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Australia - Indonesia Maritime Boundaries

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Abstract

The seas between Australia and Indonesia represent the largest area where the maritime zones of Australia overlap with those of another state and as events over the past 25 years have revealed the delimitation of the maritime boundaries between Australia and Indonesia have increased in importance to Australia both economically and politically.

Australia and Indonesia have conducted a number of negotiations on maritime boundaries since the late 1960s. This paper explores two of the treaties, namely the Timor Gap Treaty and the 1997 Treaty and concludes with a discussion that connects the issue of maritime boundaries with Australia's ongoing relationship with Indonesia and why maritime boundary issues play a significant part in Australia's ongoing foreign policy decisions in relation to Indonesia.

Australia - Indonesia Maritime Boundaries

The seas that lie between Australia and Indonesia are said to form part of one of the largest maritime areas where the zones of Australia overlap with another state. This makes the delimitation of these maritime zones an important issue both politically and economically for Australia's relationship with Indonesia. The seas between Australia and Indonesia particularly the Arafura and Timor Seas are potentially resource rich in terms of fishing resources, hydrocarbons, oil and gas. In addition, Indonesian seas represent the areas through which sixty per cent of Australia's exports pass and therefore of strategic importance to Australia.

The maritime treaties with Indonesia are an important aspect of both Australia's Ocean Policy and Foreign Policy. Both states have shown an ability to develop creative solutions to maritime delimitation problems over the past 25 years. While some of the content was not mutually beneficial to both states the outcomes of the Timor Gap Treaty and the 1997 Treaty certainly delivered solutions that not only produced successful outcomes for the benefit of both parties, but were also successful in maintaining cooperative working relations between the two states. While the negotiating positions of the two parties seemed to remain far apart, the creation of the Joint Development Zone in the Timor Gap Treaty and overlapping jurisdictions in the 1997 Treaty were innovative solutions, when agreement on a single delimitation boundary was never likely to be achieved. It cannot be denied that the motivation behind these solutions were principally driven by the potential and existing resources of the areas of the sea under negotiation, however both the negotiations and the outcomes produced positive results for the ongoing bilateral relationship.

Delimitation of maritime zones is a relatively new phenomenon in terms of international law. The purpose of delimitation is to identify the jurisdictional regimes of each state in terms of the ocean, both the water column and the seabed, and airspace. In this paper I explore two of the maritime boundary treaties that have been established between Australia and Indonesia in terms of fulfilling Australia's Ocean Policy and its wider strategic and political objectives of building bilateral relations with Indonesia. The governments involved have been particularly 'upbeat' over the negotiations of these two maritime treaties with Indonesia, viewing the Timor Gap Treaty and the 1997 Treaty as innovative and developing creative solutions over what had become to some degree a diplomatic impasse. There is evidence to suggest that even though the motivations of the Australian government may have been economic the negotiation of the Timor Gap Treaty and the 1997 Treaty produced a much more cooperative relationship between the two states. *(A Map showing the consolidated position of all the agreements and treaties follows the text of this paper.)

Timor Gap Treaty¹

The emerging need for Australia in the 1970s and 1980s was for the exploration and the exploitation of potential resources in the Timor Gap, and to finalise the gap in the seabed boundary that was omitted from the 1972 Agreement.² The gap represented the area between Australia and East Timor, which was under Portuguese rule, and became known as the Timor Gap. It was an area of approximately 130 nautical miles. While Australia made attempts in the

¹ The full name of the treaty is *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*. Hereinafter referred to as the Timor Gap Treaty or treaty.

² Two previous maritime delimitation boundary agreements had been negotiated with Indonesia. The 1971 Agreement was a seabed boundary in the Arafura Sea that delimited an area west of Cape York and to the north of Arnhem Land. The 1972 Agreement was also a seabed boundary that begins in the Arafura Sea where the 1971 Agreement had stopped and progresses along the southern side of the Timor Trough (this is an area that lies approximately 40-60 nautical miles off the island of Timor) to a point near Ashmore and Cartier Islands. There is an interruption in the boundary line that reflected the portion of the island of East Timor, which in 1972 was under the jurisdiction of Portugal.

early 1970s to negotiate with Portugal over the Gap, Portugal believed that East Timor was a low priority and was willing to await the outcome of the delimitation of maritime boundaries between adjacent states, which was before the Third United Nations Convention on the Law of the Sea in 1982 (UNCLOS) (Suter 1993, 299). This convention set out the text for the International Law of the Sea.

The Indonesian invasion of East Timor in 1975, followed by Australia's *de jure* recognition of Indonesia's incorporation of East Timor, left the path open for Indonesia and Australia to negotiate over the seabed boundary of the Timor Gap. Without *de jure* recognition being given Australia was unable to negotiate with Indonesia. *De jure* recognition was accorded to Indonesia by Australia in 1979 and Australia commenced formal negotiations with Indonesia, in relation to the seabed boundary in the Timor Gap, at this time.

