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This paper uses [ ] UK or [X] US English spelling and punctuation rules

THE INTERNATIONAL LEGAL REGIME ESTABLISHED BETWEEN AUSTRALIA AND TIMOR-LESTE FOR SHARING THE BENEFITS OF PETROLEUM, OIL AND GAS RESOURCES OF TIMOR SEA

1) Introduction

Disputes over maritime boundaries are widespread source of rasping between neighboring costal states. The struggle for control of valuable natural resources, such as petroleum, oil, and gas represents a threat to regional stability and has become an increasingly feature influencing diplomatic relations between neighboring countries.

As a question of state sovereignty, sovereign rights, and jurisdiction, many tensions are managed by adoption of international treaties, which are "the most frequent means of creating international rules."[1] This was also the solution adopted between Timor-Leste and Australia concerning Timor Sea.

Since Timor-Leste has voted for its independence in 1999, after its liberation from Indonesian military occupation, the Timor Sea has become subject to disputes,

[1] Antonio Cassese, *International Law*, Oxford University Press, 2nd Edition, 2005, page 170

negotiations, and impasses bittering Australia and Timor-Leste's relations, mainly because of its wealth in petroleum, oil, and gas.[2]

For this particular paper, after given an overview of brief history on Timor Sea legal framework, which was drafted over the years, I will focus my analyze on the international legal regime currently in force established between Australia and Timor-Leste for sharing the benefits of petroleum, oil, and gas within Timor Sea. Thus, I will analyze the *Timor Sea Treaty* (TST), the *Sunrise and Troubadour Unitization Agreement* (STUA), and *Treaty on Certain Maritime Arrangements in the Timor Sea* (CMATS) in the light of the legal framework established by the United Nations Convention of the Law of the Sea (UNCLOS) on maritime boundaries between neighboring costal states and the utilization of natural resources within continental shelf and exclusive economic zone.

2) Geographic Localization of Timor-Leste and Timor Sea

Timor-Leste is a State located in Southeast of Asia, which comprises the eastern half of the island of Timor, the islands of Atauro, Jaco and an exclave on the northwestern side of the island known Oecusse Ambeno. Situated 550 Km north of Australia by maritime boundaries, the island is also bordered land with Indonesia.[3]

The sea distance between Timor-Leste and Australia is less than 400 nautical miles (nm), where lies Timor Sea.

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[2] East Timor and Indonesia Action Network (ETAN) website, *talking points East Timor's boundary dispute with Australia*, http://www.etan.org/issues/tsea/tseafact.htm, (Accessed November 12, 2011) 7

[3] Government of Timor-Leste website, http://timor-leste.gov.tl/?p=547&lang=en, (Accessed November 12, 2011)

Figure 1 – Map showing Timor-Leste in regional context

Source: East Timor and Indonesia Action Network

3) Brief History on Timor Sea Legal Framework

The first international legal regime set up over Timor Sea concerning seabed boundary was first established between Australia and Indonesia. On 18 May 1971, both countries have signed an *Agreement establishing Certain Seabed Boundaries* [4] and then, on 9 October 1972, a supplementary *Agreement Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Sea*.[5]

[4] The United Nations website, *Agreement between the Government of the Commonwealth of Australia and the Government the Republic of Indonesia Establishing Certain Seabed Boundaries* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-IDN1971SB.pdf, (Accessed November 25, 2011)

[5] The United Nations Website, *Agreement between the Government of the Commonwealth of Australia and the Government the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Sea, Supplementary to the Agreement of 18 May 1971* (09 October 1972) http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-IDN1972TA.pdf, (Accessed November 25, 2011)

The agreements only applied to the western part of the Australia Indonesia seabed boundary and did not comprise the eastern part of the island of Timor, at that time, under Portuguese administration.

Exercising "a prerogative inherent in *jus tractuum:* the choice of the timing to negotiate"[6] Portugal refused to settle agreement with Australia concerning maritime boundaries in Timor Sea.

This situation has resulted in a gap in the boundary delimitating the seabed of the Timor Sea, which became known as the *Timor Gap*.

Instead of creating a median line between both countries, the seabed boundary was established by the treaty closer to Timor island territory than Australia, grating the last one with a larger area over the Timor Sea.

The agreements on seabed boundaries cited above were then replaced by the *Timor Gap Treaty* (TGT), signed between Australia and Indonesia on 11 December 1989.[7] The TGT was aimed to deal with the gap left regarding the seabed between Australia and the eastern part of the island, currently the territory of Timor-Leste, and at that period, possible due to the Indonesian annexation of the eastern part of the island of Portuguese Timor.

