ARTICLES

THE STRENGTH OF THE TIMOR-LESTE CASE AND SECTION 51 OF THE CONSTITUTION

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1. INTRODUCTION

The petroleum resources lying beneath the waters of the Timor Sea have attracted significant interest from both within and external to Australia. In recognition of this interest, and the increasingly prominent position maritime boundary discussions between Australia and Timor-Leste are taking on the national agenda, this paper aims to explore the public international law issues, and the strength of such issues, which touch and concern maritime boundary delimitation as they relate to the Timor Sea.

With international law giving Timor-Leste good legal arguments for establishing a maritime boundary with Australia extending along a line south of the present boundary and into the continental shelf regions claimed by Australia, including the Joint Petroleum Development Area (JPDA), the paper discusses the position of petroleum exploration permit and title holders under s 51 of the Constitution in the event of a successful maritime boundary claim by Timor-Leste.

With Australia and Timor-Leste publicly migrating towards another negotiated stay of maritime border delimitation, the paper then concludes by highlighting the results of deferring the issue of permanent maritime border delimitation between the two states and the consequential effect of leaving issues associated with s 51 of the Constitution unaddressed.

Before proceeding with these aims, the paper will, however, commence with a brief discussion on the geopolitical history of the Timor Gap.

2. THE TIMOR-GAP

The origins of the Timor Gap dispute can be found in the 1972 agreement between Australia and Indonesia on seabed boundaries in the Arafura and western Timor Sea.[1] At the time the 1972 agreement was negotiated, the territory of East Timor was under the administrative authority of

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[1] 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, opened for signature 9 October 1972 (Jakarta), ATS 1973 No 32 (entered into force 8 November 1973). See <http://www.austlii.edu.au/au/other/dfat/treaties/1973/32.html> at 20 April 2005.

Portugal,[2] with Portugal 'reluctant to conclude a delimitation agreement with Australia until UCLOS III had been completed.'[3] Following the departure of Portugal in 1975, East Timor broke into civil war, prompting the 'illegal invasion'[4] of East Timor by Indonesia.[5] Due to the subsequent turmoil, and with no seabed agreement governing the region between Australia and Indonesian controlled East Timor, the result was the 'Timor Gap', or 'the distance between the eastern and western terminal points describing the limits of the 1972 seabed boundaries of respective Indonesian and Australian maritime jurisdiction.'[6] [7]

With Australia recognizing Indonesia as de facto sovereign over East Timor in 1978[8] and de jure sovereign in 1979,[9] negotiations commenced to settle[10] the maritime boundary which resulted in the conceptually innovative Timor Gap Treaty[11] [12] being signed in 1989.[13]

With the collapse of Indonesian control over East Timor,[14] the United Nations Transitional Administration in East Timor (UNTAET) assumed authority for the region,[15] which had the effect of terminating the Timor Gap Treaty. Despite termination, UNTAET and Australia agreed to continue the terms of the Treaty in its original form until East Timor attained self government.[16]

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2 Department of Foreign Affairs and Trade, *East Timor in Transition 1998-2000: An Australian Policy Challenge* (2001) 2.

3 Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi, *Public International Law – An Australian Perspective* (2nd ed, 2005) 340.

4 Gillian Triggs and Dean Bialek, 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap' (2002) 3(2) *Melbourne Journal of International Law* 322, 326.

5 See UN Security Council Resolution 384 (1975). See <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/782/32/IMG/NR078232.pdf?OpenElement> at 20 April 2005.

6 Triggs and Bialek, above n 4, 326.

7 Timor Sea Office, *Brief History of the Timor Sea* (2005) <http://www.timorseaoffice.gov.tp/aboutus.htm#history> at 19 April 2005.

8 Department of Foreign Affairs and Trade, above n 2, 11.

9 Ibid, 12.

10 Article 2(3) of the 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 (Timor Gap Treaty) states '[n]othing contained in this Treaty and no acts or activities taking place while this Treaty is in force shall be interpreted as prejudicing the position of either Contracting State on a permanent continental shelf delimitation in the Zone of Co-operation …'. See <http://www.austlii.edu.au/au/other/dfat/treaties/1991/9.html> at 20 April 2005.

11 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 (Timor Gap Treaty). See <http://www.austlii.edu.au/au/other/dfat/treaties/1991/9.html> at 20 April 2005. See also Development Assessment Forum *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 (Timor Gap Treaty)* (2005): <http://www.daf.gov.au/cpi/browse_ins_detail.cfm?Selected=46> at 20 April 2005.

12 The Timor Gap Treaty was not without controversy with Portugal bringing an action against Australia under Article 36(2) of the ICJ Statute. See *East Timor Case* (*Portugal v Australia*) I.C.J Reports 1995; and, DJ Harris, *Cases and Material on International Law* (6th ed, 2004) 1067.

