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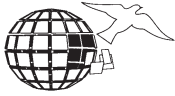
CATHOLIC SOCIAL JUSTICE SERIES

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THE TIMOR SEA'S OIL AND GAS: WHAT'S FAIR?

Frank Brennan SJ





THE AUSTRALIAN CATHOLIC SOCIAL JUSTICE COUNCIL

The Australian Catholic Social Justice Council (ACSJC) is the national social justice and human rights agency of the Catholic Church in Australia. The Council advises the bishops on social justice issues in Australia and overseas; undertakes research and advocacy on such issues; educates the Catholic community about the Church's social justice teachings and their application; and facilitates the development of social justice works within the Catholic Church in Australia.

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Frank Brennan SJ

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Abbreviations

EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
IUA	International Unitisation Agreement (between the governments of Australia and Timor-Leste, March 2003)
JPDA	Joint Petroleum Development Area (defined by the Timor Sea Treaty 2002)
LNG	Liquefied natural gas
LPG	Liquid petroleum gas
UNCLOS	United Nations Convention on the Law of the Sea 1982
ZOC	Zone of Co-operation (defined by the Timor Gap Treaty 1989)

□ A full glossary of terms is listed from page 51.

Foreword

On behalf of the Australian Catholic Social Justice Council I am very pleased to present Fr Frank Brennan's paper on the vexed issue of justice in negotiations on the Timor Sea's oil and gas deposits.

His qualifications for this challenging task are impeccable. During 18 months spent in 2001-2002 as Director of the Jesuit Refugee Service in East Timor, Fr Brennan worked as adviser to the Church Working Group on the Constitution of Timor-Leste, now the official name for the Republic of East Timor. On his return he was awarded the Humanitarian Overseas Service Medal for his work in the struggling new nation.

His balanced, closely reasoned paper shows the depth of understanding of the historical background necessary to explain the complexity in the competing claims of the current negotiations. A broad range of primary sources has been consulted.

In an era when the world is desperately searching for the justice which brings peace, it is appropriate to recall in this context the statement of His Holiness Pope John Paul II in his World Day of Peace Message on January 1, 2001:

*Faced with growing inequalities in the world, the **prime value** which must be ever more widely inculcated is certainly that of **solidarity**. A society depends on the basic relations that people cultivate with one another in ever widening circles ... States in turn have no choice but to enter into relations with one another. The present reality of global interdependence makes it easier to appreciate the common destiny of the entire human family, and makes all thoughtful people increasingly appreciate the virtue of solidarity.*

Echoing Fr Brennan's conclusion, I hope and pray for the justice that brings a fair go for all three parties, including the one who is the smallest, poorest and newest on the block.



Christopher A. Saunders DD
Bishop of Broome
Chairman, Australian Catholic Social Justice Council.

The Issues

- Should the Parliament of Timor-Leste pass legislation approving an agreement between the governments of Timor-Leste and Australia giving the security needed for the joint venturers to proceed with the Greater Sunrise project in 2005?
- What is a fair process and a fair outcome for the negotiation of maritime boundaries in the Timor Sea where Timor-Leste has competing interests and conflicting claims with Australia and Indonesia? Is there a need for interim arrangements pending the finalisation of maritime boundaries?

At the request of the Australian Catholic Social Justice Council, I have consulted with people in Australia and Timor-Leste, seeking answers to these difficult questions. Of course, the first question can be answered only by the members of the Parliament of Timor-Leste, hopefully guided by their people.

Members of the Church in both countries have an interest in seeking answers consistent with Catholic social teaching, including respect for property rights, the pursuit of the common good, and solidarity with the poor. Citizens in both countries have an interest in seeking answers which protect their national interest and which treat fairly with their neighbours. Timor-Leste's Secretary of State for Investment, Jose Teixeira, lived and trained as a lawyer in Australia for many years. Speaking to an Australian audience, he summed up the aspirations of his people:¹

Our economic independence is what we are striving for. Thank you for your view of charitable aid, but that does nothing for people's dignity. We are only asking for justice, for our right to self determination which every people in this world have a right to. We are not asking the Australian government to roll over on our demands. We are asking for negotiations in good faith within a reasonable time period, and in accordance with the principles of international law. If we are unable to agree after a reasonable period of negotiations, then we ask that Australia commit itself to an internationally recognised mechanism of arbitration of its choosing. We are only asking for a fair go, mate.

The long-term answers will require consideration by three governments: Australia, Timor-Leste and Indonesia.

The Context of Indonesia, Australia and Timor-Leste

Timor-Leste is now an independent country. It is a coastal state adjacent to Indonesia and opposite Australia. All three countries have interests in the Timor Sea.

Timor-Leste and Indonesia need to negotiate a boundary for their territorial waters. Nations exercise complete sovereignty over their territorial waters up to 12 nautical miles off the coast. They control everything from the seabed below to the skies above, provided they grant ships the right of innocent passage. Usually, when agreeing to a shared boundary for territorial waters, adjacent nations will agree to a line of equidistance drawn from their land border on the coast to 12 nautical miles offshore. A line of equidistance is drawn by linking the points which are equidistant from agreed basepoints on the coastline of the two adjacent nations. If the coastline is too curved or irregular, it may be fairer to draw a perpendicular line from the coast rather than a line of equidistance.² On its western side, Timor-Leste is adjacent to Indonesia (West Timor). There will be a need for a western lateral line which is either a line of equidistance or a perpendicular line, separating the territorial waters of Indonesia and Timor-Leste.³

On the eastern side, Timor-Leste is opposite islands of the Indonesian archipelago, separated by less than 24 nautical miles, so the territorial sea border will be constituted by a median line.

Timor-Leste and Indonesia also need to negotiate a continuation of the territorial sea boundaries so they can separate their contiguous zones, which include waters up to 24 nautical miles offshore. Within the contiguous zone, a coastal state can supervise police and customs matters.

In 1997, Australia and Indonesia negotiated a boundary for their exclusive economic zones (EEZ). Coastal nations can claim up to 200 nautical miles offshore for their EEZ, to exploit and protect water and fish resources. The EEZ might also include the continental shelf. A nation with control of the continental shelf is able to explore and exploit the seabed for oil, gas and mining purposes. Being opposite nations separated by less than 400 nautical miles, Australia and Indonesia agreed to a median line for their exclusive economic zones.

Timor-Leste and Indonesia now need to negotiate their boundaries for exclusive economic zones. North of the median line demarcating the Australian EEZ, Indonesia and Timor-Leste will need to agree to two lateral lines which will be a continuation (though possibly with some variation of direction) of the boundary lines separating territorial waters and contiguous zones.

Back in 1972, Australia and Indonesia negotiated continental shelf boundaries which permitted Australia to control its continental shelf well beyond the median line between the two countries, out to the edge of the continental shelf near the Timor Trough. This agreement acknowledged Australia's claim in international law to its continental shelf below waters less than 200 metres deep. The 1972 agreement left a gap (now known as the "Timor Gap") on the boundary line between points A16 and A17 (refer to map xx). At that time, East Timor was under the colonial control of Portugal, which had no interest in negotiating a continental shelf boundary with Australia, linking points A16 and A17.

When Portugal left East Timor and Indonesia invaded, there was no agreement about continental shelf boundaries in the Timor Gap area. Australia and Indonesia did not reach any such agreement before Indonesia relinquished its claim on East Timor. However, they did finalise the Timor Gap Treaty that left the boundary issue in abeyance while introducing an arrangement permitting exploration and exploitation of petroleum products in the area of continental shelf in the Timor Sea still disputed or not agreed to by Indonesia and Australia (the Zone of Co-operation).

Once the international community acknowledged the independence of Timor-Leste, there was a need for Timor-Leste to negotiate an agreement with Australia to enable ongoing exploration and development in the main section of the Zone of Co-operation, now named the Joint Petroleum Development Area (JPDA).

Eventually Australia and Timor-Leste will need to negotiate a maritime boundary delimiting each other's continental shelf in the area of the Timor Gap. Meanwhile Australia claims that it is entitled to continue exploration and development outside the previously contested zone with Indonesia. Australia says Portugal previously conceded Australia's right to exploit resources closer to Indonesia or Australia than to East Timor. Australia also points to Portugal's previous behaviour in

granting concessions only inside the boundaries of the JPDA. Timor-Leste claims that the boundaries of the JPDA do not necessarily include all areas in dispute between Australia and Timor-Leste. Timor-Leste says it should not be bound by any express or implied agreement between Australia and Indonesia.

Just west of the JPDA are the Buffalo oil fields, exploited by Nexen Petroleum Australia, and the Laminaria-Corallina oil fields, which are being exploited with Australian authorisation by a consortium of Woodside, BHP Billiton, and Shell. Australia receives all the government revenues from these fields. Timor-Leste has objected, claiming that these fields are in a contested area that could fall to Timor-Leste in a final maritime boundary delimitation. Australia says these fields are closer to Indonesia than to Timor-Leste and Indonesia ceded this area to Australia in 1972. Australia says it has been exercising control over this area since the 1950s and Portugal never objected or purported to exercise any control east or west of the JPDA.

Straddling the eastern boundary of the JPDA is the Greater Sunrise deposit. A consortium of Woodside, Conoco Phillips, Shell and Osaka Gas is keen to start developing the project early in 2005. The governments of Timor-Leste and Australia have signed the international unitisation agreement (IUA) which provides legal and fiscal certainty for the project to proceed. The Australian Parliament has passed legislation giving effect to the agreement. The Parliament of Timor-Leste has not yet ratified the unitisation agreement. Parliamentarians in Timor-Leste are asking that Australia first cease the exploitation of finite resources in contested areas outside the JPDA, or at least pay the government revenues from such projects into a trust fund that can be allocated to both governments according to the final resolution of maritime boundary issues. Australia claims the right to exploit resources outside the JPDA on the basis that it has always claimed such a right during both the Portuguese and Indonesian periods of Timor occupation, with acquiescence from both Portugal and Indonesia.

Citizens and the governments of Timor-Leste and Australia are confronting two sets of questions:

What is a fair deal relating to Sunrise? Should the Parliament of Timor-Leste agree to the unitisation agreement? What is the best way to proceed with boundary negotiations between Timor-Leste and

Indonesia, and between Timor-Leste and Australia? What are equitable boundaries relating to:

- Territorial waters between Timor-Leste and Indonesia?
- Contiguous zones between Timor-Leste and Indonesia?
- Exclusive economic zones between Timor-Leste and Indonesia?
- Continental shelf and EEZ between Timor-Leste and Australia?

It would be sensible for all governments to agree to a common maritime boundary in the Timor Sea. If they do, the two main lateral lines will set the east and west boundaries both of Timor-Leste's EEZ water column with Indonesia and of Timor-Leste's continental shelf with Indonesia north of the 1972 boundary line and with Australia south of that line. Negotiations involving three governments take time and demand some confidentiality and forbearance from public name-calling.

Whether or not the Sunrise deal goes ahead within the commercially viable time frame set down by the companies, the three governments will take some years to finalise permanent maritime borders in the Timor Sea.

The Greater Sunrise Project

There is a very large natural gas deposit under the Timor Sea. It was discovered in 1974 in two fields named Sunrise and Troubadour. A consortium of companies led by Woodside wants to develop these fields, known collectively as “Greater Sunrise”. The companies have already invested more than \$A200 million on various studies, exploration and drilling. If the project proceeds, a further \$A6 billion will be invested in production and processing facilities.

The consortium hopes to proceed to the next stage of development by early 2005. It will not proceed unless its investors and customers can be convinced that there is “fiscal and legal certainty for the project”. The governments of Timor-Leste and Australia have signed a unitisation agreement which would provide much of this certainty. The Australian Parliament has passed legislation giving effect to the agreement. The agreement will not come into effect unless it is also ratified by the Parliament of Timor-Leste.