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[6] University of Dundee website, www.dundee.ac.uk/cepmlp/journal/html/Vol13/article13-13.pdf *Spatial Allocation of Continental Shelf Rights in Timor Sea, Reflections on Maritime Delimitation and Joint Development,* Nuno Sérgio Marques Antues, (Accessed November 25, 2011) 7

[7] Australasian Legal Information Institute website, *Treaty between Australia and Republic of Indonesia one the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia [Timor Gap Treaty*], http://www.austlii.edu.au/au/other/dfat/treaties/1991/9.html (Accessed November 25, 2011)

The TGT, which entered into force on 9 February 1991,[8] was intended to create an international legal framework enabling the sharing of the benefits of the petroleum offshore exploration in areas subject to competing claims by both countries. The treaty was signed on a temporary basis since it would not preclude continuing efforts to reach final agreement on permanent seabed boundary delimitation or even would not prejudice the claims of either country to sovereign rights over the continental shelf.

Based on the location of the seabed limits established in *Seabed Agreement* 1972, the TGT, has created a Zone of Cooperation (ZOC), currently designated as Joint Petroleum Development Area, (JPDA)[9] within revenue from exploitation of the natural resources would be shared equally. [10]

During the United Nations Transitional Administration in East Timor (UNTAET), dully established on 25 October 1999 by Security Council resolution 1272,[11] the TGT dispositions remained in force merely between Australia and Timor-Leste. UNTAET took over Indonesia's rights and obligations under the TGT allowing for continued

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[8] Ibid., http://www.austlii.edu.au/au/other/dfat/treaties/1991/9.html

[9] In accordance with, Nuno Sérgio Marques Antues, Ibid.,, the Joint Development Area "may be defined as an agreement between two or more states, designed for purposes of sharing jointly, in the proportions and terms agreed, the exclusive rights and interests (in particular as regards natural resources) over a designated area (beyond the territorial sea), wholly or partially within the maritime entitlement of the participating states."

[10] A detailed explanation of the Timor Gap Treaty can be found at The Australian National University website, *A study of the Offshore Petroleum Negotiations between Australia, the UN and East Timor, Alexander J. Munton, https://digitalcollections.anu.edu.au/bitstream/1885/47992/6/02whole.pdf* (Accessed November 12, 2011) 80

[11] The United Nations website, *Security Council Resolutions*, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/312/77/PDF/N9931277.pdf?OpenElement, (Accessed November 12, 2011)

investment in the ZOC area, through an Exchange of Notes between Australia and UNTAET, on 10 February 2000 granting the terms of the TGT from 25 October 1999 until Timor-Leste's independence.[12]

On 5 July 2001, the UNTAET and Australia concluded a Memorandum of Understanding that put in place *Timor Sea Arrangement*. The parties have agreed to share management and revenue from oil and gas production in the JPDA area, which is delimited along the same boundaries as ZOC set out in the TGT, in the following terms: "Of the petroleum produced in the JPDA, 90 percent shall belong to East Timor and 10 percent shall belong to Australia."[13]

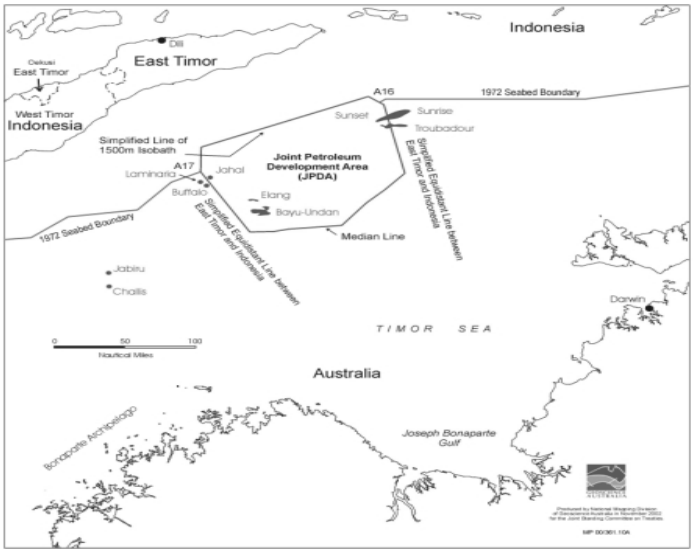

Figure 2 – Location and dimensions of the JPDA
Source: National Mapping Division, Geoscience Australia

[12] Ibid., www.dundee.ac.uk/cepmlp/journal/html/Vol13/article13-13.pdf , 18

[13] ATNS, Agreements, Treaties, and Negotiated Settlements Projects webpage, *Timor Sea Arrangement* http://www.atns.net.au/agreement.asp?EntityID=2438, (Accessed November, 14 2011) article 4 (a)

The terms of this arrangement was afterward transformed in *Timor Sea Treaty* (TST), formally signed between Australia and Timor-Leste on its first day of independence, 20 of May 2002.

Since then, the diplomatic relations between both countries have been developing and two more international treaties applicable to Timor Sea have been signed.

Thus, currently, the international legal regime established between Australia and Timor-Leste for sharing the benefits of petroleum, oil, and gas resources is regulated by three international instruments: by the *Timor Sea Treaty* (TST), by the *Sunrise and Troubadour Unitization Agreement* (STUA), and by the *Treaty on Certain Maritime Arrangements in the Timor Sea* (CMATS).