13 The Timor Gap Treaty was signed on 9 February 1991. See <http://www.austlii.edu.au/au/other/dfat/treaties/1991/9.html> at 20 April 2005. The Timor Gap Treaty was subsequently challenged in the High Court of Australia in *Horta v Commonwealth* (1994) 181 CLR 183. See also Jean-Pierre L Fonteyne, Anne McNaughton and James Stephen Stellios, *Harris – Cases and Materials on International Law: An Australian Supplement* (2003) 40.

14 25 October 1999.

15 Triggs and Bialek, above n 4, 328.

16 Ibid, 329.

With East Timor gaining independence,[17] Australia and Timor-Leste negotiated a new maritime boundary treaty, the Timor Sea Treaty 2002.[18] Significantly, the Timor Sea Treaty retained most of the provisions of the Timor Gap Treaty, including Article 2(a),[19] which gives effect under international law to Article 83 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS)[20] and Article 2(b)[21] which facilitates the operation of the Treaty without prejudice to either Australia or Timor-Leste's position and rights in relation to seabed delimitation entitlements.

3. TIMOR-LESTE'S MARITIME BOUNDARY CLAIMS

According to the Timor Sea Office, Timor-Leste has no maritime boundaries.[22] Consistent with Article 2(b) of the Timor Sea Treaty, the Timor-Leste government enacted *The Timor-Leste Maritime Zones Act*.[23] Article 9 of the Act states:

> The outer limit of the continental shelf of East Timor is the line every point of which is at a distance of two hundred nautical miles from the nearest point of the baseline, or the outer edge of the continental margin, where the continental margin extends beyond two hundred nautical miles from the baseline.[24]

Given the distance between Australia and Timor-Leste is approx. 130 nautical miles,[25] the Timor-Leste position is that a seabed boundary should be based on a median line between the two countries.[26] The Timorese also assert that 'Indonesia and Australia should have left a larger 'Timor

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[17] 20 May 2002. Democratic Government of Timor-Leste, *About TIMOR-LESTE* (2005) <http://www.gov.east-timor.org/AboutTimorleste/history.htm> at 21 April 2005. Timor-Leste became a member of the United Nations on 27 September 2002. See United Nations, List of Member States (2005) <http://www.un.org/Overview/unmember.html> at 21 April 2005.

[18] Timor Sea Treaty between the Government of East Timor and the Government of Australia (Timor Sea Treaty), opened for signature 20 May 2002, [2003] ATS 13 (entered into force 2 April 2003). See <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/special/etimor/Timor%5fSea%5fTreaty.html?query=%5e+timor+sea+treaty+2002> at 20 April 2005. The provisions of the Timor Sea Treaty are enacted in the *Petroleum (Timor Sea Treaty) Act 2003* (Cth). See <http://scaleplus.law.gov.au/html/pasteact/3/3575/pdf/0092003.pdf> at 21 April 2005.

[19] Without Prejudice.

[20] United Nations, *United Nations Convention on the Law of the Sea of 10 December 1982* (2005) Division for Ocean Affairs and the Law of the Sea <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm > at 21 April 2005.

[21] Timor Sea Treaty Article 2(b).

[22] Timor Sea Office, *Welcome to the website of the Timor Sea Office, Office of the Prime Minister, Government of Timor-Leste* (2005) <http://www.timorseaoffice.gov.tp/enindex.htm> at 19 April 2005.

[23] 20 May 2002. The Timor-Leste Maritime Zones Act. See <http://www.timorseaoffice.gov.tp/mza.htm> at 19 April 2005. See also United Nations, *Maritime Space: Maritime Zones and Maritime Delimitation* (2005) <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TLS_2002_Law.pdf> at 21 April 2005.

[24] The Timor-Leste Maritime Zones Act. See <http://www.timorseaoffice.gov.tp/mza.htm> at 19 April 2005.

[25] At their nearest point. See James Gavin, 'Timor Sea: Messy Politics' (2004) *Petroleum Economist* 30, 30.

[26] Damian Grenfell, 'Nation Building and the Politics of Oil in East Timor' (2004) 22 *ARENA Journal* 45, 47. See also Timor Sea Office, *Press – January 2005* (2005) <http://www.timorseaoffice.gov.tp/january05press.htm> at 19 April 2005; and, 'East Timor wins equal share of Sunrise', *Australian Financial Review* (Sydney) 14 May 2005, 5.

Gap' in which an independent East Timor might exercise sovereign rights over the seabed.'[27] The cumulative effect is that Timor-Leste asserts both:

1. Southern boundary claims, namely:
   - The Timor Trough is not the end of Australia's continental plate;
   - Geologically, Timor-Leste and Australia are on the same continental plate; and,
   - The Timor Trough is a "foreland basin".[28]

2. Lateral boundary claims, namely:

   - Questioning the validity of points A16 and A17 (east and west delimiting points in the 1972 Australia-Indonesia seabed boundary) so as to 'avoid areas that could be claimed by Portugal' as the colonial administrative authority.[29]

4. AUSTRALIA'S MARITIME BOUNDARY CLAIMS

Australia claims a maritime boundary[30] measured to the outer edge of the continental shelf,[31] [32] or 200 nautical miles where the outer edge does not reach that limit[33] consistent with Article 76(1) of UNCLOS.[34] However, Article 76(7) requires:

> The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

In 2004, Australia made a submission[35] to the Commission on the Limits of the Continental Shelf, pursuant to Article 76(8)[36] of UNCLOS.[37] The submission makes full claims to the continental shelf as allowed in Article 76(7).

