The Timor Gap Treaty: Creative Solutions and International Conflict

STUART KAYE*

1. *Introduction*

In recent years, much international attention and activity have been directed at the eastern half of the island of Timor and the seabed to its immediate south. This activity has been most dramatic in the last five years, with the conclusion of a most creative treaty to divide up the affected seabed, and a challenge to the legitimacy of that treaty to be brought before the International Court of Justice (ICJ). This paper will endeavour to examine the nature of that treaty, to evaluate its content, structure and the regime which it has initiated, and then critically assess the challenge which is being raised about it before the ICJ. In order to accomplish this however it will be necessary to provide some background to the international situation in the region.

2. *Earlier Delimitation Agreements*

In the early 1970s, Australia and Indonesia entered into negotiations to delimit the boundary between their continental shelves. In a relatively short space of time, they were able to reach agreement on the eastern portion of the boundary, in the vicinity of Papua New Guinea, and stretching across the Arafura Sea.[1] The boundary delimited appears to been derived through application of an equidistance line between the territories of the two States.[2]

In the year following the conclusion of the 1971 Agreement, negotiations pertaining to the seabed of the area immediately to the west continued. Unlike the 1971 Agreement, there was a distinct difference of opinion between the two States as to the method of delimitation.

The area of seabed under negotiation was the Arafura Sea. For the most part the seabed in this region is flat and relatively shallow. Geologically speaking, the Australian continental shelf extends far out to sea, and ignoring

* Postgraduate student, University of Sydney, Faculty of Law. This article is substantially drawn from a chapter of the author's LLM thesis. I would like to thank Professors Ivan Shearer, Martin Tsamenyi and Mr Don Rothwell for their comments on earlier drafts of this article. Any errors or omissions remain my own.

1 *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries*, done at Canberra 18 May 1971, entered into force 8 November 1973: 974 UNTS at 307 (1975) (hereafter referred to as "1971 Agreement").

2 For a general discussion of the 1971 Agreement see Cook, C, "Filling the Gap — Delimiting the Australia-Indonesia Maritime Boundary" (1987) 10 *Aust Ybk Int'l L* 131 at 137; Prescott, J R V, *Australia's Maritime Boundaries* (1985) at 104.

the presence of Indonesia would extend beyond 200 nautical miles. The most prominent feature of this submarine area is the Timor Trough, which lies approximately forty to sixty nautical miles off the island of Timor, and runs more or less parallel to the island.[3] The Trough is over 3000 metres deep in places, and although still the subject of debate by geologists,[4] appears to mark the plate boundary between the Indo-Australian and the Asian continental plates.[5]

In delimiting the seabed in this region, Indonesia appeared to favour the use of an equidistance line, as had been used with the eastern part of the boundary.[6] As the Timor Trough lies much closer to Timor than to Australia, the application of an equidistance line would give Indonesia jurisdiction over both sides of the Trough, and a gain of thousands of square miles of seabed.

Australia, on the other hand, wished to use the Timor Trough as a natural boundary.[7] This is evidenced from Australian practice in granting oil exploration permits in the region prior to 1972. In the eastern sector, Australian oil permits were granted only as far north as an equidistance line would run, and when this area was delimited in 1971, an equidistance line was used. In the area currently under consideration, permits were granted right up to the centre of the Trough, indicating Australia believed it could assert its rights that far north.

The boundary that was negotiated in 1972[8] appears to reflect the Australian position far more than it does the Indonesian.[9] Commencing from point A12, at the end of the previous delimitation line, the boundary maintains a course west, while the path of a median line between the two States would swing southward.[10] The line continues west until it meets the eastern end of the Timor Trough. The line runs along the southern side of the Trough, along the 200 metre isobath.[11] While this represents a concession on the Australian position of the thalweg of the Trough, it is far closer to the thalweg than it is to

---

3 Lumb, R D, "The Delimitation of Maritime Boundaries in the Timor Sea" (1981) 7 *Aust Ybk Int'l L* 72; Cook above n2 at 132; Cook, C, "The Australia-Indonesia Maritime Boundary" in Bateman, W S G and Ward, M W (eds), *Australia's Offshore Maritime Interests* (1985) at 40; Prescott, above n2 at 104.

4 Both Cook and Prescott have prepared lists of relevant authorities that deal with plate tectonics and Australia and Indonesia: Cook, above n2 at 150-1; Cook, above n3 at 44; Prescott, above n2 at 114-6.

5 Most geologists are of the view that the Earth's surface is divided into "tectonic plates" upon which sit the continental land masses. As such, a plate boundary would be the logical location for a continental shelf boundary based upon principles of natural prolongation. See Lumb, above n3 at 72-3; Bergin, A, "The Australian-Indonesian Timor Gap Maritime Boundary Agreement" (1990) 5 *Int'l J Est Coast L* at 383; Cook, above n2 at 150-1.

6 Cook, above n3 at 44; Prescott, above n2 at 105.

7 Cook, above n2 at 134; Cook, above n3 at 43-4; Prescott, above n2 at 104-5.

8 *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971*, done at Jakarta 9 October 1972, entered into force 8 November 1973: 974 UNTS at 319 (1975) (hereafter referred to as the "1972 Agreement").

9 Bergin estimates that Indonesia received only 15 per cent of the disputed area: above n5 at 384-5; Prescott quantifies this percentage by stating that Indonesia received only 3000 of 20,800 square nautical miles in dispute: Prescott, above n2 at 105.

10 Cook, above n3 at 40.

11 Cook, above n3 at 134; Lumb notes that the line runs between the 100 and 200 metre isobath: Lumb, above n3 at 73.

the Indonesian position of the median line. The line is interrupted along its passage on the 200 metre isobath, between points A16 and A17. In 1972, the eastern half of the island of Timor was under the jurisdiction of Portugal. This break in the line, popularly known as the Timor Gap, reflected the Portuguese sector of the island.[12] From A17, the line continues along the Trough until terminating at point A23, where the end of the Trough and the presence of Ashmore and Cartier Islands and Roti Island would begin to have a significant influence on its path.

The reasons for preferring the Australian position can be attributed to the time the boundary was negotiated. Discussions were carried out in 1971 and 1972, shortly after the *North Sea Continental Shelf Cases*. The paramount principle in continental shelf delimitation to come from the Court in those cases was natural prolongation.[13] The ICJ indicated that in delimiting the continental shelf, a State's entitlement was to be the natural prolongation of its territory.[14] Hence if two States were separated by a submarine continental divide, then that divide ought to be the boundary, regardless of equity considerations.

The *North Sea Continental Shelf Cases* gave great strength to the Australian position. Australia could point to the Timor Trough and argue that as the Trough was several thousand metres deep, in a relatively shallow sea, it represented the divide between the Australian and Asian continental plates. As such, everything on the southern side of the Trough must be the natural prolongation of the Australian continent, and the boundary ought to run down the thalweg of the Trough.

Faced with this argument, Indonesia was prepared to largely abandon its position of the median line, perhaps wary that an independent arbitration (or ICJ hearing if it consented to the Court's jurisdiction) would give it even less than the southern 200 metre isobath. To some extent, Indonesia may be considered most unlucky in the timing of the 1972 Agreement, as it is possibly the only maritime boundary agreement to utilise a submarine feature like the Timor Trough in delimiting a boundary.[15]

---

12 Prescott notes that the boundary termini at the edges of the Timor Gap, at points A16 and A17 are at points of equidistance between what was once Portuguese and Indonesian territory: Prescott, above n2 at 105.

13 *ICJ Reports* 1969 3 at 22 and 31.

14 The Court stated: "What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed part of the territory over which the coastal State already has dominion, — in the sense that, although covered by water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural — or the most natural — extension of the land territory of a coastal State, it cannot be regarded as appertaining to that State; — or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area is concerned is to be regarded as a natural extension, even if it be less close to it". Id at 31.

15 See Nelson, L D M, "The Roles of Equity in the Delimitation of Maritime Boundaries" (1990) 84 *AJIL* 837 at 847-8.

3. *Timor Gap Treaty*

A. Background

As noted above, there was a gap in the continental shelf boundary negotiated in 1972 by virtue of the Portuguese presence in East Timor. In 1974, Australia sought to open negotiations with Portugal in order to settle this boundary.[16] The negotiations remained unsettled when events overtook them.

