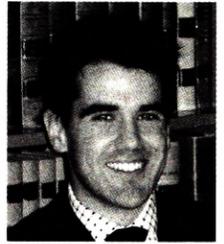


# Filling in the gaps

## Maritime delimitation in the Timor Sea



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Australia's various maritime agreements were largely delimited during the 1980s against the background of the Third United Nations Conference on the Law of the Sea (UNCLOS III).<sup>1</sup> However, insofar as Australia's boundary with Indonesia, negotiations were concluded as early as 1971,<sup>2</sup> creating an extensive maritime boundary throughout the Arafura and Timor Seas. Notwithstanding the above, a "gap" was created between the eastern and western borders of the agreed line of delimitation, known commonly as the "Timor Gap".<sup>3</sup>

At the time of negotiation with Indonesia, East Timor (*Timor-Leste*) remained a Portuguese territory and reluctance on behalf of the Portuguese to negotiate an agreement prior to the conclusion of UNCLOS III resulted in the gap remaining open.<sup>4</sup> Following the occupation of East Timor by Indonesia in 1975 and Australia's *de jure* recognition thereof in 1979, an agreement was formed to provisionally close the Timor Gap, creating a "zone of cooperation", for the purpose of exploiting the natural resources of the area.

Following East Timor's independence from Indonesia and its transitional administration, an agreement was concluded between Australia and East Timor on similar grounds to the Timor Gap Treaty between Australia and Indonesia, establishing the Joint Petroleum Development Area (JPDA). Covering the same area of seabed as the previous zone of cooperation established between Australia and Indonesia, the current treaty affords East Timor 90 per cent of all revenue derived from exploitation of the JPDA's resources, whereas the previous agreement divided the revenue equally.<sup>5</sup>

Despite the negotiation of the JPDA, the Timor Sea Treaty did not go so far as to create a maritime boundary between the two nations. Rather, the treaty states that, not only is the agreement without prejudice to Australia's or East Timor's position on, or rights relating to, seabed delimitation or their respective seabed entitlements,<sup>6</sup> but that the treaty shall only remain in force until such time as a permanent seabed boundary is delimited, or the expiration of thirty years, whichever is the sooner.<sup>7</sup> Thus, despite the negotiation of the Timor Sea Treaty, rather than solidifying boundaries between the two nations, the treaty highlights the differences that exist between Australia and East Timor in the delimitation of their maritime boundary.

Furthermore, while a 90 per cent share of JPDA revenues appears to be in East Timor's favour, the agreement only provides East Timor with a fraction

of the revenues from the largest known oil reserve in the Timor Sea, "Greater Sunrise". It is this exclusion which is the cause of most concern for East Timor and which most disagreement exists.

### Australia's position on maritime delimitation

The main variance between Australia and East Timor as regards maritime delimitation relates to the relevance of geomorphology, or the configuration of the seabed, of the Timor Sea.

Australia claims that the Timor Trough, a rift in the seabed with depths of up to 3000 metres, and situated only 35 nautical miles from East Timor, defines the outer limits of the Australian continental shelf. Australia asserts that it is this natural feature which defines the outer limits of the Australian territorial claim, based on the international legal theory of natural prolongation.

The concept of natural prolongation refers to the notion that a state is entitled to that part of its landmass which extends beyond the shoreline and continues beneath the sea's surface.<sup>8</sup> Thus, the concept of natural prolongation as a basis for asserting jurisdiction over the continental shelf exists as "an emanation from, and an automatic adjunct to, the territorial sovereignty of the coastal state".<sup>9</sup>

At its highest, the natural prolongation of a state's land territory is sufficient to establish that state's title to the continental shelf. The fundamental nature of the concept of natural prolongation, first discussed judicially in the *North Sea Continental Shelf Cases*,<sup>10</sup> recognises that rights of coastal states to areas of the continental shelf that constitute a natural prolongation of that state's land territory into and under the sea exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land.<sup>11</sup>

Therefore, on this basis Australia asserts that, insofar as the seabed of the Timor Sea is the natural extension of Australia's continental landmass, up to the Timor Trough the resources appertaining thereto come under the sovereignty of Australia.

### East Timor's position on maritime delimitation

Conversely, East Timor argues that where the distance between two opposite states is less than 400 nautical miles, considerations of natural prolongation are outdated and irrelevant and, consequently, the maritime boundary should be based on principles

of equidistance. That is to say, East Timor asserts that a state is *prima facie* entitled to at least a 200 nautical mile continental shelf, with a median line being drawn between any overlap of the two boundaries.

This assertion by East Timor arises largely from Article 57 of UNCLOS III, which allows states to declare an exclusive economic zone (EEZ) up to a distance of 200 nautical miles from its coast, giving the state exclusive jurisdiction over resources in both the water column and the seabed. East Timor argues that, while a state with a continental shelf extending beyond the 200 nautical mile EEZ may claim those additional resources, this does not apply where it would infringe on the EEZ of another state.

Therefore, East Timor argues that it is only in the absence of competing sovereign interests that reference may be made to geomorphological factors when determining maritime boundaries. If this approach is correct and a median-line is used to delimit the boundary between the two nations, East Timor would be entitled to the entirety of the petroleum resources in the Timor Sea, providing the nation with billions of dollars in revenue.

### Recent developments

Despite the differences that exist between Australia and East Timor, the stalemate between the two nations may be resolved as early as Christmas, with Australian Minister for Foreign Affairs Alexander Downer announcing that Australia would offer East Timor up to 50 percent of the Greater Sunrise revenues in an effort to settle the dispute.<sup>12</sup> However, this deal, which is yet to be ratified by Australian cabinet, is expected to be without prejudice to Australia's assertion to its current maritime boundary and may do little to achieve finality of Australian-East Timorese maritime delimitation.

### Conclusion

Despite generally good relations between our two nations, the differing opinions in relation to maritime delimitation look set to continue in the Timor Sea, with neither nation willing to compromise on the issue. In an act of good faith and in an effort to ensure good neighbourly relations, Australia needs to negotiate a profit sharing agreement with East Timor as regards the disputed resources.

However, East Timor also needs to recognise that Australia's claims are well based in international law and consistent with other maritime boundaries in the region. Furthermore, East Timor needs to

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