

A Gap in the Relationship: the Timor Gap, 1972-2013

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The 23 February 2013 was a significant date for Australia's relationship with Timor-Leste.¹ A condition of the Certain Maritime Arrangements in the Timor Sea (CMATS) Treaty was that either country could terminate it if by then there was still no jointly approved development plan for the Greater Sunrise gas project. This condition of the treaty not having been met, it was open to either country to terminate it.

The CMATS Treaty, signed in January 2006, put on hold the two countries' claims to jurisdiction and maritime boundaries in the Timor Sea for fifty years. Under the terms of the treaty, Australia agreed to share upstream revenues from the Greater Sunrise oil and gas field equally with Timor-Leste. 'Equal sharing of the upstream revenues from Greater Sunrise under CMATS could result in Australia and East Timor each receiving up to \$10 billion over the life of the project', Australian Foreign Affairs and Trade Minister Alexander Downer said in a statement. The CMATS Treaty was complemented by the Sunrise International Unitization Agreement (IUA). The IUA, first agreed in March 2003, enabled the development of Sunrise, which straddled the eastern border of the Joint Petroleum Development Area in the Timor Sea. The two treaties provided the legal and fiscal framework for the development of the Greater Sunrise field. They came into force from 23 February 2007, when the governments of Australia and Timor-Leste formally exchanged notes in Dili accepting and recognizing this. The CMATS Treaty would lapse if production did not begin by 2017, but it could also be terminated by either country if a jointly approved development plan for Greater Sunrise had not been agreed within six years.

The Joint Petroleum Development Area (JPDA) is jointly administered by Australia and East Timor and was established by the 2002 Timor Sea Treaty, under which Dili received 90% of government revenue from the production of petroleum resources in the area.² The Timor Sea Treaty replaced the 1989 Timor Gap (Zone of Cooperation) Treaty between Australia and Indonesia, which lapsed when East Timor ceased to be a province of Indonesia following a United Nations supervised act of self-determination on 30 August 1999. The Joint Petroleum Development Area created by the Timor Sea Treaty covered Zone of Cooperation Area A established by the Timor Gap Treaty. The Timor Gap Treaty was described as a unique arrangement for enabling petroleum exploration and exploitation in offshore areas subject to competing claims by two countries, and for the sharing of the benefits between those countries.³ It was signed in December 1989 to deal provisionally with the gap in the seabed area not covered by the 1972 Seabed Agreement between Australia and Indonesia, the seabed area between Australia and East Timor. When the 1972 Seabed Agreement was negotiated, a 'gap' was left between the eastern and western parts of the Australia-Indonesia seabed boundary in the area to the south of Portuguese Timor: the 'Timor Gap'.

1. Australia changed to official recognition of the name 'Timor-Leste' in July 2012: DFAT *Timor-Leste: country brief*, July 2012, replacing *East Timor: country brief*, March 2012.

2. "Australia, Timor-Leste bring Sunrise gas treaties into force", *PLATT*, 26 February 2007.

3. Mr Payne. *Senate Foreign Affairs, Defence and Trade References Committee Hansard* (hereafter *Committee Hansard*), 11 November 1999, p.873.

The Creation of the Timor Gap

The necessity for seeking agreement with Australia's neighbours on national seabed boundaries emerged as exploration began to reveal the existence of exploitable deposits of gas and petroleum on the seabed contiguous to the Australian continent. A consortium consisting of Arco Australia Ltd, Australian Aquitaine Pty. Ltd. and Esso Australia Ltd. had begun geophysical exploration in the Timor Sea and Bonaparte Gulf in 1962.⁴ A second consortium comprising Woodside Petroleum, Burmah Oil Company and the Anglo-Dutch Shell Oil Company conducted an aeromagnetic survey in 1963, followed by seismic surveys in each of the years 1964-1968.⁵ The extensive exploration efforts undertaken by both consortiums in the Timor Sea/Bonaparte Gulf/Browse Basin area from 1962 had by 1970 revealed the region to be petroliferous, and specifically, 'certain parts of the Bonaparte Gulf-Timor Sea area prospective in the search for viable oil and gas reserves'.⁶ Delimitation of respective national claims to the seabed was necessary for exploitation of these reserves to proceed.

Sea-bed negotiations with Indonesia commenced in March 1970, following informal discussions between Australian and Indonesian delegates to the fourth ECAFE (Economic Commission of Asia and the Far East) symposium on the development of regional petroleum resources held in Canberra in November 1969.⁷ The Australian government had developed its position on maritime boundaries since 1953 when it laid formal claim to its continental shelf.⁸ Australia developed two interpretations of the 1958 Geneva Convention on the Law of the Sea. Article 6.1 of the Convention stated, regarding delimitation of international boundaries:

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 absence of agreement, and unless another boundary line is justified by special circumstances, the boundary line is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

The first interpretation by Australia concerned that area of the Arafura Sea, east of longitude 133°14' East, where petroleum exploration permits were granted as far north as the line of equidistance between Australia and West Irian and the Aru Islands. According to the Australian interpretation, the shelf in this area was judged to

4. R. Laws and C. Kraus, 'The Regional Geology of the Bonaparte Gulf-Timor Sea Area', *APEA (Australian Petroleum Exploration) Journal*, 1974, p.77.

5. R. Mollan *et al.*, 'Geological Framework of the Continental Shelf of North West Australia', *APEA Journal*, 1969, p.49.

6. R. Laws and C. Kraus, 'The Regional Geology of the Bonaparte Gulf-Timor Sea Area', *APEA Journal*, 1974, p.77; Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.60.

7. R. Sorby, 'Indo-Aust. Talks on who owns Off-shore Oil', *The Australian Financial Review*, 4 November 1969; Reply by External Affairs Minister William McMahon to Question Upon Notice, *House of Representatives Debates*, Vol. 71, 1971, p. 546.

8. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours*, No.82, 1972.

be common to both Australia and Indonesia.⁹ This interpretation provided for the drawing, with relative ease, of an equitable boundary on the equidistance principle.¹⁰

The second Australian interpretation concerned the area west of that longitude, where permits were granted for areas as far north as the Timor Trough.¹¹ In a definitive statement in the House of Representatives on 30 October 1970, Minister for External Affairs William McMahon described the Timor Trough as a 'huge steep cleft or declivity, extending in an east-west direction, considerably near[er] 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 slopes down on opposite sides to a depth of over 10,000 feet [2 miles]'.¹² The significance of the Timor Trough to this second interpretation lay in the development of what McMahon called an 'unmistakably morphological' basis for the Australian claim to this area:

The Timor Trough thus breaks the continental shelf between Australia and Timor,¹³ so that there are two distinct shelves, separating the two opposite coasts.

For the Australian government, therefore, the Timor Trough separated two distinct continental shelves: a narrow shelf extending from Timor, and a wide shelf extending from the Australian coastline to the base of the Timor Trough. Since the 1958 Geneva Convention did not explicitly address a situation where there were two continental shelves, the Australian government deemed the 'special circumstances' of Article 6.1 of the Convention to apply, while as McMahon explained, 'the fall-back median between the 2 coasts provided for in the absence of agreement, would not apply for there is no common area to delimit'.¹⁴ This view had become encapsulated in the drawing of the Mackay Line. The Mackay Line, or Green Line, was drawn by and named after F.L. McCay, an officer of the Department of National Development. It followed the foot of Australia's continental slope, and while its precise location was according to journalist Peter Hastings, 'hard to pinpoint, it is known to follow the Timor Trough between 11 degrees South and eight degrees South'.¹⁵

The Minister for National Development, David Fairbairn, had unsuccessfully argued in a November 1965 Cabinet submission in favour of falling back to the median line, on the ground that the time would soon come when it would be possible to argue that there was a common continental shelf between Australia and Timor and that therefore the applicable international rule was the median line. Indonesia could adopt this argument and supported it by a 'Confrontation' policy consisting of the issue of permits and authorities either to Indonesian or foreign oil search

9. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours*, No.82, 1972.

10. M.F. Glaessner, 'Legal, Logical and Geological Boundaries of the Australian Continent', *APEA Journal*, 1971, p.34.

11. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours*, No.82, 1972.

12. Minister for External Affairs William McMahon, *House of Representatives Hansard*, Vol.70, 30 October 1970, p.3108.

13. Minister for External Affairs William McMahon, *House of Representatives Hansard*, Vol.70, 30 October 1970, p.3108.

14. Minister for External Affairs William McMahon, *House of Representatives Hansard*, Vol.70, 30 October 1970, p.3108.

15. Peter Hastings, 'Whose Riches Under The Sea?', *The Sydney Morning Herald*, 3 June 1972; J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours*, No.82, 1972.

organizations. In such a case, Australia would be faced with a decision whether to go to war with Indonesia over a doubtful claim (perhaps for the benefit of a foreign oil company) or whether to repudiate its claim.¹⁶ Cabinet did not accept Fairbairn's submission, preferring to press Australia's claim to all of the continental shelf on the Australian side of the Timor Trough.

A plea for an Australian position based on a wider consideration of national interests was made in June 1971 by C.R. (Robin) Ashwin, Minister at the Australian Mission to the United Nations, who wrote: 'I do not think it can be other than a source of great irritation to the Indonesians in the future if we are extracting oil and other minerals to our great economic advantage only some 30 or so miles from the Indonesian coast but well over 100 miles from Australia'. Keith Brennan, Senior Assistant Secretary, International Legal Division, replied to Ashwin that the Australian position reflected 'a recent and quite uncompromising reaffirmation by Ministers of the Government's stand on the matter. The fact that the Department of National Development believes the Timor Sea to hold particular promise for seabed exploitation makes any concession in the area more than usually difficult'.¹⁷

Australia's sense of urgency with regard to settling a seabed boundary was heightened by the presumption of vast hydrocarbon reserves in the Timor Sea referred to by Brennan. This was the only area in which Australia faced direct competition to its continental shelf claims or, as Ashwin put it in his letter: 'this is the only point in the whole of our enormous continental shelf where we have this problem'. Since the precise location and extent of these reserves was unknown, and those international laws applicable were in no sense definitive, Australia pursued a claim consistent with securing as much of the Timor Sea seabed as was possible. It appears that in order to secure a favourable settlement of the entire boundary in the Timor Sea, the Australian government first sought to negotiate a favourable settlement with the Indonesian government. Having achieved such a settlement (which implicitly recognized the legitimacy of Australia's perspective of the sea-floor), the Australian government could then present Portugal with a *fait accompli* in terms of the relevant applicable customary international law.¹⁸

External Affairs Minister McMahon explained to Parliament on 30 October 1970 that the Australian view 'is, of course well known to Indonesia, [there having] been a recent exchange of views, still incomplete, between Indonesian and Australian officials'.¹⁹ From these preparatory discussions, it became clear that Indonesia did not share the Australian view, counter-arguing that the Timor Trough was merely 'an incidental depression in the sea-floor, not the definitive edge of two shelves'.²⁰ The *Australian Financial Review* of 16 October 1970 reported: 'Indonesia has already

16. Cabinet submission No.1165, 'Off-Shore Petroleum', 25 November 1965, p.8, NAA A5827/1, Vol.37; NAA A1838/1, 752/1/23, pt.1, pp.8-9.

17. Ashwin to Brennan, 29 June 1971 and Brennan to Ashwin, 12 July 1971, NAA A1838/1, 752/1/23, pt.8, pp.155-6, 163.

18. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.69.

19. Minister for External Affairs William McMahon, House of Representatives Hansard, Vol.70, 30 October 1970, pp.3107-3109.

20. Peter Hastings, 'Whose Riches Under The Sea?', *The Sydney Morning Herald*, 3 June 1972; J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours*, No.82, 1972; cited in Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.70.

prepared maps showing the boundary of its own 'continental shelf' as the median line between Australia and Timor'.²¹

The sea-bed boundary in the Arafura and eastern part of the Timor Seas proved comparatively easy to negotiate. The agreement signed on 18 May 1971 defined the boundary for 520 nautical miles from the southern terminus of the land boundary between Indonesia and Papua New Guinea as far as meridian 133° 23' East, and was fixed by reference to 13 defined points.²² This agreement, reached after some fifteen months of negotiations, could only be concluded at this time by distinguishing the basis on which agreement had been reached from that applying to the remainder of the boundary, *i.e.* this boundary approximated the line of equidistance for most of its length.²³

During the visit of Indonesia's President Soeharto to Australia in February 1972, it was agreed with McMahon (now Prime Minister) 'that all outstanding issues [relating to the sea-bed boundary] should be negotiated at an early date'.²⁴ *The Canberra Times* reported on 2 May 1972 that the line Australia's negotiators would take was 'likely to involve an attempt at compromise, possibly by drawing a line half-way between where Australia believes the boundary should be, and where the Indonesians would choose to draw it'.²⁵ After a preliminary conference in September, delegates attended formal negotiations in Jakarta between 2 and 7 October which culminated in the signing of an Agreement on 9 October 1972.²⁶ The agreement embodied the compromise suggested by Australia, with the boundary being fixed 'roughly one third of the way down the southern side of the Trough', between the Mackay Line and the median line, but closer to the former.²⁷

Article 7 of the agreement provided for a situation arising where a 'single accumulation of liquid hydrocarbons or natural gas, or any other mineral deposit , extends across any of the [border] lines'. In such a case, the two governments were to consult, and seek 'to reach agreement on the manner in which the accumulation or deposit shall be most effectively exploited and in the equitable sharing of the benefits

21. Peter Robinson, 'Aust's "expanding rim" offshore minerals doctrine in question', *Australian Financial Review*, 16 October 1970.

22. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours*, No.82, 1972; 'Signing of the Sea Bed Agreement with Indonesia', *Current Notes on International Affairs*, Vol.42, No.5, 1971, p.283.

23. 'Signing of the Sea Bed Agreement with Indonesia', *Current Notes on International Affairs*, Vol.42, No.5, 1971. p.283.

24. W. McMahon, reply to question, *House of Representatives Hansard*, Vol.78, 1972, pp. 3314-3315; cited in Andrew Mills, *Australian-Indonesian Relations A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.78.

25. Bruce Juddery, 'Jakarta talks on sea boundaries', *The Canberra Times*, 2 May 1972.

26. 'Seabed pact: oil areas lost', *The Age*, 10 October 1972; 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs*, Vol.43, No.10, 1972, p.509; and Andrew Mills, *Australian-Indonesian Relations A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.78.

27. C. Cook, 'The Australia-Indonesia Maritime Boundary', unpublished Master of International Law sub-thesis, ANU, Sept. 1984, p.32; Andrew Mills, *Australian-Indonesian Relations A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.78.

arising from such exploitation'.²⁸ This article provided a basis for establishing a joint development zone under the 1989 Timor Gap Treaty.

Article 3 of the agreement dealt with the potential need for adjustments to be made, by consultation, to those portions of the boundary lines between points A15 and A16 and between points A17 and A18, should this become necessary in the event of a delimitation of that gap in the boundary created by the Agreement (the 'Timor Gap'). This was an unspoken reference to Portugal as a party to such a future settlement. Points A16 and A17 (at 9°28' South and 127°56' East, and 10°28' South and 126° East) were putatively the junction points of Australian-Indonesian-Portuguese Timor boundaries, but in the absence of tripartite negotiations they had not been agreed to by Portugal. They were the points of intersection of the compromise line agreed by Australia and Indonesia with lines following the shortest distance between the eastern and western points of Portuguese territory on the island of Timor and the nearest points on the opposite Australian coast. Alternative points of intersection along lines drawn at right angles to the coasts were farther apart, and these points would have left a wider gap: as such, the narrower gap left by the agreement represented an encroachment by Australia and Indonesia on the area that could be claimed by Portugal.

Why Indonesia agreed

In 1977 the Indonesian Foreign Minister, Dr. Mochtar Kusumaatmadja, a law of the sea expert who had played a prominent part in the 1971 and 1972 negotiations, claimed that Australia had 'taken Indonesia to the cleaners' in these negotiations.²⁹ Given that 'both parties welcomed the agreement as a tribute to the spirit of reasonableness and good neighbourliness which had marked the negotiations',³⁰ there are two areas in which Indonesia could have regarded itself as having been 'taken to the cleaners' in the 1972 negotiations. The first concerned the relevance to the negotiations of plate tectonics theory, or at least the distinction between a single and separate continental shelves. In this regard, 'the Indonesian position has always been [based] on morphological evidence that the shared Continental Shelf ...extends north of Timor'.³¹ Yet, according to Dr. Mochtar, 'The Australians were able to talk us into [accepting] that the Timor Trench constituted a natural boundary between the two shelves, which is not true'.³² He could have drawn support for his view from a definition of the Timor Trough given in a paper published in the *APEA Journal* for 1974, which stated:

28. 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs*, Vol.43, No.10, 1972, p.509.

29. Richard Woolcott, 'Fixed Relations', *The Australian*, 15-16 March 1997. Dr. Mochtar expressed this view again in 1978: Michael Richardson, 'Jakarta's Tough Sea Boundary Claim', *The Australian Financial Review*, 20 December 1978; 'Boundary threat to seabed leases', *The Sydney Morning Herald*, 21 December 1978; and Peter Hastings, 'Re-arranging The Sea Bed A Task For Diplomacy', *Sydney Morning Herald*, 22 December 1978; see also 'Visit of Indonesian Foreign Minister', *Australian Foreign Affairs Record [AFAR]*, December 1978, p. 591.

30. 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs*, Vol.43, No.10, 1972, p.510.

31. P. Hastings, 'Re-arranging The Sea Bed A Task For Diplomacy', *Sydney Morning Herald*, 22 December 1978.

32. Dr. Mochtar, in Michael Richardson, 'Jakarta's Tough Sea Boundary Claim', *The Australian Financial Review*, 20 December 1978, and Michael Richardson, 'Tying up Timor's loose ends', *Far Eastern Economic Review*, 5 January 1979, p.45.

The Timor Trough is a modern bathymetric trench in which water depths exceed 10,000 ft (3000m)The formation of the trough is probably due to isostatic adjustment following the collision in the Early Miocene of the Australian and Asian Plates in the region immediately north of the island of Timor.³³

If the plates collided *north* of Timor then the Trough/Trench was indeed merely 'an incidental depression in the sea-floor, not the definitive edge of two shelves'.³⁴ In this context, it is notable that there are no volcanoes on the island of Timor. There are volcanoes, usually associated with a continental shelf subduction zone, on the islands to the north of Timor, on the other side of the Ombai-Wetar Strait, in Flores and the other Lesser Sundas islands. The article in the *APEA Journal* drew on a consensus among geologists that had been formed during the 1960s and 1970s. For example, M.G. Audley-Charles, D.J. Carter and J.S. Milsom found in 1972 that Timor had 'formed part of the Australian continental margin since at least the early Permian' and the 'at present, the northern edge of the Australian continent, represented by Timor, is separated across the Wetar Strait from the pre-Pliocene volcanic arc by a minimum of only 40 km'. With regard to the Timor Trough, Audley-Charles *et al.* concluded: 'In an attempt to accommodate the continuing drift of Australia the continental crust south of Timor began to downbuckle, deepening the Timor Trough, with perhaps incipient underthrusting'.³⁵

As later explained by Professor Gordon Lister, Director of the Australian Crustal Research Centre at Monash University, with regard to the tectonic movements along the line of impact between north-west Australia and the Sunda archipelago, the geological trend was for Timor to be ultimately absorbed by the Australian continent: 'Timor is pretty well on board now, it'll be further on board as time goes by. As Java rides over the Australian plate it will push the sediments up, and that's why we have oil in the Timor Gap now'.³⁶

Had they so wished, the Indonesians could have pursued avenues other than that chosen to place greater pressure on Australia to reduce or alter its claim. These included waiting, like Portugal, for the forthcoming United Nations Conference on the Law of the Sea (UNCLOS) to determine appropriate guidelines; international arbitration; or waiting for scientific confirmation of its claim. All of these options would probably have involved a period of several years waiting, and the implementation of such action could hardly be interpreted as 'good neighbourly' behaviour in circumstances where the Soeharto Government felt under a compulsion to reciprocate Australian gestures of goodwill. The 1972 Agreement reflected the prevailing pressures to add substance to bilateral relations.³⁷ Both Prime Minister McMahon and President Soeharto had at their meeting in Canberra in February 1972

33. R. Laws and C. Kraus, 'The Regional Geology of the Bonaparte Gulf-Timor Sea Area', *APEA Journal*, 1974, p.80. See also Warren Hamilton, *Tectonics of the Indonesian region*, Geological Survey Professional Paper 1078, Washington, U.S. Government Printing Office, 1979.

34. Peter Hastings, 'Whose Riches Under The Sea?', *The Sydney Morning Herald*, 3 June 1972.

35. M.G. Audley-Charles, D.J. Carter and J.S. Milsom, 'Tectonic Development of Eastern Indonesia in Relation to Gondwanaland Dispersal', *Nature Physical Science*, vol.239, 18 September 1972, pp.35-39.

36. Simon Grose, 'Australia adrift in global shift', *The Canberra Times*, 8 June 2001.

37. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.86.

'expressed the belief that the relationship...was moving into a phase where it was possible to put more substance and content into that relationship'.³⁸

Australian gestures in this regard included its involvement since 1966 in the Inter-Government Group on Indonesia (IGGI), the proportional increase in the amount of foreign aid directed to Indonesia from 1966, the commencement of a formal Defence Co-operation Program in June 1972 (the Program provided \$20m for the period July 1972 to June 1975, including the transfer of Sabre jets [\$6.1m] and mapping in Indonesia [\$2m]), and preparations for Indonesia to become a 'most favoured nation' under the terms of a trade treaty. In addition, business links had become increasingly strong since 1966, although by 1972, these had not resulted in the creation of any significant bilateral economic ties. As noted by Andrew Mills, this factor by itself is indicative of Indonesia's position of deficit in the development of bilateral relations, in that economic co-operation was very much 'one way traffic' to Indonesia, in the form of Australian investment and a trade imbalance in favour of Australia.

While this was of comparatively little significance in relation to Australian civilian and military aid, as well as Australian diplomatic initiatives, together these factors pointed to a situation in which Australia was providing greater input into the substance of bilateral relations than was Indonesia. This was symptomatic of the asymmetry already implicit in bilateral relations at this time but, for diplomatic reasons if for no other, Indonesia needed to demonstrate its commitment to them. Agreement to the compromise suggested by Australia at the seabed negotiations offered Indonesia the opportunity to make a pragmatic reciprocatory gesture for accumulated Australian 'goodwill'. That reciprocation should occur in the seabed negotiations is demonstration of the limited options available to Indonesia in its choice of mechanisms to substantiate its claim of fostering better bilateral relations.³⁹

While this in large part explains Indonesia's being in as much a 'hurry' as Australia to reach an agreement, it does not explain Dr. Mochtar's second claim concerning the 'fairness', or otherwise of the actual Agreement. This may be explained by the extent of Indonesia's knowledge of the region's hydrocarbon potential at the time of the negotiations. There is some doubt as to whether or not Indonesia knew of those prospective areas in the vicinity of the median line, and between it and the Timor Trough, which on the basis of extrapolation from seismic data Australia presumed to exist. No exploration had been carried out in the Timor Sea by Indonesian concessionaries. The wells discovered to 1972 were all on the Australian side of the median line. If the Indonesian negotiators were fully cognizant of these details, then it would appear that Indonesia's agreement to the Australian compromise was an act of even greater largesse.⁴⁰ Mochtar's complaint could also have been a reference to Australian knowledge of the Indonesian negotiating position, illicitly obtained.⁴¹

38. 'The Australian-Indonesian Seabed Agreement', *Current Notes on International Affairs*, Vol.1.43, No.10, 1972, p.510.

39. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.85.

40. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.87.

41. Hamish McDonald, 'Sounding the gap', *The Sydney Morning Herald*, 21 October 2000.

East Timor's Foreign Minister José Ramos Horta said in May 2004 that when he asked his Indonesian counterpart, Hassan Wirajuda, why Indonesia had accepted Australia's claim in 1972, Wirajuda replied that Indonesia was politically very weak at that time, and was also especially concerned to gain recognition of its archipelagic concept of treating the area between its islands as internal territorial waters.⁴² Senior Indonesian diplomat Hashim Djalal, who participated in the seabed boundary talks with Australia, said in July 2004 his delegation sought to argue for a median line under the then 1958 UN Continental Shelf Convention because of its contention that the meeting point of the two plates was actually north of Timor. He explained that Jakarta, a signatory to the 1958 convention, could not produce sufficient evidence to prove its theory, while Australia was able to 'bombard' the Indonesians with a mass of data collected by oceanographic-research vessels and navy submarines to back its claim. Djalal said the Indonesians were unaware of the Timor Sea's oil-and-gas potential at that time. But he also acknowledged that regional politics could have been one reason why Jakarta spurned Portugal's suggestion to form a united front against the Australians: 'Indonesia wanted to be a good neighbour after *Konfrontasi* [the armed confrontation in the early 1960s between Indonesia and Malaysia, in which Malaysia was supported by Britain, Australia and New Zealand]'.⁴³ It is also noteworthy that Indonesia to have border talks with Portugal for fear, as Dr Mochtar said, that these would imply endorsement of the colonial regime in Timor.⁴⁴

Negotiations to close the Timor Gap, 1970-1974

Initially, Australia was unwilling to negotiate at all with Portugal. A Cabinet submission of 25 November 1965 noted that the difficulty in negotiating a seabed agreement with Portugal was that it would imply a degree of acceptance of Portugal's right to share in decisions permanently affecting the future of the area and, referring to the view expressed by Cabinet in February 1963 that 'no practicable alternative to eventual Indonesian sovereignty over Portuguese Timor presented itself', concluded: 'as a consequence, it would seem preferable not to seek negotiations with Portugal'.⁴⁵

In November 1970, the Portuguese Ministry of Foreign Affairs took note of the concessions granted by Australia in the Timor Sea in areas where Portugal itself intended to grant concessions, and therefore considered it desirable that urgent consultations take place, preferably in December 1970.⁴⁶ This did not happen, and on 20 April 1971 the Portuguese Ambassador in Canberra, Carlos Empis Wemans, renewed the request for negotiations at a meeting with Department of External Affairs Deputy Secretary Ralph Harry. He was informed that Australia preferred to conclude the negotiations then taking place with Indonesia on a seabed boundary before entering into negotiations with Portugal. Wemans protested that in that case Portugal would be presented with a position on the boundary which had already been agreed

42. Rowan Callick, 'Tiny Timor treads warily among giants', *The Australian Financial Review*, 31 May 2004.

43. John McBeth, 'Canberra's Sea of Troubles', *Far Eastern Economic Review*, 8 July, 2004.

44. Australian Embassy, Jakarta, to Canberra, 6 January 1971, NAA A1838, 756/1/4, pt.1, f.54.

45. Cabinet submission No.1165, 'Off-Shore Petroleum', 25 November 1965, NAA A1838/1, 752/1/23, pt.1, f.7.

46. Note verbale no 5191 du 2 novembre 1970 du Ministère des Affaires Etrangères portugais à l'Ambassade de l'Australie à Lisbonne, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, Vol.V, Annexe IV.4, p.280.

with a third country.⁴⁷ Apparently Australia and Indonesia saw fit to hold negotiations on what was in fact a boundary between three countries, without including Portugal: the terminal points of the Australia-Indonesia-Portuguese Timor boundaries did require the agreement of Portugal, which was not obtained.

Harry drew to the attention of Wemans an announcement in the *Boletim Oficial de Timor* of 24 October 1970 of a request from Oceanic Exploration Company for an exploration concession in an area of the Timor Sea which overlapped an area claimed by Australia. Oceanic had written to the Ministro do Ultramar on 31 December 1968 applying for an oil and gas exploration lease. In describing the area of the Timor Sea for which it was applying, Oceanic noted that there were two ways of deciding the eastern and western division points between Portuguese Timor and Australia: 'If one uses perpendicular lines to shore between the Island of Timor and Northwestern Australia, the larger area prevails. If one, however, applies diagonal lines to establish the median point, then the smaller area prevails'.⁴⁸ In the 1972 Australia-Indonesia seabed agreement, the terminal points of the Timor Gap (A16 and A17) were established using the diagonal lines, thus encroaching on the Portuguese area.

The Department of External Affairs replied to Wemans in a note of 25 May 1971, drawing his attention to the statement made in Parliament by External Affairs Minister McMahon on 30 October 1970, and stating Australia's claim that the whole of the area of the Timor Sea specified in the *Petroleum (Submerged Lands) Act 1967* formed part of the continental shelf belonging to Australia. The specified area was bounded by the Timor Trough. This being so, 'no question of negotiating a common boundary will arise where an area of ocean floor [*i.e.*, the Timor Trough] lies between the two shelves'.⁴⁹

An editorial in *The Age* of 11 October 1972 anticipated 'agreement with the Portuguese Government on the area lying off eastern Timor should follow the line already established'.⁵⁰

In a statement that verged on the disingenuous, Minister for National Development Reginald Schwartz advised the Parliament on 26 October 1972 that the Portuguese Government had not made known its position.⁵¹ Although the Australian Government was officially informed of Portugal's view only after the signing of the treaty with Indonesia in October 1972, it was known unofficially long before: the Australian embassy in Lisbon advised in a letter of 21 August 1971 that, 'Surprising as it may seem, they [the Portuguese authorities] take the view that there is one shelf there, not two, and that the Timor trough does not constitute a division between one

47. Télégramme de l'Ambassade du Portugal à Canberra au Ministre des Affaires Etrangères portugais en date du 20 avril 1971, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, Vol.V, Annexe IV.5, p.283.

48. Lettre de 'Oceanic Exploration Company' au Directeur-Général de l'économie, Ministère portugais d'Outre-mer, 31 décembre 1968, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, Vol.V, Annexe IV.3, p.277.

49. Note du Ministère des Affaires Etrangères australien à l'Ambassade du Portugal à Canberra du 25 mai 1971, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, Vol.V, Annexe IV.6, p.286.