Greater Sunrise is much closer to Timor-Leste (95 miles south-east) than it is to Australia (250 miles north-west). But most of Greater Sunrise is closer to Indonesia than it is to Timor-Leste. In 1972, Australia and Indonesia agreed to their maritime boundaries. Under that agreement, Indonesia has no claim to any of Greater Sunrise. Under that agreement, any of Greater Sunrise that is closer to Indonesia than to Timor-Leste comes within Australia's maritime boundary. Even though most of Greater Sunrise is closer to Indonesia than to Timor-Leste, there could be good reason for drawing a maritime boundary between Timor-Leste's waters and seabed on the western side and Indonesia's and Australia's waters and seabed on the eastern side, which was not strictly a line of equidistance. There could be good reason for including more water and seabed on the Timor-Leste side of the boundary. If a modified line of equidistance was agreed to between Timor-Leste and Australia, (slightly) more of Greater Sunrise might be on the Timor-Leste side of the boundary.

Australia and Timor-Leste have not yet agreed to their maritime boundaries. Under the UN Convention on the Law of the Sea (UNCLOS) they are required to reach agreement on these boundaries “on the basis of international law ... in order to achieve an equitable solution”. Meanwhile, the Convention provides:

*Pending agreement ... the states concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.*⁴

The unitisation agreement is such a provisional arrangement. It would permit the Sunrise project to proceed before the finalisation of maritime boundaries. Under the agreement, the two governments will share revenue according to the agreed geographic location of the gasfield, 79.9 per cent of which lies inside Australia's boundary and 20.1 per cent of which lies inside the Joint Petroleum Development Area (JPDA) administered jointly by Australia and Timor-Leste. The boundary between Australia's domain and the JPDA is the same boundary as agreed previously by Australia and Indonesia. It is a "simplified line of equidistance".⁵ Timor-Leste is entitled to 90 per cent of the revenue coming from the JPDA and Australia receives the remaining 10 per cent. Under the unitisation agreement, Australia would receive 82 per cent of the revenue from Sunrise (80 per cent + 10 per cent of 20 per cent) and Timor-Leste would receive 18 per cent (90 per cent of 20 per cent). Once the maritime boundaries are fixed, the two governments will renegotiate their share of revenue from the project according to the agreed boundaries. There is no requirement for them to reconcile their past receipts in accordance with the new agreement.

If the project proceeds, about 15 wells will be sunk into the seabed to extract a mixture of gas and condensate. This alone will cost about \$A2 billion. Total development costs are likely to be between \$A6 billion and \$A7 billion. From the wells, the combined liquid and gas will be piped to an offshore processing platform where the condensate will be separated before the gas is piped to a liquefaction plant on land. Here the gas will be processed into liquefied natural gas (LNG) and liquid petroleum gas (LPG).

The LNG is produced by cooling the natural gas to -161 degrees C. In liquid form it is then loaded onto large ship tankers which transport the LNG to power and gas companies in the Asia Pacific region. The most likely markets are Korea, Japan and China. The west coast of the United States is also a possibility. Customers need to be assured of secure and prompt delivery. One of the joint venturers is the Japanese gas utility Osaka Gas, which is also a potential customer.

The Greater Sunrise fields contain about 8 trillion cubic feet of gas and 300 million barrels of condensate. If the project goes ahead, Australia

and Timor-Leste could expect more than \$A30 billion in export revenues and about \$A10 billion-\$12 billion in government receipts (taxes and royalties). But time and legal certainty are of the essence to the oil and gas companies.

The companies are yet to decide where the liquefaction plant will be located. It will be on land either in Australia or in Timor-Leste. Timor-Leste is much closer to the field than is Australia. But Australia has some obvious advantages for the companies. The pipe needs to be placed on the seabed. Between the Sunrise facility and Darwin the seabed is fairly flat at a maximum depth of 150 metres. Between Sunrise and Timor-Leste is the Timor Trough, which is some 3,000 metres deep, far deeper than any pipeline that has been installed to date anywhere in the world. A pipe crossing the Timor Trough would involve greater technical challenge and risk than one constructed in shallower waters. The pipe would have much greater wall thickness and the installation would have to be done by a specially modified lay barge. The gas would also have to be compressed to a much higher pressure than using the Darwin option because a much smaller pipe would have to be used. High compression increases capital and operating costs.

A natural gas plant requires about 100 ha of flat land. There is not much suitable flat land on the south side of Timor-Leste. While sites may be identified, issues relating to ocean conditions, port facilities and ship loading will need to be considered and may prove costly. If the plant were based in Timor-Leste, it may have to be on the north side of the island with the gas being piped across the mountains or around the eastern end of Timor-Leste on the seabed. However, there is only one site on the north side with sufficient flat land.

A natural gas plant is already under construction near Darwin, with gas to be piped from the Bayu Undan field in the Timor Sea. There would be economies of scale if the Sunrise project could be meshed with the existing infrastructure in Darwin.

The natural gas market is very competitive. Natural gas carrying an Australian label already has credibility in the Asian market as product being delivered with little sovereign risk. "Timor Gas" might not command the same price or gain access to the same markets.

If the gas plant were located in Timor-Leste, it would provide good employment and training possibilities. It would be necessary to guarantee the security of the plant.

The location of the gas plant would provide additional revenue for the host country. If the gas plant were to be located in Australia, the East Timorese could make a moral claim for some share in the benefits from the downstream production even though this aspect was previously considered in the negotiations surrounding the Timor Sea Treaty, in which East Timor has secured certain rights, including a 90 per cent share of oil and gas resources within the JPDA.⁶

The companies are concluding a feasibility study on locating the plant in Timor-Leste. If it proves not to be commercially viable nor technically possible to place the plant in Timor-Leste, it is essential that the East Timorese have access to all the relevant information and endorse the decision to place the plant near Darwin.⁷

In deciding whether to agree to the unitisation agreement, the East Timorese parliamentarians need to know that the IUA provides for a fair deal. A fair deal upstream depends on the split up of revenues for the extraction of the gas from the field. A fair deal downstream depends on the commercial arrangements and the sale price between the upstream and the downstream.

They also want to know whether it is best to go ahead now with the current IUA or wait for the possibility of a better deal. They know that waiting would carry the risk that the project would not proceed for a very long time. There is even some risk that it would not proceed at all. These are very difficult decisions confronting the elected Timorese leaders and the people of Timor-Leste. They are difficult issues for those Australians wanting to make sure that both Timor-Leste and Australia get a fair deal.

There will be no answer to the downstream questions until the feasibility study on the Timor plant is complete. The answers to the upstream questions depend on a fair assessment of the likely maritime borders between Australia and Timor-Leste, and on the likelihood of a better deal being available in future, taking into account the complexities of the natural gas market and the domestic politics of Australia and Timor-Leste.

The main issue requiring clarification is the determination of the likely maritime borders between Australia and East Timor. The matter is complex and will take time to resolve. The purpose of the Timor Sea Treaty and the unitisation agreement is to put this issue to one side with the aim of allowing investment to continue.

Maritime Boundaries

Border delimitation will remain an important goal for Timor-Leste. Despite the complexity of the history and the present politics, there are some clear principles:

- ❑ Timor-Leste should not be bound by any agreement made by Australia and Indonesia in relation to areas which may come within Timor-Leste's maritime boundaries.
- ❑ Timor-Leste is entitled to rely on claims or representations made by Portugal in the past.⁸

As Australia has now made a declaration excluding the setting of maritime boundaries from compulsory dispute resolution by the International Court of Justice (ICJ), Australia should permit Timor-Leste to invoke favourable arguments supported by previous decisions of the ICJ and Australia should not make claims to boundaries which would be unlikely now to win majority support in the ICJ.

It is helpful to deal with the issues through the prism of their history.

1953-1975: A Stand-off in the Timor Sea

Between 1953 and 1976, Australia consistently claimed its continental shelf as far as the Timor Trough, while Portugal consistently claimed control over resources closer to Timor than to Australia.

In 1953, the Australian government issued a proclamation claiming control of the continental shelf off the Australian coastline to a depth of 100 fathoms (about 200 metres). In those days, there was no technology which permitted the exploitation of resources under more than 100 fathoms of water. The continental shelf is the continuation of the land mass under the water. By 1958, nations including Australia had drawn up the Geneva Convention on the Continental Shelf which allowed nation states to claim sovereignty over their continental shelf “where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil”.

Australia signed the convention in 1958 and then ratified it in 1963. In the Timor Sea, the Australian continental shelf extended well beyond the line which marked midway between Australia and its neighbours, Indonesia and Portuguese Timor. The ocean remained shallow at no

more than 200 metres until the Timor Trough which was close to the coast of the island of Timor, half of which came under Indonesian control and half of which remained under Portuguese control.

In 1967 the Australian Parliament passed the *Petroleum (Submerged Lands) Act* which gave the Commonwealth Government the power to co-ordinate the offshore exploration and development activities which otherwise would have been managed by the State and Territory governments. Oil and gas companies were starting to show interest in the Timor Sea. The Australian Government routinely granted exploration permits over the Australian continental shelf, including permits to Woodside (Burmah Oil) which had held Timor Sea permits granted by State and Territory governments since 1965.

On December 31, 1968, an American company, Oceanic Exploration, applied to the Portuguese authorities for a five-year concession granting exclusive rights to explore for oil and gas offshore from Portuguese Timor. This action caused a flurry of activity in Canberra. In 1969, Australia through diplomatic channels provided Portugal with a copy of its *Petroleum (Submerged Lands) Act* and a map showing all the exploration permits granted by the Australian government over its continental shelf in the Timor Sea.

The Portuguese saw no need to modify their behaviour or policy. As far as they were concerned, they were entitled to issue exploration licences for any area which was closer to Timor than to Australia, regardless of the geological aspects of the continental shelf. Portugal was happy to draw a line on a map marking the half-way or median line.

On October 30, 1970, the Australian Minister for External Affairs set down the Australian understanding that there were two separate continental shelves separated by the deep Timor Trough which was off the coast of Portuguese Timor. Australia wanted to have exclusive control over oil and gas activity on its continental shelf. The Portuguese should keep to their side of the Timor Trough. Three days later, the Portuguese made it clear that there was no agreement about this. They insisted on their entitlement to grant mining permits over any area closer to Timor than to the Australian coastline.

Meanwhile, Australia had been pursuing negotiations with the Indonesians about their shared maritime boundaries. Australia and Indonesia had reached agreement on partial delimitation of those areas where there was a single continental shelf. In May 1971, Australia and

Indonesia finalised their first treaty about maritime boundaries. A week later, the Portuguese ambassador was summoned to the Department of External Affairs in Canberra and told, "It is a matter for each state to delimit its own continental shelf." He was told, "There is ... no scope for negotiating a boundary since nature has already done this for us." There was the usual diplomatic assurance that we were happy to talk. But Australia had a fixed position on the continental shelf and Portugal did little to further progress a border negotiation with Australia.

Getting no satisfaction from the Portuguese ambassador, the Australians then decided to deal directly with the Oceanic Exploration Company. Canberra told the Consul-General in San Francisco:

*Oceanic should be informed that their application, in part, relates to areas which are within the scope of the Australian offshore petroleum legislation and in respect of which there are already in existence titles issued under that legislation.*¹⁰

By late 1972, Australia and Indonesia finalised another treaty which settled further maritime boundaries between the two countries. Under this agreement, the two governments agreed on the end points (A16 and A17) of the Timor Gap but provided, "in the event of any further delimitation agreement or agreements being concluded between governments exercising sovereign rights", there could be adjustments to the lines between A15 and A16 and between A17 and A18. Indonesia and Australia unquestionably had the right to fix points A15 and A18 as they were well away from Timor-Leste. Both these treaties were to come into effect on November 8, 1973. There was still no progress between Australia and Portugal.

In March 1973, the Australians suggested that the Portuguese begin negotiations within three weeks. Nothing happened. The Portuguese authorities went ahead on January 31, 1974, granting Oceanic a concession area of more than 60,000 sq km with production rights for 30 years. The Province of Timor was to hold 20 per cent of the shares of the company.

