

# Australia and East Timor during the Howard Years: An International Law Perspective

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## I. Introduction

A significant international event during the life of the Howard government was the emergence of an independent East Timor. The troubled former Portuguese territory had been under Indonesian control since its occupation by the Indonesian army in 1975, and few would have predicted in 1996 when the Howard government was elected that within seven years Timor-Leste<sup>1</sup> would be an independent state and the subject of the largest Australian military effort since the Vietnam War.

This article considers the principal aspects of Australia's interaction with East Timor during the Howard years: the role of Australia in East Timor's independence; and the negotiation of a new regime for petroleum exploitation on the continental shelf between Australia and Timor. Both are examples of an essentially Australian foreign policy, where the interests and pressures of Australia's allies abroad exerted little impact upon government policy: something for which the Howard government was often not, in the popular mind at least, known for pursuing.

## II. Australia's Role in East Timor's Independence

In 1996, Australian policy towards East Timor was essentially as it had been since the late 1970s. After the Portuguese abandoned their colony in the first half of 1975, a civil war in East Timor ensued between different political groups in the territory, culminating in a declaration of independence and the military intervention of Indonesia.<sup>2</sup> On 7 December 1975, the Indonesian army crossed into East Timor and occupied the territory and, in spite of a United Nations Security Resolution calling for their withdrawal, the Indonesian army remained.<sup>3</sup> In 1976, Indonesia moved to annex the territory and incorporate it into its territory.<sup>4</sup>

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<sup>1</sup> Until its independence in May 2002, Timor-Leste was known as East Timor. In this article, the name 'East Timor' will be used for the territory prior to independence, and 'Timor-Leste' will be used for the territory after independence.

<sup>2</sup> J G Taylor, 'East Timor: Contemporary History: A Chronology of the Main Events' in P Carey and G C Bentley (eds), *East Timor at the Crossroads: The Forging of a Nation* (1995) 238.

<sup>3</sup> SC Res 384 (1975).

<sup>4</sup> J Dunn, *Timor: A People Betrayed* (1983) 282-341.

Although Australia initially supported the UN position on East Timor as manifested in Security Council Resolutions 384 and 389 calling for an Indonesian withdrawal from the territory, a different position quickly emerged.<sup>5</sup> Preferring the stability that an Indonesian-controlled-East Timor would bring, and the positive impact such a move would have on relations between the two states, Australia moved in 1978 to *de facto* recognition of Indonesian sovereignty over East Timor,<sup>6</sup> and in 1979 to *de jure* recognition.<sup>7</sup> This recognition was the subject of much debate in Australia, particularly after attacks by the Indonesian military on demonstrators at Santa Cruz cemetery in Dili in September 1991.<sup>8</sup> Recognition did allow Australia to negotiate maritime boundary arrangements with Indonesia through the 1980s, culminating in the adoption of the Timor Gap Treaty in 1989,<sup>9</sup> and the subsequent unsuccessful challenge to the legitimacy of the treaty by Portugal.<sup>10</sup>

#### (a) Australia and the referendum

The fall of Suharto from power in Indonesia in 1998, and his replacement with B J Habibie in May 1998, paved the way for a democratic change in Indonesia, although it was not immediately apparent that this would lead to change in relation to Indonesian policies concerning East Timor. However, Habibie had indicated that he was of the view that East Timor should have greater autonomy, and in this environment John Howard wrote to Habibie proposing that there should be greater autonomy for East Timor.<sup>11</sup> Howard's letter, after noting the lack of progress of UN sponsored talks over East Timor between Indonesia and Portugal, stated:

In our view, one reason for the difficulties is that negotiations with the Portuguese do not give an adequate role for the East Timorese themselves. In the end, the issue can be resolved only through direct negotiations between Indonesia and East Timorese leaders. If you can reach agreement with the East Timorese, then the

<sup>5</sup> Australia voted for a resolution condemning the Indonesian invasion of East Timor in 1975, GA Res 3485 (XXX) (12 December 1975), abstained on later resolutions until 1978, when it began to vote against resolutions on East Timor presented by Portugal.

<sup>6</sup> See the statement by Andrew Peacock, then Minister for Foreign Affairs indicating *de facto* recognition of Indonesian sovereignty over East Timor on 20 January 1978: reprinted (1983) 8 *Aust YBIL* 279.

<sup>7</sup> On 15 December 1978, the Minister for Foreign Affairs stated that Australia would, at some point in the near future, recognise that Indonesia had *de jure* sovereignty over East Timor: reprinted in (1983) 8 *Aust YBIL* 281. The actual recognition announcement was made on 8 March 1979: reprinted in (1983) 8 *Aust YBIL* 281-82.

<sup>8</sup> See A Devereux, 'Accountability for Human Rights Abuses in East Timor' in D Kingsbury (ed), *Guns and Ballot Boxes: East Timor's Vote for Independence* (2000) 135, 140-43.

<sup>9</sup> Treaty between Australia and the Republic of Indonesia on Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia (11 December 1989) [1991] ATS 9, hereafter 'Gap Treaty'.

<sup>10</sup> Portugal was unsuccessful as the Court held Indonesia was an indispensable third party and the Court could not proceed by virtue of Indonesia's refusal to accede to the jurisdiction of the Court: *East Timor* [1995] ICJ Rep 90.

<sup>11</sup> See R Woolcott, 'Howard's "Noble" Act was Folly', *The Age* (7 March 2003) <<http://www.theage.com.au/articles/2003/03/07/1046826536143.html?from=moreStories>>.

international dimensions would take care of themselves, or at least be much easier to deal with.

I would urge you to take this course, and to focus on winning acceptance for your offer from the East Timorese themselves. The best way of achieving this may be for you to enter into direct negotiations with representative leaders from East Timor, including the two East Timorese bishops and Xanana Gusmao.

On the substance of negotiations, the advice I am receiving is that a decisive element of East Timorese opinion is insisting on an act of self-determination. If anything, their position – with a fair degree of international support – seems to be strengthening on this.

It might be worth considering, therefore, a means of addressing the East Timorese desire for an act of self-determination in a manner which avoids an early and final decision on the future status of the province. One way of doing this would be to build into the autonomy package a review mechanism along the lines of the Matignon Accords in New Caledonia. The Matignon Accords have enabled a compromise political solution to be implemented while deferring a referendum on the final status of New Caledonia for many years.<sup>12</sup>

The letter, while urging Indonesia to negotiate with East Timorese leaders directly, suggested a slow and steady pace towards an act of self-determination for the East Timorese. It proposed a road-map to independence, although not a map that was followed by Indonesia. Instead of a slow New Caledonian model, Indonesia decided on a pathway that was far faster than the Howard letter suggested.