50. 'Room for two in a seabed', *The Age*, 11 October 1972.

51. *House of Representatives Hansard*, 26 October 1972, p. 3381.

shelf and another'.⁵² A 'special correspondent' writing in *The West Australian* of 3 June 1972 reported that Portugal was expected to support Indonesia's view that the shelf was continuous and the Trough just an indentation in the shelf's surface, while Peter Hastings wrote in *The Sydney Morning Herald* of the same date: 'Obviously the Indonesian view is now shared by Portugal'.⁵³ The *Far Eastern Economic Review* of 15 July 1972 reported:

It is understood Portugal will align itself with Indonesia in seeking a share of the rich, shallow sea-bed between Timor and the Australian coast... Indonesia—and now Portugal—will seek a dividing line which would run half-way between Timor and the Australian mainland and cut across a dozen oil lease tenements granted by the Western Australian Government.⁵⁴

On 5 March 1973, the Department of Foreign Affairs wrote to Ambassador Wemans noting that Australia and Indonesia had negotiated seabed boundaries in the Timor Sea, and proposed that negotiations between Australia and Portugal commence in May or June 1973: 'the Australian Government would be grateful to be informed as soon as possible of the response of the Portuguese Government'.⁵⁵

Australian eagerness to conclude a boundary agreement in relation to Portuguese Timor was indicated in a speech by Senate Government Whip Justin O'Byrne on 23 May 1973:

It can only be to our advantage to have this matter settled amicably. We have the very good fortune to possess a defined area that is potentially rich. It has been stated that this area could become the richest hydrocarbon empire in the world. It contains gas and oil in quantities that could match even the fabulous riches of the Middle East. The future of Australia, at a time when a fuel crisis is developing in the United States of America and when the traditional source of supply of hydrocarbons is the subject of very delicate arrangements, with certain traditional practices being changed and the prices being under barter, is bright. We are extremely fortunate that at this time we are emerging into an era of self-sufficiency or near self-sufficiency in the supply of hydrocarbons.⁵⁶

The optimism expressed by Senator O'Byrne was based on the information gained by Australian exploration companies. Seismic work carried out by Burmah Oil in 1969 and 1970 had given rise to an estimate that the so-called 'Kelp Structure', the most prospective area in the Timor Sea, contained between 500 million and 5 billion

52. T.V. Holland to Secretary, 21 August 1970, NAA A1838/1, 756/1/4, pt.1, f.120.

53. 'Sea-bed row looms over oil-gas field', *The West Australian*, 3 June 1972; Peter Hastings, 'Whose Riches Under The Sea?', *The Sydney Morning Herald*, 3 June 1972.

54. Purita Go and Kingsley Wood, 'Timor: Border problems', *Far Eastern Economic Review*, 15 July 1972, p.21.

55. Note 756/1/4 du Ministère des Affaires étrangères australien à l'Ambassade du Portugal, 5 mars 1973, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, Vol.V, Annexe IV.7, p.289. The Department of External Affairs became the Department of Foreign Affairs following the December 1972 change of government.

56. Senator J. O'Byrne, *Senate Hansard*, Vol S 56, 23 May 1973, p.1838. Senator Wriedt, *Senate Hansard*, Vol.56, 23 May 1973, p.1840.

barrels of oil, and gas reserves of some 50,000 billion cubic feet of gas.⁵⁷ The Timor Sea, virtually in its entirety, was viewed as a highly prospective area.⁵⁸

Portugal had claimed sovereignty since 1956 over the seabed in accordance with current international law, subsequently codified in the 1958 Geneva Convention. It was known that in the Timor Sea case, the Portuguese preference had been for a median line determination.⁵⁹ Yet, it seemed that the Australian government was reluctant to test the relevance of its prior settlement with Indonesia to that of the remainder of the boundary with Portugal. When asked in the Senate on 23 May 1973 if it was the Australian government's intention to seek international adjudication, Senator Wriedt replied on behalf of the Government that Australia intended to proceed with direct negotiations 'in the hope that we can arrive at some definitive position'.⁶⁰ Minister for Minerals and Energy Rex Connor advised the Parliament on 2 May 1973 that Australia had been in contact with the Portuguese Government and expected discussions relating to the seabed to commence later that year (a tacit reference to the letter of 5 March 1973 to the Portuguese Ambassador).⁶¹ The Whitlam Government was reported in July 1973 to be insisting on a seabed boundary along the edge of the Timor Trough (*i.e.* the Mackay Line), even closer to Portuguese Timor than that with Indonesian Timor. Richard Ackland wrote in *The Australian Financial Review*: 'The Whitlam Government has made a particular point of condemning Portuguese colonial activities, and it is only logical to reinforce that position with a hard-nosed approach to a border... However, it is not appropriate for a Timor that someday may be independent'.⁶² The Portuguese government indicated in November 1973 that 'they did not wish to begin negotiations until after the United Nations Law of the Sea Conference [UNCLOS], the first session of which was due to open in Caracas in June 1974'.⁶³

In January 1974, Portugal granted exploration permits in the Timor Sea to the United States company, Oceanic Exploration.⁶⁴ The permit area covered 23,192

57. Mark Westfield, 'Showdown at Timor Gap', *Australian Business*, 28 March 1984, pp.44-45. Subsequent exploration has confirmed estimates of the size and value of the Kelp Structure (Paul Cleary, *Shakedown: Australia's grab for Timor oil*, Crows Nest, Allen & Unwin, 2007, pp.155-6).

58. Addressing the APPEA Conference in Hobart on 9 April 2001, Peter Galbraith, Cabinet Member for Political Affairs and the Timor Sea in the East Timor Transitional Government, said: 'The scale of the resources in the Timor Sea is vast: Bayu-Undan holds 3TCF of gas, Greater Sunrise nearly 10 TCF, Laminaria, Buffalo and Elang Kakatua are producing more than 220,000 barrels per day' (*Maritime Studies*, May/June 2001, p.2).

59. 'Sea-bed row looms over oil-gas field', *The West-Australian*, 3 June 1972; Ian Sinclair, *House of Representatives Hansard*, Vol.105, 2 June 1977, p.2589; P.G. Ross, *The Impact of Geomorphology, Distance and Other Criteria as Determinants in Maritime Boundary Delimitation in the Timor Sea*, MA (Law) thesis, Australian National University, 1984, p. 7.

60. *Senate Hansard*, Vol 56, 23 May 1973, p.1840.

61. *House of Representatives Hansard*, 2 May 1973, p. 1586; also in *Senate Hansard*, 17 May 1973, p.1740.

62. Richard Ackland, 'Australia's tough stance on Timor sea border', *The Australian Financial Review*, 20 July 1973.

63. Ian Sinclair, *House of Representatives Hansard*, Vol. 105, 2 June 1977, p.2589; Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.87; P.G. Ross, *The Impact of Geomorphology, Distance and Other Criteria as Determinants in Maritime Boundary Delimitation in the Timor Sea*, MA (Law) thesis, Australian National University, 1984, p. 7; 'Whip-crack at Portuguese', *The Age*, 28 March 1974.

64. The lease was first published in the *Diário do Governo* of 31 January 1974, and the notice was reprinted in Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, Vol.V, Annexe IV.8, pp. 291-320.

square miles (60,700 square kilometres) extending from a point not far from the south coast of the territory to the median line with Australia, and overlapped exploration permits granted by the Australian and Western Australian governments. The Kelp Structure lay within the area of overlap. Portugal thus implemented the 'confrontation' style policy that had been foreseen by National Development Minister Fairbairn in 1965. The grant of the permit brought 'a strong diplomatic protest from Canberra'.⁶⁵ Portugal ignored the protest and in December 1974 the Ministry of Overseas Territories signed an agreement with Petrotimor, a consortium which grouped Oceanic Exploration with 'Portuguese interests'.⁶⁶ The Portuguese action represented a direct challenge to the Australian licenced exploration in the region. It also struck at Australian confidence in obtaining a settlement which joined boundaries established with Indonesia in an neat straight line, as had been hoped. This expectation was expressed during debates in both Houses during 1973, and partly arose from the optimism held by the Minister for Minerals and Energy, Rex Connor, that negotiations with Portugal would effect a settlement.⁶⁷ Also, Portugal had pre-empted its stated position that it would await the outcome of the impending UNCLOS deliberations, and while the Australian government knew Portugal's preference was for a median line settlement, the granting of the exploration permit to Oceanic Exploration/Petrotimor came as a shock to both the Australian government and its licensed exploration companies.⁶⁸

This shock would have been doubly significant given the confirmation of the region's hydrocarbon potential provided by recent exploration activity in the region. The Woodside-Burmah consortium,⁶⁹ whose permits were affected by the Portuguese overlap, had expanded its exploration operations considerably since 1972. From October 1973 it sought to overcome some of the logistic problems of operating in the Timor Sea by basing part of its well servicing operations in Kupang, in Indonesian Timor.⁷⁰ The 'Big John' drilling rig was used to drill several wells, first in an area to the west of the Portuguese claim, and then in the Troubadour Shoals area, where it drilled several wells which indicated the presence of gas condensate.⁷¹ Burmah Oil advised the Department of Minerals and Energy on 18 February 1974 that the concession granted to Oceanic Petroleum by the Portuguese government cut across the company's own permit NT/P12, and that 'drilling of Troubadour location in NT/P12 appears to have become more important; we will spud soonest'.⁷² Confirmation of the prospectivity of the Timor Sea came when Troubadour No.1 well

65. Brian Toohey, 'Oil: Portuguese tail-twisting could backfire', *The Australian Financial Review*, 26 March 1974; 'Whip-crack at Portuguese', *The Age*, 28 March 1974.

66. 'Australia calls for report on oil leases', *The Age*, 14 December 1974.

67. Mr Connor, *House of Representatives Hansard*, 2 May 1973, p. 1586; Senator O'Byrne, *Senate Hansard*, Vol S 56, 23 May 1973, p.1838.

68. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, citing discussions with Department of Foreign Affairs officials in July 1985, p.89.

69. The Woodside consortium comprised: Woodside Burmah Oil NL, 50%; Shell Development (Aust.) Pty. Ltd., 16.66%; BP Development Australia Pty Ltd, 16.66; & Cal-Asiatic Oil Co., 16.66%.

70. R. Murray, 'Woodside To Service Shelf Well From Timor', *The Australian Financial Review*, 10 October 1973; John McIlwraith, "'Continental drift" theory given a run by Woodside-Burmah', *The Australian Financial Review*, 5 July 1974.

71. R. Murray, 'Woodside To Service Shelf Well From Timor', *The Australian Financial Review*, 10 October 1973; and R. Murray, 'Sunrise No.1 Points to New Gas Fields', *The Australian Financial Review*, 5 February 1975.

72. Burmah Oil to Sir Lenox Hewitt, Department of Minerals and Energy, 18 February 1974, Australian Archives A1838/1, 756/1/4 Australia-Portugal – Negotiations on Portuguese Timor – Continental shelf, PART 3, 1974, f.2.

was drilled in June 1974 on the Troubadour Shoals about 200 kilometres southeast of Timor, and intersected 83 metres of hydrocarbons.⁷³

Prime Minister Whitlam's irritation with Portugal over the question of the Timor Sea was expressed in Perth on 25 March 1974, when he revealed to the press during the recording of a television interview that the Australian Government had formally protested to Portugal about its encroachment into offshore resources areas claimed by Australia south of Timor by giving a concession to Oceanic Exploration. Mr Whitlam told an interviewer from Perth's Channel Seven that Portugal had given rights to big sections of the North-West Shelf to an American oil company, and said that in the previous two days the Australian Government had protested to the Portuguese Government. He was now free to speak on the matter, he said, because the protest to Portugal had been lodged.⁷⁴ The article in *The Australian Financial Review* which reported this⁷⁵ provoked a protest from the Portuguese Ambassador, Carlos Empis Wemans, that the Prime Minister had made public the dispute with Portugal. A subsequent note from the Ambassador said:

Whilst regretting the fact of the Australian Prime Minister having made public declarations on the subject, the Portuguese Government maintain their willingness to enter into negotiations with the Australian Government. However, since a conference on the Law of the Sea is scheduled to take place in Caracas, in June next, the Portuguese Government are of the opinion that immediate negotiations would be ill-timed and would therefore prefer to await the results of that Conference.⁷⁶

Political developments in Portugal added to the uncertainty regarding the settlement of the seabed boundary between Australia and Portuguese Timor. On 25 April 1974 the so-called 'Carnation Revolution' (*Revolução dos Cravos*) took place in Lisbon, overthrowing the 'Estado Novo' which had been established over forty years earlier by António de Oliveira Salazar. The new Portuguese Government was committed to decolonisation.⁷⁷ 'At that time', Gough Whitlam said, 'there was a change: they decided to get out of all their colonies'.⁷⁸ In Timor, the decolonisation policy was to be implemented by a team led by Colonel Mário Lemos Pires, who took up his appointment as Governor on 18 November 1974.⁷⁹

A Department of Foreign Affairs policy planning paper drawn up following the Lisbon coup of 25 April stated that Australia should 'bear in mind that the Indonesians would probably be prepared to accept the same compromise as they did in the

73. John McIlwraith, 'Drilling under way on remote Troubadour Shoals off Timor', *The Australian Financial Review*, 4 July 1974; Nigel Wilson, 'Keep hope fires burning', *The Australian*, 4 October 2000. By 1999 it was estimated that the Sunrise-Troubadour field could probably produce ten trillion cubic feet of gas (John Akehurst, Managing Director, Woodside Petroleum Ltd, quoted in 'Australia's Woodside Sees No Threat from Timor Gas Rivalry', *Asia Pulse*, 6 December 1999).

74. 'N-W Shelf centre of dispute', *Daily News*, 25 March 1974; 'Big oil area off NW in dispute', *The West Australian*, 26 March 1974.

75. Brian Toohey, 'Oil: Portuguese tail-twisting could backfire', *The Australian Financial Review*, 26 March 1974.

76. 25 March and 18 April 1974; Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, pp. 321-6, Vol.V, Annexes IV.9-10.

77. Gough Whitlam, submission to Senate inquiry, 26 March 1999, pp.7.

78. Gough Whitlam, *Committee Hansard*, 6 December 1999, p.976.

79. Mário Lemos Pires, *Descolonização de Timor: Missão impossível?* Lisboa, Publicações Dom Quixote, 1991.

negotiations already completed on the seabed boundary between our two countries. Such a compromise would be more acceptable to us than the present Portuguese position.' The paper advised caution to prevent Australia being seen as motivated by its own self-interest in pushing either for independence or incorporation of the territory.⁸⁰ This approach was endorsed at a 3 May 1974 meeting of a departmental *ad hoc* task force on Portugal.⁸¹ This caution was subsequently manifested in the insistence consistently maintained by the Australian Government that the question of the territory's political status was quite distinct from that of the maritime boundary in the Timor Sea. By the artifice of 'compartmentalizing' the two issues, public consideration of the bearing of the Timor Gap on Australia's policy toward East Timor was 'defined out'.⁸²

On 29 November 1974, the Department of Foreign Affairs again wrote to the Portuguese ambassador, setting out the basis of Australia's claims in the Timor Sea, and asking 'that the Portuguese Government not permit any activities, relating in any way to exploration or exploitation of the sea-bed or subsoil in the areas concerned by the established Australian permits'.⁸³ This letter, a response to the Portuguese letter of 18 April, had been discussed at an interdepartmental meeting convened by the Department of Foreign Affairs on 25 September.⁸⁴ That meeting had concluded that in light of the Australian Government's established policy toward Portuguese Timor, talks should not be proposed with Portugal on seabed delimitation but that Australia should issue with them on the legality of their claims and set out the basis of Australia's claim.⁸⁵ The stalemate as of January 1975 was described by the journalist, Bruce Juddery:

the Portuguese have so far insisted that the true border is halfway between Australia and their part of Timor while Australia has held that the trough itself is the true boundary. The problem is exacerbated by the prospect of major oil and gas finds beneath the intervening shelf or shelves. Portugal and Australia have both given exploration leases in the area, over seabed territory claimed by the other. The most recent lease, let by Portugal recently is reported to extend over the political "compromise line".⁸⁶

80. Wendy Way, Damien Browne and Vivianne Johnson (eds.), *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-76*, Melbourne University Press, 2000, p.52.

81. Wendy Way, Damien Browne and Vivianne Johnson (eds.), *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-76*, Melbourne University Press, 2000, p.53.

82. Minister for Foreign Affairs Gareth Evans stated in the Senate on 1 November 1989: 'Australia has consistently supported discussions between Portugal and Indonesia under the auspices of the United Nations Secretary-General to resolve the lingering East Timor issue as it exists between those two countries. That is a matter that relates to the dispute between Portugal and Indonesia, to which Australia is not a party, and is quite separate from the Timor Gap negotiations.'

83. Note du Ministère des Affaires étrangères australien à l'Ambassade du Portugal à Camberra, 29 novembre 1974 (Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, Vol.V, Annexe IV.11, p.327).

84. 'Portuguese Timor-Seabed Boundary', Wendy Way, Damien Browne and Vivianne Johnson (eds.), *Australia and the Indonesian Incorporation of Portuguese Timor, 1974-76*, Melbourne University Press, 2000, pp.111-12.

85. Department of Foreign Affairs to UN Delegation, New York, 26 September 1974, NAA A1838, 756/1/4, pt.4, f.258.

86. Bruce Juddery, 'Portuguese envoy arrives today', *The Canberra Times*, 10 January 1975.

Australian petroleum exploration in and off Timor

The Australian company Timor Oil NL had been active on Timor since 1956.⁸⁷ However, its lack of success, and its lack of resources, prompted it to enter into a 'farm in' arrangement in 1972 with International Oils Exploration NL and Amalgamated Petroleum. All three companies had an interlocking directorate, the same office, and the same company secretary, Mr. P.M. Allen. Subsequently, the new group undertook the drilling of two exploration wells in the Betano Structure off the south coast of Portuguese Timor. One of the partners also undertook a marine seismic reflection survey of the Kolbano Structure off the south coast of Indonesian Timor.⁸⁸

The reason for this growth in interest in Timor and its surrounding shelf area was linked to the establishment of a relationship between those Jurassic-Triassic sediments on Australia's North West Shelf and 'relatively similar sediments ...present in Timor'. In addition, the presence of oil and gas seeps on the island would appear to have provided further 'encouraging possibilities'. However, this small consortium did not have the capital to undertake a major exploration program in their concession area.⁸⁹ Consequently, during 1973, negotiations were conducted with 'a well known and successful oil company who have expressed definite interest' in the area, resulting in a series of 'farm in' arrangements being concluded between Woodside-Burmah and International Oils and Timor Oil.⁹⁰ The first of these earned Woodside the right to 65% of a contract International had with Pertamina to carry out a marine seismic survey and an on-shore geological survey, including the drilling of 2 to 4 wells.⁹¹ The second earned Woodside-Burmah a 30% interest in Timor Oil's contract to similar work. Prior to this, the Portuguese extended Timor Oil's rights for two further years, and re-affirmed production rights for thirty years after that time.⁹² Also, in 1972, BHP obtained from the Portuguese government 'a concession to prospect for minerals for an initial period of four yearsrenewable for a further three years with an option at the end of that time of an extra twenty years'.⁹³

The initial success of the Mola No.1 Well off the south west corner of Portuguese Timor, caused 'frenzied trading in the shares of Timor Oil and its senior partner Woodside Burmah'. This well encountered high gas readings, but subsequent testing showed no commercial hydrocarbon accumulations.⁹⁴ The strategic significance of potential oil reserves in the Timor Sea generally, but specifically in the Timor Gap, had risen in response to the OPEC induced world oil price 'hikes' since 1972.⁹⁵ Apart from the apparent abundance of hydrocarbons, an attraction for

87. J. Jolliffe, *East Timor: Nationalism and Colonialism*, Brisbane, University of Queensland Press, 1978, p.58.

88. International Oils Exploration NL, *Director's Report*, 1972, p. I; *Retrieval*, Feb/March, 1976, p. 6.; cited in Mills, p.91.

89. International Oils Exploration NL, *Director's Report*, 1972, pp.1,2; *Retrieval*, Feb/March, 1976, p.6.

90. The Woodside consortium comprised Woodside Burmah Oil NL, 50%; Shell Development (Aust) Pty Ltd, 16.66%; BP Development Australia Pty Ltd, 16.66; and Cal-Asiatic Oil Co, 16.66%.

91. Woodside-Burmah's 1974 *Annual Report*, p.6, and International Oil's Letter to Shareholders, March, 1974.

92. Woodside's total concessions on Timor and in the Timor Sea as of mid-1974 are described in Woodside Burmah's 1974 Annual Report, p.4, 'Chairman's address to the Members of Timor Oil. Ltd.', 5 December 1973, and Joint Statement issued by Woodside and Timor Oil, May 1974.

93. Jolliffe, *East Timor: Nationalism and Colonialism*, Brisbane, University of Queensland Press, 1978, p.58.

94. Woodside Burmah Oil NL., 1974 and 1975 *Annual Reports*, pp.4-5 & p.6 respectively.

95. Whilst Australia was insulated from the immediate effects of those hikes (77% in Oct. 1973, followed by a further 50% in December, or a per barrel price increase, from US\$3 to US\$11, (Hallwood

investors was that '...any oil discovered can be sold at world parity price, which is four times higher than the Australian crude price'.⁹⁶ The disparity between the price of oil produced outside Australia and that within had resulted from Minister for Minerals and Energy Rex Connor's plan to apply a fixed price to all Australian oil discovered from this time. The development during 1974 and early 1975 of Australia's commercial and national interests on and off Indonesian and Portuguese Timor had added an economic dimension to the political relationship between Indonesia, Australia and Portugal regarding the political future of Portuguese Timor.⁹⁷

Woodside-Burmah withdrew from both its 'farm in' arrangements on completion of the contract requirements. This withdrawal was attributed by the company to be for reasons associated with the need to 'concentrate resources on the development of the North West Shelf'.⁹⁸ However, the reasons for this abrupt withdrawal 'were more political than geological, according to oil industry sources in Jakarta'.⁹⁹ This conclusion would appear to be substantiated by Woodside's eagerness to fulfil the obligations entailed in its 'farm in' arrangements, and subsequent sharp market reactions to these activities. These included the drilling of the Mola No.1 well from 5 February 1975 off Portuguese Timor, and the Savu No.1 well off Savu Island in October 1975. In addition, the company acquired 2,129km and 504 kms of 'high quality seismic data' in Indonesian and Portuguese Timor respectively, during 1974.¹⁰⁰ The precise nature of any minerals exploration undertaken by BHP in Portuguese Timor is unclear; however, the development of Timor's uncertain political situation from mid-1974 effectively halted the implementation of any long term plans it may have had.¹⁰¹ Hamish McDonald reported in December 1975 that Indonesia had reached a 'suitable understanding' with those oil companies involved whereby, 'the companies agreed to delay exploration without protest in return for a guarantee of their present positions in the future'.¹⁰² The belief that Timor Oil (representing Woodside-Burmah and BP Australia) was waiting for a coup or invasion to re-negotiate its leases, as Indonesia would give much better conditions than the Portuguese or Fretilin were likely to offer, was held by the Portuguese negotiator from the Inspeção Geral da Minas, Alexandre Avelar Barbosa, who said so in Darwin after he had been evacuated from Dili following the 11 August 1975 coup.¹⁰³

The civil war in Timor following the August 1975 coup forced Petrotimor to abandon its offices in Dili and the exploration activity it had been carrying out in the Timor Sea. On 14 April 1976, the Inspeção Geral da Minas wrote to Petrotimor giving an assurance from the Secretary of State for Inter-territorial Co-operation that the terms and contractual obligations granted to Petrotimor would 'become entirely effective and in force again, as soon as the general situation in the territory of Timor is

and Sinclair, *Oil, Debt and Development*, Allen and Unwin, 1981, Ch.5), any diminution of domestic supplies had negative implications for Australia's future economic situation (Mills, p.94).

96. 'Speculator's Diary', *The Bulletin*, 22 February 1975, p.63.

97. Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.95.

98. Woodside-Burmah Oil NL, *1975 Annual Report*, p.6.

99. Hamish McDonald, 'Indonesia cool on Timor Oil Search', *The Australian Financial Review*, 29 December 1975.

100. Woodside-Burmah Oil NL, *Annual Reports for 1974 and 1975*, pp.4-5 & p.6 respectively.

101. International Oils Exploration NL, *Director's Report*, 1972, p.1, *Retrieval*, Feb/March, 1976, p. 6. p. 100; cited in Andrew Mills, *Australian-Indonesian Relations: A Study of the Timor Sea Maritime Delimitation Negotiations*, Bachelor of Arts (Honours) Thesis, University of Adelaide, 1985, p.92.

102. Hamish McDonald, 'Indonesia cool on Timor Oil Search', *The Australian Financial Review*, 29 December 1975.

103. Statement by Senator Cyril Primmer, *Senate Hansard*, 24 February 1976, p.150.

stabilized at a minimum level of normality allowing the concessionary to proceed with its activity'.¹⁰⁴

Negotiations with Indonesia on the Timor Gap

No further negotiation over the Timor Gap took place between Australia and Portugal as the situation in Portuguese Timor became increasingly unstable, culminating in Indonesia's invasion and occupation of the territory in October-December 1975. As Indonesia's intentions became more evident, Ambassador Richard Woolcott sent a cable from Jakarta on 17 August 1975 to Secretary of the Department of Foreign Affairs Alan Renouf, in which he said:

We are all aware of the Australian defence interest in the Portuguese Timor situation but 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 sea border and this could be much more readily negotiated with Indonesia by closing the present gap than with Portugal or independent Portuguese Timor.¹⁰⁵

Implicit in Woolcott's suggestion was the implication that Australia had a vested interest in an Indonesian takeover of Portuguese Timor. Given that this suggestion was made in the context of an intra-department discussion over the 'wisdom', or otherwise, of the Prime Minister's intention of expressing Australia's 'concern' with the 'settled Indonesian policy to incorporate Timor', it has a further connotation: Woolcott was apparently arguing that since Timor's incorporation was 'settled policy' as far as Indonesia was concerned, further attempts by Australia to deflect Indonesia from this objective would incur the latter's hostility. Hence, in his opinion, Australia should reconcile itself to this *fait accompli*, and attempt to maximise its own interests in terms of extracting a favourable maritime settlement. Whilst not expressed in terms of a quid pro quo, Woolcott was apparently urging Australian acquiescence on this basis. There is no explicit evidence of a *quid pro quo* agreement with Indonesia but this was unnecessary as, given the circumstances, it was implied in Australia's acquiescence to Indonesia's incorporation.

Following the Indonesian invasion, Ambassador Woolcott briefed the press at the Australian embassy in Jakarta, saying that if Australia had helped in the formation of an independent East Timor, it could have become 'a constant source of reproach to Canberra... It would probably have held out for a less generous seabed agreement than Indonesia had given off West Timor'.¹⁰⁶

In October 1976 Indonesian Justice Minister, Professor Mochtar Kusumaatmadja, confirmed that Indonesia was prepared to negotiate a settlement of the seabed boundary to close the Timor Gap on the same favourable terms as the 1972 Indonesia-Australia seabed treaty, in return for recognition of Indonesia sovereignty over East Timor. Professor Mochtar had been a senior member of the Indonesian team

104. Lettre du Directeur du service juridique de l'Inspection générale portugaise des mines, 14 avril 1976, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie) mémoire du gouvernement de la république portugaise*, La Haye, 1991, Vol.V, Annexe IV.14, p. 336.

105. *Documents on Australian Defence and Foreign policy, 1968-1975*, Munster and Walsh, Angus and Robertson.1980, p.200.

106. Hamish McDonald, 'Australia supports Indonesia takeover of East Timor', *The National Times*, 15-20 December 1975.

which had negotiated the the Australia-Indonesia seabed boundaries in 1971 and 1972. General Ali Moertopo said that Australian petroleum and mineral exploration companies with leases in East Timor granted by the Portuguese Government, such as Timor Oil Ltd and Woodside-Burmah, were 'welcome' to resume operations, provided they re-negotiated their rights with Indonesian authorities.¹⁰⁷ Woodside-Burmah's Troubadour No.1 well, drilled in June 1974 in the Timor Sea, had produced hydrocarbon findings that had raised hopes of commercial deposits.¹⁰⁸ The question of whether Indonesia had promised agreement on a seabed boundary closing the Timor Gap in return for Australian recognition of its incorporation of East Timor was reportedly discussed at a meeting of the Australia Indonesia Business Co-operation Committee on 15 October 1976.¹⁰⁹ Those in the business community who felt their trade investments in with Indonesia would be jeopardised by continuance of the policy of non-recognition of Indonesia's incorporation of East Timor enunciated by Foreign Minister Andrew Peacock on 4 March urged the Government to reverse its stance on Timor.¹¹⁰

Reports that talks on completing a border in the Timor Gap were held during Prime Minister Malcolm Fraser's visit to Jakarta in October 1976 provoked Fretilin's information officer, Mr Chris Santos, to issue a statement in Canberra saying: 'If Australia does not recognise the Indonesian takeover of East Timor, then it follows that such talks are illegal and contrary to the wishes of the East Timorese people. Fretilin and the Government of the Democratic Republic of East Timor reject such talks'.¹¹¹ However, the Fraser Government did not consider it opportune to pursue negotiations on a seabed boundary at that time, when Australia's official position was still not to acknowledge Indonesian sovereignty over East Timor.¹¹² A modification of Australia's stance was signalled when Mr Peacock said in a statement to Parliament on 20 October 1976 that the Government had not recognised Indonesia's incorporation of East Timor, but had to accept 'certain realities'. Australia had to take into account 'Indonesia's view that East Timor is now part of Indonesia and that this situation is not likely to change'.¹¹³

A further modification of Australia's position was announced on 20 January 1978, when Foreign Minister Peacock said that the Government had decided to 'recognise de facto' that East Timor was part of Indonesia, even though Australia remained 'critical of the means by which integration was brought about'. Mr Peacock asserted that it would be unrealistic not to recognise effective Indonesian control. The Government presented the recognition as a measure that would speed up the processing of family reunion requests.¹¹⁴ Senator Cyril Primmer commented that the decision to recognise integration was made in order to settle the seabed border between Australia and East Timor.¹¹⁵

107. Michael Richardson, 'Indonesia's Timor carrot', *The Australian Financial Review*, 19 October 1976.

108. 'Hydrocarbon encounter by Woodside', *The Australian Financial Review*, 3 July 1974; Hamish McDonald, 'Indonesia cool on Timor oil search', *The Sydney Morning Herald*, 29 December 1979.

