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A GAP OF LAW AND POLITICS: THE ONGOING DISPUTE OVER AUSTRALIA'S MARITIME BOUNDARY WITH EAST TIMOR

Peter Nicholas

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INTRODUCTION

The seabed boundary controversies between Australia and East Timor are perhaps one of the most complex and interesting developments pertaining to the law of the sea. The dispute is based around a fundamental difference in each State's legal approach for delimiting the continental shelf. By requiring two concepts to remain consistent with each other, that of the Law of the Sea Convention's legitimation of an Exclusive Economic Zone (EEZ) and the existing concept of a continental shelf, important uncertainties are consequently exposed. Nonetheless, while legal uncertainties have played a fundamental role in the failure to delimit a seabed boundary, political and economic factors from the 1970s to today have played a greater role in determining the course of negotiations and the final outcomes reached. This paper will examine the fundamental difference of legal opinion in delimiting the continental shelf, the particular factors that complicated the original negotiations between Australia and Indonesia (1979-1990), and the recent negotiations between Australia and East Timor (2001-2002).

WHY THE GAP?

The lengthy and unresolved negotiations over the seabed boundary between East Timor and Australia concern the area known as the 'Timor Gap'. This area covers the 129 nautical mile gap left in the Australia-Indonesia continental shelf boundary delimitations that were finalised in 1972[1] when Portugal still controlled East Timor. During this time, however, Portugal was increasingly

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[1] Bill Campbell, *Maritime Arrangements in the Timor Sea, in* THE MARITIME DIMENSIONS OF INDEPENDENT EAST TIMOR 57 (Centre for Maritime Policy, University of Wollongong, 2000). *See also* Jim Godlove, *Practical Implications of East Timor's Transition to the Timor Gap Treaty*, 2000 AMPLA Y.B. 138 – 150 at 139.

disengaged from the region and while waiting for the United Nations Conference on the Law of the Sea (UNCLOS III) to be finalised, filling "the gap" was not one of its priorities.[2]

While Portugal remained vaguely concerned about the boundaries established, Indonesia felt its uncomfortable position in the consequences of the negotiations. It became evident that the boundary established was highly favourable to Australia and Indonesia shortly afterwards felt that it had been 'taken to the cleaners' by the Australians.[3] Together with this perception and the Indonesian invasion and annexation of East Timor in 1975 turned the Timor Gap into an Indonesia-Australian boundary issue with a large amount of political baggage.

SHIFTING POSITIONS OF INTERNATIONAL LAW ON THE CONTINENTAL SHELF

The intractability of the seabed dispute is founded on essentially different legal perspectives on how to define a continental shelf in situations where State claims overlap. This has been the principal issue for both stages of the negotiations concerning the Timor Gap.[4]

The continental shelf doctrine originated from the Truman proclamation in 1945.[5] The 1958 Geneva Convention on the Continental Shelf defined the continental shelf as the natural prolongation of each continent; determined according to a depth and exploitability criterion of 200 meters. Article 6 of said Convention provides that unless there are special circumstances, a median line is preferred in a situation where the 'same continental shelf' is adjacent to two or more territories.[6] However, Australia has consistently argued that the 3000 meter deep Timor trough[7] situated just off the coast of the island of Timor shows that there are different continental shelves between Timor and Australia and thus delimitation by median line is inappropriate.[8] Australia's theory was greatly

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[2] Keith Suter, *Timor Gap Treaty: The Continuing Controversy*, 17 MARINE POLICY 294 – 302 at 299 (1993). Portugal also had granted a permit to Oceanic of Denver in Gap area during this time.

[3] Peter Reid, *Comments on the Timor Gap Treaty*, 1990 AMPLA Y.B. 248 – 258. *See also* Peter Reid, *Petroleum Developments in Areas on International Seabed Boundary Disputes*, 1985 AMPLA Y.B. 544 at 552.

[4] That is between Indonesia and Australia from 1979-1990 and Australia and East Timor between 2001-2002.

[5] D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW (5th ed. 1998) at 455.

[6] *See* Reid, *supra* note 3, at 547.

[7] *Id.* at 552.

[8] Stuart Kaye, *The Timor Gap Treaty: Creative Solutions and International Conflict*, 16 SYDNEY L. REV. 72 –96 at 77 (1994).

reinforced by the *North Sea Continental Shelf Cases*[9] resulting to the establishment of the 1972 boundary with Indonesia. Nonetheless, subsequent developments manifest the 'favouring of geographic factors over geological.'[10] A string of cases in the 1980s which dealt with competing claims moved away from the *North Sea Continental Shelf* view of natural prolongation towards a median line approach.[11] It is important to note that Indonesia never ratified the 1958 convention;[12] thus, the 1972 boundary 'is possibly the only maritime boundary agreement to utilise a submarine feature like the Timor Trough in delimiting a boundary.'[13]

In UNCLOS III, a redefinition of the continental shelf uses both a natural prolongation doctrine and, a 200 nautical mile zone that ignores geological factors. Such redefinition failed to resolve the problem between Australia and Indonesia.

Australia argued that 'the concept of natural prolongation of the continental shelf was expressly preserved in Article 76 and was given primacy. Thus, Australia has consistently demanded sovereignty over its continental shelf right up to the Timor trough. Indonesia has denied Australia's proposition and the former continues to demand that a median line be drawn without regard to the trough.[14]

Because UNCLOS III did not make the conclusion that the EEZ and continental shelf were the same, both concepts continue to co-exist.[15] The concept of the EEZ was defined in Article 56[16] and includes not just rights to the resources in the water column but also to the subsoil. Because the provision doubles up on the continental shelf definition, Ward believes that this could be a drafting error.[17] It is believed by some that there is no relevance in determining where EEZ and continental shelf boundaries coincide, but the Timor Sea has shown that this may

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[9] 1969 I.C.J. Rep 3.

[10] Stuart Kaye, *The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice*, 19 AUSTRALIAN Y.B. OF INT. LAW 49 – 72 at 61 (1998). An example of this is the *Anglo-French Channel Arbitration* which ignored to geological feature of Hurd Deep.

