimed that the onshore terminal was more expensive by around $US5 billion due to the need to construct an LNG loading jetty, the costs of site clearance and preparation, and the costs of developing associated infrastructure such as airports, and because of the technical challenges associated with laying a deep sea pipeline from the field to the facility. Timor-Leste's feasibility studies had, according to report, shown the onshore LNG option was viable although not necessarily more competitive than an FLNG.[399]

Timor-Leste's position was that the 'States' had the power under the treaties to dictate how Greater Sunrise was developed. It seemed to indicate a belief that the government could also award processing rights to a party other than the joint venture. Woodside rejected both these propositions as inconsistent with the requirements of the international treaty and Australian law. Woodside's view was that Pereira's attempt to draw legal distinction between the 'upstream' and 'downstream' components of an LNG development reflected the different tax regimes that applied to different parts of an LNG project. In Australia, a Petroleum Resource Rent Tax applied to 'upstream' (prior to entry into the liquefaction train) and income tax applies to the 'downstream' (the value adding resulting from liquefaction).[400]

East Timor's representative on the Sunrise Commission and its chief petroleum negotiator, Francisco da Costa Monteiro, said in an interview published in *The Australian* on 10 March 2011 that his country would seriously consider terminating the treaty at the first opportunity, February 2013, if the dispute remained unresolved. Mr Monteiro said the Dili government would take into account 'all consequences' of ensuring Sunrise gas was piped to Timor-Leste, 'even be it a breaking-up of the treaty. Any treaty must ensure the two sides are happy, but at the moment Timor Leste is not happy and I speak not just as a commissioner but for all Timor Leste citizens'. [401]

Woodside chief executive Don Voelte used his last annual general meeting with the company to express dismay at the stalemate with the Timor-Leste government. He said Woodside had 'done everything right', abiding by a process set up by the East Timorese and Australian governments. But efforts to secure a meeting with the 'guy that's stopping this'—East Timor Secretary of State Agio Pereira—had so far failed. 'Something's broken and I'm really disappointed,' Mr Voelte told reporters after the meeting in Perth on 19 April 2011.[402] He said: 'For a government that was such great freedom fighters, ten, eleven, twelve years later now, what's the measurement of this government on nation building? Just what have they done

398. Jonty Rushforth, and Christine Forster, 'Timor Leste claims Woodside suspended from Sunrise LNG development', *Platts Commodity News,* 25 January 2011.
399. Tom Grieder, 'East Timor Suspends Greater Sunrise Gas Project on Downstream Title Issue', *IHS Global Insight Daily Analysis,* 25 January 2011.
400. Matthew Stevens, 'Squabble darkens Sunrise outlook', *The Australian*, 5 February 2011.
401. Peter Alford, 'Floating Processing Plan Deadlocked East Timor ups ante in LNG dispute', *The Australian,* 10 March 2011.
402. Rebecca Le May, 'Woodside asks East Timor for Sunrise talks', *AAP Bulletins,* 20 April 2011.

in this area? By objecting to Sunrise being built, they must be objecting to promoting the quality of life and improving the livelihood of their people and I don't get it, I just don't understand it'.[403] In response, Mr Pereira described Mr Voelte's comments as 'ill-suited and inappropriate', and defended Timor-Leste's development since the nation gained independence in 2002. He said despite Mr Voelte's claims that Woodside had done everything right, project delays occurred because of non-compliance by the company on certain issues. One of the most significant of these was caused by Woodside's reluctance to prepare and deliver the development materials as required by the regulator: 'Issues around which development option constitutes best commercial advantage and best oil field practice as required by the treaties continue to be considered by Timorese and Australian regulators'. Mr Pereira said it was his government's 'commitment to promoting quality of life and improving the livelihood of the Timorese people' that drove the desire to pipe Sunrise LNG the short distance to the shores of Timor-Leste. That desire was deeply held by all political parties and sectors of Timorese society, he said.[404]

Mr Voelte's successor as Woodside's chief executive, Peter Coleman, adopted a more conciliatory approach. In August 2011, Timor-Leste's State Secretary for Natural Resources, Alfredo Pires met Mr Coleman, and it was understood the two parties subsequently held further talks. Mr Pires said in Timor's national parliament that, while encouraged by comments by Mr Coleman indicating support for piping the gas to Timor, the Timor-Leste government would only support the project on this basis. Woodside officials were cautious in responding to Mr Pires's comments, saying that all parties were keen for the project to proceed. 'Woodside strongly believes it is not beyond all of us to find a solution to the current impasse', a spokesman said. 'Woodside recognises that the Sunrise joint venture's preferred development concept differs from that of the Timor-Leste government's. We are not underestimating the difficulty of working through this process but we do believe that ... it is possible'.[405]

In February 2012, the government of Timor-Leste passed a resolution to form an inter-departmental working group co-ordinated by the Ministry of Foreign Affairs to 'de-limit the maritime border of Timor-Leste'. The working group would be provided with the technical equipment and resources necessary to determine the boundaries 'as well as the legal instruments necessary for the delimitation of the country's maritime border'. The working group's findings would be used to help conclude an internal ratification process for the United Nations Convention on the Law of the Sea, which Timor-Leste would like to sign and ratify. Two more possible reasons for the government taking this action on its boundaries were first, that there was an unresolved maritime boundary issue with Indonesia, which was more complex than the Australian boundary; and second, that the CMATS Treaty could lapse within a year if the Woodside-led Sunrise gas project was not approved by the Timor-Leste and Australian governments. If it lapsed, Timor-Leste wanted to be ready to engage with Australia on maritime border negotiations that had been suspended as a condition of the treaty. With national elections due in 2012, the government also needed to show that it was taking action on the maritime issue.[406]

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403. David Weber, 'Don Voelte emotional and outspoken at final Woodside AGM', *PM* (Australian Broadcasting Corporation), 20 April 2011.
404. Lindsay Murdoch, 'East Timor rejects criticism from Woodside's chief', *The Sydney Morning Herald,* 25 April 2011. 'Timor-Leste: Governo rejeita críticas da Woodside e diz que basta olhar para Darwin para ver a melhor opção', *Agência Lusa,* 23 April 2011.
405. Brian Robins, 'Talks spark hope for Timor gas', *The Sydney Morning Herald,* 19 November 2011.
406. Russell Searancke, 'Timor-Leste sets up group to look at maritime borders', *Upstream,*10 February 2012.

East Timor's newly elected president, Taur Matan Ruak, was reported in April 2012 as having described Australia's approach to the issues of maritime boundaries and oil and gas revenue as ‘always a problem’. During the election campaign, Mr Ruak was asked what he thought East Timor could do to decide the issue of unresolved maritime boundaries with Australia and Indonesia. ‘I will continue discussion’, Mr Ruak responded, ‘I see Australia is always a problem in negotiations because they want to get a bigger percentage. Most of their agreements depend just on political, not legal negotiations’. [407]

In an address during the swearing-in of the new government in Dili on 8 August 2012 following the July 9 parliamentary elections, newly re-elected Prime Minister Gusmão said the development of an oil and gas sector on the south coast would remain a priority. 'The government is committed to bringing the pipeline from the Greater Sunrise field to the south coast of Timor-Leste', he said. 'Let's prove to the world that a pipeline to Timor-Leste is a safe and economically viable solution and that our horizon is the development of a petroleum industry able to provide direct economic dividends for our population'.[408]

Mr Gusmão's comments underlined the challenge for Woodside, the Timorese and Australian governments to reach an agreement on the stalled project before the 23 February 2013 deadline. Some observers suggested the Timor-Leste government mignt be willing to compromise and accept a floating plant in return for support by the venture to develop gas-based energy infrastructure in East Timor and a petroleum supply base. But Mr Gusmão's comments signalled that any such compromise, if it could be reached, was a long way off. Woodside argued that building an LNG plant in East Timor would add $US5 billion to costs because of the technical complexity of building a pipeline across the Timor Trench and the lack of skilled labour and infrastructure in East Timor. The Timor-Leste government objected to a floating LNG plant, saying the technology was unproven and risky. Woodside had dropped any timetable for developing Sunrise, but a Citigroup energy analyst was reported as saying the earliest the project could go ahead was late 2014, with start-up in 2020.[409]

In answer to a question asked in the Senate on 7 February 2013, Minister for Foreign Affairs Senator Bob Carr confirmed that agreement had been reached by the Sunrise Commission late in 2012 to conduct an independent reserve estimate study, which was under way. Detailed discussions had been held between experts of the two governments and the joint venture on the complex legal, technical, commercial and political issues involved. Australia had not yet come to a final position on its preferred development concept. More work needed to be done before that point was reached. Senator Carr said: 'We are strongly committed to working with Timor-Leste to enable the development of the Greater Sunrise resource to the benefit of both countries. We have received, however, no indication from Timor-Leste that would suggest CMATS would be terminated'. He said that Australia was committed to supporting Timor-Leste's economic development, and noted that revenues from oil and gas had made a significant contribution to that country's progress to date and that Australia would expect that to continue.[410]

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407. Michael Bachelard, ‘New East Timor president to take tough stance on boundary issues’, *The Sydney Morning Herald,* 18 April 2012.
408. Angela Macdonald-Smith, ‘Timor sticks to onshore plant stance’, *The Australian Financial Review,* 11 August 2012.
409. Angela Macdonald-Smith, ‘Timor sticks to onshore plant stance’, *The Australian Financial Review,* 11 August 2012.
410. *Senate Hansard,* 7 February 2013, p.53.