The significance of Howard's letter was great, although it has been largely overlooked or dismissed by some commentators.<sup>13</sup> This view is not borne out by the former Indonesian Foreign Minister, Ali Alitas,<sup>14</sup> who noted that the letter had had an effect on Habibie and had encouraged him in his thinking in looking for ways of resolving ongoing difficulties in and international pressure about East Timor.<sup>15</sup> Similarly, the wisdom of Howard encouraging East Timorese autonomy was publicly criticised by Paul Keating<sup>16</sup> and Richard Woolcott.<sup>17</sup> The former as Prime Minister developed a close personal friendship with Suharto and saw the fruits of his diplomacy with Indonesia evaporate after 1999, while the latter was Ambassador to Indonesia in 1975 during the Indonesian invasion of the territory, so neither could present their objections without an eye to their previous

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<sup>12</sup> Letter from John Howard to BJ Habibie, 19 December 1998, <<http://www4.gu.edu.au:8080/adt-root/uploads/approved/adt-QGU20071023.142137/public/03Main.pdf>>.

<sup>13</sup> Eg, see J Nevins, *A Not-So-Distant Horror: Mass Violence in East Timor* (2005) 147; see also the summary of views in R Dalrymple, *Continental Drift: Australia's Search for Regional Identity* (2005) 204-6.

<sup>14</sup> G Thompson, Interview with Ali Alitas, ABC Radio National (19 February 2007) <<http://www.abc.net.au/pm/content/2007/s1851651.htm>>.

<sup>15</sup> See C Bell, 'East Timor, Canberra and Washington: A Case Study in Crisis Management' (2000) 54 *Australian Journal of International Affairs* 171.

<sup>16</sup> See 'Howard under Fire over Timor' BBC Online Network (6 October 1999) <<http://news.bbc.co.uk/2/hi/asia-pacific/466947.stm>>.

<sup>17</sup> Woolcott, above n 11

interactions with Indonesia. However, they were by no means the only critics of the Howard government's approach in the lead up to the referendum.<sup>18</sup>

Habibie used Howard's letter as part of his justification for moving towards a UN-sponsored ballot for self-determination for the territory, with a choice between full independence or a substantial level of autonomy for East Timor within Indonesia.<sup>19</sup> It has been suggested that this was in part motivated by a concern of Army chiefs that they were reluctant to spend revenue in the troublesome province, if it was shortly to become independent. If this attitude were accurate, then it amounts to the crucial point of departure from the Matignon Accords, which saw France invest heavily in New Caledonia, to try to win over the support of the local population.<sup>20</sup>

Through negotiations between Indonesia, Portugal and the UN, a referendum offering independence or autonomy within Indonesia was scheduled for the second half of 1999.<sup>21</sup> Australia was not directly involved in these negotiations, but expressed support for the process, if some reluctance at the speed with which events seemed to be moving.<sup>22</sup> The agreement brokered between Indonesia, Portugal and the UN placed certain obligations upon Indonesia.<sup>23</sup> In light of subsequent events, the most significant of these undertakings was with respect to security and the maintenance of order in East Timor.<sup>24</sup> Notably, Habibie had refused a request from Howard on 27 April 1999 for international peacekeepers to be placed in East Timor in the lead up to the referendum.<sup>25</sup>

The referendum took place on 30 August 1999,<sup>26</sup> under the supervision of the UN Mission in East Timor (UNAMET),<sup>27</sup> and there was an overwhelming majority of support for independence for East Timor.<sup>28</sup> The result, when announced by the Secretary-General of the UN on 4 September 1999 was greeted with a hostile response from pro-Indonesian supporters, and there followed extensive rioting in the capital Dili and in other centres throughout East Timor.<sup>29</sup> As much as one third

<sup>18</sup> Eg, see W Maley, 'Australia and the East Timor Crisis: Some Critical Comments' (2000) 54 *Australian Journal of International Affairs* 151.

<sup>19</sup> N J Wheeler and T Dunne, 'East Timor and the New Humanitarian Interventionism' (2001) 77 *International Affairs* 205, 812.

<sup>20</sup> Dalrymple, above n 13, 204.

<sup>21</sup> SC Res 1236 (1999), reprinted in (1999) 38 ILM 1457.

<sup>22</sup> 'Australia supports Timor Referendum Delay says Downer' *Asian Political News* (28 June 1999) <[http://findarticles.com/p/articles/mi\\_m0WDQ/is\\_/ai\\_55038752](http://findarticles.com/p/articles/mi_m0WDQ/is_/ai_55038752)>.

<sup>23</sup> SC Res 1246 (1999) and Agreements between the United Nations and the Governments of Indonesia and Portugal of 5 May 1999 regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot and regarding Security Arrangements, UN Doc S/1999/513, annexes I-III.

<sup>24</sup> See M Hilaire, *United Nations Law and the Security Council* (2005) 145-46.

<sup>25</sup> Dalrymple, above n 13, 205.

<sup>26</sup> Having been postponed from 8 August 1999: SC Res 1257 (1999).

<sup>27</sup> UNAMET was established by SC Res 1246 (1999).

<sup>28</sup> 78.5 per cent of voters chose independence over autonomy within Indonesia: United Nations, *East Timor: UNTAET Background*, <<http://www.un.org/peace/etimor/UntaetB.htm>>.

<sup>29</sup> Above n 19, 815-17.

of the buildings in Dili were destroyed, and over 180,000 persons were displaced from their homes, fleeing into the interior or across the border into Indonesian West Timor.<sup>30</sup> While there were allegations of support for the rioters by the Indonesian military, it is clear that the Indonesian army took few concrete steps to restore order to the territory.<sup>31</sup>

### **(b) The Australian intervention**

In the face of East Timor descending into civil war, the Howard government was faced with its most significant international crisis after assuming office in 1996. It was faced with a difficult choice: To intervene militarily in the territory to restore order; or to allow the humanitarian disaster to continue for an indefinite period. Both choices entailed significant risks for Australia.

Intervention in East Timor would have had the advantage of stabilising the territory, and stopping the destruction and loss of life. However Australian intervention would almost certainly be unwelcome to Indonesia, and therefore very damaging to the improved relations between the two states that had been fostered by the Keating government, and reflected in the 1995 Security Treaty.<sup>32</sup> Depending on the level of support being provided to the pro-Independence militias, and to what extent they might use West Timor as a base for attacks, there was a not insubstantial risk that Australian soldiers could find themselves returning fire from Indonesian soldiers.<sup>33</sup> This would be disastrous for relations, and might conceivably escalate into a wider conflict. In addition, a military commitment in East Timor would be expensive and place Australian lives at risk.