[11] David Ong, *The Legal Status of the 1989 Australia-Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor*, 31 NETHERLANDS Y.B. OF INT'L LAW 67 – 129 at 80 (2000). *See also* Tunisia /Libya Continental Shelf Case, 1982 I.C.J. 18; Gulf of Maine Case, 1984 I.C.J. 247; Guinea /Guinea-Bissau Arbitration 77 I.L.R. 636; Libya/Malt Continental Shelf Case, 1985 I.C.J. 13 *and* DIXON, MARTIN, AND MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW, (3rd ed., Blackstone 2000) at 380f.

[12] Kaye, *supra* note 8, at 78.

[13] *Id* at 74.

[14] Suter, *supra* note 2, at 300 and Reid, *supra* note 3, at 547.

[15] Kaye, *supra* note 10, at 72 *See also* Continental Shelf Case (Lib. v Mal.), 1985 I.C.J. 13.

[16] *See generally* Lawrence Juda, *The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of the Sea*, 16 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 1- 58 (1995) *and* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, (7th ed., Routledge 1997) from p173f.

[17] Christopher Ward, *An Independent East Timor: The Timor Gap Treaty and International Law*, 2000 AMPLA Y.B. 151 – 171 at 154.

not necessarily be the case.[18] Kaye argues that different factors of relevance could result in differing boundaries (i.e. since 'geomorphology will be relevant to a continental shelf boundary, but fishing rights will not'[19]) but recognizes that 'there appears to be overwhelming support in state practice for a single unified boundary.'[20]

While Australia and Indonesia remained unable to delimit the Timor Gap continental shelf, they entered into a temporary arrangement on fisheries jurisdiction in 1981, which used the median line.[21] The 1997 formal treaty on a water column boundary between Indonesia and Australia follows this median line and leaves substantial areas of the Australian continental shelf, under the 1972 treaty, inside an Indonesian EEZ.[22] This makes the agreement 'heavily dependant on the goodwill of the parties and their ability to resolve amicably any potential problems that could arise.'[23]

Nonetheless, there still remain arguments for moving the median line closer to Timor without relying on natural prolongation. Ong argues in Australia's favour, that the proportionality test applied in the *Libya v Malta* decision regarding disparity in coastal lengths moves away from a median line approach without concern for geological factors.[24] It must be remembered that there are many factors used and there is no definitive catalogue.[25] Each delimitation is necessarily unique. Australia has also argued that its title to a continental shelf was first asserted in 1953 under the depth exploitability criterion and it might be doubtful that the 1982 convention could take away a previously valid claim.[26] Yet at all stages of the negotiations 'Australia considers her legal views on continental shelf entitlement as fundamental to her national self-interest'[27] and thus any compromise on the legal definition has been impossible while the issue remains outside the litigation arena and in a genuine area of academic disagreement.

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[18] Kaye, *supra* note 10, at 50f.

[19] *Id.* at 57, includes discussion of submissions on point in Tunisia v. Libya Continental Shelf, 1982 I.C.R. 18.

[20] *Id.* at 59.

[21] *See* Campbell, *supra* note 1 at 71 and Herriman, Max and Tsamenyi, *The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?* 29 OCEAN DEVELOPMENT & INTERNATIONAL LAW 361 – 396 at 365 (1998).

[22] Ong, *supra* note 11, at 113.

[23] Kaye, *supra* note 10, at 71. Also at 72 he states that 'an absence of goodwill could quickly make it extremely problematic for either party effectively to conduct its activities.'

[24] Ong, *supra* note 11, at 115. The case of Jan Mayen (Den. v Nor.) I.C.J. 38 could also be another useful analogy.

[25] Reid, *supra* note 3, at 546.

[26] Pat Brazil, *Comments: Historic Timor Gap Agreement Reached – Framework and Implications*, 20 AMPLJ 133 – 136 at 135 (2001).

[27] Ong, *supra* note 11, at 75.

1975 - 1990: AN ESSENTIALLY POLITICAL CONFLICT

Given the legal differences, the complex political issues over East Timor's incorporation into Indonesia, and Australia's relationship with Indonesia made the settlement of the seabed boundary in the area impossible.[28] As a result, Australia remained torn between divergent national interests.

POLITICAL INCENTIVES FOR SETTLEMENT

Australia had a significant interest in appeasing Indonesia's invasion of East Timor guided by a Cold War fear that East Timor could become 'another Cuba',[29] Australia wanted to ensure stability in Indonesia by making certain that it is far from being torn apart by domestic pressures.[30] Australia was also concerned about the latent threat of Indonesian expansion into Australia.[31] Three months before the invasion, the Australian Ambassador in Jakarta advised the Australian Prime Minister that closing the sea border would be easier if Indonesia was in charge.[32] Indonesia's incentive was manifested in its clear intention to shore up its claim to sovereignty over East Timor; an intention concluded by its entry into a treaty that would recognise its claim.[33]

ECONOMIC INCENTIVES FOR SETTLEMENT

The huge oil potential of the Timor Gap region[34] was not only an incentive to resolve the issue but also an incentive not to concede a valuable national asset. In 1974 the first discoveries in the area were announced[35] and these were reinforced by the Jabiru Well discovery in 1983.[36] While Indonesia was becoming concerned that

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[28] For a useful chronology, *see* Reid *supra* note 3, at 254 *and* Suter, *supra* note 2, at 294f.

[29] Julie Sforza, *The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination and Decolonization*, 22 SUFFOLK TRANSNATIONAL L. REV. 481 – 528 at 488 (1999).

[30] Suter, *supra* note 4, at 296.

[31] *Id.* at 298. Although by 1993 this was no longer the case as better intelligence has more realistically assessed Indonesia's capacity for long-range force projection. See also *Australia and Indonesia: Dangerous Horizon*, THE ECONOMIST, May 29, 1999.

[32] John Pilger, *Australia Ignores the Plight of the East Timorese, but keeps a watchful eye on their Oil and Gas*, 129 NEW STATESMAN & SOCIETY 13 (2000).

[33] A.J.J. de Hoogh, *Australia and East Timor: Rights Erga Omnes, Complicity and Non-recognition*, AUSTRALIAN JOURNAL OF INT'L LAW 63 – 90 at 80 (1999).

[34] This was abundantly evident in 1990 as shown in Jaap Poll, *The Exploration Potential of the Timor Gap Treaty Area*, 1990 AMPLA Y.B. 266 – 283. See also Anon, *Wood Mackenzie: Timor Sea Decision Near*, 94 OIL AND GAS JOURNAL 34 (10 June 1996).

[35] Kaye, *supra* note 8, at 76.