Following nine rounds of negotiations, Australia and Indonesia were unable to agree on a permanent delimitation of the seabed boundary in the Timor Gap due to the different views as to the principles of international law governing maritime boundaries adopted by the two states (Stepan 1992, 919; Willheim 1989, 825). The different positions taken expressed quite opposing views as to where the seabed boundary should be drawn. Australia believed that the existence of the Timor Trough was a geophysical feature that created a divide between the two continental plates. They were basing their argument on the principle of natural prolongation and that the Timor Trough created the natural boundary of the continental shelf. Australia relied on the 1958 Continental Shelf Convention, which 'maintained the depth/exploitability criteria' and on the 'maintenance of physical criteria for delimiting the continental shelf at UNCLOS III' (Kaye 2001, 67). In addition, the rulings of the International Court of Justice (ICJ) had also reinforced Australia's position. In 1969, the Federal Republic of Germany, Denmark

and the Netherlands brought before the ICJ the need for clarification of the boundaries of their continental shelves in the North Sea. This was known as the *North Seas Continental Shelf Cases* and in making its decision the ICJ favoured delimitation on the basis of natural prolongation of the landmass of the coastal state (Prescott 1993a, 1211; Kaye 2001, 15 & 49). Australia believed that the geophysical feature of the Timor Trough was evidence of the existence of two continental shelves in the Timor Sea and therefore in accordance with the principle of natural prolongation the delimitation boundary 'should accord with a line approximating the axis of the Timor Trough' (Schofield 2007, 191). The principle of natural prolongation was the basis of the 1972 Agreement between Australia and Indonesia.

Indonesia adopted quite an opposite view to Australia. First, while Indonesia had signed the 1958 Continental Shelf Convention it had never ratified it and therefore could not be obligated to comply with the Convention. Second, since the negotiations of the 1972 Agreement, the principle of natural prolongation had been questioned in cases brought before the ICJ. This had created a sense of ambiguity in terms of the principle of natural prolongation in international law. Third, Indonesia maintained that every coastal nation was entitled to a continental shelf of 200 nautical miles irrespective of whether the continental shelf exists or not. Where the two coastlines are less than 400 nautical miles apart than a median line or the principle of equidistance is the appropriate measure to determine the seabed boundary.³

Australia did not accept the median line view, maintaining that Article 76 of UNCLOS was '...that the coastal nation was entitled to exercise jurisdiction over its continental shelf throughout its natural prolongation' (Suter 1993, 300), and that where the continental shelf is less than 200 nautical miles, the coastal nation is entitled to seabed jurisdiction to 200 nautical

³ For a full discussion of the Indonesian and Australian negotiating positions see Prescott, 'Australia-Indonesia (Timor Gap)', pp. 1252-53, Wilhelm, pp. 826-31, Kaye, pp. 67-69, Rothwell, p. 43, Suter, pp. 299-300 and Stepan, p. 919.

miles. Australia took the view that the theory of natural prolongation of the continental shelf was maintained in Article 76 and gave primacy over equidistance.

An impasse was created as neither state wished to give away their positions as to where the delimitation boundary should be and there was little evidence that decisions coming out of the ICJ could provide resolution. In addition neither party had revealed any inclination to have the issue resolved by a third party, as there was too much uncertainty for both parties as to the outcome of any third party deliberations. With this stalemate between the parties a Joint Development Zone (JDZ) was suggested in the negotiations in 1984. Though the option of a JDZ can be fraught with difficulties it was however a very real alternative to allow both parties to explore and share the resources that were evident within the area of the Timor Sea covered by the Timor Gap, particularly where permanent delimitation could not be agreed upon. The initial reaction of the Indonesian negotiators was less than enthusiastic, however in October 1985 the two states had agreed in principle to consider a JDZ as an alternative approach to allow the Timor Gap to be developed. It was understood by both parties that the provisions would be temporary and were without prejudice to any delimitation of the seabed in the Timor Gap. The negotiation of the boundaries of the JDZ took some time however in 1988 an interim agreement was signed. This committed both states to reaching a final agreement within a year and in 1989 the legal regime and terms and conditions of the JDZ were concluded (Willheim 1989, 831; Kaye 2001, 69-70; Campbell 2000, 60-61).

The *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia* was signed between Ali Alatas, the Indonesian Foreign Minister, and Gareth Evans, the Australian Foreign Minister, on the 11 December 1989 in a plane flying over the Zone of Cooperation in the Timor

Gap and came into force on the 9 February 1991. The Timor Gap Treaty was a comprehensive international legal document which divided an area of some 60,000 square kilometres of the Timor Sea into a Zone of Cooperation (ZOC) which had three areas A, B and C. The preamble to the treaty reinforced the position in relation to exploration and exploitation in which it said, 'desiring to enable the exploration for and exploitation of the petroleum resources of the continental shelf' and 'encourage and promote development of the petroleum resources of the area' and 'desiring that exploration and exploitation of these resources proceed without delay' (Timor Gap Treaty 1989).

The boundaries of the ZOC reflected the positions taken by both Indonesia and Australia in the negotiations. The area of the ZOC was a 'coffin-shaped zone' which involved an area of approximately 16,129 nautical square miles (Prescott 1993b, 1246). Area A was the largest area and was to be administered by both Australia and Indonesia. Area B was to the south of Area A and under Australian jurisdiction. In determining the line between Area A and Area B, Indonesia's argument of a median line was used and therefore this line is the median line between the two coasts. The bottom of Area B reflected Indonesia's claim of a maximum of 200 nautical miles from the coast of East Timor, which under international law would be the claim for Indonesia's Exclusive Economic Zone (EEZ).⁴ The area to the north of Area A was Area C and under Indonesian jurisdiction. The line between Area A and Area C was 'marked by a simplified representation of the 1500 meter isobath' (Prescott 1993b, 1251). The northern line of Area C reflected the Australian view as to where the boundary should be based on the axis of the Timor Trough (Prescott 1993b, 1248-51; Campbell 2000, 62).