On the other hand, to fail to act to stop the humanitarian crisis would be equally fraught. Failure to respond positively to the destruction and loss of life would have been politically impossible, particularly when John Howard's letter to B J Habibie had helped initiate the process, and criticism of Howard's action had identified the likelihood of chaos and destruction arising out of an independence referendum. Australia's support for the referendum process would be morally bankrupt if there was no response to East Timor self-destructing in the aftermath of the referendum.

Within a short space of time, the Howard government moved to prepare to intervene. Approaches were made to a number of states, and the UN, to advise of Australia's intention to act.<sup>34</sup> Indonesia was advised that Australia intended to help secure the territory, and that it sought assurances that Indonesian forces in East Timor, numbering over 15,000 personnel, would not impede Australian forces

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<sup>30</sup> Some estimates claim up to 500,000 displaced or killed: see UN, above n 28.

<sup>31</sup> See answer given by the then Foreign Affairs Minister, Mr Downer: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 20 September 1999, 9927 (Alexander Downer).

<sup>32</sup> Agreement between the Government of Australia and the Government of the Republic of Indonesia on Maintaining Security, (18 December 1995) [1996] ATS 13.

<sup>33</sup> Dalrymple, above n 13, 208. Dalrymple quotes Habibie indicating to the then UN Secretary-General Kofi Annan that Indonesia would resist any intervention by Australian troops and 'take any risk including war' in doing so.

<sup>34</sup> See press release by John Moore, 'East Timor Update', Press release (14 September 1999) <<http://www.minister.defence.gov.au/1999/27199.html>>.

seeking to restore order.<sup>35</sup> In addition, key Australian allies were approached to ask if they would support the Australian intervention, and what level of support might be provided. Reactions to these queries were generally disappointing at this point, with strong support only forthcoming from Britain and New Zealand.<sup>36</sup>

Most notably, the United States was not willing to commit ground forces to East Timor, or to offer anything beyond logistic, intelligence and diplomatic support.<sup>37</sup> The Clinton administration, with a commitment in the Balkans, was unwilling to commit a large enough force to assume leadership of any intervention, and was, consistent with United States military commitments of the past, also unwilling to have a small contingent under the operational command of a foreign power. Thus Australia faced its largest military commitment since Vietnam with no significant direct support from the United States.

The Australian approach to the UN was an integral part of the requests for support being made. The breakdown of order in East Timor was a direct outcome of the UN-sponsored referendum, and the failure of Indonesia under the referendum agreement to fulfil its obligation to provide security in the territory. The UN was therefore already actively involved in the crisis, and its own mission had been withdrawn in the face of the violence. More importantly, Australia needed the imprimatur of the Security Council to ensure the intervention would be lawful under international law. Without a Security Council resolution supporting Australian troops in East Timor, Australia could have no legitimate basis for occupying the territory. Few Australian nationals were present, with many having been evacuated prior to the referendum. Even if this were not the case, an intervention to rescue Australians could not be a basis to retain a long-term presence in East Timor.<sup>38</sup> Relying on a concept of humanitarian intervention was problematic, with only the very recent example of Kosovo providing any direct support. Further, if the irritation felt in Jakarta at this turn of events escalated into some level of armed conflict in East Timor or beyond, Australia's action could only be legitimated by a Security Council resolution.<sup>39</sup>

There are a number of points to make in respect of international law and the intervention, and the attitude of the Howard government to the UN. First, the Howard government attempted to assure the legality of the intervention by ensuring

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<sup>35</sup> Dalrymple, above n 13, 208.

<sup>36</sup> Once the UN mandate was secured and Indonesia agreed to an international force entering East Timor, the response from some ASEAN states such as Thailand, the Philippines and Singapore was surprisingly strong: A Dupont, 'ASEAN's Response to the East Timor Crisis' (2000) 54 *Australian Journal of International Affairs* 163.

<sup>37</sup> Bell, above n 15, 174.

<sup>38</sup> In fact, by 16 September 1999, the RAAF and RNZAF had evacuated 2538 individuals on 28 flights out of Dili: Admiral Chris Barrie, Press release (16 September 1999) <<http://www.defence.gov.au/media/1999/cdf0199.html>>.

<sup>39</sup> Defence cooperation between Australia and Indonesia was placed on hold and under review on 10 September 1999, five days before the Security Council Resolution authorising the intervention: John Moore, 'Military Training with Indonesia', Press release (10 September 1999) <<http://www.minister.defence.gov.au/1999/26499.html>>.

that it operated under a Security Council mandate.<sup>40</sup> Australia approached the UN offering to lead an intervention force into East Timor, and to do so as quickly as possible. Australian forces disembarked on 19 September 1999,<sup>41</sup> only three days after the Security Council resolution authorising the mission.<sup>42</sup> While the government expressed concern at the deteriorating situation with regard to public order in the days after the referendum, it was clear that Australia would act within the existing international framework of the UN. This is different to the NATO intervention in Kosovo, which relied upon a principle of humanitarian intervention,<sup>43</sup> or the invasion of Iraq by the United States, the United Kingdom, Australia and Poland in 2003, which is considered elsewhere in this volume.

Second, having assumed control of the International Force for East Timor (INTERFET) and contributed the bulk of the forces to the mission, Australia was prepared to move to hand over responsibility for the mission to UN as soon as possible. This was not reflective of a weakening in an Australian commitment to the operation, as Australian Defence Force personnel were still the most numerous national contingent in East Timor after the UN Transitional Administration in East Timor (UNTAET) assumed control, but rather indicated a desire to ensure the legitimacy of the intervention with the rest of the international community.

INTERFET proved highly successful in the restoration of order in East Timor. Its mandate, under Security Council Resolution 1264 was particularly robust, permitting the use of force against armed militias in order to restore order.<sup>44</sup> Certainly, the militias, in spite of threats to kill at least ‘one Australian a day’ during the mission, largely fled the territory. This helped build the confidence in the mission of the East Timorese people, which in turn helped to restore order, and allow the rebuilding of infrastructure. It also paved the way for an early handover of the administration of the territory to the UN who in turn was to work towards preparing East Timor for independence and self-government.

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<sup>40</sup> At a press conference on 6 September 1999, then Foreign Minister Alexander Downer stated: ‘I think that it is enormously important to understand, I mean, this is the paradigm that everyone in Australia has to, when they think of the issue of East Timor, has to understand, and that is, short of there being war with Indonesia, which nobody, of course, is canvassing, the only option for international intervention by an armed body is for there to be agreement reached by both Indonesia and the Security Council.’; John Moore and Alexander Downer, Press release (6 September 2008) <<http://www.minister.defence.gov.au/1999/mt0699.htm>>.