In 1975, following the fall of the Salazar regime in Portugal, the new Portuguese Government sought to take a more internationally responsible stand with regard to its overseas colonies. It scaled back its operations in East Timor, and began to negotiate with the main Timorese political groups with a view to self government and independence.[17] The situation soon deteriorated, and following armed clashes between the Timorese political factions, Portugal withdrew all its government officials from the main island and, shortly after, from the colony altogether.[18]

A period of significant unrest followed, which was effectively ended by the intervention of the Indonesian army in October 1975. Within 6 months, Indonesia incorporated East Timor as its twenty-seventh province, and began to seek international recognition for its control of the territory.[19]

Australia initially protested, if unenthusiastically, against the Indonesian invasion.[20] However, it quickly adopted a non-committal stance with regard to Indonesia's action, and as early as 1978 gave de facto recognition of Indonesian sovereignty over the eastern half of Timor.[21] By 1979, this had become de jure recognition,[22] and negotiations began on closing the gap in the continental shelf boundary in 1978.[23]

---

16 It is worth noting that Portugal made its position on the appropriate boundary from its point of view when it granted an exploration lease extending out as far as the median line: Valencia, M D and Miyoshi, M, "Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas?" (1986) 16 *ODIL* 211 at 228; Stepan, S, *Credibility Gap: Australia and the Timor Gap Treaty* (1990) at 1.

17 These events are dealt with far more comprehensively in Dunn, J, *Timor: A People Betrayed* (1983) at 56-101; see also Suter, K, "Timor Gap Treaty: The Continuing Controversy" (1993) 17 *Marine Policy* 294 at 294-5.

18 Dunn, above n17 at 165-206; Suter, above n17 at 294-5.

19 Dunn, above n17 at 282-341; Suter, above n17 at 295-6.

20 Australia voted for a resolution condemning the Indonesian invasion of East Timor in 1975, GA Resolution 3485 (XXX), 12 December 1975, abstained on later resolutions until 1978, when it began to vote against resolutions on East Timor presented by Portugal. See Dunn, above n17 at 358.

21 See the statement by Andrew Peacock, then Minister for Foreign Affairs indicating de facto recognition of Indonesian sovereignty over East Timor on 20 January 1978: reprinted (1983) 8 *Aust Ybk Int'l L* 279.

22 On 15 December 1978, the Minister for Foreign Affairs stated that Australia would, at some point in the near future, recognise that Indonesia had *de jure* sovereignty over East Timor: reprinted in (1983) 8 *Aust Ybk Int'l L* 281. The actual recognition announcement was made on 8 March 1979: reprinted in (1983) 8 *Aust Ybk Int'l L* 281-2; for an analysis of Australian recognition policy see generally Charlesworth, H, "The New Australian Recognition Policy in Comparative Perspective" (1990) 18 *MULR* 1.

23 Lumb says negotiations began in 1978: Lumb, above n3 at 74. Willheim says the negotiations commenced in 1979: Willheim, E, "Australia-Indonesia Sea-Bed Boundary Negotiations: Proposals for a Joint Development Zone in the 'Timor Gap'" (1989) 29 *Nat Res J*

A number of publicists have suggested reasons for the speed of Australia's recognition of Indonesia in East Timor. While these cannot be explored, certainly the need to delimit the continental shelf between Australia and East Timor had become an important consideration. As early as the 1960s, Australian mining companies had been active in searching for oil in the vicinity of the Gap. In 1974, the first oil and gas discoveries in the area were announced, and the level of exploratory activity increased.[24] Clearly, there was the potential for the continental shelf in the Gap region to yield significant quantities of oil and gas, and this provided a significant impetus towards the encouragement of negotiations.[25]

For any oil or gas to be exploited, there could be no uncertainty of ownership of the seabed of the region. Companies would not be prepared to invest millions of dollars to have their right to do so open to question.[26] Nor could an agreement with Portugal post 1975 solve the problem as, since Indonesia was far closer, and its relations with Australia of far greater importance, its concurrence in any arrangement was vital.

B. Negotiation of the Gap Treaty

(i) Position of Australia

To close the Gap, Australia was essentially seeking a continuation of the 1972 boundary, running along the 200 metre isobath of the Timor Trough.[27] Technically it could ask for a line drawn along the thalweg of the Trough, but realistically, this would be an extremely unlikely result given the existence of the earlier boundary.

Australia could rely on a number of arguments in order to support its position. Firstly, it could draw from the 1958 Continental Shelf Convention and the 1982 Law of the Sea Convention.[28] The 1958 Convention maintained the

---

821 at 825.

24 Poll, J, "The Exploration Potential of the Timor Gap Treaty Area" [1990] *AMPLA Ybk* 266 at 267-70; 1970 is the date given by Cook for the discovery of the Kelp Prospect, which she states has been estimated to contain between 500 million and 5 billion barrels of oil: Cook, above n3 at 41; Moloney notes that in the early 1970s "at least nine major resource companies" were engaged in active petroleum exploration programs, including BHP, Shell, Woodside, BP and WMC: Moloney, G J, "Australian Indonesian Timor Gap Zone of Cooperation Treaty: A New Offshore Petroleum Regime" (1990) 8 *J Energy & Nat Res L* 128 at 130; McCorquodale, J, "The Law Smooths a Path for Petroleum Politics" (1993) 31 *NSW L Soc J* 32; Suter, above n17 at 297-9.

25 Martin, W and Pickersgill, D, "The Timor Gap Treaty" (1991) 32 *Harv Int'l LJ* 566 at 568.

26 This can be evidenced by the uncertainty that existed in the 1970s and 1980s when oil companies were reluctant to commit large amounts of resources to the Gap region: Valencia and Miyoshi, above n16 at 228-30.

27 Prescott, above n2 at 115.

28 In 1979, both States were signatories to the 1958 Shelf Convention. Australia had also ratified the Shelf Convention before it came into force, although Indonesia had not (and still has not) ratified it. Both States were also to sign the 1982 Law of the Sea Convention when it was opened for signature. Indonesia ratified that Convention in 1986. Australia has yet to ratify the 1982 Convention, although there is reason to suspect Australia is slowly moving towards ratification: see Burmester, H, *Australian Policy and the Law of the Sea* (1991) 1-17.

depth/exploitability criteria, and on this basis, the Trough neatly prevented Indonesia from extending its jurisdiction beyond it. Similarly, Australia could also point to the maintenance of physical criteria for delimiting the continental shelf at United Nations Conference on the Law Of the Sea (UNCLOS) III.[29] The Trough appeared to present a physical division between the Australian continent and the Indonesian archipelago, and a number of geologists could be found to support that impression.[30] While distance as a criterion might be of great importance for the delimitation of an Exclusive Economic Zone (EEZ), Australia could note that it claimed no EEZ, and the boundary in issue was not an EEZ boundary.[31] Indonesia had signed both these Conventions, and as such should be held to accept the principles contained therein.

Secondly, Australia could point to the rulings of the International Court of Justice and other international tribunals to support its position. The ICJ in the *North Sea Continental Shelf Cases* strongly endorsed the principle of natural prolongation. The depth of the Trough, and its position between, very broadly, Asia and Australia, appeared to mark a natural boundary in the continental shelf. Such a boundary used to delimit the respective shelves would neatly accord with the ICJ's view.[32] While the Hurd Deep had been passed over in the *Anglo-French Channel Arbitration* as an accidental feature, the Court of Arbitration had not sought to indicate the ICJ was wrong in the *North Sea Continental Shelf Cases*, and Australia could argue that the Timor Trough was deeper and more significant in any case.[33]

Finally, Australia could turn to Indonesian state practice in the region. It could be argued that Indonesia had accepted the validity of Australia's position in regard to the Trough by agreeing in the 1972 Agreement to the boundary running along the 200 metre isobath of the Trough. As such, the simplest solution would be to continue along the 200 metre isobath, as would have likely been the case had Indonesia controlled East Timor in 1972. In any delimitation of the Gap, Australia could point to the 1972 Agreement as a relevant circumstance, and use it to have the line placed further north.

(ii) Position of Indonesia

Indonesia took a very different view to Australia. Essentially it maintained its argument from the original delimitation agreements, that is a median line was the most appropriate solution.[34] However, unlike 1972, the Indonesian position was far stronger, for a number of reasons.

---

29 Lumb, above n3 at 74.

30 Burmester, H, "The Timor Gap Treaty" [1990] *AMPLA Ybk* 233; Valencia and Miyoshi, above n16 at 228; Prescott, above n2 at 116.

31 This argument faces the difficulty that in 1979 Australia claimed an exclusive fishing zone (the Australian Fishing Zone (AFZ)), which for delimitation purposes functions as an EEZ. As noted above, the boundary of the AFZ with Indonesia has not been permanently settled, and the temporary arrangement which delimits a provisional boundary does not follow the Trough.

32 Lumb, above n3 at 74; Suter, above n17 at 299-300; see also above n14.

33 18 ILM 397 (1979); This argument is put by Lumb, although he makes it in 1981, prior to four of the major cases in this area: Lumb, above n3 at 84.