⁴ Under UNCLOS III an Exclusive Economic Zone (EEZ) maritime zone was created which gave exclusive rights to a coastal state to exploit for economic reasons the seabed and the water column out to a distance of 200 nautical miles from the baseline.

The Timor Gap Treaty stated that Area B would be administered under Australian jurisdiction where Australia had agreed to give Indonesia 16% of the tax revenue from petroleum.⁵ Area C was under the jurisdiction of Indonesia where Indonesia had agreed to give Australia 10% of the tax revenue from petroleum (Timor Gap Treaty 1989, Article 4). Area A was to be under joint jurisdiction between Australia and Indonesia where both states would share management, exploration and exploitation. This area was to be 'sovereignty neutral' (Campbell 2000, 63). A fundamental feature of the treaty was that Area A was under:

...joint control by the Contracting States of the exploration for and exploitation of petroleum resources, aimed at achieving optimum commercial utilization thereof and equal sharing between the two Contracting States of the benefits of the exploitation of petroleum resources, as provided for in the Treaty (Timor Gap Treaty 1989, Article 2 Clause 2 (a);

The Timor Gap Treaty established a Ministerial Council which had the task of overseeing the operation of the Timor Gap Treaty relating to the exploration and exploitation of petroleum resources in Area A and its roles are stated in Part III of the Treaty. The Ministerial Council was to meet annually and had 'overall responsibility for all matters relating to the exploration for and exploitation of the petroleum resources in Area A of the Zone of Cooperation' (Timor Gap Treaty 1989, Article 6 Clause 1). In addition the treaty detailed a list of functions including management of the Joint Authority. Part IV of the treaty established a Joint Authority under the authority of the Ministerial Council. The Joint Authority was responsible for all matters relating to oil contracts, regulation and production of petroleum resources in Area A. Decision making within both the Ministerial Council and Joint Authority was to be made by consensus and all

⁵ Some texts state that this is 10% however 10% represents the gross amount. The 16% figure represents the net amount. For clarification the wording of the Timor Gap Treaty, Article 4.1.(b) is 'pay to the Republic of Indonesia ten (10) per cent of gross Resource Rent Tax collected by Australia from corporations producing petroleum from Area B equivalent to sixteen (16) per cent of net Resource Rent Tax collected, calculated on the basis that general company tax is payable at the maximum rate.'

legal aspects were under both Indonesian and Australian legal requirements (Timor Gap Treaty 1989, Articles 3, 5, 7 & Part VI). The terms and conditions represent the complete cooperation between the two countries with neither party in the negotiations allowing any advantage to be given to the other party.

Gareth Evans, the then Australian Minister for Foreign Affairs, proclaimed the Timor Gap Treaty as:

an outstanding example of an innovative approach to what seemed an insoluble problem, addressing as it does the issue of undefined boundaries by creating a framework in which we could jointly explore for, and develop resources, for the benefit of both our countries (Cited in Haigh 2001, 63).

It represented an extraordinary initiative and major breakthrough in the stalemate that had been created in negotiations over a long period of time due to the inability of the two parties to agree on the delimitation boundaries. It appears that it was 'the most comprehensive such treaty in existence' (Prescott 1993b, 1253).

Henry Burmester, one of the negotiators to the Timor Gap Treaty, described the joint development as:

a significant achievement as....it seeks to achieve true joint development and control and does not adopt by means of sub-zones or other mechanisms a scheme whereby joint development really means development under the control of one country with simply some mechanism for sharing the financial return (Burmester 1990, 16).

The Timor Gap Treaty was an outcome of real joint development that required both parties to work cooperatively and towards conciliatory outcomes to ensure the larger goals of exploration and exploitation were achieved.

Australia's primary motivations behind the settlement of the Timor Gap Treaty have provoked differences of opinions between commentators since its conclusion. Some suggest that economic motivations drove the negotiations of the Timor Gap Treaty, while others suggest that the relationship with Indonesia was the main motivation. In *Indonesia's Forgotten War*, Taylor (1991, 171) notes that from 1986 the Australian government had already received some A\$31 million from the sale of oil permits to companies. In a speech made by the Australian Foreign Minister Bill Hayden to the Joint Services Staff College in April 1984 he says:

There is as you know a large gap off East Timor in the sea-bed boundary. In that gap are positioned 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, and yet the implication of the negotiations is that as the area open or undefined at this point is off East Timor, a certain recognition must be established to East Timor. For some people in my party who have expressed concern about the pressure of Indonesia on East Timor, this is a cold, hard, sobering reality that must also be addressed in respect of those other interests we must attend to (Canberra Times 18 April 1984 as cited in Taylor 1991, 171).

Taylor (1991) suggests that this speech could hardly have been more direct as to the intention of the Australian government. This though is hardly a new idea in terms of a growing policy assessment. In August 1975, Richard Woolcott, Australian Ambassador to Indonesia at the time, sent a cable to the Australian Department of Foreign Affairs in Canberra in which he suggests that the Minister for the Department of Minerals and Energy may have an interest in the Timor issue at that time (Way et al. 2000, 85). The resource potential within the Timor Gap

was already well known by Australian policymakers prior to Indonesia's incorporation of East Timor.