109. Russell Skelton, "'Recognise takeover" — Companies in approach to Canberra', *The Age*, 23 October 1976; 'Timor Sold for Oil', *Tribune*, 27 October 1976.

110. Michael Richardson, 'Timor: one year later', *The Age*, 7 December 1976.

111. 'PM accused of "illegal" talks on sea border', *The Canberra Times*, 18 October 1976.

112. Mike Steketee, 'Seabed border plan shelved', *The Sydney Morning Herald*, 19 October 1976.

113. *House of Representatives Hansard*, 20 October 1976, pp.2015-6.

114. Stephen Nisbet, 'Timor is Indonesian now: takeover reality: Peacock', *The Age*, 21 January 1978.

115. *Senate Hansard*, 22 February 1978, p79; "'Scramble for oil" led to Timor recognition', *The Canberra Times*, 23 February 1978.

Labor Party leader Bill Hayden, in his first statement on Indonesia as Leader of the Opposition, called Indonesia's occupation of East Timor unjustifiable, illegal, immoral and inexcusable and recognition inconceivable. 'It is inconceivable,' he said, 'that the Australian people who have built their nation on a firm belief in the rights and freedoms of people would in the circumstances endorse the Government's action in recognising Indonesia's seizure of East Timor'.¹¹⁶

In March 1978 it was announced that Australia and Indonesia had agreed to negotiate a permanent seabed boundary south of East Timor. The question of the seabed boundary had been discussed at the annual meeting of senior Australian and Indonesian foreign ministry officers on 7-8 February. The Australian and Western Australian Governments had by this time granted a total of six petroleum exploration permits in the area of dispute, although no exploration work had been conducted in the area since 1975. Under the terms of its permit, at least one of the exploration consortia was obliged to begin drilling before September 1979. In granting or renewing permits, it had been assumed by the Australian authorities that when a permanent boundary was determined it would be drawn more or less as a straight line linking the eastern and western ends of the 1972 boundary.¹¹⁷ In November 1973 a Foreign Affairs Department memorandum to its Minister said that Indonesia had given no indication that the drawing of a boundary line connecting the two extremities of the agreed Australian-Indonesian would be unacceptable to it: 'The indications, if any, are to the contrary'.¹¹⁸ Aquitaine-Elf was one of the permit-holders. That company's Australian exploration manager, Mr G. Dailly, expressed the common hope on 20 February 1978:

No one would want to find oil there without knowing who owns it. But we are not expecting any major problems over the border now because of the border lines already agreed to by Indonesia on either side of the disputed area. If these two lines are just joined together, there will be no trouble at all.¹¹⁹

It was at this point that the complicating factor of the lease granted in January 1974 by Portugal to Oceanic Exploration came into play. Oceanic's lease extended to the median line between Timor and northern Australia, cutting across the leases which had been granted by Australian authorities. The President of Oceanic, Wesley N. Farmer, declared in May 1977 that the company regarded East Timor as part of the Indonesian Republic. The company looked to the Indonesian Government to safeguard the integrity of its investment. In December 1978, Oceanic announced it was trying to reactivate its East Timor offshore lease. The company's chief exploration geophysicist Alvin Hoffman said there did not appear to be any problem in gaining Indonesian endorsement of the block originally granted by Portugal. The outstanding question for Indonesia was 'just making sure that the offshore boundaries with Australia are in order'.¹²⁰

116. Michelle Grattan, 'Timor: sense or just a sellout?', *The Age*, 23 January 1978, p. 8.

117. Michael Richardson, 'Drawing the seabed line', *Far Eastern Economic Review*, 10 March 1978.

118. Memorandum to Minister for Foreign Affairs, 28 November 1973, Australian Archives A1838/1, 756/1/4 Australia-Portugal – Negotiations on Portuguese Timor – Continental shelf, PART 3, 1974, f.17.

119. Peter Terry, 'Way opens for Timor oil hunt', *The Australian Financial Review*, 21 February 1978. 'Drawing the seabed line', *Far Eastern Economic Review*, 10 March 1978.

120. Michael Richardson, 'Tying up Timor's loose ends', *Far Eastern Economic Review*, 5 January 1979, and 'Aust-Indonesia talks on seabed boundaries', *The Australian Financial Review*, 6 March

On 15 December 1978, Foreign Minister Peacock announced to a press conference after meeting with Professor Mochtar Kusumaatmadja, now Indonesian Foreign Minister, that Australia would give *de jure* recognition of Indonesia's sovereignty over East Timor early in 1979 when talks on delineating the seabed boundary between the province and Australia began: 'The negotiations when they start, will signify *de jure* recognition by Australia of the Indonesian incorporation of East Timor'. Australia had to 'face the realities' of international law in negotiating the seabed boundaries, he said, but this did not mean the Australian Government accepted the way in which Indonesia had 'incorporated' East Timor.¹²¹

In contrast to the compliant stance he had intimated in October 1976, Foreign Minister Mochtar complained to Ambassador Woolcott in 1977 that Australia had 'taken Indonesia to the cleaners' in 1972.¹²² Dr. Mochtar expressed this view again in media interviews in December 1978 and said Jakarta wanted to ensure this did not happen again when detailed negotiations on closing the Timor Gap began. He said as 'a basic start' Indonesia would 'take the Portuguese position' in seeking to have the boundary put at the line of equidistance: 'Our general principle is the median line everywhere. Where possible we make adjustments. Now these adjustments have been a little bit too large in the Australian case. We were in a hurry in 1971 and 1972'. He said that in 1972 there was some uncertainty about where the point of equidistance should lie:

The Australians were able to talk us into [accepting] that the Timor Trench constituted a natural boundary between two continental shelves, which is not true. The latest evidence shows that the Trench does not represent a natural boundary, that the continental shelf edge is really north of Timor, and that the Trench is really a depression. Any number of geologists would confirm this. If it is only a depression and not a shelf edge, then we think we are entitled to the median line. There is another argument for the median line in that the recent developments in the continental shelf concept in the Law of the Sea Conference do not pay any attention to depressions in the shelf, of whatever depth, within the 200-mile limit.¹²³

On 8 March 1979, Mr Peacock said in an answer to a question on the seabed negotiations with Indonesia:

In accordance with the agreement I reached with the Indonesian Foreign Minister in December 1978, Australian and Indonesian officials met in Canberra from 14 to 16 February to commence

1978; Peter Hastings, 'Rearranging the sea bed a task of diplomacy', *The Sydney Morning Herald*, 22 December 1978.

121. *The Canberra Times*, 16 December 1978.

122. Richard Woolcott, 'Fixed Relations', *The Australian*, 15-16 March 1997.

123. Michael Richardson, 'Jakarta's Tough Sea Boundary Claim', *The Australian Financial Review*, 20 December 1978; 'Boundary threat to seabed leases', *The Sydney Morning Herald*, 21 December 1978; and Peter Hastings, 'Re-arranging The Sea Bed A Task For Diplomacy', *Sydney Morning Herald*, 22 December 1978; Michael Richardson, 'Tying up Timor's loose ends', *Far Eastern Economic Review*, 5 January 1979, pp.44-5. Norwegian geologist Geir Ytreland has described the Timor Trench as constituting a 'continental sag', not a 'subduction zone', and that it 'does not represent any material change in geology when travelling from the JPDA northwards' (Paul Cleary, *Shakedown: Australia's grab for Timor oil*, Crows Nest, Allen & Unwin, 2007, p.270).

negotiations on the delineation of the seabed between Australia and East Timor.¹²⁴

The talks on the maritime boundary of 14-16 February 1979 in Canberra were followed by a further round of talks in Jakarta in May, another round in November 1980, and a fourth round in October 1981 which resulted in a Provisional Fisheries Surveillance and Enforcement Agreement, that divided respective national responsibilities along a median line boundary.¹²⁵ Thereafter there was a hiatus in negotiations until after the change of government in Australia as a result of the March 1983 election. The fifth round of talks between Indonesia and Australia on maritime boundaries in the Timor Sea took place in Canberra in the first week of February 1984, but ended without resolution. Added urgency was given to the talks by the success of a test well, Jabiru 1a, drilled in October 1983 by a consortium led by BHP, which struck an oil flow of 7,500 per day.¹²⁶ In March 1984, Professor Mochtar commented:

The Indonesian position is based squarely on the law existing at present. The Australian position is that we should just draw a line connecting the old lines. In effect it is saying, "Negotiate in 1984 on the basis of the 1958 convention, which has already been revised." It's an untenable position... When the need for a solution becomes really great, paramount, then a political decision can be made overriding the technical arguments.¹²⁷

In April 1984 the importance of concluding an agreement with Indonesia to close the Timor Gap was given by Foreign Minister Bill Hayden as a reason for recognizing Indonesian sovereignty over East Timor. In a speech to the Joint Services Staff College in Canberra, Mr Hayden referred to the 'extraordinarily complex and difficult and demanding' negotiations going on over the seabed boundary, and said:

There is, as you know, a large gap off East Timor in that boundary. In that gap is positioned the natural gas fields and probably oil fields. We would not be regarded with great public celebration if we were to make a mess of those negotiations.¹²⁸

In the lead-up to the July 1984 ALP Federal Conference, Dr Mochtar Kusumaatmadja implied in an interview that an anti-Indonesian resolution on East Timor at the conference could lead to a major break between the two countries. In answer to a question on negotiations over the Timor Gap, Dr Mochtar said: 'We can only negotiate if Australia recognises Indonesian sovereignty over East Timor. If it doesn't then it should negotiate with Portugal or Fretelin, whichever it recognises'.¹²⁹

At the Federal Conference of the Australian Labor Party on 11 July 1984, a resolution moved by Minister for Science and Technology Barry Jones was passed, stating that the ALP expressed 'its continuing concern at the situation in East Timor, particularly its officially stated objection to the fact that the former Portuguese colony

124. *Senate Hansard*, 8 March 1979, p.720; quoted in *The Australian Year Book of International Law*, vol.10, p.273.

125. P.G. Bassett, 'Australia's Maritime Boundaries', *Australian Foreign Affairs Record*, vol.55, no.3, March 1984, p.188.

126. 'Timor talks unresolved', *The Australian*, 6 February 1984.

127. Michael Richardson, 'Australian claims to oil area untenable, says Indonesia', *The Age*, 31 March 1984.

128. Teresa Mannix, 'Recognising East Timor 'hard reality'', *The Canberra Times*, 18 April 1984.

129. Peter Hastings, "'Cool it', Jakarta tells Australia', *The Sydney Morning Herald*, 29 June 1984.

was incorporated without the East Timorese people being given an opportunity to express their own wishes through an internationally supervised act of self-determination.' This was somewhat more conciliatory toward Indonesia than the 1982 policy it replaced, which 'condemned and rejected the Fraser Government's recognition of the Indonesian annexation of East Timor', and opposed all defence aid to Indonesia 'until there is a complete withdrawal of occupation forces from East Timor.'¹³⁰ It represented a victory for Mr Hayden over those in the ALP who wanted a return to the wording of the resolution approved at the National Conference in Perth in 1977, which 'noted the establishment of the Democratic Republic of East Timor on 28 November 1975.' In arguing for a more conciliatory policy, Mr Hayden had been able to draw to the attention of Mr Jones and his supporters a recent change in policy by Fretilin, which had abandoned its claim to be 'the sole legitimate representative of the Timorese people' embodied in the 1975 constitution of the Democratic Republic of East Timor. Fretilin had declared the DRET and its constitution to be 'suspended', and was seeking a peace conference with the participation of Indonesia, Portugal, the Timorese Catholic Church, and Timorese parties which supported self-determination.¹³¹

Dr Mochtar Kusumaatmadja commented on the resolution on 17 July, saying, 'Considering the ALP resolution does not question the integration of East Timor, I take it... this means that the former Fraser policy is being continued.' During talks in Jakarta immediately following the Federal Conference, Mr Hayden and Dr Mochtar agreed to continue negotiations on the Timor Gap boundary. However, Dr Mochtar dismissed Australia's argument that the boundary should follow the Timor Trough rather than the mid-line, as 'untenable'.¹³²

A quite different reaction to the resolution came from Portugal. Mr Hayden met with the Portuguese Foreign Minister, Dr Jaime Gama, in Lisbon on 6 August 1984. Dr Gama said that Australia should respect Portugal as the administering power of East Timor, recognised as such by the United Nations.¹³³ Dr Gama said that Portugal harboured 'the greatest reservations' over the Hawke Government's attempts to legalise Australia's territorial boundaries with East Timor in talks with Indonesia. He said the talks did 'not respect the resolutions of the United Nations or international law'.¹³⁴ On 7 July 1976, Opposition Leader Gough Whitlam had been told in Lisbon by Socialist Party Leader Mario Soares that Portugal would continue to look to the United Nations for a solution, and could not adopt a position contrary to the United Nations. Ambassador Frank Cooper commented in his report on the meeting: 'As we have previously reported, there seems no disposition either in the Provisional Government or the Foreign Ministry to abandon the self-determination principle'.¹³⁵

At the November 1984 maritime boundary talks in Jakarta the Australian side raised the option of a joint development zone in the disputed area, with any commercial resources to be shared equally. In subsequent separate discussions with Foreign Minister Hayden and Minister for Resources and Energy Gareth Evans, the

130. Pat Walsh, 'ALP Conference: A requiem for Timor?', *Inside Indonesia*, no.3, October 1984, pp.18-22.

131. Jill Jolliffe, 'Fretilin drops demand', *The Age*, 7 November 1984.

132. 'Talks likely on "Timor gap"', *The Australian Financial Review*, 20 July 1984.

133. Nikki Savva, 'Portugal unhappy with Hayden over Timor talks', *The Australian*, 10 September 1984.

134. Jill Jolliffe, 'Hayden, Eanes gloss over differences', *The Age*, 10 September 1984.

135. Cooper to DFA, 7 July 1976, NAA, CRS A6364/4 LB1975/12.

Indonesian Foreign Minister, Professor Mochtar, and the Mining and Energy Minister, Professor Subroto, reacted favourably to the suggestion.¹³⁶

Prime Minister Hawke gave an interview on Indonesian television broadcast on Indonesia's National Day, 17 August 1985, during which he unequivocally said, regarding East Timor, 'We recognise the sovereign authority of Indonesia.'¹³⁷ Foreign Minister Mochtar commented on Mr Hawke's statement, saying it 'was a welcome statement, of course, in fact expressing Australian Government policy as conducted for some time, although unstated'.¹³⁸

President Eanes of Portugal said that Mr Hawke had given an interview on Indonesian television about the international status of East Timor, a territory under Portuguese administration. The President said that Australian-Portuguese relations were 'of such a nature to assume that no official attitude which might jeopardise national interests would be taken without the prior knowledge of the other party'.¹³⁹ The Portuguese Government claimed Mr Hawke's open statement of Australia's recognition of Timorese incorporation would jeopardise Portugal's attempt to bring about an agreement, under United Nations auspices, between Indonesia and the people of East Timor for an act of self-determination. Portugal expressed its displeasure by recalling Ambassador Inácio Rebello de Andrade to Lisbon for consultations.¹⁴⁰ Before he left Canberra, Dr Rebello de Andrade lodged a protest on behalf of his Government against the proposed Australian-Indonesian joint development zone in the Timor Gap. 'The Portuguese Government,' said Dr Rebello de Andrade, 'cannot but express to the Australian Government its vehement protest for the manifest lack of respect for international law'.¹⁴¹

The sudden decision of Portugal to withdraw its Ambassador put the Australian Government in a position where it was compelled to confirm to Parliament the policy of recognition which Mr Hawke had stated in his interview on Indonesian television.¹⁴² On 22 August 1985 the Minister for Resources and Energy, Senator Gareth Evans, stated in an answer to a question in the Senate, where he represented the Minister for Foreign Affairs, that the *de jure* recognition of Indonesian sovereignty over East Timor which the Fraser Government had given in 1979 had not been revoked by any subsequent government. He said:

The negotiations between Australia and Indonesia over the unresolved seabed boundary adjacent to East Timor have continued with the Indonesian Government. These negotiations, whose

136. 'Joint exploration plan for Timor oilfields', *The Age*, 16 August 1985.

137. 'Sovereignty over Timor recognised, PM says', *The Canberra Times*, 19 August 1985.

138. 'Mochtar says PM's view on Timor is policy', *The Age*, 22 August 1985.

139. Jill Jolliffe, 'Portuguese rebuke to Hawke on East Timor', *The Canberra Times*, 21 August 1985.

140. Hugh White, 'Hawke shrugs off Portugal's Timor protest', *The Sydney Morning Herald*, 23 August 1985.

141. Bill Goodall, 'Portugal protests at zone', *The Canberra Times*, 21 September 1985. The Portuguese perceived Australia to be motivated by 'crass opportunism in signing away Timorese human rights in exchange for expected access to the oil-rich seabed' (Jill Jolliffe, 'Why Portugal is so angry over Timor', *The Age*, 4 September 1985).

142. Deborah Snow, 'Hawke confirms recognition of East Timor takeover', *The Australian Financial Review*, 23 August 1985.

successful conclusion is of importance to Australia, can in practice only be conducted with the Indonesian Government.¹⁴³

Talks on the Gap between Senator Evans and Professor Subroto took place on 19 September 1985, and concluded with a further session in October with agreement in principle being reached on the establishment of a joint development zone.¹⁴⁴ Further talks took place in December 1985, March, May and June 1986. On 30 April 1986, Senator Evans stated: 'It is important for Australia's long term liquid fuels energy future that we be able to explore and hopefully then develop the oil fields which are reasonably thought to exist in the Timor Gap area.'¹⁴⁵

At its National Conference on 10 July 1986, the ALP formally recognised Indonesia's incorporation of East Timor. The new policy, formulated by Minister for Science Barry Jones, noted the Prime Minister's statement of 22 August 1985 that the Australian Government had given *de jure* recognition of the incorporation, 'regretted' that there was not an internationally supervised act of self-determination, and supported United Nations moves for a settlement. Mr Jones said 'We know that in 1979 the Fraser Government conferred *de jure* recognition on the incorporation of East Timor—I do not think in practise that this is now reversible.'¹⁴⁶

On 5 September 1988 Senator Evans, now Foreign Affairs and Trade Minister, and his successor as Minister for Resources, Senator Peter Cook, announced that agreement in principle had been reached by Australian and Indonesian officials for a Zone of Cooperation in the Timor Gap. Their statement said: 'the proposal to establish a Zone of Cooperation in the area between Timor and Northern Australia was the best possible means to ensure that both countries shared in the potential petroleum resources of the region until it became possible for a permanent seabed boundary to be delimited.'¹⁴⁷ It was reported from Australian Government sources that success in reaching the agreement had resulted from an Indonesian decision 'at the highest level that this matter should be settled and as quickly as practicable'.¹⁴⁸

The Portuguese Ambassador to Australia, José Luiz Gomez, described the agreement as a 'blatant and serious breach of international law'. Mr Gomez recalled Portugal's 1985 protest at Australian negotiations with Indonesia over a Timor Sea boundary, on the grounds that Portugal was the internationally recognised administrative power for East Timor and said, 'So far, no qualitative change has occurred regarding the legal status of East Timor.'¹⁴⁹

Addressing the United Nations General Assembly on 5 October 1988, Portuguese Foreign Minister João de Deus Pinheiro again called for an act of self-determination by the people of East Timor. 'East Timor' he said, 'is for us a moral, historical and legal responsibility', as well as a collective responsibility for all UN members. 'We cannot ignore the drama of East Timor unless we become the

143. *Senate Hansard*, 22 August 1985, p.169; quoted in *The Australian Year Book of International Law*, vol.11, pp.239-40. A statement in the same terms was also made by Prime Minister Hawke on that day in the House of Representatives.

144. Michael Byrnes, 'Timor-gap talks show ice has melted', *The Australian Financial Review*, 29 October 1985.

145. *Senate Hansard*, 30 April 1986, p.2078.

146. 'Indonesian rule in East Timor formally recognised', *The Sydney Morning Herald*, 10 July 1986.

147. Quoted in *The Australian Year Book of International Law*, vol.12, p.380.

148. Paul Grigson, 'Sea dispute settled: now hope for oil', *The Sydney Morning Herald*, 6 September 1989.

149. Anna Grutzner, 'Portugal challenges Timor Gap oil pact', *The Australian*, 12 September 1988.

accomplices of an intolerable policy of *fait accompli* imposed by force'. He said Portugal would do its utmost to find a just and comprehensive solution acceptable to the international community. It was committed to work with United Nations Secretary-General Javier Perez de Cuellar in a mediation effort, and hoped that Indonesia would act in the same spirit.¹⁵⁰

By August 1989, confirmed reserves of petroleum in the Timor Sea fields amounted to 214 million barrels, with production of 42,000 barrels per day from the Jabiru field.¹⁵¹

The Timor Gap (Zone of Cooperation) Treaty

Senator Evans and Senator Cook announced on 27 October 1989 that agreement had been reached with Indonesia on a treaty on a zone of cooperation in the Timor Gap. 'The agreement embodies in a real and practical way the strong mutual political will that now exists between Australia and Indonesia to work together as friends, neighbours and economic partners,' said Senator Evans. He said the treaty would be the most substantial bilateral agreement in the history of the relations between the two countries.¹⁵²

On 11 December 1989 Senator Evans and Indonesian Foreign Minister Ali Alatas (who had succeeded Professor Mochtar Kusumaatmadja) issued a joint statement informing that they had signed the Timor Gap (Zone of Cooperation) Treaty in a ceremony held in an aircraft flying over the area of the Zone in the Timor Sea. They noted that conclusion of the Treaty, 'while establishing a long-term stable environment for petroleum exploration and exploitation, would not prejudice the claims of either country to sovereign rights over the continental shelf, nor would it preclude continuing efforts to reach final agreement on permanent seabed boundary delimitation.'¹⁵³

The Timor Gap Treaty established a Zone of Cooperation in the area of the continental shelf between Australia and East Timor, comprising three distinct areas or zones of jurisdiction: Areas A, B and C. It created a regime that allowed for the exploration and development of hydrocarbon resources in the Zone. Area B lay at the southern end of the Zone and was administered by Australia. Area C lay at the northern end of the Zone and was administered by Indonesia. Area A was the largest area and lay in the centre of the Zone. The rights and responsibilities of Australia and Indonesia in relation to Area A were exercised by a Ministerial Council and a Joint Authority which was responsible to the Ministerial Council.¹⁵⁴

The west-to-east lines defining the zones in the Timor Gap Treaty reflected the earlier arguments of Australia based upon the natural prolongation of the Australian continental shelf northwards, up to the Timor Trough. The three zones were bounded on the west and east by what were loosely described as lateral median lines. The three zones were delimited by the following west-east lines (in order, starting with the most northerly, Area C):

150. 'Portugal calls for Timorese independence', *The Age*, 5 October 1988.

151. Chris Milne, 'Wildcatting for the big one', *The Courier-Mail*, 5 August 1989.

152. 'Australia and Indonesia settle Timor Gap Treaty', *The Canberra Times*, 28 October 1989;

'Australia, Indonesia plan Timor oil search' *The Sydney Morning Herald*, 28 October 1989.

153. Quoted in *The Australian Year Book of International Law*, vol.12, p.3802.

154. Attorney-General's Department, submission no.65, p.3.

- a. a simplified line representing the northern edge of the Timor Trough, being the furthest limit of Australia's diplomatic claims to the area);
- b. a simplified line along the 1500 metre isobath, representing the deepest part of the Timor Trough (which lies close to the line that would join the terminal points of the Australia-Indonesia agreements);
- c. the median line between Australia and East Timor; and
- d. a line 200 miles from East Timor, representing the maximum possible extent of an East Timorese Exclusive Economic Zone.

The lateral or side lines defining of the Zone of Co-operation were drawn by taking so-called 'simplified equidistance lines' between East Timor and Indonesia. They were based substantially on the location of the termini of the 1971 and 1972 seabed limits agreed between Australia and Indonesia. Each of the lateral lines has two segments, resulting in the 'coffin' shape of the Zone of Cooperation. On the western side, the northerly segment was drawn by taking a line from the end of the Timor Trough to the point known as A17, which was the eastern end of the boundary drawn in the 1972 agreement. This had the effect of bringing within the Zone of Co-operation the maximum extent of Australia's claim to a continental shelf, extending right up to the Timor Trough. The second, southerly, part of the western boundary of the Zone of Co-operation seems to have been determined by taking a line from point A17 and extending it to the southern boundary of the Zone of Co-operation, in the direction of a line drawn from Cabo Tafara in East Timor to Point A17.

On the eastern side the longest, southerly, segment of the lateral line was drawn by taking a line perpendicular to the Indonesian island of Leti and extending it to the southernmost boundary of the Zone of Co-operation.¹⁵⁵

The Treaty was entered into for an initial term of forty years, with provision being made for successive terms of twenty years, unless by the end of each term, including the initial term of forty years, the contracting states had concluded an agreement on the permanent delimitation of the continental shelf between Australia and East Timor—a seabed treaty.¹⁵⁶

Portugal registered an immediate protest against the Treaty, recalling its ambassador from Canberra for consultations. Foreign Minister João de Deus Pinheiro issued a statement in Lisbon declaring the Treaty 'a clear and flagrant violation of international law and the United Nations Charter'. Not only was it a violation 'of the legitimate right of the Timorese people to self-determination and sovereignty over its own resources, but it also disrespects Portugal's status in the matter', the statement said. Dr Deus Pinheiro said that Portugal would be prepared to take the matter to the International Court of Justice.¹⁵⁷

155. 'In the Matter of East Timor's Maritime Boundaries Opinion', by Vaughan Lowe, Chichele Professor of Public International Law, Oxford University; Barrister, Essex Court Chambers, London, Christopher Carleton, Head, Law of the Sea Division, UK Hydrographic Office, Christopher Ward, Barrister-at-Law, Wentworth Chambers, Australia, 11 April 2002, http://www.gat.com/Timor_Site/Iglop.html

156. Attorney-General's Department, submission no.65, p.2.

157. 'Ambassador recalled as Timor treaty protest', *The Canberra Times*, 14 December 1989.

East Timorese resistance spokesman José Ramos Horta wrote in October 1990 concerning the Treaty:

Australian oil companies would be well advised not to jump into the Timor Gap area. A future government of an independent East Timor would certainly review all oil exploration agreements in the area and will not be bound by any agreement signed by third parties. Australian oil companies that join in the violation of the Timorese maritime resources might see their licences revoked and the exploration and drilling rights transferred to American companies such as Oceanic Exploration of Denver, Colorado. A good advice to Australian business: wait and see how things develop in the next 5 to 10 years.¹⁵⁸

Oceanic Exploration whose subsidiary, Petrotimor which had been granted an exploration concession in the Timor Sea by the Portuguese administration in 1974, was invited by the Indonesian-Australian Joint Authority along with several other companies to bid for exploration permits for the Timor Sea after the Timor Gap Treaty was finalised. The company refused to bid, arguing that it already held a claim to much of the Zone A area where several promising oil and gas discoveries were subsequently made by other companies, including those forming the basis of the Bayu-Undan gas project developed by Phillips Petroleum.¹⁵⁹

A letter to Prime Minister Hawke from Xanana Gusmão, the leader of the Timorese Resistance, was passed to an Australian Parliamentary delegation which was visiting East Timor in early February 1991. The letter condemned the Treaty as 'a total betrayal' by Australia of the Timorese people.¹⁶⁰ The letter reinforced the point Gusmão had made previously in an interview broadcast on ABC Radio National:

Australia has been an accomplice in the genocide perpetrated by the occupation forces, because the interests which Australia wanted to secure with the annexation of East Timor to Indonesia are so evident. The best proof is the Timor Gap Agreement.¹⁶¹

Richard Woolcott sought to refute the charge that Timorese blood had been sacrificed so that Australia could benefit from any oil in the Timor Gap which rightly belonged to the East Timorese by writing in March 1997: 'The fact is, however, that the northern boundary of the Zone of Co-operation established under the treaty is based on Australia's long-held claim to this area of the seabed'.¹⁶² He seemed unaware that this claim had been established in the first place, in the form of the MacKay Line, to secure the resources of the seabed for Australia.¹⁶³

Commenting in March 2011 on his role in drawing up the Timor Gap Treaty, Gareth Evans said: 'We knew there was a big pot of oil there in that area, but neither Indonesia nor Australia, nor East Timor, was able to get access to it, because there was no agreed resolution of the boundary; and we drew a box around it: that was the

158. Sasha Stepan, *Credibility Gap*, ACFOA Development Dossier No.28, October 1990, Preface p.iv.

159. Jane Counsel, 'Americans threaten to derail Timor oil talks', *The Sydney Morning Herald*, 26 June 2001.

160. 'Oil treaty to bring "era of cooperation"', *The Canberra Times*, 10 October 1991; *House of Representatives Hansard*, 10 October 1991, p.1748.

161. Robert Domm, 'Report From The Mountains Of East Timor', *Background Briefing*, 28 October 1990.

162. Richard Woolcott, 'Fixed Relations', *The Australian*, 15-16 March 1997.

163. Peter Hastings, 'Whose Riches Under The Sea?', *The Sydney Morning Herald*, 3 June 1972.

agreement, we agreed to share the costs, to share the proceeds respectively. The point about it is that that did absolutely no damage at all to the longer term position of the East Timorese in the event that they were ever to gain independence'.¹⁶⁴

The Timor Gap Zone of Cooperation Treaty entered into effect in February 1991. On 9 February, the inaugural meeting of the Ministerial Council established under the Treaty was held in Denpasar, Bali. Addressing the meeting, Senator Evans said the Treaty would lead to new areas of cooperation between Australia and Indonesia, mentioning in particular practical arrangements to cooperate in relation to security and terrorism, and for surveillance measures in the Zone of Cooperation.