During 21-22 February 2013, Australian Resources and Energy Minister Martin Ferguson held a series of meetings in Dili with Timorese ministers, including Minister for Petroleum and Natural Resources Alfredo Pires. The talks covered Sunrise, as well as the CMATS treaty. After meeting with Mr Ferguson, Mr Pires raised the possibility of Timor-Leste developing Sunrise without the Woodside venture: 'Maybe we'll decide unilaterally, but we have to decide with the Foreign Affairs [Department] of Australia'. Radio Timor-Leste also reported Mr Pires saying the treaty would be continued even if its conditions had not been fulfilled by 23 February, 'to defend national interest'.[411]

Woodside Petroleum chief executive Peter Coleman said: 'I think there's a 12-month window for us to make some really significant progress on Sunrise… If you move from a floating solution to an onshore solution then there are certain fiscal arrangements that change and each of the parties, which include both governments, need to work through those arrangements and understand what they look like'.[412]

Arbitration on CMATS

Timor-Leste notified Australia on 23 April 2013 that it had initiated arbitration under the 2002 Timor Sea Treaty of a dispute related to the 2006 CMATS Treaty. The arbitration related to the validity of the treaty. Timor-Leste argued that CMATS was invalid because, it alleged, Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage. Bob Carr, Minister for Foreign Affairs, declared in response that Australia had always conducted itself in a professional manner in diplomatic negotiations and conducted the CMATS treaty negotiations in good faith. He added that Australia considered that the CMATS treaty was valid and remained in force.[413] Alfredo Pires, Timor Leste's Natural Resources Minister, explained that his government said that the treaty was invalid because they believed that, 'during the process of negotiations, there were some exercises of covert operations that allowed the other side to have information which assisted them during the process of negotiations'. Mr Pires said that the CMATS treaty contained 'confusing articles' which denied certainty to investing companies; by looking again at its arrangement Timor Leste sought to remove the uncertainty and obtain a more equitable outcome.[414]

Timor Leste Foreign Minister José Luís Guterres said in Lisbon on 16 May 2013 that his government expected to start negotiations with Australia soon over the maritime border between the two countries. His government was awaiting the Australian response to its call for arbitration on CMATS under the provisions of an earlier treaty: 'In terms of frontiers, the only one that is defined is the land border' with Indonesian West Timor, the minister said in an interview with Portuguese state news agency Lusa. 'We hope that in the near future we can also start maritime negotiations'. The minister declined to set a time frame for the talks with Australia, noting that 'rushing to reach an agreement sometimes leads to badly made

411. Angela Macdonald-Smith, Woodside hopes for Sunrise deal within one year, *The Australian Financial Review,* 25 February 2013.
412. Angela Macdonald-Smith, Woodside hopes for Sunrise deal within one year, *The Australian Financial Review,* 25 February 2013.
413. 'Timor-Leste Initiates Arbitration Under 2002 Timor Sea', *Treaty Australian Government News,* 3 May 2013.
414. Sara Everingham, 'East Timor defends allegations of Australia espionage over gas project', *Radio Australia,* 6 May 2013; 'Xanana confirma acusação de espionagem feita à Austrália nas negociações do gás e petróleo', *Agência Lusa,* 7 May 2013.

accords'.[415] Alfredo Pires, Minister for Petroleum and Minerals, subsequently explained: 'Our big objective here is to have permanent certainty for the companies in the Timor Sea. The treaty is proving [that] as it is anyone can stand up and say a few words and everything becomes shaky'. He went on to say: 'I have no problems attracting other companies to come and develop Greater Sunrise if the current companies feel uneasy and prefer to invest somewhere else. But we're not into that; we respect the contracts we have'.[416] Timor appointed former British supreme court judge Lawrence Collins as its arbitrator to the talks.[417]

The East Timorese government claimed that during the 2004 negotiations over the CMATS treaty the Australian Secret Intelligence Service (ASIS) broke into the cabinet rooms of the East Timorese government in Dili under instruction from Foreign Minister Alexander Downer and covertly recorded the Timorese foreign minister and officials. East Timor's Resources Minister Alfredo Pires and lawyer Bernard Collaery alleged that in so doing ASIS breached international law and Timorese sovereignty under a 'criminal conspiracy hatched in Canberra". The Timorese government therefore declared CMATS invalid and triggered compulsory arbitration. 'That treaty was negotiated in a number of sessions, and in negotiating… in October 2004, Australia clandestinely monitored the negotiation rooms occupied by the other party',' Mr Collaery told *The Australian*. 'So it was a Watergate situation. They broke in and they bugged, in a total breach of sovereignty, the cabinet room, the ministerial offices of then Prime Minister Alkitiri and his government. They placed clandestine listening devices in the ministerial conference room, we call it a cabinet room.' Neither Mr Collaery nor Mr Pires would divulge details of evidence of the alleged operation but described it as 'irrefutable'. 'As far as Timor Leste is concerned, the CMATS Treaty is invalid….it has come to our knowledge….that there was some covert operations by the Australian intelligence, which allowed the Australian team to have access to conversations by our negotiating team', Mr Pires said.[418]

Foreign Minister Bob Carr and Attorney-General Mark Dreyfus issued a joint press release on 3 May, claiming East Timor was alleging espionage during the negotiations on the CMATS treaty in October 2004, but refused to go into any further detail. Mr Pires and Mr Collaery said the issuing of the press release publicising the Timorese arbitration claim violated an agreement made when Prime Minister Julia Gillard met Timorese Foreign Minister Jose Luis Guterres on 7 December 2012 not to engage in 'megaphone diplomacy' on the issue. After the failure of initial talks with Australia over the dispute, Timor Leste filed for compulsory arbitration before the UN Permanent Court of Arbitration, on 23 April. 'We wanted to keep this away from the megaphones, but it was done', Mr Pires said. He said East Timor specifically waited until after a vote that secured Australia a spot on the UN Security Council before lodging its claim. Mr Pires said East Timor had every intention of following through on the allegations. 'This is a very serious allegation, we do not have a habit of doing these things', he said. 'We will have to back up our allegations. We are serious about it. Our leaders have made a decision'. Mr Collaery, a former ACT attorney-general and Australian diplomat, was in London working on the Timor arbitration claim with international lawyers Sir

415. Filipa Parreira, 'Timor-Leste espera em breve negociar fronteiras marítimas com a Austrália - MNE timorense', *Agência Lusa,* 16 May 2013; Alison Roberts, 'Timor sees frontier negotiations with Australia soon: minister', *Platts Commodity News,* 16 May 2013.
416. Karon Snowdon, 'Australia and E Timor battle over resource rich Timor Sea', *ABC Radio Australia,* 3 July 2013.
417. Angela Macdonald-Smith, 'East Timor plays risky game with Sunrise', *The Australian Financial Review,* 14 June 2013.
418. Leo Shanahan, 'Aussie spies accused of bugging Timor cabinet', *The Australian,* 29 May 2013.

Elihu Lauterpacht and Vaughan Lowe. Mr Collaery claimed that Mr Downer directly authorised the operation to listen covertly to the negotiations in a cabinet room built with Australian aid. 'Downer certainly knew', Mr Collaery said. 'It was a carefully premeditated, involved, very lengthy operation with premeditated breaches of the Vienna Convention on the Law of Treaties, and premeditated breaches of the Vienna Convention on Diplomatic Relations'.[419]

Mr Downer declined to confirm or deny the allegations. 'I am not in the business of giving any commentary on intelligence matters, full stop,' Mr Downer said. 'Otherwise we won't have intelligence services'. Mr Downer said he thought East Timor was motivated by a desire to redraw the CMATS treaty so that a gas processing plant was built in Timor. 'I assume ultimately they want to terminate the treaty, but I have no real idea what's motivating them," he said. 'They obviously have the option of going to arbitration and are hoping to do better out of it from that. But the real issue here is where they build the receival terminal or whether there is a floating LNG plant… Not surprisingly—because of sovereign-risk issues—Woodside, and the consortium generally, have been keen to build it in Australia. Then they've come up with this idea of a floating plant that would be much cheaper than building it in East Timor. So I assume it's all to do with that'.[420]

In an application for international arbitration in The Hague, East Timor used the affidavit of a former ASIS (Australian Secret Intelligence Service) agent to allege that construction work to renovate and reinforce the office of the East Timor prime minister in early 2004, funded by AusAID, planted listening devices inside the walls of a meeting room adjacent to the prime minister's private office. Numerous meetings with Mr Alkatiri and East Timor's negotiating team took place in the meeting room, adjacent to the prime minister's private office. The bugging coincided with an intensive round of negotiations between East Timor and Australia over Timor's demand for a maritime boundary between the two countries in the Timor Sea. The first meeting took place in the Hotel Timor in April 2004, and negotiations continued into late 2005. In addition to bugging, it was suggested that a senior member of East Timor's negotiating team was bribed or blackmailed by ASIS during the negotiations. During talks held in the bugged meeting room the team member was said to have urged Mr Alkatiri to capitulate and accept a very low offer from Australia of $3 billion to settle the dispute, rather than the percentage share that East Timor was pursuing. East Timor's legal counsel planned to argue at The Hague that the Australian government and Woodside were working together and that the bugging gave the company a commercial advantage. A preliminary meeting between the two countries was held in December 2013 at the Permanent Court of Arbitration in The Hague.[421]

The former ASIS agent's disclosure and East Timor's bid to have the treaty declared void led to an extraordinary ASIO raid on the Canberra office of Bernard Collaery. Officers of Australian intelligence services seized documents from Mr Collaery's offices in Canberra on 3 December 2013. East Timor subsequently brought an action against Australia before the International Court of Justice in The Hague, demanding return of the seized documents. On the first day of proceedings, East Timor's counsel described the 2006 treaty as 'seriously disadvantageous' to the country. Australian Solicitor-General Justin Gleeson SC took issue

419. Angela Macdonald-Smith, 'East Timor plays risky game with Sunrise', *The Australian Financial Review,* 14 June 2013.
420. Leo Shanahan, 'Aussie spies accused of bugging Timor cabinet', *The Australian,* 29 May 2013.
421. Paul Cleary, 'How Canberra and Woodside `bugged' Timor PM to strip fledgling nation of oil billions', *The Australian,* 6 January 2014.