The opposition to the treaty mainly revolved around whether Australia had a legitimate right to negotiate with Indonesia over the Timor Gap. The question arose as to the legitimacy of Indonesia's invasion of East Timor in 1975 and its subsequent integration of East Timor and the lack of an act of self-determination. The opposition was concerned that Australia's *de jure* recognition of Indonesian sovereignty over East Timor was a violation of the rights of the East Timorese and it was *de jure* recognition that had enabled the negotiations of the Timor Gap to begin. The treaty resulted in two legal cases being brought against the government in addition to growing public opposition in Australia to the annexation of East Timor by Indonesia. It is important to note that the cases were not arguing as to the content of the treaty within international law, but rather that Australia's actions in negotiating with Indonesia rather than Portugal, were illegal within international law.

The first case was that of Portugal taking Australia to the ICJ over Australia's legitimacy in negotiating with Indonesia rather than with Portugal. Portugal maintained that it was the sovereign power of East Timor. The ICJ found that the decision sought from the Court by Portugal would necessarily require the Court to determine the rights and obligations of a third state, namely Indonesia, and assess the legality of the conduct of the third state, and this could not be made in the absence of Indonesia, which did not submit to the jurisdiction of the ICJ. The ICJ considered it could not separate the behaviour of Australia from the question as to the legitimacy of Indonesia's intervention in East Timor. This meant that Indonesian sovereignty over East Timor had to be examined in order to rule as to the legitimacy of Australia's behaviour. With the absence of Indonesia this could not be determined (Kaye 2001, 91).

The second case was *Horta v Commonwealth* brought by Jose Ramos Horta, an East Timorese activist, against the Commonwealth of Australia over the constitutional validity of the implementation of the *Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990*. The basis of this case was 'that the Treaty was void under international law and therefore could not form a constitutional basis for enacting the implementing legislation' (Campbell 2000, 65) under Section 51 (xxix) of the Constitution, 'external affairs'. The High Court rejected the argument brought by Horta by stating that the government did have the right to exercise legislation under external powers and that the Court could not rule on the basis of its legitimacy in international law.⁶ Both cases illustrate the opposition to the treaty, which had more to do with the legitimacy of Indonesia's actions in East Timor.

On the other hand there was a group that believed that the Timor Gap Treaty was a sign of a remarkable achievement between Australia and Indonesia that indicated the potential for the ongoing relationship between the two states. The Timor Gap Treaty as Evans (1989, 703) has discussed was the 'most substantial bilateral agreement concluded in the 40-year history of Australia-Indonesia relations'. It represented a triumph of creative solution over a diplomatic impasse and it personified in a very real and practical way the strong mutual political will that existed between Australia and Indonesia to work together as friends, neighbours and economic partners. Evans (1989, 703) goes on to say that it represents a significant achievement in finding a non-military solution to a problem that had historically created a conflict between the two countries involving the disputed boundary. He believed it was significant in demonstrating the level of maturity that had developed between Australia and Indonesia where neither country

⁶ For a more detailed discussion on the cases brought against Australia refer to the *Case Concerning East Timor (Portugal v Australia)* ICJ Reports (1995) 90, *Horta v Commonwealth* (1994) 181 CLR 183, Kaye, pp. 87-92 and Campbell, pp. 64-65.

sought to impose a unilateral solution but rather produce an agreement that was in the national interests of both countries.

There are further indications that it was the relationship between Australia and Indonesia that really drove the success of the Timor Gap Treaty. In the report from the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Australia's Relations with Indonesia* (1993, 190) it states that 'While there have been concerns raised about the signing of the Timor Gap Treaty, it represents a cooperative solution to part of the boundary and resource problems between Australia and Indonesia'.

The Timor Gap Treaty was driven by both the relationship with Indonesia and the economic resources that existed in the Timor Gap. While part of the preamble to the treaty suggests that the economic potential of the Timor Gap was the driving motivation behind the treaty, another section of the preamble also stated that the Treaty would 'contribute to the strengthening of the relations...' (Timor Gap Treaty 1989) between Australia and Indonesia. It would be fair to conclude that the major reason for negotiating the ZOC was to enable the exploration and exploitation of petroleum resources to progress as quickly as possible, particularly as Australia was being recommended to do so by oil interests. The potential of the area was reinforced by the development of an oil field, Jabiru, just to the west of the area of the gap and the potential of an area called Kelp in Area A (Prescott 1993b, 1249). In addition the delimitation of this area of the seabed was an issue that both countries wanted to resolve, as it had been outstanding since the 1972 Agreement.

Woolcott suggested a pragmatic approach rather than a moral one in 1975 and in this vein it is difficult to believe that the Australian government's major reason for the conclusion of the Timor

Gap Treaty was anything other than pragmatic, that is the resource potential in the Area, given the preamble to the treaty and the evidence of petroleum resources in the ZOC. While a creative solution was found of negotiating a ZOC, this established the need for complete cooperation between Australia and Indonesia on the management and operation of the ZOC, which enhanced the relationship between these two neighbouring states. One can only surmise that the strengthening of the bilateral relationship was an inevitable outcome and side benefit of the treaty rather than a driving motivation, however given the preamble there is also a suggestion that strengthening the bilateral relationship may have been a major reason in negotiating the treaty. While the Timor Gap Treaty was politically significant for Australia both in terms of developing a closer relationship with Indonesia and Australia's engagement with Asia, it was still a pragmatic solution to resolve economic issues. Australia believed that negotiations with Indonesia would produce a far more favourable outcome than negotiating with Portugal. Given the outcome of the 1972 Agreement there was little doubt to suggest that this was not an accurate assessment.

