

AUSTRALIAN CLAIMS TO THE TIMOR SEA'S PETROLEUM RESOURCES: CLEVER, CUNNING, OR CRIMINAL?

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I INTRODUCTION

On 12 January 2006 Australia and East Timor signed the *Treaty on Certain Maritime Arrangements in the Timor Sea between Australia and the Democratic Republic of Timor-Leste*.¹ The signing of *CMATS* marked the conclusion of over six years of negotiations between the two states over the rights to petroleum resources in the Timor Sea. However, the origin of the dispute over these resources pre-dates the existence of the independent State of East Timor. Contention over the rights to the petroleum resources under the Timor Sea first emerged in the 1950s, following Australia's official claim to thereto in 1953.² This article will discuss the international legal dispute that ensued, with a view to assessing the adequacy of the final resolution of the matter, marked by the conclusion of the *CMATS*.

The approach taken will be to consider the progression of the dispute within the context of the expectations of the interested states — Australia, East Timor and Indonesia — relative to their respective entitlements under international law. The discussion will centre upon the negotiation and outcome of the four principal agreements regulating resource exploitation in the disputed area since 1989: the *Agreement Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia*, signed by Australia and Indonesia in October 1972;³ the *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, signed by Australia and Indonesia in December 1989;⁴ the *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed in May 2002;⁵ and *CMATS*, signed by Australia and East Timor in January 2006.⁶ These agreements, and other legal developments relevant to the dispute, will be

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1 *Treaty on Certain Maritime Arrangements in the Timor Sea between Australia and the Democratic Republic of Timor-Leste*, signed 12 January 2006, [2007] ATS 12 (entered into force 23 February 2007) ('*CMATS*').

2 Paul Cleary, *Shakedown: Australia's Grab for Timor Oil* (Allen & Unwin, 2007) 4–8.

3 *Agreement Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia*, signed 9 October 1972, 974 UNTS 319 (entered into force 8 November 1973) ('*CSBATAS*').

4 *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, signed 11 December 1989, 1654 UNTS 105 (entered into force 9 February 1991) ('*Timor Gap Treaty*').

5 *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed 20 May 2002, [2003] ATS 13 (entered into force 2 April 2003) ('*Timor Sea Treaty*').

6 *CMATS*.

considered in chronological order. It is necessary to begin, however, by providing a contextual overview of the dispute.

II INTRODUCTION TO THE DISPUTE

Timor-Leste is one of the world's youngest countries.⁷ Colonised by Portugal in the 16th century, it unilaterally declared independence on 28 November 1975.⁸ However, formal diplomatic recognition was conferred by only six states⁹ and on 7 December 1975 the province was invaded by Indonesian forces and later annexed as the 27th province of Indonesia in July 1976.¹⁰ It was not until 20 May 2002, following almost 25 years of occupation by the Indonesian military and nearly 31 months of United Nations transitional administration, that the region finally achieved formal independence as The Democratic Republic of Timor-Leste.¹¹

Prior to independence, Timor-Leste was known as East Timor. Whilst it is no longer officially correct, the use of this title is still accepted.¹² Therefore, since much of this paper concerns events occurring prior to May 2002, the latter title — East Timor — shall be used so as to avoid the confusion that may arise from using both.

Since its inception, East Timor has struggled to achieve economic self-sufficiency.¹³ Despite the existence of what would be a significant oil and gas bonanza located within 160–250 miles of its coastline, East Timor was ranked 147th in the 2011 UNDP Human Development Index report¹⁴ and is one of the poorest states in Asia.¹⁵ East Timor's uncertain economic future can be attributed, at least in part, to a decades-long dispute with the Commonwealth of Australia over the rights to the revenue and control of these oil and gas resources located in the 'Timor Gap'.¹⁶

7 Joseph Nevins, 'Contesting the Boundaries of International Justice: State Counter-mapping and Offshore Resource Struggles between East Timor and Australia' (2004) 80(1) *Economic Geography* 1, 1.

8 Timothy Mapes and Patrick Barta, 'Deep Division: For East Timor, Energy Riches Lie Just out of Reach; Poor, Fledgling Nation Seeks to Redraw Undersea Map; Australia Stakes Its Claim; A Couple over Greater Sunrise', *The Wall Street Journal* (New York), 10 June 2004, A1.

9 Albania, Cape Verde, Guinea, Guinea-Bissau, Mozambique, and São Tomé and Príncipe.

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

11 Nevins, above n 7, 1–3.

12 See, eg, Department of Foreign Affairs and Trade: ASEAN Regional Issues and East Timor Section, *East Timor* (2009) <http://www.dfat.gov.au/geo/east_timor/index.html>.

13 Kathryn Khamsi, 'A Settlement to the Timor Sea Dispute?' (2005) 9(4) *Harvard Asia Quarterly* 6.

14 United Nations Development Program, *Human Development Indices* (2011) <http://hdr.undp.org/en/media/HDR_2011_EN_Table1.pdf>.

15 Cleary, above n 2, 2–4; 'A Squabble over Oil; Australia and East Timor', *The Economist* (London), 13 March 2003, 67.

16 Khamsi, above n 13.

The Timor Gap is an area of sea and continental shelf located in the Timor Sea between Australia and East Timor.¹⁷ It is an area rich in petroleum resources and is therefore of great economic significance to both states.¹⁸ Within the contested area lie three main oil and gas resources: Laminaria and Corallina, Bayu-Undan and Greater Sunrise.¹⁹

The Laminaria and Corallina fields were discovered in 1994 and 1995, respectively.²⁰ They are located 550 kilometres west-northwest of Darwin, Australia and 160 kilometres south of East Timor, at a depth of 340 metres.²¹ Laminaria-Corallina began production in late 1999 and was developed on reserves of around 200 million barrels.²² However, the fields are now over 95 per cent depleted.²³ Whilst Laminaria-Corallina is twice as close to East Timor as it is to Australia, tax profits from the project have flowed solely to Australia.²⁴ Conservative calculations estimate that by the close of 2011 Australia had received some \$US2 billion in government revenues from Laminaria-Corallina, though the actual figure can be presumed to be significantly higher.²⁵

Bayu-Undan is a gas condensate field located in 80 metres of water 500 kilometres northwest of Darwin and 250 kilometres south of East Timor.²⁶ Discovered in 1995, Bayu-Undan contains recoverable reserves of between 350–400 million barrels of hydrocarbon liquids and 3.4 trillion cubic feet of gas.²⁷ It has an estimated value of between \$US6–7 billion.²⁸ Commercial production of the Bayu-Undan field began in April 2004;²⁹ the field has an expected lifetime of 25 years.³⁰

17 Kristen Walker, 'Horta v the Commonwealth: Case Notes' (1994) 19 *Melbourne University Law Review* 1114, 1114.

18 Ibid; Cleary, above n 2, 4.

19 The Timor Sea Justice Campaign, *Resources in Dispute* (2009) <http://tsjc.asiapacificjustice.org/res_dispute.htm>.

20 Andrew Symon, 'Timor Sea Natural Gas Development: Still in Embryo' (Economic Issues No 2, South Australian Centre For Economic Studies, August 2001); Woodside, *Laminaria-Corallina* (2009) <<http://www.woodside.com.au/Our+Business/Production/Australia/Laminaria-Corallina+Northern+Australia.htm>>; Net Resources International, *Laminaria, Australia* (2009) [offshore-technology.com/projects/laminaria/](http://www.offshore-technology.com/projects/laminaria/)>.

21 Symon, above n 20; Woodside, above n 20; Net Resources International, above n 20.

22 Symon, above n 20; Woodside, above n 20; Net Resources International, above n 20.

23 La'o Hamutuk, *How Much Oil Money Has Australia Stolen from East Timor Already? A Look at Laminaria-Corallina* (2012) <http://www.laohamutuk.org/Oil/Boundary/laminaria_revenues.htm>.

24 The Laminaria-Corallina field falls outside the JPDA and is therefore not subject to revenue sharing arrangements between Australia and East Timor.

25 Hamutuk, above n 23.

26 Offshore-technology.com, *Bayu-Undan, Timor Sea Australia* (2011) <<http://www.offshore-technology.com/projects/bayu-undand/>>; Santos, *Bayu-Undan Liquids* (2009) <<http://www.santos.com/Content.aspx?p=216>>; The Territory, *Darwin LNG Plant/Bayu-Undan* (2009) <<http://www.theterritory.com.au/index.php?menuID=171>>.

27 Offshore-technology.com, above n 26; Santos, above n 26; The Territory, above n 26.

28 Offshore-technology.com, above n 26; Santos, above n 26; The Territory, above n 26.

29 Liquids production commenced in April 2004 and LNG production commenced in February 2006.

30 Offshore-technology.com, above n 26; Santos, above n 26; The Territory, above n 26.

By far the greatest prize in the Timor Sea, however, is the Greater Sunrise field.³¹ Greater Sunrise is located about 450 kilometres from Darwin and 170 kilometres from East Timor.³² Discovered in 1974, Greater Sunrise consists of the Sunrise and Troubadour reservoirs and is estimated to contain recoverable reserves of 7.7 trillion cubic feet of dry gas and 299 million barrels of condensate.³³ Prior to the decline in the price of oil in 2008, the total value of Greater Sunrise was estimated at \$US90 billion.³⁴ Greater Sunrise has a projected lifetime of 30–40 years.³⁵

III THE BASIS OF THE DISPUTE

The dispute over the petroleum resources located within the Timor Gap centres upon the delimitation of the seabed between East Timor and Australia.³⁶ Under art 57 of the *United Nations Convention on the Law of the Sea*, a coastal state is entitled to claim an exclusive economic zone ('EEZ') extending up to 200 nautical miles from the baseline of its territorial sea.³⁷ Within its designated EEZ a state has sovereign rights for the purpose of, inter alia, exploring and exploiting the natural resources in and superjacent to the seabed and its subsoil.³⁸

Article 77 of *UNCLOS* conveys a similar entitlement with respect to a coastal state's continental shelf.³⁹ A continental shelf is the submerged prolongation of a state's landmass.⁴⁰ It is comprised of the seabed and subsoil and extends from the state's shoreline to the first prominent cleavage.⁴¹ A state may claim its continental shelf to a distance of 350 nautical miles from the baseline of its territorial sea, thereby acquiring sovereign rights for the purpose of exploring and exploiting the natural resources therein.⁴²

Both Australia and East Timor are coastal states. Each is therefore entitled to claim sovereign rights in accordance with arts 57 and 77 of *UNCLOS*. Both states have claimed the full extent of their rights under both articles. In legislation passed shortly after its independence, East Timor claimed a 200 nautical mile

31 Triggs and Bialek, above n 10, 341.

32 Mapes and Barta, above n 8; 'Timor Sea' (2003) *Petroleum Economist* 1, 10.

33 'Timor Sea', above n 32.