with these remarks and pointed out that the 2006 CMATS treaty increased East Timor's share of the Greater Sunrise field from 18.1 per cent to 50 per cent. When summing up East Timor's case, the country's agent in the proceedings, ambassador to the UK Joaquim da Fonseca, said he could not allow the remark by Gleeson to go unchallenged:

> Mr Gleeson criticised Timor-Leste for omitting to mention the profitable revenue-sharing arrangement for the Greater Sunrise fields under the CMATS Treaty. This is not the place to debate CMATS, but we cannot let that remark pass without pointing out the following. Both the Timor Sea Treaty and CMATS Treaty are meant as temporary arrangements for the exploration and exploitation of maritime resources in the Timor Sea. But under no conceivable maritime delimitation would the Greater Sunrise fields lie within Australia's territory. They are located within 200 nautical miles from the coastline of Timor-Leste, far closer to Timor-Leste than they are to Australia. So, in the absence of a permanent maritime boundary, the question remains: To whom actually do the resources currently shared at 50:50 per cent between Timor-Leste and Australia really belong? And who is being generous to whom?'[422]

The court was due to hand down a determination on the matter in September 2014, but in August both parties agreed to work outside the judicial system to seek a negotiated outcome. The International Court of Justice announced on 5 September that it had agreed to a request from Timor Leste and Australia to postpone hearings on the case so that both parties could make an attempt to 'reach an amicable solution'.[423]

Recommencement of negotiations on the maritime boundary

Australia and Timor-Leste agreed to suspend the International Court of Justice hearing into Timor-Leste's allegations of spying by Australia to try to 'resolve differences amicably'. A spokesman for the Australian Department of Foreign Affairs and Trade explained the parties would postpone the proceedings in the Court for an initial period of six months. They also agreed to suspend their case on the Timor Sea Treaty before the UN Permanent Court of Arbitration. The spokesman said that Australia and Timor-Leste would meet regularly to discuss these issues.[424] Former president, Dr José Ramos Horta, said in Sydney on 7 September 2014, 'I know contacts are taking place between Prime Minister Xanana Gusmão and Prime Minister Tony Abbott [Australia's Prime Minister since September 2013] and between the two foreign ministers, so I'm confident that the two countries will resolve this issue'.[425]

The parliament of Timor-Leste passed a resolution on 28 October 2014, authorizing the 'immediate commencement of negotiations' with Australia to establish a new maritime boundary between the countries. According to the resolution, the parliament resolved to 'support and accept the immediate commencement of negotiations' with Australia 'for the purpose of establishing the definitive maritime border' between the two countries. It also endorsed the creation of a 'council for the final delimitation of maritime boundaries', which would include current and former prime ministers and presidents. Preliminary meetings

422. Paul Cleary, 'Timor Pours Oil on Spy Fire', *The Australian,* 24 January 2014.
423. 'Tribunal Internacional de Justiça adia audições a Timor-Leste e à Austrália', *Lusa,* 6 Setembro 2014.
424. 'East Timor spy row: Australia, East Timor postpone ICJ case to seek 'amicable settlement'', *Radio Australia,* 7 September 2014.
425. 'East Timor spy row: Ramos Horta downplays tensions over controversial gas treaty', *Radio Australia,* 7 September 2014.

between Australian and Timorese officials had already been held to discuss a 'framework for negotiations to deal with the boundary issue'.[426]

In an address to the UN General Assembly in New York on 26 September 2014, Prime Minister Xanana Gusmão emphasized the 'necessity of defining maritime borders between countries clearly and honestly in the light of international law'. He also, without mentioning Australia by name, deplored the arrogance of the powerful and ambition of the rich in taking advantage of the inexperience and ignorance of poor and small countries by committing acts of dishonesty and bad faith which were grave insults to universal values.[427] In a subsequent interview, Prime Minister Gusmão also confirmed that Australia and Timor Leste were in negotiation on the maritime border, affirming that 'we will defend our sovereignty and international law'. He noted that 'international law says that when two countries are in close proximity, the intermediate line is what delimits the borders, which is not the case at present; and this is what we want'.[428]

On 14 January 2015, the parliament of Timor Leste passed a law establishing the Conselho para a Delimitação Definitiva das Fronteiras Marítimas (CDFFM), a maritime council with the intent of settling permanent boundaries with Australia. The law defined 'the principal terms for negotiation of a treaty to delimit final maritime borders with Australia, the discharge of fiscal arrangements to assure the quality and the general direction of the process of negotiation, and provided instructions and directions on relevant decisions and strategy'. The CDFFM was to be headed by the prime minister of Timor-Leste and include former heads of government and former heads of state as well as other 'eminent and qualified persons'. In a statement issued on 30 January 2015 on behalf of the government, Mr Agio Pereira said: 'Twelve years have passed since the restoration of the nation's independence, and it is necessary to define, once and for all, the national borders in light of the enormous social, polítical and economic impact involved'. Mr Pereira referred to the negotiations between Timor Leste and Australia, saying that the two countries, 'had an obligation to arrive at a final accord on the maritime delimitation of their borders in which the present provisional arrangements do not prejudice or put in question the conclusion of a final agreement'.[429] Mr Pereira said Timor Leste now considered the CMATS treaty covering the Sunrise resource 'invalid', throwing the issue of boundaries, put aside for 50 years under the treaty, back into contention.[430]

Rui Maria de Araujo succeeded Xanana Gusmão as Prime Minister on 15 February 2015. He reiterated his predecessor's demands that the gas from Sunrise be processed on the country's south coast and said his nation would not consider a floating LNG option as proposed by Woodside.[431] He subsequently suggested that Timor Leste might fund construction of a

426. Tom Allard, 'Australia and East Timor restart talks on maritime boundary', *The Sydney Morning Herald,* 28 October 2014.
427. 'PM timorense lamenta acuação da Austrália na questão das fronteiras maritimas'', *Lusa,* 26 Setembro 2014.
428. 'Timor-Leste e Austrália debatem fronteiras maritimas', *Lusa,* 27 Setembro 2014.
429. 'Timor-Leste cria Conselho Marítimo, numa estratégia para definir fronteiras marítimas', *Agência Lusa,* 30 January 2015.
430. Rick Wilkinson, 'Renewed uncertainty emerges over Greater Sunrise development', *Oil & Gas Journal,* 10 February 2015.
431. Kim Christian, 'East Timor PM rejects Woodside's FLNG plan', *Australian Associated Press,* 20 February 2015.

150km undersea pipeline from the Sunrise field to the south coast of Timor.[432] Woodside chief executive Peter Coleman announced on 18 February that work on the Sunrise LNG project had been shelved because the consortium had come to a dead end amid the ongoing standoff between the governments of Australia and Timor Leste on regulatory and fiscal regimes for the gas-condensate field. 'We've pretty well exhausted the activities that we can progress', Mr Coleman said.[433] He added: 'we don't know what the regulatory framework is, we don't know what the fiscal framework will be, so we can't evaluate this project and we can't put it up to buyers as to being a viable project that they would be interested in'.[434]

The Timorese minister of Petroleum and Natural Resources Alfredo Pires said on 19 February that Timor Leste was prepared to buy out Woodside's share of the Greater Sunrise project if the company were to maintain its intention to keep the project on hold indefinitely, and had put this to Woodside. The company had replied that it was not thinking of selling. Woodside's contract with the Australian and Timorese governments over Greater Sunrise would remain in force until 2026 but investors required certainty for a period of at least twenty years, Mr Pires noted, and said that in that case the Timorese national oil company Timor Gap would be the ideal partner for the project. Woodside risked losing all by putting off development of Greater Sunrise indefinitely, Mr Pires said.[435] Opposition spokesman for Resources (and former Minister for Resources and Energy in 2013 in the Gillard government.) Gary Gray was moved to express his 'despair' for the Sunrise project.[436]

Upon taking up his appointment as prime minister, Mr Araujo confirmed the East Timorese and Australian governments were in confidential discussion on the issue of boundaries.[437] He reaffirmed that it was a priority of his government to 'secure a clear definition of maritime and terrestrial borders in the light of international law'.[438] A spokesman for the prime minister said Timor Leste was seeking to 'properly settle its maritime boundary with Australia', and that 'Timor-Leste has been blessed with a world class gas reserve in an area which will lie within its maritime boundary once delimited under international law'.[439] Mr Araujo said the six-month suspension of Timor Leste's international legal action with Australia over spying allegations was a chance to negotiate 'in an honest and friendly way' with Australia to resolve the long-standing dispute over maritime boundaries.[440] Minister of State Agio Pereira also reiterated his government's desire for Australia and East Timor to come an agreement on their maritime boundaries: 'We do understand that fiscal certainty is important for business and believe that the best way to achieve long-term fiscal certainty and an optimal investment environment is to "draw the line". The most straightforward way to achieve this

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432. Peter Klinger, 'Timor tests Woodside's on Sunrise offer plan', *The Australian,* 13 March 2015.
433. Kim Christian, 'Sun sets on Woodside's Sunrise', *Australian Associated Press,* 18 February 2015.
434. Sonali Paul and Richard Pullin, 'Woodside sees slim hope for East Timor LNG this decade', *Reuters*, 17 Feb 2015.
435. 'Timor-Leste preparado para comprar parte da Woodside em projeto no Mar de Timor', *Agência Lusa,* 21 February 2015; Paul Garvey, 'E Timor offers to buy out Sunrise, *The Australian,* 13 March 2015.
436. Gary Gray, 'Woodside should ride on Shell's energy', *The Australian Financial Review,* 22 April 2015.
437. Kim Christian, 'East Timor PM rejects Woodside's FLNG plan', *Australian Associated Press*, 20 February 2015.
438. 'PM timorense não acredita que Woodside coloque Greater Sunrise na gaveta', *Agência Lusa*, 19 February 2015.
439. Kim Christian, 'East Timor PM rejects Woodside's FLNG plan', *Australian Associated Press*, 20 February 2015.
440. Daniel Flitton, 'East Timor's new leader Rui Araujo doesn't want Australian 'charity'', *The Sydney Morning Herald,* 19 February 2015.