34 Burmester, above n30 at 233; Valencia and Miyoshi, above n16 at 228.

First, it could reject the validity of the depth/exploitability criteria of the 1958 Continental Shelf Convention. Although a signatory to that Convention, Indonesia never ratified it, so could not be formally bound. In addition, given the widespread disapproval of the depth/exploitability criteria expressed at UNCLOS III, there was no question that it could represent customary international law.[35]

Secondly, as time went on, international law and practice tended to weaken the Australian position. During the course of the negotiations, a string of cases all sought to distinguish and limit the paramount principle of the *North Sea Continental Shelf Cases*.[36] The appropriateness of utilising a boundary based upon natural prolongation was questioned by the ICJ in a number of circumstances, and this made the application of the principle to the boundary south of Timor unacceptable to the Indonesian Government. The perception that Indonesia had, in the words of one minister, been "taken to the cleaners" in 1972 also increased Indonesia's conviction that any line using the Timor Trough was completely unacceptable.[37]

(iii) A Joint Development Zone (JDZ) as a compromise position

With neither side prepared to give ground on their respective positions, in 1984, Australian officials suggested that the negotiations be based around a Joint Development Zone (JDZ) for the disputed region.[38] This initially received a cool reception from the Indonesian officials, but in October 1985 there was agreement in principle between the two States that a JDZ be used to fill the Gap.[39] Negotiation of the boundaries of the JDZ presented some difficulties, especially given a deterioration in Australia-Indonesia relations in 1986[40], however in 1988 an interim agreement was signed.[41] This committed both States to the reaching of a final agreement within a year, a deadline which was just met.[42]

---

35 See generally statements by delegations on the continental shelf: United Nations, *Third United Nations Conference on the Law of the Sea. Official Records* (1975) 2:142-71; and especially the statement by the Nepalese delegate to the effect that "more than ninety" States were dissatisfied with then existing criteria: id at 7:38.

36 See generally *Tunisia/Libya Continental Shelf Case* ICJ Reports 1982 18 at 46-7 and 49-59; *Gulf of Maine Case* ICJ Reports 1984 247 at 293; *Guinea/Guinea-Bissau Arbitration* reprinted in *International Boundary Cases* (1992) 2:1301 at 1351-2; *Libya/Malta Continental Shelf Case* ICJ Reports 1985 13 at 35; *St Pierre and Miquelon Case* 31 ILM 1148 (1992) at 1165; see also Evans, M D, *Relevant Circumstances and Maritime Delimitation* (1989) at 109.

37 Stepan, above n16 at 3. The Indonesian minister who made the "cleaners" comment was the then Foreign Minister, Dr Mochtar. See also Prescott, above n2 at 116.

38 Stepan, above n16 at 3-4.

39 Stepan, above n16 at 6; Moloney, above n24 at 128.

40 Relations soured in 1986, following the disclosure of the extensive property interests of the Suharto family in the *Sydney Morning Herald*: Stepan, above n16 at 6.

41 The text of the release concerning this provisional arrangement is reprinted at (1989) 4 *Int'l J Est Coast L* 149-51; (1989) 7 *J Energy Nat Res L* 78; see also above n5 at 384-5; Moloney, above n24 at 128.

42 Smart, A, "The Timor Gap Zone of Co-operation Treaty" in Anderson, D (ed), *Australia and Indonesia: A Partnership in the Making* (1991) at 49.

C. *Provisions of the Gap Treaty*

The Gap Treaty was finally concluded in 1989, and has the distinction of being signed by the Foreign Ministers of Australia and Indonesia while flying over the Zone of Cooperation.[43] The Treaty is a quite substantial document, covering 127 pages, with 34 articles and four annexes. The major features of the Treaty are discussed below.

(i) Zone of Cooperation

The raison d'être for the Treaty is to delimit the continental shelf in the Gap, and with its second article, the Treaty establishes a Zone of Cooperation (ZOC). It is important to note that the Treaty only divides the Gap for the purposes of petroleum and similar hydrocarbon deposits.[44]

The ZOC itself is delimited in Annex A of the Treaty, and is divided into three areas, A, B and C. It covers over 60,000 square kilometres, and has been described as having the shape of a coffin.[45] In terms of its area, it represents the extremes that both States could claim, and all that lies between them. That is to say, the northern extremity of the ZOC approximates the bathometric axis of the Timor Trough, which is the furthest north that any Australian shelf claim could be made, in the absence of any other land territory. Similarly, the southern boundary of the Zone approximates a line 200 nautical miles from the island of Timor, representing the potential ultimate unhindered reach of Indonesia. The northern and southern edges of the ZOC are joined by simplified equidistance lines.

The boundaries of the areas within the Zone also reflect the positions of the parties. Area C, in the north of the ZOC, is separated from Area A by a line approximating the 1500 metre isobath. Area B, in the Zone's south, is divided from Area A by a line representing a simple version of the median line between the two parties.

This division of the Zone is useful. First, it does not prejudice the future negotiating positions of the parties with respect to the permanent boundary, as its area must encompass the boundary, no matter where that boundary ultimately be placed. Secondly, the areas within the ZOC reflect the difference between the range of extremes. The north of Area A appears to indicate Australia's position with regard to where it believes a permanent boundary should run, while the median line closing off the south of Area A indicates Indonesia's view of the issue. The area in between is the area in dispute between the two parties, and as such is the area subjected to joint control.

---

43 *Treaty between Australia and the Republic of Indonesia on Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia*, done over the Timor Gap 11 December 1989, entered into force 9 February 1991: *Aust TS* (1991) No 9; 29 ILM 469 (1990) (hereafter referred to as the "Gap Treaty").

44 Article 2; Moloney points out that the definition of "petroleum" in Article 1 of the Treaty is somewhat narrower than the definition in the *Petroleum (Submerged Lands) Act* 1967 (Cth): Moloney, above n24 at 129.

45 Moloney notes that this phrase was coined in an article in the *Australian Financial Review* on 10 November 1989: Moloney, above n24 at 129-30; see also above n5 at 385.

(ii) Jurisdiction in the ZOC

The division of jurisdiction within the ZOC also reflects the strengths of each parties' claim to it. In Area C, the most northerly of the three areas, Indonesia has complete civil and criminal jurisdiction, but is required to account for 10 per cent of the petroleum tax revenue generated in the Area. A similar arrangement exists in Area B, where Australia may exercise unfettered jurisdiction but has agreed to account for 16 per cent of the tax revenue generated from petroleum.[46]

A number of reasons exist for the disparity in tax shares to the other state in Areas B and C. First, it appears to indicate the greater urgency brought by Australia to the negotiations. It was an Australian suggestion that the Gap be temporarily delimited by some form of joint regime, and not one that received an alacritous initial reception. A greater share to Indonesia would therefore sweeten the inducement for their participation.[47]

Additionally, Area B is far larger than Area C, and appears to have far greater potential for viable oil production. As such, the tax revenue which may ultimately flow from Area B is likely to far exceed the tax revenue from Area C. Therefore while Australia would be surrendering a greater share of its tax revenue, the size of that revenue would be far larger than Indonesia's taxation return from Area C.

Finally, it may represent, from an Indonesian point of view, tacit recognition that their position, in respect of the final delimitation, is stronger than that of Australia. The ZOC itself may not indicate where a final delimitation line may run, but the decline of natural prolongation, and the position of the provisional fisheries line[48] are suggestive that a more southerly course than the 1972 line is likely. As such, Indonesia may have demanded that its entitlement to tax revenue in Area B should reflect the greater strength of its view. While this explanation may have little currency in Australia, it may echo Indonesian perceptions of the Gap Treaty, given that a number of Indonesian publicists have questioned whether the Treaty gives Indonesia a fair share of the region.[49]

---

46 Both States must also notify each other of any changes to their petroleum or exploration arrangements in Areas B and C, and should there be any significant changes in the levying of tax from the areas, the percentages to be shared are open to renegotiation: Article 4; see also Moloney, above n24 at 131.

47 Stepan, above n16 at 3.

48 *Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of the Commonwealth of Australia concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement*, done at Jakarta 29 October 1981, unpublished; for a discussion of this arrangement see Willheim, above n23 at 824-5;(1981) 52 *AFAR* 568; Prescott, above n2 at 106; Prescott, J R V, "Maritime Boundaries and Related Issues in the Regions Around Australia" (1983) 10 *Dyason House Papers* 24 at 27; Evans, G, "Australia and Indonesia" in Anderson, D (ed), *Australia and Indonesia: A Partnership in the Making* (1991) at 4.

