

SUBMISSION NO. 41

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Subject: Submission to JSCT on Timor Gap resources by AETA.

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES - by the Australia East Timor Association, NSW.

OUTLINE

This submission argues that East Timor is not currently receiving (under the terms of the Timor Sea Treaty) a fair share of its potential entitlements to its oil and gas resources - and thus will not receive a fair share of the revenues to which it is entitled unless there are further negotiations that create an equitable outcome.

It is argued that under the Timor Sea Treaty (TST) currently signed (but not yet ratified) by Australia and East Timor, East Timor will only receive a fraction of its legitimate entitlements. The TST has been presented by the Australian government as a 'generous' deal for East Timor but we argue that it is the converse. The normal outcome in a situation such as this would be the determination of maritime boundaries between Australia and East Timor in accordance with the norms set down in the United Nations Convention on the Law of the Sea (UNCLOS). Currently there are no sea-bed boundaries determined between East Timor and Australia, as there were no sea-bed boundaries determined between East Timor and Australia when the Australian government recognised the territory as Indonesia's 27th province. The best available evidence indicates that determination of sea-bed boundaries in accordance with international law would grant full sovereignty to East Timor over all the oil and gas resources that are now the subject of some dispute between Australia and East Timor.

We argue that East Timor will receive (under the existing terms of the Timor Sea Treaty) only about 40% of its potential offshore petroleum resource entitlements and that if one factors in the 'downstream' benefits (from development of its own potential resources) being forgone by East Timor, it will be receiving only about one third of its potential benefits from the exploitation of its own resources. We argue that Australia is using unfair means to block East Timor's options - through withdrawing from the jurisdiction of the International Court with respect to the determination of maritime boundaries - and thus intentionally restricting East Timor's negotiating and bargaining power. Australia is using its disproportionate weight and leverage to push its smaller neighbour into accepting an unfair outcome and then knowingly misrepresenting its own actions as 'generous'.

We argue that East Timor is very poor and in great need of these revenues and that Australia should therefore not overly exploit its relative strength in these negotiations.

We believe that it is in the long-term interests of both countries that a much fairer compromise be reached than the current deal. This compromise might take a number of forms and could involve the physical extension or modification of the current Timor Sea Treaty concept (the concept of the Joint Petroleum Development Area - JPDA) to involve not only shared economic interests (with fairer revenues for East Timor) but also cooperation in defense and security as well as other issues. We envisage a number of possible outcomes - from permutations of the current JPDA shared economic zone through to the determination of exclusive economic zones (EEZ) .

We would argue that whatever the outcome, it is in the long term interests

of Australia and East Timor that East Timor should receive a much fairer share of its resources and the revenues to which it is entitled than is being offered under the existing Timor Sea Treaty.

ELABORATION OF THESE POINTS

There is currently no sea-bed boundary in the 'Timor Gap' and there has not been a boundary in the past. Australia and Indonesia had agreed to sea-bed boundaries between their relevant coastlines in 1972 - however Portugal was not party to this agreement. Thus there was no sea-bed boundary determined between Australia and Portuguese Timor - and this gap in the agreed sea-bed boundaries became known as the 'Timor Gap'.

After Indonesia invaded Portuguese Timor in 1975 (with Australia's acquiescence) Australia assumed that Indonesia would simply 'join up the dots' on both sides of the 'Timor Gap'. However Indonesia now proved to be less cooperative than Australia had hoped and Australia and Indonesia engaged in a decade of wrangling (between 1979 and 1989) to come up with the convoluted Timor Gap Treaty (TGT). The TGT avoided determining maritime boundaries between the territory Australia now considered to be Indonesia's 27th province (Timor Timur) and the coast of northern Australia.

The current Timor Sea Treaty simply adopted the borders of the central area ('Zone A') of this prior Timor Gap Treaty. The borders of this 'Joint Petroleum Development Area' (JPDA) of the current Timor Sea Treaty are identical to the former 'Zone A' from the old Timor Gap Treaty.

In 1989 Australia and Indonesia had used the termination points of the 1972 sea-bed treaty between Indonesia and Australia to define the lateral borders of the Timor Gap. It had been accepted by Australia and Indonesia at the time (in article 3 of the 1972 sea-bed treaty) that the termination points of the 1972 treaty might have to be moved in the light of any delimitation of the sea-bed in the Timor Gap .