would be by friendly engagement in this process by both countries under the norms of international law'.[441]

During a radio interview in Canberra, Mr Gusmão, now Minister of Planning and Strategic Investment and member of the CDFFM, reiterated his nation's determination to ensure its sovereignty was not compromised by the maritime boundary issue: 'I participated in the struggle for independence for twenty-four years. When we got independence after the referendum in 1999, becoming president in 2002, I told the people that independence is not a flag,' he said. 'Independence is not having a state, presidents, parliaments, governments. Independence is to be the owner of our sovereignty. And sovereignty is the capacity to decide what belongs to us, what is ours… We will continue to fight in the international area. We have a cause, and we have a case in the International Court of Justice ... in this, I can tell you we will not give up'.[442]

Australian Foreign Minister Julie Bishop characterized the ongoing process between Australia and Timor-Leste as 'consultations' rather than negotiations. 'We are engaged in consultations with Timor-Leste to seek an amicable settlement of the Timor Sea Treaty arbitration and the case before the International Court of Justice and these consultations are ongoing', Ms Bishop said. She also rejected the need for Australia to return to the International Court of Justice for resolving maritime boundary disputes.[443]

The Timor-Leste government revealed on 3 May 2015 that Australia would return the documents seized in the December 2013 raid by the Australian Security Intelligence Organisation on the office of its Canberra-based lawyer. The documents were returned on 12 May under the supervision of Timor-Leste's ambassador to Australia, Abel Guterres. Australia had defended its right to seize and hold the documents for 16 months.[444] Timor-Leste said that in September 2014, Prime Minister Tony Abbott and Foreign Minister Julie Bishop asked for a six-month adjournment to the ICJ hearings so the two countries could seek an amicable settlement. Timor-Leste said it agreed to the request 'with the proviso' the two countries agree to structured talks on permanent maritime boundaries in the Timor Sea.' The adjournment period expired on 3 March 2015. 'A schedule for bilateral talks on maritime boundaries between the two countries remains un-defined,' the statement said. East Timor's Minister of State, Agio Pereira, said he welcomed Australia's willingness to return the documents but there had been little progress towards a schedule of structured negotiations on securing permanent maritime boundaries in the Timor Sea. 'Timor-Leste hopes to see Australia put action to its declared principles, and remains optimistic that the leaders of our great neighbour will demonstrate courage and commit to a clear course of negotiations to settle the maritime boundaries between our two countries once and for all,' he said.[445] In response, Foreign Minister Bishop denied an agreement to engage in bilateral talks on maritime boundaries had been part of the agreement in September 2014 to adjourn the ICJ matter. 'An agreement to produce a structured plan for bilateral talks on maritime delimitation was never part of the

441. 'East Timor hopeful of future LNG project', *The Sydney Morning Herald,* 23 February 2015.
442. 'Timor-Leste will not give up in dispute over oil, maritime boundary: former leader Xanana Gusmao', *Australian Broadcasting Corporation (ABC) News,* 17 March 2015.
443. Paul Cleary, 'Departing Gusmao cleans out ministry', *The Australian,* 14 February 2015.
444. Daniel Hurst, 'Timor-Leste presses ahead with challenge to Timor Sea oil and gas treaty'. *The Guardian,* 5 June 2015.
445. 'Austrália devolve a Timor-Leste documentos sobre espionagem confiscados a advogado', *Agência Lusa,* 3 May 2015; Paul Cleary, 'Australia 'broke its word' to Timor', *The Australian,* 4 May 2015.

agreement to adjourn the matter,' she said. 'Australia's arrangements with Timor-Leste in the Timor Sea are entirely consistent with international law'.[446]

Steve Bracks, former Premier of Victoria and governance adviser to the Prime Minister of Timor Leste, and prominent Labor Party member, argued in advance of the July 2015 Labor Party national conference for a commitment that the next Australian government formed by the Labor Party would re-submit to the maritime jurisdiction of the international courts, so allowing the Australia-Timor Leste maritime boundary to be finalised according to the rule of law.[447] The ALP national conference resolved on 26 July to begin formal talks on a new maritime boundary with East Timor. The resolution stated:

> In Government, Labor will enter into structured engagement with Timor-Leste to negotiate the settlement of maritime boundaries between our two countries. Labor reaffirms our commitment to a rules-based international system, underpinned by a philosophy of mutlilateralism and institutions like the International Court of Justice (ICJ). In light of this, in Government Labor will review its reservations to the United Nations Convention on Law of the Sea (UNCLOS) to the settlement of maritime boundary disputes through the ICJ and the International Tribunal of the Law of the Sea (ITLOS).

The Ambassador of Timor-Leste to Australia Abel Guterres welcomed the resolution, noting favourably the decision to reconsider the UNCLOS reservations that 'deny Timor-Leste access to a third party independent umpire on the boundary issue'.[448] Elizabeth 'Betti' Exposto, chief executive of the Timor-Leste Maritime Boundary Office, said*:* 'For us, it's an issue of sovereignty. We have no maritime boundaries in the Timor Sea, we only have temporary arrangements to manage the oil and gas activities in that area. All we're asking for is what all other countries have, even Australia, which is the right to settle their maritime boundaries under international law… Either we negotiate them bilaterally or we can take it to an international umpire'.[449]

In a speech to the National Press Club in Canberra on 10 February 2016, Tanya Plibersek, deputy opposition leader and foreign affairs spokeswoman, went beyond the ALP national conference resolution, and said Australia must 'redouble efforts' to resolve a boundary dispute that had 'poisoned relations' with Timor-Leste: 'This must change, for their sake, and for ours. A Shorten Labor government will redouble efforts to conclude good faith negotiations with Timor-Leste to settle the maritime boundaries between our two countries. If we are not successful in negotiating a settlement with our neighbour, we are prepared to submit ourselves to international adjudication or arbitration'.[450] Ms Plibersek said in April 2016 that if the United Nations ruled in favour of East Timor in the border dispute and her party won government in the forthcoming general election, it would negotiate a new and fair maritime boundary with the country. She said in a radio interview: 'I think if we revert to a position where might is right and we ignore conventions like the UN Convention on the Law of the Sea, then we're not an infinitely strong position ourselves. The best case, the best environment for

446. Daniel Hurst, 'Timor-Leste welcomes Australia's return of spying documents seized by Asio', *The Guardian,* 4 May 2015.
447. Steve Bracks, 'Timor Sea policy a challenge for Labor', The Saturday Paper, 11 Jul 2015.
448. 'Sea boundary talks backed' *The Sydney Morning Herald,* 27 July 2015; 'Labor backs talks on new maritime boundary with East Timor', *West Coast Sentinel,* 27 July 2015.
449. Mark Skulley, 'Timor-Leste's battle to settle its maritime borders resumes', *The Saturday Paper,* 12 September 2015.
450. Daniel Hurst, 'Tanya Plibersek: Australia must restore 'poisoned relations' with Timor-Leste', *The Guardian,* 10 February 2016.

Australia, is a world where all countries abide by the law, the international law, and if we are not prepared to do it ourselves, we can't expect that other countries will do it'.[451]

The Permanent Court of Arbitration

The government of Timor-Leste decided to withdraw its International Court of Justice case against Australia relating to evidence seized by the Australian Security Intelligence Organisation (ASIO) in raids in December 2013, but while the return of the documents prompted the discontinuation of the ICJ case, it did not deter Timor-Leste from pressing ahead with arbitration against Australia challenging the validity of the CMATS treaty. Timor-Leste delivered a diplomatic note on 1 June 2015 to Australia, formally notifying intent to proceed to arbitration by a private panel under The Hague court's auspices, to have the CMATS treaty declared invalid.[452] 'Timor-Leste's expectation that dialogue would produce a road map for structured talks on the delimitation of permanent maritime boundaries has not been met', Mr. Araujo said. [453] Minister of State Agio Pereira, said: 'Timor-Leste's preference is always to avoid legal confrontation and focus all of our energy and resources on national development. However, it is also the mandate of the government to defend the national interest... Timor-Leste is focusing on moving forward in its relationship with its neighbour to substantive dialogue to finalise a permanent maritime boundary based on the principles of international law'.[454]

Attorney-General George Brandis and Foreign Affairs Minister, Julie Bishop, issued a joint statement on 5 June 2015 saying that the countries' differences were 'best resolved through consultation'. They were 'therefore disappointed that Timor-Leste has decided to resume the arbitration against Australia challenging the validity'. 'The Australian government reached agreement … with Timor-Leste in 2006 and we remain committed to the treaty,' the Ministers said. 'Both governments agreed to defer further maritime boundary negotiations during the life of the treaty. Australia remains committed to that agreement and is disappointed that Timor-Leste is attempting to re-open it.' Brandis and Bishop said the existing treaty framework had 'provided an effective means to share resources claimed by both countries and to develop them jointly' and also provided 'the certainty required by international companies in order to make substantial investments in the resource sector. Under the Timor Sea treaty framework, Timor-Leste receives 90% of revenue from the Joint Petroleum Development Area and will receive 50% of the upstream revenue from the Greater Sunrise fields—despite nearly 80% of the Greater Sunrise fields lying in an area of exclusive Australian seabed jurisdiction'.[455] In a letter published in *The Saturday Paper* on 17 October 2015, Julie Bishop said: 'We negotiated the Timor Sea treaties in good faith and remain committed to them'.[456]

Prime Minister Rui Araujo said his government had decided to continue its legal battle against Australia in the international court, a process he expected to take years: 'We want justice. We want to follow international law and we are requesting what belongs to us', he said