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[27] Triggs and Bialek, above n 4, 342.

[28] Dionísio Babo-Soares, Timor-Leste Maritime Boundary Case (2005) *East Timor Law Journal* <http://www.eastimorlawjournal.org/Articles/didionseaboundaries.html> at 19 April 2005.

[29] Triggs and Bialek, above n 4, 342.

[30] 'East Timor wins equal share of Sunrise', *Australian Financial Review* (Sydney) 14 May 2005, 5.

[31] In reliance on the principle of natural prolongation in the *North Sea Continental Shelf case*. See Anthony Heiser, 'East Timor and the Joint Petroleum Development Area' (2003) 17 *Maritime Law Association of Australia and New Zealand Journal* 54, 69.

[32] Geologically, the continental shelf may generally be described as 'the submarine continuation of the land mass, extending under the sea to where the sea floor begins to fall off steeply into oceanic depths'. See Zdenek J. Slouka, *International Custom and the Continental Shelf – A Study in the Dynamics of Customary Rules of International Law* (1968) 40.

[33] United Nations, *Table of claims to maritime jurisdiction* (2005) Maritime Space: Maritime Zones and Maritime Delimitation <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/claims_2004.pdf> at 25 May 2005.

[34] United Nations, *United Nations Convention on the Law of the Sea of 10 December 1982 Overview and full text* (2005) Oceans and Law of the Sea – Division for Ocean Affairs and the Law of the Sea <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm> at 21 April 2005.

[35] Continental Shelf Submission of Australia (15 November 2004). See United Nations, *Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by Australia* (2005) Oceans and Law of

The above analysis therefore indicates the principal zone of contention rests in the geographical extent of each countries claim to the seabed.

5. THE STRENGTH OF TIMOR-LESTE'S MARITIME BOUNDARY CLAIMS UNDER INTERNATIONAL LAW IN RELATION TO THE TIMOR GAP

Accepting the Timor-Leste position that a maritime boundary with Australia should be constructed on a median line drawn between the two countries, the question then becomes, what is the strength of such a position?

The natural starting point when considering the strength of Timor-Leste's median line, or equidistant approach,[38] would be the 1958 Convention on the Continental Shelf.[39] Article 6(2), which arguably represents a rule of treaty law only,[40] of the Convention provides:

> Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, *the boundary shall be determined by application of the principle of equidistance* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.[41]

Whilst the Convention appears to favour Timor-Leste's position, the Convention must be read in light of UNCLOS, which permits a State to claim a continental shelf 'throughout the natural prolongation of its land territory to the outer edge of the continental margin', or to a distance of 200 nautical miles.[42] Article 76, however, must be read in conjunction with Article 83(1) which requires:

> The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of *international law*, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an *equitable solution*.[43] (emphasis added)

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the Sea – Division for Ocean Affairs and the Law of the Sea <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm> at 25 May 2005.

36 Article 76(7) establishes the substantive provisions of the continental shelf delimitation requirements. Subparagraph (8) establishes the reporting requirements attached to subparagraph (7).

37 The Hon. Alexander Downer, MP, Minister for Foreign Affairs, Australia, 'Australia Lodges Continental Shelf Submission' (Press Release, 16 November 2004).

38 Equidistant has been defined by the I.C.J. in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* as "[t]he equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured." *(I.C.J. Reports 2001, para. 177.)*

39 International Law Commission, *Convention on the Continental Shelf 1958* (2005) <http://www.un.org/law/ilc/texts/contsh.htm> at 21 April 2005.

40 RR Churchill and AV Lowe, *The Law of the Sea* (3rd ed, 1999) 184.

41 International Law Commission, *Convention on the Continental Shelf 1958* (2005) <http://www.un.org/law/ilc/texts/contsh.htm> at 21 April 2005 (emphasis added).

42 It should be noted that UNLOS III does allow a coastal State to claim a continental shelf up to a distance of 350 nautical miles from the baseline, under given circumstances. See Article 76(5).

43 UNCLOS III, Article 83 'Delimitation of the continental shelf between States with opposite or adjacent coasts.

The combination of equity and equidistance has been referred to as the 'combined rule,' one of normative quality, and a contributor to the 'maturation of international delimitation law.'[44] Whilst the Convention provisions provide the skeletal framework in which to guide the decision making process, it is necessary to turn to international case law to furnish substantive authority in any assessment of Timor-Leste's claims.