Map 1

For the first time, the diplomatic misunderstanding came into the public spotlight with former Australian Prime Minister Gough Whitlam making a statement on national television in which he was critical of the Portuguese decision to grant the concession to Oceanic. The Portuguese ambassador was summoned to receive advance notice of the Prime Minister's statement and formal protest to the grant. The First Assistant Secretary of the Department of External Affairs noted:

*The Portuguese government considered that the delimitation should follow the median line, whereas the Australian government considered that the delimitation should follow the Timor Trough ... I recalled that Australia had since early in 1973 been trying to persuade Portugal to open negotiations regarding the delimitation of the boundary.*¹¹

Within the month, on April 18, 1974, the Portuguese ambassador returned with his government's official note responding to the protest. As far as Portugal was concerned, there was one continental shelf and therefore the median line should be chosen as the boundary for any government's concessions granted to mining companies. Boundaries of any previously granted concession could be amended in line with internationally negotiated boundaries. Portugal was happy to negotiate but would prefer to wait given that a major conference on the law of the sea was due to begin in June 1974.

In the circumstances, Portugal thought that "immediate negotiations would be ill-timed".¹² The Portuguese did not know that Timor-Leste would be invaded by Indonesia long before any convention on the law of the sea was concluded. The UN Convention on the Law of the Sea would not open for signature until December 1982. By then, the time had well passed for any negotiations between Portugal and Australia.

By November 1974, there was no prospect of meaningful negotiation between Australia and Portugal.¹³ Each remained intransigent. Oceanic Exploration went ahead and set up a Portuguese subsidiary company, Petrotimor – Companhia de Petroleos SARL. The Portuguese Government published the statutes and details of the prospecting rights for Petrotimor. Australia did not respond to Portugal's official note of April 1974 until November 29, 1974. Australia insisted, "The morphological character of the seabed unmistakably established two distinct continental shelves. Australia has exercised its sovereign rights over the areas in question for more than 20 years."¹⁴

The Portuguese were provided with details of the permits that Australia had granted over its continental shelf well beyond the median line between Australia and Timor. The Australian Government asked the Portuguese Government “not to permit any activities in the area that would infringe the sovereign rights of Australia.”¹⁵ These were no longer academic matters between diplomats. The Troubadour and Sunrise gas fields had been discovered under the provisions of the Australian permits. The Timor Sea was a veritable treasure trove.

Having obtained no satisfaction from the Portuguese Government, the Australian Government then wrote to Oceanic Exploration on July 21, 1975 warning of penalties for encroaching on Australian territory. Given that the disputed concession to Oceanic Exploration and its subsidiary was on the Timor side of the median line, the Oceanic executives replied within the week: “We fail to recognise the claim of your government in this area.”¹⁶ On August 28, 1975 Oceanic was notified that any exploration on the Australian continental shelf would attract severe penalties.

There was now widespread civil unrest in East Timor. The Portuguese withdrew and on November 25, 1975 Timor-Leste declared its independence. The Whitlam Government was dismissed. Disregarding the threat of punishment, Oceanic confirmed to the Australian diplomatic authorities:

*It is the intent of our company to carry out geophysical work and eventual drilling activities in the licence area ... This work will resume as soon as the political situation in Timor again normalises.*¹⁷

In Australia, Malcolm Fraser was elected Prime Minister. The Indonesians invaded East Timor.

By January 1976, Oceanic was seeking a suspension of its contractual obligations from the Portuguese Government because the war in East Timor made routine business activity impossible. In any event, East Timor's independence and Portugal's withdrawal raised significant questions relating to the validity of the continuity of Oceanic's licence. On April 14, 1976 the Portuguese agreed to the suspension:

*... it being understood that the same will become entirely effective and in force again, as soon as the general situation in the territory of Timor is stabilised at a minimum level of normality allowing the concessionary to proceed with its activity.*¹⁸

Timor-Leste's initial independence was short-lived. On July 17, 1976 Indonesia purported to annex East Timor as a province of Indonesia. Portugal never again established ruling authority in East Timor.

From 1953 to 1976, consistent and opposed positions had been adopted by the governments of Australia and Portugal. Mining companies had conducted exploration activities consistent with the licences they were granted by either government. Throughout, Portugal was consistent, insisting that it had control of the resources on its side of the median line between Australia and Timor. Australia was consistent in insisting that it had control of the resources on the continental shelf up to the Timor Trough, which was said to be a natural geological feature marking the end of the Australian continental shelf on one side and the end of the narrower and steeper Timor continental shelf on the other side.

Australia claimed support for its position from the 1958 Geneva Convention. Portugal saw little point in negotiations until the 1974 law of the sea convention bore fruit. Australia and Indonesia had cooperated well in determining boundaries either side of the Timor Gap. But they had conceded that any agreement about boundaries near East Timor might require amendment in the light of any technical adjustments needed in the location of points A16 and A17.

Given the consistency of the Portuguese position, the East Timorese are entitled to argue that any subsequent agreement between the Australians and Indonesians about boundaries around the Timor Trough was not determinative or influential to the determination of what is fair now in drawing a boundary between Timor-Leste and Australia.

We have seen that there were extensive negotiations between Australia and Indonesia as coastal nations opposite each other wanting to determine maritime boundaries in the sea lying between them. There was no engagement (and arguably a protracted standoff within what is now the JPDA) between Australia and Portugal as coastal nations opposite each other with conflicting claims to the seabed between them. At no time before 1976 did Indonesia and Portugal attempt to negotiate their maritime boundaries as adjacent countries which would have shared common boundaries of seabed and waters off their coastlines.

While Australia and Indonesia were negotiating their boundaries, they had to agree on endpoints for the borders so as not to encroach on Portugal's areas. Australia and Indonesia agreed that those endpoints might have to be revised were there ever to be any negotiations among all three parties with an interest in the Timor Sea.

1976-1999: Australia and Indonesia Cut a Deal

In January 1976, Prime Minister Malcolm Fraser requested a paper from the Department of Defence on Australia's relations with Indonesia and the issue of East Timor. The paper was discussed by the Foreign Affairs and Defence Committee of Cabinet the following month. The paper concluded that Australia had “no realistic and acceptable alternative but to disengage and maintain a low profile, leaving the running to the parties principal – Indonesia, the Timorese and the relevant UN organs or agencies – while supporting, but not becoming a prominent party to, any political process under the UN that may develop to confirm Indonesia's absorption of the territory”.¹⁹

The Department of Foreign Affairs then did the groundwork for the negotiation of maritime boundaries in the Timor Gap. In April 1978, Foreign Minister Andrew Peacock received a departmental submission informing him that it was ...

*... likely that negotiations with Indonesia on a seabed boundary between the south of East Timor and Australia will lead to inferences that Australia is according de jure recognition of Indonesia's incorporation of East Timor.*²⁰

The Department thought that:

... in all the circumstances the Government may prefer to “slip” into de jure recognition of Indonesia's incorporation of East Timor.

*This would not require any new announcement. If questions are asked about these changes the Government could explain its position by arguing that it was necessary to acknowledge Indonesia's claim to East Timor for the purpose of negotiating an international agreement which is very much in Australia's interest, but that the Government remains critical of the means by which the integration was brought about.*²¹

Andrew Peacock then met Indonesian Foreign Minister Mochtar and announced on December 15, 1978 that Australia would give *de jure* recognition to Indonesia's incorporation of East Timor as a result of the entry into seabed negotiations. In February 1979, Indonesian and Australian officials began discussions about maritime boundaries, including the Timor Gap. In 1981, Australia and Indonesia finalised a memorandum of understanding about fishing in waters between the two countries with the exception of the Timor Gap. The gap was the break in the agreed boundary line between Australia and Indonesia (between points 27 and 33 on map 3).

There were two significant developments in international law while Australia and Indonesia were negotiating the Timor Gap arrangements. In 1982, the UN Convention on the Law of the Sea (UNCLOS) was opened for signature. Indonesia ratified the convention in 1986. Although Australia did not ratify until 1994, well after the finalisation of the Timor Gap Treaty, Australia had signed the treaty on December 10, 1982. Both countries were bound not to defeat the objects and purposes of UNCLOS pending its entry into force.

The second development was the 1985 decision of the International Court of Justice in the “Case Concerning the Continental Shelf between Libya and Malta”. Although Australia continued to argue that it was entitled to the continental shelf up to the deepest point of the Timor Trough, international law seemed to be moving in the direction of drawing a median line between countries with coastlines opposite each other and separated by less than 400 nautical miles, as was the case with Australia and East Timor.

UNCLOS specifies that the coastal nation exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources, having the exclusive right to authorise and regulate drilling on the continental shelf for all purposes. But “the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters”.²² The coastal nation's continental shelf is defined to include the seabed and subsoil of the submarine areas “throughout the natural prolongation of its land territory to the outer edge of the continental margin”.²³ A coastal nation is entitled to a continental shelf out to 200 nautical miles regardless of the geological offshore features if there is no other coastal nation with a claim to the same area. Coastal nations opposite or adjacent to each other are required to seek agreement about

continental shelf boundaries on the basis of international law so as to achieve an equitable result.

The UNCLOS provisions about the continental shelf did not detract from the legitimacy of Australia's claim to control exploration in the Timor Sea on its continental shelf as far as the Timor Trough, regardless of which nation might control the waters and the airspace above.

The matter was further complicated by the invention of a new category for claims of sovereignty over the “exclusive economic zone” of a coastal nation. A coastal nation is entitled to an economic zone up to 200 nautical miles off the coast. Within the EEZ, the coastal nation has sovereign rights not only over the seabed and non-living resources. It has sovereign rights ...

... for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.²⁴

Obviously coastal nations separated by less than 400 nautical miles would need to have a border setting the limits on their exclusive economic zone. What would be the situation if one coastal nation did in fact have a continental shelf that extended into the area that an opposite nation could claim to be within its exclusive economic zone? The UNCLOS provisions relating to the exclusive economic zone and the continental shelf each specify that any conflicts are to be resolved according to international law so as to achieve an equitable result.

The International Court of Justice had the opportunity to cast some light, or at least its opinion, on these questions in the 1985 decision about the continental shelf between Libya and Malta. Libya's situation was somewhat analogous to Australia, and Malta's situation somewhat analogous to Timor-Leste. While Libya argued that it had a naturally prolonged continental shelf, Malta argued for equal distance between opposite coastal nations. The court decided that the principles and rules underlying the concept of the exclusive economic zone could not be left out of account in determining an equitable division of the continental shelf. The court said it was incontestable that ...

*... the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of states to have become a part of customary law.*²⁵

The court made two findings which could undermine Australia's longstanding claim that it can assert sovereignty as far as the Timor Trough and that Timor-Leste cannot assert sovereignty any further than the Timor Trough. First, the court conceded that the concept of the continental shelf had not been completely absorbed by the concept of the exclusive economic zone. However, "greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts".²⁶ Second, Indonesia, the sovereign of East Timor, like any other sovereign coastal nation, could have asserted the rights to an exclusive economic zone up to 200 miles offshore ...

*... whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the states concerned or in proceeding to a delimitation as between their claims.*²⁷

When opposite coastal nations are separated by less than 400 nautical miles, the search for an equitable result in determining the limits of each exclusive economic zone and continental shelf for the purposes of controlling mining activity will be assisted by a consideration of distance and will not be assisted by any consideration of geological factors. Australia might still find some consolation in the observation by Vice-President Sette Camara in his separate opinion: "The Timor Trough seems to be the only indisputable example of a geomorphological phenomenon governing a line of delimitation."²⁸ There is at least one other such example. That is the Okinawa Trough between China and Japan. The issue between China and Japan will not be resolved for some time given the dispute over the nearby Senkaku Islands.²⁹

Against this backdrop of new legal developments, Australia and Indonesia came up with a formula for the Timor Gap, trying to give weight to the competing principles. They saw no need to resolve immediately the maritime boundaries. They wanted only to reach an agreement that would provide certainty for parties wanting to exploit the resources inside the Timor Gap area. They used the concept of a joint development zone which had been used by other countries on about a dozen occasions. Eventually, the two foreign ministers, Gareth Evans and Ali Alitas, were photographed clinking champagne glasses at

30,000 feet over the Timor Gap. They decided on a Zone of Co-operation. The Timor Gap Treaty was finalised on December 11, 1989 and came into effect on February 9, 1991.