451. 'Labor will give Timor a new deal on oil if it wins election', *ABC PM,* 12 April 2016.
452. Hamish McDonald, 'Australia called to Hague on Timor Gap', *The Saturday Paper,* 13 June 2015.
453. Rob Taylor, 'Australia to Fight East Timor Sea-Border Challenge', *Dow Jones Top Energy Stories,* 5 June 2015.
454. Daniel Hurst, 'Timor-Leste presses ahead with challenge to Timor Sea oil and gas treaty'. *The Guardian,* 5 June 2015.
455. Daniel Hurst, 'Timor-Leste presses ahead with challenge to Timor Sea oil and gas treaty'. *The Guardian,* 5 June 2015. Mark Skulley, 'Timor-Leste's battle to settle its maritime borders resumes', *The Saturday Paper,* 12 September 2015.
456. Julie Bishop, 'Australia stands by Timor treaties', *The Saturday Paper,* 17 October 2015.

at a Jakarta hotel, shortly after meeting with Indonesian President Joko Widodo on 26 August 2015 to discuss trade and maritime border issues.[457] At the meeting Indonesia and Timor Leste agreed to start discussing their maritime boundaries.[458] At a symposium at Monash University on 15 February 2016, East Timor's ambassador to Australia Abel Guterres announced that Prime Minister Araujo had written to his Australian counterpart Malcolm Turnbull [who had replaced Prime Minister Abbott in September 2015] asking him to open talks on a permanent maritime boundary between the two countries.[459] Mr Araujo said on 29 February that Prime Minister Malcolm Turnbull had replied by letter, saying that 'in a general sense, the Australian government was open to negotiations on trade but not on maritime borders'. Mr Turnbull said he wanted to negotiate 'in a generic way on bilateral issues. But he maintained the position that the sharing of resources, which was being done through the CMATS, was the same as having already fulfilled the requirements of international law'.[460]

Acting on advice from Vaughan Lowe and Sir Michael Wood, eminent experts in international maritime law, the Government of Timor-Leste announced on 11 April 2016 that it had approached the UN to begin a formal conciliation process conducted by an independent panel of experts, an Obligatory Process of Conciliation in accordance with Article 298 of UNCLOS.[461] 'Establishing permanent boundaries is a matter of national priority for [Timor-Leste] as the final step in realising our sovereignty as an independent state,' Prime Minister Rui Maria de Araujo said.[462] 'Under international law, Australia is obliged to negotiate permanent maritime boundaries with Timor-Leste but it has refused to do so, despite all our invitations. This has left us with only one option. This process allows for a commission to assist our two countries to reach an amicable solution on permanent maritime boundaries.' Dr Araujo said his country was seeking a fair and equitable solution to what it argued it was entitled to under international law.

Minister of State Agio Pereira told the ABC's *PM* program on 11 April 2016: 'It's really time to draw the line to give more certainty for East Timor and to consolidate more or less the sovereignty '. He said, 'The sovereign access to natural resources is a very sacrosanct principle of UN member states. [A] sovereign nation state, without that, does have a lot of constraints in terms of full development of its own capacity, and that definitely will give Timor much higher certainty and better understanding of its potential'. Mr Pereira noted that this was the first time the provisions of Article 298 of UNCLOS had been invoked. Mr Pereira said Australia must abide by the UN commission's findings. 'Australia has been trying hard in the last few years to be as best of a citizen in international community as possible. I think Australia cannot go on lecturing other countries about respecting international law in the limitation of maritime boundaries, and yet look the other way in its closest neighbour, Timor Leste.' Mr Pereira made the case that Australia was behaving like China in its approach to the domination of the South China Sea. 'I think Australia also played a very important role in other international issues, and that's very important. But you must lead by example'. But he said he was 'not necessarily'

457. Randy Fabi, 'East Timor PM seeks to diversify economy with help of oil fund', *Reuters News,* 27 August 2015.
458. Ina Parlina, 'RI, Timor Leste agree to resolve border problems, boost ties', *The Jakarta Post,* 27 August 2015.
459. Tom Allard, 'East Timor to Malcolm Turnbull: Let's start talks on maritime boundary', *Eastern Riverina Chronicle,* 16 February 2016.
460. 'Austrália não está aberta a negociar fronteiras marítimas com Timor-Leste - PM timorense', *Agência Lusa,* 29 February 2016.
461. Frank Brennan, 'Another win for "David" Timor against "Goliath" Australia', *Eureka Street,* vol.26, no.19, 26 September 2016.
462. Tom Allardin. 'East Timor asks UN to rule on dispute', *Canberra Times,* 12 April.

comparing Canberra with Beijing. 'We see the foreign policy of Australia as a complex one in geopolitical sense, in its regional security sense, in economic sense. We respect that.' [463] Mr Pereira said they were pursuing the UN path because it could provide high-profile and powerful recommendations: 'The recommendations will be a guide for both countries, Australia and Timor Leste, to understand under international law, or even from a political perspective, economic perspective, the sovereignty over the Timor Sea that Timor Leste also originally has, and wants delimitation of maritime boundaries to consolidate this sovereignty'. [464]

Resources Minister Josh Frydenberg, who was Foreign Minister Alexander Downer's adviser on the matter when the treaty was negotiated, said on ABC Radio: 'We're not about to enter into these further discussions because we believe we've got the balance right. But certainly East Timor are the ones who are getting the greatest benefit. Japan and Korea did a similar agreement. And we think any move to go towards this compulsory arbitration or coordination actually contravenes the previous agreements that both countries voluntarily entered into '.[465]

On 12 July 2016, the Permanent Court of Arbitration in The Hague delivered a ruling in the dispute between The Philippines and China over territory claimed by both states. It found there was no legal basis to China's claim over 90 per cent of the South China Sea, including land features and waters within The Philippines' exclusive economic zone. Foreign Minister Julie Bishop said with reference to the ruling that Australia stood by the existing treaties with Timor Leste, which were negotiated in 'good faith in a manner fully consistent with international law'. She said: 'The existing treaties agreed on a moratorium on negotiating boundaries and arrangements... Australia will take part in any compulsory arbitration as per our legal obligations. In doing so, Australia will argue our case before the commission, including on matters of jurisdiction'.[466] Law of the sea expert and partner at Gilbert and Tobin law firm Chris Flynn commented that the Foreign Minister's remarks suggested that Australia was not as certain as it once was about the status quo:

> If the Foreign Minister is saying that Australia will respect international law, then it has to respect the decision it was reached by the PCA (Permanent Court of Arbitration) yesterday. If you applied the reasoning of the court in the South China Sea dispute to this dispute with East Timor, what you end up with is the likelihood that the court would say to Australa… East Timor is right, you need to apply only the principles under the Law of the Sea Convention. And the PCA has said that the principles of the Law of the Sea Convention will apply to any dispute such as that between the Philippines and China and also therefore between Australia and East Timor. And if you apply those Law of the Sea Convention principles the boundary should be drawn along the equidistant line.[467]

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463. Peter Lloyd, 'Timor takes Australia to the UN to conciliate their unresolved dispute over a maritime boundary', *PM,* 11 April 2016.
464. Hannah Sinclair, 'Australia's relationship with East Timor is this week being tested, with stark policy differences emerging between the Liberal and Labor parties', *SBS World News Radio,* 14 April 2016.
465. 'No more sea talks: Aust tells East Timor', *AAP,* 12 April 2016; Hannah Sinclair, 'Australia's relationship with East Timor is this week being tested, with stark policy differences emerging between the Liberal and Labor parties', *SBS World News Radio,* 14 April 2016.
466. Amanda Hodge, 'Dili eyes gap in sea row with Canberra', *The Australian,* 16 July 2016.
467. Peter Lloyd, 'Timor reckons China law of sea verdict has lessons for Australia', *ABC,* 13 July 2016.

East Timor Prime Minister Rui de Araujo told *The Weekend Australian* that Canberra's respective positions on the South China Sea and Timor Sea were 'inconsistent'. 'While Australia has been urging China to use international mechanisms to resolve disputes in the South China Sea, it refuses to respect the Law of the Sea in its own backyard, the Timor Sea,' Mr Araujo said. 'If differences in the Timor Sea can't be resolved at the negotiating table using the global architecture, why would anyone believe that more complicated challenges in the South China Sea can be resolved at all?'[468]

Ms Bishop insisted on 26 August that Australia's position on the Timor Gap was fully consistent with its position on The Philippines arbitration case. 'In both situations we emphasise the importance of the rule of law and the willingness to resolve disputes peacefully,' she said, adding Australia considered the 'decision of the upcoming compulsory conciliation binding on both sides'. Timor Leste government adviser and former Victorian premier Steve Bracks commented that the Foreign Minister had made a key concession. 'This is the first time the Australian government has said it will abide by the UNCLOS decision. This is a sensible way to resolve this dispute,' he said.[469]

It was reported that the Australian representatives could argue the Commission of the Permanent Court of Arbitration did not have the jurisdiction to conciliate over the maritime boundaries when only two of the parties were present. The third party to share a boundary in the Timor Sea was Indonesia, which was not a party to the compulsory conciliation requested by Timor Leste.[470] Possibly3 the Australian side anticipated a decision similar to that made by the International Court of Justice in the action brought by Portugal in 1991 over the validity of the Timor Gap Zone of Cooperation Treaty. On that occasion, the ICJ found that because 'the very subject matter' of the case related to the rights and obligations of a third State, namely Indonesia which did not recognize the jurisdiction of the Court, it could not adjudicate on the dispute.[471]