<sup>41</sup> John Moore, ‘First Deployment of Australian Peacekeeping Contingent’, Press release (19 September 1999) <<http://www.minister.defence.gov.au/1999/28199.html>>.

<sup>42</sup> SC Res 1264 (1999).

<sup>43</sup> See R Goodman, ‘Humanitarian Intervention and Pretexts for War’ (2006) 100 *American Journal of International Law* 107, 130-32. In the context of East Timor, see generally T Voon, ‘Closing the Gap between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo’ (2002) *UCLA Journal of International Law and Foreign Affairs* 31.

<sup>44</sup> Operative para 3 of the resolution provided the force was: ‘To restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks, and, within force capabilities, to facilitate humanitarian assistance operations, and authorizes the States participating in the multinational force to *take all necessary measures* to fulfil this mandate [my emphasis]. SC Res 1264 (1999).

The Howard government provided the mainstay of support to UNTAET in the lead up to independence in May 2002. Australian troops left Timor-Leste in 13 June 2005, as the Timorese government were sufficiently confident to assume responsibility without assistance.<sup>45</sup> Ultimately this may have been precipitated, as domestic unrest in 2006 in Timor-Leste saw a request for Australian soldiers to return to ensure stability.<sup>46</sup> This support was forthcoming, and has continued after the fall of the Howard government in November 2007: even to the point of the new Prime Minister, Kevin Rudd, visiting Timor-Leste within days of the attempted assassination of the President Jose Ramos Horta and Prime Minister, Xanana Gusmao by a small group of rebels, in March 2008.<sup>47</sup> While not necessarily a vindication of the Howard government's original policy choice of support for East Timor, it did amount to a clear and unambiguous endorsement of the existing policy by the new government.

### III. Maritime Boundaries

After the independence of Timor-Leste in 2002, one issue more than any other dominated media attention in relation to its relationship with Australia; maritime boundary delimitation. The issue was made complex by the convoluted nature of the issue, which was rarely explored in any depth in media coverage or public comment. In order to understand the Howard government's approach to the boundary issue, it is necessary to consider the events and legal steps that impacted upon the formation of the policy.

#### (a) Australian boundary-making prior to 1999

Australia began working towards delimiting its northern maritime boundaries with its neighbours prior to the Indonesian occupation of East Timor in 1975. Negotiations over the maritime boundary in Torres Strait began with Papua New Guinea, even prior to that state's independence, and Australia and Indonesia had concluded continental shelf boundaries in 1971<sup>48</sup> and 1972.<sup>49</sup> These last two agreements ran from Papua New Guinea to an area of the Timor Sea where the geographical effect of Ashmore and Cartier Islands began to impact. While the eastern portion of these boundaries was based on equidistance, the western portion made use of the principle of natural prolongation, derived from the judgment of the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases*.<sup>50</sup> As

<sup>45</sup> See Department of Defence, <<http://www.defence.gov.au/opspire/images/gallery/20050613/index.htm>>.

<sup>46</sup> See SC Res 1704 (2006).

<sup>47</sup> 'Rudd to send forces to East Timor – Ramos-Horta on life support', News Limited, 11 February 2008, <<http://www.news.com.au/story/0,23599,23192568-2,00.html>>.

<sup>48</sup> Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries, (18 May 1971), 974 UNTS 307.

<sup>49</sup> Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, (9 October 1972), 974 UNTS 319.

<sup>50</sup> *North Sea Continental Shelf Cases* [1969] ICJ Rep 1, esp 31.



a result the boundary travelled along the southern side of a submarine feature known as the Timor Trough, which was substantially deeper than the surrounding seabed, and appeared to mark a plate tectonic boundary between the Asian and Australian continental plates.<sup>51</sup>

The presence of East Timor, then under Portuguese sovereignty, caused a break in this boundary, creating the so-called 'Timor Gap'.<sup>52</sup> In spite of Australian approaches, there was no agreement with the Portuguese on filling the Gap. One reason might have been a Portuguese preference for the use of an equidistance line rather than natural prolongation, which would have placed a continental shelf boundary much further south, closer to the Australian mainland. Certainly, there is some evidence to support this, most notably the granting of an oil mining concession bounded by equidistance lines, to the east, west and south of the territory by Portugal.<sup>53</sup> This remained the situation up to the Indonesian military intervention in 1975.

In the years following Indonesian annexation of East Timor, further progress to close the Timor Gap required recognition of Indonesian sovereignty by Australia. This occurred *de facto* in 1978 and *de jure* in 1979.<sup>54</sup> With *de jure* recognition, Indonesia and Australia resumed negotiations during the 1980s, but there was little progress in 'closing the Gap'. This is in part because the attitude of the ICJ and other international tribunals to natural prolongation had begun to change, to the extent that by 1984, the ICJ in the *Libya Malta Continental Shelf Case* indicated that the configuration of the seabed should not be a relevant consideration at all in the delimitation of maritime boundaries within 200 nautical miles of a coastal state.<sup>55</sup> This meant that Indonesia was most unsympathetic to the Australian position of closing the Timor Gap by extending the existing continental shelf boundary.

Matters remained at an impasse until 1989, when the two states agreed to the creation of a joint development zone in the disputed Gap area, bounded in the north by the maximum Australian claim, and the south by the maximum Indonesian claim, with shared jurisdiction and exploitation rights in a central area bounded in the north by the extension of the existing 1973 shelf boundary, and in the south by an equidistance line.<sup>56</sup> The central area of this 'Zone of Cooperation' would be administered by a Joint Authority, equally drawn from both Australia and Indonesia, with offices in both states. The Timor Gap Treaty,<sup>57</sup> as it was known, provided for sharing of the jurisdiction and oil and gas revenue from the Zone of

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<sup>51</sup> S Kaye, *Australia's Maritime Boundaries* (2nd ed, 2001) 48-50.

<sup>52</sup> The expression 'Timor Gap' is even used to refer to the area as the abbreviated name of the joint development treaty negotiated by Australia and Indonesia in 1989: See generally the Gap Treaty, above n 9.

<sup>53</sup> See below at n 80.

<sup>54</sup> See above n 6 and n 7.

<sup>55</sup> *Libya Malta Continental Shelf Case* [1985] ICJ Rep 13, 35.

<sup>56</sup> Kaye, above n 51, 70-71.

<sup>57</sup> Gap Treaty, above n 9.