Over the years, reflected in the body of developing case law, 'title to the continental shelf was to detach itself increasingly from its physical roots.'[45] In other words, the ICJ[46] and arbitral tribunals[47] have progressively migrated from natural prolongation and geomorphological factors towards equidistance or median line with equitable considerations to produce an equitable solution.[48]

Evidence of this migration is reflected in the judgment of the ICJ in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*,[49] where the Court stated (para. 39):

> [t]hat since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation of their claims.

The Court continued to state (para. 39):

> [t]itle depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial.

The *Libyan Arab Jamahiriya/Malta* case, coupled to Article 76(1), suggests geological and geomorphological factors are all but irrelevant and lend strong support towards Timor-Leste to claim up to 200 nautical miles.[50]

Such a claim would, however, overlap with Australia's claim to the natural prolongation of its land territory under the sea. In this respect the Court, at para. 39, provides guidance:

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44 Gerard J. Tanja, *The Legal Determination of International Maritime Boundaries – The Progressive Development of Continental Shelf, EFZ and EEZ Law* (1990) 117.

45 Prosper Weil, *The Law of Maritime Delimitation – Reflections* (1989) 33.

46 See *Tunisia v Libya Continental Shelf Case* ICJ 1982, 18; *Gulf of Maine Case* (Canada / USA) ICJ 1984 246; *Libya-Malta Continental Shelf Case* ICJ 1985, 13 esp. at 35; and, *Maritime Delimitation in the area between Greenland and Jan Mayen Case* (Denmark v Norway) ICJ 1993, 38.

47 See *Anglo-French Continental Shelf Arbitration* (1978) 18 RIIA 3, 18 ILM 397; *Guinea-Guinea Bissau Maritime Boundary Delimitation* (1986) 25 ILM 2511; and, *Canada-France Maritime Boundary between Newfoundland and St Pierre and Miquelon* (1992) 31 ILM 1145.

48 IA Shearer, Starke's International Law (11th ed, 1994) 244-5.

49 I.C.J. Reports 1985, 13. See <http://www.icj-cij.org/icjwww/icases/ilm/ilm_ijudgments/ilm_ijudgment_19850603.pdf> at 21 April 2005.

50 Note however the separate opinion of Judges Ruda, Bedjaoui and Jimenez De Arechaga in the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* when discussing argument that the maritime projections of a coastal state stretch out radically in all directions. See Separate Opinion of Judges Ruda, Bedjaoui and Jimenez De Arechaga < http://www.icj-cij.org/icjwww/icases/ilm/ilmframe.htm> at 28 August 2005.

> [s]ince the distance between the coasts of the Parties is less that (sic) 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the "rift zone" cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf and the northward extension of the Libyan as if it were some natural boundary.

It can therefore be argued the Timor Trough, at 3,000 metres,[51] would likely fail as a material consideration in dispute resolution proceedings, consistent with other delimitation agreements disregarding similar geological features.[52] This, it can be considered, arguably assists Timor-Leste's position.

With geological features likely to be ignored, it would be appropriate to default to an arrangement which arrives at an equitable solution,[53] employing the so called 'equitable principles / relevant circumstances'[54] consistent with international law and Article 83(1) of UNCLOS, which now 'appears to be regarded as international law.'[55]

In the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria: Equatorial Guinea Intervening*)[56]case the Court stated the applicable criteria:

> [a]re expressed in the so called equitable principles / relevant circumstances method. This method, which is very similar to the equidistance / special circumstances method applicable in delimitation of the territorial sea, *involves first drawing an equidistant line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an "equitable result"*.[57]

In addition to case law support for equidistance and 'corrective equity',[58] customary international law can be seen to lend support for 'delimitation … in accordance with equitable principles, and taking account of all the relevant circumstances', as stated in the *North Sea Continental Shelf cases*.[59]

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51 Department of Foreign Affairs and Trade, *Australia-East Timor Maritime Boundaries – Finding an Equitable Solution* (2005) <http://www.dfat.gov.au/geo/east_timor/index.html> at 18 April 2005.

52 Including the Dominican Republic and Venezuela (which disregards the 5,000 metre Muertos Trough) and the equidistance oriented delimitation between Cuba and Haiti (which disregards the 6,200 meter plus deep Cayman Trench).

53 Principles of equity have long played a part in maritime seabed delimitation. The first ever agreed maritime seabed delimitation, between the British Colony of Trinidad and Venezuela, concerning the Gulf of Paria (26 February 1942) was settled on an 'equitable division' between the two territories. See S.P. Jagota, *Maritime Boundary* (1985) 49.

54 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* I.C.J. 10 October 2002, General List No. 94, para. 288. See <http://www.icj-cij.org/icjwww /idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF> at 22 April 2005.

55 Shearer, above n 48, 245.

56 I.C.J. 10 October 2002, General List No. 94.

57 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* I.C.J. 10 October 2002, General List No. 94, para. 288. See < http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF> at 22 April 2005 (emphasis added).