34 Back Door Newsletter on East Timor, *Historical Background* (2004) <<http://members.pcug.org.au/~wildwood/04tsjcbck.html>>.

35 Cleary, above n 2, 60; PetroleumNews.net, *Parliament Passes Greater Sunrise Bill* (2 March 2007) <[http://www.petroleumnews.net/storyview.asp?storyid=95026§ionsource=s90&highlight=a*";](http://www.petroleumnews.net/storyview.asp?storyid=95026§ionsource=s90&highlight=a*)> hydrocarbon-technology.com, *Sunrise Gas Field, Timor Sea, Australia* (2009) <<http://www.hydrocarbons-technology.com/projects/sunrise-gas-field/>>.

36 Triggs and Bialek, above n 10, 324.

37 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 57 ('*UNCLOS*').

38 *Ibid* art 56.

39 *Ibid* art 77.

40 *Ibid* art 76.

41 *Ibid*.

42 *Ibid* arts 76, 77.

EEZ and continental shelf rights to the greatest allowable distance.⁴³ Australia too has claimed a 200 nautical mile EEZ.⁴⁴ It has also claimed continental shelf rights up to the Timor Trough, a deep trench in the seabed located some 250–300 nautical miles off the Australian coast, which Australia argues constitutes a definitive break in the continental shelf between Australia and East Timor.⁴⁵

However, Australia and East Timor lie less than 400 nautical miles apart; at their nearest point the distance between the two states is a mere 130 nautical miles.⁴⁶ Consequently, the sovereign entitlements claimed by Australia and East Timor overlap significantly.

Overlapping claims such as those made by Australia and East Timor are to be determined by agreement on the basis of international law.⁴⁷ Where the states concerned are separated by less than 400 nautical miles, customary practice favours the establishment of a boundary equidistant between the two, known as the ‘median’ or ‘equidistance’ line.⁴⁸ This principle has been applied in many negotiations, including during the renegotiation of the maritime borders between Australia and New Zealand in 2004.⁴⁹ However, agreeing on a median line boundary with East Timor would require Australia to relinquish control of the entire Greater Sunrise field.⁵⁰ Consequently, Australia has been reluctant to engage in maritime boundary negotiations with East Timor on such terms.⁵¹ Instead, Australia has sought to replicate the terms of the *CSBATAS* agreement struck with Indonesia in 1972, which marks the only instance in which such overlapping maritime claims have been resolved other than by application of the median line principle.⁵²

In the event that negotiations fail to yield a solution, either party to a maritime boundary dispute may call for the matter to be taken to international arbitration.⁵³ The appropriate bodies in this case would be the International Court of Justice

43 *Fronteiras Marítimas do Território da República Democrática de Timor-Leste, Lei No 7/2002* (20 May 2002) [Timor-Leste Maritime Zones Act, Law No 7/2002] ss 7, 8:

The outer limit of the continental shelf of East Timor shall be defined by a line in which each of the points is situated at a distance of two hundred nautical miles from the nearest point of the baseline or by the outer edge of the continental margin, in case the continental margin is located at a distance exceeding two hundred nautical miles from the baseline.

44 The EEZ in relation to Australia and its external territories has been declared under the *Seas and Submerged Lands Act 1973* (Cth) s 10B and the *Acts Interpretation Act 1901* (Cth) s 4: Commonwealth, *Commonwealth of Australia Gazette*, No S 290, 29 July 1994, ‘Proclamation dated 26 July 1994’.

45 Cleary, above n 2, 6; Marcia Langton et al, *Honor among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 330–4.

46 Cleary, above n 2, 4; John McBeth, ‘Canberra’s Sea of Troubles’ (2004) 167(27) *Far Eastern Economic Review* 42, 43.

47 *UNCLOS* arts 74(1), 83(1).

48 Mapes and Barta, above n 8; McBeth, above n 46, 43; The Timor Sea Justice Campaign, *International Law* (2009) <<http://tsjc.asiapacificjustice.org/international.htm>>.

49 McBeth, above n 46; The Timor Sea Justice Campaign, above n 48.

50 See MAP 1 (below); Andrew Trounson, ‘New Nation, Old Frustration: Who Owns What?’, *The Wall Street Journal* (New York), 18 July 2002, A10.

51 Khamsi, above n 13.

52 *Ibid.*

53 *UNCLOS* art 286.

(‘ICJ’) or the International Tribunal on the Law of the Sea (‘ITLOS’).⁵⁴ However, in March 2002 Australia withdrew from the maritime jurisdiction of both the ICJ and ITLOS. As a result, in the absence of Australia’s resubmission to ICJ or ITLOS jurisdiction, direct negotiation between Australia and East Timor is the only way to settle their respective claims.

As mentioned above, on 12 January 2006 Australia and East Timor signed *CMATS*,⁵⁵ a provisional bilateral agreement intended to provide for the exploitation of oil and gas resources under the Timor Gap.⁵⁶ *CMATS* does not resolve the maritime border dispute between Australia and East Timor, but rather defers determination of such borders until the exhaustion of the disputed resources.⁵⁷ The terms and ramifications of *CMATS* will be considered in the latter half of this paper, within the context of each state’s legitimate claim to the territory concerned therein. However, in order to properly understand the significance of *CMATS*, it is necessary to begin by considering the origins of the dispute.

IV 1972 INDONESIA NEGOTIATIONS

In 1945 the then President of the United States of America, Harry Truman, issued the Truman Proclamation, thereby claiming jurisdiction over ‘the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the United States’.⁵⁸ The Proclamation sparked a race by coastal states to assert corresponding rights and in 1953 Australia followed suit by claiming control of its continental shelf to a depth of 200 metres.⁵⁹ Five years later the United Nations General Assembly passed the first Conventions on the Law of the Sea: the *Convention on the Territorial Sea and the Contiguous Zone*; the *Convention on the High Seas*; the *Convention on Fishing and Conservation of Living Resources*; and the *Convention on the Continental Shelf*.⁶⁰ Article 2(1) of the *Convention on the Continental Shelf* confirmed the right of coastal states to claim sovereign rights over their continental shelf for the purpose of ‘exploring it and exploiting its natural resources’.⁶¹ Article 2(2) provided that such rights ‘are exclusive in the sense that if the coastal State does not explore the continental

54 The Timor Sea Justice Campaign, *Historical Background* (2009) <<http://tsjc.asiapacificjustice.org/background.htm>>.

55 *CMATS*.

56 *Ibid*; Department of Foreign Affairs and Trade, *Fact Sheet* (2009) Australia–East Timor Maritime Arrangements <http://www.dfat.gov.au/geo/east_timor/fs_maritime_arrangements.html>.

57 Charles Scheiner, ‘Drilling East Timor: Australia’s Oil Grab in the Timor Sea’ (2006) 27(1) *Multinational Monitor* 30, 31.

58 United States of America, Executive Order 9633, 10 FR 12305 (28 September 1945).

59 Cleary, above n 2, 5.

60 *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964); *Convention on Fishing and Conservation of Living Resources*, opened for signature 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966); *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962); *Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

61 *Convention on the Continental Shelf*, above n 60, art 2(1).

shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State'.⁶²

With a vast coastline, Australia stood to benefit significantly from the *Convention on the Continental Shelf*. However, Australia's claim was complicated somewhat by its close proximity to Indonesia and what was then Portuguese-controlled East Timor. Article 6 of the *Convention on the Continental Shelf* states:

Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line.⁶³

Undeterred, the Australian government simply denied the mutuality of the continental shelf between itself, Indonesia and East Timor. In October 1970 the government proclaimed the existence of 'two shelves' in the Timor Sea, divided by the Timor Trough, which it claimed constituted a definitive break in the continental shelf between Australia and its neighbours.⁶⁴ By asserting the existence of two distinct shelves Australia's argument denied the applicability of art 6 of the *Convention on the Continental Shelf* to its claim.⁶⁵ Speaking to the Australian Parliament, William McMahon, then Australian Minister for External Affairs, outlined the government's position:

the rights claimed by Australia in the Timor Sea area are based unmistakably on the morphological structure of the sea bed. The essential feature of the sea bed beneath the Timor Sea is a huge steep cleft or declivity called the Timor Trough, extending in an east-west direction, considerably nearer to the coast of Timor than to the northern coast of Australia. It is more than 550 nautical miles long and on the average 40 miles wide, and the sea bed sloped down on opposite sides to a depth of over 10,000 feet. The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves, and not one and the same shelf, separating the two opposite coasts. The fall-back median line between the two coasts, provided for in the Convention in the absence of agreement, would not apply for there is no common area to delimit.⁶⁶

Following its announcement, Australia sought to enter into negotiations with both Portugal and Indonesia in an effort to secure a permanent maritime boundary with each.⁶⁷ Portugal rejected Australia's contention and negotiations between the

62 Ibid art 2(2).

63 Ibid art 6(1).

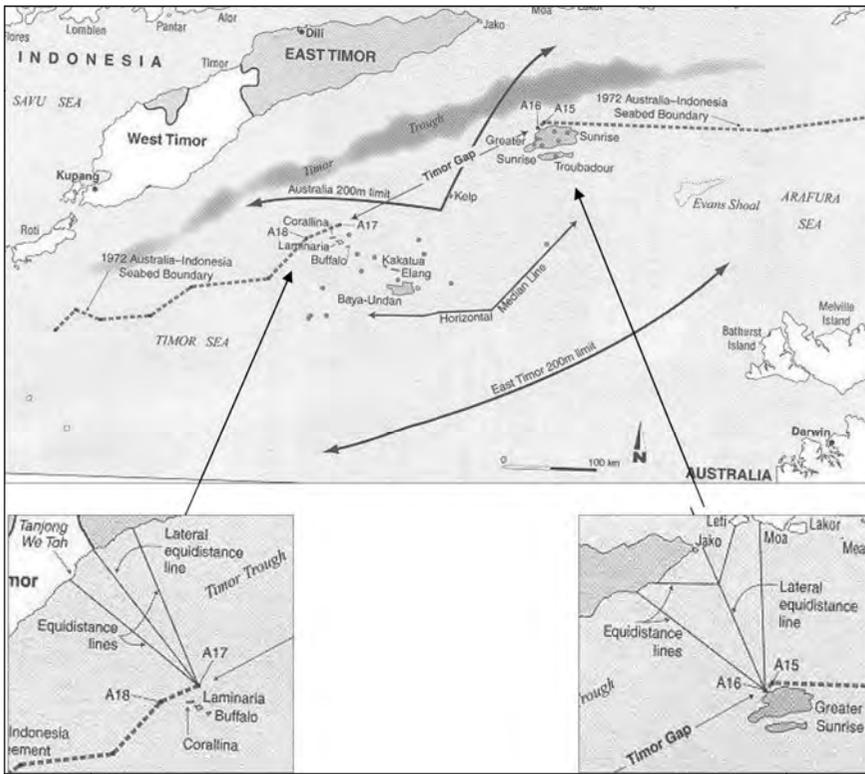
64 Cleary, above n 2, 7.