Cooperation (with percentages allocated to the more distant party for the northern and southern sectors)<sup>58</sup> for a period of 40 years.<sup>59</sup>

In the years following the adoption of the Gap Treaty, Australia and Indonesia moved to delimit the remainder of their maritime boundary to the west of the existing continental shelf boundary, as well as a water column boundary and the boundary between Christmas Island and Java. This was concluded in March 1997 in Perth, where the remaining maritime boundary issues (with the exception of a permanent solution for the Timor Gap itself) were concluded.<sup>60</sup> The agreement provided for the use of an equidistance line to separate water-column jurisdiction between the two states, including the Timor Gap, except in the vicinity of Christmas Island, which favoured Indonesia. The agreement had significant benefits for Australia, most notably the use of a continental shelf boundary that was, save at a single point, northward of the median line. This placed much of the Browse Basin under Australian jurisdiction.<sup>61</sup>

The 1997 Treaty had not been ratified by either state when events in East Timor in 1999 rendered at least that portion pertaining to the water column in the Timor Gap out of date.<sup>62</sup> As Timor-Leste has never accepted that it is a successor state of Indonesia, the 1997 Treaty could not be binding upon it, even if the Treaty had entered into force. As such, upon independence, Timor-Leste had no maritime boundaries in place.

### (b) Filling the Gap

With the end of Indonesian sovereignty, the validity of the Gap Treaty was also at an end. However, in the face of the devastation wrought in the aftermath of the independence referendum, it was clear that the East Timorese economy was in ruin, and one potential source of revenue was the funds generated by the Timor Gap arrangements. Relatively quickly after assuming authority from INTERFET, UNTAET began negotiations with Australia to secure the continuation of the Gap Treaty in some form.<sup>63</sup>

By February 2000, an exchange of notes took place between Australia and UNTAET purporting that all the rights and obligations previously exercised by Indonesia would now be assumed by UNTAET.<sup>64</sup> This arrangement was backdated

<sup>58</sup> See generally H Burmester, 'The Timor Gap Treaty' [1990] *AMPLA Yearbook* 233; G J Moloney, 'Australian Indonesian Timor Gap Zone of Cooperation: A New Offshore Petroleum Regime' (1990) 8 *Journal of Energy and Natural Resources Law* 128.

<sup>59</sup> Art 33, Gap Treaty, above n 9.

<sup>60</sup> Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, (14 March 1997), [1997] ATNIF 4.

<sup>61</sup> Kaye, above n 51, 53-8.

<sup>62</sup> Points Z28 to Z36 of the EEZ boundary in the 1997 Treaty are identical to the water column boundary negotiated in the CMATS Treaty, although the numbering of the coordinates is reversed.

<sup>63</sup> G French, 'The Timor Gap Treaty in Transition' (1999) 18 *Australian Mining and Petroleum Law Journal* 201, 202.

<sup>64</sup> Exchange of Notes constituting an Agreement between the Government of Australia

to 25 October 1999, and was stated to be without prejudice to any position adopted by a future independent East Timorese administration.<sup>65</sup> To remain consistent with the Security Council's resolution 384 calling for an Indonesian withdrawal, and the UN's refusal to recognise Indonesia's incorporation of East Timor in 1976, the exchange of notes stated: 'In agreeing to continue the arrangements under the terms of the [Gap] Treaty, the United Nations does not thereby recognise the validity of the 'integration' of East Timor into Indonesia.'<sup>66</sup>

While the continuation of the Gap Treaty brought much needed revenue to UNTAET, as East Timor progressed towards independence through 2001, it became increasingly apparent that any new post-independence administration would not accept the continuation of the Gap Treaty. Both Xanana Gusmao and Jose Ramos Horta, who were to occupy the positions of President and Foreign Minister immediately post-independence, made it plain that there would be a rejection of all things associated with the Indonesian regime, insofar as that were possible. The new state would not regard Indonesia as a successor state in any shape or form, and would reject any approach that would continue the Gap Treaty. On the other hand, East Timor was still desperately short of revenue, and it was not in a position to reject some accommodation with respect to its southern maritime boundary, if only to keep the oil and gas revenues flowing.<sup>67</sup>

Australia was also willing to renegotiate the Gap Treaty to continue economic activity in the area, recognising that East Timor needed this revenue stream to continue. The Howard government also indicated a willingness to renegotiate the terms of the treaty, to give a much more favourable outcome for East Timor. This process began even before independence in May 2002, with an agreement reached between the UN and Australia negotiated on the UNTAET side with Jose Ramos Horta and Mari Alkatiri, the post-independence Prime Minister, with the support of UN personnel.<sup>68</sup> The new 'Timor Sea Arrangement' abandoned the northern and southernmost shared areas, restricting the new Joint Petroleum Development Area (JPDA) to the limits of the old Area A and also changed the revenue split between the two states from 50:50 to 90:10, with the bulk of revenue going to East Timor. There was also tentative agreement that the most substantial field discovered in the JPDA, the Greater Sunrise fields, which extended substantially to the east beyond the edge of the JPDA, would be the subject of a unitisation agreement, with an

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and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989 (10 February 2000), [2000] ATS 9.

<sup>65</sup> Ibid [2].

<sup>66</sup> Ibid [3].

<sup>67</sup> See generally V Prescott, 'East Timor's Potential Maritime Boundary Options' in D R Rothwell and B M Tsamenyi (eds), *The Maritime Dimensions of Independent East Timor* (2000) 79-106; A Heiser, 'East Timor and the Joint Petroleum Development Area' (2003) 17 *MLAANZ Journal* 54.

<sup>68</sup> See Alexander Downer, Nick Minchin and Daryl Williams, 'Australia, East Timor and the United Nations agree on a New Resources Deal in the Timor Sea', Press release (3 July 2001) <[http://www.foreignminister.gov.au/releases/2001/fa097a\\_01.html](http://www.foreignminister.gov.au/releases/2001/fa097a_01.html)>.

approximate 20:80 split in favour of Australia. The new treaty would be temporary, lasting 30 years, unless the two parties reached agreement on a permanent boundary. Existing leases and contracts from the old Gap Treaty were to be continued, as well as an additional aid package of \$A8 million a year from Australia to East Timor.<sup>69</sup>

With East Timorese independence, the Timor Sea Arrangement could be formally adopted as a treaty, and on the day UNTAET was disestablished and Timor-Leste assumed control over its own administration, the Timor Sea Treaty was signed.<sup>70</sup> The Timor Sea Treaty retained much of the administrative structures and arrangements previously contained in the Timor Gap Treaty and the Timor Sea Arrangement, providing for shared jurisdiction over the JPDA,<sup>71</sup> under the control of a Joint Commission and Ministerial Council.<sup>72</sup> The revenue split giving 90 per cent of the JPDA's revenue was retained,<sup>73</sup> and agreement to conclude a unitisation agreement<sup>74</sup> was also included.<sup>75</sup>

The Timor Sea Treaty met the twin policy objectives of the Howard government of continuing and stable access to the petroleum resources of the Timor Sea,<sup>76</sup> and provision for a revenue stream for East Timor.<sup>77</sup> Exploration continued, and revenue continued to be generated in the fields within the JPDA. However, there was growing public disquiet in Australia as to the equity of the arrangements,<sup>78</sup> which was fostered by a foreign oil company interested in restoring the arrangements that existed prior to the Indonesian occupation of East Timor.