58 Tanja, above n 44, 117.

59 [1969] *ICJ Rep*. 3, 54. The North Sea Continental Shelf cases are significant as Germany had not ratified the 1958 Convention on the Continental Shelf.

The Court went on to state in the Land and Maritime Boundary between Cameroon and Nigeria case that:

> The Court is bound to stress in this connection that delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court's jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely and (sic) aim that should be borne in mind in effecting the delimitation.[60]

Accepting 'equity does not necessarily imply equality',[61] the question turns to what relevant circumstances may be considered in any adjustment of an equidistant line. In the *Land and Maritime Boundary between Cameroon and Nigeria* case the Court considered certain geographical features, including:

- the concave nature of a coastline;
- the effect of islands;
- a lack of proportion between a State's coastline;
- the area of its jurisdictional zone; and,
- oil concession practice.

as relevant circumstances for deviating from the equidistant line to achieve an equitable result.

In the *North Sea Cases*[62] the ICJ considered the natural prolongation of the land of the claimant state, however, this was later discounted in *Libya v Malta*,[63] and is representative of a strengthening of Timor-Leste's position vis-à-vis Australia.

However, in the *Libya v Malta* case[64] the Court took into account differences in the lengths of the coastlines, adjusting the median line closer to Malta on account of Libya's proportionally longer coastline, a factor which would weigh heavily against Timor-Leste. In the *Tunisia/Libya* case,[65] prior conduct of the parties, in relation to provisional boundary lines, was considered relevant. This consideration could prove decisive in Timor-Leste's position given the unitisation agreement between Timor-Leste and Australia, which states:

> East Timor and Australia shall have title to all petroleum produced in the JPDA. Of the petroleum produced in the JPDA, ninety (90) percent shall belong to East Timor and ten (10) percent shall belong to Australia. [66]

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60 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* I.C.J. 10 October 2002, General List No. 94, para. 294. See < http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF> at 22 April 2005.

61 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* I.C.J. 10 October 2002, General List No. 94, para. 294, quoting the court in the *North Sea Continental Shelf cases*. See <http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF> at 22 April 2005.

62 [1969] *ICJ Rep*. 3.

63 I.C.J. Rep. 1985, 35.

64 *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* I.C.J. No. 68, 13. See <http://www.icj-cij.org/icjwww/icases/ilm/ilm_ijudgments/ilm_ijudgment_19850603.pdf> at 22 April 2005.

65 *Case Concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)* I.C.J. No. 63, 18. See <http://www.icj-cij.org/icjwww/icases/itl/itl_ijudgment/itl_ijudgment_19820224.pdf> at 22 April 2005.

66 Timor Sea Treaty, Article 4: Sharing of petroleum production.

However, not all circumstances argued as 'relevant' have been accepted. In the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*[67] the ICJ rejected a claim, based in part, on economic considerations.[68] Despite any consideration towards the Timorese, 'such [economic] considerations are totally unrelated to the underlying intention of the applicable rules of international law,'[69] tacit acknowledgment that the ICJ is not 'engaged in redistributive justice.'[70]

Other factors considered irrelevant include differences in the land territory of each State[71] and, the resources and ecology of the delimitation area.[72]

It should be noted, however, given the array of circumstances a Court may consider as relevant, the Court has 'broad discretion to determine the relative weight of any particular circumstances, subject only to the need for some consistency with previous cases.'[73]

Turning from Timor-Leste's southern boundary claim, a brief note on the lateral claims is warranted. The relevance of any lateral claim is circumscribed by the concept of 'non-encroachment' in international law. Whilst it is possible for Timor-Leste to question the 1972 Australia-Indonesia seabed boundary agreement, arguing the respective terminal points[74] 'do not reflect the full extent of the potential maritime claims of an independent East Timor',[75] such questioning would be met with case authority circumscribing any lateral expansionist intentions.

In the *Libya/Malta case*, Judge Sir Robert Jennings stated:

> In determining any continental shelf boundary it is necessary to draw attention to all the relevant circumstances, and it is difficult to imagine a more relevant circumstance than the legal rights of a geographically immediate neighbour.[76]

The point being the ICJ would likely limit any lateral expansion of Timor-Leste's claims to the extent such claims do not invite third party involvement.

Before concluding the assessment of the strength of Timor-Leste's maritime boundary claims, it is useful to identify a number of arguments Australia is likely to employ to mitigate Timor-Leste's position. First, the validity of the Australia-Indonesia seabed boundary agreement would be subject to the principle of intertemporal law, which would work to preserve the validity of the agreement.[77]

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67 I.C.J. Rep. 1982, No 63. See <http://www.icj-cij.org/icjwww/icases/itl/itl_ijudgment/itl_ijudgment_19820224.pdf> at 22 April 2005.

68 I.C.J. Rep. 1982, No 63, para. 106.

69 Jonathan L Charney and Lewis M Alexander, *International Maritime Boundaries* (1993) vol II 1653.

70 DJ Harris, *Cases and Material on International Law* (6th ed, 2004) 489.

71 Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) I.C.J. No. 68, 13. See <http://www.icj-cij.org/icjwww/icases/ilm/ilm_ijudgments/ilm_ijudgment_19850603.pdf> at 22 April 2005.