65 Ibid 4–6.

66 William McMahon, 'Ministerial Statement — Australian Practice in International Law' (1970–3) 5 *Australian Yearbook of International Law*, 146.

67 Cleary, above n 2, 8; Nevins, above n 7, 3–4.

two stalled at the preliminary communications stage when Australia indicated its unwillingness to consider a boundary lying more than 50 nautical miles off the Timorese coast.⁶⁸ Until its decolonisation of East Timor in 1974–5, Portugal continued to exercise its right to grant petroleum licenses up to the median line.⁶⁹ Indonesia, however, was emerging from a brutal campaign against the Indonesian Communist Party and was eager to gain legitimacy by doing deals with the west.⁷⁰ Indonesia accepted Australia's contention regarding the continental shelf and negotiations between the two states culminated in the *CSBATAS* agreement, signed in October 1972.⁷¹



MAP 1: This map shows the boundaries agreed to by Australia and Indonesia in the 1972 *CSBATAS* agreement. Also visible is the median line between Australia and Indonesia, as well as each state's 200 nautical mile limit.⁷²

68 Cleary, above n 2, 8; Walker, above n 17.

69 Cleary, above n 2, 6–13.

70 Ibid 10.

71 *CSBATAS*; Triggs and Bialek, above n 10, 324.

72 Cleary, above n 2, xx.

The *CSBATAS* agreement was significantly more favourable to Australia than to Indonesia.⁷³ On the basis of the *Convention on the Continental Shelf*, Australia successfully argued that it was entitled to all of the resources contained within its continental shelf, which it declared extended up to the Timor Trough.⁷⁴ In accordance with Australia's argument, the boundary agreed to corresponded with the southern edge of the Timor Trough, thereby granting Australia control of some 80 per cent of the area in dispute.⁷⁵ At the time of the negotiations however, East Timor remained a Portuguese territory and thus its maritime border could be settled only with Portugal's consent. Accordingly, the border agreed to by Australia and Indonesia was fixed only to the east and west of East Timor, leaving what has become known as the 'Timor Gap' between points A16 and A17 on MAP 1 above.

The lateral limits of the 1972 boundaries were set in accordance with the median line principle, such that each point was equidistant from the coasts of East Timor and Indonesia.⁷⁶ In determining East Timor's coastline the negotiators opted for a simplified approach, disregarding features such as islands or capes that might unfairly influence the line.⁷⁷ This was not the case with regard to the determination of Indonesia's coastline however, which was set having reference to various Indonesian points and islands.⁷⁸ Consideration of these features caused the median line to veer towards East Timor at the exact location of the Greater Sunrise field in the east and the Buffalo, Laminara, and Corallina fields in the west.⁷⁹ That the lateral limits of the border encroached upon territory potentially under East Timor's maritime jurisdiction and may therefore have been the subject of a challenge by Portugal, was recognised in art 3 of the *CSBATAS* agreement:⁸⁰

In the event of any further delimitation agreement or agreements being concluded between governments exercising sovereign rights with respect to the exploration of the seabed and the exploitation of its natural resources in the area of the Timor Sea, the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia shall consult with each other with a view to agreeing on such adjustment or adjustments, if any, as may be necessary in those portions of the boundary lines between Points A15 and A16 and Points A17 and A18.⁸¹

The agreed horizontal border, however, is permanent.

Australia's insistence during the negotiations that the Timor Trough marked a break in the continental shelf between Australia and Timor, thereby precluding

73 Nevins, above n 7, 3.

74 Cleary, above n 2, 8–14.

75 Nevins, above n 7, 3.

76 Cleary, above n 2, 10–13.

77 *Ibid* 11–13.

78 *Ibid* 10–13.

79 *Ibid*.

80 *Ibid* 12.

81 *CSBATAS* art 3.

application of art 6 of the *Convention on the Continental Shelf*, was tenuous.⁸² Geological opinion at the time of the negotiations suggested that Australia and East Timor did in fact share the same continental shelf; the Timor Trough was considered merely a geological 'crumple zone' formed millions of years earlier by the collision of the Australian plate and the Indonesian islands north of East Timor.⁸³ As Charles Hutchison explained, '[t]he continental shelf unit extends from the Australia Sahul shelf, beneath the axis of the Timor Trough, to reappear uplifted and folded on the island, where it is widely exposed'.⁸⁴ Seismic surveys and geological studies conducted since the 1972 negotiations have conclusively proved this theory, thereby completely discrediting Australia's argument.⁸⁵ Indeed, six years after the agreement was reached, the then Indonesian foreign minister, Professor Mochtar Kusumaatmadja, a law of the sea expert and participant in the 1972 negotiations, declared that Australia had taken Indonesia 'to the cleaners'.⁸⁶

Why Indonesia accepted Australia's contention remains somewhat uncertain. However, while tenuous, Australia's argument was not altogether implausible and thus Australian negotiators were able 'to bombard [their Indonesian counterparts] with a mass of data'⁸⁷ substantiating their claim. Strengthening Australia's position was a recently delivered ICJ decision regarding the North Sea Continental Shelf, which placed significant emphasis on the concept of natural prolongation in determining maritime boundaries.⁸⁸ It is therefore possible that Indonesia was simply out-manoeuvred by Australia. Indeed, it is likely that at the time of the negotiations Indonesia was unaware of the Timor Sea's vast oil potential.⁸⁹ Nevertheless, the impact that regional politics may have had on the negotiations ought not to be overlooked. Whilst maritime border negotiations typically span a number of years, the agreement between Australia and Indonesia was finalised in a mere 17 months, at a time when the Indonesian government was looking to garner political support within the region after recent internal conflict.⁹⁰ Quite possibly, Indonesia's stance during the negotiations was born out of a combination of the aforementioned factors. In any event, with the exception of the lateral boundaries, which required Portuguese assent, the *CSBATAS* agreement reached between Australia and Indonesia in 1972 was permanent; once signed and ratified, maritime boundary agreements cannot be undone.⁹¹

82 Cleary, above n 2, 9–10; McBeth, above n 46, 43–4.

83 Cleary, above n 2, 9–10; McBeth, above n 46, 43–4.

84 Cleary, above n 2, 9.

85 Ibid; McBeth, above n 46, 43–4.

86 Cleary, above 2, 13.

87 McBeth, above n 46, 43.

88 Cleary, above n 2, 11; *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3; *North Sea Continental Shelf (Federal Republic of Germany v Netherlands) (Judgment)* [1969] ICJ Rep 3.

89 McBeth, above n 46, 43.

90 Nevins, above n 7, 3.

91 Khamsi, above n 13; Triggs and Bialek, above 10, 351–2.

V 1989 INDONESIAN NEGOTIATIONS

On 7 December 1975, following Portugal's withdrawal from the region, Indonesia launched a full-scale invasion of East Timor.⁹² Seven months later Indonesia annexed East Timor as its 27th province.⁹³ Both the invasion and annexation were illegal under international law.⁹⁴ From the very beginning, however, the Australian government viewed these developments through a prism of national interest.⁹⁵ Although there was certainly a genuine debate within the government regarding the principle of self-determination, such concerns were ultimately subordinate to Australia's interest in securing a favourable seabed boundary in the Timor Gap.⁹⁶ In August 1975, the then Australian Ambassador to Jakarta, Richard Woolcott, sent a cable to the Department of Foreign Affairs illustrative of Australia's perceived interest in the developments:

I wonder whether the Department has ascertained the interest of the Minister or the Department of Minerals and Energy in the Timor Situation. It would seem to me that this Department might well have an interest in closing the present gap in the agreed seabed border and that this could be much more readily negotiated with Indonesia by closing the present gap than with Portugal or an independent Portuguese Timor.⁹⁷

A Policy Planning Paper dated 3 May 1974 indicates that the Department of Foreign Affairs had indeed considered the matters raised by Woolcott.⁹⁸ Issued prior to the Indonesian invasion, the paper concludes that an Indonesian-controlled Timor would be in Australia's best interests since 'the Indonesians would probably be prepared to accept the same compromise as they did in the negotiations already completed on the seabed boundary ...'⁹⁹

However, it was not only Australia that stood to gain from further negotiations regarding the Timor Sea. International opposition to Indonesia's invasion of East Timor was considerable.¹⁰⁰ The United Nations General Assembly and Security Council both passed resolutions deploring the invasion and calling for Indonesia's immediate withdrawal.¹⁰¹ Negotiations with Australia over the Timor

92 Triggs and Bialek, above n 10, 326.

93 Nevins, above n 7, 3; Triggs and Bialek, above n 10, 324–6; Walker, above n 17.

94 The *United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations*, GA Res 2625/25, UN GAOR, 25th sess, 183rd plen mtg, UN Doc A/RES/25/2625 (24 October 1970), provides that '[n]o territorial acquisition resulting from the use or threat of force shall be recognized as legal'; Nevins, above n 7, 3.

95 Cleary, above n 2, 15–267.

96 Ibid 15–33.

97 Ibid 22.

98 Ibid 15–16; Department of Foreign Affairs and Trade, *Australia and the Indonesian Incorporation of Portuguese Timor 1974–1976* (Melbourne University Press, 2000).