49 For example, Moloney has noted that Professor Johannes, Head of the Indonesian National Research Council, has been reported in the Australian press as saying Indonesia will receive a lesser share of the oil revenue generated by the ZOC, as Area B has more oil in it than Area C. He is quoted as saying that there should be an equal division of oil revenues for all of the Zone: Moloney, above n24 at 131.

Area A is the crucial part of the ZOC. As noted above, it lies between the lines most strongly pressed by both Australia and Indonesia, and is the area where a compromise boundary between the two States proved impossible to draw. Neither State would give ground, and Area A preserves this impasse, as it gives neither State jurisdiction nor control.

(iii) Legal Regime of Area A

The laws applicable in Zone A highlight the accommodation and compromise which permitted its creation.[50] Part VI of the Treaty deals with the identification of the laws which are to apply in any given situation. As oil platforms are likely to be built in Area A, and so be occupied for extended periods by significant numbers of people, it was necessary to spell out, in some detail, which courts and which legislation were relevant to the settling and determination of a wide variety of disputes.

Contract Law

Firstly, perhaps reflecting its primacy in the eyes of the parties, the first provision of Part VI, Article 22 deals with the law applicable to production sharing contracts. Not surprisingly, this is to be the law stated within the contract to be the proper law of the contract.[51]

Customs, Quarantine and Immigration

Customs, immigration and quarantine are considered in Article 23, and are matters of some importance. Both States wished to ensure that the joint zone could not be used as a mechanism to circumvent its customs and immigration control. This was a particularly important concern for Australia, given its tough quarantine laws and its continuing desire to remain free of a number of dangerous diseases, plants and animals. Article 23(1) thus allows both States to apply its customs and immigration legislation to persons and goods entering and leaving the Area.[52] In order to prevent third States from circumventing these protections, the Treaty requires (unless otherwise authorised) that all personnel and material be transported through either Australia or Indonesia.[53] Article 23(3) allows for consultation between the parties on the entry of goods and persons into Area A, while Article 23(4) allows both States, without prejudice to the other, to apply their own legislation to anyone illegally entering the Area, and in this too they may choose to coordinate their efforts. Presumably to encourage development, all goods and equipment entering Area A used for petroleum operations, and any goods and equipment permanently leaving for Australia or Indonesia, are to be duty free.[54]

---

50 Burmester describes the approach of the negotiators as one seeking "sovereignty neutral" solutions to problems: Burmester, H, "Zone of Cooperation Treaty" [1990] *Maritime Studies* 16 at 17

51 See also Wilde, D and Stepan, S, "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia" (1990) 18 *Melan LJ* 18 at 21; above n25 at 574; Moloney, above n24 at 134.

52 Above n30 at 242; Wilde and Stepan, above n51 at 21; above n25 at 574-5; above n50 at 17-8; above n5 at 389.

53 Article 23(2).

54 Article 23(5); see also above n50 at 17; Moloney, above n24 at 134; above n30 at 242.

Employment and Occupational Health

Article 24 of the Treaty deals with employment in Area A. Preference is to be given to Australian and Indonesian nationals (or permanent residents) in the employment of persons in the Zone, with their employment in equivalent numbers, taking into account "good oilfield practice".[55] This is designed to prevent the employment of low-cost third world labour in Area A.[56]

Article 24(2) deals with employment terms and conditions. Contracts or collective agreements can be used to set out the terms and conditions, which must include some form of workplace insurance and compensation scheme,[57] and also set out details of remuneration, leave, termination and periods of duty or overtime. Any such agreement must indicate which State's law under which it is to operate.[58] Most notably, terms and conditions of employment in Area A must be no worse than those existing for comparable activities in both Australia and Indonesia.[59] Industrial disputes are to be resolved by negotiation, by a special tripartite ad hoc committee or through the conciliation and arbitration systems in the two States,[60] although the election as to which mechanism to use must be made in the workplace agreement.[61] Article 24(3) extends these requirements to those employed on vessels in Area A engaged in petroleum related activities, regardless of the flag of the relevant vessel.[62] Health and safety standards and procedures for Area A are dealt with in Article 25. This article empowers the Joint Authority[63] to develop such standards and procedures to be applied to petroleum installations in Area A, having due regard to the systems, standards and procedures operating in Australia and In-

---

55 Article 24(1).

56 Above n30 at 242-3; above n50 at 18.

57 The Treaty does allow for the operation of a presently existing domestic workers' compensation scheme in Area A. Burmester cites the Northern Territory's workers' compensation scheme as an example that could be used in the Area, above n30 at 242.

58 Article 24(7).

59 The piece of Article 24(2) in issue reads: "The terms and conditions shall be no less favourable than those which would apply from time to time to comparable categories of employment in both Australia and the Republic of Indonesia". Moloney has noted that there is some ambiguity in this statement. He points out that elements in the popular press have stated that the provision will see Indonesian workers paid at Australian rates, well in excess of what they might expect in Indonesia for the same kind of work. Moloney submits that this does not appear to have been the intention of the parties, particularly when viewed in the context of Article 24(4) which deals with discrimination based on nationality: Moloney, above n24 at 134-5.

60 Article 24(5). In addition, Article 24(6) permits recognised (by either State) employer and/or employee organisations to represent the protagonists in any negotiation or conciliation and arbitration proceedings as described in Article 24(5).

61 Article 24(7).

62 Article 26 specifically deals with such vessels. It provides: "Except as otherwise provided in this Treaty, vessels engaged in petroleum operations shall be subject to the law of the Contracting State whose nationality they possess and, unless they are a vessel within the nationality of the other Contracting State, the law of the Contracting State out of whose ports they operate, in relation to safety and operating standards, and crewing regulations. Such vessels that enter Area A and do not operate out of either Contracting State shall be subject to relevant international safety and operating standards under the law of both Contracting States."

63 See below at 85-6.

donesia. Any standard developed must be at least as effective as the equivalent standards in those States.

Criminal Jurisdiction

Criminal jurisdiction in Area A also reflects the compromise position of the two Parties. Article 27(1) provides that criminal jurisdiction is to be based upon the nationality or permanent residency of the offender, provided that the offender is a national or resident of either Australia[64] or Indonesia.[65] For the nationals of third States, both Australia and Indonesia have jurisdiction, with a proviso that a person shall not be subject to double jeopardy or double conviction. This proviso extends to the situation where one State decides, in the public interest, not to prosecute the act or omission in the Area.[66] The Treaty states that the parties ought to consult as to which would be the most appropriate State to try a third State offender, suggesting that the nationality of any victim and the interests most affected as relevant considerations in such a decision.[67] Vessels and aircraft in Area A are to be under the criminal jurisdiction of the flag State.[68]

Cooperative measures to ensure the overlap of criminal jurisdiction does not create problems are dealt with in Articles 27(4) and (5). Assistance and cooperation in the collection of evidence[69] and for law enforcement[70] can be the subject of special agreements between Australia and Indonesia, and where the national of one State is the victim of an offender being prosecuted in the other State, the victim's State is entitled to be informed as to the action being taken by the other State.[71]

Civil Jurisdiction and Taxation

Claims arising out of activities taking place in Area A can be brought in the courts of the contracting State whose nationals or permanent residents have suffered damage. The appropriate law to be applied is the lex fori.[72]

Article 29 of the Treaty provides that both States have jurisdiction to apply tax laws to activities related to the exploration and exploitation of petroleum in Area A as if the Area was part of their continental shelf.[73] In order to avoid the obvious problem of double taxation, the Treaty establishes a Taxation Code, which is found in Annex D. The Code covers some 13 Articles, and will not be examined in any great detail here.

---

64 For a discussion of the legislation applicable see Saunders, C, "Maritime Crime" (1979) 12 *MULR* 158; see also Moloney, above n24 at 135.

65 Where a person is a permanent resident of one of the contracting States, and a permanent resident of another, then the State having the offender as a national has criminal jurisdiction: Article 27(1); see above n50 at 18.

66 Article 27(2)(a).

67 Article 27(2)(b).

68 Article 27(3); above n50 at 18.

69 Article 27(4)(a).

70 Article 24(5).

71 Article 27(4)(b).

72 Article 28.

73 Above n50 at 17.

Briefly, the Code provides that individuals working in Area A shall be subject to their own State's tax if they are nationals or residents of Australia or Indonesia.[74] Burmester has suggested that such a compromise was seen as acceptable because it was envisaged that approximately equal numbers of the nationals of both States would be employed in the Area.[75] Individuals from third States must pay tax levied by both States, although they are to receive a 50 per cent rebate from both.[76] Legal entities that are not individuals are to pay tax to both States, but only upon 50 per cent of their taxable income.[77] Separate arrangements exist for royalties, dividends and interest paid by a contractor in Area A.[78]

(iv) Exploitation and Administration of Area A

As Area A is an area where neither Australia nor Indonesia has any paramountcy or control, the administration of the Area, particularly with regard to the allocation of oil exploration rights, was bound to present the negotiators some difficulty. The solution arrived at was to hand the administration of the Zone to two cooperative bodies: the Ministerial Council and the Joint Authority. These bodies are ultimately responsible for the allocation and exploitation of the oil-bearing areas in Area A, and their roles and functions will be considered separately below.