Since the 1980's maritime boundaries have been determined under a system codified in the United Nations Convention on the Law of the Sea (UNCLOS). The lateral boundaries of the current JPDA are too narrow because of the historic circumstances that created them. East Timor's potential lateral boundaries would be significantly wider than the lateral borders of the JPDA if the appropriate principles of UNCLOS would be applied.

Under the Timor Sea Treaty the revenue share has been altered within the boundaries of the JPDA . Revenues from within the 'Zone A' / JPDA have been altered from 50/50 (in the TGT between Indonesia and Australia) to 90/10 (in the TST between East Timor and Australia). Whilst this appears a reasonable deal for East Timor it must be remembered that under the application of the principles of UNCLOS, the Joint Petroleum Development Area would unquestionably be 100% East Timorese. The Timor Sea Treaty is only giving East Timor 90% of what is really 100% East Timorese. To put it another way, East Timor is giving away 10 % of its own revenue.

However this matter (of East Timor forfeiting 10% of its potential revenues) is of much less economic significance than the question of the correct location of the lateral boundaries. The location of the lateral borders is very significant given that large oil and gas reserves lie just outside the lateral borders of the JPDA.

The existing lateral borders of the JPDA of the Timor Sea Treaty are the result of metamorphoses in response to political considerations over three decades and are not in accordance with current international law. The world's newest country should have the right to determine its boundaries in accordance with current international norms and not be saddled with outcomes from a time when Indonesia and Australia overrode or ignored the

rights and interests of East Timor.

Recently a legal opinion has been obtained from recognised international experts on East Timor's potential maritime boundaries - an opinion 'In The Matter Of East Timor's Maritime Boundaries' by Lowe, Carleton and Ward of 11 April 2002. Professor Vaughan Lowe of Oxford University and Chris Carleton from the UK Hydrographic Institute have provided an advice that indicates that East Timor's potential maritime boundaries (in the Timor Gap) should be significantly wider (further east than the eastern border and west than the western borders) than the lateral boundaries of the JPDA under the TST. Although there has been an attempt to question the validity of this opinion because it was commissioned by Petrotimor (and oil company with its own interest in this issue), a distinction should be made here between 'the messenger' and 'the message'. This advice has been provided by experts recognised internationally in this field and their opinion of East Timor's maritime entitlements has not been seriously questioned.

Australia chose to withdraw from the jurisdiction of the International Court with respect to the determination of maritime boundaries soon after it became aware that the advice from Lowe and Carleton had been provided to the East Timorese leadership.

This potential widening of East Timor's lateral boundaries has great significance in terms of the resources and revenues involved. The 'southern' border is not at issue as the southern border of East Timor's potential sea-bed boundary (outlined in the Lowe, Carleton opinion) is the median line between the opposing coastlines and is therefore the same as the southern border of the JPDA in the current TST.

The entitlements to the most crucial reserves in the region depend on the location of the lateral borders of Timor's shared or exclusive economic zone. The single most crucial resource in 'the Gap' is the Greater Sunrise gas field which straddles the eastern border of the 'JPDA' (favoring Australia which controls 82% of this vital resource under the current Timor Sea Treaty). However (according to the Lowe, Carleton opinion) Greater Sunrise would be mostly (or completely) within East Timor's exclusive economic zone (EEZ) if formal seabed boundaries were determined. Greater Sunrise is the biggest resource in the 'Gap' and variations in revenue flow from it will have a crucial effect on East Timor's economy. The projected western boundary (in the Lowe, Carleton opinion) also indicates that East Timor should have sovereignty over a lucrative oil reserve (the 'Laminaria Corallina' field) currently controlled by Australia. Essentially East Timor's actual entitlements are much greater than those circumscribed within the JPDA in the Timor Sea Treaty.

Under the current TST, East Timor can claim only about 40% of the reserves (and thus revenues) to which it would be entitled if it were to pursue its full boundary entitlements. This figure is based on a report by leading Australian oil and gas engineer Geoffrey McKee. The figure of 40% is arrived at by using figures for the 'proven' and 'probable' reserves in the 3 most important fields - Greater Sunrise, Bayu-Undan and Laminaria-Corallina - and comparing them (using the common unit of 'barrels of oil equivalent'). If one compares the resources that East Timor is entitled to under the current TST with the full entitlements within its potential maritime boundaries, it transpires that East Timor is only receiving about 40% of its potential resources. When one also considers that downstream development of these resources is likely to occur in Darwin (not in East Timor) it becomes clear that East Timor will only be receiving about a third of the potential benefits from its own resources. It is accepted that there is a margin of error in these calculations, but they are made to try to give a sense to the relativities involved.