99 Cleary, above n 2, 15–16; Department of Foreign Affairs and Trade, above n 98.

100 Rebecca Kavanagh, 'Comments and Notes — Oil in Troubled Waters: The International Court of Justice and East Timor: Case concerning East Timor (Australia v Portugal)' (1996) 18 *Sydney Law Review* 87, 88.

101 Ibid.

Gap would go some way toward undermining such opposition by signifying Australia's recognition of East Timor's integration into Indonesia.¹⁰² Indeed, as a precondition to formal negotiations, Indonesia required that Australia officially recognise its sovereignty over East Timor.¹⁰³ Australia extended de jure recognition of Indonesian sovereignty over East Timor on 14 February 1979 and formal discussions concerning the Timor Gap began soon thereafter.¹⁰⁴ However, international law concerning the delimitation of seabed boundaries had developed considerably since the 1972 *CSBATAS* agreement was struck and Indonesia's compliance with Australian demands proved to be somewhat less forthcoming than Australia had anticipated.¹⁰⁵

In 1973 the Third United Nations Conference on the Law of the Sea was convened in New York. The Conference culminated in the adoption of *UNCLOS* in 1982.¹⁰⁶ Indonesia ratified *UNCLOS* in 1986.¹⁰⁷ Australia signed it on 10 December 1982, but did not ratify it until 12 years later, presumably as ratifying the Convention during the course of the negotiations would likely have undermined Australia's position.¹⁰⁸

It is frequently claimed that *UNCLOS* confirmed the growing acceptance of the median line principle, thereby buttressing Indonesia's claims with regard to the Timor Sea.¹⁰⁹ This is incorrect. *UNCLOS* certainly places emphasis on the principle of delimitation by agreement, as did the 1958 *Convention on the Continental Shelf*.¹¹⁰ However, it does not go so far as to stipulate any normative rules to be applied in the absence of agreement.¹¹¹ Indeed, nowhere in *UNCLOS* does the term 'median line' appear. Nevertheless, state and juridical practice following the 1972 *CSBATAS* agreement increasingly resorted to the median line principle when the distance between competing states was less than 400 nautical miles.¹¹²

Whilst *UNCLOS* did not affirm the median line principle, it did establish the right of a coastal state to claim a 200 nautical mile EEZ.¹¹³ Part V of *UNCLOS* extends to a coastal state the right to claim an EEZ extending up to 200 nautical miles from the baseline of its territorial sea,¹¹⁴ within which it possesses:

102 Nevins, above n 7, 3–4.

103 Ibid; Cleary, above n 2, 29.

104 Cleary, above n 2, 29; Nevins, above n 7, 4; Triggs and Bialek, above n 10, 326–7.

105 Ibid 327; Cleary, above n 2, 34–49.

106 *UNCLOS*.

107 Cleary, above n 2, 37.

108 Ibid.

109 See, eg, Nevins, above n 7, 5; Triggs and Bialek, above n 10.

110 Park Hee Kwon, *The Law of the Sea and Northeast Asia: A Challenge for Cooperation* (Kluwer Law International, 2000) 42.

111 Ibid.

112 Khamsi, above n 13; Triggs and Bialek, above n 10.

113 *UNCLOS* arts 55–8.

114 Ibid arts 55–7.

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.¹¹⁵

Therefore, regardless of the strength of Australia's arguments vis-à-vis the continental shelf, under *UNCLOS* Indonesia had a valid claim to the seabed and subsoil beyond its coastline to a distance of 200 nautical miles.¹¹⁶

Accordingly, whilst Indonesia could not seek to renegotiate the *CSBATAS* agreement, it was no longer prepared to close the Timor Gap by simply drawing a line between points A16 and A17 (see MAP 1 above).¹¹⁷ Instead, Indonesia sought to negotiate a boundary with Australia based on the median line principle, claiming an EEZ stretching almost two-thirds of the way towards the Australian coastline.¹¹⁸ For its part, Australia persisted in its claim to the full extent of its proclaimed continental shelf. Australia's intransigence was based on its desire to secure control of the Kelp Prospect, a potential petroleum resource located south of the median line, which the Department estimated may contain some 6 billion barrels of oil and 3–17 trillion cubic feet of natural gas.¹¹⁹ The two sides were irreconcilable and negotiations reached an impasse.¹²⁰

Negotiations remained stalled until 1985 when discussions began concerning a resource sharing arrangement that would give both states a share in the Kelp Prospect.¹²¹ Agreement was reached in late 1988, culminating in the *Timor Gap Treaty*, signed by the Australian and Indonesian foreign ministers whilst flying over the seabed in December 1989.¹²²

115 Ibid art 56(1)(a).

116 Triggs and Bialek, above n 10.

117 Ibid 326–7.

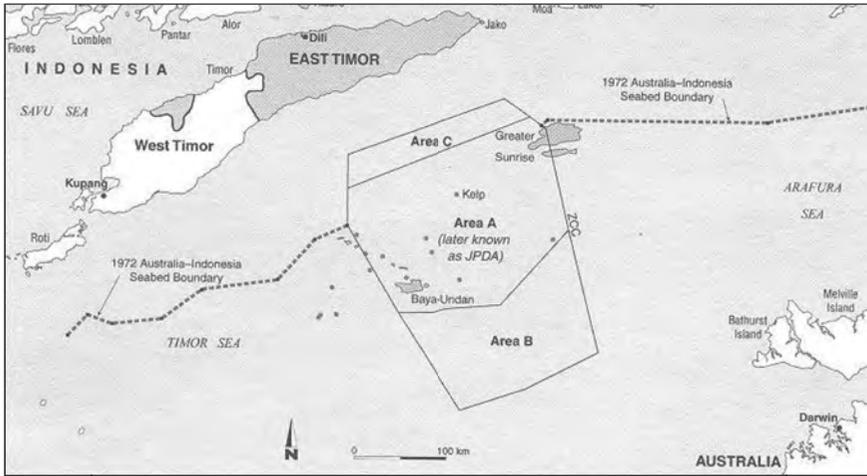
118 Ibid; Cleary, above n 2, 35.

119 Despite high expectations, the Kelp Prospect has proved disappointing, being declared a 'dry hole' by Woodside in 1994. Cleary, above n 2, 37.

120 Nevins, above n 7, 5.

121 Ibid; Cleary, above n 2, 38.

122 *Timor Gap Treaty*; Cleary, above n 2, 38–9; Nevins, above n 7, 4.



MAP 2: This map shows the three areas in the ‘Zone of Cooperation’ agreed to by Australia and Indonesia in the *Timor Gap Treaty*. The Kelp Prospect can be seen near the centre of Area A.¹²³

The *Timor Gap Treaty* set aside the dispute over the final sea boundary, providing instead for the joint exploration of resources within the disputed area.¹²⁴ It divided the disputed area into three separate areas — Area A, Area B and Area C (see MAP 2 above) — which together comprised a ‘Zone of Cooperation’ within which petroleum resources were to be jointly exploited.¹²⁵ Article 2 of the *Timor Gap Treaty* provided that Area A was to be an area of ‘joint control’ from which the benefits of exploitation were to be shared equally between Australia and Indonesia.¹²⁶ Area B was placed under Australian control, however revenues were to be shared with Indonesia on a 90:10 basis.¹²⁷ Area C was placed under Indonesian control, with revenues apportioned 90:10 in Indonesia’s favour.¹²⁸ The *Timor Gap Treaty* established an organisational structure consisting of a Ministerial Council, having overall policy responsibility for matters ‘relating to the exploration for and exploitation of the petroleum resources in Area A of the Zone of Cooperation’, and a Joint Authority possessed of responsibility for routine management of such activities.¹²⁹ The Joint Authority was granted juridical personality and the legal capacity required to enter into production sharing contracts with private corporations.¹³⁰ Importantly, the *Timor Gap Treaty*

123 Cleary, above n 2, xxii.

124 Triggs and Bialek, above n 10, 327.

125 *Timor Gap Treaty* arts 2–4.

126 *Ibid* art 2(2)(a).

127 *Ibid* art 4(1).

128 *Ibid* art 4(2).

129 *Ibid* arts 5–9.

130 *Ibid* arts 7(2), 8(b); Triggs and Bialek, above n 10, 327.

was concluded without prejudice to the respective juridical positions of Indonesia and Australia.¹³¹

At no point during the negotiations did either state seek to have the matter determined other than by negotiation.¹³² Australia would not have supported referring the matter to an international arbiter, such as the ICJ, since its claim was not well-founded in international law and its prospects of achieving a favourable ruling were therefore poor.¹³³ Whilst Indonesia undoubtedly had the stronger claim to the disputed area, it feared that bringing the matter before an international arbiter would draw attention to its illegal occupation of East Timor.¹³⁴ In 2001, Peter Galbraith, a former United States diplomat who participated in later negotiations on behalf of East Timor, explained:

If the Courts and the Law of the Sea favor a midpoint, why didn't Indonesia just ask the International Court of Justice to define a maritime boundary between Australia and Indonesia? Indonesia could not go to court because the first issue that would be raised (not by Australia but by Portugal) would be the illegality of Indonesia's occupation of East Timor.¹³⁵

By this time, however, Australia had recognised Indonesia's sovereignty over East Timor. It is therefore possible that a court would not have raised the matter.¹³⁶ Nevertheless, Indonesia proved unwilling to take such a chance.¹³⁷

VI UN ADMINISTRATION

Following East Timor's vote for independence on 30 August 1999, Indonesia withdrew from East Timor and the United Nations Transitional Administration in East Timor ('UNTAET') assumed authority over the region. The last Indonesian forces left East Timor on 31 October 1999.¹³⁸ UNTAET's mandate enabled it to conclude international agreements on behalf of the East Timorese leadership.¹³⁹ Pursuant to this authority UNTAET agreed, by Exchange of Note in February 2000, to an interim arrangement providing for the continuation of the terms

131 *Timor Gap Treaty* art 33(4); Triggs and Bialek, above n 10, 327.