1997 Treaty⁷

On the 14 March 1997 Australia and Indonesia signed a treaty that completed a series of maritime boundaries between Australia and Indonesia that had begun with the 1971 seabed boundary. The 1997 Treaty brought to a close issues that had been between the two countries and on the negotiating table for over 25 years. It established what some consider to be one of the longest maritime boundaries in the world (Kaye 2001, 53; Prescott 2002, 2697). In a media release of the 13 September 1996, the Australian Foreign Minister, the Hon Alexander Downer, announced that the 1997 Treaty 'is a great achievement of which both governments can be

⁷ The full name of the treaty is *Treaty Between the Government of Australia and the Government of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries*. Hereinafter referred to as the 1997 Treaty or treaty.

proud' (DFAT 1996). In a further joint statement on the 14 March 1997 the Australian and Indonesian Foreign Ministers further announced that:

...finalisation of the seabed boundary provides a basis on which exploitation of natural resources can proceed in a climate of confidence and certainty. The agreement on the complete EEZ boundary between the two countries provides a clear foundation for the future management of fisheries resources and the protection of the environment (JSCT 1997, 21; Herriman and Tsamenyi 1998, 362).

The 1997 Treaty was a further example where the two states found creative solutions and developed a cooperative working relationship that served the mutual benefit of each party. The goodwill and cooperation that had been established through the negotiation of the Timor Gap Treaty gave the impetus for the conclusion of the 1997 Treaty. Both parties wanted to reach an outcome that was mutually beneficial that would result in both parties being able to explore and exploit the natural resources of the water column and the seabed. The outcome reached suggests that the economic goals of both states were influential in a desire to negotiate the treaty. The period of 1995/96 was also a time when both countries were experiencing good bilateral relations and therefore this was an opportunity where a mutually beneficial outcome may be produced. There was 'a recognition that in the interest of future good relations, the delimitation of maritime boundaries should be completed' (Prescott 2002, 2699).

There are a number of major provisions in the treaty.

1. The treaty affirms the 1971 and 1972 seabed agreements which established permanent seabed boundaries within the areas of the Arafura and Timor Seas. The 1972 Agreement produced a positive outcome for Australia, though Indonesia was not overly happy with the outcome of the 1972 Agreement.

2. The treaty reaffirmed the Timor Gap Treaty and specified in Article 8 that the treaty does not affect 'the rights and obligations of either Party as a Contracting State to the Zone of Cooperation Treaty' (1997, Article 8 Clause 1).
3. The treaty separated the EEZ into two zones by dividing the EEZ into a seabed EEZ and a water column EEZ, thus resolving the two different negotiating positions of Australia and Indonesia by dividing the seabed and water column into separate EEZ's. The resolution of separate EEZ's recognised Australia's position, which was to continue the seabed boundary as described in the 1972 Agreement on the basis of natural prolongation and Indonesia's desire for a more southerly boundary, based on a median line or the principle of equidistance. The boundary line in the treaty begins at the point in the Arafura Sea where the 1971 Agreement ends. It creates an overlapping jurisdiction between the seabed boundary that was determined in the 1972 Agreement and a boundary that effectively runs along the Provisional Fisheries and Surveillance Line that was negotiated as part of the Provisional Fisheries Surveillance and Enforcement Arrangements in 1981. Between these two boundary lines is an area of overlapping jurisdiction whereby the seabed boundary under the 1972 Agreement remains Australia's seabed EEZ and the new boundary line running along the Provisional Fisheries and Surveillance Line becomes Indonesia's water column EEZ (Prescott 2002, 2697-98, 2704, 2707; Kaye 2001, 54-5). The area in between these two lines, or what is known as the overlapping area, is where Australia has jurisdiction over the seabed and Indonesia has jurisdiction over the water column.

These are the areas in which Australia will exercise seabed jurisdiction, including jurisdiction over oil and gas reserves, while Indonesia will exercise jurisdiction in the water column, including jurisdiction over fisheries resources (JSCT 1997, 19).

This overlapping jurisdiction has the substantial advantage of permitting both states to retain some elements of their negotiating positions and yet reach a mutually acceptable solution.

- There is an argument that the separation of the seabed and water column within the EEZ could be in contention with UNCLOS, however the outcome of the treaty is not inconsistent with the convention. UNCLOS defines the EEZ as the seabed and the water column, though this does not exclude states from negotiating some other arrangements as Australia and Indonesia have done with the overlapping jurisdiction. Where there may be differences between the two parties over the overlapping jurisdiction, Article 7 of the treaty provides for the areas of overlapping jurisdiction, and the sovereign rights of each party over their respective areas of water column and the seabed. Under Article 7, Australia must give Indonesia three months notice of any proposed grant of exploration or exploitation rights. Indonesia must give Australia due notice in relation to the construction of a fish aggregating device and both countries are required to give due notice prior to the construction of any installation and structure in relation to their respective activities in the seabed and water column. Both countries must also agree to the construction of an artificial island. Article 7 concludes by stating that both countries shall cooperate in relation to the exercise of each states rights and jurisdiction over their respective EEZ's, however such exercise of rights is not to hinder the rights of the other state (1997, Article 7 Clauses (m) and (n)).
4. The 1997 Treaty extends beyond the 1972 Agreement, which stopped near the Ashmore and Cartier Islands. The Provisional Fisheries and Surveillance Line extended a provisional boundary around the Ashmore and Cartier Islands to a distance of 12 nautical miles. The 1997 Treaty extends this line to a radius of 24 nautical miles.