4) The Timor Sea Currently Legal Framework

a) Timor Sea Treaty

TST was signed between Timor-Leste and Australia, in Dili, on 20 May 2002, and entered into force on 3 April 2003, through formally exchanged of notes issued by both parties notifying each other that their respective legal requirements were completed.[14] [15]

Under its constitutional requirements, Timor-Leste has ratified the TST by National Parliament Resolution No. 2/2003 enacted on 3 January 2003.[16] In Australia the TST was

[14] Australasian Legal Information Institute website, *Timor Sea Treaty*, http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html, (Accessed November 12, 2011)

[15] Australia's foreign Minister website, http://www.foreignminister.gov.au/releases/2003/joint_timor.html, (Accessed November 13, 2011)

signed as well under the Australian constitutional terms and implemented through Petroleum Timor Sea Treaty Act 2003.[17]

The TST, which has replaced the TGT, is composed by seven annexes and accompanied by a simultaneous Memorandum of Understanding where the parties have agreed to negotiate, expeditiously and in a good faith, an international unitization agreement for exploration of the natural resources laid down on Geater Sunrise gas field, out of JDPA, as regulated in the Annex E of TST.[18]

The TST represents a temporary and a practical solution to regulate the Timor Sea bottleneck, thus, its dispositions neither prejudice a final determination of the seabed boundaries delimitation between the parties nor should be interpreted as prejudicing Timor-Leste's or Australia's position on rights relating to seabed delimitation.

The TST delimits and provides the legal and fiscal framework for the exploration, exploitation and sharing of revenue from petroleum resources in the JPDA, which corresponds to the ZOC established by the TGT.[19] In accordance with the terms of the treaty, JPDA shall be jointly controlled, managed and facilitated the exploration and development of the petroleum resources for the benefit of the peoples of Australia and

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[16] Jornal da República of Timor-Leste website, *Resolution N.º 2/2003* http://www.jornal.gov.tl/?mod=artigo&id=1297 , (Accessed November 12, 2011)

[17] Ibid., http://www.comlaw.gov.au/Details/C2004C01300,

[18] This agreement has become later the Sunrise and Troubadour Unitization Agreement.

[19] La'ohamutuk website, Certain Maritime Arrangements in the Timor Sea, the Timor Sea Treaty and the Timor Gap, 1972- 2007, *Submission to the Australian Parliament's Joint Standing Committee on Treaties, Inquiry into the Treaty on Certain Maritime Arrangement in the Timor Sea, Robert J. King.* http://www.laohamutuk.org/Oil/Boundary/JSCT/sub6RKing.pdf, (Accessed November 12, 2011) 22

Timor-Leste. Moreover, it is established that petroleum activities conducted in the JPDA shall be carried out pursuant to a contract between the Designated Authority, created by the treaty and a limited liability corporation or entity with limited liability specifically established for the sole purpose of the contact."[20]

In terms of revenue sharing, article 4 designates ownership of the petroleum resources of the JPDA at a proportion of 90% to Timor-Leste and 10% to Australia. The treaty also states that any other reservoir of petroleum that eventually extends across the boundary of the JPDA should be treated as a single entity for management and development purposes. In this case, the parties have agreed to "work expeditiously and in good faith to reach an agreement on the manner in which the deposit will be most effectively exploited an on the equitable sharing of the benefits arising from such exploitation.[21]

For managing the JPDA, the TST creates a three-tiered joint administrative structure consisting of Designated Authority, a Joint Commission and a Ministerial Council.

The Designated Authority has juridical personality and legal capacity for enter into contracts and the exercise of its powers and the performance of its functions and is responsible to the Joint Commission and carries out the day-to-day regulation and

[20] National Petrol Authority of Timor-Leste website, *Timor Sea Treaty*, http://www.anp-tl.org/webs/anptlweb.nsf/vwAll/ResourceTimor%20Sea%20Treaty/$File/Timor%20Sea%20Treaty.pdf?openelement, (Accessed November 12, 2011)

[21] Ibid., http://www.anp-tl.org/webs/anptlweb.nsf/vwAll/ResourceTimor%20Sea%20Treaty/$File/Timor%20Sea%20Treaty.pdf?openelement,

management of petroleum activities. Detailed powers and functions of the Designated Authority are set out in Annex C of the TST.

The Joint Commission is responsible for establishing policies and regulations to petroleum activities in the JDPA and oversees the work of the Designated Authority. Detailed powers and functions of the Joint Commission are set out in Annex D of the TST.

The Ministerial Council, in turn, is entitled to consider any matter relating to the operation of the TST.

Beyond dispositions related to JPDA exploitation of petroleum, the TST regulates other matter as well. In fact, the treaty also sets up terms for the taxation of petroleum activities conducted within the JPDA area, in the annex G, setting out a taxation code for the avoidance of double taxation and the prevention of fiscal evasion.