[36] William Martin and Dianne Pickersgill, *The Timor Gap Treaty*, 32 HARV. INT'L L. J. 566 – 581 at 568 (1991).

it was moving from being an oil exporting to an oil-importing nation,[37] Australia was concerned about declining oil production in Bass Strait.[38] Economic concerns were nevertheless not limited only to the two States. Concerned with commercial certainty, the oil industry exerted constant pressure on both parties to resolve the issue.[39]

POLITICAL AND LEGAL BARRIERS TO SETTLEMENT

Nevertheless, the international disapproval for Indonesia's actions following 1975 and the legal uncertainty it created made Australia reluctant to move forward quickly on the establishment of a seabed boundary.[40] Fighting in East Timor still persisted during this period[41] and Indonesia was accused of breaching international humanitarian law.[42] By 1999 it was estimated that 200,000 had died since the invasion.[43] Australia was held back by the idea that it should refrain from acts that recognize territory gained by aggression as set out in the *Namibia Advisory Opinion*.[44]

The issue stemmed from the right to self-determination of the East Timorese, which was considered a principle *jus cogens* from which no derogation is permitted.[45] If this were so, Article 53 of the Vienna Convention of the Law of Treaties could render any treaty with Indonesia void.[46] Right to self-determination is seen as having a basis in the UN Charter,[47] but it is also a right *erga omnes*, which would mean that each state is individually and independently obliged to respect it.[48]

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[37] Moritis, Guntis 'Indonesia' (16 August 1993) 91 *Oil and Gas Journal* 68 – 71.

[38] Martin and Pickersgill, *supra* note 36, at 568.

[39] Donald Rothwell, *The Timor Gap Treaty: A Post-ICJ Analysis of its Implementation and Prospects*, 2 AUSTRALASIAN JOURNAL OF NATURAL RESOURCES LAW AND POLICY 39 – 57 at 49 (1995).

[40] Ong, *supra* note 11, at 71.

[41] Martin and Pickersgill, *supra* note 36, at 580 *and* John Pilger, *The Rising of Indonesia*, 8 NEW STATESMAN & SOCIETY 14 (1995).

[42] Suter, *supra* note 2 at 302.

[43] Hoogh, *supra* note 33 at 66.

[44] Derrick Wilde and Sasha Stepan, *Treaty Between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area Between the Indonesian Province of East Timor and Northern Australia*, 18 MELANESIAN L. J. 18 – 30 at 27 (1990) *and* Thomas Grant, *East Timor, the UN System and Enforcing the Non-Recognition in International Law*, 33 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 273 – 310 at 289 (2000).

[45] Wilde and Stepan, *supra* note 44 at 28.

[46] *Id.* This article also points out however that only a party to the treaty could complain on that basis under Articles 65 and 66.

[47] Sforza, *supra* note 29, at 492 with particular reference to the Western Sahara decision in 1975.

[48] *Id.*, at 503 *and* Hoogh, *supra* note 33, at 70f.

This claim has been supported by UN resolutions.[49] Australia feared that in delimiting a boundary with Indonesia, it would deny the East Timorese the right to permanent sovereignty over their natural resources. [50] This claim finds further support in UNCLOS III where Resolution 3(a) provides that '(r)ights and interests flowing to a non-self-governing territory or territory under colonial domination under the convention shall be preserved for the people of that territory.'[51]

At several points Portugal challenged Australia's right to negotiate with Indonesia over the Timor Gap. In 1985 when a joint development area was first proposed and in 1988 when an interim agreement was reached, Portugal denounced the agreements as a 'blatant and serious breach of international law.'[52] After Australia signed the Timor Gap Treaty, Portugal brought an action against Australia in the International Court of Justice (ICJ). Fortunately for Australia, the court would not rule when Indonesia was absent and the UN resolutions did not go far enough in mandating a regime of non-recognition.[53] Yet there were two strong dissents and the court stated that East Timor remained a non-self-governing territory under Chapter XI of the UN Charter.[54] In this way the court attempted to force Indonesia to take up the obligations of an administering power.[55] Thus 'Indonesia has become a substitute administering power over East Timor in Portugal's absence.'[56]

MOVE TO A TREATY TO AGREE TO DISAGREE

As Portugal seemed to lose interest and the UN seemed to remain inactive,[57] it became evident to Australia that it 'had no choice but to take its own action.'[58] Australia realised that in practice any agreement over the Timor Gap with Portugal would be useless.[59] After nine rounds on negotiations[60] Indonesia and

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[49] For example, Security Council Resolution 389 of 22 April 1976 which 'called upon all states to respect the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination,' quoted and discussed in Grant, *supra* note 44, at 277.

[50] *See generally* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES (Cambridge 1997).

[51] Ward *supra* note 17 at 169.

[52] Wilde and Stepan, *supra* note 44, at 26.

[53] *See* Grant, *supra* note 44, at 301.

[54] East Timor Case, 1995 I.C.J. 103, explored in Sforza, *supra* note 29 at 509.

[55] Sforza, *supra* note 29, at 522.

[56] *Id.* at 526.

[57] Suter, *supra* no 2, at 302.

[58] *Ibid.*

[59] Kaye, *supra* note 8, at 76.

[60] Wilde and Stepan, *supra* note 44, at 30.

Australia agreed to disagree on the legal problem partly because of 'negotiation fatigue.'[61]

In December 1989 Australia and Indonesia signed a novel agreement to pursue joint development measures over the disputed area in the Timor Gap with a 50:50 split of revenues.[62] With its purpose of establishing 'a long-term stable environment for petroleum exploration and exploitation,'[63] the treaty was hailed as a 'substantial step forward in the relations between the two countries.'[64] This was possible by utilising Article 83(3) of the Law of the Sea Convention in making 'provisional arrangements of a practical nature' pending finalisation of the dispute. The Treaty was set to last 40 years with the possibility of continual renewal.[65] The delimitation is set out below.