Assuming that Indonesia was the sovereign of East Timor, there was agreement that Indonesia would control all activity between the coast of East Timor and the Timor Trough. Also, there was no doubt that Australia would control activity between the Australian coastline and the line marking 200 nautical miles from the coast of East Timor. The contest was over activity between the Timor Trough and the 200 nautical mile line, marking the furthest claim East Timor could make for an exclusive economic zone. Rather than making a final determination, the parties decided on a zone of co-operation in three sections, resulting in five different regions between the coastlines of the two coastal nations (see map 2).

- ❑ Between East Timor and the deepest point of the Timor Trough (the maximum limit of Australia's continental shelf): 100 per cent to Indonesia
- ❑ Zone of Co-operation C – between the deepest point of the Timor Trough and to the 1,500m depth point (the area in which it was presumed that there was no technical possibility of exploration or drilling³⁰): 90 per cent to Indonesia, 10 per cent to Australia.
- ❑ Zone of Co-operation A – between the 1,500m depth point and the median line between East Timor and Australia: 50 per cent to each.
- ❑ Zone of Co-operation B – between the median line and the line marking 200 nautical miles from East Timor (the maximum limit of East Timor's exclusive economic zone): 10 per cent to Indonesia and 90 per cent to Australia.
- ❑ Between the line marking 200 nautical miles from East Timor and the Australian coastline: 100 per cent to Australia.

The eastern and western lateral lines separating the Zone of Co-operation (ZOC) from surrounding waters controlled exclusively by Indonesia and Australia as the adjacent coastal states were drawn as follows:

The southern portion of the lateral lines were supposed to be drawn as median lines between the two adjacent coastal “states” of East Timor and the remainder of Indonesia, such that every point on the southern portion of the western lateral line would be equidistant from West Timor and East Timor. Every point on the southern portion of the

Map 2

eastern lateral line was to be equidistant from East Timor and Indonesia, using base lines which took into account the archipelagic nature of Indonesia. Being an archipelagic country, Indonesia is entitled to construct baselines by drawing straight lines linking the outermost islands and reefs.³¹ There is a problem with the eastern lateral line because the Australians and Indonesians did not include the Timorese island of Jaco when they came to draw this line. The result is that point A16 “lies about 2nm west of a line of equidistance that takes account of Ilheu do Jaco”.³²

The northern portion of the lateral lines were then drawn from significant coastal points on the closest Australian coastline, transecting A16 (71.9nm from East Timor and 72.3nm from Indonesia) and A17 (77.6nm from Indonesia and 78.3nm from East Timor) respectively. The northern portion of the western line “was created by the projection of a line joining Long Reef off the north coast of Australia to Point 17”. The north portion of the eastern line “was formed by the extension of a line from Cape Van Dieman on Melville Island through the nearest equidistant point on the boundary south of the 1971 boundary then through point 16”.³³ A16 is not an equidistant point and East Timor could argue for a point up to another 2nm east which might include marginally more of the Greater Sunrise field in the JPDA.

In December 1995, the Bayu Undan fields were discovered in 80 metres of water about 270 nautical miles north-west of Darwin and about 135 nautical miles south of Suai in East Timor in Zone of Cooperation A (ZOC A). By 1997 Australia and Indonesia had finalised their agreement for agreed exclusive economic zones. Basically they agreed to adopt a median line between the two coasts, approximating the fisheries boundary they had previously finalised in 1981. In 1998 oil production began in ZOC A from the Elang-Kakatua fields, operated by Phillips Petroleum, underlining the effectiveness of arrangements entered into by the governments in the absence of an agreement on borders in the area.

No sooner had the first major mining project within the Timor Gap come on stream than Indonesian President Habibie responded to various pressures and agreed to hold a popular consultation about the future of East Timor. The Timorese voted overwhelmingly for independence on August 30, 1999. As Indonesia withdrew, dreadful violence erupted, fuelled by local militia supported and encouraged by the Indonesian Army. The Indonesians agreed to an international peacekeeping force and the United Nations took over the administration of East Timor on October 25, 1999.

1999-2002: Australia and the UN Set Up a Holding Operation

No sooner had the United Nations Transitional Administration in East Timor (UNTAET) taken over in Dili than Phillips announced that it was proceeding with the Bayu Undan development. The company was anxious to maintain the same arrangements it had enjoyed under the Timor Gap Treaty. Understandably, companies investing heavily in such projects are anxious that their tax liability and operating circumstances do not change simply because there is a change of government or change of sovereign. In February 2000, Australia and UNTAET exchanged notes agreeing to extend the terms of the Timor Gap Treaty from the day on which UNTAET took over from Indonesia in Timor-Leste. This exchange of notes guaranteed the companies security and certainty in the interim before the election of the first government of Timor-Leste.

Timor-Leste received its first royalty cheque of \$3 million on October 18, 2000. With Elang Kakatua producing inside ZOC A, Australia then agreed with UNTAET that from July 5, 2001, the revenue split between Timor-Leste and Australia would now be 90:10 rather than 50:50. The other zone closest to Timor-Leste (ZOC C) would now be exploited exclusively to the benefit of Timor-Leste and the zone closest to Australia would be exploited exclusively to the benefit of Australia (ZOC B). ZOC A would now be known as the Joint Petroleum Development Area (JPDA). By December 2001, the joint venture partners in Bayu Undan had negotiated an agreement with the Timor-Leste government.

Meanwhile Peter Galbraith, a former United States ambassador, stayed on as a consultant to the Timorese after he finished his appointment with UNTAET. He wanted to help the Timorese negotiate a better deal over the Timor Gap with the Australians. There was a rising chorus of voices suggesting that the poorest, newest country in Asia should not be locked into a compromise arrangement that Australia had forged with Indonesia as illegal occupiers of Timor-Leste.

The elected Constituent Assembly, which had drawn up a new constitution for Timor-Leste, had been permitted to vote itself into existence as the first Parliament of the new nation with Mari Alkatiri, the leader of Fretilin, the largest party represented in the Constituent Assembly, appointed Prime Minister until 2007. Xanana Gusmao was

elected President by popular vote of the people, but with largely symbolic powers consistent with the separation of powers set out in the Portuguese Constitution. Alkatiri was one of the Timorese leaders who had discussed the Timor Gap Treaty with Australian politicians and officials back in 1998.

Australia and the mining companies wanted to maintain the status quo, following through on arrangements made in the light of the Timor Gap Treaty. Alkatiri and his Foreign Minister, Jose Ramos Horta, were urged to guarantee that the mining companies would enjoy the same terms and security as they had under the previous government of East Timor, regardless of the legitimacy of that government. International and local NGOs expressed concern. At the very least, Timor-Leste should be able to negotiate their boundaries with Australia free from the constraints of any agreement reached between Australia and Indonesia, they argued.

For the Timorese, the big prize was not Bayu Undan but the Greater Sunrise and Troubadour fields, of which only 20 per cent was located inside the JPDA, the boundaries of which had been set initially by Australia and Indonesia.³⁵ The remaining 80 per cent lay in Australia's jurisdiction, even though these deposits were much closer to Timor-Leste than to Australia. But then, they were even closer to Indonesia than to Timor-Leste.

Lawyers told the East Timorese that the recent developments in international law favoured their side. For example, in the Libya-Malta case of 1985, the court rejected Libya's submission that its far greater land mass would be a relevant consideration in determining an equitable result. The court accepted the agreement of the parties that "the entitlement to continental shelf is the same for an island as for mainland".³⁶ Also, the boundaries between Malta and Libya were not to be drawn as if Malta were simply part of Italy:

*Malta being independent, the relationship of its coasts with the coasts of its neighbours is different from what it would be if it were a part of the territory of one of them.*³⁷

So too with Timor-Leste. The boundary with Australia cannot be delimited simply as if Timor-Leste were a part of Indonesia. The fact that there was an agreed boundary between Indonesia and Australia in relation to the other coastal areas of the territory claimed by Indonesia does not impact on the boundary to be drawn between Timor-Leste and

Australia. The ICJ reaffirmed the proposition accepted in the 1969 North Sea cases that ...

*... the natural resources of the continental shelf under delimitation "so far as known or readily ascertainable" might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation.*³⁸

The Timorese rightly think there is merit in their claim to an equitable carve-up of the known resources in the Timor Gap area. Also, the court recognised that a boundary might have to be moved back from a coastline if it were so close that there could be questions of security. A line drawn at the Timor Trough permitting Australia's ready access to the coast of Timor-Leste could be a security concern from the Timorese perspective. It is irrelevant that Australia is a democratic nation unlikely to engage in acts of unwarranted aggression.

There are two negative outcomes for Timor-Leste in the 1985 decision. The court did say that a comparison of the lengths of each country's coastline could be relevant in determining proportionality. A country with a much longer coastline could be entitled to an even greater share of the continental shelf than would result from the simple drawing of the median line. The median line could be moved closer to the nation with the much shorter coastline. Timor-Leste's in-house adviser, Dr Nuno Antunes, concedes that the relevant coastline lengths to compare are 148 nautical miles for Timor-Leste and 327 nautical miles for Australia, giving rise to "a slight disproportion in area attribution to the prejudice of Australia". He argues that:

*A slight adjustment to the benefit of Australia would contribute to a finer balance between the two states – although it is, on its own, insufficient to determine an adjustment of the provisional equidistance-line.*³⁹

However, Australia is able to point to the 1984 precedent in the Gulf of Maine Case in which the ICJ observed, "The ratio between the coastal fronts of the United States and Canada on the Gulf of Maine is 1.38 to 1. This ratio should be reflected in the location of the delimitation line."⁴⁰ The ratio between the coastal fronts of Australia and Timor-Leste is 2.21. There could be equitable grounds for moving the median line between Australia and Timor-Leste slightly north placing some of Bayu Undan outside Timor-Leste's continental shelf. The southern limit of the Bayu Undan field comes as close as 12 nautical miles to the median line. Alexander Downer has gone so far as to claim:

*It is a myth that a median-line approach would give East Timor all or most of the oil and gas resources in the Timor Sea. Such an approach could well leave East Timor without any share of the Bayu Undan gas field, rather than the generous 90 per cent share East Timor currently enjoys.*⁴¹

By 2004 gas was being drawn from Bayu Undan, which is estimated to have reserves of 400 million barrels of condensate and liquefied petroleum gas and 3.4 trillion cubic feet of natural gas. Conoco Phillips, the major stakeholder in Bayu Undan, expects liquid production from this field to peak at about 110,000 barrels per day of condensate and LPG. Phillips has told the Australian Parliament, "The second and larger part of the vision is, instead of reinjecting the Bayu Undan gas, to pipe that gas to an onshore LNG plant in Darwin for export to Japan. Bayu Undan is contracted to supply 3 million tonnes of LNG a year to Tokyo Electric Power Company and Tokyo Gas for a period of 17 years commencing in January 2006."⁴²

There has been much media attention to the comparative wealth of Australia and the poverty of Timor-Leste. Australia is a first-world country with extensive offshore mineral wealth within its already existing maritime boundaries. Timor-Leste is the newest and one of the poorest countries in Asia. In international law, however, these are irrelevant considerations when it comes to the determination of maritime boundaries. In the Libya-Malta Case, the court reaffirmed that "equity does not necessarily imply equality". Equity does not "seek to make equal what nature has made unequal". The court majority said, "There can be no question of distributive justice."⁴³ An equitable boundary would be deemed to exist even if the Timorese were rich and the Australians poor. Fourteen of the 17 judges who constituted the majority in the decision said:

*The court does not ... consider that a delimitation should be influenced by the relative economic position of the two states in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two states would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law.*⁴⁴

Neither did any of the three dissenting judges place any reliance on these economic considerations. The court is not concerned with the economic development or economic potential of the parties to any dispute about maritime boundaries.