Ministerial Council

The Ministerial Council for the Zone is established and its functions circumscribed in Part III of the Treaty. It consists of equal numbers of designated Australian and Indonesian Government ministers,[79] and in ordinary circumstances meets annually.[80] Meetings are normally to be held alternately in Australia and Indonesia, and be alternately chaired by nominated Australian or Indonesian ministers.[81] In addition to these arrangements to ensure equal representation, Article 5(5) of the Treaty requires all Council decisions to be arrived at by consensus. In this way, decisions affecting the Zone can only be made with the concurrence of both Treaty States, therefore giving neither State even an alternating control through holding the chair. Membership of the Council was four ministers at the inaugural meeting in Bali in 1991, but it is envisaged that usually only the two Petroleum Ministers from each State will attend.[82]

The functions of the Ministerial Council are set out in Article 6 of the Treaty. Its primary function is stated as having "overall responsibility for all matters relating to the exploration for and the exploitation of the petroleum re-

74 Articles 9 & 10, Annex D, Taxation Code; see Moloney, above n24 at 140; above n25 at 575; above n50 at 17.
75 Above n30 at 245.
76 Article 11(2), Annex D, Taxation Code; see Moloney, above n24 at 141; above n25 at 575; above n50 at 17.
77 Article 4, Annex D, Taxation Code; see Moloney, above n24 at 140-1; above n25 at 575.
78 Articles 5, 6, 7, 8, and 12, Annex D, Taxation Code; Moloney, above n24 at 141.
79 Article 5(2).
80 Article 5(3).
81 Article 5(4).
82 Above n42 at 50.

sources in Area A of the Zone of Cooperation".[83] Within this general responsibility, the Treaty enumerates a detailed list of specific functions, which include supervision of the Joint Authority and policy-making considerations with regard to Area A.[84] The Council is also directed that in the exercise of its functions, it must ensure the "optimum commercial utilisation" of Area A, consistent with sound oilfield and environmental practice.[85]

Joint Authority

The Ministerial Council's role is essentially supervisory and policy oriented, and so the practical management of Area A is the responsibility of the Joint Authority.[86] The Authority's structure also reflects the nature of the Gap Treaty, with an equal split in functions and personnel between Australia and Indonesia.

First, the executive directors of the Authority are to be appointed by the Ministerial Council, and there is to be one from each State.[87] The Authority itself consists of four directorates, namely Financial, Technical, Legal and Corporate Services. Each is headed by a director, who together with the two executive directors make up the Authority's Executive Board.[88] Again, the structure reflects the equality of compromise in the Treaty, the two most important of the four directorates, Financial and Technical, not to be headed by both Australians or Indonesians.[89] If one is held by an Australian, the director of the other must be an Indonesian. Even the locations of the directorates maintains the balance. While the head office of the Joint Authority is in Indonesia, it must maintain an office in Australia, and the technical directorate must be based at that office. As such, the principal directorates are located in each of the two States.[90]

The functions of the Joint Authority are spelt out in Article 8. These are listed in some detail,[91] but can be summarised without difficulty. Essentially, the Joint Authority is responsible for the division of Area A into contract areas, the entering into contracts with oil producers for the extraction of that oil, the regulation of oil exploration and production activities in Area A, and various miscellaneous reporting and regulatory functions.

---

83 Article 6(1); Wilde and Stepan note that the powers of the Ministerial Council are "akin to those of the Joint Authority under [the] *Petroleum (Submerged Lands) Act* 1967 (Cth)": above n51 at 20.

84 For the list of functions see Article 6(1)(a) – (s); Bergin notes that the major decision-making powers applicable to the ZOC are retained by the Ministerial Council: above n5 at 388.

85 Article 6(2); see above n51 at 20; Moloney, above n24 at 132.

86 Moloney states that while the Ministerial Council is the principal policy-making body for the ZOC, its day-to-day administration and management is left to the Joint Authority: Moloney, above n24 at 131.

87 Article 9(2). Even the appointment of the executive directors reflects the equality nature of the Treaty. Article 9(1) requires that the executive directors are to be selected from lists of equal numbers provided by both States.

88 Article 9.

89 Article 9(2).

90 The head office of the Joint Authority is in Jakarta, while the office of the Technical directorate is in Darwin.

91 Article 8 has the functions listed from (a) to (u), with (u) allowing the Ministerial Council to give it other functions if that body wishes.

The primary task of the Joint Authority, to enter into Production Sharing Contracts (PSC) and to regulate the behaviour of contractors in extracting oil and other petroleum products under the Petroleum Mining Code, will be examined in more detail below.[92] Before dealing with the PSCs and the Code, there are a number of subsidiary issues affecting the Joint Authority that ought to be considered.

First, like all the other elements of the Treaty, the decisions made by the Joint Authority are to reflect the equality of the two parties. All decisions made by the Authority are to be by consensus, and failing that, the matter in question is to be referred to the Ministerial Council.[93] The Authority's powers are also limited in respect of the more commercially oriented issues involved in the administration of A. The Authority cannot, for example, enter into contracts without Council approval, and can only make recommendations to the Council as to whether oil companies ought to be granted contracts[94] or have their contracts terminated.[95]

One interesting feature about the Joint Authority is the arrangement for its funding. While both States are to initially support the Authority,[96] it is to be funded in the long term by the oil revenue that Area A is to generate.[97] The hope is that the Authority will become self-funding as soon as possible.

The Petroleum Mining Code and Production Sharing Contracts

The rights and obligations of the Joint Authority and petroleum producers are dealt with in the Petroleum Mining Code, in Annex B of the Treaty. The Code is, in its length and subject matter, more extensive than the Treaty itself, with some 48 articles dealing with a variety of administrative matters.

The Code firstly divides the area into blocks, which are to be divided into further sections at the discretion of the Joint Authority.[98] This to provide the identification of areas allocated for oil exploration and production.[99] Burmester has estimated that there are about 450 such blocks in Area A.[100]

The Code then considers the rights and obligations of the contract between the Authority and the producer. Notably, a contract will only give a producer the right to extract oil from the block identified in the contract. It does not pass any title to the oil extracted. Rather the contract will specify a share of

---

92 In this regard, the Treaty provides that the Joint Authority is to have a juridical personality in both Australia and Indonesia, allowing it to sue, and be sued in its own name: Article 7(2); see also Moloney, above n24 at 133.

93 Article 7(3); see also Moloney, above n24 at 133.

94 Article 8(b). The Ministerial Council must also authorise the transfer of contract rights to other oil producers — Article 8(e).

95 Article 8(c) — where the contractors do not meet the terms and conditions of the contract. However, the Authority has complete control where a contract is to be terminated by agreement with the contractors — Article 8(d).

96 Article 11(2) provides that where the Authority cannot meet an obligation from its own resources, the two States will both contribute equally to meet that obligation.

97 Article 11(1).

98 Article 2, Annex B, Petroleum Mining Code.

99 Article 2(3), Annex B, Petroleum Mining Code.

100 Above n30 at 238; Smart estimated there would be 10 to 15 contract areas with 30 to 40 blocks in each: Smart, A, "Timor Gap Zone of Cooperation" [1990] *APEA J* 386 at 388.

the oil to which the contractor will be entitled after the oil has been successfully dispatched from the well site.[101] Until loading onto the tanker, the Joint Authority will be the owner of all the oil, and will be seised of a not insignificant percentage of the oil recovered even after loading.[102] The Joint Authority has the power to market the petroleum recovered itself, and reimburse the contractor,[103] but it appears that the preferred method of marketing will be by the contractor, with reimbursement to the Authority.[104]

The contract to be concluded between the Authority and the producer is to be based on the Model PSC, which is considered below. Some details of the contract are specified in the Code. Firstly, the term of the contract is to be thirty years,[105] although there are provisions for relinquishment,[106] termination[107] and extension.[108]

Secondly, all aspects of oil exploration and exploitation are regulated. The Authority is to be notified within 24 hours of any petroleum discoveries,[109] and must give approval for any construction of any rig, structures[110] or pipelines.[111] Work is to commence within 6 months of the establishment of a permanent structure,[112] and the Authority can make regulations about rates of production,[113] insurance,[114] the removal of property from Area A,[115] and the establishment of safety zones.[116] More contentious, the Authority is also entitled to direct that a contractor supply it with any technical or financial information about its activities.[117] Of concern to McDonald is that, regardless of confidentiality agreements, the holders of contracts for neighbouring blocks are entitled to access all the Authority's data for any particular block.[118] He believes that the result of such an arrangement may discourage exploration and seismic investigation of promising areas at the edge of a block to prevent alerting a competitor to the existence of a sizeable deposit, as well as depriving companies of the legitimate commercial advantage gained from discovery.[119]

The remainder of the Petroleum Mining Code deals with a variety of matters. The Joint Authority can make regulations under Article 37 in relation to

---

101 Article 4(3) and (4); Annex B, Petroleum Mining Code; for a useful discussion as to the types of title that may be held in Area A, see Moloney, above n24 at 138.