JOINT DEVELOPMENT AREA — A MORE POLITICALLY USEFUL TOOL

The failure to settle on a permanent boundary can also be seen as resulting from a view that the joint development model offered significant political and pragmatic solutions to the main concerns of each party. Australia wanted a link with Asia. Indonesia was a huge market but at that stage only Australia's thirteenth largest export market.[66] A joint development area was a unique way of kick starting a commercial nexus between the two countries.[67] The success of this was demonstrated by the fact that by 1997 Indonesia had become Australia's second biggest export market.[68] The joint development zone was also a very practical and innovative way to deal with the issue of deposits that straddle potential boundaries and allow for them to be exploited to the economic benefit of each party.[69] The area of cooperation with its control by the Joint Authority and Ministerial Council

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[61] Geoffrey A. McKee, *The New Timor Gap : Will Australia Now Break with the Past?*, 62 INSIDE INDONESIA (Apr - Jun 2000) *available at* http://www.insideindonesia.org/edit62/mckee3.htm.

[62] Henry Burmester, *The Timor Gap Treaty*, 1990 AMPLA Y.B. 233 – 247; Wilde and Stepan, *supra* note 44; Garrie Moloney, *Australian-Indonesian Timor Gap Zone of Co-operation Treaty: A New Offshore Petroleum Regime*, 8 JOURNAL OF ENERGY & NATURAL RESOURCES LAW 128 – 141 (1990); Martin and Pickersgill *supra* note 36; and J. C. McCorquodale , *The Law Smoothes a Path for Petroleum Politics*, 31 LAW SOCIETY JOURNAL 32 – 37 (1993).

[63] Joint Ministerial Statement (December 11, 1989) *quoted in* Wilde and Stepan, *supra* note 44 at 30.

[64] Martin and Pickersgill, *supra* note 36, at 581, 576. See also Suter, *supra* note 2 at 302; Rothwell, *supra* note 39, at 54; and *Indonesia, Australia Sign Pact to Develop Timor Gap*, WALL ST. J., December 12, 1989.

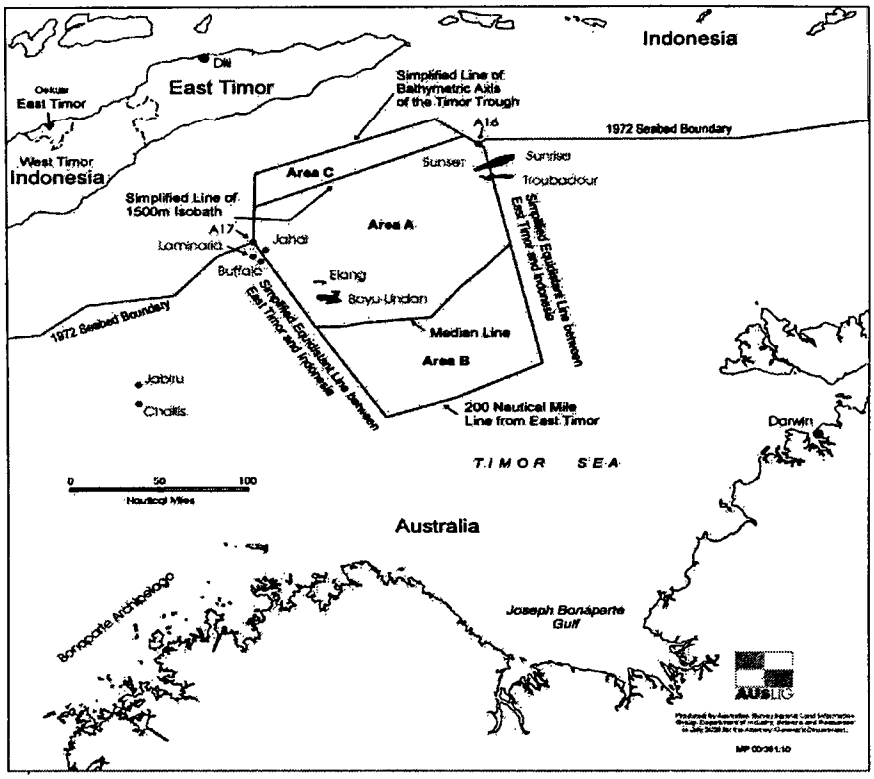
[65] Kaye, *supra* note 8 at 89.

[66] Suter, *supra* note 2, at 297.

[67] *Id.* at 298. *See also generally* Kaye, *supra*, note 10 at 62f .; Reid, *supra* note 3 at 549f; and Burmester, *supra* note 62, at 234f.

[68] This changed after the 1997 economic slump. *Australia and Indonesia: Dangerous Horizon*, THE ECONOMIST, May 29, 1999.

[69] *See* Gillian Triggs , *Timor Gap Treaty Between Australia – Indonesia: Straddle Deposits Expose Legal Issues*, LAW ASIA JOURNAL 117 – 130 (1998).



also facilitated the building of trust between Indonesian and Australian officials, which could be utilised in other initiatives.

Thus, the Treaty was a 'notable legal and political achievement' and 'an important precedent that will be of use in other parts of the world.'[70]

TECHNICAL ISSUES TOOK TIME TO RESOLVE

In 1984 a joint development was first suggested[71] and in 1985 Indonesia accepted the idea of joint cooperation.[72] Nevertheless the concept of a joint development zones had faced substantial criticisms because of 'lack of certainty, the

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[70] Burmester, *supra* note 62, at 247. *See also* John Holmes , *End of Moratorium: The Timor Gap Treaty as a Model for the Complete Resolution of the Western Gap in the Gulf of Mexico*, 35 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 925 – 953 (2002).

[71] Kaye, *supra* note 8, at 78.

[72] Martin and Pickersgill, *supra* note 36, at 568.

expense to maintain their joint administrations and the legal complexity that arise.'[73] A 1979 Thai-Malaysia agreement was seen to lack details so that Australia and Indonesia 'were determined to agree from the start on detailed rules and regulations.'[74] This desire to get the agreement right was no doubt a substantial reason for the lengthy negotiations between 1984 and 1989. The Treaty dealt in complex detail with employment, taxation, civil law issues, criminal jurisdiction, health and safety, customs, migration, and quarantine. It also provided for a Modal Production Sharing Contracts and a Petroleum Mining Code to address the interests of both parties. Given the difference in legal and social systems, the achievement of the treaty was all the more impressive.[75] Moreover, the 'Treaty (was) not burdened by excessive government infrastructure' and the ministerial council involves a workable number of representatives, which kept the differences between Australian and Indonesian Bureaucracies to a minimum.[76] Yet its complexity meant that 'political will (was) the single most important determinant of this success.'[77]

A NEW TREATY 2000-2003: UNCERTAINTY WITH EAST TIMOR'S INDEPENDENCE IN 1999

Eight years after the Treaty progressed in successful operation, it was challenged on August 30, 1999 when 78.5% of East Timorese voted for independence.[78] This has re-ignited the boundary debate and the same factors have continued to work against a permanent delimitation of the boundary.