East Timor has recently achieved its independence after a 24 year struggle

that involved deep hardship and loss for its people. The challenges that it faces are still immense. It has always been considered poor - when it was a Portuguese colony, then when it was considered the 27th province of Indonesia and now as an emerging independent nation. East Timor has recently been determined (in a report by the United Nations Development Programme) to be the poorest country in Asia and amongst the poorest countries in the world.

Its infrastructure was already weak - but became crippled by the sacking and burning of the country undertaken by the Indonesian military and its proxies after the independence vote in 1999. The UN estimates that 70% of East Timor's infrastructure was damaged or destroyed during that onslaught. Though rebuilding has occurred East Timor is not yet back to the position it was in prior to the ballot in 1999. It faces huge challenges to develop its material infrastructure and human resources.

It will be crucial that East Timor receive a fair share of the revenues from the oil and gas reserves that lie within its potential maritime boundaries in order to be able to create a reasonable quality of life for its citizens. Other potential revenue sources (such as government revenues from the coffee industry, tourism etc.) will only amount to a small percentage of the potential revenues from the oil and gas resources, at least in the next decades. East Timor will need significant inputs to develop the many functions of government that are urgently needed (such as education and health care amongst many others). East Timor will need the revenues from its oil and gas reserves more than most countries - especially if it is to avoid the pitfall of debt from the outset.

Ultimately it is in the interests of Australia and the wider region that East Timor should have the resources to manage its affairs adequately. This would allow East Timor to provide a better standard of living for its citizens and would be the basis for stable and democratic government - which would benefit Australia's long-term interests.

Australia is in an unequal power relationship with East Timor: it is a significant donor to East Timor, a powerful regional influence, the country that backed the INTERFET force and is still a major contributor to East Timor's peacekeeping forces. Australia is also less urgently in need of these revenues than East Timor and has alternative oil and gas resources it can exploit. Thus Australia holds most of 'the cards' in any negotiations with East Timor and can (and is) exploiting its power to force unreasonable concessions from the East Timorese government. Whilst it is probable that East Timor's and Australia's long term interests are best served by compromise, it can be argued that the current deal - with East Timor sacrificing about 60% of its potential revenues as well as the potential revenues from 'downstream' processing of its resources - is an unfair deal for East Timor and one that its government should not be forced to accept.

We therefore urge the Australian government to reconsider its withdrawal from the UNCLOS dispute resolution procedures. Whilst Australia says it does not want to resolve boundary issues through "litigation" we would submit that these dispute resolution procedures (applying the principles of UNCLOS within the jurisdiction of the International Court) simply allow arbitration between friendly neighbours. These principles are able to provide a fair outcome for both parties irrespective of the differing amounts of 'leverage' that each party may be able to apply to negotiations. We believe that if Australia is not prepared to agree to appropriate international arbitration, it should at least be willing to negotiate for a fairer and more equitable allocation of revenues to East Timor.

CONCLUSION

Currently the Timor Sea Treaty has been signed (but not yet ratified) by both sides. East Timor is taking steps in its parliament to claim its potential maritime boundaries. However Australia has withdrawn from the jurisdiction of the International Court of Justice with respect to maritime boundary disputes and East Timor will probably be unable to bring its case to court. East Timor may be in a situation where it will be unable to apply much leverage to Australia to demand a better deal and (as has been referred to above) the current JPDA of the Timor Sea Treaty appears to offer East Timor only a fraction of its potential resources and revenues. East Timor is undeniably very poor and needs major infrastructure and human resource development in order to create a well functioning society.

A more equitable outcome is in the interests of both parties - of Australia as well as East Timor. It is also in East Timor's interests that there be a close and cooperative relationship between both countries in matters such as security and defense, training and capacity building. Both parties have agreed to undertake further negotiations.

We believe that it is important that Australia not abuse the disproportionate weight and leverage that it can bring to these further negotiations.

We therefore argue that the Australian government should reconsider its withdrawal from the dispute resolution procedures of UNCLOS and engage with East Timor in order to resolve the boundary dispute in accordance with accepted international principles.

If Australia will not do that we strongly suggest that it at least look at the legal and moral basis of this case as well as the impoverished state of East Timor and recognise that it would not only be fair but also wise for Australia to concede a significantly greater proportion of the revenues from 'the Gap' to East Timor.

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