This was a considerable advantage for Australia as it increased Australia's fishing zone by approximately 1000 nautical square miles around the Ashmore Reef (Prescott 2002, 2704). It was also a triumph for Australia as Indonesia had maintained that the islands around the Ashmore reef 'were incapable of human habitation or an economic life of their own' (Kaye 2001, 56). In the course of the negotiations two delegations visited the islands and officials recognised that the islands were capable of habitation and as a result the arc extended an additional 12 nautical miles north around the islands.

5. Another important feature of the treaty was a new boundary that delimited 'the areas of seabed and EEZ belonging to Australia north of Christmas Island and to Indonesia south of Java' (Prescott 2002, 2698). The boundary represents a weighted median line, reflecting in part the different coastal lengths of Java and Christmas Island. The ruling from the ICJ in relation to *The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary Delimitation* influenced the parties to the negotiation, where the ICJ determined that different lengths of the two coasts represented a movement in the equidistant line (Prescott 2002, 2703). This boundary favours Indonesia, however Australia's negotiating position was that the loss in this area was set-off against the gains in the Timor Sea. The Australian position was that this was a good negotiating outcome due mainly to the fact that the seas 'north of Christmas Island are deep and have limited economic potential, whereas there is at least some for petroleum exploitation in the vicinity of the Ashmores and further west in the Browse Basin' (Kaye 2001, 57).

On balance most commentators and certainly government officials would suggest that the 1997 Treaty was a positive outcome in terms of Australia and Indonesia relations. Though the negotiating positions of the respective states were somewhat far apart, again the two

negotiating teams developed creative solutions through the splitting of water column and seabed jurisdiction to create a realistic and sensible modification for both parties. As the 12th Report from the Joint Standing Committee on Treaties notes in November 1997, 'the Treaty is a further boost to the broader bilateral relationship between Australia and Indonesia'. (JSCT 1997, 2) There were no obvious economic gains from the treaty however a general desire to explore and exploit the areas of the water column and the seabed for the benefit of each state was a major element in the negotiating positions and outcomes achieved. While Indonesia profited in terms of gaining approximately two-thirds of the water column and seabed north of Christmas Island and the 'conversion of most of the western sector of the provisional fisheries line to the status of an EEZ boundary' (Prescott 2002, 2705), this was set-off by Australia gaining seabed rights within the Indonesian EEZ boundary, particularly to the west of the 1972 Agreement. The treaty 'can be considered equitable for two reasons. First, [it was] freely negotiated by two governments during a period of cordial relations. Second, there were offsetting gains and losses of waters and seabed for both countries' (Prescott 2002, 2710-11).

While the treaty was applauded for its innovation there was another view of the treaty provisions that did not support the confidence in the treaty being expressed. The first of these is that while the treaty was signed on the 14 March 1997 the treaty has not been ratified and therefore not in force. The 12th Report from the Joint Standing Committee on Treaties (1997, 69) recommended that the 1997 Treaty be ratified and therefore there were no barriers that prohibited Australia from exchanging the necessary instruments for ratification. Following the events in East Timor in 1999 the treaty now cannot be ratified in its current form, as there are a number of references to the Timor Gap Treaty in the 1997 Treaty. As Indonesia's responsibilities over East Timor ceased in October 1999 the 1997 Treaty would need to be amended to remove the references to the Timor Gap Treaty.

Secondly, there have been questions raised regarding the areas of overlapping jurisdiction. Some would suggest that this was not anticipated by UNCLOS, and therefore 'the co-location of the EEZ of one state and the continental shelf of another' (JSCT 1997, 21) makes the meaning of several provisions of UNCLOS unclear. While Article 7 of the treaty provides for the rights and special arrangements of each party in relation to the overlapping jurisdiction, it is contended that it is silent on a number of matters that may be important to the operation of the treaty. These matters specifically relate to:

- whether there is any obligation on behalf of Indonesia to allow construction of *all* proposed Australian installations, which, whilst in contact with the seabed, must of necessity exist within the water column;
- whether Australia will be exempt from claims of compensation for lost fishing opportunities occurring as a result of activity associated with the exploration or exploitation of seabed resources;
- whether Indonesia is compelled to allow all proposed marine scientific research by Australia that is associated with the continental shelf;
- with respect to marine research, whether Australia has a duty to provide to Indonesia all of the information detailed at UNCLOS Article 248 and 249(1)(b), and, importantly, to comply with any or all of the other conditions stipulated at Article 249; and
- whether construction of Australian installations in the Indonesian EEZ will be exempt from any levy to provide contingency funds to compensate for possible harm arising from 'pollution of the marine environment' (JSCT 1997, 22).⁸

In addition to this there is also a suggestion that the treaty in essence allows Indonesia to enjoy:

⁸ These are the issues that Mr Herriman and Professor Tsamenyi argue in their submission to the 12th Report of the Joint Standing Committee on Treaties and can also be found, along with a broader discussion of these arguments in Herriman and Tsamenyi, pp. 361-96.

sovereign rights to explore, exploit, conserve and manage the marine living resources in the water column, while Australia cannot exercise its right to explore and exploit the seabed without giving rise to the possibility that Indonesia's interests are harmed by such activity (JSCT 1997, 22; Herriman and Tsamenyi 1998, 362).