ISSUE OF STATE SUCCESSION

On independence, there was considerable academic uncertainty over whether East Timor had to or could succeed to the Timor Gap Treaty. The 1978 Vienna Convention on Succession of States in Respect to Treaties supports a 'clean slate' approach to treaty succession for States under a colonial power.[79] While academic debate suggests that boundary treaties are an exception to this rule, the

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[73] Kaye, *supra* note 10, at 64. For concerns on the oil industry, see Reid, *supra* note 3 at 551 and D. R. McDonald, *Comment on the Timor Gap Treaty*, 1990 AMPLA Y.B. 259 – 265.

[74] Burmester *supra* note 62, at 235.

[75] Martin and Pickersgill, *supra* note 36, at 578. *See also* Guntis Moritis, *Indonesia*, 91 OIL AND GAS JOURNAL 68 – 71 (1993).

[76] Rothwell, *supra* note 39, at 56.

[77] Triggs, *supra* note 69, at 120.

[78] Ward, *supra* note 17, at 153.

[79] Although not in force, some of it is seen as a codification of international law. Ward, *supra* note 17, at 159 - 160.

Timor Gap Treaty however does not delimit any permanent boundary.[80] This comes under the *uti possidetis* rule of international law.[81] It is also uncertain whether the applicability of the rule to maritime boundaries is indeed less certain than land boundaries.[82] Ong also raises the possibility that if the Timor Gap Treaty is seen as a new species of boundary treaty it could be applied with inconsistent parts being severed.[83] It if further questioned whether the change in circumstances has been 'so great to distort the performance of the treaty'[84] under the *rebus sic stantibus* rule.[85] Nonetheless, a clean slate approach may afford East Timor the choice to continue the treaty[86] but at the time the East Timorese were adamant that they are 'not going to be successor to an illegal treaty.'[87] The original issue of illegality remains unresolved, particularly on the *jus cogens* principle, which East Timor could have potentially agitated in the ICJ.[88]

The idea of succession was initially suggested by Australia but after East Timor put the arguments raised above, Australia backed down from that demand.[89] Australia had also admitted in its submissions to the 1995 Timor Gap case in the ICJ that the Treaty would not bind an independent East Timor.[90] Legal uncertainty was prolonged by the status of the UN Administration as Campbell states 'in the period of UNTAET (the United Nations Transitional Administration for East Timor) there is no relevant State with whom a treaty could be made.'[91] East Timor would have 'complete discretion to disregard any re-negotiated treaty agreed in the current re-negotiation process between UNTAET and Australia.'[92] UNTAET has had to be careful of its consultation with the East Timorese people which had already been criticised by bodies like the CNRT (Council for National Resistance of East Timor).[93]

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[80] *Id.* at 161. *See also* Bruce Johnston, *The Impact of East Timorese Independence on the Timor Gap Treaty*, 2000 AMPLA Y.B. 172 – 193 at 182.

[81] *See* Concerning the Frontier Dispute (Bukina Faso v. Rep. of Mali), 1986 I.C.J., *discussed in* Ong, *supra* note 11, at 90.

[82] Ong, *supra* note 11, at 99.

[83] *Id.* at 107.

[84] Johnston, *supra* note 80, at 182. *See also* Ong, *supra* note 11 at 86.

[85] Ong, *supra* note 11, at 108. *See* Art. 62 of the Vienna Convention of the Law of Treaties.

[86] Ong, *supra* note 11, at 96.

[87] Godlove, *supra* note 1, at 146.

[88] Ong, *supra* note 11, at 88.

[89] Campbell, *supra* note 1, at 67.

[90] McKee, *supra* note 61.

[91] Campbell, *supra* note 1, at 66.

[92] Ong, *supra* note 11, at 98.

[93] Daniel Fitzpatrick , *UNTAET and East Timor : The Current Legal and Institutional Context, in* THE MARITIME DIMENSIONS OF INDEPENDENT EAST TIMOR 57 (Centre for Maritime Policy, University of Wollongong, 2000).

DANGER OF UNSETTLING THE OLD BOUNDARY WITH INDONESIA

After having suffered greatly in its role in the INTERFET, Australia continues its concern over the possible effects of their negotiations with East Timor. In 2000 Australia had to work out a careful strategy for the disengagement of Indonesia from the original treaty structure.[94] There is also substantial fear that litigation in favour of a permanent median line seabed boundary for East Timor would prompt Indonesia to make similar arguments about its 1972 boundaries.[95] Triggs argues that 'determination of a moderated median line by the ICJ could have a highly destabilising effect on hitherto agreed boundaries with Indonesia.'[96] Rothwell and Bateman also agree that 'it is conceivable Australia will come under pressure to reopen negotiations on the Australian/ Indonesian boundaries in the Timor and Arafura Sea with resulting legal and commercial uncertainty.'[97] They also point to precedent issues with current negotiations with New Zealand.[98] The Senate Committee report also reflects these fears, although it does point out that a unilateral denunciation of the 1972 treaty would be rejected by the ICJ.[99] The realignment of those boundaries would cost Australia a lot more in revenue than would be gained from the resources in the Timor Gap.

AUSTRALIAN POLITICAL IMPERATIVES TO ASSIST EAST TIMOR

In 2000 Bergin argued that the renegotiation 'will be driven by politics, principally domestic politics in Australia, not narrow legal considerations.'[100] Domestic politics have had a substantial impact on Australia's bargaining position and have worked to check Australia's national interest in maximising its territorial claim. The media has played an important role in directing public opinion in favour

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[94] Campbell, *supra* note 1, at 70. See also *Australia in Timor Oil Treaty Talks*, FINANCIAL TIMES, January 27, 2000 and Reinie Booysen, *Chaos in East Timor May Shake Up Industry*, THE OIL DAILY, September 13, 1999.

[95] Johnston, *supra* note 80, at 186.

[96] Gillian Triggs, *Commercial Risks of Investment in the Timor Gap Treaty Zone of Cooperation Area A*, *in* THE MARITIME DIMENSIONS OF INDEPENDENT EAST TIMOR 57 (Centre for Maritime Policy, University of Wollongong, 2000) at 138.