Soon after the ratification of the Treaty, Portugal notified Australia that an action would be brought against it in the International Court of Justice. The Portuguese Ambassador to Australia, José Luiz Gomez, said on 25 February the ICJ action was linked to Australia's recognition of Indonesia's sovereignty over East Timor, and aimed at forcing Australia to recognise East Timor as a non-self-governing territory under Portuguese administration.¹⁶⁵

Paul Keating succeeded Bob Hawke as Prime Minister in December 1991. The Keating Government faced the task of responding to the consequences of the Dili massacre which had occurred on 12 November, when a large number of unarmed Timorese civilians had been killed by Indonesian military during a funeral at the Santa Cruz cemetery. By 11 December, Foreign Minister Evans was using the formula that had been arrived at to define the Government's response to the massacre. He said in answer to a question he had been asked in the Senate that the Government did not believe what had happened in Dili, 'deplorable as it was, was something that could be construed as an act of state: a calculated or deliberate act of the Government as such'. It was not an act of state but 'the product of aberrant behaviour by a subgroup within the country,' and therefore did not justify a change in policy that would involve a refusal to sign an agreement with Indonesia to award Timor Gap production sharing contracts to oil exploration companies.¹⁶⁶ The agreement was signed on 11 December by the Minister for Resources, Alan Griffiths, and Indonesia's Minister for Mines, Ginandjar Kartasasmita, at what was announced, to avoid protesters, as an 'undisclosed location' (in fact, it was Cairns).¹⁶⁷ Mr Griffiths reiterated during the meeting at which the agreement was signed that the Australian Government 'was deeply concerned by the recent killings in Dili', and that it had condemned the killings in strong terms and had called on the Indonesian Government to conduct a credible inquiry and punish any wrongdoers.¹⁶⁸

The agreement brought forth a further protest from Portugal. A note delivered by the Portuguese Embassy in Canberra stated that the signing of the agreement aggravated Portugal's dispute with Australia over East Timor. It 'confirmed and worsened' the illicit nature of the facts denounced by Portugal in its application to the International Court of Justice. It occurred at a time of increased criticism and

164. Gareth Evans, *Enlargers, Straiteners and the Making of Australian Foreign Policy*, 12th Annual Manning Clark Lecture, National Library of Australia, 20 March 2011.

165. David Lague, 'Portugal sues over Timor treaty', *The Australian Financial Review*, 26 February 1991.

166. *Senate Hansard*, 11 December 1991, p.4618.

167. David Lague, 'Timor oil deal signed', *The Australian Financial Review*, 12 December 1991.

168. John Loizou, 'Secret talks herald oil boom', *Sunday Territorian*, 15 December 1991.

condemnation of Indonesia's 'brutal and repressive' policy toward East Timor.¹⁶⁹ Foreign Minister João de Deus Pinheiro said in Lisbon that Portugal would 'take action and ask for compensation'. He said Indonesia and Portugal must resolve the East Timor question through United Nations supervised negotiations: 'I hope the Indonesian Government will leave the military solution behind and be willing to negotiate'.¹⁷⁰

Decision of the International Court of Justice

In putting Australia's case to the International Court of Justice at a hearing on 6 February 1995, The Hon. Michael Tate, Australia's Ambassador to The Hague, stated: 'It remains the firm policy of the Australian Government that the people of the territory should exercise freely and effectively their right to self-determination'.¹⁷¹

The International Court made its decision on the case brought by Portugal in June 1995, when it found that because 'the very subject matter' of the case related to the rights and obligations of a third State, namely Indonesia which did not recognise the jurisdiction of the Court, it could not adjudicate on the dispute. Therefore, it could not rule on the merits of the case, 'whatever the importance of the questions raised by those claims and the rules of international law which they bring into play'.¹⁷² Foreign Minister Evans commented on the Court's decision on 30 June:

It is difficult to see how Portugal's action could have assisted the East Timorese people. The Indonesian Government, which is in control of the territory, could not have been bound by it. For Australia's part, we will continue our substantial program of development assistance to the people of East Timor, and continue to make every diplomatic effort we can to improve the human rights situation there.¹⁷³

Portugal took comfort from the Court's observation that the right of peoples to self-determination was 'irreproachable' in international law and usage, and that consequently 'the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination'.¹⁷⁴ Portugal saw no reason in the Court's decision to change its view of the Treaty as an infringement of the rights of the people of East Timor and of Portugal's status as the territory's administering power recognised by the United Nations. On these grounds Portugal lodged a protest on 28 August 1997 against the subsequent Australian agreement with Indonesia on demarcation of respective exclusive economic zones in the Timor Gap.¹⁷⁵

169. Robert Garran, 'Portugal slams Timor oil pact', *The Australian Financial Review*, 19 December 1991.

170. 'Portugal to take issue on Timor oil', *The Canberra Times*, 17 December 1991. Soon after this, the Keating Government took the decision to close the Australian embassy in Lisbon, as a 'cost-cutting' measure. The embassy was re-opened by the Howard Government in April 2000 (Minister for Foreign Affairs, Alexander Downer, 'Diplomatic Appointment—Ambassador to Portugal', media release, 26 April 2000).

171. Quoted in *The Australian Year Book of International Law*, vol.17, p.680.

172. Opinion of the International Court of Justice, *Case Concerning East Timor (Portugal v. Australia)*, 30 June 1995. General List No. 84, 30 June 1995 .

173. Quoted in *The Australian Year Book of International Law*, vol.17, p.683.

174. Opinion of the International Court of Justice, *Case Concerning East Timor (Portugal v. Australia)*, 30 June 1995. General List No. 84, 30 June 1995 .

175. 'Portugal denounces new Australia-Indonesia agreement on exclusive economic zone in East Timor', *Lusa*, 11 September 1997.

1997 Delimitation Treaty

The Delimitation Treaty between Indonesia and Australia, signed in Perth on 14 March 1997 by Foreign Ministers Alexander Downer and Ali Alatas, was a treaty which was intended to complete the negotiation of maritime boundaries between Australia and Indonesia. The Treaty delimited the exclusive economic zone boundary between East Timor and Australia. The challenge to the Treaty circulated at the United Nations by Portugal on 2 September 1997 disputed the right of the Treaty to set a water-column line running through the Timor Gap, on the same grounds as Portugal's earlier challenge to the Timor Gap Treaty.¹⁷⁶ Richard Woolcott commented at the time, 'The maritime treaty has yet to be ratified by the Australian and Indonesian parliaments but I do not anticipate any problems with this process',¹⁷⁷ but ratification had not been achieved before East Timor secured its independence from Indonesia in 1999.

After the signing of the Timor Gap Treaty, there was an active exploration program within the Zone of Cooperation that involved the drilling of forty-two wells. The successful exploration program resulted in the discovery of hydrocarbons in thirty-six of the wells and the identification in Area A of about 400 million barrels of condensate and LPG and three trillion cubic feet of gas. These resources were discovered in some medium to small oilfields, including at Elang-Kakatua and Jahal, and some large gas fields at Bayu-Undan and Sunrise Troubadour.¹⁷⁸ There was no exploration carried out in Area C, which was not seen as prospective, partly because of its depth, but also because of the geology of the area; because of its depth and the seismic movement in the Timor Trough it was a difficult area to work in. In Area B, the Australian area of jurisdiction, there was some exploration, both seismic and drilling of wells, but no hydrocarbons were found.¹⁷⁹ Commencement of commercial production from the Elang-Kakatua field began in mid-1998 with a value of production to November 1999 of around \$250 million, returning to each contracting state around \$5 million in revenues from the production sharing arrangements.¹⁸⁰ The Elang/Kakatua/Kakatua North oil fields, which produced around 17,000 barrels of oil a day from 1998, were closed down as the much larger Phillips-led venture started producing liquids and then natural gas from its Bayu-Undan fields.¹⁸¹

East Timor during the period of UNTAET

Following the vote of the people of East Timor for independence in the UN supervised referendum on 30 August 1999, the United Nations Transitional Administration for East Timor (UNTAET) was established on 25 October 1999 by Security Council resolution 1272. Resolution 1272 and the related report of the Secretary-General on the situation in East Timor provided the foundation for East Timor's transition to an independent state. UNTAET had overall authority for the administration of East Timor.¹⁸² Under paragraph 35 of the UN Secretary-General's report, which was incorporated by specific reference into the Security Council resolution, the UN would 'conclude such international agreements with states and

176. 'Australia's sea boundary challenged', *ABC News*, 2 September 1997.

177. Richard Woolcott, 'Fixed Relations', *The Australian*, 15-16 March 1997.

178. Mr Payne, *Senate Committee Hansard*, 11 November 1999, p.873.

179. Mr Kjar, *Senate Committee Hansard*, 11 November 1999, pp.87-9.

180. Mr Payne, *Senate Committee Hansard*, 11 November 1999, p.873.

181. 'Oil and gas fields in the Timor Treaty area', *Reuters*, 6 March 2003; Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune*, 17 May 2002.

182. Mr Campbell, *Senate Committee Hansard*, 11 November 1999, pp.869, 882.

international organisations as may be necessary for the carrying out of the functions of UNTAET in East Timor'. This gave UNTAET a wide treaty making power, providing the basis for the UN to enter into an agreement with Australia to confirm the continued operation of the Treaty, and to negotiate a replacement treaty. The UN through UNTAET was Australia's treaty party until the independent state of East Timor emerged.¹⁸³ Resolution 1272 stressed the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate, including the question of keeping the Treaty on foot.¹⁸⁴ The Secretary-General nominated the transitional administrator, Sérgio Viera de Mello, who took up duties in East Timor on 16 November 1999.

The perception of the UN was that it was a trustee for the interim phase and that the Timorese needed to be associated at all levels of the administration. On 26 November 1999, agreement was reached between the East Timorese leadership and UNTAET to set up a National Consultative Council (NCC) that would determine policy during the transitional period.¹⁸⁵ The Council would assist UNTAET to hold national elections in East Timor for a constituent assembly to write a new constitution, and to constitute the first government which would lead East Timor into actual independence.¹⁸⁶ Over the duration of UNTAET, the East Timorese came to be associated more and more with it in the administration.¹⁸⁷ A further stage in this process was reached when on 14 July 2000 the NCC approved regulations by which it was replaced by a National Council of 33 East Timorese members selected from the political, religious and private sectors, and establishing a Cabinet of the East Timor Transitional Administration (ETTA), consisting of four East Timorese and four UNTAET members.¹⁸⁸

Just a month after production began from the Elang-Kakatua field, BHP's senior representative in Indonesia, Peter Cockcroft, had a secret meeting with Xanana Gusmão in his Cipinang Prison cell in Jakarta. Gusmão gave Cockcroft an assurance that an independent East Timor would honour, during an interim period, the rights awarded to mining companies under the Timor Gap Treaty. Gusmão said: 'We encourage them to stay on, looking to help the Timorese with the proceeds of the oil until a resolution is reached'.¹⁸⁹

The Australian Government developed and implemented a strategy aimed at ensuring the smooth transition of the Timor Gap Treaty. Following the moves towards East Timorese independence, officers from the departments of Foreign Affairs and Trade, Attorney-General's, and Industry, Science and Resources liaised with officials from the United Nations and East Timorese representatives and consulted with the petroleum industry to enable a smooth transition of operations under the Treaty. Transition arrangements needed to cover issues such as the location of the headquarters of the Joint Authority, originally in Jakarta, subsequently moved to Darwin; appointment by the United Nations of appropriate representatives on the

183. Mr Michael Potts, *Senate Committee Hansard*, 11 November 1999, p.872.

184. Mr Campbell, *Senate Committee Hansard*, 11 November 1999, p.881.

185. Sérgio Viera de Mello, UNTAET Administrator, *Lusa*, 26 November 1999; Ian Timberlake, 'UN administration lays groundwork for governing East Timor', *Agence France-Presse*, 27 November 1999.

186. The constitution of the Democratic Republic of East Timor, proclaimed on 28 November 1978, was suspended in 1984. (Jill Jolliffe, 'Fretilin drops demand', *The Age*, 7 November 1984).

187. Mr Michael Potts, *Senate Committee Hansard*, 11 November 1999, p.880.

188. UNTAET daily briefings, 12, 13, 14 and 17 July 2000; SRSRG Sérgio Viera de Mello's press briefing of 15 July 2000.

189. David Jenkins, 'BHP talks to jailed E Timor leader', *The Sydney Morning Herald*, 20 August 1998.

Ministerial Council and of people to participate on the Joint Authority; and the status of the existing production sharing contracts as well as the existing regulations, directions and other matters resolved to date by the Ministerial Council and the Joint Authority.¹⁹⁰

The Australian Government also had discussions with East Timorese representatives, particularly Xanana Gusmão, José Ramos Horta, and the spokesman on Timor Gap matters, Mari Alkatiri. They confirmed both publicly and in discussion with Foreign Minister Alexander Downer and Australian officials their willingness to see the Treaty continue in its current form. The United Nations indicated a similar view. The Department of Foreign Affairs and Trade consulted closely with industry, ensuring that their views were taken into account in the government strategy.¹⁹¹ In the meantime the Joint Authority arrangements continued on a business as usual basis. Revenues continued to be paid to Indonesia until February 2000, regardless of the vote on 19 October 1999 of the Indonesian People's Consultative Assembly (MPR) to formally renounce Indonesian sovereignty over East Timor. The Joint Authority held an executive board meeting on 9 November 1999 in Jakarta at which several important issues were addressed, including matters relating to the Bayu-Undan project. Industry confidence in the continued workability of the Treaty under the transitional arrangements was demonstrated by the decision on 25 October 1999 by the Bayu-Undan consortium to proceed with their major liquids extraction project in Area A of the Zone of Cooperation.¹⁹²

Bayu-Undan Liquids Recovery and Gas Recycle Project

The Bayu-Undan field, developed at a cost of about \$3 billion, contained estimated reserves of 400 million barrels of condensate and liquefied petroleum gas and 96.3 billion cubic meters (3.4 trillion cubic feet) of gas.¹⁹³ A consortium led by Ohio-based Phillips Petroleum announced on 25 October 1999 that it would proceed with the first stage of the development of the Bayu-Undan field, in Area A of the Timor Gap Zone of Cooperation. This would involve the extraction of gas, stripping of the condensate and LPG liquids from the gas, and re-injection of the dry gas. The project would involve a capital expenditure of around \$US1.6 billion. It would provide significant employment opportunities to Australians and East Timorese. The press release that Phillips put out announcing their decision to proceed with Bayu-Undan made a reference to their having had substantive and encouraging discussions with all relevant parties involved in East Timor's transition to independence.¹⁹⁴ They had received a letter signed by Xanana Gusmão, José Ramos Horta and Mari Alkatiri, saying the East Timorese would honour Timor Gap petroleum zone arrangements.¹⁹⁵ Phillips' Australian area manager, Jim Godlove, said that revenues of 'many tens of millions of US dollars' a year were likely to flow to both Australia and East Timor.¹⁹⁶

Santos Ltd, which held an 11.8 per cent share of the Bayu-Undan gas project, confirmed on 18 November 1999 that it had opted to participate in the project.¹⁹⁷

190. Mr Payne, *Senate Committee Hansard*, 11 November 1999, p.874.

191. Mr Michael Potts, *Senate Committee Hansard*, 11 November 1999, p.871-2.

192. Mr Payne, *Senate Committee Hansard*, 11 November 1999, p.874.

193. Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune*, 17 May 2002.

194. Mr Payne, *Senate Committee Hansard*, 11 November 1999, p.885.

195. Paul Tait, 'East Timor backs gas project but warns on treaty', *Reuters*, 10 November 1999

196. Mr Godlove, *Senate Committee Hansard*, 8 September 1999, p. 421.

197. Mr Ross Adler, Managing Director, Santos Ltd, *Asia Pulse*, 18 November 1999.

Santos was the last of the six partners in the project to publicly confirm its continuing participation, opening the way for the development plan to be submitted to the Joint Authority for final approval.¹⁹⁸ The United Nations Transitional Administrator in East Timor, Sérgio Vieira de Mello, and the Australian Minister for Industry, Science and Resources, Senator Nick Minchin, announced on 28 February 2000 that approval had been given by the Joint Authority for the first phase of the Bayu-Undan petroleum project in Area A of the Timor Gap Zone of Co-operation.¹⁹⁹ The project was expected to produce 110,000 barrels of condensate and LPG from 2004. The second stage of the project proposed construction of a gas pipeline to a LNG production facility in Darwin, which would then sell the product to overseas customers.²⁰⁰ The Timor Gap Zone of Cooperation was replaced by the Joint Petroleum Development Area (JPDA) following an agreement in July 2001 between Australia and East Timor.

Phillips Petroleum announced on 13 March 2002 that it had decided to go ahead with a \$US3 billion project to develop the Bayu-Undan field and pipe its gas ashore to Darwin where it would build one of the world's biggest liquefied natural gas processing plants. The move followed the signing of an agreement by Phillips (subsequently ConocoPhillips) and its partners (Inpex of Japan, Kerr McGee Corp and Eni unit Agip and Santos of Australia) with Tokyo Electric Power and Tokyo Gas to buy nearly all of the field's proven reserves under a 17-year contract due to begin in 2006. Phillips had also agreed to sell the two Japanese companies a 10 per cent stake in the field, reducing its own holding to 48 per cent.²⁰¹ Drilling of a batch of six wells from Wellhead Platform-1, the first of three offshore platforms to be constructed on the Bayu-Undan reservoirs, began as East Timor celebrated its independence on 20 May 2002. With this production drilling program, the first major development of the Timor Sea gas fields was under way. Phillips Petroleum's \$US1.6 billion Bayu-Undan gas recycling operation was scheduled to be in production by early 2004, producing about 100,000 barrels a day of condensate, propane and butane from a permanent floating storage and offloading facility. The product was expected to be sold on the international market. Development of the Bayu-Undan project went ahead despite domestic pressure on the East Timorese leadership to renegotiate the maritime boundary with Australia. Phillips' Darwin area manager, Blair Murphy, said on 2 June 2002 the LNG phase of Bayu-Undan needed early ratification of the Timor Sea treaty by the two countries' parliaments so markets could be met on time. Mr Murphy said the LNG project would take gas from Bayu-Undan and process it for sale under the 17-year contracts with Tokyo Electric Power Co and Tokyo Gas, with shipments scheduled to begin in 2006.²⁰² The Timor Sea Designated Authority (the joint Australian and East Timorese authority) granted approval on 15 June 2003 to the Bayu-Undan partnership to proceed with the \$2.24 billion liquefied natural gas export project. This was in addition to the \$2.7 billion already invested by the partners on the

198. The partners were: Phillips Petroleum Company, 50.29%, Santos Ltd, 11.83%, Inpex, 11.71%, Kerr McGee Corporation, 11.2%, Petroz NL, 8.26%, British Borneo, 6.72%.

199. Senator Nick Minchin, 'World Scale Petroleum Project for Timor Sea', Media Release 00/49, 28 February 2000.

200. *Asia Pulse*, 18 November 1999.

201. Virginia Marsh, 'East Timor set for bonanza as gas project gets go-ahead', *Financial Times*, 14 March 2002; Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune*, 17 May 2002; 'Oil and gas fields in the Timor Treaty area', *Reuters*, 6 March 2003.

202. The venturers were Phillips (58.6 per cent), Santos (1.8 per cent), Inpex (11.7 per cent), Kerr-McGee (11.2 per cent) and Agip (6.7 per cent); Nigel Wilson, 'Drilling begins at \$1.6bn project,' *The Australian*, 3 June 2002.

liquids (condensate and liquefied petroleum gas) stripping project scheduled to start production early in 2004.

The Timor Sea Office announced on 13 February 2004 that production had begun with operator ConocoPhillips confirming a regular flow of "wet gas" from the wells of the Bayu-Undan field. "The start of production is an historic milestone in Timor-Leste's (East Timor's) struggle for economic independence," Prime Minister Mari Alkatiri was quoted as saying. "The Bayu-Undan project is expected to provide a significant source of revenue to our economy over the next 20 years, averaging more than \$US100 million (\$A127.11 million) a year." The statement said Bayu-Undan contained estimated recoverable reserves of 400 million barrels of condensate (light oil) and liquefied petroleum gas, and 102 billion cubic metres of natural gas. Platforms would process "wet gas" in the first development phase. Condensate, together with propane and butane, would be separated and shipped while dry gas would be re-injected into the reservoir. The dry gas would be recovered and piped to Darwin during the second phase expected to begin in early 2006. The statement said ConocoPhillips and its partners had signed contracts for the sale of nearly all the natural gas reserves with Tokyo Gas and Tokyo Electric.²⁰³ ConocoPhillips confirmed on 12 August 2005 that dry gas had been released into the undersea pipeline to the processing plant at Wickham Point, Darwin harbour, in readiness for production to commence in early 2006. The Bayu-Undan LNG project partnership was ConocoPhillips of the US (operator, with 56.72 per cent, having bought out Kerr-McGee and, earlier, Petroz), Eni of Italy (12.04 per cent), Santos of Australia (10.54 per cent) and Japan's Inpex (10.52 per cent) and Tokyo Electric with Tokyo Gas (10.52 per cent).²⁰⁴ In February 2006, the first shipment of liquid natural gas left Darwin from the newly commissioned \$1.75 billion, 3.24 million tonne per annum Wickham Point plant. LNG was sold from this plant to the Japanese energy companies under a 17-year contract. The plant was geared for new gas developments in the Timor Sea, with approval for expansion of up to 10 million tonnes per annum of LNG production.²⁰⁵

Indonesia's interest subsequent to its renunciation of sovereignty

On 10 February 2000, diplomatic notes were exchanged in Dili by the UN Transitional Administrator, Sérgio Viera de Mello, and Australia's representative in East Timor, James Batley, to give effect to a new agreement whereby UNTAET replaced Indonesia as Australia's partner in the Treaty. Under the agreement, which was negotiated in close consultation with East Timorese representatives, the terms of the Treaty would continue to apply. In talks in Jakarta preceding the agreement, Indonesian representatives had agreed that following the separation of East Timor from Indonesia, the area covered by the Treaty was now outside Indonesia's jurisdiction and that the Treaty ceased to be in force as between Australia and Indonesia when Indonesian authority over East Timor transferred to the United Nations.²⁰⁶ This position was formalised for Australia by the *Timor Gap Treaty (Transitional Arrangements) Act 2000*.

203. "Start of gasfield production welcomed", *AFP*, 13 February 2004.

204. "ConocoPhillips clinches sale for its Bayu-Undan LNG", *Upstream*, 12 August 2005.

205. David Tollner, *House of Representatives Hansard*, Wednesday, 28 February 2007, p.106.

206. Minister for Foreign Affairs and Minister for Industry, Science and Resources Joint Media Release, 10 February 2000.

Indonesia's remaining legal interest in the location of the boundaries of the Zone of Cooperation following the movement of East Timor out of Indonesian sovereignty related to points A16 and A17.²⁰⁷ These points are at the eastern and western extremities of the Timor Gap Joint Petroleum Development Area (the former Zone of Cooperation Area A). Points A16 and A17 (at 9°28' South and 127°56' East, and 10°28' South and 126° East) are the points at which the Australia-Indonesia seabed boundary joins the JPDA (the Zone of Cooperation under the 1989 treaty) on each side. It is those two points, termed *tripoints* or *tri-junction points*, where the interests of Australia, independent East Timor and Indonesia would meet, and it is in the location of those points where Indonesia has a continuing interest.²⁰⁸ The 1972 seabed treaty noted in Article 3 that the lines connecting points A15 and A16 and points A17 and A18 identified in the treaty indicated the direction of the boundary and that negotiations with other governments that claimed sovereign rights to the seabed (then Portugal, now Timor Leste) might require adjustments to points A16 and A17.²⁰⁹

The two tripoints, A16 and A17, are closer to the island of Timor than the mid-points between the island and Australia. In 1972, Indonesia conceded the Australian contention that the seabed boundary between the two countries should lie along the deepest part of the seabed, the Timor Trough, to the extent that the seabed boundary agreed at that time followed a line mid-way between the line preferred by Australia and the line preferred by Indonesia. Negotiations on a seabed treaty with Portugal failed at that time because Portugal argued for a boundary along the mid-line between Australia and Portuguese Timor.²¹⁰ On two occasions subsequent to the 1972 seabed boundary agreement Indonesia accepted points A16 and A17 as being reasonable and in the proper location: first, in the negotiation of the 1989 Timor Gap Treaty, where it continued to recognise those points; and secondly, it recognised those points in the 1997 agreement between Australia and Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries.²¹¹

If the line of equidistance was adopted as the basis for delimitation purposes in a seabed boundary between Australia and East Timor, the Joint Petroleum Development Area would be located in East Timorese territory. It could also have implications for the boundary between Australia and Indonesia as the new Australia-East Timor boundary would be south of the two tripoints marking the Timor Gap in the Australia-Indonesia boundary. Indonesia might be prompted to seek re-negotiation of its seabed boundary with Australia.²¹² Dr Gillian Triggs, Associate Dean of the University of Melbourne's Law Faculty, commented: 'There is no doubt Indonesia will feel quite aggrieved if we have unequal boundaries in certain areas with Indonesia and

207. Mr Campbell, *Committee Hansard*, 11 November 1999, p.869.

208. Mr Campbell, *Committee Hansard*, 11 November 1999, p.870.

209. Department of Foreign Affairs, *Agreement between... Australia and... Indonesia Establishing Certain Seabed Boundaries*, Treaty Series 1973, No.31.

210. J.R.V. Prescott, 'The Australian-Indonesian Continental Shelf Agreements', *Australia's Neighbours*, vol.82, September-October 1972, pp.1-2. Richard Ackland, 'Aust tough stance on Timor sea border', *The Australian Financial Review*, 20 July 1973. Brian Toohey, 'Oil: Portuguese tail-twisting could backfire', *The Australian Financial Review*, 26 March 1974; 'Canberra, Lisbon head for row', *The Age*, 26 March 1974; 'Australia calls for report on oil leases', *The Sydney Morning Herald*, 14 December 1974. Portuguese Ambassador Carlos Empis Wemans to Lisbon, 25 March 1974, Cour internationale de justice, *Affaire relative au Timor oriental (Portugal c. Australie): mémoire du gouvernement de la république Portugaise*, La Haye, 1991, Annexe IV.9, pp. 321-3.

211. Mr Campbell, *Committee Hansard*, 11 November 1999, p.870.

212. Michael Richardson, 'Oil Reserves are Sensitive Independence Issue', *International Herald Tribune*, 15 December 1999.

we suddenly blow the boundary out and make a more equidistant one in relation to East Timor'.²¹³ This view was shared by legal journalist, Richard Ackland, who commented in May 2004: 'If we were to suddenly adopt an equidistant line approach with East Timor, Indonesia would be bound to jump up and down and threaten our vital economic interests secured in the early 1970s'.²¹⁴

Speaking at the announcement of an agreement between East Timor and Indonesia to begin work on defining maritime boundaries, Indonesia's Foreign Minister, Hassan Wirajuda, observed on 26 February 2002 that it should give Indonesia the right to be part of a three-way process in redefining the boundaries of the Timor Gap:

Of course, there is a possibility of the two lines left and right of the formerly East Timor Gap that might touch the area under Australian jurisdiction. So there is a possibility and in fact we have discussed of the possibility in the future for three of us to agree on tri-junction points somewhere in the Timor Sea.²¹⁵

Foreign Minister Downer said at the Timor Sea Treaty ministerial meeting in Dili on 27 November 2002: 'The boundaries East–West, it is relevant that Indonesia be included'.²¹⁶ In an article in *The Australian Financial Review* of 16 April 2003, Prime Minister Alkatiri wrote:

Timor-Leste has already made great progress with Indonesia in plotting boundaries. But no progress has yet been made with Australia.²¹⁷

East Timor's Foreign Minister, José Ramos Horta, confirmed that progress had been made with Indonesia in an interview in May 2003: 'the Indonesian authorities have shown statesmanship, openness and cooperation. We have made progress in the negotiations on our maritime border, which I hope to see concluded this year, perhaps in June or July'.²¹⁸

The border alongside the JPDA was a sensitive issue as several major gas and oil deposits lay just outside Indonesian territory in Australian waters, including the 140,000 barrels per day Laminaria project. In August 1999 Australia defined the south-western maritime boundary for the Interfet operational area in East Timor by drawing a line perpendicular to the general direction of the coastline starting from the mouth of the Massin River which separates West and East Timor: a similar projection of East Timor's maritime claims, if adopted as part of settlement of Timor Gap maritime boundaries, would bring the Laminaria/Corallina fields which are just

213. Wendy Pugh, 'Australia seeks to avoid East Timor border dispute', *Reuters*, 6 October 2000.

214. Richard Ackland, 'Ungrateful Timor gets the Downer treatment', *The Sydney Morning Herald*, 28 May 2004.

215. 'Trilateral talks in Bali', *AM*, 26 February 2002.

216. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics

217. Mari Alkatiri, 'War-weary East Timor knows no boundaries', *The Australian Financial Review*, 16 April 2003.

218. Carlos Albino, 'Notas altas para Xanana e Governo, juizes chumbam', *Diário de Notícias*, 20 de Maio de 2003; *BBC Monitoring*.

outside the current western boundary of the JPDA within the sovereignty of East Timor.²¹⁹

The line on the eastern side of the Gap appeared to have been drawn from the eastern tip of the East Timor mainland, not the small outlying island of Jaco. If the eastern boundary were rectified to take this into account, the adjustment would put more of the Sunrise-Troubadour gas fields, found by Woodside Petroleum and partners, into the Timor Gap (north of the median line) rather than the Australian exclusive zone. Under the Treaty, this group of gas reservoirs extends about 20 per cent under the shared zone.²²⁰ It was estimated that Sunrise-Troubadour could probably produce ten trillion cubic feet of gas, as opposed to three to four trillion cubic feet from Bayu-Undan.²²¹

Position of the East Timorese leading up to independence

A 'Statement on Timor Gap Oil' dated 22 July 1998, signed by José Ramos Horta, Mari Alkatiri and João Carrascalão, said:

The National Council of Timorese Resistance will endeavour to show the Australian Government and the Timor Gap contractors that their commercial interests will not be adversely affected by East Timorese self-determination. The CNRT supports the rights of the existing Timor Gap contractors and those of the Australian Government to jointly develop East Timor's offshore oil reserves in cooperation with the people of East Timor.

At his first meeting with Foreign Minister Downer on 23 February 1999 while still in Indonesian custody, Xanana Gusmão said that an independent East Timor would honour the Timor Gap Treaty and would be happy to share the resources of the Timor Sea on an equitable basis with Australia. East Timor would expect to take over Indonesia's obligations under the Treaty.²²²

The East Timorese spokesman on Timor Gap matters, Mari Alkatiri, stated on 10 November 1999 in reference to the letter signed by Xanana Gusmão, José Ramos Horta and himself sent to Phillips Petroleum giving an assurance that they would honour the Treaty arrangements:

Yes, it was sent... but that doesn't mean we have already accepted the Treaty as it is. It's not a problem of oil and gas, it's a problem of maritime borders... I think we have to redefine, renegotiate the border later on when East Timor becomes independent.²²³

In a further statement in Jakarta on 29 November 1999, Mr Alkatiri said:

219. Cmdr. Robin Warner, RAN, 'Law of the Sea Issues for the Timor Sea: A Defence perspective', *East Timor and its Maritime Dimensions: Law and Policy Implications for Australia*, Canberra, Australian Institute of International Affairs, 14 June 2000.

220. Hamish McDonald, 'Sounding the gap', *The Sydney Morning Herald*, 21 October 2000.

221. Mr John Akehurst, Managing Director, Woodside Petroleum Ltd, quoted in 'Australia's Woodside Sees No Threat from Timor Gas Rivalry', *Asia Pulse*, 6 December 1999.

222. Greg Earl, 'Gusmao assures Gap treaty is safe', *The Australian Financial Review*, 27 February 1999.

223. Paul Tait, 'East Timor backs gas project but warns on treaty', *Reuters*, 10 November 1999.

We still consider the Timor Gap Treaty an illegal treaty. This is a point of principle. We are not going to be a successor to an illegal treaty.

Mr Alkatiri said the East Timorese were willing to make transitional arrangements so that existing operators could continue their projects, and referred to negotiations that were under way between the United Nations, Portugal and Australia to sort out intermediate arrangements.²²⁴

José Ramos Horta declared on 7 May 2000 that East Timor was entitled to up to 90 per cent of the revenues:

What I'm saying is that so far we are happy to continue to live with the terms of the agreement for the next year or two or three years. However at the same time we must begin negotiations to review some of the terms... For instance if you look into the Timor Sea map and if you notice where the gas and oil findings are located, I would dare to say that up to 90 per cent of the revenues from there could go to East Timor if we have a fair deal.²²⁵

In Canberra on 15 June 2000, Mr Alkatiri announced CNRT policy on the Treaty. The CNRT would be seeking, prior to UNTAET relinquishing its mandate, a new seabed boundary drawn an equal distance between East Timor and Australia as the starting point for negotiations on a new oil and gas revenue-sharing agreement. He said:

We are not thinking of renegotiation but a new treaty. Of course, some of the terms will be the same but the starting point needs to be the drawing of a maritime boundary between our countries and that means the Treaty would not have any effect any more.²²⁶

Mr Alkatiri was visiting Canberra as part of an UNTAET team to negotiate with Australia on a new treaty. Another member of the team, UNTAET's Director of Political Affairs Peter Galbraith, made a statement following the talks, saying:

What UNTAET seeks is what the East Timorese seek. The East Timorese leadership has made it clear that the critical issue for them is to maximise the revenues of the Timor Gap. The legal situation is this: UNTAET has to continue the terms, but only the terms of the old Timor Gap Treaty and only until independence. Therefore a new regime will have to be in place on the date of independence.²²⁷

The Australian Government's position was stated by a spokesman for Foreign Minister Alexander Downer on 11 July 2000, who said that Australia 'understands the discussion or debate is about the share of revenue; it's not delimitation of the seabed'.²²⁸

224. Karen Polglaze, 'Future of Timor Gap Treaty thrown into doubt', *Australian Associated Press*, 29 November, *The Sydney Morning Herald*, 30 November 1999.

225. *Background Briefing*, 7 May 2000.

226. Peter Alford and Robert Garran, 'East Timor wants new gap treaty', *The Australian*, 15 June 2000; Rod McGuirk, 'Downer stresses need for stability in Timor Gap', *AAP*, 15 June 2000.

227. Mark Dodd, 'Timor Gap deal set to deliver windfall for Dili', *The Sydney Morning Herald*, 21 June 2000.

228. Ray Brindal, 'Australia says revenue, not border, focus of Timor talks', *Dow Jones Newswires*, 14 July 2000.

The Australian Opposition defined its policy in a resolution moved by Foreign Affairs Shadow Minister Laurie Brereton at the Australian Labor Party National Conference on 3 August 2000. The resolution stated:

Labor is prepared to support the negotiation and conclusion of a permanent maritime boundary in the Timor Gap based on lines of equidistance between Australia and East Timor. Such a settlement would see major gas and petroleum reserves within East Timor's maritime boundaries and would be a just outcome consistent with the Law of the Sea.²²⁹

Speaking at a CNRT congress in Dili on 26 August 2000, Dr Alkatiri said East Timor wanted its maritime boundary with Australia to be equidistant between the two countries, which would put all the current oil and gas activity in the Timor Gap on East Timor's side. He stressed the need for a new legal instrument so as not to retroactively legitimise the 1989 Treaty: 'We refuse to accept that East Timor be the successor to Indonesia to the Treaty'.²³⁰ Mr Galbraith said in a radio interview on 10 October 2000:

UNTAET's position, acting on behalf of the East Timorese people, is that the royalties and the tax revenue from the area north of the mid-point should come to East Timor, and if there is not going to be a maritime delimitation East Timor, however, should have the same benefit as if there were a maritime delimitation. That, after all is what East Timor is entitled to under international law.²³¹

In the same interview, Mr Galbraith said that any state, including the independent country of East Timor, had the option of going to the International Court of Justice to seek a maritime delimitation. 'Hopefully', he said, 'it won't come to that because an agreement acceptable to the East Timorese will be negotiated and in place by independence'.

Negotiations with UNTAET/ETTA

On 18 September 2000, Foreign Minister Alexander Downer, Resources Minister Nick Minchin and Attorney General Daryl Williams announced that Australian officials would travel to Dili for a preliminary round of negotiations over three days from 9 October with UNTAET and East Timorese representatives on rights for future exploration and exploitation for petroleum in the Timor Gap. The ministers said the aim of the talks was to reach agreement on a replacement for the Timor Gap Treaty to enter into force on East Timor's independence. 'Australia currently has an agreement with UNTAET which provides for the continued operation of the terms of the Timor Gap Treaty originally negotiated with Indonesia', they said. 'It will expire on the date East Timor becomes independent.' The Ministers said it was necessary to avoid a legal vacuum and to provide commercial certainty for the petroleum industry operating in the gap: 'The eventual export of petroleum by pipeline from the Timor Gap to Darwin would bring considerable benefits in terms of Australian regional

229. Laurie Brereton, 'Labor Party policy on the future of the Timor Gap', media release, 3 August 2000.

230. 'Dili & Canberra to begin sea boundary talks in October', *Kyodo*, 28 August 2000; 'East Timor: Oil Negotiations with Australia to begin in October', *Lusa*, 28 August 2000.

231. *Asia Pacific*, 10 October 2000.

development. It is very important that there is a seamless transition of arrangements governing petroleum exploitation in the Timor Gap.²³²

In its response on 5 April 2001 to the December 2000 report on East Timor of the Senate Foreign Affairs, Defence and Trade Committee, the Australian Government reaffirmed the position held since William McMahon's statement in the House of Representatives of 30 October 1970:

It remains the Government's position that, under international law, Australia's seabed rights extend from its coastline throughout the natural prolongation of its continental shelf to the deepest part of the Timor Trough. East Timor has a different position. Under international law,²³³ it is for both parties to work to achieve an equitable solution.

East Timor Cabinet Member for Economic Affairs Mari Alkatiri and Cabinet Member for Political Affairs and Timor Sea Peter Galbraith jointly led the UNTAET/ETTA delegation at the second round of talks on the Timor Sea in Melbourne on 4-6 April 2001. The talks failed to secure agreement on the location of the boundary. Speaking to the media upon his return to East Timor, Alkatiri described the talks as a 'setback'. He said that UNTAET/ETTA's position on the Timor Sea was that if East Timor would apply current international law, one hundred per cent of the resources of the cooperation zone would belong to East Timor. 'But since there is an overlapping of claims, international law advises that a solution be found through negotiations', he said. Alkatiri said on 12 April 2001 that UNTAET and the East Timor Transitional Administration were 'flexible in the Timor Sea negotiations', but that the strength of East Timor, being a small country, was international law.²³⁴

In a speech on 9 April 2001 to an Australian Petroleum Production and Exploration Association annual meeting in Hobart, Peter Galbraith said without a treaty based on international law, East Timorese were prepared to wait patiently for their rights and risk losing important markets. East Timorese negotiators could not return with a treaty 'that would give East Timor less economic benefit than that which it is entitled under international law', he said.²³⁵

International Law

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), which entered into force in 1994, is not prescriptive about the basis for delimitation. Article 83 (1) reads:

The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute

232. Minister for Foreign Affairs, 'Timor Gap Treaty Negotiations to Begin', media release, 18 September 2000; 'Renegotiation of Timor Gap treaty to begin', *AAP*, 18 September 2000.

233. *Senate Hansard*, 5 April 2001.

234. 'According To Cabinet Member, "East Timor Flexible On Timor Sea"', *UNTAET News Briefing*, Dili, 12 April 2001.

235. 'Australia, E Timor To Resume Timor Gap Treaty Talks In May', *Dow Jones Newswires*, 11 April 2001.

of the International Court of Justice, in order to achieve an equitable solution.²³⁶

Article 38 of the Statute of the International Court of Justice reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The Latin term, '*ex aequo et bono*' may be translated 'in justice and fairness'. Something to be decided *ex aequo et bono* is something that is to be decided by principles of what is fair and just. Most legal cases are decided on the strict rule of law. For example, a contract will be normally upheld and enforced by the legal system no matter how 'unfair' it may prove to be. But a case to be decided *ex aequo et bono*, overrides the strict rule of law and requires instead a decision based on what is fair and just given the circumstances.²³⁷

The International Court of Justice concluded in its 1993 judgement on delimiting the maritime boundary between Greenland and Jan Mayen Land that 'it is in accord with precedents to begin with the median line as a provisional line and then to ask whether "special circumstances" require any adjustment or shifting of that line'.²³⁸

In 1985, in a ruling on the continental shelf between Libya and Malta, the International Court of Justice confirmed that under UNCLOS geological or geophysical factors, such as the Timor Trough, have no relevance to a boundary delimitation where states are less than 400 nautical miles apart.²³⁹

Although the Law of the Sea Convention does not prescribe the median point for delimitation purposes, the median point is now generally accepted as the basis for

236. Article 83 (1) in the Informal composite negotiating text, Document A/CONF.62/WP.10 of 15 July 1977 of the Law of the Sea Conference read: 'The delimitation of the continental shelf between adjacent or opposite States, shall be effected by agreement in accordance with equitable principles, employing where appropriate, the median or equidistant line, and taking account all the relevant circumstances'. The reference to the 'median or equidistant line' was omitted in the final version of the Convention. The 1977 draft was included as Appendix II in the report of the Joint Committee on Foreign Affairs and Defence, *Australia, Antarctica and the Law of the Sea, Interim Report*, 1978.

237. *The WWLIA Legal Dictionary*.

238. *International Court of Justice Reports*, 38, 1993, *Maritime Delimitation in the Area Greenland and Jan Mayen (Denmark v. Norway)*, paras, 49-51; cited in Kathryn Khamsi, 'A Settlement to the Timor Sea Dispute?', *Harvard Asia Quarterly*, vol.IX, no.4, Fall 2005, n.35.

239. *International Court of Justice Reports*, 13, 1985, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, paras, 39-40; cited in Kathryn Khamsi, 'A Settlement to the Timor Sea Dispute?', *Harvard Asia Quarterly*, vol.IX, no.4, Fall 2005, n.42.

delimitation. It should be noted that Australia adopted the median line in 1981 as the fisheries boundary, and in 1997 for the Australia-Indonesia Delimitation Treaty as it related to exclusive economic zones. And when in 2004 Australia negotiated a maritime boundary with New Zealand, agreement was reached on the basis of the median line.²⁴⁰ The Treaty 'confirms the median line boundary between the overlapping EEZs that has been observed de facto by the two countries for more than two decades'.²⁴¹

Petrotimor

On 21 June 2001, Petrotimor (owned 80 per cent by Colorado-based Oceanic Exploration and 20 per cent by East Timorese interests) presented the United Nations Transitional Administration in East Timor with its claim to own a concession over the sea bed resources granted by the Portuguese administration in 1974.²⁴² UN administrator Sérgio Vieira de Mello reacted to the company's claim by issuing a memo forbidding UN employees to have contact with its staff.²⁴³ Petrotimor's chief executive, Mr Charles Haas, said on 26 June 2001 the company planned to lodge a statement of claim in the Australian Federal Court seeking legal recognition of the 1974 exploration concession granted by Portugal. Petrotimor's action in the Federal Court against the Australian Government, Phillips Petroleum Company and the Timor Gap Joint Authority was launched on 22 August 2001.²⁴⁴ It sought orders for compensation of up to \$2.85 billion in damages, a declaration that the Timor Gap Treaty was void and that all decisions by the Australian and Indonesian Joint Authority over the Timor Sea concerning the issue of production sharing contracts were invalid and of no effect. The action focussed on section 51(xxxi) of the Constitution, which states that the Commonwealth cannot 'acquire property other than by just means'. United Nations legal experts advising the East Timor Government said Petrotimor's claim was unlikely to succeed. 'Petrotimor is engaged in exploration by litigation', one adviser said.²⁴⁵ The full bench of the Federal Court ruled on 3 February 2003 it could not hear Petrotimor's claim as the issue could require interference in Australia's international relations and foreign policy and so the court did not have the power to act. In their ruling, Justices Black and Hill said: 'We are of the view that ... the court would simply have no jurisdiction to adjudicate on the application of the law of Portugal in granting to the applicants (Petrotimor) the concessions to which they claim to be entitled.'²⁴⁶

On 3 March 2004, Oceanic Exploration began an action against Australia, Indonesia and Conoco Phillips in the Columbia District Court in Washington, DC, claiming up to \$30 billion in compensation, an amount equivalent to Conoco Phillips' earnings from the Bayu Undan oil and gas development.²⁴⁷ The case was lodged

240. Jonathan I. Charney *et al.*, *International Maritime Boundaries*, 2005, pp. 3759–3777.

241. Land Information New Zealand (LINZ) - Toitū te whenua, 'The New Zealand-Australia Maritime Treaty', at <http://www.linz.govt.nz/hydro/projects-programmes/continental-shelf/treaty/index.aspx> (as at 4 March 2013).

242. 'US company claims rights to Timor Sea resources', AAP, 21 June 2001.

243. Gavin Lower, 'Timor Sea \$2bn compo claim', *The Australian*, 16 May 2002.

244. Jane Counsel, 'Damages bid hits Timor Gap talks', *The Sydney Morning Herald*, 23 August 2001.

245. Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune*, 17 May 2002.

246. Sarah Crichton, 'Timor oil hearing ruled out by court', *The Sydney Morning Herald*, 4 February 2003.

247. Nigel Wilson, 'Timor oil bribe probe', *The Australian*, 4 March 2004.

under the RICO (Racketeer Influenced and Corrupt Organisations) Act.²⁴⁸ The case moved slowly through the US court system for three years. In September 2006, the District Court of Columbia dismissed some legal grounds upon which Oceanic had lodged its claim but denied ConocoPhillips' motion to dismiss the case. In February 2007, the court brought the case closer to conclusion when it ruled that the case should be heard in the District Court of Southern Texas near ConocoPhillips' Houston headquarters. Judge Emmet Sullivan said that he decided to order the transfer, which ConocoPhillips requested, in part because 'any alleged wrongdoing that occurred in the United States emanated from the Houston headquarters'.²⁴⁹ In May 2008, the US District Court in Texas dismissed the claim brought by Oceanic and its Petrotimor subsidiary. In 1972, according to the judgment, Australia and Indonesia agreed to jointly exploit undersea oil and gas. In 1974, Portugal, then in control of East Timor, independently granted Petrotimor—of which Oceanic owns 80 per cent—the right to explore and produce in the same area, later to become known as Timor Gap. Petrotimor lost its purported interests when Indonesia invaded East Timor in 1975. By 1989 Australia and Indonesia had formalised their arrangement and in 1991 ConocoPhillips successfully bid to develop seabed blocks. It would go on to become the biggest operator in the petroleum field. In 2001, Oceanic asked the UN—which held transitional power in Timor—to honour the concessions it had been awarded by Portugal in the 70s. This was refused. Upon winning independence, Dr Alkatiri, East Timor's first prime minister, confirmed the ConocoPhillips contracts and ratified the Timor Gap Treaty. Houston judge Lynn Hughes said Oceanic's case amounted to '50 pages of trivia'. The judge said: 'Oceanic may well have been the victim of international politics when it lost its Portuguese concession to the Indonesian invasion. It cannot recover for its losses to political risk 30 years ago—not from Indonesia, not from ConocoPhillips'.²⁵⁰

The July 2001 Interim Agreement

On 6 July 2001 Australia and East Timor signed an interim agreement to share the management and revenue from oil and gas production in the Timor Gap. Foreign Minister Alexander Downer said: 'We have a quite clear national interest in ensuring as best we can that East Timor is a stable and prosperous society. There is no point in us taking a parsimonious approach to East Timor and plunging it into economic difficulties. It is in our interests to be generous to East Timor.' East Timor negotiator Peter Galbraith commented that Australia would also benefit greatly, with an estimated \$80 billion in earnings over the two decades for downstream processing of gas at a major new plant to be built in Darwin.

The need for the agreement on petroleum production arose because Australia and East Timor could not reach agreement on a maritime boundary. Under the agreement they agreed to share the management and revenue from oil and gas production in an area of 75,000 sq km between East Timor and northern Australia, the area of disputed sovereignty. The agreement abolished the three zones that existed in the 1989 Timor Gap Treaty between Indonesia and Australia. In the 1989 treaty, revenue from the main, central zone was split evenly, but under the 2001 agreement revenue from 90 per cent of production in the whole zone would be paid to East Timor. Negotiators resolved the last outstanding issues in the week before the

248. Anne Barker, "Company disputes Timor Sea oil rights", *AM*, 3 March 2004.

249. Lindsay Murdoch, "Way cleared for Timor oil challenge", *The Age*, 27 February 2007.

250. Paul Toohey, "Timor's Alkatiri to sue over 'false allegations' of oil and gas bribes", *The Australian*, 5 June 2008.

agreement was signed, including the tax and royalties that would be applied to companies operating in the area, and the split of royalties between the two sides. Industry was concerned that because 90 per cent of revenue would go to East Timor, the new agreement would expose companies to higher levels of taxation than under the earlier treaty with Indonesia.²⁵¹

The agreement gave an estimated \$7 billion to East Timor over 20 years and nearly \$1 billion to the Australian Government, down \$3 billion on the previous arrangement with Indonesia. Gas and oil in the Australia/East Timor Joint Petroleum Development Area was valued at \$22 billion. East Timor would also get royalties from 20 per cent of the adjoining \$27 billion dollar Greater Sunrise Field. Planned infrastructure worth more than \$6 billion included pipelines and gas processing facilities in the Northern Territory. Australia would give \$8 million a year to East Timor for petroleum-related industry projects.²⁵²

At a news conference after the signing, Mr Galbraith described the negotiations as 'surprisingly difficult', and said it was the first time in UN history the world body had negotiated a bilateral treaty on behalf of another country: 'This treaty will be one of the most important legacies of the transitional period'. Proceeds from the Timor Sea would not make East Timor a rich country but it would give it an escape from aid dependency if used wisely, he said.²⁵³

East Timor's Foreign Minister José Ramos Horta said in Sydney on 2 April 2002 he did not expect any problems to arise over the signing into treaty by an independent East Timor of the interim agreement reached with Australia in July 2001 to share oil and gas production in the Timor Sea. However, he brought up the possibility of later opening negotiations with Australia and Indonesia on the new country's maritime boundaries: 'We can open negotiations with Australia and Indonesia to redefine our maritime boundaries'. He said the treaty with Australia would nevertheless be ratified on or shortly after East Timor officially gained full independence 20 May 2002:

I hope...on May 20, or 21, or within days, that East Timor and Australia would sign the interim arrangements we have reached. I am the Foreign Secretary, and one of the sacred principles is you negotiate something in good faith, you sign it, you honour it. It would be very bad for East Timor's international standing if on day one of independence the very first thing we did as a major foreign policy act was to breach, fail to ratify, an international agreement that we had negotiated for two years between the United Nations and the Australian Government....Australia is still the main beneficiary, but we reached agreement in good faith with Australia and we must honour it.²⁵⁴

In contrast to the willingness of the East Timorese leadership to sign a treaty on Independence Day, there was concern among civil groups and some members of parliament that the agreement had been pushed through too quickly and secretly. In March 2002, Petrotimor executives flew into Dili with international experts and invited East Timorese parliamentarians to attend two seminars. Neil Blue, chairman of

251. Robert Garran and Don Greenlees 'Downer signs Gap deal with Dili', *The Australian*, 6 July 2001.

252. Mark Dodd, 'Oil deal sealed with champagne', *The Sydney Morning Herald*, 6 July 2001.

253. Robert Garran and Don Greenlees 'Downer signs Gap deal with Dili', *The Australian*, 6 July 2001.

254. 'East Timor to ratify Timor Gap Treaty', *Asia Times*, 4 April 2002; 'Timor Sea Treaty To Be Ratified', 2 April 2002, http://www.rigzone.com/news/article.asp?a_id=2975

Petrotimor, told East Timorese politicians it would finance an international legal challenge to redraw their country's seabed boundaries with Australia. He said: 'Petrotimor is prepared to fund that litigation. We have engaged the services of people who are major experts on the seabed issue.' Mr Blue said Timorese leaders should reconsider signing a new treaty on Timor Sea oil resources on East Timor's independence day on 20 May. He said that his company would take over the 10 per cent Australian share in the maritime investments if its bid was successful. Petrotimor proposed to proceed with separate plans to develop the Bayu-Undan gas fields by building a pipeline to gas processing facilities in East Timor.²⁵⁵ Petrotimor's lawyer, Ron Nathans, said the proposed international litigation could cost 'between \$US3 million to \$US5 million' over several years. Politicians at the seminar included leaders of several opposition parties, who said they now felt UN administrators had deceived them.²⁵⁶ Interviewed on 15 May 2002, Eusebio Guterres, East Timorese Democratic Party MP, said twenty-six members of parliament—representing his own party, the Socialist Democratic Party, KOTA, UDT, PPT, PDC and some dissenting Fretilin Party members—did not want the agreement to be signed on 20 May. Mr Guterres said a decision to stick to the 1972 Indonesian-Australian agreement on sea borders meant East Timor could be robbed of control over valuable resources: 'Boundaries have been decided by simply following negotiations with treaties signed by Indonesia and Australia'.²⁵⁷

Australia's rejection of international arbitration

Speaking at a seminar on maritime boundaries in the Timor Sea on 14 June 2000, Mr Bill Campbell, First Assistant Secretary, International Law Office, Attorney-General's Department, said he favoured a negotiated settlement of the Timor Gap dispute rather than arbitration by an international court or tribunal: 'States lose a degree of control over maritime delimitation where the matter is placed in the hands of a court or tribunal. The resulting boundary/arrangements may not satisfy some or all of the parties'.²⁵⁸ Mr Campbell's speech foreshadowed a decision announced on 25 March 2002 in a joint statement by Attorney-General Daryl Williams and Foreign Minister Alexander Downer that Australia would henceforth exclude maritime boundaries from compulsory dispute settlements in the International Court of Justice and the International Tribunal for the Law of the Sea. 'Australia's strong view is that any maritime boundary dispute is best settled by negotiation rather than litigation', Foreign Minister Alexander Downer said. Mari Alkatiri, East Timor's chief minister, described the move as 'an unfriendly act'.²⁵⁹

Mr Downer denied the decision was linked to the Timor Sea issue but the announcement was made after a seminar held under Petrotimor auspices in Dili on 23-24 March 2002, during which experts advised that East Timor should own most of the biggest natural gas fields so far discovered in the Sea, including the Greater Sunrise

255. Jill Jolliffe, 'East Timor oil pact row stirs', *The Age*, 26 March 2002.

256. Jane Counsel, 'Americans threaten to derail Timor oil talks', *The Sydney Morning Herald*, 26 June 2001.

257. 'Economy hinges on oil and gas deal', *Asia Pacific*, 15 May 2002.

258. Mr Campbell spoke at "East Timor and its Maritime Dimensions: Legal and Policy Implications for Australia", Canberra, Australian Institute of International Affairs, 14 June 2000; Bill Campbell, 'Maritime boundary arrangements in the Timor Sea', *International Trade & Business Law*, vol.1, no.5, June-July 2000, pp.61-68,72.

259. Michael Richardson, 'Battle lines drawn in fight for oil riches off East Timor', *International Herald Tribune*, 17 May 2002.

resource being developed by Woodside, Shell, Phillips and Osaka Gas.²⁶⁰ The seminar heard advice from two international law experts, Professor Vaughan Lowe of Oxford University and Sydney barrister Christopher Ward, that current maritime law would swing the lateral boundaries of East Timor's offshore zone to the east and west, giving it at least 80 per cent of the Greater Sunrise fields and potentially 100 per cent, as opposed to the 20 per cent under present boundaries.²⁶¹

On 17 June 2002, Dr Ramos Horta said East Timor respected Australia's sovereign right to make the unilateral withdrawal from the jurisdiction of the International Court of Justice in relation to some maritime boundary issues. But East Timor, he said, had no intention of taking legal action as a first step: 'It was never an intention on the part of the East Timor side to seek International Court of Justice intervention as a first measure'.²⁶²

The 2002 Timor Sea Treaty

The Timor Sea Treaty was signed in Dili on 20 May 2002, the first day of East Timor's existence as an internationally recognized independent state. The Timor Sea Treaty was to remain in force until there is a permanent seabed delimitation between Australia and East Timor, or for thirty years from the date of its entry into force, whichever was the sooner (article 22). The Treaty confirmed the creation by the July 2001 interim agreement of a Joint Petroleum Development Area (JPDA), with 90 per cent of revenue going to East Timor and 10 per cent to Australia. East Timor was expected to get \$6 billion in revenue from the Bayu-Undan oil and gas field in the joint area over 20 years. Dr Alkatiri said signing the treaty did not prejudice East Timor's boundary claim, while Foreign Minister José Ramos Horta said he expected Australia would eventually concede a bigger share of Greater Sunrise revenue.²⁶³

In his maiden speech to the first session of East Timor's parliament on its first day as an independent nation, Prime Minister Mari Alkatiri declared that his government would be seeking a greater share of Timor Sea oil and gas revenue. The warning was given just an hour before he signed the Timor Sea Treaty with Prime Minister John Howard: '[The treaty] does not represent, under no circumstances does it represent, a maritime border', he said. The Government of East Timor 'will use all available instruments and international mechanisms to search for a solution'.²⁶⁴ He later described the Treaty as 'an administrative contract, a framework for the two countries to solve their problems, such as the difficulty over maritime boundaries, which is the principal difference which divides us'.²⁶⁵

After Australian and East Timorese government leaders signed the Timor Gap Treaty in Dili on 20 May 2002, East Timorese Foreign Minister José Ramos Horta said he believed Australia would concede a larger share of Greater Sunrise—a gas field three times larger than Bayu-Undan—through negotiation. 'It's only fair and Australia is a fair-minded country', Dr Ramos Horta said. 'I dread the thought we will

260. Attorney-General Daryl Williams and Minister for Foreign Affairs Alexander Downer, 'Changes to International Dispute Resolution', joint media release, 25 March 2002; Hamish McDonald, 'Timor gas billions all at sea', *The Sydney Morning Herald*, 27 March 2002; 'Dispute Over Timor Sea Resources Intensifies', *Xinhuanet*, 27 March 2002.