As Timor-Leste has always regarded itself as a successor state to Portugal and not Indonesia, in theory rights and benefits held by individuals and corporations prior to 1975 would still subsist post 2002. The Portuguese had, in late 1974,<sup>79</sup>

<sup>69</sup> Ibid.

<sup>70</sup> Timor Sea Treaty between the Government of East Timor and the Government of Australia (20 May 2002), [2002] ATS 13, hereafter 'Timor Sea Treaty'.

<sup>71</sup> Art 3, Timor Sea Treaty, *ibid*.

<sup>72</sup> Art 6, Timor Sea Treaty, *ibid*.

<sup>73</sup> Art 4, Timor Sea Treaty, *ibid*.

<sup>74</sup> See Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields (6 March 2003), [2007] ATS 11.

<sup>75</sup> Art 9 and Annex E, Timor Sea Treaty, *above n 70*.

<sup>76</sup> National Interest Analysis, 'Review of the Timor Sea Treaty' (25 June 2002) [2002] ATNIA 22.

<sup>77</sup> See generally, Joint Standing Committee on Treaties, 'Review of the Timor Sea Treaty', (11 November 2002) <<http://www.aph.gov.au/house/committee/jsct/timor/report/fullreport.pdf>>.

<sup>78</sup> Joint Standing Committee on Treaties, 'Review of the Timor Sea Treaty', Minority report by Senator Andrew Bartlett, (11 November 2002) <<http://www.aph.gov.au/house/committee/jsct/timor/report/minorityreport.pdf>>.

<sup>79</sup> Decree No. 25/74 permitting the concession agreement with Oceanic was made on 31 January 1974. The concession agreement itself was entered into by Portugal and Petrotimor on 11 December 1974. This was within 12 months of the Portuguese abandonment of the colony. See *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3 [89].

granted an oil concession in the waters south of Timor to an American oil company, Oceanic Exploration,<sup>80</sup> which had in turn created a subsidiary, Petrotimor, to hold this concession. With Timor-Leste's independence, Petrotimor began to press the new government in Dili for recognition of its rights. This took a number of forms including litigation in Australia,<sup>81</sup> the transfer of 20 per cent of Petrotimor's stock to the Government of Timor-Leste,<sup>82</sup> submissions made to the Joint Committee on Treaties of the Australian Parliament in relation to the Timor Sea Treaty, and the commissioning of a legal opinion questioning the validity of the boundaries used in the Timor Sea Treaty written by Vaughan Lowe, Chris Carleton and Christopher Ward.<sup>83</sup>

Ultimately the legal opinion had the greatest impact, as it was taken up in support of a public campaign that was pursued in the lead up to the adoption of the Treaty on Certain Maritime Arrangements in the Timor Sea<sup>84</sup> (CMATS Treaty). The opinion argued that principles of maritime boundary delimitation would entitle Timor-Leste to a much greater proportion of the oil and gas resources of the Timor Sea, through the use of equidistance for the boundary between Australia and Timor-Leste, and a more generous formulation of the lateral boundaries to the east and west.<sup>85</sup> The opinion was used by Petrotimor to urge the Timor-Leste Government to abandon the Timor Sea Treaty and negotiate the boundary over again, with Petrotimor's assistance.

The opinion did not bring about the desired effect, but it marked a rise in public dissatisfaction with Australian policy over the maritime boundary in the Timor Sea. Over time, the negative publicity that accompanied the negotiations between Australia and Timor-Leste was persistent and significant, but it did not bring about a change in the Howard government's position. The maintenance of the JPDA was perceived as being important to Australia for a number of reasons, and that meant that there was no Australian effort to abandon the joint development zone (JDZ) and create a permanent boundary along the equidistance line. First, the volume of gas present in and around the JPDA was such that it was economically justifiable to establish a gas processing plant in the region, and the most likely site of such a plant would be Darwin.<sup>86</sup> This would be a great economic boon for the Northern

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80 Oceanic is based in Colorado in the United States and hold petroleum concessions in a number of areas where there are significant disputes including the southern Aegean Sea, the East China Sea and waters to the east of Taiwan: <<http://finance.yahoo.com/q/pr?s=OCEX.OB>>.

81 See *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3.

82 V Lowe, C Carleton and C Ward, Legal opinion for Petrotimor, (11 April 2002) <<http://www.petrotimor.com/lglop.html>> at 28 April 2008.

83 Ibid.

84 Treaty on Certain Maritime Arrangements in the Timor Sea (12 January 2006), [2007] ATS 12, hereinafter 'CMATS Treaty'. See the discussion below.

85 <http://www.petrotimor.com/lglop.html>; note the critique of the opinion given by P Brazil, 'Critique of the "Lowe" Opinion of 11 April 2002', Submission to the Joint Standing Committee on Treaties, (17 September 2002) <<http://www.aph.gov.au/house/committee/jsct/timor/subs/sub22.1>>.pdf.

86 An LNG plant was built in Darwin, and had its first shipment of LNG in February

Territory, and was perceived as a great positive of development in the JPDA.<sup>87</sup> Maintaining a stable exploration and exploitation regime in the Timor Sea was essential if the significant infrastructure was ever to be constructed.

Second, and perhaps more significantly, the maritime boundary arrangements with Timor-Leste were not viewed in a vacuum by the Howard government, as they might have an impact on other boundary arrangements. The conclusion of a complete maritime boundary with Indonesia in 1997 had been a diplomatic success, as it created a favourably located boundary west of the Ashmore Islands that determined sovereign rights over a potentially valuable area of seabed in the Browse Basin. The continental shelf boundary west of Ashmore in the 1997 Treaty did not, save at a single point, make use of equidistance, but rather was at least partial acceptance by Indonesia of the Australian argument that other methods of delimitation were appropriate.<sup>88</sup>

The difficulty in dealing with the East Timorese boundary as the protesters might have wished was that the 1997 Treaty was yet to enter into force, as neither Australia nor Indonesia had ratified it. This was in part because of East Timorese independence, and the fact the 1997 Treaty dealt with waters that were now within Timor-Leste's jurisdiction. To give into public pressure and give Timor-Leste a maritime boundary based on equidistance would, at best, irritate Indonesia, who had urged the use of equidistance along its boundary with Australia, including in relation to what was now the JPDA. As it was yet to ratify the 1997 Treaty, Indonesia could refuse to be bound and to seek to negotiate a new treaty, reflective of the Australian acceptance of equidistance with Timor-Leste. This would have been disastrous for Australia, as the petroleum resources of the Browse Basin are potentially much greater than those within the JPDA.