If starting afresh, the appropriate approach would be to draw provisional lines of equidistance between the adjacent nations, Timor-Leste and Indonesia, and provisional lines of equidistance between the opposite nations, Timor-Leste and Australia. We would then consider any special or relevant circumstances that would warrant an adjustment of the equidistance principle to achieve an equitable result among all parties. It is not certain that this would deliver a significantly different outcome from that contemplated by the borders of the JPDA, although it is certainly possible.

In 2001 the ICJ ruled on a boundary dispute between Qatar and Bahrain, confirming the relevance of what is now termed the “equidistance/special circumstances” rule:

*The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances. Once it has delimited the territorial seas belonging to the parties, the court will determine the rules and principles of customary law to be applied to the delimitation of the parties' continental shelves and their exclusive economic zones or fishery zones. The court will further decide whether the method to be chosen for this delimitation differs from or is similar to the approach just outlined.*⁴⁵

Such an approach is warranted in this case. Australia would have no real grounds for objecting to the initial drawing of provisional equidistance lines or to the preference now given to distance over geology when it comes to determining a maritime boundary between two countries separated by less than 400 nautical miles.

Map 3

2002-2004: Timor-Leste Cries Foul

The East Timorese had honoured each undertaking to proceed with the negotiation of the Timor Sea Treaty mirroring the previous arrangements of the Timor Gap Treaty, except that there would now be only the Joint Petroleum Development Area (JPDA) with boundaries identical to the old Zone of Co-operation A, and the revenue share would now favour Timor-Leste by 90:10. Any deposits straddling the JPDA and the exclusive zone of Australia or Timor-Leste were to be unitised and Greater Sunrise would be attributed 20.1 per cent to the JPDA and 79.9 per cent to Australia. Unitisation generally means that the revenue from the resources extracted from a straddling field are to be allocated between the two jurisdictions in the same ratio as the geographic distribution of the field. Recognising the uncertainty that would otherwise surround the development of Greater Sunrise, Australia insisted on connecting the Sunrise unitisation agreement to the Timor Sea Treaty.

Some voices of discontent were now being heard in Dili. Mari Alkatiri and Xanana Gusmao reflected some of the disenchantment of Timorese who thought they were being given little option but to rubber-stamp previous arrangements made when they were not at the table and when Australia had wrongfully recognised Indonesia's sovereignty over East Timor. The Timorese were also concerned that Australia had avoided the scrutiny of the ICJ when Portugal had tried to challenge the validity of the Timor Gap Treaty.⁴⁶

Oceanic/PetroTimor had sought a legal opinion about the boundaries from Professor Vaughan Lowe, Chichele Professor of Public International Law at Oxford. Lowe was assisted on technical matters by Christopher Carleton, head of the Law of the Sea Division in the UK Hydrographic Office. Oceanic even offered to fund Timorese legal challenges in the ICJ. Peter Galbraith, advising the East Timorese, urged a tough approach to negotiations. For the first time, Australia faced the prospect of a neighbouring country which might consider litigation in the ICJ rather than protracted negotiation. There was every chance that Timor-Leste would tell Australia that Canberra's unyielding insistence on boundaries in line with what was previously negotiated with Indonesia was unacceptable.

Without any prior notification – to avoid the prospect of any last-minute litigation being lodged – Australia announced on March 25,

2002 that it had lodged documents in New York excluding the setting of maritime boundaries from compulsory dispute resolution, effectively removing the issue from UN determination processes. Although Downer claimed “Australia is yet to resolve boundaries with France, New Zealand and Norway in the maritime area adjacent to Antarctica”, there can be no doubt that this action was taken, in part, to deny Timor-Leste access to any international processes for determination of boundaries in the absence of agreement with Australia.⁴⁷ Downer expressed Australia’s strong view that “any maritime boundary dispute is best settled by negotiation rather than litigation”. And the Australian negotiating position was to be fixed in accordance with arrangements drawn up during the Indonesian occupation of East Timor.

Australia’s position is that it is always preferable to negotiate boundaries rather than having them determined by court processes that can be very protracted, rendering uncertain results. But the East Timorese have shown every indication that they are keen to finalise boundaries as quickly as possible. When there is mistrust between parties, they will have a greater motivation to negotiate an outcome if there is the prospect of the matter being referred to compulsory arbitration by an independent third party. At this stage, neither Australia nor Timor-Leste is subject to the jurisdiction of the ICJ when negotiating maritime boundaries.

Alkatiri described Australia's withdrawal from international dispute resolution as “a hostile act”. Galbraith later commented on Australia's withdrawal to the SBS program *Dateline*:⁴⁸

The Australians from time to time in the negotiations under the Timor Sea Treaty, said that they might do so. Frankly, I didn't believe it because I had an image of Australia as one of those countries like the Scandinavian countries that was very law-abiding, believing in the United Nations – a kind of good government country in the world and I thought what they did was completely out of character.

The Australian Government claims that it is still very law-abiding by international standards, given that two-thirds of the UN members have not subscribed to the ICJ jurisdiction on maritime boundaries.

The Constituent Assembly in Timor-Leste voted itself the first Parliament of Timor-Leste with a term running until 2007. Mari Alkatiri was confirmed as Prime Minister. Elaborate independence celebrations took place on May 20, 2002. Not a moment was to be lost

with Australian dignitaries in attendance. The Timor Sea Treaty was signed in Dili that day and both governments exchanged notes committing themselves to a unitisation agreement for Sunrise by the end of the year. The Australians knew that the Timorese were keen to finalise the Timor Sea Treaty so the increased revenues could start flowing to Timor-Leste from Bayu Undan.

It took only a month for the treaty to be presented to the Australian Parliament, satisfying all the steps preliminary to its ratification by the Australian Government. At the same time, Woodside was provided with a draft unitisation agreement for Greater Sunrise. Downer launched the Australia Timor-Leste Business Council on June 12, 2002, describing the Timor Sea Treaty as “a cornerstone for the development of a strong and deep bilateral relationship”. He claimed:

... the negotiations which led to the treaty, although tough at times, were conducted in a spirit of cooperation and goodwill which augurs well for the future of our bilateral relationship.

Downer said this while making no reference to Australia's withdrawal from all processes which could have required Australian compliance with an independent umpire's decision on the boundaries.

By July 2002 the Sunrise partners were getting anxious and told both governments in very clear terms that they wanted certainty so they could proceed with an investment of up to \$A6 billion, having already committed more than \$A200 million. Woodside was very upfront in expressing its concerns about the sovereign risk of any project wearing the Timor label. Woodside told the Australian Parliament about the ...

... sovereign risks associated with a new nation such as Timor-Leste. Given that 20.1 per cent of the Greater Sunrise fields are attributed to the JPDA, the substantial impact of any such risks is readily identifiable due to the higher tax rates and relatively immature regulatory environment that is in place within the JPDA and more generally Timor-Leste. Indeed, it will be many years before Timor-Leste demonstrates its sovereign risk credentials.⁴⁹

The two governments were unable to meet the 2002 deadline for the unitisation agreement, but it was signed on March 6, 2003. The Timor Sea Treaty then came into effect on April 2, 2003. The legislation for the unitisation agreement was presented to the Australian Parliament in March 2004. The day before the legislation was introduced to the

House of Representatives, 53 US members of Congress backed calls by the US Senate Foreign Relations Committee, writing to Prime Minister John Howard urging the Australian and Timor-Leste governments:

... to engage in good faith negotiations to resolve their maritime boundary in accordance with international legal principles, and we hope both governments will agree to a legal process for an impartial resolution if the boundary dispute cannot be settled by negotiation.

They also urged Howard to “heed Prime Minister Mari Alkatiri's call to conclude negotiations within three to five years”. The Australian Government claimed that the legislation was uncontroversial, being a straightforward implementation of an agreement which both governments favoured and which was consistent with the undertakings given by both governments to the joint venturers ever since the Timorese leadership had been consulted on the issue.

Under the Timor Sea Treaty, the governments have agreed to unitise Greater Sunrise on the basis that East Timor will receive about 18 per cent of the revenue flow from Greater Sunrise and Australia 82 per cent. This agreement is now in force and the IUA provides the regulatory framework around which development can occur, without prejudicing ongoing border negotiations or a final settlement.

The Opposition Labor Party supported the IUA, saying it was “as keen as anyone” to have the Greater Sunrise field developed. “It is in the national interest to have it developed.”⁵⁰ In the House of Representatives, the rushed legislation was rejected only by the four Independents. The Independents had been given just one day's notice of the legislation. The Independent Peter Andren told Parliament:

*If it is a fair deal for both parties then why not take the time to give it a proper hearing in the light of day? Perhaps because it is not a fair deal. It is another sad indictment on our relationship with Timor-Leste. We have in the main betrayed our small northern neighbour over the years. Just when our servicemen and women had redeemed us for 24 years of silence and betrayal, we go and do it all over again.*⁵¹

The Labor Party did wonder, why the rush? Their lead speaker in the House of Representatives said, “One can only assume that it is designed to put additional pressure on the East Timorese government.”⁵²

Although Labor lamented Australia's withdrawal from the UN determination processes on boundary disputes, it was careful not to pledge a recommitment to such processes if elected to government. Labor unanimously supported the legislation in the House of Representatives.

In the Senate, the minor parties tried to pressure the Australian Government to reinstate its full submission to the jurisdiction of the ICJ and to hold all revenues from the mining in escrow until a permanent boundary was settled. The Greens wanted an amendment to the legislation providing that the unitisation agreement would lapse if there was no permanent boundary agreed to by December 31, 2006. The One Nation Party wanted "to put it very clearly on the record that we believe that all funds from this resource should go directly to Timor-Leste".⁵³

The Labor Party stood firm with the Government, declaring that: "The interests of both Australia and Timor-Leste will be best served by the Greater Sunrise petroleum resources being developed as soon as possible."⁵⁴ Labor's lead speaker in the Senate debate said, "As far as I am aware, no representative of the Democratic Republic of Timor-Leste has asked that these bills not be passed."⁵⁵ Labor's second speaker went even further:

*The Australian Opposition has sought to talk directly to the government of Timor-Leste, and the Prime Minister, Mr Alkatiri, spoke with Mr Rudd and Mr Jull last week. Specific questions were put on the issue of whether or not there were problems with the Opposition in this country supporting this legislation, and the response was no. So we feel that the issue of this particular legislation, which should be the subject of this debate, is worthy of support – and I will explain the reasons for that – and that is the view that the Government of Timor-Leste is putting to us. We are not relying on hearsay here. We are not relying on press reports. We are not even relying on the Australian Government. We are getting it directly from Dili.*⁵⁶

Alkatiri was upset by these Labor Party statements and issued a press statement immediately the remarks were brought to his attention. He said:

I clearly voice my concerns regarding the IUA bill and consider that the Australian actions and statements in regard to the IUA undermine the prospects for its approval by the Timor-Leste national Parliament. These actions are the unilateral issuances

*of licences by Australia in an area of the Greater Sunrise field described as a disputed area in the text of the IUA. There are Australian statements that claim that this area is an area of “sole Australian jurisdiction”. This is categorically incorrect. The Timor-Leste Government is committed to adhere to its obligations in regard to agreements entered into. However, the process of the ratification of the IUA to the Timor-Leste national Parliament would be made easier if Australia was acting in accordance with international law.*⁵⁷

So the miscommunication between Alkatiri and Australian politicians was not just with Howard and Downer. The Australian Government is adamant that it is inappropriate for the East Timorese to add further conditions before the implementation of the unitisation agreement. Bill Patterson, First Assistant Secretary of the Department of Foreign Affairs, spoke at a seminar in Sydney with Jose Ramos Horta on July 20, 2004 and said:

*I don't want to overstate this point too much, but it is of course difficult to negotiate with confidence with a government which has refused to follow on ... follow through on a previously negotiated agreement.*⁵⁸

In the Australian Parliament, little has separated the Labor Opposition and the Coalition Government on this issue. All major political parties have supported a prompt unitisation agreement so that development can proceed with assured markets being found. The major Australian political parties have previously been untroubled by a prompt finalisation of the unitisation agreement. They have insisted that the future distribution of revenues between the two governments can be readily amended once any boundary changes are made. There is no guarantee of back payments being made to Timor-Leste if the final boundary delimitation is more favourable to Timor-Leste. Equally, there is no requirement that Timor-Leste refund moneys if the border is more favourable to Australia.