102 The percentage will be specified in the contract. The figures in the model PSC will be discussed below.

103 Article 4(5), Annex B, Petroleum Mining Code.

104 See Clause 7.11 of the Model PSC, Annex C; this analysis is confirmed by Burmester; above n30 at 239.

105 Article 7, Annex B, Petroleum Mining Code.

106 Article 22, Annex B, Petroleum Mining Code.

107 Article 48, Annex B, Petroleum Mining Code.

108 Article 7(1)(a) and (b), Annex B, Petroleum Mining Code.

109 Article 15, Annex B, Petroleum Mining Code.

110 Article 17, Annex B, Petroleum Mining Code.

111 Article 18, Annex B, Petroleum Mining Code.

112 Article 19, Annex B, Petroleum Mining Code.

113 Article 20, Annex B, Petroleum Mining Code.

114 Article 25, Annex B, Petroleum Mining Code.

115 Article 27, Annex B, Petroleum Mining Code.

116 Article 30, Annex B, Petroleum Mining Code.

117 Article 29, Annex B, Petroleum Mining Code.

118 Article 36(4), Annex B, Petroleum Mining Code.

119 McDonald, D R, "Comment on the Timor Gap Treaty" [1990] *AMPLA Ybk* 259 at 262.

environmental safeguards, the construction, use and maintenance of structures, rigs and pipes, and for the sale and transport of oil in Area A,[120] and appoint inspectors to police these regulations.[121] The fees that the Authority can levy from contractors are contained in Part VI. The Authority itself can do nothing to enforce any sanction for breach, however it can recommend to the Ministerial Council that a contractor have its contract terminated after an opportunity for the contractor to explain the breach.[122]

Annex C of the Treaty contains a Model Production Sharing Contract, that is intended to be the basis of actual contracts entered into between the Authority and oil producers in Area A. There is no obligation for the Authority to contract exactly in the terms of the Model PSC, but it must be the starting point from whence the ultimate contract is made.[123] Of most interest in the Model PSC are the terms relating to the sharing of petroleum and the conduct of producers, as these give an insight into the formulae envisaged for production sharing in Area A. Only two aspects of the Model PSC will be examined, namely the arrangements for the sharing of oil and gas production, and the requirements to be met if an oil company is to retain its block.

Firstly, recovered petroleum in a block in Area A is divided according to a detailed formula.[124] The contractor and the Joint Authority share a specific percentage of the oil produced, known as "first tranche petroleum", at ratios dependent on the rate of production. For the first 5 years on production, the first tranche is to be 10 per cent of production, and then for the remainder of the contract, the first tranche is at 20 per cent.[125] Shares of the first tranche petroleum are divided in the following formula:

Production Rate	**Contractor Share**
0-50,000 barrels/day	50 per cent
50,001-150,000 barrels/day	40 per cent
150,001+ barrels/day	30 per cent[126]

From the remaining oil, the contractor can claim all operating and exploration costs,[127] including depreciation of capital costs and production equal to Investment Credits of 127 per cent of all exploration and capital costs incurred in that year.[128] After these deductions, the remaining oil, if any, is divided on the same formula as above.[129] For natural gas, after recovery of costs and investment credits, the division is 50 per cent each, regardless of production.[130]

---

120 The list of subjects for regulation are found in Article 37(1) from (a) – (n), although this list is stated not to be limiting on the Authority: Article 37(1), Annex B, Petroleum Mining Code.

121 Article 34, Annex B, Petroleum Mining Code.

122 Article 48, Annex B, Petroleum Mining Code.

123 Article 5(1), Annex B, Petroleum Mining Code; see also above n30 at 240.

124 Useful discussions of the production sharing formula can be found at the following references: above n30 at 239-41; Wilde and Stepan, above n51 at 25; above n25 at 572-4; Smart, above n100 at 388.

125 Section 7.9, Annex C, Model PSC.

126 Section 7.3, Annex C, Model PSC.

127 Section 7.2, Annex C, Model PSC.

128 Section 7.10, Annex C, Model PSC.

129 Section 7.3, Annex C, Model PSC.

130 Section 7.5, Annex C, Model PSC.

The formula is cumbersome, but does not appear to make exploitation of oil in Area A uneconomic, in water depths of less than 100 metres. While the Australian Department of Primary Industries and Petroconsultants Australia Pty Ltd have separately stated that such a formula would be less economic than the regime for Area B (given all the same physical circumstances), it would be more economic than the system to be used in Area C.[131] McDonald, who cites these statements, is more equivocal, and believes that there is little additional incentive on these grounds to differentiate between Areas A and B.[132] On this basis then, provided oil is in Area A in economic deposits, the financial structures set up for its extraction will not hamper its exploitation.

Finally, the Model PSC does not allow for the long term holding of rights to exploit a block without production taking place. Once the contract is on foot, the contractor has six years to discover commercial quantities of petroleum, with an option to request the Joint Authority to extend the time limit to ten years.[133] In addition, after 3 years[134] and then again after 6 years,[135] the contractor must relinquish 25 per cent of the blocks allocated to it in the contract. After 10 years, all those blocks which do not contain discoveries must be relinquished.[136] Blocks relinquished are, if possible, to be in sufficiently large parcels to be reallocated to new explorers in other contracts.[137]

According to Martin and Pickersgill, this progressive handing back of blocks is designed to promote efficient exploration and development of Area A.[138] Oil companies will be unable to "sit" on contract areas waiting for funds to explore them properly. Rather, if they cannot act to evaluate an area within a relatively short time frame, they will be compelled to give it up and forfeit that part of their investment. As such, continuing exploration of the contract area is made to be good commercial sense for the contractor.

(v) Miscellaneous

There are a number of other features of the Treaty which need to be addressed. Firstly, as a temporary arrangement, the Treaty has only a limited lifespan. Article 33 provides an initial term of forty years from the entry into force of the Treaty, followed by successive terms of twenty years where the two States have not agreed on a permanent boundary. Five years prior to the conclusion of any of these terms, the Parties are required to attempt to reach an agreement on a more permanent boundary, although there is no obligation to reach such an agreement.[139] As such, there is nothing to prevent the Treaty being continued automatically at the end of each twenty year term ad infinitum. The Treaty can also be amended at any time.[140]

---

131 Above n119 at 263.
132 Ibid.
133 Section 2.2, Annex C, Model PSC.
134 Section 3.1, Annex C, Model PSC.
135 Section 3.2, Annex C, Model PSC.
136 Section 3.3, Annex C, Model PSC.
137 Section 3.6, Annex C, Model PSC.
138 Above n25 at 572.
139 Article 33(3).
140 Article 31(1); in the unlikely event an agreement is reached on a permanent boundary and there are still current production sharing contracts for parts of the Zone, then the State with

The resolution of disputes under the Treaty is referred to in Article 30. Consultation and negotiation for disputes between the Parties is required by sub-article (1), while a clause requiring special commercial arbitration in the event of a dispute is to be inserted in all production sharing contracts.[141] Such arbitral awards are to be domestically enforceable in both States.[142]

The Treaty also provides for various cooperative measures on a variety of subjects. Security,[143] search and rescue,[144] air traffic control,[145] and marine environmental protection[146] are all to be the subject of cooperation. The Treaty also does nothing to derogate from the right of both States to surveillance[147] or hydrographic surveys[148] of Area A, but again encourages cooperation. Separate articles also deal with the question of petroleum deposits that extend outside Area A,[149] and with marine scientific research.[150]

The Gap Treaty entered into force on 9 February 1991. It was signed on 11 December 1989, and had the unusual distinction of being signed in an aircraft flying over the ZOC. It could be said that such an act represents the cooperative nature of the agreement, although a more cynical view would be that neither State wished to concede the other the "honour" of hosting the signature lest they give the other some advantage in doing so. While the former would seem the better view, it is interesting that even in its signature, the Treaty reflects the sovereignty neutral nature of the whole document, with neither State being forced to make any concession which the other has not made.