72 *Greenland/Jan Mayen* case [1993] ICJ Rep. 38, 58.

73 Churchill and Lowe, above n 40, 188.

74 Points A 16 (east) and A 17 (west).

75 Triggs and Bialek, above n 4, 342.

76 *Continental Shelf (Libya v Malta) (Application by Italy for Permission to Intervene* ([1984] ICJ Rep 3.

77 Triggs and Bialek, above n 4, 352.

Second, Australia is likely to argue a line of equidistance does not apply to opposite States which do not share a common continental shelf. This position is premised, that as a matter of geomorphology, Timor-Leste either has no continental shelf or a very narrow one. The jurisprudence and State practice on this point, therefore, has little bearing on the sui generis of the Timor Gap.[78]

Third, the principal of proportionality would require consideration when arriving at an 'equitable' boundary in the Timor Gap. Given the disparate coast line differences and the decision in the *Gulf of Maine case*[79] and *Libya-Malta case*,[80] Australia's greater coast line length would work to significantly mitigate an equidistant maritime border claim in Australia's favour.

Finally, UNCLOS Article 53(3) provides a degree of protection by affording sovereign rights for the exploitation of natural resources within the exclusive economic zone (EEZ). Timor-Leste's claim could, therefore, potentially breach UNCLOS and Timor-Leste's obligations under customary international law.

6. SOUTHERN BOUNDARY EXPANSION AND S 51 OF THE CONSTITUTION

Having examined the strength of the international legal issues which touch and concern boundary negotiations applicable to the Timor Gap, it is then appropriate to consider, under s 51 of the Constitution, the position of title holders in the joint petroleum development area (JPDA) in the event of Timor-Leste being successful in any maritime boundary settlement. In particular, the position of title holders will be considered with reference to s 51(xxxi) of the Constitution.[81]

As a head of power, s 51 of the Constitution authorizes the Commonwealth to make laws for the peace, order, and good government of the Commonwealth, with respect to:-

> (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.[82]

For present purposes, two aspects of s 51(xxxi) must be addressed, namely the phrase 'acquisition of property' and, that of 'just terms'. Against the order of s 51(xxxi), and for purposes of convenience and context, this paper will address the phrase 'just terms', followed by 'acquisition of property'.

Whilst a full discussion on the phrase 'just terms' is beyond the scope of this paper, for present purposes it is sufficient to refer to the judgment of Kitto J. in *Nelungaloo Pty. Ltd. v Commonwealth*,[83] where His Honour states:

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78 Ibid, 352-3.

79 Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Gulf of Maine case). See <http://www.icj-cij.org/icjwww/icases/icigm/icigm_ijudgment/icigm_ijudgment_19841012.pdf> at 22 April 2005.

80 Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) I.C.J. No. 68, 13. See <http://www.icj-cij.org/icjwww/icases/ilm/ilm_ijudgments/ilm_ijudgment_19850603.pdf> at 22 April 2005.

81 The acquisition of property on just terms.

82 For a discussion on the role of s 51(xxxi) see the comments of Dixon CJ. in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349-50.

83 (1952) 85 CLR 545.

> The standard of justice postulated by the expression "just terms" is one of fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence.[84]

His Honour then proceeded to quote Dixon J. (as he then was):

> When the question is one of fairness in any community the standard must depend upon the life and expeience (sic) of that community, rather than upon the changing fortunes of other countries and the exigencies which beset them.[85]

Regarding the acquisition of property, in a similar vein there exists an array of High Court decisions which expound on the term.[86] Given the 'property' with respect to offshore operations in the JPDA, and under the *Petroleum (Submerged Lands) Act 1967*[87] (herein referred to as the *P(SL)A*), is categorized as either a permit,[88] lease[89] or license[90] it stands that any southern adjustment of the maritime border between Australia and Timor-Leste, in Timor-Leste's favour, would have legal significance in relation to such property.

As Australia would be effectively ceding territory to Timor-Leste, any compensation, outside express agreement, may turn on whether there has been an acquisition of property by the Commonwealth to give effect to any boundary settlement.

In the *Commonwealth v WMC Resources*,[91] the Court held, by a majority,[92] that the excising of exploration permit blocks on the continental shelf covered by a statutory exploration permit under the *Consequential Provisions Act* did not constitute an acquisition of property within paragraph s 51(xxxi) of the Constitution.

According to Brennan CJ., whilst municipal law enabled the Commonwealth to 'legislate in respect of the exploration of and the exploitation of the resources of the continental shelf, it has no property in the continental shelf at common law.'[93] His Honour added:

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84 (1952) 85 CLR 545, 600.

85 (1948) 75 CLR 495, 569.