Unfortunately, for the Howard government, the second reason was not one they could articulate clearly in response to the protests, as to do so might have provoked the same response from Indonesia as to give the protesters what they wanted. Given the relatively benign public response from Xanana Gusmao and Jose Ramos Horta during the negotiations,<sup>89</sup> there is every reason to suppose that they were sympathetic to Australia's position vis-à-vis Indonesia, while at the same time seeking to ensure Timor-Leste would not be disadvantaged in any way.

Further criticism was also directed at the Howard government shortly before East Timorese independence when Australia lodged declarations of exception to the jurisdiction of the ICJ and under Part XV of the Law of the Sea Convention in respect of maritime boundary delimitations.<sup>90</sup> In the former case, Australia had

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2006. See the statement of David Tollner, Member for Solomon: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 28 February 2007, 159 (David Tollner).

<sup>87</sup> National Interest Analysis, above n 76, [13]-[15].

<sup>88</sup> Kaye, above n 51, 56-7.

<sup>89</sup> See a compilation of media reports from May 2005: <<http://www.etan.org/et2005/may/08/02t-sea.htm>>.

<sup>90</sup> See Declaration under the Statute of the ICJ concerning Australia's acceptance of the jurisdiction of the ICJ, [2002] ATS 5 (21 March 2002); and, Declaration under the UN

maintained complete acceptance of the jurisdiction of the ICJ since the early 1970s, in spite of unwelcome litigation from Nauru and Portugal through the 1990s. In the case of the latter, maritime boundary delimitations are an optional exception for states to refuse compulsory jurisdiction procedures.<sup>91</sup>

At the time of the objections to jurisdiction, Australia had effectively concluded all its maritime boundary agreements with its neighbours, with the exception of those with East Timor and New Zealand. While no specific state or boundaries were mentioned as justification for the objections, it is reasonable to suppose that East Timor was the motivation for the move, as the boundary with New Zealand was uncontroversial and was concluded in any case in 2004.<sup>92</sup> The objections have not been withdrawn, lending support to the notion that they were directed at preventing litigation initiated by Timor-Leste.

Negotiations in respect of the maritime boundary between Australia and Timor-Leste were not prevented by the Australian objections to jurisdiction, or by the efforts of Petrotimor to have its concession recognised. It is important to recall that while the focus of efforts since 1999 had been on securing continued access to the petroleum resources of the JPDA, there were other maritime boundary issues that needed to be addressed. The 1997 Treaty had settled the water column between Australia and Indonesia, including East Timor, but the independence of Timor-Leste meant that this boundary was again unsettled. Such a boundary would provide certainty as to the extent of fisheries jurisdiction possessed by each state, and would remove another potential point of friction. Negotiations took place through 2005 to not only try to settle the issue of petroleum in the JPDA, but also to conclude the less contentious but significant water column boundary.

### **(c) The Certain Maritime Arrangements in the Timor Sea Treaty**

In January 2006, Australia and Timor-Leste reached agreement on a maritime boundary treaty that would settle matters between them for the decades to come. Entitled the CMATS Treaty, it provided for retention of the Timor Sea Treaty, with the shared jurisdiction and exploitation regime in the JPDA, and altered the period of operation of the Timor Sea Treaty to 50 years from the date of adoption of the CMATS Treaty or five years after the last production activity in the JPDA, whichever comes first.<sup>93</sup>

The CMATS Treaty has a number of elements that met the Howard government's objective of neutralising litigation arising out of the issue of the maritime boundary, while at the same time trying to reduce the political heat being

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Convention on the Law of the Sea concerning the application to Australia of the dispute settlement provisions of that Convention, [2002] ATS 6 (21 March 2002); see generally the discussion in G Triggs, 'The Timor Sea Treaty and the International Unitisation Agreement for Greater Sunrise: Practical Solutions in the Timor Sea' (2004) 23 *Aust YBIL* 161, 163.

<sup>91</sup> Art 298, UN Convention on the Law of the Sea (10 December 1982), [1994] ATS 31.

<sup>92</sup> Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries (25 July 2004), [2006] ATS 4.

<sup>93</sup> Art 12, CMATS Treaty, above n 84.

generated by the boundary. In relation to the former, in a provision that is probably unique in a maritime boundary delimitation agreement, the two parties agreed not to pursue litigation in respect of their maritime boundary and surrounding areas for the life of the Treaty.<sup>94</sup> This removed the possibility of Timor-Leste commencing an action against Australia, even if the jurisdictional hurdle of the exceptions could be overcome. Further, it effectively prevented Timor-Leste from ever asserting a right of diplomatic protection on behalf of Petrotimor, as the moratorium on litigation extends beyond international tribunals to any court, tribunal or other dispute resolution mechanism. In addition, the CMATS Treaty provides that existing activities under domestic legislation as at the date of Timor-Leste's independence can be continued. In an exchange of side letters pursuant to this provision, the two then Foreign Ministers both noted that for Timor-Leste, there was no applicable legislation at 19 May 2002.<sup>95</sup> For Petrotimor, this may make it more difficult to argue they retain rights under Timorese law.

In response to public concerns about Australia's treatment of Timor-Leste, there is also a change in the split over Greater Sunrise in the CMATS Treaty. Article 5 of the CMATS Treaty provides that government revenue from the upstream exploitation of petroleum will now be split on an equal basis. This is a generous settlement, as it is clear that the bulk of the Greater Sunrise field is not physically in the JPDA. While the value of the additional revenue going to Timor-Leste is uncertain, with the fluctuations in world oil and gas prices, it was estimated to be worth around \$A4 billion over the 30 year life of the project.<sup>96</sup>

The CMATS Treaty also deals with the water column boundary between the two states. In this, the line used is essentially an equidistance line, reflecting the Timorese position, and being essentially the same boundary agreed to by Indonesia in 1997. The Treaty does indicate that this jurisdiction cannot be used in a fashion to inhibit petroleum activities.<sup>97</sup> The CMATS Treaty also establishes a consultative body, titled the Timor-Leste/Australia Maritime Commission, to act as a 'focal point for bilateral consultations with regard to maritime matters of interest to the parties' including maritime boundary arrangements, maritime security and the protection of the marine environment.<sup>98</sup>

There have been suggestions from a number of quarters that Australia's intervention in East Timor in 1999 and subsequent behaviour in negotiating the Timor Sea Treaty was motivated by a desire to appropriate Timor-Leste's oil and gas deposits in the Timor Gap. As noted above, these suggestions drew much support from the legal opinion commissioned by Petrotimor, although it would not be correct to intimate that either the opinion or Petrotimor subscribed to this view. While such arguments may be superficially compelling, there is little objective evidence to support them. First, in 1998, Australia and Indonesia were sharing oil and gas revenue 50:50, and there was nothing to suggest that this arrangement

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<sup>94</sup> Art 4, CMATS Treaty, above n 84.