Another concern raised is around the use of terminology and the terms in the treaty, 'seabed' and 'water column' which differ from the maritime zones described in UNCLOS as 'continental shelf' and 'EEZ'. Herriman and Tsamenyi (1998, 364) suggest that this is 'an over simplistic understanding of the nature of the ocean and international law of the sea'. They state that the EEZ described in Part V of UNCLOS is not strictly concerned with the water column but is concerned with both the water column and the seabed (JSCT 1997, 22-3; Herriman and Tsamenyi 1998, 364).

The final area of concern is that in the event that relations were to deteriorate between Australia and Indonesia, 'the Treaty is silent on matters that could be contentious and which might actually serve to aggravate relationship difficulties' (JSCT 1997, 23).

The Attorney General's Department challenged many of these claims and stated that 'the principles contained in UNCLOS were applied throughout the negotiation of the Treaty and the solution achieved is one which is equitable for both Parties' (JSCT 1997, 18). In terms of the areas of overlapping jurisdiction the Attorney General's Department argued that such a modification of a separation of the water column and seabed is permitted under UNCLOS (JSCT 1997, 23-4). In a further submission to the 12th Report this position had been endorsed where it was acknowledged that while the separation of the two zones is unusual 'such an arrangement has been expressly approved in *obiter* statements by the International Court of

Justice in the *Gulf of Maine Case*' (JSCT 1997, 19). In relation to Article 7 of the treaty the Attorney General's Department indicate that Australia has sole control over the construction of installations. Further, Australia is only required to give due notice of the construction of installations and structures and three months notice of any proposal granting exploration and exploitation rights. The Attorney General's Department stated that 'due' notice reflects the provisions in UNCLOS and an acknowledgement that there may be very little time from the decision to construct to the actual construction of any installations or structures. Further, they state that the three months notice period does not imply, and is not subject to, Australia needing Indonesia's permission to proceed, rather it is a period of notice of intent (JSCT 1997, 24). The Attorney General's Department further argue that in relation to marine scientific research that Australia has no obligation to obtain permission from Indonesia to carry out any such research (JSCT 1997, 24).

While the arguments raise important legal questions as to the provision of the treaty there is no conclusive evidence to confirm whether the provisions are adequate in dealing with any legal challenges to the treaty. On the basis that the treaty is not in force than this is yet to be determined and as the treaty would require modification these concerns may be purely conjecture.

There is little doubt that the treaty is a very innovative solution to what was a potential problem between the two states, namely the lack of certainty created by a lack of finality over the delimitation of the maritime zones, in particular in the Arafura and Timor Seas. Once again Australia and Indonesia have shown their ability to find creative solutions to the mutual benefit of both parties. However, given that the treaty has not been ratified there is a certain lack of finality between the two states as to delimitation. The treaty in its present form could now not

be ratified. The treaty would have to be amended to delete the references to the Timor Gap Treaty and there is little evidence to show that negotiations are taking place or will take place in the near future. A decade has now passed since the signing of the 1997 Treaty. One can only conclude that this is not an urgent matter requiring government attention. The exploration and exploitation of the seabed has progressed and to date there seems to be little political crisis that has hindered this progression.