[97] Bateman and Rothwell, *East Timor's Maritime Dimensions: Rethinking Australia's Legal and Policy Options*, *in* THE MARITIME DIMENSIONS OF INDEPENDENT EAST TIMOR 57 (Centre for Maritime Policy, University of Wollongong, 2000) at 174.

[98] *Ibid.*

[99] Senate Foreign Affairs, Defence and Trade Committee 'Senate Foreign Affairs, Defence and Trade References Committee: Final report on the inquiry into East Timor' (7 December 2000) *available at* <http://www.aph.gov.au/senate/committee/fadt_ctte/East%20Timor/contents.htm> at para. 415.

[100] Anthony Bergin , *East Timor's Maratime Future*, *in* THE MARITIME DIMENSIONS OF INDEPENDENT EAST TIMOR 57 (Centre for Maritime Policy, University of Wollongong, 2000) at 165.

of East Timor's claims.[101] Writers like John Pilger have called for the entire zone of cooperation to go to East Timor and Australia to hand over 'all royalties collected since Evans toasted his Faustian friend while flying over the graves of his victims.'[102] This is evident in media criticisms of Australia's opening positions of a redistribution of the revenues to East Timor from 60:40, to 85: 15 and finally to 90: 10.[103]

Australia has also realised that the success of East Timor is 'strategically important for regional stability'[104] and '(i)t is in neither Australia nor Indonesia's interest to have a poor, unstable State on its doorstep that could provide a base for illicit drug smuggling, organised crime, people smuggling, piracy, illegal fishing, money laundering and so on.'[105] The Senate Committee on East Timor reinforces this view stating that 'it is in Australia's interest for East Timor to become a viable nation; one that does not remain a mendicant state and one that can play a constructive role in regional affairs.'[106]

BUSINESS INCENTIVES FOR CERTAINTY

Business interests also prompt a need for certainty as millions of dollars have already been committed in finely balanced business decisions.[107] An example of the uncertainty can be seen in the 2001 disagreements between East Timor and Phillips Petroleum over taxation issues under the new treaty arrangements.[108] Businesses fear that if negotiations fall through, compensation claims would not succeed against the Australian Government.[109] From 1998 East Timorese leaders were keen to make it clear that the terms of the treaty would be respected.[110] Triggs

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[101] Johnston, *supra* note 80, at 188. See also Melissa Roberts, *Australia's Sense of Loss in East Timor goes back Decades: Why Sydney Is Screaming?*, NEWSWEEK, September 20, 1999.

[102] Pilger, *supra* note 32, at 33.

[103] Virgina Marsh, *Australia Agrees Oil and Gas Deal with East Timor*, FINANCIAL TIMES, July 4, 2001. See also *Asia: Australia Sees Reason*, THE ECONOMIST, July 7, 2001.

[104] Godlove, *supra* note 1, at 145. See also Alexander Downer, *East Timor – Looking Back on 1999*, 54 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 5 – 10 (2000) *and* James Cotton, *Australia's Commitment in East Timor: A Review Article*, 23 CONTEMPORARY SOUTH EAST ASIA 552 – 569 (2001).

[105] Bergin, *supra* note 100, at 169.

[106] Senate Foreign Affairs Final Report, *supra* note 99, at para. 459.

[107] Ward, *supra* note 17, at 153. See also Godlove, *supra* note 1, at 141 and Triggs, *supra* note 69.

[108] U.N., East Timor Officials Defend Timor Gap Oil Treaty, XINHUA NEWS AGENCY, August 6, 2001 and Stephen Sherlock. Research Note no. 45 2001-02 The Timor Sea Treaty: Are the Issues Resolved?, FOREIGN AFFAIRS, DEFENCE AND TRADE GROUP (18 June 2002) available at <http://www.aph.gov.au/library/pubs/RN/2001-02/02rn45.htm>.

[109] Johnston, *supra* note 80, at 192. See also Commonwealth of Australia v. Western Mining Corporation Resources Ltd., 194 CLR 1 (1998).

[110] See Senate Foreign Affairs Final Report, *supra* note 99 at para. 440, and *East Timorese Leader Pledges Support for Treaty*, LLOYD'S LIST, October 15, 1999.

explains this by looking at two tiers of obligations created by the treaty – those between states and those between an international legal person and private interests. While the first tier may be in doubt, the assurances and interests of the parties mean that the second tier (i.e. commercial) obligations should be protected.[111] Moreover, East Timor retained a significant ability to disrupt Australian business interests through the possibility of obtaining interim orders preventing mining in the gap until a border had been settled.[112] Thus there is considerable 'moral, legal, political and public pressure on Australian commercial interests not to exploit Area A of the ZOC.'[113] These desires for certainty created an incentive to work on modifying the terms of the existing treaty for a quick implementation rather on a permanent delimitation of the seabed boundary on which Australia is not willing to compromise and would only be resolved by lengthy and uncertain litigation.

POSITION OF EAST TIMORESE

East Timor is in a unique situation with huge challenges in nation building.[114] These challenges give East Timor specific priorities in negotiating the seabed boundary. They desperately need the revenue from the Timor Gap that could amount to AUD $7 billion over 20 years while their current yearly budget stands at around $45m.[115] Peter Galbraith of UNTAET has also stated that '(t)he resources of the Timor Sea could make the difference between having to choose between children's health and children's education to being able to do both.'[116] While the East Timorese suffer fundamental weakness in negotiating because of their stretched resources and knowledge base, Australia remains 'wary of appearing to bully a helpless nation.'[117] Australia is also aware of the necessity for stable government in East Timor to give certainty to any agreement.[118] The employment of the population remains a crucial issue for East Timor, although since 'East Timor has no pre-existing oil and gas industry base, it will be very difficult to find skilled employees' to fill employment preferences in Treaty.[119] The Australian

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[111] Triggs, *supra* note 69, at 116.

[112] Ward, *supra* note 17, at 169.

[113] *Id.* at 170.

[114] *See* Fitzpatrick, *supra* note 93.

[115] Virgina Marsh, *Australia Agrees Oil and Gas Deal with East Timor*, FINANCIAL TIMES, July 4, 2001; *Indonesia: Oil: Australia to Renegotiate Timor Gap Treaty when East Timor Gains Independence*, ANTARA, February 15, 1999; *and* Seth Mydans, *A Tonic for East Timor's Poverty*, N.Y. TIMES, October 19, 2000.