The Labor Party will not consider moving the boundaries of the JPDA because that would complicate existing agreements with Indonesia. But in the lead-up to the 2004 Australian election, Mark Latham has 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.*⁵⁹

Joel Fitzgibbon, the Shadow Minister for Mining and Energy, explained his leader's concerns:

*We have been outraged at the Howard Government's bullying tactics with East Timor. In the interests of the Timorese and in the interests of investment certainty, we would try to negotiate a deal on this. Any deal with Timor would obviously require a review of the unitisation agreement.*⁶⁰

Such remarks angered the Coalition Government. Downer threatened to suspend the next round of maritime boundary negotiations, saying:

*It is extremely irresponsible during a delicate stage of negotiations for the Leader of the Opposition, unbriefed, with no idea what state these negotiations are at, just coming out and making these kind of haphazard remarks.*⁶¹

The major Australian political parties readily understand Timor-Leste's desire to share in the revenues from the Buffalo, Laminaria and Corallina oilfields to the west of the JPDA and to share in more of the revenues from the Sunrise project which is transected by the eastern border of the JPDA. But they firmly believe that both the western and eastern lateral lines are drawn in the right place and there is no case for a redrawn boundary which could substantially favour Timor-Leste. They accept the view of the expert geographers and those lawyers who have argued that the relevant western and eastern boundaries are basically median lines drawn between the adjacent nations, Indonesia and Timor-Leste. But the major political parties in Australia have not yet had to address the disagreement among experts as to what weight to give to small islands in determining the eastern line of equidistance between Timor-Leste and its neighbours.

While Timor-Leste's adviser, Nuno Antunes,⁶² has sided with the Lowe opinion claiming that half-effect should be given to the four Indonesian islands to the east of Timor-Leste, Victor Prescott has sided with Gillian Triggs, saying, "In my view, there are no islands, in the relevant area of the Timor Sea, which are located in positions that would distort the use of equidistant boundaries."⁶³ Triggs says, "Indonesia will argue that the Leti islands should be given a full legal effect in determining a line of equidistance with East Timor ... Indonesian support for an easterly move of the eastern lateral of the JPDA is unlikely."⁶⁴

Map 4

Even if the 1972 Australia-Indonesia maritime boundary was redrawn closer to Australia, this could not result in a greater revenue flow to Timor-Leste. It could only mean some redistribution of revenue between Indonesia and Australia. But there is no suggestion of that because the Australia-Indonesia borders have been finalised, being open to revision only by agreement of both parties. It is not very likely that Indonesia would want to redraw its maritime boundary with Australia, gaining some foothold in Greater Sunrise, then only to agree with Timor-Leste that Indonesia would relinquish that new foothold in favour of Timor-Leste.

On April 19, 2004 Australian and Timorese officials started boundary discussions in Dili. In his opening statement, Alkatiri said:

For us, a 20-year negotiation is not an option. Timor-Leste loses \$1 million a day due to Australia's unlawful exploitation of resources in the disputed area. Timor-Leste cannot be deprived of its rights or territory because of a crime.

The Timorese have requested monthly meetings with the Australian officials. Two weeks after Mr Alkatiri's spirited attack, Downer replied on the ABC's *Four Corners* program:

I think they've made a very big mistake thinking that the best way to handle this negotiation is trying to shame Australia, is mounting abuse on our country, accusing us of being bullying and rich and so on, when you consider all we've done for East Timor.

Australia insists there is no point in meeting any more regularly than every six months to negotiate complex boundaries. Australia's most recently completed boundary negotiations with other countries have resulted from meetings which occurred on average each 5.5 months in one case and each 8.5 months in another. When boundaries are being negotiated, meetings usually become more regular towards the end of the process. Oceanic Exploration has now begun litigation in the US courts alleging that Alkatiri has accepted bribes from Australian officials and from joint venture partners.

What is fair? What is the best way forward

Although the public focus has been on the negotiations and verbal abuse traded between Australia and Timor-Leste, it is important to remember that there will be no conclusion of maritime boundaries in the Timor Sea until all three governments, Indonesia, Timor-Leste and Australia, have been involved. If they cannot agree on boundaries separating territorial waters, contiguous zones, the EEZ and the continental shelf, the boundaries will have to be delimited by international judicial or arbitral decision. This will not happen overnight, although a delimitation need not take many years if all the governments act in good faith, since the applicable principles of international law are now well established.

Timor-Leste has one strong grievance against Australia, that the Australians are unilaterally exploiting finite resources in disputed areas outside the JPDA. No such allegation is made against the Indonesians. That is why the Timorese want the Australians to negotiate more urgently. They would have no grounds for demanding quicker determinations from Australia than from Indonesia if Australia were not in a position to profit from delay.

The Timorese are worried about the exploitation of the Buffalo, Laminaria and Corallina fields just to the west of the JPDA. They object to Australia's issuing of new licences in areas outside but close to the JPDA lateral lines. That is why they have now attached conditions to their Parliament's approval to the Sunrise unitisation agreement. Prime Minister Alkatiri has said, "It was the Australians who taught us to connect things which are not connected."⁶⁵

Peter Galbraith told *Four Corners*:

*All we ask is that Australia stop taking the resource until we have an agreement, or that Australia negotiate seriously and rapidly about all the issues, including the lateral boundaries, or that Australia agree to an impartial decision by an international court of Australia's choosing. Any one of those three.*⁶⁶

Australia should not profit from the exploitation of resources that might end up under Timor-Leste's control. It should set aside the government revenues earned from these resources, awaiting a boundary delimitation. This could be done on a "without prejudice" basis, making it clear that Australia has not surrendered its claim but has suspended its use of the earnings to avoid the risk of any unwarranted gains.

If Australia is not prepared to put the funds from these fields into a trust account (escrow) and is intent on granting new licences in disputed areas, Timor-Leste will have a strong case for the adjustment of boundaries making up for the loss of known resources.⁶⁷ If equity would otherwise require that the western lateral line be a variation on a perpendicular line (rather than a variation on a line of equidistance), bringing Buffalo, Laminaria and Corallina inside Timor-Leste's maritime borders, Timor-Leste ought be entitled to a more favourable eastern lateral line, including a greater proportion of Greater Sunrise within its maritime borders.⁶⁸

The Government of Timor-Leste is setting up a Petroleum Fund which will become operational in 2005. Until 2008, the Government expects an annual budget shortfall of \$US30 million. The Petroleum Fund, with revenue from Bayu Undan, should then assist with balancing the budget until 2020, when Bayu Undan will be exhausted. If the Timor-Leste Parliament ratifies the unitisation agreement for Sunrise by the end of 2004, revenue from that project would start to flow in 2010, ensuring the long-term future of the Petroleum Fund. The prospect of that revenue flow would also allow the Timor-Leste Government responsibly to make up its present budget shortfall with revenue from other projects, which would not all need to be invested long term in the Petroleum Fund. Woodside predicts:

*With Sunrise revenues in the fund, the fund could be worth in excess of \$US3,000 million by 2020 and in excess of \$US9,000 million by 2050. The fund would cover the expected revenue gap beyond 2020 as well as earning enough interest to enable continued growth of the fund in nominal terms.*⁶⁹

If the East Timorese parliamentarians decide not to ratify the unitisation agreement by the end of 2004, there is a strong chance that the joint venturers will not proceed with the development of Greater Sunrise for many years to come. The gas will still be there under the sea. There may be a future opportunity to develop the resource, but the opportunity to capitalise on it in the near term will have been missed and delay will result in reduced, immediate revenues for the Government of Timor-Leste. If the revenues can be captured now and a proportion placed in the proposed Petroleum Fund, the principal in the fund would be greater, creating additional recurrent earnings than would otherwise be possible.⁷⁰

If the East Timorese parliamentarians decide to ratify the unitisation agreement, there is a very good chance the Greater Sunrise project will proceed. In time, there would be an agreed maritime boundary which could increase Timor-Leste's share in the revenue flow.

If, as seems likely, all downstream development – such as processing plants and pipelines – is to occur on the Australian mainland, there need to be complementary arrangements to ensure that the East Timorese receive some share in the value-added benefit of the development of the resource.

If the Sunrise project does not get the go-ahead from the Timor-Leste Parliament in 2004, it is likely that the oil and gas will remain under the sea for many years to come. There will then be less urgency to negotiate permanent maritime boundaries between Australia and Timor-Leste. The Timor Sea Treaty can remain in force for 30 years (until April 2, 2033) if there has not been a permanent seabed delimitation between Australia and Timor-Leste.

If there were a change of government in Australia, there might be some prospect that Australia would once again subscribe to the jurisdiction of the International Court of Justice to determine maritime boundary disputes. But to date, the Labor Party has not given such a commitment.⁷¹

What would be a fair maritime boundary between Australia and Timor-Leste? Timor-Leste has a strong case for arguing that the seabed boundary, the fisheries boundary, and the boundary of the exclusive economic zone should be one and the same. In the negotiations, Timor-Leste is likely to argue for:

- ❑ A median line between Australia and Timor-Leste with minimal modification on account of Australia's longer coastline.
- ❑ An eastern lateral line of modified equidistance between Timor-Leste and Indonesia with less than full effect being given to the four Indonesian islands to the west of Timor-Leste, and with Point A16 being adjusted to take full account of the island of Jaco on the tip of Timor-Leste.
- ❑ A western lateral line which is closer to being a perpendicular line than a line of equidistance so as to correct the inequitable effect of Tanjong We Toh.

Timor-Leste could argue for a slightly more favourable eastern lateral line south of point A16 on the basis that the concave shape of the Indonesian coastline and baselines results in the eastern and western lines of equidistance being separated by only 120 nautical miles where they reach the median line between Australia and Timor-Leste, whereas the Timor-Leste coastline is 148 nautical miles long as the crow flies.

Timor-Leste may even succeed in its negotiations with Indonesia in arguing for an amended eastern lateral line all the way from the coast of Timor-Leste to the median line between Australia and Timor-Leste. However, the convergence is slight compared with that in cases where boundaries have been adjusted to compensate for the effects of coastline curvature (for example, Belize in the Caribbean Sea and Togo in West Africa). Victor Prescott says, “The convergence is so slight that it does not create a special circumstance.”⁷²

With computer technology, it is now possible to plot very accurate lines of equidistance. The experts need to put on the table the different arguments for and against, giving full weight to the island of Jaco and the small adjacent Indonesian islands when drawing a modified line of equidistance as the eastern lateral line. Prescott concludes:⁷³

It is hard to see what arguments might be used to justify a divergence from the line of equidistance. There are no islands located so as to cause a major divergence of the boundary in favour of any state at the expense of a neighbour.

The Timorese suggest giving half-effect to the four Indonesian islands – Leti, Moa, Lakor and Meatiij Miarang – which are located to the east of Jaco. They argue that this adjustment would move most of Greater Sunrise inside Timor-Leste's maritime boundary. Prescott says that if Timor-Leste “wants to move the median line markedly in its favour it would have to construct a line that ignored the four Indonesian islands”.⁷⁴ Indonesia may claim that its islands are to be given full effect as they are behind the archipelagic baselines. One of the basepoints for the drawing of the baselines is actually on Leti. On the other hand, Antunes argues:

*These islands are in some degree unrepresentative of the geographical relationship between East Timor and Indonesia. Besides the cut-off that results from the relative position of the facades, it is ... necessary to weigh up the “unrepresentativeness” of these insular features. Their effect upon the equidistance line is clearly unreasonable.*⁷⁵

None of these considerations are overruled by Indonesia's archipelagic state. As the features in question stand on the archipelago's outer perimeter, no archipelagic waters are in question. Another point concerns the fact that some basepoints on these features are used to trace some of Indonesia's archipelagic baselines. This entails no impediment to reduce their effect in the delimitation.