261. Hamish McDonald, 'Timor gas billions all at sea', *The Sydney Morning Herald*, 27 March 2002.

262. Karen Polglaze, 'Maritime boundary talks will press Australia', *AAP*, 17 June 2002.

263. Tom Hyland, 'Brace for fight over oil, Australia told', *The Sydney Morning Herald*, 21 May 2002.

264. Tom Hyland, 'Brace for fight over oil, Australia told', *The Sydney Morning Herald*, 21 May 2002.

265. Jill Jolliffe, 'Dili still contesting sea treaty', *The Age*, 23 June 2002.

have to go to court. It would be a failure of leadership if the two neighbours, friendly countries, can't reach agreement through negotiation on new boundaries to replace those struck with Indonesia'.²⁶⁶ But Prime Minister John Howard said while Australia was open to discussion, the boundaries on which the original treaty with Indonesia was based, which put 80 per cent of Greater Sunrise in Australian territory, were fair: 'We believe that the approach we have taken to date has been very fair; has been generous'. He denied that Australia's withdrawal from the ICJ and from dispute settlement under the United Nations Convention on the Law of the Sea was unfriendly: 'That is a legitimate protection of a national interest'.²⁶⁷

Foreign Minister Alexander Downer signalled on 25 May 2002 that Australia would dismiss any proposals from East Timor to radically change seabed boundaries because it would risk unravelling thousands of kilometres of boundaries that had already been settled with Indonesia. Responding to calls from East Timorese leaders for Australia to provide a greater share of oil and gas reserves currently within Australian territory, Mr Downer said Canberra was obliged to consider any proposals put forward, but a radical change to delimitation of the boundaries was unacceptable:

As I explained to the East Timorese some time ago, we are happy to hear what they have to say but we don't want to start renegotiating all of our boundaries, not just with East Timor, but with Indonesia. It has enormous implications. As I have explained to them, our maritime boundaries with Indonesia cover several thousand kilometres. That is a very, very big issue for us and we are not in the game of renegotiating them.²⁶⁸

In response, Prime Minister Alkatiri said that the Timor Sea Treaty was 'nothing to do with boundaries and we would like to negotiate maritime boundaries,' and that Mr Downer had assured him 'that they are prepared, they are ready to negotiate the maritime boundaries'.²⁶⁹ Interviewed on 28 May 2002, Mari Alkatiri denied that Australia's position made negotiations on maritime boundaries a waste of time, and left East Timor no alternative but to go directly to the International Court:

No, I think the International Court is really out of the question. Australia has already withdrawn from the jurisdiction of the International Court. This was classified by me at the time as an unfriendly act from the Australian government. Now I'm realising that this act is linked to the maritime boundaries. I hope not. But I'm realising that this is really linked to the maritime boundaries—a way to tighten [tie] our hands. We are looking to apply international law in the zone and we would like, really to have friendly discussions, friendly negotiations between the two friendly countries...I still have a lot of instruments to be used even in the treaty itself. I think the signing of this treaty was the right move.²⁷⁰

Dr Alkatiri may have taken comfort from Australia's continued adherence to the Law of the Sea Convention, article 83(1) of which requires adherent states to observe international law and custom when reaching agreement on the delimitation of the continental shelf between them—as acknowledged by the Australian Government in its April 2001 response to the Senate Foreign Affairs, Defence and Trade

266. 'East Timor Considers Court Action Against Australia', *Asia Pulse*, 20 May 2002.

267. 'East Timor Considers Court Action Against Australia', *Asia Pulse*, 20 May 2002.

268. Don Greenlees, 'Downer: no change to Timor borders' *The Australian*, 25 May 2002.

269. 'Alkatiri says Australia has promised to renegotiate seabed boundary', *Asia Pacific*, 28 May 2002.

270. 'Alkatiri says Australia has promised to renegotiate seabed boundary', *Asia Pacific*, 28 May 2002.

Committee report on East Timor: 'Under international law, it is for both parties to work to achieve an equitable solution'.²⁷¹ Current international law and custom would appear to favour division along a line of equidistance.

Negotiations on a unitisation agreement for Greater Sunrise

Despite the breakthrough on Bayu-Undan, negotiations on the other large project in the Timor Sea remained deadlocked. In contention were two large oil and gas fields known as Greater Sunrise. About 80 per cent of this resource lay on the Australian side of the 1972 seabed boundary. The remainder was within the JPDA. These reservoirs were subject to a so-called 'unitisation' agreement between the oil companies and the East Timorese Government, which was in the process of being negotiated (unitisation meant treating the field as a unit or whole).²⁷² East Timorese and Australian officials held the first round of negotiations on reaching an international standardization agreement in the Greater Sunrise gas field on 18 July 2002. After the meeting, Prime Minister Alkatiri said: 'We now have a clear negotiating timetable and are in a good position to conclude a standardization accord by the end of the year'.²⁷³

Woodside Petroleum (owning 33.44 per cent) favoured a proposal by Royal Dutch/Shell to develop substantial resources in the Timor Sea via the world's first floating liquefied natural gas facility. The decision reversed the original plan to bring the gas onshore through a pipeline and dealt a blow to Phillips Petroleum, the other partner in the Greater Sunrise project, and to the Northern Territory government that had hoped to use the offshore energy reserves to develop an industrial base in Darwin. Under the original plans, one option was for Sunrise to share Bayu-Undan's pipeline and for gas from the two fields to be marketed jointly, with El Paso Corporation signing a letter of intent, later expired, to be a cornerstone customer. Woodside, which as operator of Sunrise was asked in 2001 to evaluate the competing proposals, said on 13 March 2002 it had decided on Shell's plan because it involved lower costs. 'The fundamental economics of a floating LNG facility at Sunrise are significantly better than bringing the gas to shore', said John Akehurst, Shell's managing director. Phillips favoured a pipeline partly because this would enable it to share infrastructure with its Bayu-Undan project, the first Timor Sea field being developed. Under Shell's proposal, the gas would be processed, liquefied and stored on the facility before being loaded on to tankers and exported without ever entering Australia.²⁷⁴ Phillips said on 14 March 2002 it was still not convinced that the floating LNG (FLNG) facility proposed by its partners, Royal Dutch/Shell and Woodside, was the best way to proceed.²⁷⁵

271. *Senate Hansard*, 5 April 2001. Professor Gordon Lister, Director of the Australian Crustal Research Centre at Monash University, was reported in June 2001 as commenting with regard to the tectonic movements along the line of impact between north-west Australia and the Sunda archipelago that the geological trend was for Timor to be ultimately absorbed by the Australian continent: 'Timor is pretty well on board now, it'll be further on board as time goes by. As Java rides over the Australian plate it will push the sediments up, and that's why we have oil in the Timor Gap now' (Simon Grose, 'Australia adrift in global shift', *The Canberra Times*, 8 June 2001).

272. Nigel Wilson, 'Drilling begins at \$1.6bn project', *The Australian*, 3 June 2002; 'With Independence, What Changes for the Timor Gap?' *The La'o Hamutuk Bulletin*, vol.3, no.4, May 2002. 'Talks begin with Canberra on Greater Sunrise gas field', *Lusa*, 19 July 2002.

273. 'Talks begin with Canberra on Greater Sunrise gas field', *Lusa*, 19 July 2002.

274. Virginia Marsh, 'Woodside opts for Shell plan over Phillips', *Financial Times*, 21 February 2002.

275. Virginia Marsh, 'East Timor set for bonanza as gas project gets go-ahead', *Financial Times*, 14 March 2002.

Australia had insisted, as a condition for the Timor Sea Treaty going ahead, on an annex to it involving the Greater Sunrise field, a richer deposit with reserves worth about \$30 billion that straddled the eastern corner of the joint area. East Timor would get 18 per cent of revenues from Greater Sunrise, but its Government had legal advice that the entire area could be within its maritime boundaries.²⁷⁶ In Darwin on 16 June 2002, Prime Minister Mari Alkatiri said East Timor would demand Australia's 80 per cent share of Greater Sunrise. Dr Alkatiri told the South East Asia-Australia Offshore Conference in Darwin that Canberra had agreed to discuss new maritime boundaries between the two countries which were not settled by the Timor Sea Treaty. He said: 'Sunrise should be 100 per cent East Timorese'. He added that East Timor's claim was 'open to negotiations'.²⁷⁷ He said that existing arrangements covered by the treaty signed on 20 May would not limit East Timor's ambitions for its maritime boundary with Australia. He said both the Laminaria oilfield, operated by Woodside and producing more than 100,000 barrels of oil a day, and the Sunrise gas reservoir, which was being studied for a \$5 billion development project, would come under East Timorese control if the nation's argument for the location of maritime boundaries succeeded. In 2001 Laminaria provided \$81 million to the Australian Government. Dr Alkatiri said that, as a new nation, East Timor did not have legal boundaries with other countries, which meant it could reach a new boundary with Australia. He said:

The main issues still are the lateral boundaries. Our claim is very clear. Under current international law Sunrise should be 100 per cent East Timorese, Laminaria should be 100 per cent East Timorese. We're open to negotiation. We're not going to push for a quick and tidy solution.²⁷⁸

At talks in Canberra on 17 June 2002, East Timor's Foreign Minister, José Ramos Horta, asked his Australian counterpart, Alexander Downer, to agree to start maritime boundary negotiations as soon as possible. 'There is no timetable as yet', an East Timorese source said.²⁷⁹ Dr Ramos Horta said that East Timor would soon enter negotiations with Indonesia over maritime boundaries, putting pressure on Australia to begin talks to resolve its sea frontiers with East Timor: 'Our position has been made very clear. We intend to start negotiations with Indonesia very soon'.²⁸⁰ He said that East Timor accepted that it was Australia's sovereign decision to 'make reservations' on the jurisdiction of the ICJ. However, he said it was up to both Indonesia and Australia as 'neighbours and friends' to negotiate with East Timor on boundaries. He did not rule out a legal battle with Australia if negotiations broke down.²⁸¹

On 9 July 2002, East Timor's parliament approved draft legislation outlining a maritime boundaries claim extending 200 nautical miles from the nation's coastline. The claim made under the Maritime Zones Act took in oil and gas deposits and fishing zones in waters claimed by Australia and Indonesia. It claimed all of the JPDA, and all of the Greater Sunrise gas field. Prime Minister Mari Alkatiri said the

276. Don Greenlees, 'Downer: no change to Timor borders' *The Australian*, 25 May 2002.

277. Karen Polglaze, 'Maritime boundary talks will press Australia', *AAP*, 17 June 2002.

278. Nigel Wilson, 'East Timor to extend sea oilfield', *The Australian*, 18 June 2002.

279. Craig Skehan, 'Timor stakes claim for bigger slice of gas field', *The Sydney Morning Herald*, June 18 2002.

280. Karen Polglaze, 'Maritime boundary talks will press Australia', *AAP*, 17 June 2002.

281. Craig Skehan, 'Timor stakes claim for bigger slice of gas field', *The Sydney Morning Herald*, 18 June 2002.

legislation should not be seen as aggressive towards Australia and that he looked forward to peaceful negotiations:

In areas where there could be overlapping, we hope to begin calm and swift negotiations with the parties involved. East Timor is a small country, recovering after decades of occupation, and our neighbours are strong and rich. However, I believe that Indonesia and Australia will be fair in the negotiations.²⁸²

Reporting at a conference in Melbourne in October 2002 on the course of negotiations, Dr Ramos Horta complained that Australia was insisting that the ratification of the Timor Sea Treaty await agreement on unitisation of excise and royalties from the Greater Sunrise field. He said: 'Australia want to impose a fait accompli on its claims on the maritime boundary negotiated in 1972, over which East Timor had no say'.²⁸³

The Joint Standing Committee on Treaties of the Australian Parliament reported on the Timor Sea Treaty on 11 November 2002 and recommended it be ratified. On unitisation, the Committee considered that there was an urgent need to progress negotiations to 'provide the necessary certainty to allow the substantial investment required for the development of the Greater Sunrise fields', and recommended that the Australian Government use its best endeavours to 'conclude the International Unitisation Agreement for the Greater Sunrise fields on or before the date on which the Timor Sea Treaty is ratified and in any event before 31 December 2002 as this would serve the best interests of both nations'.²⁸⁴ Speaking at the presentation of the report, the Deputy Chair of the Committee, Mr Kim Wilkie, said:

It is vitally important that the treaty be ratified, but it is also vitally important that we get the unitisation process happening as quickly as possible. If we do not do that, we could end up losing Bayu-Undan as a project and not getting Greater Sunrise developed in the future. I want to know what the foreign minister is doing and what his counterpart in developing projects, Minister Macfarlane, is up to in relation to getting these projects happening—that is, getting in there and getting unitisation happening before the end of the year, as per the memorandum of understanding. If they do not get that happening, Australia stands to lose billions of dollars.²⁸⁵

Foreign Minister Downer said at the Timor Sea Treaty ministerial meeting in Dili on 27 November 2002, 'for Greater Sunrise we definitely want to go ahead with offshore [processing]. The Northern Territory government is not very pleased'.²⁸⁶ Woodside said in December 2002 that neither option was viable but highlighted the potential of a FLNG facility at Greater Sunrise supplying LNG to both the Asia Pacific and North America.²⁸⁷ Northern Territory Chief Minister Clare Martin said on 27 March 2003 she was lobbying hard for gas to be brought from the Sunrise field

282. 'Parlamento aprova proposta de lei sobre fronteiras marítimas'/'Dili aims to claim full maritime boundaries in Timor Sea', *Lusa*, 9 July 2002.

283. Rowan Callick, 'Delay jeopardises East Timor gas', *The Australian Financial Review*, 23 October 2002.

284. Australia Parliament Joint Standing Committee on Treaties, *Report 49*, Canberra, 2002, p.35.

285. *House of Representatives Hansard*, 11 November 2002, p.8655.

286. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council Of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics

287. Nigel Wilson, 'Sunrise development in tatters', *The Australian*, 27 November 2002; Nigel Wilson, 'Sunrise development ends', *The Australian*, 6 December 2002.

onshore to Darwin: 'I believe it is in their best interests; I believe there are profits to be made and certainly we are encouraging the joint venturers... to bring the gas from Sunrise onshore'.²⁸⁸ On April 30, an open letter to Woodside shareholders published in *The Australian Financial Review*, signed by Ms Martin and the NT's Opposition Leader, Denis Burke, as well as leading business and community groups, urged Woodside to support the national interest by bringing the Greater Sunrise gas ashore rather than developing it on a floating plant at the wellhead and shipping it overseas. In response, Mr Gary Gray, Woodside's Director of Corporate Affairs, flew to Darwin from Perth to see Martin and voice, among other things, Woodside's 'concerns' the letter had very pointedly singled out their company.²⁸⁹

The negotiations over unitization were accompanied by tension in relations between Canberra and Dili. Timorese officials said there had been an angry outburst by Foreign Minister Alexander Downer during a meeting in Dili on 27 November 2002 with Dr Alkatiri and senior Timorese negotiators. Mr Downer had thumped the table and abused Dr Alkatiri and his officials for insisting that they would not give up potential resources claims before a formal maritime boundary was agreed between the countries.²⁹⁰ Mr Downer described it as a "good and boisterous discussion". At that meeting, he proposed the establishment of a Joint Maritime Commission which would start to examine the seabed and EEZ issues in 2003. He said: 'We will negotiate boundaries'. He made clear that Australia would not agree to the East Timorese demand for an expansion of the Joint Petroleum Development Area to include the Greater Sunrise field: 'We worry about negotiations on the TST and the implications for our relations with other countries, especially Indonesia. We have a massive boundary—with France—New Caledonia, New Zealand, Papua New Guinea'. He pointed out that acceptance of the Timor Sea Treaty was 'without prejudice to maritime boundaries'.²⁹¹

The Australian Government adopted the policy of delaying ratification of the Timor Sea Treaty until East Timor assented to the terms it set for the unitisation agreement although, as was made clear by Dr Geoff Raby, Acting Secretary, Department of Foreign Affairs and Trade, there was 'no technical dependency' between finalising the IUA and ratification of the Treaty.²⁹² Northern Territory Minister for Asian Relations and Trade Paul Henderson said on 11 February 2003 that the Commonwealth Government was linking ratification with separate negotiations over the Greater Sunrise oilfield in a bid to increase its bargaining power.²⁹³

On 28 February 2003, Prime Minister Mari Alkatiri accused the Howard Government of stalling ratification of the \$5 billion Bayu-Undan project in an attempt to force the Timorese to accept a smaller share of royalties for the neighbouring Sunrise fields, which were estimated to hold reserves at least twice as large. While Australia had proposed that East Timor receive 90 per cent of revenues from the 20 per cent of the Sunrise field within the Timor Gap treaty zone—the same sharing

288. 'NT still pushing onshore option for Greater Sunrise gas', *AAP*, 27 March 2003.

289. Alan Ramsey, 'Sunrise—a New Dawn for the Territory', *The Sydney Morning Herald*, 10 August 2002. Gary Gray is at the time of writing Minister for Resources and Energy in the Gillard government.

290. Nigel Wilson, 'Downer "abuse" claims', *The Australian*, 13 December 2002.

291. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics

292. Dr Raby, *Senate Foreign Affairs, Defence and Trade Legislation Committee Hansard*, 13 February 2003, p.299; Senator Crossin, *Senate Hansard*, 6 March 2003, p.9228.

293. Jill Jolliffe, 'NT offers to help save E Timor gas deal', *The Sydney Morning Herald*, 11 February 2003.

formula as for Bayu-Undan—the Australian Government was insisting all reserves outside the zone belonged to Australia. Dr Alkatiri said that unless the Timor Gap Treaty was approved by the Australian Parliament by 11 March, the contract deadline for project operators ConocoPhillips, the Japanese companies which had agreed to buy the entire output of Bayu-Undan might quit the deal:

The Japanese will seek a better price or they may go elsewhere to find a more secure supplier. If Australia wants to retain its credibility and honour, this treaty must be ratified within the next week. Is Australia governed by the rule of law or not? The Australians are trying to force us to give up on our claims on Sunrise. Their tactics are very clear. Australia knows that these revenues are vital for us. I am very surprised by their attitude. I never thought a democratic country like Australia would play this kind of role with a poor neighbour.²⁹⁴

A spokesman for Resources Minister Ian Macfarlane confirmed that ‘priority’ was being given to concluding the Sunrise negotiations, but said the treaty could still be ratified in the near future: ‘Our priority is now finalising the agreement on Sunrise. The treaty is in the queue to go to the House. Both countries are aware of the deadlines, but deadlines have to be moved sometimes’.²⁹⁵ Dr Geoff Raby, Acting Secretary, Department of Foreign Affairs and Trade, explained on 13 February 2003, ‘The unitisation agreement is a factor in the consideration of our national interest in this whole area’, and that ‘ministers will make the decision on what they wish to do with this in the fullness of consideration of what advances Australia’s national interest’.²⁹⁶ Australia was prepared to refuse to sign the IUA by the 11 March contract deadline for the Bayu-Undan project unless East Timor accepted the Australian demand for more than an 80 percent share of revenues from Greater Sunrise, even at the risk that the Bayu-Undan project would be abandoned by the venturers.²⁹⁷ Mr Downer said to the Timorese at the ministerial meeting in Dili on 27 November 2002:

You have to face reality. If you are going to demand that all resources are Timor-Leste’s—your claim almost goes to Alice Springs—you can demand that for ever for all I care, you can continue to demand, but if you want to make money, you should conclude an agreement quickly.²⁹⁸

The decision of the Government of East Timor to agree on 5 March to the terms of the IUA followed a telephone call from Prime Minister Howard to Prime Minister Alkatiri in which he explained the “formal processes” for Australian ratification. “It was an ultimatum. Howard said that unless we agreed to sign the new deal immediately, he would stop the Senate approving the treaty”, a senior official close to Dr Alkatiri said.²⁹⁹

294. Mark Baker, ‘Timor resents Australian tactics’, *The Sydney Morning Herald*, 28 February 2003.

295. Mark Baker, ‘Timor resents Australian tactics’, *The Sydney Morning Herald*, 28 February 2003.

296. Dr Raby, *Senate Foreign Affairs, Defence and Trade Legislation Committee Hansard*, 13 February 2003, p.303.

297. Tim Colebatch, ‘How they fooled us on East Timor’, *The Age*, 11 March 2003; ‘Australia promised secret aid to seal Timor gas deal’, *Agence France Presse*, 12 March 2003.

298. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics

299. Mark Baker and Mark Riley, ‘Howard accused of bullying Timor into treaty’, *The Sydney Morning Herald*, 6 March 2003; Steve Lewis and Nigel Wilson, ‘Gas deal widens gap in relations’, *The Australian*, 7 March 2003.

The International Unitisation Agreement (IUA)

The IUA (International Unitisation Agreement) between Australia and East Timor relating to the Sunrise and Troubadour oil and gas fields in the Timor Sea was signed in Dili on 6 March 2003 by Foreign Minister Downer and Minister of State Ana Pessoa.³⁰⁰ As a condition of assent to the IUA, Australia and East Timor made a separate agreement under which East Timor would receive \$US1 million (\$A1.6 million) a year for at least five years. In addition, East Timor would receive \$US10 million a year from the Australian Government, over and above its share of revenues, once production from the Greater Sunrise reservoir began.³⁰¹ The separate agreement on payments was to provide East Timor with an equitable share of upstream earnings from developing the reservoir through a floating liquified natural gas plant (FLNG).³⁰² ‘In reality, it represents our share of the gas product that will be sold from the FLNG plant’, according to an East Timorese official.³⁰³ The preamble to the IUA contained a reference to the fact that both countries were in disagreement over the location of maritime boundaries in the Greater Sunrise area, noting:

Australia and Timor-Leste have, at the date of this agreement, made maritime claims, and not yet delimited their maritime boundaries, including in an area of the Timor Sea where Greater Sunrise lies.

For the Timorese the inclusion of this clause was crucial, as Prime Minister Mari Alkatiri explained at the press conference following the signing of the agreement. He said that neither country had abandoned its claims and said that if current international law had been applied, one hundred per cent of Sunrise would belong to East Timor. At the same time, East Timor’s Council of Ministers issued a statement insisting on the ‘vital importance of a definitive delimitation of the maritime boundaries between East Timor and Australia, so as to guarantee the stability of the Timor Sea zone’. The process of negotiation should be ‘begun and concluded speedily’.³⁰⁴

As soon as agreement had been reached on the terms of the IUA, the Timor Sea Treaty was presented to the Australian Parliament for ratification on 5 March 2003. It had been ratified by the Parliament of East Timor on 17 December 2002. Following Australian ratification, it came into force on 2 April 2003. In welcoming this development, Prime Minister Alkatiri announced that significant work had already been carried out by investors and by the two governments to bring into production petroleum fields in the treaty area, including the Bayu-Undan, Jahal and Kuda Tasi fields, and Greater Sunrise reservoirs lying partly within the JPDA. But he emphasized that the Treaty, while providing a clear legal framework for investment, did not provide a permanent or comprehensive framework: ‘A permanent framework can only be provided by permanent maritime boundaries, which unfortunately East Timor does not yet have,’ he said. ‘But as a temporary revenue sharing arrangement, the Treaty represents a good interim measure until maritime boundaries are agreed’.³⁰⁵

300. Nigel Wilson, ‘East Timor to extend sea oilfield’, *The Australian*, 18 June 2002.

301. Nigel Wilson, ‘Dili’s Timor Sea gas deal sweetener’, *The Australian*, 12 March 2003.

302. Nigel Wilson, ‘Timor gas treaty papers for scrutiny’, *The Australian*, 14 March 2003.

303. Nigel Wilson, ‘Timor writes us a hefty gas bill’, *The Australian*, 13 March 2003.

304. Antonio Sampaio, ‘Dili e Camberra assinam acordo técnico sobre poço de gas natural’, *Lusa*, 6 Março 2003.

305. ‘Australia-E.Timor treaty on oil, gas comes into force’, *Kyodo News*, 2 April 2003.

“There are not one but two areas of unfinished business,” Foreign Minister Alexander Downer said at the Timor Sea Treaty Ministerial Meeting on 27 November 2002, “the IUA and the renegotiation of maritime boundaries”.³⁰⁶

At the press conference following the signing of the IUA in Dili on 6 March 2003, Mr Downer reaffirmed that Australia was interested in concluding the negotiations on frontiers, although no date for beginning the process had been set.³⁰⁷ On the occasion of the Timor Sea Treaty’s entry into effect on 2 April, Australia’s ambassador to Dili, Paul Foley, remarked that the negotiations on boundaries could begin soon and be concluded in less time than those which Australia had been conducting with New Zealand, which had been going on for a hundred years.³⁰⁸ Dr Alkatiri’s response was to say, ‘This is a question of self-determination for the country. I am waiting for a serious commitment to negotiate maritime boundaries and not talk about 100 years of negotiations’, and to reaffirm that he would not present the IUA to parliament for ratification until Australia agreed to delimit the maritime boundaries within three or four years. ‘If I table it now it will certainly be rejected’, he said.³⁰⁹

Dr Alkatiri said on 11 March 2003 that the accord on unitisation of the Sunrise fields would be sent to the parliament for ratification only after Australia had agreed to a timetable for negotiations on maritime boundaries. The timetable would have to include a termination date for negotiations. “The agreement on unitisation was signed, but it still has to go to the parliament and if there is not found to be good faith on the part of the Australian Government on negotiating maritime boundaries, with dates set for beginning and ending, the agreement will not go to the parliament”, he said. “If they delay, the resources will stay in the sea. We are in no hurry.”³¹⁰ He reiterated this stance when East Timor’s parliament approved two fiscal bills covering oil and gas exploration in the Timor Sea on 26 May, warning that his government would delay ratification of the IUA until Australia accepted negotiation over maritime borders: ‘My government will not rest until we obtain our territorial integrity—until we have permanent borders. Just as we fought to protect our right to our land, we must fight to preserve our right to our sea’.³¹¹

The Australian position was that ratification of the IUA was a pre-condition for boundary negotiations, as Chris Moraitis, Senior Legal Adviser, Department of Foreign Affairs and Trade, explained on 23 June 2003: ‘it has always been understood that once the Timor Sea treaty and the IUA are finalised and ratified... hopefully we will have it ratified in the near future—we can then start on permanent boundary delimitation’.³¹² Prime Minister John Howard wrote to his East Timor counterpart, Mari Alkatiri, on 1 August, saying that Australia would agree to the maritime boundary talks beginning before the end of the year. He did not specify a time frame

306. Minutes of the Timor Sea Treaty Ministerial Meeting, 27 November 2002, Council of Ministers Meeting Room, Dili, Timor-Leste, crikey.com.au/politics

307. ‘Dili e Camberra assinam acordo técnico sobre poço de gás natural’, *Lusa*, 6 Março 2003.

308. ‘Tratado de Mar de Timor entra hoje em vigor’, *Lusa*, 2 Abril 2003.

309. Carl Mortished, ‘Wrangles beset development of gasfield’, *The Times*, 21 June 2003.

310. ‘Timor-Leste exige à Austrália calendário negociações sobre fronteiras marítimas’, *Lusa*, 13 Março 2003.

311. ‘Tax bill “just beginning” of Dili “control” over oil, gas—Alkatiri’, *Lusa*, 26 May 2003.

312. Mr Moraitis, *Joint Standing Committee on Treaties [Proof] Committee Hansard*, 23 June 2003, p.78.

for the negotiations to conclude and in response, Dr Alkatiri said he wanted to see the issue resolved 'in a maximum of three to five years'.³¹³ Preliminary talks were held in Darwin on 13 November 2003.³¹⁴

Foreign Minister José Ramos Horta said in Canberra on 11 December 2003 that delays in talks were allowing Australia to exploit, under current licences, the Buffalo, Laminaria and Corallina oil fields which East Timor claimed were rightfully its own under international law. Speaking at the National Press Club he said those fields "that have been under Australian licences are rightfully part of East Timor sovereign rights. What I believe firmly is that our claims are solidly grounded in international law—that's our only strength. Look at East Timor. What can we do against the giant of Australia, when we go to negotiations our side has two or three people, Australia always brings 10 times more." A spokesman for Foreign Minister Alexander Downer said: "We're operating under international law and in accordance with international law and at the same time we're negotiating in good faith under this issue."³¹⁵

The Australian Government included areas of the Timor Sea claimed by East Timor among 31 new offshore petroleum exploration areas released on 29 March 2004. The new exploration leases covered areas off the Northern Territory, Western Australia, Victoria, Tasmania, and the Ashmore and Cartier Islands. Although claimed by East Timor, Australia had a long history of sovereignty over the area said Resources Minister Ian Macfarlane and the leases had been released in accordance with Australia's established practice. "We can't leave these resources unexplored and undeveloped," he said. Mr Macfarlane said he did not expect an early settlement of the boundary dispute with East Timor. He expected long and robust negotiations but refused to indicate any timetable. Mr Macfarlane said successful bidders for the new Timor Sea acreage should not be alarmed because their rights would be protected.³¹⁶ Dr Alkatiri commented:

There is widespread lack of support for the IUA in Timor-Leste. The facts that Australia is issuing licenses in disputed areas; has not committed to a timeframe to determine our maritime boundaries; claims to have insufficient resources to enter into more than bi-annual meetings to negotiate our boundaries; has withdrawn from the International Court of Justice on maritime boundaries and continues to exploit the Laminaria, Corallina and Buffalo oil fields which lie in an area of sea claimed by Timor-Leste and which are nearing the end of their lives despite our official objections, does not help Timor-Leste's trust in Australia to abide by any legally binding agreement entered into. If permanent maritime boundaries were agreed expeditiously and in accordance with international law, many of these issues would dissolve.³¹⁷

The first round of talks on the maritime border was held in Dili, 19-22 April 2004, but ended without any apparent agreement. Peter Galbraith, head of Dili's

313. Nigel Wilson, 'East Timor sea boundaries may change', *The Australian*, 11 August 2003; 'Five-year deadline to settle sea border with Australia—Alkatiri', *Lusa*, 11 August 2003.

314. 'Australia refuses to set border talks deadline', *Asia Pacific*, 13 November 2003.