In addition, dispositions related to pipelines construction, marine environment, employment, health and safety for workers, criminal jurisdiction, customs, quarantine and migration, hydrographic and seismic surveys, surveillance, secure measures, search and rescue, air traffic services are also put in place by the treaty.

It should be stressed that TST does not prejudice any territorial claims of Timor-Leste or Australia to areas of the Timor Sea seabed that lies between the two countries.[22] In fact, the treaty will be in force until both countries have definitely agreed in permanent

[22] Ibid., http://www.anp-tl.org/webs/anptlweb.nsf/vwAll/ResourceTimor%20Sea%20Treaty/$File/Timor%20Sea%20Treaty.pdf?openelement, article 2

seabed delimitation. Article 22 is very clear saying that "This treaty shall be in force until there is a permanent seabed delimitation between Australia and East Timor or for thirty years from the date of its entry into force, whichever is sooner."[23] [24]

It is also important to refer that any dispute arising from the interpretation or application of the TST, with exception of dispute falling within the scope of taxation, shall be settled by consultation or negotiation or to be submitted to an arbitral tribunal.

The TST does not contain an express obligation on the parties to continue their efforts to reach an agreement on a permanent maritime boundary delimitation in Timor Sea. However, such obligation arises by implication from the provisional nature of the treaty. Besides, the treaty was done without prejudice to the rights of the parties with respect to seabed delimitation. [25]

b) Sunrise and Troubadour Unitization Agreement

The STUA was signed between Timor-Leste and Australia on 6 March 2003 and entered into force on 23 February 2007.[26]

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[23] Ibid.,http://www.anp-tl.org/webs/anptlweb.nsf/vwAll/ResourceTimor%20Sea%20Treaty/$File/Timor%20Sea%20Treaty.pdf?openelement,

[24] Australian and New Zeeland Maritime Law Journal website, *Antony Heiser, Solicitor of the Supreme Court of Queensland, East Timor and the Joint Petroleum Development Area*, https://maritimejournal.murdoch.edu.au/archive/vol_17/Vol_17_2003%20Heiser.pdf, (Accessed November 14, 2011) 12

[25] Ibid., https://maritimejournal.murdoch.edu.au/archive/vol_17/Vol_17_2003%20Heiser.pdf, 13

[26] Ibid., http://www.dfat.gov.au/geo/east_timor/fs_maritime_arrangements.html

Timor-Leste has internally ratified the treaty by National Parliament Resolution No. 5/2007 enacted on 8 March 2007[27] fulfilling its constitutional requirements, and in Australia, after being signed by the competent authorities, STUA was implemented through Greater Sunrise Unitisation Agreement Implementation Act 2004.[28]

This Agreement was done basically because it was found, during the exploitation in the Timor Sea, an area with petroleum deposits known as Sunrise and Troubadour fields, collectively known as Greater Sunrise, which extend across the eastern boundary of the JPDA. So, the Agreement is aimed to establish the regime for sharing that petroleum between both countries, especially nothing that Australia and Timor-Leste have made maritime claims and not yet delimited their maritime boundaries, including in the area where Greater Sunrise lies.

In accordance with the terms of the previous Annex E of the TST, the distribution of exploitation was agreed under the article 7 which affirms that the production of petroleum shall be apportioned between JPDA and Australian. 20.1 % apportioned to JPDA and 79.9 % to Australia. This means that Timor-Leste will receive approximately 18 % and Australia approximately 82 % of the revenues from the Greater Sunrise field exploration.

In terms of applicable law, the parties have agreed that petroleum activities attributed or within to the JPDA pursuant to the apportionment ratio are subject to TST terms, and petroleum activities attributed to Australia pursuant to the apportionment ratio are subject

[27] Ibid., *Resolution No. 5/2007* http://www.jornal.gov.tl/?mod=artigo&id=420

[28] Ibid., http://www.comlaw.gov.au/Details/C2004A01282

to Australian jurisdiction. This applies for all the disposition of the treaty, namely in terms of taxation.

For managing the area and to facilitate the implementation of the agreement a Regulatory Authorities and a Sunrise Commission were created, under the TST terms and Australia legislation.

The treaty contains dispositions on abandonment, point of sale, cost recovery and producing sharing, employment and training, safety, occupational health and safety, environmental protection, customs, security arrangements, measuring systems, provisions on information and settlement of disputes.

Once more, this is agreement entered into force for regulating practical questions of exploration of natural resources and shall not be interpreted as prejudicing or affecting the position of the counties with regard to their respective maritime boundaries.

c) Treaty on Certain Maritime Arrangements in the Timor Sea

CMATS was signed between Timor-Leste and Australia on 12 January 2006 and entered into force on 23 February 2007, after a formally exchanged of notes which covered both the CMATS and the SIUA as well.[29]

Timor-Leste has duly ratified the treaty by National Parliament Resolution No. 4/2007 enacted on 8 March 2007,[30] observing the internal requirements for adoption of international treaties. Australia has signed the treaty by its competent authorities.