[116] *Quoted* Senate Foreign Affairs Final Report, *supra* note 99, at para. 429.

[117] *Asia: Timor's Troubled Waters*, THE ECONOMIST, December 2, 2000.

[118] James Goldrick, *Strategic Issues for the Timor Sea : A Commentary*, *in* THE MARITIME DIMENSIONS OF INDEPENDENT EAST TIMOR 57 (Centre for Maritime Policy, University of Wollongong, 2000) at 164.

[119] Ward, *supra* note 17, at 162.

government have tried to remedy this with specifically targeted aid.[120] Moreover, East Timor does not have resources to fulfil some of the treaty obligations such as surveillance.[121] East Timor also has concerns over whether the Zone of Cooperation establishes too onerous a fiscal regime and discourages development of smaller discoveries.[122]

NEW EAST-WEST DELIMITATION ISSUES

Another new issue that has complicated and delayed a resolution of the seabed boundary is the East - West delimitation of the Timor Gap, which was not at issue with Indonesia.[123] The points A16 and A17 which represent the original 'Timor Gap' were recognised as possibly needing adjustment in the 1972 treaty with Indonesia at Article 3.[124] *Arena Magazine* has recently reported that independent lawyers including Christopher Ward estimated that a more lateral division of the boundaries would give East Timor rights over 80% of the Greater Sunrise, Laminaria/ Corallina and future Bayu-Undan Field.[125] The Senate Committee on East Timor also pointed out that the 1999 South-Western maritime boundary for the INTERFET operation if used again would put the Laminaria/ Corallina fields into East Timorese territory.[126] The eastern boundary is also in contention due to the small Island of Jaco which if it was taken into greater account could put the Sunrise fields into the Joint Development Zone.[127] This issue has surfaced in the unitisation of the Greater Sunrise field, which straddles the Joint Development Zone and Australian territory and has remained a sticking point even after the new treaty was signed in May 2002.[128] Some East Timorese now feel that even under the new arrangements that they are only getting 40% of what they are entitled to.[129]

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[120] This includes a $700,000 per annum scheme over the next two years. *Australian Government: East Timor to Benefit from Timor Gap Treaty Arrangements*, M2 PRESSWIRE, October 4, 2000.

[121] Ward, *supra* note 17, at 163.

[122] McKee, *supra* note 51.

[123] Sherlock, *supra* note 108.

[124] Senate Foreign Affairs Final Report, *supra* note 99, at para. 412.

[125] Alexandra Kirkham , *Right and Revenue: The Price of an Education*, ARENA MAGAZINE 18 – 19 at 18 (2002). For the text of the opinion *see* <http://www.gat.com/Timor_Site/lglop.html>.

[126] Senate Foreign Affairs Final Report, *supra* note 99, at para. 417.

[127] *Id.* at 418.

[128] *Timor Gap treaty signed*, THE ADVERTISER, MAY, 2002, *available at* http://www.theadvertiser.news.com.au/common/story_page/0,5936,4352477%255E1702,00.html; *New Timor Gap Treaty Signed*, THE AGE, May 20, 2002 *available at* http://www.theage.com.au/articles/2002/05/20/1021801654981.html; *and I'll sign Timor Gap Treaty, says PM*, SYDNEY MORNING HERALD, May 17, 2002.

[129] *Widening the gap*, ABC NEWS, May 15, 2002 *available at* <http://www.abc.net.au/asiapacific/focus/asia/GoAsiaPacificFocusAsiaStories_556474.htm>.

Triggs and Bialek address the East Timorese claims to extend both the east and west boundaries and conclude that the East Timorese position is overstated.[130] On the eastern boundary they argue that the current line correctly gives full effect to the Indonesian islands of Leti, Moa and Lakor. Although delimitations concerning islands would not always do this, Indonesia's status as an archipelagic state allows it to draw baselines linking the outermost points of its archipelagic islands according to Part IV of UNCLOS.[131] On the western boundary, Triggs and Bialek argue that the Timorese position is based upon a perpendicular rather than more common equidistance formulation which is the basis of the current boundary. They state that '(l)ines that are perpendicular to the coast are an exception to the general approach of equidistance, and appear to have found favour almost exclusively in delimitations in Central and South America and West and Northern Africa.'[132] They also point out that any adjustment of these boundaries requires the participation of Indonesia whose rights would necessarily be affected by the change.[133]

AUSTRALIA'S WITHDRAWAL FROM ICJ JURISDICTION

On 22 March 2002 Australia withdrew from ICJ jurisdiction over its maritime boundaries and submitted a new declaration under the UNCLOS denying the ability to bring compulsory Part XV proceedings regarding maritime delimitation.[134] The reasoning behind this was stated to be the desire that all future maritime disputes would be resolved by negotiation rather than litigation. There was initial speculation about whether Australia's withdrawal would be effective if East Timor lodged an immediate challenge as soon as it was granted UN membership after independence. This was based on the *Nicaragua*[135] decision where the USA's attempt to withdraw from the ICJ's jurisdiction was held to be invalid when Nicaragua lodged a suit three days afterwards.[136] The court suggested that 'reasonable time for withdrawal from or termination of treaties' was necessary.[137]

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[130] Gillian Triggs and Dean Bialek, *The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap*, 3 MELBOURNE JOURNAL OF INTERNATIONAL LAW 322 – 363 (2002) at 340f.

[131] *Id.* at 345.

[132] *Id.* at 350.

[133] *Id.* at 347

[134] *East Timor Hits at Australia over Gap Treaty*, BERNAMA, April 13, 2002. East Timor may have been able to challenge this withdrawal by immediately commencing litigation in the International Court of Justice, yet this is now no longer available to them and there would be no way of settling the dispute legally without an explicit consent of Australia.

[135] Military and Paramilitary Activities (Nic. V. U.S.), 1984 ICJ Rep 392 (Jurisdiction).