132 Cleary, above n 2, 36.

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

136 *Ibid.*

137 The matter ultimately did end up before the ICJ, when Portugal instituted proceedings against Australia in 1991 in *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90. Portugal submitted, *inter alia*, that by concluding the agreement with Indonesia, Australia had violated its obligation to respect the duties and powers of Portugal as the administering Power of East Timor, as well as the right of the East Timorese to self-determination. In its 1995 decision the ICJ found that, 'Australia's behaviour cannot be assessed without first entering into the question of why it is that Indonesia could not lawfully have concluded the 1989 Treaty': at [28]. Since Indonesia was not a party to the proceedings the Court declined to consider the matter on the basis that it lacked jurisdiction.

138 Triggs and Bialek, above n 10, 328.

139 *Ibid.*; Khamsi, above n 13.

of the *Timor Gap Treaty* with regard to Area A.¹⁴⁰ Whilst both the Timorese leadership and UNTAET refused Timorese succession to the *Timor Gap Treaty*,¹⁴¹ both realised that East Timor could not establish itself as an economically self-sufficient state without ready access to petroleum revenues.¹⁴² Their strategy was to secure an interim arrangement that would ensure an immediate flow of revenue to East Timor whilst leaving open the possibility of future negotiations.¹⁴³

In March 2000, shortly after the Exchange of Notes was completed, UNTAET made it clear to Australia that the interim agreement would cease to exist once East Timor officially achieved independence.¹⁴⁴ Formal negotiations for a post-independence agreement thus began in October 2000.

The Australian negotiators pushed for an agreement that closely resembled the terms of the *Timor Gap Treaty*, again offering East Timor 50 per cent of Area A.¹⁴⁵ However, regulatory control was more important to Australia than direct revenue; the government feared that relinquishing regulatory control to East Timor could lead to higher taxes for Australian resource companies.¹⁴⁶ It also did not want to grant East Timor any significant degree of control over future development plans — such as pipeline construction — as this too could adversely affect the bottom lines of Australian resource companies.¹⁴⁷ Australia therefore sought equal representation and veto power in any joint authority regulating commercial activity in the disputed area.¹⁴⁸

Prior to the talks, Galbraith alluded to East Timor's negotiating posture, stating:

Marí Alkatiri has ... asked me to remind you that the Timorese are a patient people, and, when it comes to their rights, a very determined people ... [w]ithout a treaty based on international law, the East Timorese are prepared to wait patiently for their rights.¹⁴⁹

Ultimately, East Timor sought 100 per cent control — reduced to 90 per cent over the course of negotiations¹⁵⁰ — over an area wider than the former Area A and encompassing all of the Greater Sunrise, Laminaria, Corallina and Buffalo oil fields. East Timor also sought enhanced regulatory control over the disputed area.¹⁵¹

140 Cleary, above n 2, 55; *Exchange of Notes Constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor [UNTAET] Concerning the Continued Operation 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 of 11 December 1989*, signed 10 February 2000, [2000] ATS 9 (entered into force 10 February 2000).

141 This arrangement would have seen East Timor receive a mere US\$50 million per year in revenues (based on oil prices of around US\$20 a barrel): Cleary, above n 2, 50–1.

142 Khamsi, above n 13.

143 Nevins, above n 7, 6.

144 Cleary, above n 2, 55.

145 *Ibid.* 56.

146 *Ibid.*; Khamsi, above n 13.

147 Cleary, above n 2, 55; Khamsi, above n 13.

148 Cleary, above n 2, 56.

149 *Ibid.*

150 *Ibid.* 58.

151 *Ibid.* 56–7.

A second interim arrangement was signed by Australia and UNTAET in Dili on 5 July 2001.¹⁵² Whilst UNTAET could conclude agreements on behalf of East Timor, it could not bind a future East Timorese government.¹⁵³ Accordingly, the *Memorandum of Understanding* was entered into in anticipation of an agreement — the *Timor Sea Treaty* — that was to be signed following East Timor becoming independent.¹⁵⁴ The *Memorandum of Understanding* outlined the provisions of the anticipated *Timor Sea Treaty*.

The *Timor Sea Treaty* was signed by Australia and East Timor on 20 May 2002 — East Timor's first day as an independent state.¹⁵⁵ Like the February 2000 agreement before it, the *Timor Sea Treaty* was an interim arrangement intended to provide for the joint exploitation of petroleum resources in the disputed area, pending agreement on permanent maritime boundaries.¹⁵⁶ The *Timor Sea Treaty* abolished the Zone of Cooperation established by the *Timor Gap Treaty* between Australia and Indonesia in 1989.¹⁵⁷ Area A was renamed the Joint Petroleum Development Area ('JPDA') and designated as an area of joint control (see MAP 3 below). Areas B and C were integrated into the territorial waters of Australia and East Timor, respectively.¹⁵⁸ Petroleum produced in the JPDA was to be apportioned on a 90:10 basis in favour of East Timor.¹⁵⁹ Significantly however, Area A encompassed only 20.1 per cent of the Greater Sunrise field.¹⁶⁰ Accordingly, the *Timor Sea Treaty* granted East Timor only 18 per cent of the revenue earned from Greater Sunrise; Australia retained control of the remaining 82 per cent.¹⁶¹ A separate unitisation agreement was signed in 2003 in accordance with Annex E of the *Timor Sea Treaty*.¹⁶²

152 *Memorandum of Understanding between the Government of Australia and the Government of the Democratic Republic of East Timor concerning an International Unitisation Agreement for the Greater Sunrise field*, signed 5 July 2001 ('*Memorandum of Understanding*').

153 Cleary, above n 2, 54–5; Triggs and Bialek, above n 10, 328.

154 Triggs and Bialek, above n 10, 331–4.

155 *Ibid*; *Timor Sea Treaty*.

156 Khamsi, above n 13; Triggs and Bialek, above n 10, 332.

157 *Timor Sea Treaty* art 3.

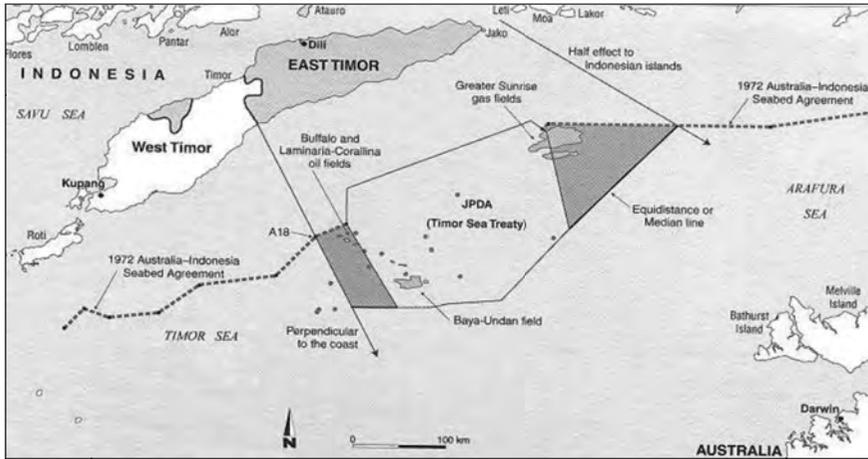
158 *Ibid*; Nevins, above n 7, 5–6.

159 *Timor Sea Treaty* art 4.

160 Scheiner, above n 57, 32.

161 Cleary, above n 2, 60.

162 The International Unitisation Agreement was signed by Australia and East Timor on 6 March 2003, though Australia did not ratify it until a year later. Without the Agreement, the Greater Sunrise field, situated partly within the JPDA and partly in the dispute area to the east of the JPDA, could not be developed: *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste Relating to the Unitisation of the Sunrise and Troubadour Fields*, signed 6 March 2003, [2007] ATS 11 (entered into force 23 February 2007); Cleary, above n 2, 60.



MAP 3: This Map shows the JPDA agreed to in the 2002 *Timor Sea Treaty*. The shaded areas either side of the JPDA represent the areas in which East Timor argued that Australia had a legal obligation to exercise restraint in regard to licensing, petroleum exploration, and development.¹⁶³

Regulatory authority over the JPDA was to be exercised by a Joint Commission consisting of two Timorese representatives and one Australian representative.¹⁶⁴ The Executive Director of the Joint Commission was to be appointed by East Timor, yet all appointments to the Commission were required to be approved by a Ministerial Council within which Australia and East Timor were equally represented.¹⁶⁵ Thus, whilst East Timor did not succeed in securing an area wider than the former Area A, it nevertheless attained considerable regulatory control over the JPDA.¹⁶⁶

VII EAST TIMOR–AUSTRALIA NEGOTIATIONS

Article 2 of the *Timor Sea Treaty* provided that:

Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting Australia's or East Timor's position on or rights relating to a seabed delimitation or their respective seabed entitlements.¹⁶⁷

Accordingly, the *Timor Sea Treaty* did not limit the extent of East Timor's maritime jurisdiction and rights.¹⁶⁸ The East Timorese leadership therefore

163 Cleary, above n 2, xxiii.

164 *Timor Sea Treaty* art 6.

165 Ibid.

166 Cleary, above n 2, 59.

167 *Timor Sea Treaty* art 2.

168 Cleary, above n 2, 60–1.

considered the Treaty to constitute an interim arrangement.¹⁶⁹ Indeed, art 22 of the *Timor Sea Treaty* provided that it would continue only for a period of thirty years,¹⁷⁰ or until permanent maritime boundaries were agreed to by Australia and East Timor.¹⁷¹ However, Australia had already conceded more than it had hoped to and thus had little desire to enter into further negotiations with East Timor over the Timor Sea prior to the exhaustion of the petroleum resources found therein.¹⁷² Accordingly, in March 2002 the Australian government sought to render the *Timor Sea Treaty* effectively permanent by excluding certain areas of ICJ and ITLOS jurisdiction.¹⁷³

Prior to 2002, Australia accepted both the ICJ and the ITLOS as venues for the compulsory resolution of disputes under *UNCLOS*, albeit with limited exceptions.¹⁷⁴ Under *UNCLOS* art 298 however, a state party is entitled, at any time, to exclude certain areas from compulsory jurisdiction.¹⁷⁵ Australia invoked this option in March 2002 so as to exclude maritime boundaries from the compulsory resolution of disputes under the ICJ and ITLOS.¹⁷⁶ In accordance with art 298(1) Australia submitted an official declaration to *UNCLOS* to this effect. The declaration affirmed Australia's acceptance of ICJ and ITLOS jurisdiction for the settlement of disputes, but added that:

The Government of Australia further declares, under paragraph 1 (a) of article 298 of the United Nations Convention on the Law of the Sea done at Montego Bay on the tenth day of December one thousand nine hundred and eighty-two, that it does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (a) and (b) of this declaration) with respect of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles. These declarations by the Government of Australia are effective immediately.¹⁷⁷

When delivering the declaration, the government explained that it was Australia's 'strong view ... that any maritime boundary dispute is best settled by negotiation rather than litigation'.¹⁷⁸ However, a November 2000 telegraph sent to East Timor by a ranking Australian Department of Foreign Affairs and Trade official¹⁷⁹

169 Ibid.

170 Measured from the date of entry into force.

171 *Timor Sea Treaty* art 22.