Speaking at a preliminary hearing before the Permanent Court of Arbitration in The Hague on 29 August, Department of Foreign Affairs and Trade Deputy Secretary Gary Quinlan said there was no proper basis under which East Timor was entitled to bring the claim before the commission and doing so violated treaty commitments. He said that under CMATS both countries had committed not to bring proceedings against each other on maritime boundaries. Australia's objection to the commission's jurisdiction in the matter was not driven by politics but was 'motivated by a serious regard for principle'. Mr Quinlan said East Timor should not use compulsory conciliation 'in an effort to oust the express treaty commitments it has made'.[472] Mr Quinlan told the hearing that Canberra believed all current treaties, including the CMATS, were legal, binding and valid and should be respected. Australia 'contested the competence of the commission,' he said, adding 'Australia's view is that there is no proper basis from which Timor-Leste is entitled to bring these claims.' Dili's claim 'violates its treaty commitments, specifically CMATS, under which both countries have committed not to bring proceedings against each other,' he said.[473] The treaties, he said, 'really are a model example of

468. Amanda Hodge, 'Dili eyes gap in sea row with Canberra', *The Australian,* 16 July 2016.
469. Amanda Hodge, 'Dili eyes gap in sea row with Canberra', *The Australian,* 16 July 2016.
470. Steve Cannane, 'East Timor-Australia maritime border dispute set to be negotiated at The Hague', *ABC News,* 28 August 2016.
471. Opinion of the International Court of Justice, *Case Concerning East Timor (Portugal v. Australia),* 30 June 1995. General List No. 84, 30 June 1995.
472. L Lloyd Jones, Aust-East Timor conciliation underway, *AAP*, 29 August 2016.
473. L Lloyd Jones, 'Aust-East Timor conciliation underway', *AAP,* 29 August 2016.

how two states can work together for mutual benefit despite different views on how to finalize boundaries'. The CMATS treaty included a clause that put negotiations on hold over a permanent maritime boundary for fifty years. Mr Quinlan said Australia's position was to urge the commission not to disregard their treaties, 'simply because one party has changed its mind'.[474]

Professor of International Law at the Australian National University, Donald Rothwell noted that the consistent position of Australian governments on both sides of politics was that Australia preferred to negotiate its maritime boundary arrangements. Australia had determined some innovative maritime boundaries, of which the Torres Straits treaty between Australia and Papua New Guinea was a good example. The fact that Australia had been brought before the compulsory conciliation process was distinctive not only because it was the first time that Australia has been brought before a formal tribunal with respect to its maritime boundaries but also because this was the first time that any country has been brought before the Annex 5 conciliation process. Timor-Leste argued that as Australia had failed to reach an agreement a permanent settlement of the maritime boundary, accordingly under article 298 of the Law of the Sea Convention they had activated the procedures for compulsory conciliation.[475]

Australia objected to the competence of the Conciliation Commission on three main grounds. Australia relied on Article 281 of UNCLOS to argue that compulsory conciliation under UNCLOS was precluded by Article 4 of CMATS between Australia and Timor-Leste, which imposed a moratorium on the utilization of dispute settlement mechanisms that 'would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea'. Australia also submitted that the first condition of Article 298 of UNCLOS – that the relevant dispute must arise subsequent to the entry into force of UNCLOS – was not met because the maritime boundary dispute dated to 2002, which was prior to the 2013 entry into force of the Convention as between Australia and Timor-Leste. Nor, argued Australia, was the second Article 298 condition met, because there were not 'negotiations on the maritime line' before Timor-Leste initiated compulsory conciliation. Timor-Leste contested each of Australia's objections.

The five-member Commission held hearings from 29 to 31 August. It reached a unanimous decision on Australia's objections to its competence on 19 September, which it published a week later. In that decision, the Commission substantially agreed with Timor-Leste's submissions. The Commission acknowledged that Article 4 of CMATS did establish a moratorium on claims to sovereign rights and jurisdiction and maritime boundaries for the period of that treaty, but found that CMATS was not an agreement 'to seek settlement of the dispute by a peaceful means of [the Parties'] own choice', as required by Article 281 of UNCLOS. Therefore, Timor-Leste was not precluded from recourse to compulsory conciliation under Article 298 and Annex V. The Commission also found that the requirements for competence under Article 298 were met. First, the Commission interpreted Article 298 to require only that a dispute arise after the initial entry into force of the Convention in 1994, as opposed to the 2013 entry into force as between Australia and Timor-Leste. Second, the Commission found that the states had not reached an agreement on their maritime boundary dispute by negotiations within a reasonable period of time.

474. Steve Cannane, 'East Timor says Australia took advantage of a vulnerable nation, demands Timor Sea treaty torn up', *ABC,* 30 August 2016.
475. 'Timor-Leste and Australia at the Hague', *ABC*, 30 August 2016.

Having established its competence, the Commission was to proceed to hear the states' positions on the maritime boundary and examine their claims, with the object of making proposals to the states for an amicable settlement. Talks between the two countries would continue over the next year, the Commission said, but stressed the meetings would be 'largely in a confidential setting'.[476] If Timor-Leste and Australia could reach an amicable settlement, they could agree to terminate the conciliation proceedings. Within twelve months of its decision on competence, or by 19 September 2017, the Commission would issue a report recording any agreements reached by Australia and Timor-Leste or, failing an agreement, the Commission's conclusions on all questions of fact and law relevant to the dispute as well as appropriate recommendations for an amicable settlement. This report of the Conciliation Commission, including its conclusions and recommendations, would not be binding on Timor-Leste and Australia. The two states were obliged to attempt to negotiate an agreement on the basis of the Commission's report. If the negotiations failed, they 'shall, by mutual consent', submit their maritime boundary dispute to binding adjudication or arbitration. Therefore, although conciliation proceedings could not result in legally binding decisions resolving maritime boundary disputes, the Conciliation Commission wa3s assisting Australia and Timor-Leste to find a resolution to their dispute.[477]

Foreign Minister Julie Bishop and Attorney-General George Brandis issued a statement saying that Australia accepted the commission's decision 'and will continue to engage in good faith as we move to the next phase of the conciliation process. This approach is consistent with our support for the rules-based international order.' The ministers said Australia abided by the 2002 Timor Sea Treaty and 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) signed by both countries. 'We seek to uphold these treaty arrangements which are consistent with international law and were negotiated in good faith.' The ministers noted that the Commission's role was to assist the parties to reach a settlement and it would produce a report 'which, unlike an arbitration decision, is not legally binding'.[478]

Timor's Minister of State Agio Pereira welcomed the Commission's decision to continue with the conciliation to reach 'an amicable settlement'. 'This process is an opportunity to set a good example in our region and we will engage with respect for the Commission and its recommendations, ever conscious of the importance of maintaining the best possible relationship with our close neighbour Australia,' he said. Former East Timorese president Xanana Gusmão, the chief negotiator before the Commission, thanked the commissioners for their ruling: 'Just as we fought so hard and suffered so much for our independence, Timor-Leste will not rest until we have our sovereign rights over both land and sea'.[479]

Commenting on the ruling of the Permanent Court of Arbitration, expert in the international law of the sea, Chris Flynn, said:

> there is a paragraph in there which I think will provide East Timor with a lot of hope that there actually might be potentially, if this conciliation fails, a much stronger position it can take against Australia even though CMATS says it can't... Australia makes its claims under a much older set of laws and East Timor says, well, UNCLOS is the treaty that should determine the dispute. That

476. 'Global court takes up Timor, Australia sea border row'. *Agence France Presse,* 26 September 2016.
477. Hao Duy Phan, 'The Precedent-Setting Timor-Leste and Australia UNCLOS Case', *The Diplomat*, 29 September 2016.
478. L Lloyd Jones, 'East Timor Sea conciliation to proceed', *AAP,* 27 September 2016.
479. L Lloyd Jones, 'East Timor Sea conciliation to proceed', *AAP,* 27 September 2016.

> position is consistent with what the Permanent Court of Arbitration in The Hague said in the China/Philippines dispute. Now that's why it says Australia will be forced to have a conciliation based on the principles under the Law of the Sea, which would apply a much fairer and equitable resolution for East Timor… It should mean the equidistance principle.[480]

The Permanent Court of Arbitration issued a statement on 12 October 2016, saying Australia and East Timor aimed to 'reach an agreement' over the maritime boundary in the waters between their countries. It said that confidential meetings 'were very productive: all agreed we should aim to reach agreement within the time frame of the conciliation process'. Peter Taksøe-Jensen, who headed the arbitration talks, said: 'I was very pleased to see a sincere willingness on both sides to come together in a spirit of co-operation. Both sides are to be commended for being willing to move beyond past differences and work hard to create conditions conducive to achieving an agreement'.[481]

Tanya Plibersek's successor as Opposition foreign affairs spokeswoman, Senator Penny Wong, said in September 2016 that bilateral relations had been strained with Timor Leste and the time was right to reopen negotiations. Senator Wong said Australia always encouraged other countries to follow international rules, such as in the whaling dispute with Japan, the fight to halt French nuclear testing in the Pacific, and Antarctic claims in the 1980s. 'Australia's unwillingness to commit to maritime border negotiations with [Timor Leste] also raises valid questions about our commitment to a rules-based international system and to being a good global citizen', she said.[482] Senator Wong said after the decision by the Permanent Court of Arbitration: 'We think it's an opportunity to resolve an issue which has been long running and heavily disputed… I think this is an invitation for the Prime Minister to resolve a dispute which has been a problem in the region, certainly a problem in terms of our relationship with East Timor and this provides an opportunity to ensure we can resolve this issue.[483]

More than half those surveyed in a November 2016 opinion poll favoured setting Australia's maritime boundary with East Timor to give the new nation a greater share of oil and gas reserves. Conducted by ReachTEL for the Australia Institute, the poll found 56.5 per cent of 10,271 respondents backed setting the boundary according to international law. The poll found 17 per cent of respondents said no to setting the boundary in accordance with current international law while 26.6 per cent didn't know. Australia Institute executive director Ben Oquist said this polling suggested most people wanted Timor-Leste to have a fair go with regards to resources in the Timor Sea.[484] Challis Chair of International Law at the University of Sydney, Ben Saul has commented:

> There is an inescapable perception that Australia is denying its tiny, impoverished neighbour its sovereign birthright to determine its boundaries, control its own resources, and shape its own destiny. This dynamic contaminates the wider bilateral relationship. The dispute cannot be viewed

480. Peter Lloyd, 'Australia receives 'drubbing' by UN commission over East Timor maritime borders', *ABC,* 26 September 2016.
481. 'Aust, E Timor to seek 'agreement': court', *AAP Bulletins,* 13 October 2016.
482. Lisa Martin, 'Aus should play by rules on Timor: Wong', *AAP,* 1 September 2016.
483. Peter Lloyd, 'Timor Leste secures win in claiming oil and gas reserves in Timor Sea', *ABC,* 27 September 2016.
484. 'New poll calls for fairness for East Timor', *AAP*, 12 November 2016.