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[29] Ibid., http://www.dfat.gov.au/geo/east_timor/fs_maritime_arrangements.html

The CMATS was, once more done based on the premise that Timor-Leste and Australia have not yet delimited their maritime boundaries and recognizing the need to "make every effort in a spirit of understanding and cooperation to enter into provisional arrangements of practical nature"[31] that would give effect to the UNCLOS articles 74 and 83 without prejudice to the final determination of the maritime boundaries between the countries.

In terms of the delimitation of maritime boundaries this new treaty does not prejudice or affect any claim or legal position of the parties to the whole or any part of the Timor Sea. Yet, despite representing a temporary solution exclusively directed for revenue sharing, CMATS contains important dispositions on maritime boundaries.

In fact, based on article 4 the parties shall not assert, pursue or further by any means claims to sovereign rights and jurisdiction and maritime boundaries while the TST and CMATS is in force. This include the prohibition to commence any proceeding before the court, tribunal or any other dispute settlement mechanism directly or indirectly connected to maritime boundaries or delimitations in Timor Sea or raise this issue in any international organization.

Additionally, the CMATS definitely kills the obligation to negotiate permanent maritime boundaries in a period fifty years, since it highlights that "The Parties shall not

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[30] Ibid., http://www.jornal.gov.tl/?mod=artigo&id=419

[31] Ibid., http://www.anp-tl.org/webs/anptlweb.nsf/vwAll/Resource-060113%20CMATS%20Signature%20Text%20-%20Timor%20alternative/$File/060113%20CMATS%20Signature%20Text%20-%20Timor%20alternative%20-%20REFORMATTED.pdf?openelement

be under an obligation to negotiate permanent maritime boundaries for the period of this Treaty,"[32] which was agreed in fifty years.

It should also be stressed that this treaty has amended the article 22 of the TST concerning its duration making it connected with CMATS. In this way, the TST will be in force for the duration of the CMATS, with possibility of renewal. Hence, CMATS shall remain in force until the date fifty years after its entry into force or until the date five years after the exploitation the Unit Area ceases, whichever occurs earlier.

CMATS has also disposition related to the upstream exploitation of the petroleum lying within the Unit Area, establishing that revenues shall be equally shared.

5) The UNCLOS legal framework on maritime boundaries and natural resources exploration

Both Indonesia and Australia are parties to UNCLOS[33] which was signed in Montenegro Bay in 1982 and entered into force in 1994. Timor-Leste has not yet

[32] Ibid., http://www.anp-tl.org/webs/anptlweb.nsf/vwAll/Resource-060113%20CMATS%20Signature%20Text%20-%20Timor%20alternative/$File/060113%20CMATS%20Signature%20Text%20-%20Timor%20alternative%20-%20REFORMATTED.pdf?openelement , article 7

[33] The United Nations website, Division for Ocean Affairs and Law of the Sea, *Chronological lists of ratification of, accessions and successions to the Convention and the related Agreements as at 03 June 2011*. http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea, (Accessed November 16, 2011)

formally accepted it, however, the international convention applies to Timor-Leste pursuant to UNTAET Regulation No. 1999/1.[34]

The UNCLOS defines the concepts of continental shelf and exclusive economic zone (EEZ) as well, whose explanations are important to understand the legal regime established in Timor Sea. I will explain the both concepts taking into account whether solution adopted in Timor Sea are or not consistent with UNCLOS.

a) The concept of continental shelf

Under the UNCLOS continental shelf "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nm from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."[35]

The zone of continental shelf itself is an area of maritime jurisdiction part of the customary international law[36] under the Truman proclamation of 28 September 1945,[37]

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[34] Ibid., https://maritimejournal.murdoch.edu.au/archive/vol_17/Vol_17_2003%20Heiser.pdf, 14, explains in footnote how UNCLOS may be applied to Timor-Leste even without country's ratification.

[35] The United Nations website, United Nations Convention on the Law of the Sea, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, (Accessed November 16, 2011) article 76

[36] Customary International Law is defined as "Rules derived from general practice among the states together with opinio juris" Anthony Aust, *Handbok of International Law*, Cambridge University Press, 2nd Edition, 2010, page V

[37] Ocean Commission website, *proclamation 2667 of September 28, 1945 Policy of the United States with respect to Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, http://www.oceancommission.gov/documents/gov_oceans/truman.pdf, (Accessed November 25, 2011)

[38]which defends that "States' rights extended over the physical continental shelf adjacent to their coasts."[39]

A coastal state exercises exclusive sovereign rights over its continental shelf for purpose of exploring it and exploiting its natural resources."These rights are inherent: unlike an EEZ, they do not have to be proclaimed and do not depend on occupation." [40]

Based on definitions mentioned above, in cases where two or more States lie opposite or adjacent to one another, having less than 400 nm, as it occurs between Australia and Timor-Leste, an overlapping of areas does exist and problems may arise in terms of delimitation of the limits of continental shelf.