172 Cleary, above n 2, 60–6; Khamsi, above n 13.

173 Cleary, above n 2, 61; Khamsi, above n 13.

174 Nevins, above n 7, 7.

175 *UNCLOS* art 298.

176 Nevins, above n 7, 7.

177 *Declaration of 21 March 2002 under Articles 287 and 298 of the United Nations Convention on the Law of the Sea*, Australia (entered into force 21 March 2002) <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Australia%20after%20ratification>.

178 Nevins, above n 7, 7.

179 Michael Potts, the then First Assistant Secretary, International Organisations and Legal Division, Australian Department of Foreign Affairs and Trade.

suggested an ulterior motive. The telegraph outlined Australia's resolve to 'play very tough and avoid international law'.¹⁸⁰ It warned that in the event of litigation instigated against Australia by East Timor, Australia would refuse any temporary arrangement. Doing so would render uncertain the legal framework underlying petroleum exploitation in the Timor Sea and would thus freeze development in the region.¹⁸¹ This would deny East Timor of much-needed funds, thereby placing it in a vulnerable position. The telegraph represented a veiled threat to East Timor's economic security, but also indicated Australia's awareness of the dubious nature of its claim under current international law.¹⁸²

Despite Australia's attempts to avoid further negotiations, the newly-independent East Timor continued to push for the immediate settlement of permanent maritime boundaries.¹⁸³ Australia was rapidly depleting the Laminaria, Corallina and Buffalo oil fields and was continuing to issue new licenses in the disputed areas, thereby denying East Timor the opportunity to derive any benefit from such resources.¹⁸⁴ Accordingly, East Timor's President, Mari Alkatiri, wrote to his Australian counterpart in March 2003, requesting the commencement of formal negotiations.¹⁸⁵

Whilst it took the Australian Prime Minister some five months to respond, substantive talks between the two states began on 12 November 2003.¹⁸⁶ The talks were slow going and broke down on a number of occasions.¹⁸⁷ Although some matters were quickly agreed upon, there were a number of outstanding details upon which neither side was prepared to give ground.¹⁸⁸ Australia sought, to the greatest extent possible, merely to replicate the terms of previous agreements — principally the 2002 *Timor Sea Treaty* — but on a permanent basis.¹⁸⁹ East Timor, however, saw the negotiations as an opportunity to secure greater regulatory control over the disputed resources, as well as a larger share of the resultant revenue.¹⁹⁰ East Timor's negotiators were instructed to seek a minimum of 70 per cent of the revenue derived from the Greater Sunrise field, as well as compensation for loss of income from the Laminaria, Corallina, and Buffalo fields.¹⁹¹

East Timor also raised the issue of downstream benefits from the Greater Sunrise field.¹⁹² Of particular interest to East Timor was the possibility of securing the construction of a gas pipeline from the Greater Sunrise field.¹⁹³ This would allow

180 Cleary, above n 2, 63.

181 Ibid 61–2.

182 Nevins, above n 7, 7.

183 Cleary, above n 2, 100–8.

184 Ibid 99–100.

185 Ibid 100.

186 Cleary, above n 2, 100, 108; Khamsi, above n 13.

187 Cleary, above n 2, 228–32; Khamsi, above n 13.

188 Khamsi, above n 13.

189 Ibid.

190 Ibid; Cleary, above n 2, 185–6, 209.

191 Cleary, above n 2, 185–6, 209.

192 Ibid 183, 185–6, 209.

193 Ibid 183–4; Khamsi, above n 13.

for onshore processing of Greater Sunrise gas in East Timor.¹⁹⁴ Prior to raising the matter, East Timor asked Woodside — Australia's largest oil company — to prepare a feasibility study on construction of both a pipeline to and a LNG plant in, East Timor. Woodside declared the project to be technically unfeasible, citing the depth at which such a pipeline must be built in order to navigate the Timor Trough (in excess of 2000 metres).¹⁹⁵ However, at the time of Woodside's report there already existed at least two pipelines built at such depths — one in the Gulf of Mexico and one in the Black Sea — and experts from Europe and the Middle East believed such a project to be both technically feasible and commercially viable.¹⁹⁶

A review of the Woodside report conducted by Norwegian engineering consultants was critical of its findings. The Norwegian review stated: 'when seeing the results, the premises for the [Woodside] study appear to have been colored by lack of incentives to demonstrate that the Timor-Leste alternative can be a realistic option'.¹⁹⁷ Indeed, Woodside had already entered into discussions with Australia regarding the possible payment of a \$200 million subsidy in order for the company to direct processing activities to Australia. Modelling commissioned by the Northern Territory Chamber of Commerce and Industry and the Territory Construction Association showed that piping Greater Sunrise gas to northern Australia would benefit Australia to the tune of \$22 billion in tax revenue and 20 000 new jobs.¹⁹⁸

East Timor sought Australia's commitment to the construction of a pipeline to and a LNG plant in, East Timor.¹⁹⁹ At the very least, East Timor wanted Australia to agree not to subsidise the construction of a pipeline to northern Australia.²⁰⁰ However, with both options being clearly contrary to Australian commercial interests, Australian negotiators immediately dismissed the idea, declaring the matter to be a purely commercial decision.²⁰¹

Another issue of considerable contention was the scope of the area up for negotiation. The Australian delegation sought to limit the area under negotiation to that covered by the 2002 *Timor Sea Treaty*, arguing that the areas beyond A16 and A17 (see MAP 1 above) fell under Australian jurisdiction by virtue of the 1972 *CSBATAS* agreement and the 1989 *Timor Gap Treaty*.²⁰² Australia contended that by concluding the *CSBATAS* agreement with Indonesia it had obtained a benefit which it ought not be expected to give up.²⁰³ However, the *CSBATAS* agreement did not set lateral boundaries. Rather, it set a frontal boundary with flexible end points. Article 3 of the *CSBATAS* agreement states:

194 Cleary, above n 2, 183.

195 Ibid 184.

196 Ibid 184, 222.

197 Ibid 185.

198 Ibid 183–6, 209.

199 Ibid; Khamsi, above n 13.

200 Cleary, above n 2, 183.

201 Ibid.

202 Khamsi, above n 13.

203 Ibid; Cleary, above n 2, 124.

The lines between Points A 15 and A 16 and between Points A 17 and A 18 referred to in Article I and Article 2 respectively, indicate the direction of those portions of the boundary. In the event of any further delimitation agreement or agreements being concluded between governments exercising sovereign rights with respect to the exploration of the seabed and the exploitation of its natural resources in the area of the Timor Sea, the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia shall consult each other with a view to agreeing on such adjustment or adjustments, if any, as may be necessary in those portions of the boundary lines between Points A 15 and A 16 and between Points A 17 and A 18.²⁰⁴

Furthermore, under international law a state cannot be bound by a treaty to which it has not consented.²⁰⁵ Neither Portugal — the then administering power in East Timor — nor East Timor itself were party to the *CSBATAS* agreement.²⁰⁶ Therefore, even if the *CSBATAS* agreement did set permanent lateral boundaries, East Timor would not be bound by such provisions.²⁰⁷

Nor does the 1989 *Timor Gap Treaty* support Australia's contention; it was illegal and therefore of no force.²⁰⁸ However, even if it were legal, the *Timor Gap Treaty* was concluded without prejudice to permanent maritime boundaries.²⁰⁹

East Timor countered that the *CSBATAS* agreement was the only agreement in which overlapping claims between two states lying less than 400 nautical miles apart had been resolved with reference to the shape of the seabed.²¹⁰ Accordingly, East Timor contended that Australia's reliance on the *CSBATAS* agreement to limit the scope of current negotiations constituted bad faith — a serious charge.²¹¹ East Timor pushed instead for an agreement incorporating a western lateral boundary set perpendicular to the coast of East Timor and an eastern lateral boundary set by giving partial effect to the Indonesian islands of Leti, Moa and Lakor.²¹² Such boundaries would place the entire Greater Sunrise field, as well as the Laminaria, Corallina and Buffalo fields, within the area to be negotiated. Australia nevertheless persisted in its attempt to limit the area under negotiation and East Timor eventually conceded the matter.²¹³

204 *CSBATAS* art 3.

205 Khamsi, above n 13.

206 *CSBATAS*.

207 Cleary, above n 2, 124.

208 Khamsi, above n 13.

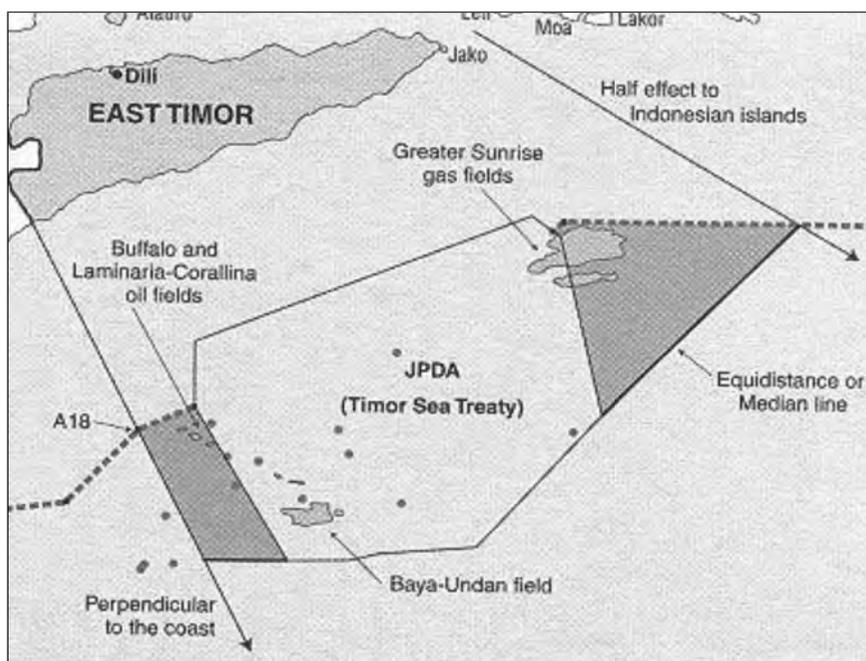
209 *Ibid.*

210 Cleary, above n 2, 126; Khamsi, above n 13. See also Vaughan Lowe, Christopher Carleton and Christopher Ward, *Opinion in the Matter of East Timor's Maritime Boundaries* (11 April 2002) Petrotimor <<http://www.petrotimor.com/lglop.html>>, on which East Timor's position was based.