> in isolation but is part of a long history of bad faith by Australia that continues to poison relations and corrode trust.[485]

A maritime boundaries treaty

On 9 January 2017, the East Timor government notified Australia that it wished to terminate the CMATS Treaty. A joint statement issued by Foreign Minister Julie Bishop and East Timor's Foreign Minister Hernani Coelho on that day announced the dissolution of the CMATS treaty: 'The government of Timor Leste has decided to deliver to the government of Australia a written notification of its wish to terminate the 2006 treaty on Certain Maritime Arrangements in the Timor Sea,' the statement read, adding that Australia would not contest the move. It also noted both governments' commitment to negotiate permanent maritime boundaries under the auspices of the Conciliation Commission convened by the UN Permanent Court of Arbitration. 'The parties recognise the importance of providing stability and certainty for petroleum companies with interests in the Timor Sea and of continuing to provide a stable framework for petroleum operations and the development of resources in the Timor Sea'.[486] There would be confidential meetings held over the course of the year between representatives from both countries and the Commission.[487]

A spokeswoman for Woodside Petroleum welcomed the development in the absence of a permanent resolution. 'Woodside supports this morning's joint statement by the Governments of Australia and Timor-Leste and the Conciliation Commission committing to negotiate permanent maritime boundaries between the two countries,' she said. 'Woodside understands the Timor Sea Treaty remains in place and we look forward to an agreement that allows for the earliest commercialisation of the Greater Sunrise fields, which promise great benefits for all parties.[488]

ConocoPhillips, which had a stake in Sunrise and operates the Bayu-Undan gas project in the Timor Sea, said it 'welcomes the progress being made jointly by both governments'. A spokesman in Perth stated: 'The announcement has no impact on our current operations as these are governed by the Timor Sea Treaty which remains in place'.[489]

Swinburne University Professor Michael Leach said the UN conciliation panel's finding that the CMATS treaty did not extinguish Australia's obligation to negotiate maritime boundaries with East Timor, as it had long argued, was likely to have been a major factor in Canberra's abandonment of it: 'Once CMATS could no longer be used to delay this process for 50 years, it was a lot less value to the Australian side'. [490]

After a week of confidential talks in Singapore, Timor-Leste and Australia issued a joint statement on 23 January 2017, saying the two countries confirmed Timor-Leste had

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485. Ben Saul, 'On Timor, Australia looks like it's denying an impoverished neighbour its birthright', *The Guardi*an, 29 August 2016.
486. Victoria Laurie and Amanda Hodge, 'Australia yields on E Timor 'oil treaty', *The Australian,* 10 January 2017.
487. 'Timor Sea 2006 treaty to be terminated', *Australian Associated Press,* 9 January 2017.
488. Henry Belot and Emily Stewart, 'East Timor tears up oil and gas treaty with Australia after Hague dispute', *ABC,* 9 January 2017.
489. Primrose Riordan and Angela Macdonald-Smith', 'Australia backs down on Timor Sea deal', *The Australian Financial Review,* 10 January 2017.
490. Victoria Laurie and Amanda Hodge, 'Australia yields on E Timor 'oil treaty', *The Australian,* 10 January 2017.

withdrawn from CMATS and the treaty would cease to operate from 10 April. As the final in a series of 'confidence-building measures', Timor-Leste had agreed to withdraw two arbitration cases before the Permanent Court of Arbitration in The Hague: the 'espionage case' and a second arbitration concerning jurisdiction of a gas pipeline from Bayu-Undan to Darwin. Both countries 'reaffirmed their commitment to work in good faith towards an agreement on maritime boundaries by the end of the conciliation process in September 2017... The commission and the parties recognise the importance of providing stability and certainty for petroleum companies with current rights in the Timor Sea... The parties are committed to providing a stable framework for existing petroleum operations [and] the commission intends to do its utmost to help the parties reach an agreement that is both equitable and achievable.' In order to provide a stable framework for existing petroleum operations, Australia and Timor-Leste agreed that the 2002 Timor Sea Treaty and its regulations would remain in force in its original form until a final delimitation of maritime boundaries had come into effect. [491]

The consequences of termination of the CMATS Treaty was referred to the Australian Parliamentary Joint Standing Committee on Treaties on 13 February 2017. The Committee reported on the matter on 30 March, when its Chair, the Hon. Stuart Robert, stated in an accompanying media release:

> The Committee recognises that the termination of the CMATS Treaty is the first step towards to developing a permanent maritime boundary in the Timor Sea. The Committee is of the strong view that the maritime boundary dispute should be negotiated bilaterally and in good faith, and commends both Governments for agreeing to operate by these principles.[492]

Although the goal of Timor Leste in initiating the conciliation proceedings was limited to settling its maritime boundaries, at Australia's insistence the scope of the proceedings was broadened to include issues related to development of the Greater Sunrise fields and, in particular, discussions on the Greater Sunrise development concept including the options of a pipeline to Darwin, the south coast of Timor or a floating LNG plant.[493]

On 30 August, the Permanent Court of Arbitration in The Hague announced that Australia and East Timor had reached an agreement 'on the central elements of a maritime boundary delimitation between them in the Timor Sea'. The countries agreed to establish a special regime for the Greater Sunrise field, paving the way for its development and the sharing of the resulting revenue, the Court said. The leader of East Timor's delegation, chief negotiator and former President Xanana Gusmão, said the agreement was a historic moment which would mark the beginning of 'a new era in Timor-Leste's friendship with Australia….I thank the Commission for its resolve and skill in bringing the Parties together, through a long and at times difficult process, to help us achieve our dream of full sovereignty and to finally settle our maritime boundaries with Australia'. Foreign Minister Julie Bishop said the agreement was a 'landmark day' in the relationship between Timor-Leste and Australia: 'This agreement, which

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491. Ben Doherty, 'Timor-Leste drops espionage claims against Australia in maritime border dispute', *The Guardian,* 24 January 2017; Daniel Flitton, 'East Timor dumps spying case against Australia', *The Sydney Morning Herald,* 25 January 2017.

492. 'Committee endorses bilateral negotiations on permanent maritime boundaries with Timor-Leste', *Joint Standing Committee on Treaties*, 30 March 2017.

493. Kay Rala Xanana Gusmão to Conciliation Commissioners, 28 February 2018; quoted in Peter Lloyd, 'East Timor accuses Australia of colluding with companies over Greater Sunrise oil and gas deal', ABC *PM,* 7 March 2018 at:
http://www.abc.net.au/news/2018-03-06/east-timor-acuses-australia-of-collusion/9519530

supports the national interest of both our nations, further strengthens the long-standing and deep ties between our governments and our people'.[494]

The Permanent Court of Arbitration announced on 14 October 2017 that Timor Leste and Australia had reached agreement on 'the complete text of a draft treaty' in confidential talks in The Hague over the previous week. The agreement 'delimits the maritime boundary between them in the Timor Sea and addresses the legal status of the Greater Sunrise gas field'. Further talks were scheduled before the end of November in Singapore to discuss the Greater Sunrise joint venture.[495] Peter Taksøe-Jensen, the head of the Conciliation Commission, praised the 'constructive' atmosphere of the talks. Dili and Canberra were 'standing together to ensure that the resources of the seabed are developed to the benefit of both peoples', he said.[496]

In November and December, the two governments and the Greater Sunrise Joint Venture, which held the license of the resource, held three intensive trilateral talks to seek agreement on the development concept of the Greater Sunrise. Following the final meeting in Singapore, it was announced on 16 December 2017 that Australia had agreed to sign a treaty on maritime boundaries with Timor-Leste in the presence of the Secretary-General of the United Nations early in 2018. The agreed boundary would follow the median line between the two countries. The announcement followed five meetings at which the oil companies concerned were participants. A final decision had still to be made on whether the oil and gas of the Sunrise field would be piped to the south coast of Timor across the Timor Trough, to Darwin or be processed at sea on a floating facility.[497] Discussion of this question took place at a meeting in Sydney in the first week of February 2018 between negotiating teams from Timor Leste led by Xanana Gusmao and an Australian delegation led by Foreign Minister Julie Bishop, and subsequently in Kuala Lumpur in the middle of that month.[498] The meeting in Kuala Lumpur failed to reach agreement on a preferred option for development of the Sunrise/Troubadour field, but the parties agreed to proceed with signing on March 6 in New York the treaty on maritime boundaries which would also address the 'legal status' of the gas field.[499] The Australia-Timor Leste *Treaty Establishing Their Maritime Boundaries in the Timor Sea* was signed on that date in the presence of United Nations Secretary-General Antonio Guterres.