86 See *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Trade Practices Commission v Tooth and Co. Ltd* (1979) 142 CLR 397; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Australian Tape Manufacturers Association Ltd. v Commonwealth* (1993) 176 CLR 480; and , *Mutual Pools & Staff Pty. Ltd. v Commonwealth* (1994) 179 CLR 155.

87 *Petroleum (Submerged Lands) Act 1967* (Cth) (No 118 of 1967). See <http://scaleplus.law.gov.au/html/pasteact/0/80/pdf/PetrolSubLand1967.pdf> at 17 May 2005. The constitutional basis for the *Petroleum (Submerged Lands) Act 1967* (Cth) is to be found in s 51(xxix) – the external affairs power. See C. W. Harders, 'Australia's Offshore Petroleum Legislation: A Survey of its Constitutional Background and its Federal Features (1968) 6 *Melbourne University Law Review* 415, 416.

88 For example see *Petroleum (Submerged Lands) Act 1967* (Cth), Division 2 – Exploration permits for petroleum.

89 For example see *Petroleum (Submerged Lands) Act 1967* (Cth), Division 2A – Retention leases for petroleum.

90 For example see *Petroleum (Submerged Lands) Act 1967* (Cth), Division 3 – Production licences for petroleum.

91 (1998) 194 CLR 1.

92 Brennan CJ., Gaudron., McHugh and Gummow JJ.

93 (1998) 194 CLR 1, 20.

> It is erroneous to regard the P(SL) Act as the off-shore equivalent of those provisions which, in Australia, authorize the Crown to alienate interests in the waste lands of the Crown (provisions which I shall call "Land Acts"). If it were the equivalent of Land Acts, it would be arguable that the extinguishing of a permittee's proprietary rights relieves the Commonwealth of a reciprocal burden on its title to land within the permit area and thus constitutes an acquisition of property. The Land Acts assume the existence of the Crown's radical title to land lying above the low water mark, a title which is sufficient to support the alienation of interests in that land and to found the Crown's full beneficial title to that land when there are no other interests or when other interests have been extinguished or are exhausted. In *Mabo v Queensland [No 2]* (1992) 175 CLR 1 I examined the nature of that radical title and it is unnecessary now to repeat it. It is sufficient to note that the extinguishing of an interest in land above the low water mark necessarily results in the enhancement of the title which was subject to the interest extinguished. The position in relation to interests in or over the continental shelf is quite different.[94]

Gaudron J. argued that:

> … a statutory right is inherently susceptible of statutory modification or extinguishment and no acquisition of property is effected by a law which simply modifies or extinguishes a statutory right that has no basis in the general law.[95]

Gaudron J. went on to state, however:

> If a law modifies or extinguishes a statutory right which has no basis in the general law in circumstances in which some person obtains some consequential advantage or benefit in relation to property, that law may and, ordinarily, will effect an acquisition. And there may and, ordinarily, will be an acquisition if a law operates to transfer a right to some other person, even though the right has no basis in the general law and is inherently susceptible of modification or extinguishment. So, too, there may and, ordinarily, will be an acquisition if a law extinguishes a right of that kind (particularly a monopoly right) and vests a similar right or a right with respect to the same subject matter in some other person.[96]

Whilst the comments of Gaudon J. offer a qualified light for permit holders, Her Honour went on to find that the *Consequential Provisions Act* did not confer a benefit on the Commonwealth.[97]

McHugh J. characterised s 51(xxxi) as a power hedged with qualifications rather than a constitutional guarantee.[98] His Honour went on to state:

> The power to make laws with respect to a subject described in s 51 carries with it the power to amend or repeal a law made on that subject. A property interest that is created by federal legislation, where no property interest previously existed, is necessarily of an inherently determinable character and is always liable to modification or extinguishment[99]

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94 Ibid, 18.
95 Ibid, 35.
96 Ibid, 36.
97 Ibid, 38.
98 Ibid, 48.
99 Ibid, 51.

> … [t]he fact that the Commonwealth or some other person might be viewed as benefiting from that alteration or revocation is irrelevant.[100]

Gummow J. held that the reduction in the specified area and adjustment of the scope of the permit did not result in an acquisition of property.[101]

With judicial divisions and split case law in relation to the operation of s 51(xxxi)[102] there exists no reason why property rights 'should not flow from the "sovereign rights" enjoyed by the Commonwealth over the continental shelf, just as radical title flowed from the "sovereignty" exercisable over the territorial sea and land territory.'[103] Coupling this argument to the issues of fairness and standards found in a community, promoted by Dixon J. in *Nelungaloo Pty. Ltd. v Commonwealth*,[104] and the prospect of changing fortunes in resource allocation in favour of Timor-Leste,[105] which could work to strip legislatively created property rights from permit holders within the JPDA, it is clear an unsatisfactory legal environment exists with respect to title security in which to found significant exploration capital. The Commonwealth Parliament should, therefore, endeavor to cure the 'concessionary'[106] title deficiencies which exist, in an otherwise sound jurisdictional regime, so as to afford sufficient protection against legislative defeasibility of title to offshore petroleum resources.[107]

7. BOUNDARY NEGOTIATIONS, THE JPDA AND THE FUTURE

Despite Timor-Leste's calls for maritime boundary delimitation with Australia, and in a vein reminiscent of the political negotiations which produced the offshore petroleum settlement, Timor-Leste and Australia are migrating towards a stay of maritime border delimitation in exchange for Australia granting Timor Leste an increase in the share of the Greater Sunrise field. Following discussions between Australia and Timor-Leste in Sydney throughout May, Australian officials have announced that 'the two countries had agreed that East Timor's share in the Greater Sunrise

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[100] Ibid, 52.