315. Cynthia Banham, "Fair play demanded in oil talks", *The Sydney Morning Herald*, 11 December 2003.

316. Nigel Wilson, 'Release taunts East Timor', *The Australian*, 30 March 2004.

317. 'Prime Minister Alkatiri voices concerns over ALP support for the International Unitisation Agreement bill', Office of the Prime Minister Media Release, 26 March 2004.

negotiating team, said on 23 April that Canberra had proposed the next meeting be held in Australia in September even though East Timor wanted monthly meetings. East Timor claimed it was losing a million dollars a day due to what it called Australia's illegal exploitation of resources in a disputed area of the Greater Sunrise field. "What is unfair is that is Australia has so far refused to negotiate in a manner that will bring a conclusion any time soon," Galbraith told a press conference. "It has tried to block a court from considering it, and continued to take resources found in the disputed area." He urged Canberra either to reverse its refusal to accept international arbitration or to stop the exploitation until a final agreement is reached. "I can promise you that there is only one reason you try to stay out of a court, and that is because you think you will lose in court," Galbraith said.³¹⁸

Indicating that his views on Australia's stance on the Timor Sea had not changed since he expressed them in his 1990 interview with Robert Domm, President Xanana Gusmão declared in Portugal: 'We have a rich sea which Australia is trying to rob us of, and which would guarantee the future of generations of our country'.³¹⁹ The President was speaking at a dinner in his honour in Aveiro on 20 April 2004.³²⁰ Two days later addressing a conference at Lisbon University, he said: 'Today, with the ending of occupation by Indonesia, we come up against the wrongful seizure of our natural resources by Australia'.³²¹

Mr Downer sent the Deputy Secretary of his Department, Doug Chester, to Dili on 6-7 May 2004 to tell the East Timorese leadership that some of the comments they had made on the issue were 'over the top and inflammatory', and that it would be naïve to think that comments like that would not have some impact on their relationship with Australia. Such comments, said Mr Chester, could run the risk of developing anti-Australian sentiment within the East Timorese community.³²²

Towards a "Creative Solution"

In an interview published in *The Australian Financial Review* on 31 May 2004, Foreign Minister José Ramos-Horta said: "We are sympathetic to Australia's dilemma. We have a very solid confidence in our legal claims, but we are also prepared to explore creative ideas to reach a satisfactory agreement. However, right now I absolutely have concerns about the poisoning of our relationship."³²³

On 30 July 2004, Don Voelte, chief executive officer of Woodside Petroleum, which headed the Greater Sunrise development joint venture, met East Timor Prime Minister Mari Alkatiri in Dili. Mr Voelte was understood to have told Dr Alkatiri the project would not proceed unless East Timor ratified the IUA. At the same time, the Australian Government told East Timor it would get no revenue from the Bayu Undan and Greater Sunrise gas fields if it pursued its claim for a maritime boundary set at the median point between the two countries. Australian officials warned that even if the East Timor claim were accepted and the boundary changed from the edge of the

318. "East Timor, Australia still far apart after first round of sea border talks", *Agence France-Presse*, 23 April 2004.

319. See above, n.161.

320. 'Xanana Gusmão acusa Austrália de tentar roubar riquezas marítimas', *Lusa*, 20 April 2004.

321. 'Enfrentamos luta desigual com Austrália - Xanana Gusmão', *Lusa*, 22 April 2004.

322. Dennis Shanahan, 'Secret Canberra envoy turns up heat on Timor oil critics', *The Australian*, 26 May 2004; Doug Chester, *Senate Foreign Affairs, Defence and Trade Legislation Committee Hansard*, 2 June 2004.

323. Rowan Callick, "Tiny Timor Treads Warily Among Giants", *The Australian Financial Review*, 31 May 2004.

continental shelf 80km from the East Timor coast, the new border would probably be established north of the two gas fields. This would mean the billions of dollars in revenue from the fields would flow exclusively to Australia rather than be shared with East Timor. A boundary re-drawn to the midpoint might not deliver the benefits hoped for by the East Timorese because, for technical and geophysical reasons, the known gas reserves in the Timor Sea were clearly associated with the Australian landmass and not East Timor. This meant that even if the continental shelf was not accepted as the boundary, a mid-point would not result in the gas reserves at Bayu-Undan and Greater Sunrise being under East Timor's control.³²⁴

Australian Opposition Leader Mark Latham said on 22 July 2004 that the Government was failing to negotiate in good faith with East Timor and that a Labor government would re-start talks. "We have an Australian interest in the viability of East Timor so I think we've got to conduct these negotiations in good faith", he said. "If we come into government, I think we'll have to start again because, from what I can gather, there's been a lot of bad blood across the negotiating table and you never get it right in these sensitive areas unless you're there doing things in good faith".³²⁵ Mr Downer claimed Mr Latham was threatening the national interest by suggesting negotiations on the boundary should begin afresh because of "bad blood" in earlier talks between the two countries.³²⁶

Foreign Minister Alexander Downer said on 11 August 2004 he hoped to wind up negotiations by Christmas on the outstanding Timor Sea issues. "It will be an agreement that I am sure will be very beneficial to the Government and people of East Timor," he said after meeting with José Ramos Horta. "I feel we have made extremely good progress today and we are absolutely heading in the right direction." He said both parties had adopted a "creative solution" to the maritime boundary.³²⁷ Mr Ramos Horta said he shared Mr Downer's optimism that a comprehensive agreement could be achieved by the end of the year. "We have the basic ideas ... I think we can meet halfway, and now we just need to work out the details," he said. Mr Downer declined to spell out the detail of the previous day's negotiation but clearly signalled a more generous approach by Canberra to the existing shares in the Greater Sunrise field. It was reported then that Ramos-Horta and Downer had agreed, "in principle" to a framework for resolving the dispute. The basic parameters of the agreement, dubbed the "Hong Kong solution", involved the following exchange: East Timor would agree to put the issue of permanent maritime boundary delimitation on hold for the next 100 years and in return Australia would accept changes to the current system of revenue sharing from offshore oil and gas development, in East Timor's favour.³²⁸ The breakthrough followed comments by Mark Latham that he would restart negotiations over the Timor Sea if he won the coming poll. "Our concerns are less with the revenue that we can extract from the Timor Sea than with the broader questions of sovereignty," Mr Ramos Horta said. Before the meeting, sources in Dili had flagged that East Timor wanted a 50-50 split on Greater Sunrise. Mr Ramos Horta said he had discussed the issue with both President Xanana Gusmão and Dr Alkatiri before leaving Dili. "Both leaders have asked me to convey to Alexander Downer our firm

324. Nigel Wilson, "Australia warns Timor on gas claim", *The Australian*, 30 July 2004.

325. "Labor shifts stance on Timor gas", *AAP*, 23 July 2004.

326. Dennis Shanahan and Nigel Wilson, "Latham 'threat' to East Timor", *The Australian*, 28 July 2004.

327. "as duas partes tinham garantido uma 'leitura criativa' relativamente a um acordo frontereiro" ("Possível acordo sobre fronteira marítima até ao Natal", *Lusa*, 12 August 2004).

328. Alex Munton, "E. Timor plays a waiting game over oil and gas", *The Canberra Times*, 2 December 2004.

commitment to find a solution that is satisfactory to the two sides." Mr Downer hoped that the talks would determine the maritime boundary between Australia and East Timor, confirming Canberra's legal position based on the continental shelf.³²⁹

On 22 September 2004, the Australian government announced that maritime boundary talks with neighbour East Timor would resume in Darwin following "productive" discussions between the two nations.³³⁰ Following the Darwin talks, the next round of negotiations was held in Dili, but broke down in acrimonious circumstances on 27 October 2004. Australian Government sources said East Timor was offered "billions" (believed to be about \$3 billion in additional tax revenue) in exchange for deferring discussions for 100 years over the sea boundary between the two nations. But East Timor refused to budge on the offer, which would have given it almost half of the estimated \$10 billion in oil royalties from the Greater Sunrise project. East Timor also wanted the \$3 billion gas processing plant and pipeline servicing Greater Sunrise to be built on its land, rather than at Darwin, Australia's preferred location. The spin-off benefits of the processing plant could amount to \$22 billion over 30 years, East Timor argued. "We were talking about Timor-Leste participation in the development of the disputed resources; they were talking about money," said East Timor's Prime Minister Mari Alkatiri. "We were too far apart to reach agreement." A senior Australian official said that East Timor had "backtracked" on a tentative agreement made at talks the previous month in Darwin.³³¹

In Perth on 29 October 2004, Prime Minister Mari Alkatiri said he would not be rushed into a maritime border agreement vital to the development of the Sunrise gas project, and dismissed a warning from Woodside Petroleum that the Sunrise project would stall if Australia and East Timor failed to resolve their dispute by the end of the year. Woodside said it wanted the East Timorese to provide legal and fiscal certainty by the end of the year. Speaking in Perth ahead of a meeting with Woodside and joint venture partner ConocoPhillips, Mr Alkatiri said he did not believe the December deadline was real. "We are not rushing," he told reporters. "If you can really get into a solution, agreement by December—good. It's good for all of us. But we are not rushing because we do believe that this timeframe is not (a) real one. It was an event timeframe." Mr Alkatiri said the sticking point was the way the maritime border issue was being approached. "What the Australian government is looking for is money for everything," he said. "We are not looking for money only. We would like to participate in a way to develop our own knowledge on this." He said Australia's approach was not unfair, but East Timor felt there was a better way of doing things. "For Australia it is much easier because they have already developed their own knowledge on these areas of exploration, exploitation of oil and gas...But we do believe it is much better for us if we can get an agreement on the resource sharing and of course the participation on the exploration and exploitation."

Woodside Petroleum was looking at three alternatives for Sunrise consisting of a floating liquefied natural gas (FLNG) facility, piping gas to a LNG facility in East Timor, or a pipeline to a Darwin-based plant. Talks with Mr Alkatiri focussed on the feasibility of a pipeline to East Timor. "We have done our own study assisted by

329. Nigel Wilson and Patrick Walters, "More gas cash for East Timor", *The Australian*, 12 August 2004.

330. "East Timor Boundary Talks Productive", *Dow Jones International News*, 22 September 2004.

331. Tom Allard, "Talks on Timor Gap reserves collapse", *The Sydney Morning Herald*, 28 October 2004.

credible people and the results are really positive," Mr Alkatiri said. "That's why we think that technically this is possible and commercially this is feasible too".³³²

In Melbourne on 14 December 2004, Dr. Ramos Horta, warned that his country would ask the UN to intervene in the dispute with Australia over the shared seabed boundary and ownership of seabed oil and gas deposits. He said that at the negotiations in October Australia had issued an ultimatum to Timor-Leste to accept a permanent maritime boundary on its terms and had also lowered its offer of compensation to US\$3 billion over 30 years. He said that when leaving Dili airport, Mr. Doug Chester, the chief negotiator for Australia departed with these words: "Take it or leave it."

Dr. Ramos Horta announced that in 2005 an international campaign on the maritime issue would commence: 'We will mobilize Nobel peace prize winners around the world to talk about this issue, people in Hollywood, in LA, Nelson Mandela, Desmond Tutu, everyone that I have been in touch with already! It will be one of the most intense campaigns the world has seen since the apartheid campaign! We are prepared to do it! And with enormous respect for Australia! Still with enormous gratitude for Australia.'³³³ He subsequently told ABC Radio: "It will be Australia that has to explain to the international community why it refuses as a western democracy that lectures other countries about international law, about human rights... Australia will have to explain why it refuses to accept jurisdiction on the international court of justice...We have tremendous international support, the European Union, Commonwealth countries, Non Aligned Movement, I do not know of a single country that is not sympathetic to the East Timorese situation".³³⁴

Woodside carried out its threat to halt work on Sunrise after the East Timorese Government refused to present to its parliament for ratification the agreement it signed with Australia in 2003 covering legal and fiscal terms for the Greater Sunrise development. The company announced on 13 January 2005 that no more money was being committed to the Greater Sunrise gas project and that employees working on Sunrise had been reassigned. This meant that gas reserves were unlikely to be developed for at least a decade. East Timor's desire for the Sunrise LNG facility to be built on its territory required constructing a large sub-sea pipeline under the Timor Trough. More than \$200 million had been invested in exploration and marketing, both overseas and within Australia, and on development planning on Greater Sunrise. But without an agreement with the East Timorese—as Woodside described it, legal and fiscal certainty—the project partners could not organise long-term supply contracts that would underpin development costs.³³⁵

Doug Chester, Australia's chief negotiator, said Australia was happy to focus on formal legal negotiations to settle a permanent maritime boundary but it was also open to "creative solutions" that would allow development of oil and gas projects pending a permanent boundary.³³⁶ At a briefing on 24 February, journalists were told

332. Holly Nott, "Sunrise deadline dismissed by East Timor's PM", *Australian Associated Press General News*, 29 October 2004.

333. Maria-Gabriela Carrascalao Heard, 'Dr. Ramos Horta in Melbourne', *SBS Portuguese Radio Program*, 15 December 2004.

334. Anne Barker, "East Timor ups ante in oil and gas fight", *The World Today*, 16 December 2004.

335. The Sunrise project joint venture partners are Woodside (33.44%), ConocoPhillips (30%), Shell (26.56%) and Osaka Gas (10%); Russell Searancke, "Ministers agree pact for Sunrise", *Upstream*, 20 January 2006.

336. Veronica Brooks, "Timor Positive Ahead of Fresh Boundary Talks", *Dow Jones*, 8 February 2005.

that Australia's position was that "the permanent boundaries should be put off for quite some considerable time, at least until the resources have been exploited".³³⁷ Australia was prepared to hold out for up to 99 years—referring to a "Hong Kong" scenario—if East Timor maintained its demand that the maritime boundaries be settled according to international law.³³⁸

The next round of maritime boundary talks between Australia and East Timor in Canberra ended on 10 March 2005 with the possibility of an agreement that would allow the Greater Sunrise gas development to go ahead. Officials from both governments said they were happy with progress that had been made on a range of issues. East Timor chief negotiator José Teixeira declined to comment on the detail. But Australian sources said it was significant the East Timor team again included Peter Galbraith, a member of the former UN cabinet in Timor in the run up to independence. Dr Galbraith, one of the architects of the Timor Sea treaty signed in 2002, did not attend talks in Dili in October 2004 that collapsed after East Timor insisted on linking the maritime boundary issue with the Greater Sunrise gas development issue.³³⁹ Alexander Downer said on 27 April that Australia remained opposed to any agreement to change the maritime boundary: "What Australia doesn't want is to unravel all of our maritime boundaries which have been laboriously negotiated over many years with all our neighbours. If we can find a suitable settlement that keeps our principles intact but ensures that East Timor gets a steady flow of revenue, then there should be honour on all sides".³⁴⁰

On 29 April 2005, Australia and East Timor reached an agreement on Timor Sea gas and oil resources. The consensus came after Australia agreed to make what one East Timorese Government source described as a "quantum shift". Canberra gave in to Dili's demand for a percentage of revenues from the gas and oil resources from the Greater Sunrise field, not a fixed-dollar payment from Australia, which it had offered at previous rounds of talks. In exchange for the revenue sharing, which the Foreign Minister, Alexander Downer, said could be worth \$2-5 billion, East Timor agreed to defer the issue of a maritime boundary between the two for between 50 and 60 years. Neither Australia nor East Timor would disclose what percentage share was agreed, but it was rumoured to be in the vicinity of a 50-50 split. Mr Downer said there had been "substantial agreement on all major issues", which had been incorporated into a draft text. "There are still some minor issues to be agreed, but all the major issues have been agreed," he said. Mr Downer praised his East Timorese counterpart, José Ramos-Horta, and said his personal relationship with the East Timorese Foreign Minister had played an important role in the talks.³⁴¹ The months of negotiations leading up to the agreement had been little more than a waiting game, according to Stratfor, a private intelligence provider based in Austin, Texas. "Australia had the bargaining position and financial resources to stall until the smaller country buckled under financial strain", it said. "The Timorese, needing fast cash flow, were forced to accept the Australians' offer in order to survive, regardless of their position in the sea boundary dispute".³⁴²

337. Jon Lamb, "Howard's attempted bribery to steal Timor Oil", *Green Left Weekly*, 16 March 2005.

338. "Tussle over Timor Sea Oil and Gas Resumes", *Inter Press Service via Asia Times*, 8 March 2005.

339. Nigel Wilson, "Sunrise hopes as talks end", *The Australian*, 11 March 2005.

340. Mark Dodd, "East Timor hopes for break in oil talks", *The Australian*, 27 April 2005.

341. Cynthia Banham, "Reported Deal reached on Timor Sea oil", *The Sydney Morning Herald*, 30 April 2005.

342. "Stratfor says Australia managed to out-wait cash-strapped Timor", *Australian Associated Press*, 3 May 2005.

Following talks which ended in Sydney on 13 May 2005, the terms of the revenue-sharing agreement covering proceeds from the Timor Sea appeared to be almost resolved and ready for final examination and endorsement by the two governments. Under the deal, East Timor agreed to shelve for 50 years its demand for a new maritime boundary with Australia in exchange for a bigger revenue share from Greater Sunrise. It was understood that East Timor's stake in the field had increased from 18 to 50 per cent. Foreign Minister Alexander Downer said almost all key issues had been settled. "We feel the discussions were very successful. There will probably be no further need for negotiations," he said. "Assuming that the East Timor Government, as well as our Government is happy with the conclusion reached at this round ... then we will be able to move towards signing an agreement".³⁴³ Mari Alkatiri said in Dili on 13 May that negotiations were continuing and that he could only guarantee that "the position of Timor-Leste remains unchanged".³⁴⁴

The agreement between Australia and East Timor that had appeared to be concluded in Sydney on 13 May 2005 was not immediately signed off by East Timor's Prime Minister, Mari Alkatiri. He told the London *Financial Times* on 17 May: "I do believe that we are close to a deal. But we do not have a deal yet. We still have some details, some very important details that are going to guarantee our claims on maritime boundaries, and Australia's also, during the life of the project".³⁴⁵ Dr Alkatiri indicated that he might wish to reopen fundamental issues that had appeared resolved at that sixth round of talks. In an interview with Timorese newspaper *Publico* he said that yet another round of negotiations or possibly two would be needed in order to find a "creative solution". He told the paper, "It is said that the devil is in the details. It would be good if we do not allow this space to be occupied by the devil". Dr Alkatiri said that if his country gained any revenues from Sunrise within six or seven years "we would be very lucky". East Timor's Foreign Minister, José Ramos Horta, said that "we are on the cusp of securing for the people of East Timor the fairest agreement possible". But the issue of where the pipeline should go had still to be resolved with Woodside, he said.³⁴⁶

A spokesman for Woodside Petroleum, Sunrise's operator, said the project would remain stalled, with staff reassigned "until we get the legal, regulatory and fiscal stability necessary for us to proceed". "We haven't seen the agreement they are negotiating, but when we have done we would then as a joint venture reconsider restarting the project," he said. The issues that the joint venture would need resolved were the location of the boundary between the countries, the map of the approvals process and the details of the tax structure and revenue-sharing arrangement. Once those were made clear and accepted by the project partners, Woodside would then seek to start or resume negotiations with potential customers, followed by heads of agreement, letters of intent and sales agreements. Only then could construction start. The Woodside spokesman said: "We think that during the 2011-2014 period the liquefied natural gas market will provide a significant opportunity for Australian producers, before everyone else starts to catch up" with global demand, and thus probably prices, running high. One of the major outstanding issues at Sunrise was the location of the LNG processing plant. East Timor wanted the plant to be built there, but Canberra's view was that such decisions should be left to the commercial

343. Mark Dodd, "E Timor to receive bigger gas stake", *The Australian*, 14 May 2005.

344. "Alkatiri labels report of Timor Sea accord an 'absolute lie'", *Lusa*, 13 May 2005.

345. Shawn Donnan and Lachlan Colquhoun, "East Timor says no energy deal yet", *The Financial Times*, 17 May 2005.

346. Rowan Callick, "East Timor gas deal may be on backburner", *The Australian Financial Review*, 3 June 2005.

operators. The Woodside spokesman said: 'The joint venture did a feasibility study last year and found the option of taking the pipeline to East Timor was not viable'.³⁴⁷

Writing in *The Age* of 30 May 2005, José Ramos-Horta outlined what he referred to as the salient elements of the draft agreement reached at the fifth round of talks held in Sydney, which were to be discussed by the respective cabinets:

The possible treaty would be "without prejudice" to Timor-Leste and Australia's sovereign maritime boundary claims. No acts or activities by either side under the treaty could be relied upon to assert, support, deny or further the legal position of either country. A 50-year moratorium would be agreed to for the duration of the treaty. In return for the moratorium on maritime boundaries, the parties would agree to share equally the total tax and royalty revenues from petroleum produced in the Greater Sunrise area. The Timor Sea Treaty of 2002 will continue to be observed and Timor-Leste will continue to receive 90 per cent of income from that area. The revenue split could mean more than \$US7 billion (\$A9.23 billion) to our impoverished country. Other fields underlying Greater Sunrise field either wholly or partly would be treated in the same manner as the Greater Sunrise field.³⁴⁸

In June 2005, the Timor Leste government conceded that the location of processing facilities for the Greater Sunrise gas development was a matter for the project's owners and not for the Australian and East Timor governments.³⁴⁹ In September it emerged that a technical argument about what activities might occur between the sea bed and the surface of the Joint Petroleum Development Area in the Timor Sea was delaying a revenue-sharing agreement. Officials on both sides were confident an agreement was close after Australia rejected an East Timor "clarification" that could have resulted in a maritime border being established as a result of international action on fishing reserves.³⁵⁰ At talks in Canberra on 9 November with Foreign Minister Alexander Downer, East Timor's Foreign Minister José Ramos Horta said a boundary deal with Australia over the oil and gas reserves of the Timor Sea should be completed by the end of the year. He said the deal with Australia was more than 90 per cent agreed. The remaining difference was over any future mediation or arbitration if disputes arose over security, fisheries, new oil and gas discoveries or environmental problems. Mr Ramos Horta predicted full agreement within weeks. "I remain very optimistic that by the end of the year we should be able to clinch the deal," he said. Signing of the agreement reached in Sydney in May was delayed by a tortuous process of establishing the exact meaning and consequences of each clause. Another cause of delay was East Timor's discussions with Woodside on bringing Greater Sunrise onshore across the Timor Trough. Woodside claimed such a proposition was not commercially viable.³⁵¹ Mr Ramos Horta told Radio Australia that East Timor now accepted the revenue sharing agreement would not include reference to the location of Greater Sunrise processing facilities. "We are in discussions with Woodside," he said. "It is up to them to make a credible case that the

347. Rowan Callick, "East Timor gas deal may be on backburner", *The Australian Financial Review*, 3 June 2005.

348. Jose Ramos-Horta, "The shape of a fair deal for East Timor", *The Age*, 30 May 2005.

349. Nigel Wilson, "Hope for Sunrise after Timor changes its tune", *The Australian*, 29 June 2005.

350. Nigel Wilson, "Agreement close on E Timor revenue", *The Australian*, 6 September 2005.

351. Nigel Wilson, "Timor talk back minus LNG plant", *The Australian*, 14 November 2005.

gas should be shipped to Darwin rather than East Timor. The advice to me is that it makes more commercial sense to come to East Timor".³⁵²

Alexander Downer said on 1 December 2005 that Australia and East Timor had reached agreement over energy resources in the Timor Sea, after officials from the two countries had agreed on the accord during talks in Darwin on 30 November, and that the prime ministers of Australia and East Timor would sign the new agreement by mid-January. "This is a deal which is a good one for Australia and East Timor," Downer told Parliament. "It safeguards Australia's sovereign interests, and it will provide investors with the certainty needed for large-scale resource projects to go ahead." Mr Downer would not comment on details of the new revenue-sharing arrangement until the two governments formally signed the deal. He said arrangements under the May 2002 Timor Sea treaty would remain in place, ensuring East Timor would continue to receive 90 percent of the revenues of the JPDA.³⁵³

Prime Minister Mari Alkatiri said on 9 December 2005 that his country's revenue-sharing deal with Australia covering the Sunrise natural gas project would be signed in Sydney on 12 January 2006. He said the pact was a "very positive" outcome and did not prejudice the positions and claims of both countries in relation to maritime boundaries in the Timor Sea. "Timor-Leste has not compromised its legal claim and legal position in respect of the question of maritime boundaries. This agreement takes account of the essential interests of both Timor-Leste and Australia," he said in a statement. "This agreement also opens the way for the construction of a pipeline between Greater Sunrise and Timor-Leste and for the installation of a refining facility that will be the start of petroleum activities on Timorese soil," he said. Dr Alkatiri said Sunrise was crucial in terms of government revenues from the petroleum sector. "At the moment, Timor-Leste is dependent almost exclusively on only one project—Bayu-Undan... Under this deal, it is expected that the Greater Sunrise will go ahead and start producing approximately halfway through the production cycle of Bayu-Undan," he said. Following the scheduled signing in Sydney, the Sunrise agreement needed to be ratified by the parliaments of both nations.³⁵⁴ He dismissed criticism that the accord would long postpone negotiations over sovereignty in the Timor Sea, saying, "If we had chosen to define the frontiers first, at this time the only beneficiary would have been Australia, nor would we have received at this moment a single centimo for East Timor's coffers; now we have hundreds of millions of dollars".³⁵⁵

The Treaty on Certain Maritime Arrangements in the Timor Sea

The Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) was signed in Sydney on 12 January 2006 by the two countries' Foreign Ministers—José Ramos-Horta for the Timorese and Alexander Downer for Australia, in the presence of their respective Prime Ministers Mari Alkatiri and John Howard. The treaty would see the equal sharing of upstream government revenues flowing from the Sunrise project, and put on hold the two parties' claims to jurisdiction and maritime boundaries in the Timor Sea for 50 years. The Woodside-operated Greater Sunrise fields held an estimated 8 trillion cubic feet of gas and up to 300 million barrels of

352. "Hopes for Timor Sea deal by year's end", *Australian Broadcasting Corporation (ABC) News* 9 November 2005.

353. James Grubel, "Australia, East Timor agree Sunrise gas field deal", *Reuters News*, 1 December 2005.

354. Veronica Brooks, "Timor Plans Jan 12 Signing Of Australia Oil Revenue Pact" *Dow Jones Commodities Service*, 10 December 2005.

355. "Assinatura de acordo com Austrália é a 12 Janeiro—PM Mari Alkatiri", *Lusa*, 12 December 2005.

condensate. Australia would pay East Timor an agreed fee to cover 50 per cent of royalties and all other taxes the government collects from companies that develop the oil and gas fields. But to achieve the full \$25 billion, the Greater Sunrise gas project would have to go ahead within 10 years: either country could terminate it in February 2013 if by then there was still no jointly approved development plan. The treaty would also lapse if production did not begin by 2017. Under the previous IUA agreement, East Timor was entitled to 18 per cent of royalties compared to the 82 per cent flowing to Australia. Mr Downer said: "The new maritime arrangements agreed with East Timor under this treaty are on top of the already very generous sharing arrangements within the Joint Petroleum Development Area, where East Timor received 90% of revenue from production of petroleum resources, which may be worth as much as \$15 billion." Prime Minister Howard said it would provide "a very important addition to the revenue stream coming to a tiny independent country".³⁵⁶ Mr Howard believed the deal was a fair and just outcome and would strengthen relations between the two countries: "It means that the very close relationship between our two countries can not only continue but become even closer," he said.³⁵⁷

East Timor government spokesman, the Director of the Darwin-based Timor Sea Office, Manuel de Lemos said that, while the deal would deliver "significant benefits to the people of Australia and East Timor", his country had "given up more than \$2.5 billion in revenue from the Buffalo, Laminaria and Corallina fields, which were claimed by East Timor. This was part of the negotiation process". He added: "It is inappropriate to characterise the result of these negotiations as a 'very generous' gesture on the part of Australia. The resources at stake in these negotiations were claimed under international law".³⁵⁸ East Timor's Foreign Minister, José Ramos Horta, described the agreement as fair and just: "While we do not renounce our sovereign claims to a maritime boundary, we proceed with this type of arrangement, which is very much a fair and just deal...the legal opinion of one side is valid as far as that side is concerned. It doesn't mean necessarily that in a court of law, if we were to go to an international jurisdiction we would prevail."³⁵⁹ Dr Alkatiri said the agreement would provide a major boost to the tiny nation's revenues, while protecting its territorial sovereignty. "I am confident this is for the benefit of the people," he said. Dr Alkatiri said East Timor was "fighting" to have the processing plant built in his country. But this option had been rejected by the Sunrise partners—Woodside, ConocoPhillips, Shell and Osaka Gas—as too difficult and too expensive. Dr Alkatiri predicted production could be up to 10 years away.³⁶⁰

Woodside gave no indication the project, which had been stalled since December 2004, would proceed. A spokesman congratulated the two governments in signing the agreement but reiterated Woodside's position that it needed the agreement to be ratified by the parliaments of both countries before considering whether to proceed with Sunrise.³⁶¹ Company spokesman Roger Martin said there were still a few steps to go before the Greater Sunrise joint venture partners would be making any

356. Nigel Wilson, 'Treaty to pump \$25bn to E Timor', *The Australian*, 13 January 2006.

357. Sandra O'Malley, 'E Timor stand to reap windfall from new energy pact', *Australian Associated Press General News*, 12 January 2006.

358. Nigel Wilson, 'Treaty to pump \$25bn to E Timor', *The Australian*, 13 January 2006; Russell Searancke, 'Ministers agree pact for Sunrise', *Upstream*, 20 January 2006.

359. Peta Donald, 'Australia and East Timor reach agreement on oil field', *Australian Broadcasting Corporation Transcripts*, 12 January 2006.

360. Nigel Wilson, 'Treaty to pump \$25bn to E Timor', *The Australian*, 13 January 2006.

361. Nigel Wilson, 'Treaty to pump \$25bn to E Timor', *The Australian*, 13 January 2006.

decisions on how to proceed.³⁶² East Timor continued to press Woodside to consider locating processing facilities for the development in Dili rather than Darwin. Dr Alkatiri said that a pipeline to Dili and an onshore liquefied natural gas (LNG) plant were technically feasible and economically viable.