4. *Portuguese Challenge before the ICJ*

On 22 February 1991, Portugal commenced an action before the International Court of Justice against Australia. Portugal is seeking a declaration that in participating in the Timor Gap Treaty, Australia has violated its rights in the area of the ZOC, as the rightful administering power of East Timor, and has misappropriated seabed resources that should remain within the permanent sovereignty of the East Timorese people.[151] The action was commenced

---

jurisdiction over the area covered by the contract shall continue it on terms no more onerous than those existent at the time of the Treaty ceased to exist: Article 34.

141 See above.

142 Article 30(2).

143 Article 13.

144 Article 14.

145 Article 15.

146 Article 18; see Moloney, above n24 at 133-4.

147 Article 12.

148 Article 16.

149 Essentially, the Treaty encourages a negotiated agreement to reach a satisfactory solution, but does not attempt to specify the nature of such an agreement other than it should be equitable, and that both States assist in the exploitation of the deposit: Articles 20 and 21.

150 Article 17 states that where a Party receives a request to conduct continental shelf non-living resource research in Area A, then without prejudice to that State's claims, it must consult with the other to determine if the research is related to petroleum exploitation or exploration. If it is so related, then together with the Joint Authority the States shall look to the regulation, and transmission of results of and participation in the research.

151 The text of the Portuguese request to the Court is reprinted in (1990-1) 45 *Ybk Int'l Court of Justice* 152-4.

against Australia, and not Indonesia, by virtue of Australia's complete acceptance of the jurisdiction of the ICJ,[152] and Indonesia's refusal to accept that jurisdiction.[153] While it is not within the scope of this chapter to explore in detail the Portuguese action, some discussion of it is necessary, by virtue of its potential effect upon the Gap Treaty. As such, rather than engage in a detailed analysis of the cases of Australia and Portugal, only the primary substantive issues likely to face the ICJ will be considered.

A. Difficulties facing the Portuguese Case

There are a number of distinct obstacles that Portugal will have to negotiate in order to be successful before the ICJ. The first of these is its standing to bring the action in the first place. Essentially, Portugal is challenging the legality of a treaty to which it is not a Party, and as such must demonstrate substantive and cogent reasons why it is entitled to bring the action.

In the *South West Africa Cases*, the ICJ denied standing to Ethiopia and Liberia to bring an action against South Africa in respect of the United Nations Mandate held by South Africa over what is now Namibia. Since neither Ethiopia nor Liberia was a party to the original mandate with South Africa, the Court, by the narrowest of margins, held they lacked a sufficient interest to bring the proceedings. If the Court chose to follow its previous decision in the present case, it may be compelled to find Portugal lacks standing, as it is not a party to the treaty whose legality is in question.[154]

In order to distinguish the *South West Africa Cases* Portugal will have to demonstrate its close connection with East Timor, and its rights as the legitimate administering power. Both Chinkin and Fonteyne have questioned Portugal's ability to do this. They both separately argue that the Portuguese abandonment of the territory in 1975, and its subsequent lack of protest at Australian recognition of Indonesian sovereignty in 1979 will preclude Portugal establishing a special legal interest in East Timor.[155]

Political reality too makes Portugal's position untenable. At present, there is little or no chance of East Timor being returned to Portuguese sovereignty. Indonesia has been in effective occupation for in excess of 15 years, and has been most unwilling to allow any international interference in its affairs in

---

152 When Australia originally acceded to the Court's jurisdiction in 1954, it did so on certain conditions. However in 1974, Australia unconditionally accepted the jurisdiction of the Court. The text of the declaration may be found in: (1989-90) 44 *Ybk Int'l Court of Justice* 62-3.

153 In order to hear a contentious matter between States, all Parties before the ICJ must have consented to its jurisdiction. The ICJ's Statute provides the three ways the Court may competently hear a matter. See Art 36(1), (2), (3) and 37. Since Indonesia has not made any declaration, nor been a party to any special agreement, the ICJ would have no jurisdiction to have Indonesia joined in the present dispute. Indonesia's lack of response to the Portuguese action would also preclude its being joined by virtue of forum prorogatum: see *Treatment in Hungary of Aircraft and Crew of the USA Cases* ICJ Reports 1954 at 99; *Aerial Incident Cases* ICJ Reports 1956 at 9; *Antarctica Cases* ICJ Reports 1956 at 12.

154 Fonteyne, J-P L, "The Portuguese Timor Gap Litigation before the International Court of Justice" (1991) 45 *Aust J Int'l Aff* 171.

155 Chinkin, C M, "The Merits of Portugal's Claim Against Australia" (1992) 15 *UNSWLJ* 423 at 428; above n154 at 173.

East Timor. While the Indonesian occupation of East Timor was condemned in 1976 by the Security Council and General Assembly, Indonesia has been able to command considerable support for its position in the General Assembly. Until the 1991 Dili Massacre, there had been a distinct cooling of world interest in East Timor, with the last resolution concerning the territory in 1982, and that only being passed by a small margin.[156] Fonteyne notes that notions of "historical consolidation" may operate to legitimise Indonesia's position as "there comes a time when realities, however illegal or inequitable they may have been initially, appear to become irreversible and the world community's interest in orderliness and stability might justify cloaking it with the mantle of legality".[157]

The most significant problem facing Portugal is the absence of Indonesia from the proceedings. It is open to Australia to argue that as it was Indonesia who occupied East Timor and that Australia has contracted with Indonesia over the Timor Gap, then Indonesia is an indispensable third party. In the *Monetary Gold Case*,[158] the ICJ indicated that where the rights and obligations of a third party State not present before the Court were in issue, it would not adjudicate the matter. While this doctrine has been restrictively interpreted by the Court in later cases, there is nothing to suggest it no longer represents international law.[159] Portugal has framed its action against Australia to attempt to avoid this problem, but it is difficult to see how they could do so effectively.[160] The issue of whether Australia can legally enter into a treaty to divide East Timorese resources must be dependent on whether the other party to the treaty, Indonesia, could validly contract on behalf of East Timor. In raising the question of Australia's actions, Portugal must by necessity raise the legality of Indonesia's position, and thereby call for an adjudication of Indonesia's actions. On this basis, unless Indonesia consents to the ICJ's jurisdiction, the Court would seem bound to dismiss Portugal's action.

B. Difficulties facing the Australian Case

Although the Portuguese case faces some significant difficulties, the Australian case is not without its problems. Some of these are legal in nature, while others are best described as political, although certainly they are of some importance.

One difficulty in Australia's position could stem from challenging Portugal's standing to bring the action. This might entail some reliance upon the ICJ's judgment in the South West Africa Cases,[161] a judgment which has been condemned by a number of publicists.[162] The decision was certainly the

156 GA Res 37/30 50 for, 46 against, 50 abstentions.

157 Above n154 at 177-8; Chinkin, above n155 at 429.

158 *ICJ Reports* 1954 at 19.

159 In the context of third party intervention, it was discussed by the ICJ as recently as 1990: *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras) Application to Intervene* ICJ Reports 1990 at 92; see also Chinkin, C M, *Third Parties in International Law* (1993) at 210-2.

160 The text of the Portuguese Application to the ICJ is reprinted in above n151 at 152-3.

161 *ICJ Reports* 1966 at 4.

162 The decision has also been blamed for no Australian being elected to the Court since the case. Sir Percy Spender, as the Court President, not only gave the casting decision denying Ethiopia and Liberia standing, but also his possible involvement in the disqualification in

most controversial in the Court's history, and it may take the opportunity to reassess its position. On this point, it may be possible to distinguish the *South West Africa Cases* to their facts,[163] and to re-evaluate the principle of locus standi without reference to the case, leaving Australia some room for argument without reliance upon the decision.

In addition, Australia could face an argument that Portugal has standing in the public interest, because self-determination is a right that exists erga omnes. Although such an argument was rejected in the *South West Africa Cases*, Chinkin has noted the ICJ has suggested that it may be more amenable to this position.[164] Politically speaking, the Portuguese case places Australia in an extremely awkward position. Australia will be compelled, if the Court determines it may hear the merits of the case, not merely to defend its action as a party to the Gap Treaty, but also its recognition of Indonesian sovereignty over East Timor, in the face of General Assembly and Security Council resolutions to the contrary. This could have the unfortunate side-effect of Australia attempting to defend illegal acts of armed aggression by another State, largely on the basis that the acts occurred 18 years before and occurred in a territory that was abandoned by a colonial power.[165] Such a defence of a morally dubious position can only hold Australia out to ridicule domestically and internationally,[166] especially given Indonesia's actions in East Timor in the years since 1976.