[101] Ibid, 71-2.

[102] Through a refusal to find an acquisition of property in *WMC v Commonwealth, Mutual Pools & Staff Pty. Ltd. v Commonwealth*, *Nintendo Co. Ltd. v Centronics Systems Pty. Ltd.* against a willingness to do so in *Commonwealth v Mewett*, *Georgiadis v Australian* and *Overseas Telecommunications Corp*. and *Newcrest Mining (WA) Ltd v Commonwealth.*

[103] Michael Crommelin, 'The Legal Character of Resource Titles' (1998) 17 *Australian Mining and Petroleum Law Journal* 57, 68-9.

[104] (1948) 75 CLR 495, 569.

[105] Which would result in an acquisition of property by Timor-Leste using the reasoning of Black CJ., in *Commonwealth v Western Mining Corp. Ltd.* (1996) 136 ALR 535. See also Pat Brazil, 'Constitutional Protection of Resource Rights under Commonwealth Laws Vindicated?' (1996) 15(3) *Australian Mining and Petroleum Law Association Bulletin* 149.

[106] The term used to describe title under the *P(SL)A* by Professor Terence Daintith. See Terence Daintith, 'A Critical Evaluationof the Petroleum (Submerged Lands) Act as a Regulatory Regime' (2000) *Australian Mining and Petroleum Law Association Yearbook* 91, 93.

[107] 'Next round in Timor Sea resource negotiations', *Australian Financial Review* (Sydney) 9 May 2005, 17. See in general the comments of Woodside Petroleum spokesman Mr. Robert Millhouse and in particular, Woodside Petroleum's requirement for 'proper legal, fiscal and regulatory certainty' in relation to the Greater Sunrise project located in the JPDA.

field would rise from 18 per cent to 50 per cent.'[108] In return, 'East Timor would agree to postpone for 50 years any final drawing of its maritime boundary with Australia.'[109]

Whilst it is reasonable to expect this arrangement would be captured by a bilateral treaty between Australia and Timor-Leste, and arguably be capable of delivering further economic relief to the people of Timor-Leste, still regarded as amongst the worlds poorest,[110] the arrangement maintains the effect of deferring the acrimonious issue of maritime border delimitation between the two states.

In addition, any deferral of a permanent maritime boundary between Australia and Timor-Leste will have the consequential effect of leaving long run issues associated with s 51(xxxi) of the Constitution unaddressed. Against this argument, and in recognition that the production lifespan of the JPDA fields is finite and measured in decades,[111] it is possible to surmise that on completion of the proposed 50 year agreement between Australia and Timor-Leste the value of seabed petroleum resources within the JPDA may be comparatively negligible when considering legal argument for compensation under s 51(xxxi) of the Constitution and the phrase 'just terms'.

8. CONCLUSION

Internationally, Timor-Leste, encouraged by public international law developments post the ICJ judgment in the *North Sea Continental Shelf cases*, is diplomatically and publicly voicing a pressing need for maritime boundary delimitation with Australia over the continental shelf. Any successful claim by Timor-Leste, in the form of a median line between the two countries, would, arguably, involve a net loss of sovereign rights, and corresponding valuable petroleum resources, by Australia within the geographical confines of the continental shelf and the JPDA.

With the decision of the High Court in *WMC v Commonwealth* leaving petroleum exploration and production companies operating in the Timor Gap outside the ambit of protection afforded by the 'just terms' clause in s 51(xxxi) of the Constitution, it is clear the Commonwealth, through the *P(SL)A*, needs to address this fundamental flaw in the legislation, and the concerns of the offshore petroleum industry, against loss of property for what Dixon J. described as the changing fortunes of other countries and the exigencies which beset them. That said, current negotiations between Australia and Timor-Leste may generate agreement which would work towards furnishing a perpetual stay against any need to address this perceived legislative flaw.

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108 'East Timor still not ready to sign deal', *Australian Financial Review* (Sydney) 20 May 2005, 55.
109 Ibid.
110 Ibid.
111 Tim Anderson, 'Aid, Trade and Oil: Australia's Second Betrayal of East Timor' (2003) 52 *Journal of Australian Political Economy* 113, 122. See also Timor Sea Office, *Fact Sheets – The Bayu-Undan Development* (2005) <http://www.timorseaoffice.gov.tp/bayufacts.htm> at 17 May 2005.