211 Cleary, above n 2, 124–5.

212 Khamsi, above n 13.

213 Cleary, above n 2, 231.



MAP 4: This map shows the lateral boundaries for which East Timor pushed. The Greater Sunrise, Laminaria, Corallina and Buffalo fields clearly lie within East Timor's preferred boundaries.²¹⁴

VIII CMATS

After much negotiation, Australia and East Timor finally reached agreement in the closing hours of 27 November 2005.²¹⁵ Accordingly, on 12 January 2006 Australia and East Timor signed the *CMATS*,²¹⁶ thereby concluding over six years²¹⁷ of negotiations concerning the rights to petroleum resources in the Timor Gap.²¹⁸ *CMATS*, which is to be read in conjunction with the *Timor Sea Treaty* of 2002 and the *Sunrise International Unitisation Agreement* of 2003, provides for equal distribution of the revenue derived from the disputed Greater Sunrise field.²¹⁹ Under *CMATS* Australia is permitted to exploit oil and natural gas under the Timor Sea, but must provide to East Timor 50 per cent of the resultant revenues.²²⁰

214 Ibid xxiii.

215 Ibid 231.

216 *CMATS*.

217 Negotiations between Australia and the East Timorese leadership began following Indonesia's withdrawal from East Timor in 1999.

218 *CMATS*.

219 Ibid art 5(1).

220 Ibid art 5(9).

CMATS art 4 permits the parties to continue petroleum exploration and exploitation in disputed areas outside the JPDA 'in which its domestic legislation on 19 May 2002 authorized the granting of permission for conducting activities in relation to petroleum or other resources of the seabed and subsoil'.²²¹ In a side letter addressed to East Timor's Minister for Foreign Affairs and Cooperation, José Ramos-Horta, the Australian Foreign Minister, Alexander Downer, confirmed that Australia does indeed have such legislation in place. The letter read:

As at 19 May 2002 Australian legislation applying to the area referred to in the preceding paragraph authorised the granting of permission for conducting activities in relation to petroleum or other resources of the seabed and subsoil. That legislation included the Petroleum (Submerged Lands) Act 1967 and the Offshore Minerals Act 1994. Accordingly, Australia will continue activities (including the regulation and authorisation of existing and new activities) in that area.²²²

Ramos-Horta acknowledged Australia's position in a reciprocal letter in which he also confirmed that East Timor had no legislation in place as of 19 May 2002.²²³ Indeed, having not attained independence until the following day, East Timor could not possibly have had legislation in place as of 19 May 2002.²²⁴ The effect of this provision, therefore, is to completely deny the existence of East Timor with regard to resources lying in disputed areas outside the JPDA.²²⁵

CMATS also places a moratorium on the determination of a permanent maritime boundary between the two states. Article 2 of *CMATS* provides that the moratorium is to last for the duration of the treaty, that being 50 years after its entry into force or five years after exploitation ceases, whichever occurs earlier.²²⁶ The moratorium neither prejudices nor affects either party's legal position or rights with regard to the delimitation of their respective maritime boundaries.²²⁷ Thus, like its predecessors, *CMATS* does not set permanent maritime boundaries between Australia and East Timor. However, given the life expectancy of the disputed fields, art 2 effectively ensures that permanent maritime boundaries will not be set prior to the exhaustion of the Timor Sea's petroleum resources.²²⁸ As such, *CMATS* represents the final settlement between Australian and East Timor concerning entitlement to the disputed resources.

Australian officials praised *CMATS* as a success.²²⁹ Their satisfaction is understandable; the agreement achieves precisely that which Australia set out to achieve. Australia's aim in agreeing to the final round of negotiations was primarily to enable the timely development of the Greater Sunrise field on

221 Ibid art 4(2).

222 Letter from Alexander Downer to José Ramos-Horta, 12 January 2006.

223 Letter from José Ramos-Horta to Alexander Downer, 12 January 2006.

224 Cleary, above n 2, 232–3.

225 Ibid.

226 *CMATS* art 12.

227 Ibid art 2.

228 Scheiner, above n 57, 30.

229 Khamsi, above n 13.

favourable terms.²³⁰ *CMATS* achieves this, thereby greatly benefiting Australia through the generation of revenue and the creation of commercial opportunities for Woodside Petroleum and the Northern Territory.²³¹ Furthermore, Australia was able to secure the *CMATS* settlement with very little compromise.²³² Australia successfully evaded East Timor's attempts to widen the area under negotiation, such that the final agreement concerns only revenues derived from the Greater Sunrise field and underlying structures; disputed fields located outside the former JPDA are not addressed. Indeed, *CMATS* does not even contemplate the payment of compensation by Australia for its past exploitation of disputed fields.

Praise for the agreement within the East Timorese leadership was somewhat less forthcoming.²³³ Common was the belief that if East Timor had held out longer they might have secured a more beneficial deal.²³⁴ Many within the leadership did not consider a fifty-fifty split a great success given what they might have expected to gain had the dispute gone to independent arbitration.²³⁵ Whilst East Timor's Foreign Minister, José Ramos-Horta, supported the deal, believing that it could be considered a success if East Timor later secured the pipeline and LNG plant, support from both the Prime Minister and President was tentative.²³⁶ During the negotiations Prime Minister Alkatiri had declared a 70 per cent share of Greater Sunrise revenue to be the minimum acceptable settlement; 50 per cent was probably the minimum politically acceptable settlement.²³⁷ Public opinion within East Timor was also equivocal, with public comment frequently critical of the failure to establish permanent maritime boundaries.

Australian officials publicly dismissed East Timor's lacklustre embrace of *CMATS*, describing the agreement as one not only beneficial to Australian interests but also 'generous' to East Timor.²³⁸ Assertions of generosity were not new to Australian rhetoric regarding the negotiations; the theme of Australian 'generosity' had featured in the government's public comment since early on in the dispute. Such assertions were, however, disingenuous.²³⁹ Assertions of Australian 'generosity' ignore the legitimacy and strength of East Timor's claim to the disputed area.²⁴⁰ When one considers what East Timor might have been entitled to under international law, *CMATS* is, at least from East Timor's position, somewhat less than generous.

During the negotiations East Timor argued that international law would set a frontal boundary at the median line, a western lateral boundary perpendicular

230 Ibid.

231 Cleary, above n 2, 261–2, 264; Khamsi, above n 13.

232 Khamsi, above n 13.

233 Cleary, above n 2, 237–8; Khamsi, above n 13.

234 Cleary, above n 2, 237–8; Khamsi, above n 13.

235 Ibid.

236 Khamsi, above n 13.

237 Cleary, above n 2, 237–8.

238 Ibid 234; Khamsi, above n 13.

239 Khamsi, above n 13.

240 Ibid.

to the coast of East Timor and an eastern lateral boundary part-way between East Timor's coast and the Indonesian islands of Leti, Moa and Lakor (see MAP 4 above). An agreement incorporating these boundaries would have placed the entire Greater Sunrise field, as well as the Laminaria, Corallina and Buffalo fields, within East Timor's sole jurisdiction. Accordingly, on this view of international law, *CMATS* requires East Timor to forfeit considerable revenues — most notably, 50 per cent of those derived from the Greater Sunrise field.²⁴¹

East Timor's interpretation of international law is supported by many law of the sea experts, including Oxford University's Professor Vaughan Lowe.²⁴² However, this interpretation of international law is not unanimous amongst scholars; many experts propose that a maritime boundary set in accordance with international law would be less rewarding.²⁴³ Portugal's Dr Nuno Marques Antunes believes that a more likely outcome would incorporate lateral boundaries set perpendicular to East Timor's coast on both the west *and* the east.²⁴⁴ This would grant East Timor jurisdiction over only around 50 per cent of Greater Sunrise, much the same as it achieved under *CMATS* (see MAP 4 above). Accordingly, on this view of international law, *CMATS* requires East Timor to forfeit only the Laminaria, Corallina and Buffalo fields. This is not a significant surrender given that the Buffalo field has already been depleted and the Laminaria and Corallina field is following close behind.

Yet another interpretation of international law envisions lateral boundaries set in accordance with the median line principle.²⁴⁵ This would result in boundaries corresponding with the lateral limits of the *Timor Sea Treaty*, thereby granting East Timor only 18 per cent of Greater Sunrise revenues.²⁴⁶ Under this scenario East Timor would in fact secure much less than it did under *CMATS*.

It is apparent therefore, that whilst East Timor may indeed have achieved a significantly more beneficial settlement under international law than it did by negotiation, it could also have fared worse. In any event, such comparisons are arguably moot given that Australia has thus far been able to preclude judicial resolution of the dispute.²⁴⁷ Since Australia's resolve in this regard appears unlikely to change — former Prime Minister Kevin Rudd made it clear that Australia has

241 Ibid.

242 Pat Brazil, 'Disputatious Oil and Gas Issues on Unitisation and Delimitation in a Timor Sea Setting' [2003] *AMPLA Yearbook* 406, 411.