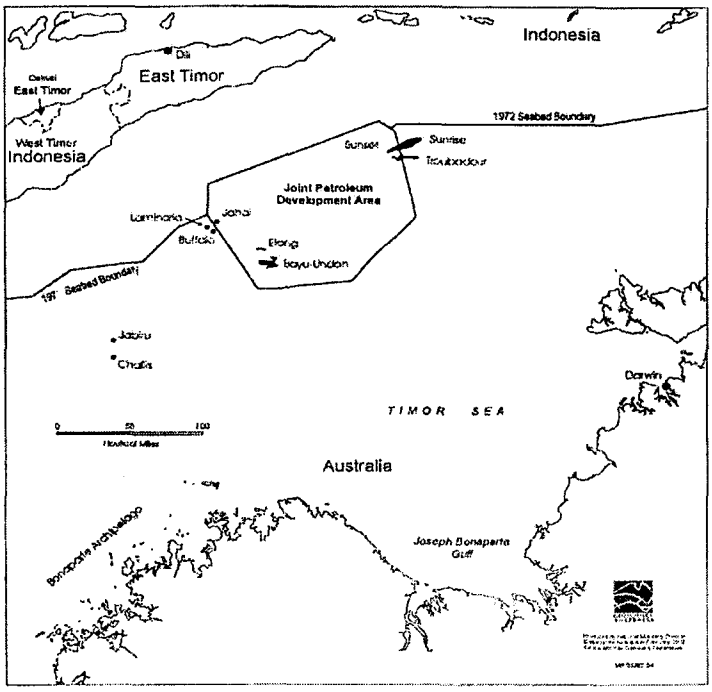
[136] Triggs and Bialek, *supra* note 130, at 358.

[137] *Ibid.*

However, as no challenge has yet arisen from East Timor this question will remain purely academic and any judicial delimitation of the boundary will now need the consent of Australia.

THE NEW ARRANGEMENT – A COMPROMISE

On 20 May 2002 Australia and the new East Timorese Nation compromised by signing the Timor Sea Treaty.[138] The Joint Development Zone was maintained but with a 90:10 split of proceeds. The old area's B and C have been removed. The delimitation is demonstrated below:



Australia still has huge benefits in refining the oil and gas in Darwin, which could be 'four or five times the amount of its direct revenues.'[139] Unitisation of Greater Sunrise deposit has been agreed in principle at 20% within the joint

[138] The new treaty is online at <http://www.austlii.edu.au/au/other/dfat/special/etimor/Timor_Sea_Treaty.html>.

[139] Ong, *supra* note 11, at 126. *See also* Pat Brazil *Comments: Historic Timor Gap Agreement Reached – Framework and Implications*, 20 AMPLJ 133 – 136 (2001).

development area and 80% in Australia's continental shelf.[140] There has also been a change to a three tier institutional framework with a Designated Authority, Joint Commission and Ministerial Council.[141] Yet after three years, the Designated Authority will revert to the East Timorese minister responsible for petroleum activities or an East Timorese statutory authority.[142] The dispute resolution procedures under the treaty have also been tightened with a compulsory and binding arbitral process being agreed.[143] This involves each State appointing one arbiter each and the two arbiters then deciding upon a third.[144] Arrangements for joint jurisdiction over many legal matters remain similar to the previous treaty such as subjection to criminal law based on nationality.[145]

The Treaty further defers a permanent delimitation of the continental shelf. While the terms of the Treaty are favourable to East Timor, Triggs and Bialek deny that this would affect either country's long term rights in delimitation.[146] Australia's interests have been protected by the oversight of the Ministerial Council to which any matter can be referred and a strong without prejudice clause which 'is likely to be afforded full legal effect in international law'[147]. This provision states:

> 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.[148]

RATIFICATION

Even after signing the Treaty, political debate continued as to whether it should be ratified. East Timor's parliament ratified the Treaty in 2002 but Australia waited for the 'International Unitisation Agreement' (IUA) over the Greater Sunrise field to be finalised.[149] Tension arose at various stages of the negotiations but were

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[140] Ong, *supra* note 23, at 127.

[141] *Ibid.*

[142] Art 6(b)(ii). See Ong, *supra* note 23.

[143] *See* Annex B of the Treaty.

[144] *See* Triggs and Bialek, *supra* note 130, at 337. If they both fail to agree, an arbiter is appointed by the President of the ICJ.

[145] *See* Article 14.

[146] Triggs and Bialek, *supra* note 130, at 333.

[147] Gillian Triggs, *The New Timor Sea Treaty between East Timor and Australia*, 4 AUSTRALIAN JOURNAL OF ASIAN LAW 188- 206 (2002) at 196.

[148] Article 2(b).

[149] James Cotton, *From Timor Gap to Timor Sea*, 75 THE AUSTRALIAN QUARTERLY 27-32 (2003) at 27.

finally resolved by early March 2003 when Australia ratified the Treaty and East Timor signed the IUA.[150]

A NEW PRESUMPTION OF JOINT DEVELOPMENT?

Ong claims this agreement 'represents the fairest and most pragmatic legal solution that could be arrived at.'[151] This is particularly the case since an adjudicated delimitation would not have been able to resolve the crucial issue of straddling deposits and how they are to be exploited.[152] Ong points out that the *Eritrea-Yemen Arbitration (Phase II – Maritime Delimitation)* lends support to the principle of a joint development zone. In that case the tribunal asked the parties in that case to give 'every consideration' to a similar joint development zone.[153] Ong has also argued that the obligation to cooperate in regard to straddling resources may be becoming an obligation of customary international law with a possible 'presumption in favour of joint development'.[154]

CONCLUSION

The legal dispute over the Timor Gap area is a unique test case that neither side really wants to take to trial. The trend away from the natural prolongation theory has served to weaken Australia's originally strong position in claiming most of the Timor Gap. However, Australia's bargaining position is continuously justified by the residual legal uncertainty, the huge economic benefits and a fear of destabilising the existing boundary with Indonesia. These factors have turned the discussion around more creative solutions to the conflict which also address important political concerns. It has become apparent that the nature of the hydrocarbon deposits which straddle most of the potential boundaries and the differential seabed and water column boundary that has developed in the area have created a necessity for creative compromises and structures for joint exploitation. The cooperation needed for joint development to work also becomes a very effective mechanism for promoting greater understanding and communication between neighbours. There may never be a settled seabed boundary between Australia and East Timor, but that should not be a problem given the ingenuity of the latest treaty.

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[150] *Id.* at 31. *See also* PETROLEUM (TIMOR SEA TREATY) ACT OF 2003.

[151] Cotton, *supra* note 149, at 29.

[152] *Ibid.*

[153] *Ibid.*

[154] David Ong, *Joint Development of Common Offshore Oil and Gas Deposits: 'Mere' State Practice or Customary International Law*, 93 AJIL 770 (1999) at 801, 803.

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