C. *Ramifications of the Portuguese Action*

A balanced assessment of the pros and cons of the likely arguments of both sides suggests that Portugal has a relatively remote chance of success. However condemnation of the Gap Treaty by the ICJ need not be the only positive outcome that Portugal may be seeking from the case. Certainly, international interest in East Timor was flagging in the United Nations, and the case may serve to rekindle international interest.

The decline in international support for Portugal's position on East Timor can be clearly seen in the text of the various Security Council and General Assembly Resolutions on the territory since 1975. The Security Council has made only two resolutions concerning East Timor, the first on 22 December

---

somewhat controversial circumstances of Judge Khan from sitting on the case: for sources see Higgins, R, "The International Court and South West Africa — Implications of the Judgment" (1966-7) 42 *Int'l Aff* 573; Carey, J and Hynning, C J, "The World Court's Decision on South-West Africa" (1966) 1 *Int'l Lawyer* 12; Reisman, W M, "Revision of the South West Africa Cases" (1966) 7 *Virg J Int'l L 4*; Prott, L V, *"Avoiding a Decision of the Merits in the International Court of Justice" (1976) 7 Syd LR* 433; a more complete bibliography of the literature on the *South West Africa Cases* see Dugard, J (ed), *South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (1973).

163 The focus of the case was the League of Nations Mandate over South West Africa, whereas no such document exists in relation to East Timor.

164 Chinkin, above n155 at 433.

165 Above n154 at 175-6; Wilde and Stepan, above n51 at 28.

166 Although note that Australia is by no means the only State to have recognised Indonesian sovereignty over East Timor. For example, within the region, the other ASEAN states, Malaysia, Singapore, the Philippines, Thailand and Brunei, have recognised Indonesian sovereignty.

1975 and the second on 22 April 1976. While the first expresses "grave concern" at events in East Timor, "deplores" the intervention of Indonesia and was adopted unanimously, the second calls for an Indonesian withdrawal and the taking of steps to a peaceful solution without the pejorative tone against Indonesia, and was adopted with 2 abstentions.

The resolutions in the General Assembly chart an even clearer decline in support. Aside from the clear shift in support away from Portugal,[167] the language of the resolutions has moderated considerably. Resolution 3485 (XXX) on 12 December 1975 demanded an immediate Indonesian withdrawal from East Timor, and "strongly deplored" Indonesia's intervention in the territory. By Resolution 32/34 on 28 November 1977, the General Assembly reaffirmed previous resolutions, and rejected Indonesia's claim to have incorporated East Timor within it. In Resolution 34/40 on 21 November 1979, previous resolutions were no longer adopted, and the General Assembly expressed its "deepest concern at the suffering of the people of East Timor". The final resolution concerning East Timor on 23 November 1982, Resolution 37/30, merely requested all the parties involved to consult with the Secretary-General and various UN agencies to assist the East Timorese people. When coupled with a decline in numerical terms within the General Assembly, the weakening of the text of the resolutions clearly demonstrates the degeneration in international support of Portugal's position.

By taking Australia to the ICJ, Portugal has been able to reintroduce East Timor into international debate, without a potentially disastrous defeat on the floor of the General Assembly. Such a defeat, which would appear a distinct possibility given the numbers opposing Portugal's resolution in 1982, would have been very damaging to Portugal's position. In addition, the action has and probably will continue to embarrass the Australian Government whatever the ultimate result, and while it may not force Australia to renounce the Gap Treaty and its recognition of Indonesian sovereignty, it may impact on Australian policy in a way positive to the interests of the East Timor self-determination movement.

Were Portugal completely successful in its action, Australia would be placed under intense pressure to abandon the Gap Treaty. Such a move would throw the status of the continental shelf in the Gap region into chaos for an indefinite, but probably lengthy period. Even if Australia was compelled to recognise Portugal as the rightful power in East Timor, there would be no quick solution. Prior to 1975, Portugal was as intractable as Indonesia became after 1975 on the question of where the shelf boundary ought to be and negotiation of the Gap Treaty took almost 10 years. Indonesia certainly would not be prepared to accept any delimitation agreement Australia might reach with Portugal, and as the power in occupation in East Timor, it can bring significant force, both economic and military to support its position. Further, as Australia has unreservedly accepted the jurisdiction of the ICJ, if it abandoned the Gap

167 GA Res 3485 (xxx), 12 December 1975, 72:10:43; GA Res 31/53, 1 December 1976, 68:20:49; GA Res 32/34, 28 November 1977, 67:26:47; GA Res 33/39, 13 December 1978, 59:31:44; GA Res 34/40, 21 November 1979, 62:31:45; GA Res 35/27, 11 November 1980 58:35:46; GA Res 36/50, 24 November 1981 54:42:46; GA Res 37/30, 23 November 1982 50:46:50. Derived from a list supplied to the author by Ivan A Shearer.

Treaty, it could even find itself defending an action by Indonesia for breach of treaty obligations! Realistically though, an abandonment of the Gap Treaty would do much damage to Australian/Indonesian relations, as well as deprive all the affected States of the benefits of the Gap oil deposits.

5. *Assessment of the Gap Treaty and Prospects for a Permanent Boundary*

The Timor Gap Treaty represents the triumph of compromise in the division and distribution of a valuable continental shelf resource. Clearly, the potential value of the oilfields in the Gap region could have become the source of a major dispute between Australia and Indonesia, and by the mechanisms in the Treaty, this discord was avoided. Certainly, an agreement of this type was what was envisaged at UNCLOS III with regard to Article 83(3), which encouraged States to enter into without prejudice "provisional arrangements of a practical nature".[168] In fulfilling that objective, the Timor Gap could present a model to other States, demonstrating that two States, even with widely different cultural, economic and political backgrounds, can cooperate to ensure an expeditious but equitable exploitation of oceanic resources.

However, there are a number of "snakes in the garden". As discussed above, the Portuguese action in the ICJ has, in addition to highlighting the disagreeable way East Timor came into Indonesia's sphere, the potential to derail the Treaty itself, and casting oil exploration and development in the Timor Sea into chaos. The Treaty also does not sit comfortably with Resolution III taken at the Final Session of UNCLOS III at Montego Bay in 1982. While Resolution III(b) positively encourages States to reach provisional arrangements of the kind created by the Gap Treaty, Resolution III(a) states that rights and interests flowing to a non-self-governing territory or territory under colonial domination under the Convention shall be preserved for the people of that territory.[169] The last United Nations resolution dealing with East Timor still recognised Portugal as the administering power responsible for the dependent territory of East Timor.[170] As a dependent territory, any division of the resources of the Gap must include some benefit to the East Timorese people. The Gap Treaty, rather than seeking to pass any revenue generated by the ZOC on to East Timor, merely seeks to emphasise Indonesian sovereignty over East Timor, to the extent that even the full name of the Treaty reinforces that State's assertion of sovereignty.[171]

---

168 Article 83 of the 1982 Law of the Sea Convention is expressly referred to in the recitals of the Treaty; see also Moloney, above n24 at 129.

169 Resolution III(a) states:"In the case of a territory whose people have not attained full independence or other self-governing status recognised by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development". See Stepan, above n16 at 4-5; Wilde and Stepan, above n51 at 27-8.

170 GA Res 37/30, 23 November 1982.

171 While the Gap Treaty expressly refers to the East Timor as an Indonesian Province, only a geographical rather than a political description is used for Australia: ie Northern Australia.

These political difficulties may, in time, make the continued operation of the Gap Treaty untenable for Australia, although there is nothing to suggest that such a result is likely in the foreseeable future. Even recent events like the massacre of civilians by Indonesian troops in Dili has done little to shake Australia's commitment to the Treaty. That being so, it would seem reasonable to assume that the Gap Treaty will continue to operate if and until a more permanent solution to the boundary can be found. As to the likelihood and course of a permanent boundary, it is submitted there is little hope for a permanent boundary while there is oil in the Timor Gap. Before the Gap Treaty, both States would not be budged from their entrenched positions interpreting international law in the manner that most suited those positions. While there is some value in the Gap region, neither State will be prepared to give ground on its position.

Once the oil is gone, much of the reason for the impasse should also have dissipated. Without a tangible and valuable resource at stake, a compromise may be possible. The exact course of the line will depend on a multitude of factors, not the least of which being the development of principles of international law for maritime boundary delimitation over the next forty years. The recent trend has been a favouring of geographic factors over geological, and that would tend to place a negotiated or arbitrated boundary closer to the median line than the existing shelf boundary on either side of the Gap. However with the potential size of the Gap's oil deposits still unclear, the interim arrangement could profitably continue for half a century or more, by which time the applicable principles could have changed as much as the Law of the Sea has done over same period to the present day. The only certainty would therefore seem to be, that unless the ICJ condemns the Gap Treaty, it is likely to remain for a considerable period to come.