243 Khamsi, above n 13.

244 Ibid.

245 Ibid.

246 Ibid.

247 Nevins, above n 7, 13.

no intention of reversing its position vis-à-vis ICJ and ITLOS jurisdiction²⁴⁸ — East Timor's only viable option was, and indeed remains,²⁴⁹ negotiation.²⁵⁰

Over the course of its negotiations with Australia, East Timor secured a 270 per cent increase in resource control and revenue entitlements from the disputed areas of the Timor Sea (see TABLE 1 below).²⁵¹ While the actual amount will depend upon oil prices, in dollar terms, East Timor improved its position by some \$US15.6 billion.²⁵² The results of six years of negotiations can be summarised in the table below, which uses the value of the resources at the time of the January 2006 settlement.²⁵³

THE OUTCOME	2000	2002	2006
East Timor's share of resources (%)	22	41	60
East Timor's share of the revenue earned over the resource lifetime (US\$ billions)	8.4	16	24

TABLE 1: This table shows the improvement of East Timor's position over the course of its negotiations with Australia. The value of the resources is calculated as at January 2006.²⁵⁴

Furthermore, by negotiating a percentage rather than a fixed sum share of Greater Sunrise, East Timor ensured its potential to benefit from any future expansion of the field.²⁵⁵ Given Australia's considerable economic and political advantage over East Timor, this result is arguably a considerable feat for East Timor, regardless of what it might otherwise have achieved had there been an available option to seek judicial determination of the matter.²⁵⁶

That said, a significant shortcoming of the agreement exists for East Timor insofar as it fails to address downstream activities.²⁵⁷ As has been previously mentioned, the East Timorese leadership sought to secure Australia's agreement to support, or at the very least refrain from actively undermining, East Timor's attempts to secure the construction of a pipeline from Greater Sunrise to East Timor and a Liquefied Natural Gas plant in East Timor. Australia refused, cognisant of its own interest in securing such a pipeline to northern Australia, and East Timor eventually dropped

248 At the time of writing, Kevin Rudd was Australia's Minister for Foreign Affairs; Patrick O'Connor, *East Timor: Political Tensions Mount over Greater Sunrise Gas Pipeline* (2008) World Socialist Web Site <<http://www.wsws.org/articles/2008/dec2008/etim-d31.shtml>>.

249 Further negotiation will be required at the conclusion of *CMATS* if East Timor and Australia wish to set permanent maritime boundaries.

250 McBeth, above n 46, 42.

251 Cleary, above n 2, 235.

252 Ibid.

253 Ibid.

254 Cleary, above n 2, 235.

255 Ibid 236.

256 Khamsi, above n 13.

257 Ibid; Cleary, above n 2, 183–6, 209, 236–9.

its demands.²⁵⁸ Consequently, *CMATS* did not address the matter, instead leaving it to be decided by the market. Woodside Petroleum, an Australian company, has already indicated its preference for a pipeline to Darwin, Australia, where ConocoPhillips has already built a \$6 billion dollar processing plant.²⁵⁹

What follows from this analysis of the 2006 *CMATS* agreement is that the success of the agreement very much depends upon the context within which it is considered. From Australia's perspective the agreement must surely be celebrated. Whilst Australia had hoped to secure greater than 50 per cent control over the Greater Sunrise field, it has little, if any, legal entitlement to such resources. Under the most widely-supported view of international law Australia is legally entitled to roughly 50 per cent of Greater Sunrise, if that.²⁶⁰ Yet, Australia secured exactly that. Australia also maintained the ability to develop and exploit disputed areas outside the former JPDA and was not required to pay any compensation to East Timor for past, or indeed future, exploitation of such resources.

From East Timor's perspective, *CMATS* is both a success and a disappointment. Over the course of six years East Timor stood its ground in the face of a formidable opponent with access to much greater resources. In doing so, East Timor was able to secure a far greater share of revenues and regulatory control than Australia had originally been willing to concede. Nevertheless, East Timor was ultimately unsuccessful in its attempts to significantly widen the area under negotiation, to secure compensation for Australia's past exploitation of disputed fields and to have the agreement address downstream activities. Consequently, East Timor failed to secure all the revenue to which it is arguably entitled and looks set to lose out on lucrative processing opportunities with respect to the Greater Sunrise field.

However, *CMATS* is arguably the best resolution to the Timor Sea dispute that East Timor could realistically have achieved. When Australia excluded maritime boundaries from its acceptance of the compulsory jurisdiction of the ICJ and ITLOS in 2002, it left East Timor with no recourse but to settle the dispute via negotiation.²⁶¹ Nevertheless, international law does not mandate a specific maritime boundary in the Timor Sea and thus, by seeking to have the matter determined in accordance with international law, East Timor might well have ended up with a less favourable result than that achieved by negotiation. It is therefore proposed that *CMATS* represents an acceptable, even if not completely satisfactory, resolution to the dispute concerning the petroleum resources under the Timor Sea.

258 Cleary, above n 2, 183.

259 O'Connor, above n 248.

260 Khamsi, above n 13.

261 McBeth, above n 46, 42.

IX CONCLUSION

In October 1953 the Australian government laid claim to its continental shelf to a depth of 200 metres.²⁶² The outer limit of Australia's claim was marked by the Timor Trough, a deep trench in the seabed located some 250–300 nautical miles off the Australian coast, which Australia argues constitutes a definitive break in the continental shelf between itself and its northern neighbours. Australia's right to lay such a claim is conferred by art 2(1) of the 1958 *Convention on the Continental Shelf* and confirmed by art 77 of the 1982 *UNCLOS*.²⁶³ *UNCLOS* also grants coastal states such as Australia the right to claim an EEZ extending up to 200 nautical miles from the baseline of their territorial seas²⁶⁴ and Australia invoked this right. If successful, Australia's claim to its continental shelf and EEZ would have granted it sovereign rights over the seabed and subsoil for the purpose of exploring and exploiting the natural resources therein. However, the area to which Australia laid claim is rich in petroleum resources and therefore of great economic significance not only to Australia but to its neighbours also.²⁶⁵ Accordingly, Australia's claim did not go unchallenged as it overlapped significantly with that of East Timor, as well as those formerly made by Indonesia and Portugal.

In order to realise its claim to the continental shelf Australia sought to enter into negotiations with both Portugal and Indonesia so as to secure a permanent maritime boundary with each. Whilst negotiations with Portugal stalled at the preliminary communications stage, those with Indonesia were markedly more successful, culminating in the *CSBATAS* agreement, signed in October 1972.²⁶⁶ The *CSBATAS* agreement reflected Australia's contention regarding the geographical significance of the Timor Trough, setting the boundary between the two states at the southern edge of the Timor Trough.

However, due to Portugal's absence from the negotiations, the *CSBATAS* agreement left a gap corresponding with the coast of East Timor — the Timor Gap. Following Indonesia's annexation of East Timor in 1986, Australia and Indonesia entered into negotiations aimed at closing the Timor Gap. By this time, however, developments in international law had strengthened Indonesia's negotiating position. Of particular significance was the adoption of *UNCLOS* in 1982, which established the right of a coastal state to claim a 200 nautical mile EEZ.²⁶⁷ This meant that regardless of Australia's claim to the continental shelf, Indonesia had a valid counter-claim to the seabed and subsoil beyond its coastline to a distance of 200 nautical miles.²⁶⁸

262 Cleary, above n 2, 5.

263 *UNCLOS* arts 2(1), 77.

264 *Ibid.*

265 Cleary, above n 2, 4; Walker, above n 17.

266 *CSBATAS*.

267 *UNCLOS* arts 55–7.

268 Triggs and Bialek, above n 10.

Australia and Indonesia agreed to the *Timor Gap Treaty* in 1988.²⁶⁹ The *Timor Gap Treaty*, signed in December 1989, deferred agreement on permanent maritime boundaries between the two states. It divided the disputed area into three separate areas, together comprising a 'Zone of Cooperation'.²⁷⁰ Resources within the three areas were to be jointly exploited with the resultant revenues shared between Australia and Indonesia on a 50:50; 90:10; and 10:90 basis.²⁷¹

Following East Timor's vote for independence in August 1999, Australia secured the temporary continuation of the terms of the *Timor Gap Treaty*, entering into an interim arrangement with UNTAET and then later with the newly independent East Timor — the 2002 *Timor Sea Treaty*. However, East Timor continued to push for agreement on permanent maritime boundaries and further negotiations begun soon thereafter.

Australia and East Timor finally reached agreement in 2005, signing *CMATS* in early 2006. *CMATS* provides for the exploitation of oil and gas resources within the Timor Gap, whilst deferring determination of permanent maritime borders between Australia and East Timor for 50 years or until the exhaustion of the disputed resources.²⁷² Under *CMATS*, each state is entitled to 50 per cent of the revenue derived from the disputed Greater Sunrise field.²⁷³

For East Timor the settlement constitutes a 270 per cent increase in resource control and revenue entitlements gained over the course of the negotiations.²⁷⁴ It also ensures that East Timor will benefit from any future expansion of the field.²⁷⁵ However, *CMATS* fails to accommodate East Timor's claims vis-à-vis jurisdiction over disputed resources lying beyond the former JPDA. Nor does *CMATS* make provision for Australia's past exploitation of such fields or address downstream activities, both of which were of considerable importance to East Timor.²⁷⁶ Support for *CMATS* within East Timor has therefore been both limited and hesitant.²⁷⁷

Disappointment regarding the outcome of *CMATS* within East Timor was deepened by expectations as to the likely outcome had the matter been determined by independent arbitration.²⁷⁸ However, had the matter been settled other than by negotiation, East Timor might well have achieved a less favourable result than it ultimately did.²⁷⁹ In any event, independent arbitration was not an option available to East Timor due to Australia's 2002 exclusion of certain ICJ and ITLOS jurisdiction. Considered in this context *CMATS* represents an acceptable

269 *Timor Gap Treaty*.

270 *Ibid* art 1.

271 *Ibid* art 2.

272 Department of Foreign Affairs and Trade, above n 56.

273 *CMATS* art 5(1).

274 Cleary, above n 2, 235.

275 *Ibid*.

276 *Ibid* 183–6, 209, 236–239; Khamsi, above n 13.

277 Cleary, above n 2, 237–8; Khamsi, above n 13.

278 Khamsi, above n 13.

279 *Ibid*.

outcome for East Timor. This is especially so given East Timor's limited political and economic influence relative to that of Australia.

Although Australia had hoped to secure greater than 50 per cent control of the Greater Sunrise field, reception of *CMATS* within the government was largely positive.²⁸⁰ Over the course of some 53 years Australia sustained a claim based on perpetually tenuous grounds. In doing so, it was able to secure control over a vast area rich in petroleum resources to which it had little, if any, entitlement. It follows that for Australia *CMATS* must surely be considered a boon, made possible only by its merciless negotiating tactics and favourable string of political circumstances.

280 Ibid.