Woodside gave little indication it planned to budge on its preference for a Darwin plant.³⁶³ In an article in *The Australian Financial Review* of 18 January 2006, Mari Alkatiri wrote:

The next step for us is to bring the gas from Greater Sunrise to an onshore LNG plant. Some say that it only makes sense to build it to Darwin. We would be pragmatic enough to accept this solution, should there be no other economically and commercially viable alternative. But today we are certain that that is not the case. From an economic and commercial standpoint, preliminary data indicates that bringing the pipeline to East Timor is a perfectly credible alternative, if only because the distance to East Timor is about a half the distance to Darwin....From an equity standpoint, it does not seem reasonable that the petroleum resources of the Timor Sea, which we are sharing with Australia, generate only one development pole, precisely in the country that, at the start, is already the more developed one. This would be another way of denying our people the benefits from the resources to which they are entitled, or a new form of exploitation. For this reason, we understand the deal on Greater Sunrise within a package that includes the pipeline to East Timor and the processing of the gas in our country.³⁶⁴

The Australian Minister for Industry and Resources Ian Macfarlane and the Prime Minister of East Timor Mari Alkatiri signed agreements in March 2006 that put in place the legal framework and production sharing agreements required by oil companies to operate with certainty in the disputed waters of the Timor Sea. Mr Macfarlane later said:

Already significant investment has been made in the joint area, and I would expect that to continue given the amounts of proven reserves identified in, and close to, the region. Last month's exploration and production agreements were agreed by both governments in recognition of the fact companies require this certainty before they can even begin to weigh the commercial considerations of investing in the JPDA. Given the successful negotiation of these operational instruments, Australia looks to East Timor to soon ratify the 2003 Greater Sunrise International Unitisation Agreement and progress ratification of the recently signed Treaty on Certain Maritime Arrangements in the Timor Sea to enable the Greater Sunrise project to proceed.³⁶⁵

Mari Alkatiri resigned in July 2006 following a political crisis and outbreak of civil unrest. His successor, José Ramos Horta, said on 10 July that the issue of whether natural gas from the Timor Sea was pumped to Darwin or Timor "must not

362. Sandra O'Malley, 'E Timor stand to reap windfall from new energy pact', *Australian Associated Press General News*, 12 January 2006.

363. Sandra O'Malley, 'E Timor stand to reap windfall from new energy pact', *Australian Associated Press General News*, 12 January 2006.

364. Mari Alkatiri, 'Equity flows in pipeline to East Timor', *Australian Financial Review*, 18 January 2006.

365. Damon Frith, 'Pacts clears legal fog to let Timor Sea operations take off', *The Australian*, 1 April 2006.

be an insurmountable obstacle" to ratifying an agreement on the deal: "We never said the pipeline was a life and death thing, only that we prefer an independent study on the pros and cons". He also warned: "If it has to go to Darwin, I will do everything to milk every extra cent out of Woodside and Australia before agreeing to it." He said he hoped to put the Greater Sunrise ratification bill before parliament "quite soon", and that he expected it to pass, despite his predecessor Mari Alkatiri's belief the house would not accept the agreement signed in Sydney the previous January.³⁶⁶

On 20 February 2007, East Timor's parliament agreed to ratify the agreement with Australia over the management of oil and gas resources in the Greater Sunrise field in the Timor Sea. During the debate in the national assembly in Dili on 20 February, East Timor's Minister for Natural Resources and Energy Policy, José Teixeira, emphasized the necessity of not further delaying the process of ratification. Deputy Prime Minister Estanislau da Silva commented: "Nothing in this world is perfect. We would prefer that Australia give us all of the Bayu-Undan, all of the Sunrise, in sum, all of the Timor Sea. But the world does not work like that". He said that the terms of the accord and of the treaty, which gave continuity to the Timor Sea Treaty signed in 2002, "were the most just possible for Timor-Leste". Estanislau da Silva emphasized that the country "had not abdicated the delimitation of its frontiers" in accordance with the median line criterion. "There are not two separate continental shelves" in the Timor Sea, said Estanislau da Silva: "Our shelf is the continuation of the Australian continental shelf".

"I am glad because after one year, the parliament finally has approved this agreement," Prime Minister José Ramos-Horta told reporters after the vote, with 48 in favour, five against and three abstentions. "With this agreement, large investors such as Woodside, can start to invest in the Greater Sunrise (field) to manage oil and gas," he said. Dr Ramos-Horta conceded that many technical details remained to be settled before such investment could actually take place, such as the pipeline from the field.³⁶⁷

Foreign Minister Alexander Downer, using a power invoked only six times in its history, invoked a "national interest" exemption clause to fast-track ratification of the CMATS treaty through the Parliament without scrutiny by its Joint Standing Committee on Treaties.³⁶⁸ Mr Downer referred to the forthcoming presidential and parliamentary election in East Timor, and said it was "uncertain when an opportunity would arise after the East Timor elections period" to finalize the arrangements agreed for the Timor Sea.³⁶⁹ At a hearing of the Committee on 26 February 2007, the Acting Chair, Mr Kim Wilkie, stated: "I think it is outrageous that this committee was not given the opportunity to examine the treaty in due time, and it is a failing on behalf of both the minister and the department which I find totally unacceptable".³⁷⁰

The Australian and East Timor governments formally exchanged notes in Dili on 23 February 2007 to bring into force the two treaties that provided the legal and fiscal framework for the development of the Greater Sunrise gas field in the Timor Sea. The notes covered the Sunrise international unitization agreement (IUA) and the

366. Stephen Fitzpatrick, "Timor to push on with gas deal", *The Australian*, 12 July 2006.

367. 'East Timor approves oil agreement with Australia', *Agence France Presse*, 20 February 2007.

368. Mark Dodd, "'Downer rushes on Timor deal', *The Australian*, 6 February 2007.

369. Mr Downer to Dr Andrew Southcott, Chair, Joint Standing Committee on Treaties, 22 February 2007.

370. Mr Wilkie, *Joint Standing Committee on Treaties [Proof] Committee Hansard*, 26 February 2007, p.33.

Certain Maritime Arrangements in the Timor Sea (CMATS) Treaty.³⁷¹ The Australian Parliament passed legislation to enable implementation of the Treaty on 28 February. Speaking for the Opposition, Mr Bob McMullan noted that the parliament of Timor-Leste had voted on 20 February to accept the Treaty by a vote of 48 to five, with three abstentions. “Given this emphatic support for the treaty”, he said, “Labor is satisfied with that treaty arrangement...Accordingly, the opposition will be supporting these bills”.³⁷² In its June 2007 report on the CMATS Treaty, the Joint Standing Committee on Treaties noted that under Articles 74 and 83 of UNCLOS, in the absence of agreed exclusive economic zone and continental shelf delimitation, Australia was obliged to make every effort to enter into provisional arrangements of a practical nature which were without prejudice to the final delimitation, and considered “that this has been achieved by through the CMATS Treaty”.³⁷³

Non-implementation of the CMATS Treaty, 2007-2013

Following ratification of the CMATS accord by the East Timor national assembly on 20 February 2007, Woodside’s chief executive officer Don Voelte said that the ratification could enable Sunrise to compete for development with the company's Browse LNG project in Western Australia, which had been targeting a market window of 2012-2014.³⁷⁴ Woodside announced the re-staffing of the Greater Sunrise project on 15 November 2007, and said that production through a gas liquefaction plant on a floating platform over the field was now the favoured option over pipelines either to Darwin or across the Timor Trough to the Timorese mainland.³⁷⁵ This was unacceptable to East Timor. State Secretary for Natural Resources and Petroleum Minister Alfredo Pires said in November 2008: ‘It has become very difficult for us to accept any other alternative than bringing the plant to East Timor. We would like to see the field developed but we are not in a hurry. We have money and so we can wait’.³⁷⁶ He said that his government had concluded a agreements with the South Korean government and a consortium of Korean companies to secure financial and technical backing for a potential LNG project.³⁷⁷

The Timor Leste government confirmed on 6 May 2009 that it did not intend to approve plans that Woodside Petroleum Ltd. had said it would put forward to develop the Sunrise field in the Timor Sea. ‘We have made clear to Woodside our position’, the government said in the statement. ‘We have not, and do not intend to approve their development plans, no further engagement or negotiations will be entertained as stands’. Secretary of State for Natural Resources Alfredo Pires said: ‘The fact that one pipeline has gone already to Australia, we feel that it's only fair that the other one comes to Timor-Leste. We also have studies that confirm that the Timor-Leste option is much more viable than we had been led to believe.’³⁷⁸ This position was confirmed in November 2009 by Francisco da Costa Monteiro, special adviser to Alfredo Pires, during talks in Canberra with Australian Resources Minister

371. ‘Australia, Timor-Leste bring Sunrise gas treaties into force’, *PLATT*, 26 February 2007.

372. Bob McMullan, *House of Representatives Hansard*, 28 February 2007, p.157.

373. Australian Parliament Joint Standing Committee on Treaties, *Report 85*, Canberra, 2007, p.43.

374. ‘Australia, Timor-Leste bring Sunrise gas treaties into force’, *PLATT*, 26 February 2007.

375. Nigel Wilson, ‘Backflip: Woodside praises floating LNG platform as best Greater Sunrise option’, *The Australian*, 16 November 2007.

376. Angus Grigg, ‘East Timor Talks Tough’, *The Australian Financial Review*, 14 November 2008.

377. Russell Searancke, ‘Timor hits out at Sunrise plans’, *Upstream*, 14 November 2008; Lindsay Murdoch, ‘Survey backs East Timor pipeline bid’, *The Sydney Morning Herald*, 14 November 2008.

378. Angela Macdonald-Smith, ‘East Timor Says It Won't Approve Woodside LNG Plan’, *Bloomberg*, 6 May 2009.

Martin Ferguson. Mr Da Costa said the Government in Dili would not accept sending the gas abroad and accused Woodside of ignoring the interests of the Timorese people: 'For us, the best outcome is development of Greater Sunrise on the shores of Timor Leste that can underpin the overall economic and social development of the country.' He said establishing the project was expected to cost \$8 billion to \$10 billion and that investment would drive the development of other services in the country of 1 million. 'That's the reason why we see that for Australia this is one drop in a big ocean, but for Timor Leste this is almost the single biggest [project] and you can imagine how much attention we put into this', he said. A spokesman for Mr Ferguson issued a statement saying the destination of the pipeline was a commercial matter to be determined by the project partners. But Mr Da Costa said that under the terms of various treaties dividing the oil and gas fields between Australia and Timor-Leste, the two governments should be left alone to decide how to develop the fields. He said Timor-Leste was willing to leave the resources in the ground for future generations rather than rushing into a deal. 'They should start to realise that Timor today is very different from Timor in 2002 and 1999 or before,' Mr Da Costa said. He pointed out that Timor-Leste's substantial national savings from other resource projects came to a total of more than \$5 billion. 'If it's [Great Sunrise] to be developed, then it's to be developed to Timor Leste', he said. "If it's not coming to Timor Leste, then we will not approve anything."³⁷⁹

On 13 March 2010, President Jose Ramos-Horta said his country was serious about making sure its interests were not ignored in the development of the Greater Sunrise Gas field. Timor-Leste's government wanted the gas processing plant built in Timor-Leste. The field's developer Woodside said it would soon make a choice between building a floating plant in the Timor Sea or a pipeline to Darwin. Dr Ramos-Horta said it was possible Timor-Leste would not allow the development to go ahead:

If it's an arbitrary decision that we know is politically motivated, based on prejudices about a small developing country—if the decision is based on that and seems like it's based on that rather than technical and commercial considerations—then obviously we can not agree. For Australia, one pipeline more, one pipeline less to Darwin—it wouldn't make a terrible difference. But to Timor, it would ensure its prosperity into the future. So this is a political question. It's a moral, ethical question besides the commercial consideration.³⁸⁰

Woodside and its partners, Shell, ConocoPhillips and Osaka Gas, confirmed on 29 April 2010 that they had chosen a floating liquid natural gas (FLNG) plant as the best option to develop the Sunrise field.³⁸¹ Woodside's chief executive officer Don Voelte said East Timor's opposition to this option was merely a negotiating tactic; he claimed the FLNG plant was the biggest revenue-raising option for the East Timor and Australian governments.³⁸² In response, Prime Minister Xanana Gusmão said the Woodside-led consortium was trying to steal his country's natural resources. 'I don't believe Woodside company because it is a liar,' Gusmão said. 'They intend to steal our oil and gas in the Timor Sea as they don't want to bring the pipeline to East Timor.' He said the consortium had broken its promise to provide training for East

379. Daniel Flitton, 'Argument over pipeline clouds Timor gas deal', *The Age*, 26 November 2009.

380. 'East Timor threatens to scuttle gas development', Australian Broadcasting Corporation, *ABC News*, 13 March 2010.

381. Matt Chambers and Paul Cleary, 'Timor hurdle next for Sunrise', *The Australian*, 30 April 2010.

382. Peter Klinger, 'Woodside chief convinced floating LNG will win out', *The West Australian*, 1 May 2010.

Timorese engineers and had only hired thirty local people in its Timor Sea exploration. 'I call on the people of East Timor and the country's leaders, we must be united to defend our wealth in the Timor Sea and the pipeline must come to East Timor, not to Darwin or floating as Woodside desires,' he said.³⁸³ Timor-Leste subsequently allocated \$US12.4 million for research into an LNG processing plant at Beaco Beach. It also planned to spend at least \$US36 million to develop a south-coast petroleum infrastructure corridor. The government said it wanted the LNG plant at Beaco Beach to have a production capacity of up to 20 million tonnes of LNG a year.³⁸⁴

The Sunrise Commission represented both Timor-Leste and Australia in the development of the production area shared by both countries. The December 2010 Sunrise Commission meeting broke down when Timor-Leste asked for suspension of consideration of Woodside's proposals while rights over the 'downstream' project were clarified. A statement released to the media on 24 January 2011 by Secretary of State Agio Pereira, said that the National Petroleum Authority (the ANP) had been asked by the Sunrise Commission on December 16 to 'cease their evaluation on Woodside's development concepts due to the content of the proposals submitted'. The statement added that Woodside's proposals included both upstream and downstream components, but that Woodside 'has no license or permit to carry out downstream activities nor have the States given the right to the National Petroleum Authority to assess downstream activities which are not covered in the Timor Sea Treaty'. The ANP had not been given the right by the government to assess downstream activities: 'Therefore, neither Woodside nor regulators will proceed with the proposals until the downstream title issue is resolved'. The statement concluded: 'This effectively means that Woodside's operations on Greater Sunrise have been suspended.'³⁸⁵

Manuel Mendonça, director of communications in the Natural Resources Ministry, announced that Timor-Leste had invited Malaysia's Petronas to develop the field. The move was designed to increase pressure on Woodside to accept the onshore development option or risk losing its field-development rights. However, Petronas would not be allowed to develop the field without the approval of the Australian government. Woodside claimed that the onshore terminal was more expensive by around \$US5 billion due to the need to construct an LNG loading jetty, the costs of site clearance and preparation, and the costs of developing associated infrastructure such as airports, and because of the technical challenges associated with laying a deep sea pipeline from the field to the facility. Timor-Leste's feasibility studies had, according to report, shown the onshore LNG option was viable although not necessarily more competitive than an FLNG.³⁸⁶

Timor-Leste's position was that the 'States' had the power under the treaties to dictate how Greater Sunrise was developed. It seemed to indicate a belief that the government could also award processing rights to a party other than the joint venture. Woodside rejected both these propositions as inconsistent with the requirements of the international treaty and Australian law. Woodside's view was that Pereira's attempt to draw legal distinction between the 'upstream' and 'downstream' components of an

383. Guido Goulart, 'East Timor PM claims Australian-led oil consortium is trying to steal its natural resources', *Associated Press Newswires*, 26 May 2010.

384. Lindsay Murdoch, 'Move to break impasse over Timor Sea gas supply', *The Sydney Morning Herald*, 3 January 2011.

385. Jonty Rushforth, and Christine Forster, 'Timor Leste claims Woodside suspended from Sunrise LNG development', *Platts Commodity News*, 25 January 2011.

386. Tom Grieder, 'East Timor Suspends Greater Sunrise Gas Project on Downstream Title Issue', *IHS Global Insight Daily Analysis*, 25 January 2011.

LNG development reflected the different tax regimes that applied to different parts of an LNG project. In Australia, a Petroleum Resource Rent Tax applied to ‘upstream’ (prior to entry into the liquefaction train) and income tax applies to the ‘downstream’ (the value adding resulting from liquefaction).³⁸⁷

East Timor’s representative on the Sunrise Commission and its chief petroleum negotiator, Francisco da Costa Monteiro, said in an interview published in *The Australian* on 10 March 2011 that his country would seriously consider terminating the treaty at the first opportunity, February 2013, if the dispute remained unresolved. Mr Monteiro said the Dili government would take into account ‘all consequences’ of ensuring Sunrise gas was piped to Timor-Leste, ‘even be it a breaking-up of the treaty. Any treaty must ensure the two sides are happy, but at the moment Timor Leste is not happy and I speak not just as a commissioner but for all Timor Leste citizens’.³⁸⁸

Woodside chief executive Don Voelte used his last annual general meeting with the company to express dismay at the stalemate with the Timor-Leste government. He said Woodside had ‘done everything right’, abiding by a process set up by the East Timorese and Australian governments. But efforts to secure a meeting with the ‘guy that’s stopping this’—East Timor Secretary of State Agio Pereira—had so far failed. ‘Something’s broken and I’m really disappointed,’ Mr Voelte told reporters after the meeting in Perth on 19 April 2011.³⁸⁹ He said: ‘For a government that was such great freedom fighters, ten, eleven, twelve years later now, what’s the measurement of this government on nation building? Just what have they done in this area? By objecting to Sunrise being built, they must be objecting to promoting the quality of life and improving the livelihood of their people and I don’t get it, I just don’t understand it’.³⁹⁰ In response, Mr Pereira described Mr Voelte’s comments as ‘ill-suited and inappropriate’, and defended Timor-Leste’s development since the nation gained independence in 2002. He said despite Mr Voelte’s claims that Woodside had done everything right, project delays occurred because of non-compliance by the company on certain issues. One of the most significant of these was caused by Woodside’s reluctance to prepare and deliver the development materials as required by the regulator: ‘Issues around which development option constitutes best commercial advantage and best oil field practice as required by the treaties continue to be considered by Timorese and Australian regulators’. Mr Pereira said it was his government’s ‘commitment to promoting quality of life and improving the livelihood of the Timorese people’ that drove the desire to pipe Sunrise LNG the short distance to the shores of Timor-Leste. That desire was deeply held by all political parties and sectors of Timorese society, he said.³⁹¹

Mr Voelte’s successor as Woodside’s chief executive, Peter Coleman, adopted a more conciliatory approach. In August 2011, Timor-Leste’s State Secretary for Natural Resources, Alfredo Pires met Mr Coleman, and it was understood the two parties subsequently held further talks. Mr Pires said in Timor’s national parliament

387. Matthew Stevens, ‘Squabble darkens Sunrise outlook’, *The Australian*, 5 February 2011.

388. Peter Alford, ‘Floating Processing Plan Deadlocked East Timor ups ante in LNG dispute’, *The Australian*, 10 March 2011.

389. Rebecca Le May, ‘Woodside asks East Timor for Sunrise talks’, *AAP Bulletins*, 20 April 2011.

390. David Weber, ‘Don Voelte emotional and outspoken at final Woodside AGM’, *PM* (Australian Broadcasting Corporation), 20 April 2011.

391. Lindsay Murdoch, ‘East Timor rejects criticism from Woodside’s chief’, *The Sydney Morning Herald*, 25 April 2011. ‘Timor-Leste: Governo rejeita críticas da Woodside e diz que basta olhar para Darwin para ver a melhor opção’, *Agência Lusa*, 23 April 2011.

that, while encouraged by comments by Mr Coleman indicating support for piping the gas to Timor, the Timor-Leste government would only support the project on this basis. Woodside officials were cautious in responding to Mr Pires's comments, saying that all parties were keen for the project to proceed. 'Woodside strongly believes it is not beyond all of us to find a solution to the current impasse', a spokesman said. 'Woodside recognises that the Sunrise joint venture's preferred development concept differs from that of the Timor-Leste government's. We are not underestimating the difficulty of working through this process but we do believe that ... it is possible'.³⁹²

In February 2012, the government of Timor-Leste passed a resolution to form an inter-departmental working group co-ordinated by the Ministry of Foreign Affairs to 'de-limit the maritime border of Timor-Leste'. The working group would be provided with the technical equipment and resources necessary to determine the boundaries 'as well as the legal instruments necessary for the delimitation of the country's maritime border'. The working group's findings would be used to help conclude an internal ratification process for the United Nations Convention on the Law of the Sea, which Timor-Leste would like to sign and ratify. Two more possible reasons for the government taking this action on its boundaries were first, that there was an unresolved maritime boundary issue with Indonesia, which was more complex than the Australian boundary; and second, that the CMATS Treaty could lapse within a year if the Woodside-led Sunrise gas project was not approved by the Timor-Leste and Australian governments. If it lapsed, Timor-Leste wanted to be ready to engage with Australia on maritime border negotiations that had been suspended as a condition of the treaty. With national elections due in 2012, the government also needed to show that it was taking action on the maritime issue.³⁹³

In an address during the swearing-in of the new government in Dili on 8 August 2012 following the July 9 parliamentary elections, newly re-elected Prime Minister Gusmão said the development of an oil and gas sector on the south coast would remain a priority. 'The government is committed to bringing the pipeline from the Greater Sunrise field to the south coast of Timor-Leste', he said. 'Let's prove to the world that a pipeline to Timor-Leste is a safe and economically viable solution and that our horizon is the development of a petroleum industry able to provide direct economic dividends for our population'.³⁹⁴

Mr Gusmão's comments underlined the challenge for Woodside, the Timorese and Australian governments to reach an agreement on the stalled project before the 23 February 2013 deadline. Some observers suggested the Timor-Leste government might be willing to compromise and accept a floating plant in return for support by the venture to develop gas-based energy infrastructure in East Timor and a petroleum supply base. But Mr Gusmao's comments signalled that any such compromise, if it could be reached, was a long way off. Woodside argued that building an LNG plant in East Timor would add \$US5 billion to costs because of the technical complexity of building a pipeline across the Timor Trench and the lack of skilled labour and infrastructure in East Timor. The Timor-Leste government objected to a floating LNG plant, saying the technology was unproven and risky. Woodside had dropped any

392. Brian Robins, 'Talks spark hope for Timor gas', *The Sydney Morning Herald*, 19 November 2011.

393. Russell Searancke, 'Timor-Leste sets up group to look at maritime borders', *Upstream*, 10 February 2012.

394. Angela Macdonald-Smith, 'Timor sticks to onshore plant stance', *The Australian Financial Review*, 11 August 2012.

timetable for developing Sunrise, but a Citigroup energy analyst was reported as saying the earliest the project could go ahead was late 2014, with start-up in 2020.³⁹⁵

In answer to a question asked in the Senate on 7 February 2013, Minister for Foreign Affairs Senator Bob Carr confirmed that agreement had been reached by the Sunrise Commission late in 2012 to conduct an independent reserve estimate study, which was under way. Detailed discussions had been held between experts of the two governments and the joint venture on the complex legal, technical, commercial and political issues involved. Australia had not yet come to a final position on its preferred development concept. More work needed to be done before that point was reached. Senator Carr said: 'We are strongly committed to working with Timor-Leste to enable the development of the Greater Sunrise resource to the benefit of both countries. We have received, however, no indication from Timor-Leste that would suggest CMATS would be terminated'. He said that Australia was committed to supporting Timor-Leste's economic development, and noted that revenues from oil and gas had made a significant contribution to that country's progress to date and that Australia would expect that to continue.³⁹⁶

During 21-22 February 2013, Australian Resources and Energy Minister Martin Ferguson held a series of meetings in Dili with Timorese ministers, including Minister for Petroleum and Natural Resources Alfredo Pires. The talks covered Sunrise, as well as the CMATS treaty. After meeting with Mr Ferguson, Mr Pires raised the possibility of Timor-Leste developing Sunrise without the Woodside venture: 'Maybe we'll decide unilaterally, but we have to decide with the Foreign Affairs [Department] of Australia'. Radio Timor-Leste also cited Mr Pires saying the treaty would be continued even if its conditions had not been fulfilled by 23 February, 'to defend national interest'. Woodside Petroleum chief executive Peter Coleman said: 'I think there's a 12-month window for us to make some really significant progress on Sunrise... If you move from a floating solution to an onshore solution then there are certain fiscal arrangements that change and each of the parties, which include both governments, need to work through those arrangements and understand what they look like'.³⁹⁷

The future

Since 1965, Australian governments have pursued the receding horizon of an agreed international boundary along the line of the Timor Trough. A significant first step toward achieving this was gained when Indonesia agreed to a seabed treaty in 1972. In the succeeding thirty-five years the trend has set very much against Australia gaining its desired outcome. The successive rulers of East Timor—Portugal, Indonesia, the United Nations, and now the elected government of an independent country—have all insisted on a maritime boundary along lines of equidistance. Australia has been successful to the extent of achieving, in the 1989 Timor Gap Treaty and in the 2002 Timor Sea Treaty, an interim arrangement which allows exploitation of the oil and gas resources to proceed. This has been at the cost of having an unresolved dispute with East Timor and potentially with Indonesia.

395. Angela Macdonald-Smith, 'Timor sticks to onshore plant stance', *The Australian Financial Review*, 11 August 2012.

396. *Senate Hansard*, 7 February 2013, p.53.

397. Angela Macdonald-Smith, Woodside hopes for Sunrise deal within one year, *The Australian Financial Review*, 25 February 2013.

Believing it has international law and justice on its side, East Timor will continue to pursue its claim and will seek the support of other nations.³⁹⁸ 'It is a struggle to control our maritime resources, just as in the past it was a struggle for land,' Dr Alkatiri said addressing East Timor's parliament on 26 May 2003, 'We may be small, but we hold firm principles, we have the law on our side and we have many friends'.³⁹⁹

The Australian Government is bound to act in the best long term interests of Australia, and that is best served by policies that are in accord with international law and equity. A fair border in the Timor Sea is in the best long term interests of Australia. The current, essentially belligerent, stance taken by the Australian Government (which has been taken consistently by all Australian governments since 1965) is contrary to the national interest (though it might be favourable to some particular interests). Political scientist Dr Peter Quiddington has commented: 'By playing hardball in negotiations over sharing oil and gas in the Timor Sea, Australia has undermined trust and confidence.' Referring to the invitations that had been extended to resources companies from China and Malaysia to examine the Greater Sunrise field, Dr Quiddington said: 'It is little wonder China has inveigled its way into negotiations over joint operations to develop these resources.'⁴⁰⁰ The Timor Sea and CMATS Treaties, if they succeed, together form an ingenious device for procrastinating, passing on to a later and perhaps wiser generation of statesmen and diplomats the responsibility for reaching a settlement on a maritime boundary between Australia, Indonesia and East Timor.

The Australian Opposition/Australian Labor Party policy on the Timor Sea Treaty adopted in April 2007 stated:

Labor recognises the Treaty signed by Australia and Timor Leste on Certain Maritime Arrangements in the Timor Sea and the provision of the Treaty that neither party will pursue its claims to sovereign rights and jurisdiction and maritime boundaries for the period of the Treaty. Labor recognises that the people of Timor Leste have the right to secure, internationally recognised borders with all neighbouring countries. Labor will negotiate in good faith with the Government of Timor Leste, in full accordance with international law and all its applications, including the United Nations Convention on the Law of the Sea. Labor believes that the conclusion of the maritime boundary should be based on the joint aspirations of both countries.

The costs of allowing an unresolved boundary dispute to fester may turn out to be unexpectedly high. The Minister for National Development, David Fairbairn, argued unsuccessfully in a November 1965 Cabinet submission in favour of falling back to the median line, for the following reasons:

The time will almost certainly come (and probably quite soon) when depths as great as those of the Timor Trough will be exploitable. It will then be possible to argue that there is a common continental

398. Jill Jolliffe, 'East Timor says China is its closest ally', *The Sydney Morning Herald*, 10 July 2002. See also Kate Reid-Smith, "Crocodile Oil: Dragon's Treasure—a Possible Future Southeast Asian Geopolitical Diaspora", in Dennis Shoemsmith (ed.), *Crisis in Timor-Leste: Understanding the Past, Imagining the Future*, Darwin, Charles Darwin University Press, 2006, pp.65-73.

399. 'Parlamento aprova legislação tributária para Mar de Timor', *Lusa*, 26 Maio 2003.

400. Peter Quiddington, 'East Timor's big, dopey neighbour needs to wake up', *The Sydney Morning Herald*, 11 September 2009.

shelf between Australia and Timor and that therefore the applicable international rule is the median line. Whether or not this claim would be legally correct is not the critical matter. Such a claim could nevertheless be maintained by Indonesia. And it could be supported by a 'confrontation' policy consisting of the issue of permits and authorities either to Indonesian or foreign oil search organizations, and the physical implementation of those permits and authorities. Such a situation could thus face us with a decision whether to go to war with Indonesia over a doubtful claim (perhaps for the benefit of a foreign oil company) or whether to repudiate our responsibilities to the people who had taken action and incurred great expenditure in good faith under our grant.⁴⁰¹

Fairbairn was overruled, the Cabinet preferring the advice of the Attorney-General, B.M. Snedden, to the effect that it was more advantageous to stake a claim in the disputed area and then defend it against any challenges. Snedden observed that Australia's claim had not been challenged in the two years since it had first been asserted and that 'jurisdiction asserted without challenge constitutes a powerful claim in international law'.

It is in Australia's long term interests to seek a stable maritime boundary based on current international law and equity—a median line boundary. The alternative, current Australian Government's policy will expose us to the kind of risks, *mutandis mutandis*, outlined so prophetically by David Fairbairn in 1965.

The non-fulfilment of one of the conditions of the CMATS Treaty, the failure to achieve a jointly approved development plan for the Greater Sunrise gas project by 23 February 2013, provides an opportunity to resume negotiation of a maritime border with Timor Leste, which must include Indonesia to settle the junction points of the border. An agreed border would, among other desiderata, allow exploitation of the gas and oil reserves of the Timor Sea to proceed.

401. Cabinet submission No.1165, 'Off-Shore Petroleum', 25 November 1965, National Archives of Australia, NAA A1838/1, 752/1/23, pt.1, pp.8-9.