The concept of continental shelf was essential for delimitation the sea bed boundary at the time Australia and Indonesia have signed the international agreements on it.[41]

As it was told, instead of creating a median line, as it was expected, the seabed boundary was established closer to Timor island territory than Australia, grating the last one with a larger area over the Timor Sea.[42] This was a result of the claim made by the

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[38] Malcom N. Shaw QC, International Law, Cambridge University Press, 5th Edition, 2003, page 522

[39] Petrotimor website, *in the matter of East Timor's maritime boundaries opinion, by* Vaughan Lowe, Christopher Carleton and Christopher Ward, http://www.petrotimor.com/lglop.html, (Accessed November 25, 2011)

[40] Anthony Aust, *Handbok of International Law*, Cambridge University Press, 2nd Edition, 2010, page 287

[41] The UNCLOS and the concept of EEZ were still being discussed at that period.

[42] As a general disposition on this matter, the article 6 of the Convention on Continental Shelf stipulates that where two or more states lie opposite or adjacent to one another on the same continental shelf, the boundaries of the shelves appertaining to each of them shall be determined by agreement. In the absence of agreement, the boundary would be the median line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

Australian Government based in geological studies and in developing two interpretations of the article 1 and 6 of the 1958 Geneva Convention on the Continental Shelf regarding delimitation of international boundaries and based on the extension of the Australian continental shelf northwards, up to the Timor Trough, under natural prolongation principle developed in the *North Sea Continental Shelf Case* (Germany versus Denmark and Germany versus Netherlands).[43] [44] [45]

The grounds and arguments invoked by Australia are not analyzed in this paper. However, it can be advanced that they are mainly based in geological claims defending a continental shelf breaking, and then in an interpretation of the International Court of Justice (ICJ) prolongation principle.[46] The grounds were contested not only by Indonesia but also by Portugal.

In fact, since the beginning of negotiations, Portugal demonstrated a clear reluctance to accept the Australia's claim on the boundary limits of the Timor Trough defined in the Agreement settled between Australia and Indonesia.

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[43] Ibid., http://www.laohamutuk.org/Oil/Boundary/JSCT/sub6RKing.pdf, 3, 27

[44] International Court of Justice website, *North Sea Continental Shelf Case*, http://www.icj-cij.org/docket/files/52/5563.pdf (Accessed November 16, 2011)

[45] Antony Heiser, Solicitor of the Supreme Court of Queensland, defends that Australian's claim took the International Court of Justice out of the context, Australian and New Zeeland Maritime Law Journal website, *Antony Heiser, Solicitor of the Supreme Court of Queensland, East Timor and the Joint Petroleum Development Area*, https://maritimejournal.murdoch.edu.au/archive/vol_17/Vol_17_2003%20Heiser.pdf, (Accessed November 14, 2011) 17

[46] A detailed explanation of the Australian claims can be found at The Australian National University, *A study of the Offshore Petroleum Negotiations between Australia, the UN and East Timor, Alexander J. Munton, https://digitalcollections.anu.edu.au/bitstream/1885/47992/6/02whole.pdf (Accessed November 12, 2011) 34, 36, 40*

Portugal defended that geological arguments invoked by Australia to divide the seabed in the Timor Sea into two separate continental shelves were not enough, and thus, the legal continental shelf of Timor-Leste shall extend to the median line.

Moreover, the Australia's position in 1972's, regarding Timor Through geology, which supposed to justify a continental beak and which is the base to current limitation of the Timor Sea legal regime had not been treated as constituting a break in a continental shelf, under the *Libyan Arab Jamahiriya versus Malta continental shelf case*,[47] and *Tunisia versus Libya Continental Shelf case*, both decided by the ICJ.[48]

Actually, the irrelevance of natural prolongation of the continental shelf principle and the physical characteristics of the seabed in areas of continental shelf within 200 nm of the coast of one or other State was also recognized by the IJC in its decision in the case of *Libyan Arab Jamahiriya versus Malta continental shelf case*. In the light of the IJC jurisprudence on this case the concept of natural prolongation is not applicable within 200 nm of the cost and where the distance between opposite states is less than 400 nm.[49] In this case, delimitation by references to distance shall apply since "there is no reason to ascribe any role to geological or geophysical factors within that distance."[50] [51]

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[47] International Court of Justice website, http://www.icj-cij.org/docket/index.php?sum=353&code=lm&p1=3&p2=3&case=68&k=a8&p3=5, (Accessed November 25, 2011)

[48] Ibid., http://www.icj-cij.org/docket/index.php?sum=330&code=tl&p1=3&p2=3&case=63&k=c4&p3=5

[49] Ibid., http://www.icj-cij.org/docket/index.php?sum=353&code=lm&p1=3&p2=3&case=68&k=a8&p3=5,

[50] Ibid., http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf,

This means that the juridical interpretation made by Australia's Government over *North Sea Continental Shelf Case* and that partly supported its maritime claims might not probably be correct.