Fear that the difficulties of piping the gas across the Timor Trough, low gas prices, a looming LNG glut and high green field development costs could delay exploitation of the Sunrise field indefinitely may have influenced Australia's decision to agree to a median line maritime border with Timor-Leste. It was reported that Woodside was looking at the latter half of the next decade before development could proceed.[500] Also pertinent was recognition that

494. Joseph Hinchliffe and Anthony Deutsch, 'Australia, East Timor reach agreement on maritime border', *Reuters,* 2 September 2017.
495. 'Australia, Timor Leste draw up maritime borders draft treaty to bring end to oil and gas dispute', *Special Broadcasting Service,* 15 October 2017.
496. 'Timor Leste and Australia agree draft maritime border treaty', *Agence France-Presse,* The Hague, Netherlands, Sun, October 15, 2017.
497. Andreia Sofia Silva, 'Austrália acorda assinar novo tratado de fronteiras marítimas com Timor-Leste', *Agência Lusa,* 19 December 2017.
498. Gary Shipway, 'Election puts a cloud over Sunrise gas field', *Northern Territory News,* 7 February 2018; 'Timor-Leste tenta último esforço para resolver impasse sobre poços de Greater Sunrise', *Agência Lusa*, 17 February 2018.
499. Angela Macdonald-Smith, 'Border treaty revives hope for Woodside's stalled Sunrise venture', *The Australian Financial Review,* 28 February 2018.
500. Babs McHugh, 'Development of Greater Sunrise gas field in East Timor could be decades away', *ABC Rural,* 12 January 2017; 'East Timor, Aust agree on maritime border', *AAP Bulletins,* 26 February 2018.

Australia's relationship with Timor-Leste should not be limited to or governed by desire to gain control of the hydrocarbon resources of the Timor Sea.

The Australian foreign policy white paper released in November 2017 declared with regard to the agreement on the maritime boundary with Timor-Leste that it was 'a testament to the way in which international law, in particular the UN Convention on the Law of the Sea, reinforces stability and allows countries to resolve disputes peacefully without resorting to force or coercion'.[501]

Toward a final settlement of Australia's maritime borders in the Timor Sea

There were reported to be fears within the Turnbull government that negotiations on a maritime boundary between Australia and East Timor could encourage Indonesia to challenge its own 1972 maritime boundary with Australia. A senior government source confirmed there was a sense of unease that Jakarta could seek to copy East Timor's push for a greater slice of the field's revenues given the proximity of the Greater Sunrise project to Indonesian waters.[502] Professor Donald Rothwell of the Australian National University has commented that if there were an adjustment to some of the maritime boundaries between Australia and Timor-Leste, Australia might be faced with an inquiry from Indonesia as to whether or not some of the maritime boundaries settled with Indonesia in the early 1970s should also be looked at. Professor Rothwell noted that Alexander Downer, when he was Australian Foreign Minister, made the point that Australia would be concerned that if there were adjustments of the maritime boundary arrangements with Timor-Leste, as this could have knock-on effects in terms of the existing arrangements with Indonesia.[503]

Swinburne University Professor Michael Leach noted that Indonesia's maritime boundary with Australia in the Timor Sea was finalised in 1972 to align with the Australian continental shelf. He said the standard practice since that time had been for a maritime boundary to be located at an equal difference between two countries—the median line. 'In international law, there's no question that the prevailing presumption over the last 30 years is that the median line is the starting point,' he said. 'Every maritime boundary, or close to it, that Australia has negotiated since 1972 has been a median line boundary.' Professor Leach stressed it was unlikely for the conciliation process initiated by East Timor to lead Indonesia to challenge its boundary with Australia. But, 'In the unlikely event that Indonesia was to successfully challenge the settled 1972 boundary to a median line boundary situation, then they would certainly be a player in the greater Sunrise revenues,' he said.[504]

It is relevant to recall that Article 3 of the Australian-Indonesian Seabed Agreement of 9 October 1972 provides for adjustments to be made, by consultation, to those portions of the boundary lines between points A15 and A16 and between points A17 and A18, when this becomes necessary in the event of a delimitation of that gap in the boundary created by the Agreement (the 'Timor Gap'). This was an unspoken reference to Portugal (or its successor state) as a party to such a future settlement. Points A16 and A17 (at 9°28' South and 127°56' East, and 10°28' South and 126° East) were putatively the junction points of Australian-Indonesian-Portuguese Timor boundaries, but in the absence of tripartite negotiations they had

501. 'Australia, Department of Foreign Affairs and Trade, *Opportunity, Security, Strength: 2017 Foreign Policy White Paper,* November 2017, p.105.
502. Joe Kelly, 'Fears of Jakarta play for gas grab', *The Australian,* 11 January 2017.
503. 'Timor-Leste and Australia at The Hague, Ocean noise pollution', *ABC*, 30 August 2016.
504. Joe Kelly, 'Fears of Jakarta play for gas grab', *The Australian,* 11 January 2017.

not been agreed to by Portugal. They were the points of intersection of the compromise line agreed by Australia and Indonesia with lines following the shortest distance between the eastern and western points of Portuguese territory on the island of Timor and the nearest points on the opposite Australian coast.[505] In other words, those portions of the border were recognized by the treaty as only agreed *ad interim* and subject to final determination by Australia, Indonesia and whichever state held sovereignty over East Timor. As explained by Professor Clive Schofield, the starting point from which a maritime delimitation would proceed was confirmation of the termini of the land boundaries between Timor-Leste and Indonesia on the coast:

> With the concept that the land dominates the sea, one needs land territory and then that gives rights over maritime space, one needs to agree the terminal point where the land boundary actually hits the coast in order to start that process…Australia cannot really negotiate those seaward lateral lines without Indonesia and Timor-Leste having already delimited their lateral lines from the terminus of the land boundary between West Timor and Timor-Leste and between the island of Timor and the Leti island group.[506]

Article 3 of the 2018 treaty on maritime boundaries between Australia and Timor-Leste provides for adjustment of the continental shelf boundary between the two countries following settlement of that boundary between Indonesia and Timor-Leste. If those countries agree to an endpoint to their continental shelf boundary west of point A18 on the 1972 Seabed Treaty Boundary, the continental shelf boundary between Australia and Timor-Leste shall be adjusted so that it proceeds in a geodesic line from point TA-2 in the 2018 Treaty (at 11° 24' 00.61" South and 126° 18' 22.48" East), to point A18 (at 18 10° 37' South and 125° 41' East). The Treaty provides that this shall not come into force before the commercial depletion of the Laminaria and Corallina Fields. In the event that a continental shelf boundary agreed between Timor-Leste and Indonesia meets the 1972 Seabed Treaty boundary at a point to the west of point A18 on the 1972 Seabed Treaty Boundary, the continental shelf boundary shall be adjusted so that it proceeds in a geodesic line from point TA-11 in the 2018 Treaty (at 9° 42' 21.49" South and 128° 28' 35.97" East), to point A18. But this shall not come into force before the commercial depletion of the Greater Sunrise Fields.

After the signing of the Maritime Boundaries Treaty on 6 March 2018, Indonesian Foreign Minister Retno Marsudi congratulated the two parties and said a preliminary study of the treaty by technical officials showed that ‘none of the lines encroach Indonesia's maritime rights. Therefore, we appreciate the effort of both negotiators and Commission for paying respect to Indonesia's interests," Ms Marsudi told reporters in Sydney following a meeting with Foreign Minister Julie Bishop and defence counterparts on the sidelines of the ASEAN special summit: ‘We look forward to cooperating on related boundary issues in the future’. She acknowledged the agreement did raise the question of the future of the 1997 Perth treaty, which finalized the maritime boundary between Australia and Indonesia. The treaty, however, was never ratified and so was not in force, primarily because the independence of East Timor meant

505. 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs,*Vo1.43, No.10, 1972, p.509; and Andrew Mills, *Australian-Indonesian Relations A Study of the Timor Sea Maritime Delimitation Negotiations,* Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.78.

506. Professor Clive Schofield, Director of Research, Australian National Centre for Ocean Research and Security; and Challenge Lead, Sustaining Coastal and Marine Zones, Global Challenges Program, University of Wollongong, *Joint Standing Committee on Treaties [Proof] Committee Hansard*, 14 March 2017.

some amendments were needed but were yet to be agreed upon: 'At this point, talks at the technical level are required to deal with the future of the Perth treaty', Ms Marsudi said.[507]

In February 2018, Prime Minister Mari Alkatiri said he hoped Xanana Gusmão would lead the Timorese side in negotiations with Indonesia on the maritime borders between the two countries, as he had led in negotiations with Australia.[508] Once those negotiations are concluded, the final adjustments of the tripoints of the Australia-Indonesia-Timor Leste border can be made.

The 2018 Maritime Boundaries Treaty formalized the agreement reached by Australia and Timor Leste on their maritime boundaries. The two countries had failed to reach agreement on a preferred option for development of the Sunrise/Troubadour field, and annexes to the Treaty set out procedures for achieving this. Xanana Gusmão as leader of the Timor Leste Treaty negotiating team expressed dissatisfaction with the way those procedures were negotiated in a letter to the Conciliation Commissioners on 28 February 2018.[509] It could be seen that Australia used its disparity in strength to force the Timorese to accept procedures set out in the annexes to the Treaty that favoured the Sunrise Joint Venturers' preferred option of a pipeline to Darwin to exploit the resource. The Timorese have repeatedly expressed their strong preference for a pipeline to the Beaço area on the south coast of Timor. It remains to be seen whether the parliament of Timor Leste will accept the Treaty under those circumstances. If it does, the Treaty will be seen to have successfully resolved a dispute that has postponed development of the Sunrise field and aroused resentment against Australia among the people of Timor Leste.

507. Roje Adaimy, 'Aust-East Timor deal 'respects' Indonesia', *Australian Associated Press,* 16 March 2018.
508. 'Governo timorense reitera apoio a Xanana Gusmão em negociações sobre Greater Sunrise', *Agência Lusa,* 20 February 2018.
509. Kay Rala Xanana Gusmão to Conciliation Commissioners, 28 February 2018; quoted in Peter Lloyd, 'East Timor accuses Australia of colluding with companies over Greater Sunrise oil and gas deal', ABC *PM,* 7 March 2018 at:
http://www.abc.net.au/news/2018-03-06/east-timor-acuses-australia-of-collusion/9519530