The problem with this line of argument is that archipelagic countries are usually entitled to treat the areas behind their baselines as if they were land and internal waters. And they are entitled to press all maritime claims seaward of their archipelagic baselines accordingly.

The fairest outcome would be for drawing boundaries that then give Timor-Leste:

- ❑ 100 per cent of the revenue flow from projects north of a modified median line between Australia and Timor-Leste (including whatever proportion of Bayu Undan was north of such a line).
- ❑ An increased percentage of the revenue flow from Greater Sunrise reflecting an increased percentage of the Greater Sunrise fields lying on the Timor-Leste side of a negotiated eastern lateral maritime boundary. That boundary should be a modified line of equidistance which takes into account four factors not previously considered by Australia and Indonesia when they drew their "simplified line of equidistance":
 - Expert agreement about what weight is given to small islands, including Jaco and the four adjacent Indonesian islands, in determining a line of equidistance.
 - The ICJ's reaffirmed principle that "the natural resources of the continental shelf under delimitation 'so far as known or readily ascertainable' might well constitute relevant circumstances which it would be reasonable to take into account in a delimitation".
 - Adjustment needed to the lateral lines to overcome the adverse effect to Timor-Leste caused by the concave shape of Indonesia's baselines. The distance between the east and west modified lines of equidistance where they meet the median line between Australia and Timor-Leste should be approximate to the straight line distance between the endpoints of Timor-Leste's coastline (see map 5).
 - Australia's exploitation of finite resources in a disputed area just outside the western lateral line of the JPDA.

Map 5

There has been strong language exchanged by the political leaders of both sides to the dispute. Now is the time for sensible negotiations to proceed.

The East Timorese will ratify the unitisation agreement by the end of the year only if they have the assurances that:

- ❑ Their possible interests outside the JPDA are protected.
- ❑ The maritime boundary negotiations could produce an equitable result for Timor-Leste even though Australia is no longer subject to the compulsory jurisdiction of the ICJ.

The short-term and long-term economic benefits of the unitisation agreement are such that it would be imprudent to delay development in the hope of gaining greater long-term benefits.

The finalisation of all maritime borders in the Timor Sea will take longer. Australia, Timor-Leste and Indonesia need to reach agreement on the basis of international law in order to achieve an equitable solution – seeking not charity, but justice – just a fair go for all three parties, including the one that is the smallest, poorest and newest in the region.

Glossary

EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
IUA	International Unitisation Agreement (between the governments of Australia and Timor-Leste, March 2003)
JPDA	Joint Petroleum Development Area (defined by the Timor Sea Treaty 2002)
LNG	Liquefied natural gas
LPG	Liquid petroleum gas
UNCLOS	United Nations Convention on the Law of the Sea 1982
ZOC	Zone of Co-operation (defined by the Timor Gap Treaty 1989)

Bayu Undan – A condensate and gas project in the south-west corner of the JPDA developed by a consortium led by Conoco Phillips. The gas is being piped to Darwin for liquefaction.

Contiguous Zone – The zone contiguous to the territorial waters of a coastal nation, up to 24 nautical miles offshore.

Continental shelf – The seabed and subsoil of the submarine areas that extend beyond a coastal nation's territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Eastern lateral line – The lateral line on or near the east of the JPDA which will separate the continental shelf and the EEZ of each nation. It could be a modified line of equidistance (giving less effect to some of the islands in the Indonesian archipelago). It could also be modified to correct the effect of coast curvature or to more equitably distribute known, remaining resources.

Escrow account – An account which holds funds in trust until an ultimate determination is made about the entitlement to disputed funds.

Exclusive economic zone (EEZ) – A zone up to 200 nautical miles offshore (or to the median line if the opposite nation be less than 400 nautical miles away) over which the coastal nation enjoys sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

Greater Sunrise – A deposit of condensate (a light crude oil) and gas in two fields named Sunrise and Troubadour which straddle the eastern boundary of the JPDA. A consortium of Woodside, Conoco Phillips, Shell and Osaka Gas wants to develop the project.

International Unitisation Agreement (IUA) – The 2003 agreement between the governments of Australia and Timor-Leste for the unitisation of the Greater Sunrise fields.

Joint Petroleum Development Area (JPDA) – an arrangement permitting exploration and exploitation of petroleum products in the area of continental shelf in the Timor Sea still disputed or not agreed to by Indonesia and Australia (formerly the Zone of Co-operation).

Laminaria-Corallina – Oilfields just west of the JPDA which are being exploited with Australian authorisation by a consortium of Woodside, BHP Billiton and Shell.

Lateral line – A line going roughly north-south which separates the EEZ and continental shelf between Timor-Leste and Indonesia and between Timor-Leste and Australia.

Line of equidistance – A line drawn between adjacent nations such that each point on the line is equidistant from agreed basepoints on the coastline of the adjacent nations.

Median line – A line drawn midway between two opposite nations (which may be modified to take into account the disparity in relative length of coastlines).

Perpendicular line – A line perpendicular to the line of direction of the coastline of the nation.

Timor Gap – The gap (opposite East Timor) in the 1972 maritime boundary line negotiated by Australia and Indonesia.

Timor Gap Treaty – The treaty negotiated by Australia and Indonesia in 1989.

Timor Sea Treaty – The treaty negotiated by Australia and Timor-Leste in 2002.

Timor Trough – The seabed depression south of the island of Timor which is more than 3,000 metres deep.

Timor-Leste – The official name for the Democratic Republic of East Timor, which became an independent nation on May 20, 2002.

Territorial waters – The adjacent belt of sea beside the coastline of a nation up to 12 nautical miles offshore.

Unitisation – The process by which parties agree to exploit and share the benefits of a resource which is located in two jurisdictions. The revenue from the resource extracted from a straddling field is allocated between the two jurisdictions in the same ratio as the geographic distribution of the field.

Western lateral line – The lateral line on or near the west of the JPDA which will separate the continental shelf and the EEZ of each nation. It could be a modified line of equidistance or a modified perpendicular line.

Appendices

Article 2(b) Timor Sea Treaty

(signed May 20, 2002)

Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting Australia's or East Timor's position on or rights relating to a seabed delimitation or their respective seabed entitlements.

Article 9 Timor Sea Treaty

(signed May 20, 2002)

Unitisation

- (a) Any reservoir of petroleum that extends across the boundary of the JPDA shall be treated as a single entity for management and development purposes.
- (b) Australia and Timor-Leste shall work expeditiously and in good faith to reach agreement on the manner in which the deposit will be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation.

Annex E under Article 9(b) of the Timor Sea Treaty

(signed May 20, 2002)

Unitisation of Greater Sunrise

- (a) Australia and Timor-Leste agree to unitise the Sunrise and Troubadour deposits (collectively known as "Greater Sunrise") on the basis that 20.1 per cent of Greater Sunrise lies within the JPDA. Production from Greater Sunrise shall be distributed on the basis that 20.1 per cent is attributed to the JPDA and 79.9 per cent is attributed to Australia.
- (b) Either Australia or Timor-Leste may request a review of the production sharing formula. Following such a review, the production sharing formula may be altered by agreement between Australia and Timor-Leste.

- (c) The unitisation agreement referred to in paragraph (a) shall be without prejudice to a permanent delimitation of the seabed between Australia and Timor-Leste.
- (d) In the event of a permanent delimitation of the seabed, Australia and Timor-Leste shall reconsider the terms of the unitisation agreement referred to in paragraph (a). Any new agreement shall preserve the terms of any production sharing contract, licence or permit which is based on the agreement in paragraph (a).

Preamble Unitisation Agreement

(signed March 6, 2003)

Noting that 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.

Article 2 Unitisation Agreement

(signed March 6, 2003)

Without prejudice

- (1) Nothing contained in this Agreement, no acts taking place while this Agreement is in force or as a consequence of this Agreement and no law operating in the Unit Area by virtue of this Agreement
 - shall be interpreted as prejudicing or affecting the position of either Australia or Timor-Leste with regard to their respective maritime boundaries or rights or claims thereto; and
 - may be relied on as a basis for asserting, supporting, denying or limiting the position of either Australia or Timor-Leste with regard to their respective maritime boundaries or rights or claims thereto.

References

1. ABC *Four Corners* Forum, May 10, 2004.
2. Article 15 of the UN Convention on the Law of the Sea provides: "Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured."
3. Leonard Legault and Blair Hankey point out that the International Court of Justice has stated "that the equidistance method generally produced an equitable result in situations of oppositeness". They say: "The court believed that this was often not the case in instances of lateral adjacency since the effect on an equidistance line of a protrusion or convexity on the coast of one of the parties, or a concavity on the coast of another, is progressively magnified as the boundary extends seawards. A relatively minor feature on the coast of one of the parties, particularly when situated in the vicinity of the land boundary terminus, thus has a disproportionate effect on the delimitation. This phenomenon causes the equidistant line to swing out across the coast of one of the parties to the delimitation, cutting off that state from the continental shelf lying in front of its coasts." ("Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation", in *International Maritime Boundaries*, American Society of International Law, Volume 1, J Charney and L Alexander (eds), 1993, p 216). Timor-Leste argues this is the case with the western lateral line that needs to be drawn between Indonesia and Timor-Leste and thus the need for a perpendicular line rather than a line of equidistance. They claim that Tanjong We Toh is a cape on the Indonesian coast, close to the border, causing closure.
4. UNCLOS Article 83(3).
5. This is the term now used by the Australian Government in describing the eastern and western lateral boundaries of the JPDA (see "Australia-East Timor Maritime Boundaries: Finding an Equitable Solution", Department of Foreign Affairs and Trade, Australian Government, July 2004, p 1).
6. This moral claim should not be overstated. The same moral claim could be made by Australia if the downstream production were to occur in Timor-Leste.
7. Article 12 of the Unitisation Agreement signed on March 6, 2003 provides: "Production of petroleum shall not commence until a development plan for the effective exploitation of the unit reservoirs, which has been submitted by the unit operator and contains a programme and plans agreed in accordance with joint venturers' agreements, has been approved by the regulatory authorities. The unit operator shall submit copies of the development plan to the regulatory authorities for approval." Geoffrey McKee, who was a staff engineering adviser with an oil company previously active in the Timor Sea and who has worked as an independent oil and gas industry consultant since 1996, has made detailed submissions to Australian parliamentary inquiries since 2002, arguing that a pipeline from Sunrise to Timor-Leste is not only technically possible but also commercially viable. He suspects the main issue is corporate concern about the political stability of Timor-Leste. In his October 2002 submission to the Joint Standing Committee on Treaties (Submission 87, Review of the Timor Sea Treaties, para 5.3.6), he made comparative observations about the Black Sea pipeline completed in 2002: "This existing deepwater pipeline, laid at 2,150 metres water depth, is living proof that a pipeline across the Timor Trough is well within present pipelaying capabilities. The Black Sea area has very steep shore approaches, is seismically active, prone to mud volcanoes, mud and rock fall and has an aggressive H₂S-rich sediment. By comparison the Timor Trough is much more favourable for pipelaying. There now should be no debate about the technical feasibility of a pipeline across the Timor Trough." He claims his views are supported by INTEC Engineering of Houston which conducted a feasibility study for Oceanic Exploration in 2002.