Juridically, there are many misgivings about the consistence of the Australia's position with the jurisprudence of the ICJ in *the North Sea Continental Shelf Cases*. Vaughan Lowe, Christopher Carleton and Christopher Ward, once requested to advice the situation under the Petrotimor sponsorship have defended, that "Australia's position in the 1970s was not necessarily consistent with the jurisprudence of the [ICJ] in the North Sea Continental Shelf cases" – for "the ICJ determined that although the concept of natural prolongation of the physical continental shelf was fundamental, the result of any delimitation must take into account considerations of equity and fairness."[52]

In addition over the time, several voices has raised in the international scene defending that the sea bed boundary delimitation between Australia and Timor-Leste, based on the previous agreement of the Australia with Indonesia was quit ungrounded and a non-equitable solution, as required under the article 83 of the UNCLOS.[53]

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[51] Petrotimor website, *in the matter of East Timor's maritime boundaries opinion, by* Vaughan Lowe, Christopher Carleton and Christopher Ward, http://www.petrotimor.com/lglop.html, (Accessed November 25, 2011)

[52] Petrotimor website, *in the matter of East Timor's maritime boundaries opinion, by* Vaughan Lowe, Christopher Carleton and Christopher Ward, http://www.petrotimor.com/lglop.html, (Accessed November 25, 2011)

[53] Article 74 and 83of the UNCLOS specify that delimitation of the EEZ and continental shelf and between sates with opposite or adjacent coasts shall be established by agreement on the basis of international law, as referred to in Article 38 of the Statute of International Court of Justice, in order to achieve *an equitable solution*.

Indeed, in respect of maritime boundaries delimitation between neighboring states the equidistance and median line does not assume the nature of customary international law, as it was explained in the *North Sea Case jurisprudence*. However, its seems to be more equitable, especially when there is no particular circumstances that justify another solution and when the injured State is a developing country that definitely needs its sovereign rights to be used for exploitation of its natural resources.

Particularly, the CMATS that extends the TST's duration for a period of fifty years, forcing at the same time the parties to avoid any claim before a tribunal, while, naturally in that period the revenues of natural resources would be sold out, should be certainly be seen as a non-equitable solution, required by the international law.

As Vaughan Lowe, Christopher Carleton and Christopher Ward have advised "There do not appear to be any special circumstances between Australia and East Timor that would compel departure from a median line. Therefore, a line close to the median line between Australia and East Timor would very probably be the appropriate boundary determined according to international law. East Timor would have exclusive rights to the resources north of that line."[54]

Hence, what I might conclude it that the base for Australia and Indonesia sea bed boundary delimitation was grounded in fake premises on the continental shelf that, impressively are still the base for the legal regime in force nowadays between Australia and Timor-Leste.

[54] Ibid., http://www.petrotimor.com/lglop.html

Beyond all these questions that may be raised in regard to Australia's position it should be pointed out that, legally for Timor-Leste, the 1971 Treaty is *res inter alios acta* and, thus could not adversely affect Timor-Leste's rights, which, was not part of the treaty. In the light of international law, its position is protected by the *pacta tertiis is nec nocent nec prosunt* rule, under the article 34 and 35 of the Vienna Convention on the Law of the Treaties.[55] This means that the sea bed boundary line first established between Australia and Indonesia would not have been mandatory followed by the UNTAET and then by the Timor-Leste.

Furthermore, Timor-Leste did not succeed to Indonesia in the TGT, since its Constitution declares 28 November 1975 the day of independence. For this reason, 1978 Vienna Convention on Succession of States in respect to treaty does not apply.

b) The concept of the Exclusive Economic Zone

"The EEZ is an area adjacent to the territorial sea and extending up to 200 nautical miles from the baselines from which the territorial sea is measured,"[56] which has exclusive rights to exploring, exploiting, conserving and managing, living or non-living the resources of the water column and the resources of the sea-bed and its subsoil.[57]

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[55] The United Nations website, *Viena Convention on the law of the Treaties* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, (Accessed November 25, 2011)

[56] Anthony Aust, *Handbok of International Law*, Cambridge University Press, 2nd Edition, 2010, page 284

[57] Ibid., http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, article 56 and 57

"Unlike the continental shelf, the rights to which are inherent, an EEZ, has to be formally established by the coastal state,"[58] which assumes particular importance in developing states, basically because of EEZ wealth in natural resources or fisheries stocks.

Based on definitions mentioned above, in cases where two or more States lie opposite or adjacent to one another having less than 400 nm, as it occurs between Australia and Timor-Leste, an overlapping of areas does exist and problems may arise in terms of delimitation of the limits of the EEZ.

The legal basis conferred by the EEZ is additional or alternative to the rights arising from the continental shelf entitlements. In any case, analyzing the situation under the EZZ concept a similar conclusion may be reached.

As defined above the EZZ concept is simply based on maritime distance. No Physical features of the seabed and concepts of natural prolongation are taking into account for its delimitation.