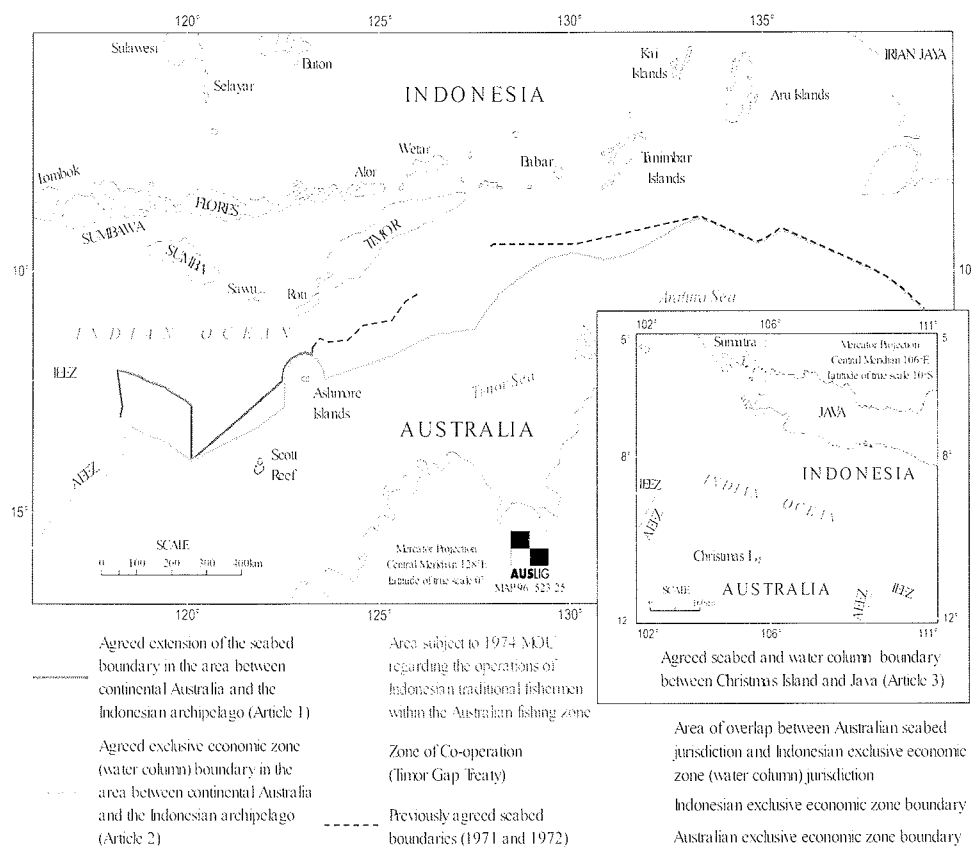
If the amendments were to occur as mentioned previously then there are still questions as to the legal implications of Article 7. If Article 7 as it is written does not give sufficient legal assurance to Australia then in effect Australia may have negotiated a position whereby its jurisdiction over the seabed in the overlapping areas may require Indonesia's approval for any exploration or exploitation of the seabed resource. If this legal argument was correct then Indonesia could, if it wanted too, cause considerable problems for Australia. The treaty relies very heavily on the two states maintaining good relations and given the record of relations between the two states over the past 60 years this cannot be guaranteed. We would have expected the 1997 Treaty to be ratified in 1998, particularly following on from the recommendation in the 12th Report from the Joint Standing Committee on Treaties, however relations between the two states had begun to deteriorate over East Timor and one can only conclude that this was the reason for the lack of ratification. While Australia had maintained cordial relations through the negotiations of the Timor Gap Treaty and the 1997 Treaty, the East Timor issue has been one issue that has caused problems in the bilateral relationship over a 25 year period. Given the events since 1999 the issue of East Timor may have been overcome in the long-term however we cannot rely on this being the only issue that may disturb the bilateral relationship in the future.

An underlying issue in terms of the treaty and any future amendments to it relates to East Timor. On the 12 January 2006 East Timor and Australia finally concluded the *Treaty on Certain Maritime Arrangements in the Timor Sea*, (CMATS Treaty) coming into force in February 2007. Of particular note is that the CMATS Treaty does not delimit a maritime boundary between Australia and East Timor, rather 'it provides for an additional practical resource-sharing agreement', which is 'without prejudice to either side's claims to maritime delimitation' (Schofield & Made 2007, 74). Why did Australia not agree to a delimitation boundary with East Timor? Australia was concerned with the broader political and strategic implications that such a boundary may provoke. In particular, they were reluctant to negotiate a delimitation boundary based on the principle of equidistance, which was the favoured position of East Timor. Australia's concern was that even though the existing maritime boundary treaties with Indonesia are binding, any agreement as to equidistance might well initiate an attempt by Indonesia to renegotiate the agreements already in place, particularly since the 1997 Treaty had not been ratified (Schofield and Made 2007, 73). This had the potential to disrupt an improvement in bilateral relations following the disruption caused by Australia's actions in relation to East Timor in 1999. The period of the negotiations of the CMATS Treaty was a time when there was, and is now, a high priority on rebuilding relations with Indonesia. As Alexander Downer stated in 2004, Australia had no desire 'to "unscramble the omelette" of all its previously agreed boundaries with neighbouring states in the region'.⁹

The negotiations and the outcomes of both treaties produced positive benefits for both states, both economically and in terms of a stronger bilateral relationship. Given this it is difficult to comprehend that 'An Inquiry into Australia's Relationship with Indonesia' by the Joint Standing Committee on Foreign Affairs, Defence and Trade, titled *Near Neighbours – Good Neighbours*

⁹ Part of this quote was a comment made at a symposium on 'Strategic directions for Australia and the Law of the Sea' held at the Australian Department of Foreign Affairs and Trade, Canberra, 16 November 2004, cited in Schofield and Made, p. 74

(2004) has very little mention of the role that the treaties have played in the building of the relationship, or how the renegotiation of the amendments to the 1997 Treaty could improve the relationship. While the inquiry cannot detail every relationship between the two states, given the 'upbeat' government response to both the Timor Gap Treaty and the 1997 Treaty one would expect that the treaties would have been mentioned in terms of the positive outcome they have contributed toward the bilateral relationship and the potential any future negotiations on maritime delimitation have to do so again. The importance of this is unclear. However, it does raise a question as to why the treaties are not mentioned in the inquiry given the importance both the Keating and Howard governments placed on the outcome of the treaties. One can only assume that since the conclusion of the 1997 Treaty and the resulting decline in the bilateral relationship over the issue of East Timor the positive developments that improved the relationship through the negotiation of these treaties have been overlooked. In the final analysis one can only conclude that as much as the developments between the two states in terms of maritime delimitation boundaries have produced positive results for the bilateral relationship in the past, other issues that exist outside the negotiations will inevitably have a bearing not only on the bilateral relationship but also on the content of any future delimitation boundary negotiations.



Map 5 - Consolidated depiction of all Australian-Indonesian maritime boundaries after entry into force of the Treaty

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