8. Australia equally argues that Timor-Leste should be bound by Portugal's past behaviour which indicated acquiescence to Australia's actions outside the boundaries of the present JPDA. But Australia cannot rely simply upon the fact that Petrotimor's concession granted by Portugal was restricted to an area inside the boundaries of the JPDA.
9. Department of Foreign Affairs, Record of Conversation between Mr Keith Brennan and Dr Carlos Empis Wemans, Ambassador of Portugal, May 25, 1971. The note handed to Dr Wemans stated, "In such circumstances, it is a matter for each state to delimit its own continental shelf. Nevertheless, if the Portuguese Government, having considered the views of the Australian Government, should wish to discuss the matter further, the Australian Government for its part would be agreeable."
10. Department of Foreign Affairs, outward cablegram, to Australian Consulate-General, San Francisco, June 23, 1971 (O. 52419).
11. Department of Foreign Affairs, record of conversation between Messrs H. Gilchrist, J.S. Bailey and Dr Carlos Empis Wemans, Ambassador of Portugal, March 25, 1974.
12. Embassy of Portugal, Canberra, diplomatic note delivered to Australian Government, UL-A.2/150, April 18, 1974. The note stated, "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 for the establishment of boundary on the seabed between Portuguese Timor and Australia."
13. On May 3, 1974 there had been a meeting of the Department of Foreign Affairs "Ad Hoc Task Force on Portugal" which was considering relations with Portugal and its territories following the coup in Portugal. The meeting noted "possible criticism of an attitude favouring the union of Timor with Indonesia lest it appear that prospects for the settlement of our seabed boundary (and oil rights) dispute with the Portuguese were colouring our attitude." (Department of Foreign Affairs and Trade, *Australia and the Indonesian Incorporation of Portuguese Timor 1974-1976*, Melbourne University Press, 2000, p 53).
14. Department of Foreign Affairs, Canberra, diplomatic note presented to Embassy of Portugal, November 19, 1974, p 1. On September 26, 1976 an interdepartmental committee convened by the Department of Foreign Affairs had agreed "that the Australian government should reply by note to the Portuguese note for the following reasons:
 - (a) From the international legal standpoint it is essential that the assertions in Portuguese Government's note should not remain unchallenged on the written record. In any future negotiations or litigation it would be vital that Portugal's assertions had been met with a clear statement that under international law the area in question forms part of Australia's Continental Shelf and has been declared to be such since 1953.
 - (b) Such a note setting out Australia's position would help to give needed confidence to Australian mining companies with interests in or near the disputed area to commence or continue drilling."
 (Department of Foreign Affairs and Trade, *Australia and the Indonesian Incorporation of Portuguese Timor 1974-1976*, Melbourne University Press, 2000, p 112)
15. Department of Foreign Affairs, Canberra, diplomatic note presented to Embassy of Portugal, November 19, 1974, p 4.
16. Letter of Oceanic Exploration to Mr C. Hewitt, Department of Minerals and Energy, Canberra, July 28, 1975. The letter stated, "The area begins a short distance from the Island of Timor and extends to the median line between the continent of Australia and the Island of Timor. This is wholly consistent with principles of international law and the Geneva Convention of 1957 (sic). It is further in keeping with the principles enunciated at the recent Law of the Sea conference which principles will probably be ratified at the next conference."

17. Letter of Oceanic Exploration to Mr J. Scully, Department of Minerals and Energy, Canberra, December 10, 1975.
18. Letter of A.. Cotta, Inspector-General of Mines, Lisbon, to J. Gomes, Petrotimor, April 14, 1976.
19. Department of Defence Paper, February 4, 1976, in Department of Foreign Affairs and Trade, *Australia and the Indonesian Incorporation of Portuguese Timor 1974-1976*, Melbourne University Press, 2000, p 696.
20. Submission to A. Peacock, April 26, 1978, Department of Foreign Affairs and Trade, *Australia and the Indonesian Incorporation of Portuguese Timor 1974-1976*, Melbourne University Press, 2000, p 839.
21. *Ibid*, p 840.
22. Article 78(1) UNCLOS.
23. Article 76(1) UNCLOS.
24. Article 56(1)(a) UNCLOS.
25. *Libya-Malta Case*, [1985] ICJ Rep 13, [34]
26. *Libya-Malta Case*, [1985] ICJ Rep 13, [33]
27. *Libya-Malta Case*, [1985] ICJ Rep 13, [39]
28. *Libya-Malta Case*, [1985] ICJ Rep 13, Separate Opinion 61.
29. Personal communication from Professor J.R.V. Prescott, June 21, 2004. Professor Prescott holds no brief for any of the three governments in the present delimitation exercise. He has had a lifetime academic interest in the maritime boundaries of the Timor Sea. He was a scientific and technical adviser for the Republic of Malta in the *Libya-Malta* case.
30. Pat Brazil, who was an Australian official when the maritime boundary was negotiated, informed a parliamentary inquiry in his critique of the Lowe Opinion, dated September 17, 2002, that the 1500m isobath "at the time of the relevant negotiations in 1972 between Australia and Indonesia was identified as the most likely limit for exploitation based on technical limitations of drilling equipment at that time and for a reasonable time in the future".
31. UNCLOS Article 46.
32. V. Prescott, "East Timor's Potential Maritime Boundaries", in *The Maritime Dimensions of Independent Timor-Leste*, D. Rothwell and M. Tsamenyi (eds), University of Wollongong, 2002, 79 at p 89.
33. V. Prescott, Exhibit 11, "Timor-Leste's Possible Boundaries with Indonesia and Australia in the Timor Sea", p 6.
34. This agreement has not yet come into force, in part because it required amendment omitting water column which could now be claimed by an independent Timor-Leste.
35. The boundaries of the JPDA are now set out in the Timor Sea Treaty agreed to by Australia and Timor-Leste.
36. *Libya-Malta Case*, [1985] ICJ Rep 13, [52]
37. *Libya-Malta Case*, [1985] ICJ Rep 13, [53]
38. *Libya-Malta Case*, [1985] ICJ Rep 13, [50]
39. Nuno Antunes, *Towards the Conceptualisation of Maritime Delimitation*, Brill, 2003, p 390.
40. *Gulf of Maine Case (Canada/USA)* [1984] ICJ Rep 4 at [222]
41. Letter to *The Wall Street Journal*, June 25, 2004.
42. Submission by the Bayu Undan joint venture participants to the Joint Standing Committee on Treaties, July 2002, p 3.
43. *Libya-Malta Case*, [1985] ICJ Rep 13, [46]
44. *Libya-Malta Case*, [1985] ICJ Rep 13, [50]
45. Qatar v Bahrain, General List No 87, March 16, 2001, para 176. The same rule was applied by the ICJ in *Cameron v Nigeria*, General List No 94, October 10, 2001.
46. Before the ICJ, Australia had begun its refutation of Portugal's denial "that Australia has long asserted sovereign rights over the area of seabed covered by the Timor Gap Treaty"

- by asserting: "It should be noted that this issue is one which the court cannot determine. Since another state (Indonesia) claims rights over the whole of the continental shelf in question, which does not appertain to Australia, any decision to the extent of Australia's rights is also a decision on the rights of that state." (*Portugal v Australia* [1991-1995], Australia's Rejoinder Part II, Chapter 4, para 276, p 156).
47. On November 24, 2000 at a meeting to discuss Timor Gap issues, UN officials had been warned by Australian officials that opting out of the compulsory jurisdiction of the ICJ was "Australia's get out of jail card". The option had already been put to Cabinet and no minister had objected. The UN officials were warned: "The more ambitious East Timor's claim, the easier it would be for the Government to pursue this approach in terms of living down domestic controversy."
 48. SBS *Dateline*, The Timor Gap, April 24, 2004.
 49. Woodside Energy Ltd, submission to Joint Standing Committee on Treaties, Submission No 21, July 2002, p 4.
 50. Joel Fitzgibbon, (2004) CPD 26375 (H of R); March 10, 2004.
 51. Peter Andren, (2004) CPD 26393 (H of R); March 10, 2004.
 52. Joel Fitzgibbon, (2004) CPD 26377 (H of R); March 10, 2004.
 53. Senator Leonard Harris (2004) CPD 21787 (S); March 24, 2004.
 54. Senator Kerry O'Brien (2004) CPD 21765 (S); March 24, 2004.
 55. *Ibid*, 21768.
 56. Senator Kim Carr (2004) CPD 21777 (S); March 24, 2004.
 57. M. Alkatiri, press release, March 26, 2004, quoted by Senator Bob Brown (2004) CPD 21858 (S); March 29, 2004.
 58. Replayed on ABC *AM*, July 21, 2004.
 59. Mark Latham, radio interview with Neil Marks, 2LM, July 22, 2004.
 60. *The Australian Financial Review*, July 24, 2004.
 61. *Sunday*, Channel 9, July 25, 2004.
 62. In *Towards the Conceptualisation of Maritime Delimitation*, Brill, 2003, Nuno Antunes provides a "test study" on "Maritime Delimitation between Australia and East Timor". Given that he is a serving Portuguese Navy officer, it could be very politic for Timor-Leste to produce legal opinions by outstanding, independent international legal scholars supporting the Antunes position.
 63. Personal communication with author, June 21, 2004.
 64. Gillian Triggs and Dean Bialek, "The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap" (2002) 3 *Melbourne Journal of International Law* 1 at p 26.
 65. He said this in the Timor-Leste Parliament and repeated it to me in our meeting in Dili on July 6, 2004.
 66. "Rich Man, Poor Man", *4 Corners*, ABC TV, May 10, 2004.
 67. Professor Gillian Triggs told 4 Corners: "If there is any credibility to the East Timorese argument on shifting that line further to the west, and if that were to be determined on any objective assessment of the law and of the geographical features that you mention, then there's a very good argument for putting the funds in escrow for a period."
 68. INTERFET used a perpendicular line in this case. According to East Timor, Final Report of the Senate Foreign Affairs, Defence and Trade References Committee, Australian Parliament, December 2000, p 62: "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 Zone of Co-operation, within the sovereignty of East Timor" (see 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, June 14, 2000).
69. J. Cleary, Woodside, *Securing Timor-Leste's Future With The Sunrise Gas Project*, July 2004, p 4.
 70. Woodside claims that delay of the Greater Sunrise project would impose a significant cost on Timor-Leste, severely affecting the value of the Petroleum Fund. According to Woodside, "A five-year delay could cost Timor-Leste \$US500m in lost value by 2020 and \$US1,800m by 2050. A 10-year delay to the project could cost Timor-Leste \$US1,000m by 2020 and \$US3,000m by 2050." (J. Cleary, Woodside, *Securing Timor-Leste's Future With The Sunrise Gas Project*, July 2004, p 4.)
 71. Kevin Rudd was not able to give such a commitment at the Sydney Institute on May 27, 2004. But the Labor members of the Joint Standing Committee on Treaties have said "the ICJ declaration made by the Minister for Foreign Affairs damages Australia's international reputation and may not be in Australia's long-term national interests. The declaration may be interpreted as an effort to intimidate and limit the options of neighbouring countries in relation to any future maritime border disputes. It should also be noted that Australia has never had an adverse finding from the ICJ." (para 4.32, Joint Standing Committee on Treaties, Report No 47, *Review of treaties tabled on 18 and 25 June 2002*, August 26, 2002.)
 72. Personal communication with author, June 21 2004.
 73. V. Prescott, "East Timor's Potential Maritime Boundaries" in *The Maritime Dimensions of Independent Timor-Leste*, D. Rothwell and M. Tsamenyi (eds), University of Wollongong, 2002, 79 at p 90.
 74. Personal communication with author, July 6, 2004.
 75. Nuno Antunes, op cit, p 384.

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His books on Aboriginal issues include *The Wik Debate, One Land One Nation, Sharing the Country, and Land Rights Queensland Style*. His books on civil liberties are *Too Much Order With Too Little Law and Legislating Liberty*. His latest book, *Tampering with Asylum*, compares Australia's asylum policies with other first world countries.

Fr Brennan is an Officer of the Order of Australia (AO) for services to Aboriginal Australians, particularly as an advocate in the areas of law, social justice and reconciliation. In 1996, he and Pat Dodson shared the inaugural ACFOA Human Rights Award. In 1997, he was Rapporteur at the Australian Reconciliation Convention.

In 2002, Fr Brennan returned from 18 months in East Timor where he was the Director of the Jesuit Refugee Service. He was adviser to the East Timorese Church Working Group on the Constitution passed by the Constituent Assembly. He was awarded the Humanitarian Overseas Service Medal for his work in East Timor and was a recipient of the Australian Centenary Medal in 2003 for his service with refugees and human rights work in the Asia Pacific region.



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