<sup>95</sup> Annex to CMATS Treaty, above n 84.

<sup>96</sup> National Interest Analysis, 'CMATS Treaty' [2007] ATNIA 4.

<sup>97</sup> Art 8, CMATS Treaty, above n 84.

<sup>98</sup> Art 9, CMATS Treaty, above n 84.



would not subsist for many years. The international legal action by Portugal to disrupt this arrangement had failed,<sup>99</sup> and there had been little international attention on East Timor in the four years leading up to the independence referendum. After Timor-Leste's independence, Australia renegotiated the previous arrangements and the split of oil and gas revenue changed from 50:50 to 10:90 in favour of Timor-Leste. From a purely numerical point of view, it is difficult to see how such a move was in Australia's favour if its ultimate objective was to secure oil and gas.

Second, by 1999 it was apparent that the oil and gas resources of the Timor Gap were extremely limited as commercial deposits, in contrast to the seabed elsewhere in the Timor Sea. Very little oil and relatively modest (in commercial terms) gas deposits had been identified, in spite of the Gap Treaty actively encouraging detailed exploration of the area. Certainly, the size of the fields in 1999, and the poor prospects for other discoveries being made, meant that securing a bonanza in oil and gas revenue could not have motivated Australian decision-making to the point of risking an armed conflict with Indonesia. This is most starkly demonstrated by the fact that between 2003 and 2005, Australia gave Timor-Leste \$A106.7 million in foreign aid,<sup>100</sup> while at the same time the total first tranche petroleum and oil and gas revenue (of which 90% went to Timor-Leste) in the JPDA was \$A121.3 million.<sup>101</sup>

Third, the most valuable field in the vicinity of the JPDA is the Greater Sunrise field of which only a small portion extends into the JPDA. The status of Greater Sunrise has also been the focus of much debate, with many commentators asserting that Timor-Leste has a stronger claim to the field than Australia, ostensibly because international law would require the use of equidistance to determine the boundary.<sup>102</sup> While superficially attractive to many, this argument ignores the significant difficulty that while Greater Sunrise is closer to Timor-Leste than Australia, it is even closer to Indonesia than either Australia or Timor-Leste. The employment of equidistance lines between Timor-Leste and Indonesia would mean that Greater Sunrise would still not be under Timorese jurisdiction, even if Australia did not exist.

While the Lowe, Carleton and Ward opinion made an argument rejecting the use of equidistance lines for the eastern and western sides of the JPDA, arguing the boundaries should be shifted to favour Timor-Leste because of the small size of Indonesian islands to the east of Timor,<sup>103</sup> there is some evidence to suggest this is

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<sup>99</sup> *East Timor* [1995] ICJ Rep 90.

<sup>100</sup> See Commonwealth of Australia, *Budget Papers 2003-04*, <<http://www.budget.gov.au/2003-04/ministerial/download/ausaid.pdf>> and Commonwealth of Australia, *Budget Papers 2006-07*, <<http://www.budget.gov.au/2006-07/ministerial/download/ausaid.pdf>>.

<sup>101</sup> Derived from Timor Sea Development Authority, *Annual Reports 2004-2006*, <[http://www.timorseada.org/annual\\_reports.html](http://www.timorseada.org/annual_reports.html)>.

<sup>102</sup> Eg, see the comments by the former Member for Calare, the late Peter Andren: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 March 2004, 26392 (Peter Andren).

<sup>103</sup> Lowe, Carleton & Ward, above n 82.

not a position that was taken by Portugal as the predecessor state to the state of Timor-Leste. First, the Portuguese made no protest in respect of the 1973 continental shelf boundary concluded between Australia and Indonesia, which terminated and recommenced at equidistance points creating the Timor Gap in the first place. In diplomatic correspondence with Australia prior to quitting the territory, Portugal indicated it was preparing to grant a mining concession to an oil company and would do so up to 'the medium line'<sup>104</sup> pursuant to Article 6 of the 1958 Continental Shelf Convention.<sup>105</sup> Article 6 provides that in the absence of an agreement or special circumstances, an equidistance line should be used.<sup>106</sup>

Second, the lease granted to Oceanic by Portugal and purported to be held today by Petrotimor was essentially generated by using equidistance, and overlaps almost perfectly with the extent of the JPDA. The concession, even if upheld today by the Government of Timor-Leste, would not include the Laminaria field to the west of the JPDA, or most of the Greater Sunrise field, which was intimated in a map accompanying the opinion. While these actions would not have prevented either Portugal or Timor-Leste seeking a different boundary, they do not indicate that the lateral boundaries enclosing the Australian oil fields have the inevitability assumed by many advocates.

#### IV. Conclusion

The Howard government's interactions with East Timor prior to 2002 and Timor-Leste post-independence highlight aspects of an Australian foreign policy that were not always reflected in its other foreign activities. The sending of troops to East Timor in 1999 was a difficult decision, but one carried out with respect for international law and the mandate of the UN. The motivation seems to have been the desire for a stable and secure East Timor, and to ensure that there would be no repeat of the humanitarian disaster like Rwanda on Australia's doorstep.

The conclusion of maritime boundary arrangements with Timor-Leste was not inconsistent with the above objectives, but the Howard government was placed in the invidious position of wanting to avoid antagonising Indonesia into rejecting the 1997 Treaty that could not be clearly or publicly articulated. This in turn allowed those without a full appreciation of Australia's position who wanted to support Timor-Leste to attack the government, something which neither the President nor the Foreign Minister of Timor-Leste (although they advocated their position strongly) were prepared to do.

It is notable that there does not seem as at mid-2008 to have been a change in policy towards Timor-Leste by the Rudd government, either with respect to military support to retain the stability of the East Timorese government, or with respect to the maritime boundary arrangements. Perhaps, given the Rudd government's stated desire to engage with the UN and to uphold the rule of law, this is the best indicator of the nature of the Howard government's interaction with East Timor.

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<sup>104</sup> See *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3 [93].

<sup>105</sup> Convention on the Continental Shelf (29 April 1958), 499 UNTS 311.

<sup>106</sup> *Ibid.*