Moreover, the EEZ limitation and the right of its exploitation more than being part of UNCLOS are recognized in customary international law, as was highlighted in the ICJ case on *Libya Arab Jamahiriya versus Malta on Continental Shelf* dispute.[59]

This means that Timor-Leste is entitled to declare an EZZ event has not ratified the 1982 UNCLOS yet. Actually, in compliance with the Timor-Leste Constitution section

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[58] Anthony Aust, *Handbok of International Law*, Cambridge University Press, 2nd Edition, 2010, page 284

[59] Ibid., http://www.icj-cij.org/docket/index.php?sum=353&code=lm&p1=3&p2=3&case=68&k=a8&p3=5

4.2, country has already claimed it EZZ on its law on maritime boundaries already enacted by the National Parliament, where the country claims an EEZ based on 200 nm from the coast.[60]

Well, regarding delimitation of the EEZ between states with opposites or adjacent coast, the UNCLOS article 74 states that the parties shall enter into agreement on the basis of international law based in the article 38 of the Statute of the ICJ in order to achieve a equitable solution.

As I have already mentioned it does not seem that the solution reached between the parties is an equitable solution and clearly unfair to Timor-Leste. Since there is no reason for not apply median line rule.

Regarding the solution of this problem, it should be taking into account that Australia lodged a declaration on both ICJ and International Tribunal for the Law of the Sea, under the UNCLOS article 287 and 298 and IJC Statute article 32, excluding the compulsory jurisdiction of those bodies with respect to dispute concerning or relating to the delimitation of maritime zones, based on the argument that "any maritime boundary dispute is best settled by negotiation rather than litigation."[61] This position clearly demonstrates that Australia has sought to avoid any litigation on maritime boundaries in the Timor Sea.

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[60] Jornal da República of Timor-Leste website, *Law n.º 7/2002* http://www.jornal.gov.tl/?mod=artigo&id=105, (Accessed November 12, 2011)

[61] Australia's foreign Minister website, http://www.foreignminister.gov.au/releases/2002/fa039j_02.html, (Accessed November 13, 2011)

c) The significance of the median line

As demonstrated, despite the legal regime established between Australia and Timor-Leste in force, there is no compelling reason in international law for Timor-Leste to share the revenue or resources from resources located in the north of the median line.

Delimitation based on the principle of median distance would move significantly natural resources, (namely the resources included in Greater Sunrise) to Timor-Leste jurisdiction, as it can be seen in the following figure.

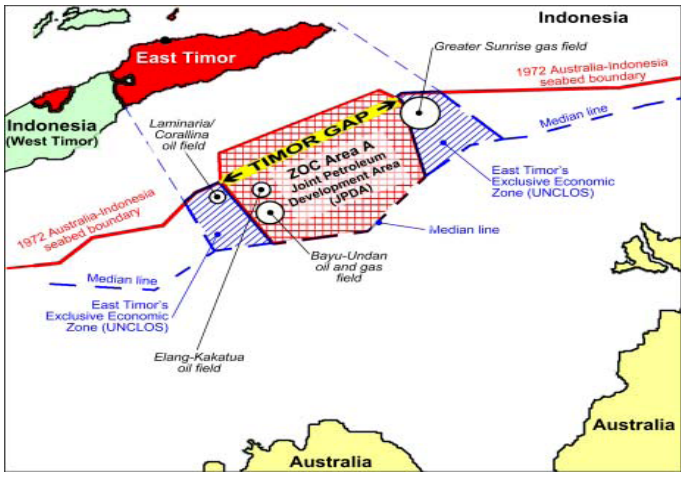

Figure 3 – Australia and Indonesia seabed boundary and median line
Source: Laohamutuk Timor-Leste

This situation would give the revenues of the natural resources exploration exclusively to Timor-Leste and exclude Australia.

However, as it was pointed out, in accordance with the current legal framework in force between both countries this solution will not be adopted at least while the CMATS is in force.

6) Conclusion

The maritime boundary between Timor-Leste and Australia has been a matter of controversy and due to the large reserves of natural resources lying down within it, the definition of definitive boundaries has been postponed and being substituted by provisional agreements related for exploring the resources within the Timor Sea.

In one hand, Australia maintains its former position negotiated first with Indonesia and then with Timor-Leste defending that continental shelf boundary "ought to be drawn through the bathymetric axis of the Timor Trough, which is located 40 to 60 nm of the coast of Timor."[62]

On the other hand, Timor-Leste, as an independent country since 2002 defends that continental shelf boundary as well as EZZ should be drawn along the median line, as it seems to be the subsidiary rule under the UNCLOS and more equitable solution.

Regarding this, the ICJ has consistently defended that the median line is neither mandatory nor does it hold some privileged status over other methods of boarders delimitation between opposites states within 400 nm of each other, which means that the parties are free to establish their legal framework in a spirit of cooperation, respect good faith and on the basis of arm's length principle. However, it seems that an equitable solution required by UNCLOS is not in place.

[62] Ibid., https://maritimejournal.murdoch.edu.au/archive/vol_17/Vol_17_2003%20Heiser.pdf, 1

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