CHRISTOPHER WARD
BARRISTER-AT-LAW

OPINION

I have been asked to comment upon the terms of the Timor Gap Treaty (the "Treaty") and associated "understandings" signed between Australia and East Timor on 20 May 2002, and in particular to provide an opinion as to the extent to which the terms of that Treaty may be inconsistent with the potential maritime boundary claims of East Timor as described in the Joint Opinion of Lowe, Carleton & Ward.

The Treaty is expressed in a number of places to be "without prejudice" to the rights of East Timor and Australia to a future permanent delimitation of the sea bed boundaries. Thus Article 2 provides as follows:

> Article 2: Without prejudice
>
> (a) This Treaty gives effect to international law as reflected in the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982 which under Article 83 requires States with opposite or adjacent coasts to make every effort to enter into provisional arrangements of a practical nature pending agreement on the final delimitation of the continental shelf between them in a manner consistent with international law. This Treaty is intended to adhere to such obligation.
>
> (b) 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 of the Treaty provides that:

> Article 9: 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 East Timor 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.

Article 9 must be read with the provisions of "Annex E". Annex E is as follows:

> Annex E under Article 9(b) of this Treaty
>
> Unitisation of Greater Sunrise
>
> (a) Australia and East Timor agree to unitise the Sunrise and Troubadour deposits (collectively known as `Greater Sunrise') on the basis that 20.1% of Greater Sunrise lies within the JPDA. Production from Greater Sunrise shall be distributed on the basis that 20.1% is attributed to the JPDA and 79.9% is attributed to Australia.
>
> (b) Either Australia or East Timor 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 East Timor.

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(c) The unitisation agreement referred to in paragraph (a) shall be without prejudice to a permanent delimitation of the seabed between Australia and East Timor.

(d) In the event of a permanent delimitation of the seabed, Australia and East Timor 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).

Also entered into on 20 May 2002 was a Memorandum of Understanding as follows:

Memorandum of Understanding between the Government of Australia and the Government of the Democratic Republic of East Timor concerning an International Unitisation Agreement for the Greater Sunrise field

1. The Government of Australia and the Government of the Democratic Republic of East Timor, reinforcing their wish to cooperate in the development of the petroleum resources of the Timor Sea in accordance with the Timor Sea Treaty ("the Treaty"), will work expeditiously and in good faith to conclude an international unitisation agreement ("the Agreement") for certain petroleum deposits in the Timor Sea known as Greater Sunrise by 31 December 2002.

2. The conclusion of the Agreement is without prejudice to the early entry into force of the Treaty, and is without prejudice to the agreement recorded in paragraph 9 of the 20 May 2002 Exchange of Notes between the Government of Australia and the Government of the Democratic Republic of East Timor which states that the Treaty is suitable for immediate submission to their respective treaty approval processes and that the parties will work expeditiously and in good faith to satisfy their respective requirements for the entry into force of the Treaty.

3. This Memorandum of Understanding will enter into effect upon signature.

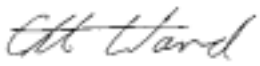
The combined effect of the above provisions and documents is not clear. The Joint Opinion highlighted two issues in relation to the then proposed treaty that formed an annexure to the Memorandum of Understanding between UNTAET and Australia on 5 July 2001. Those concerns, briefly, were that any adoption of the lines of the zone of co-operation as legitimate boundaries, even for the sole purpose of resource sharing, had the necessary consequence that East Timor could subsequently be limited by those lines in future boundary delimitation proceedings on the basis of concepts of equity and acquired rights. The Treaty signed on 20 May is, for relevant purposes, identical with the 5 July draft. It is not immediately clear how the Memorandum of Understanding of 20 May affects the operation of Articles 2 and 9 (I note that it is expressed to be "without prejudice" to Article 9). In my opinion the better view is that it does not materially alter the position.

The more critical problem, adverted to in the Joint Opinion, arises because of the language of Annex E Paragraph (d). That Article does not, in terms, place any obligation on either of Australia or East Timor to agree to a revision to the unitisation presently set forth in Article 9. Thus it is conceivable (and indeed may even be the more likely position) that Australia and East Timor could delimit the sea bed boundary between them in accordance with modern principles of international law, and yet not mutually agree between them that the unitisation set out in Article 9 be varied. Obviously, it is possible to argue that such a construction does not reflect the intention of the parties;

nevertheless it remains a possible interpretation. In my opinion the language of the provisions set out above (particularly in Article 9(b)) suggests that it would be open to Australia, even if a boundary delimitation gave all or most of the sea bed within which Greater Sunrise was located to East Timor's sovereign jurisdiction, to refuse to vary the unitisation set out in Article 9 (being 20.1%:79.9%).

I note in any event that the Treaty provides for a 90:10 split of the sea bed resources within the Joint Development Area. For the reasons set out in the Joint Opinion, in so far as such a sharing of resources depends on an acceptance of a division to the North of the median line, and of the accuracy of the Western lateral line, the division is inconsistent with East Timor's entitlements at international law.

To that extent, and because of the potential effect on East Timor's claims (based on the operation of equitable doctrines in sea bed delimitations) the Treaty is inconsistent with East Timor's potential sea bed entitlements.



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