

PETROLEUM IN TIMOR LOROSAI 2002

1. WITH INDEPENDENCE, WHAT CHANGES FOR THE TIMOR GAP? BORDERS AND OIL DEALS BETWEEN AUSTRALIA AND EAST TIMOR

Revenues from oil and natural gas currently represent East Timor's greatest hope for meeting the nation's basic needs in the future. Although a few small oil and natural gas deposits exist on East Timor's land, the current discussion focuses on much larger oil and gas deposits in the waters between East Timor and Australia. These deposits mean between US\$8 and US\$38 billion (thousand million) for East Timor over the next thirty years. (East Timor's government budget for the coming year is US\$77 million.)

Currently, East Timor and Australia are negotiating a treaty to jointly develop petroleum in the Timor Gap, an area previously subject to a treaty between Australia and Indonesia. The question of whether East Timor's share is closer to US\$8 billion or to US\$38 billion depends largely on where boundary lines are drawn in the Timor Sea. Some experts state that if the maritime (seabed) boundary were established using current international legal principles, East Timor would stand to gain more than US\$30 billion. The issue of the maritime boundary between Australia and East Timor is not new, but East Timor's independence brings new questions and challenges.

Many expect that shortly after East Timor's official independence, new East Timorese Prime Minister Mari Alkatiri and Australia will sign the 'Timor Sea Arrangement' which was negotiated by the Australian government and UNTAET/East Timor in 2001. This agreement will then go to East Timor's new Parliament for ratification as a treaty on the Timor Sea reserves. Its proponents call the agreement the "best deal" that East Timor can get at this time with Australia, and are quick to explain that it is a temporary agreement "without prejudice to East Timor's maritime boundaries," which means that the agreement will not influence the determination of a future maritime boundary decision. Others, however, believe that this agreement will compromise East Timor's ability to claim broader boundaries and thus gain access to all the seabed deposits to which the country could be legally entitled.

La'o Hamutuk has written two editorials on the Timor Gap negotiations (see LH Bulletin Vol. 1, No. 3 and Vol. 2, No. 5). In this article, we provide information regarding the question of maritime boundaries and the proposed treaty. We also hope to encourage more transparency and dialogue around this important issue, which is little understood by most East Timorese. Future issues of the La'o Hamutuk Bulletin will look at other aspects of East Timor's oil and natural gas

resources, including current exploration projects, oil companies' involvement, labor and environmental concerns, and the global context of oil and gas exploitation.

a) MARITIME BOUNDARY BETWEEN EAST TIMOR AND AUSTRALIA

Upon independence, East Timor will have no definite maritime boundaries and will need to seek maritime boundary agreements with both Indonesia and Australia. Past maritime boundaries between Australia and Indonesia lay the foundation for the current division of oil and gas reserves in the Timor Sea as well as in the proposed treaty. To understand where East Timor currently stands, it is important to look at the history of the maritime boundary between the two countries.

In 1972, using the continental shelf argument (which argues that a seabed boundary should follow the deepest point on the ocean floor between the countries), Australia managed to negotiate with Indonesia a maritime boundary that gave Australia 85% of the ocean territory between the two countries. Portugal never accepted the continental shelf argument and unsuccessfully sought a boundary located mid-way between Australia's and East Timor's coastlines. The contested area became known as the "Timor Gap."

In 1975, with full knowledge of Indonesia's intention to invade East Timor, Australian Ambassador to Jakarta Richard Woolcott sent a confidential memo to his government, stating that "closing the present gap in the agreed sea border could be much more readily negotiated with Indonesia...than with Portugal or an independent Portuguese Timor." He noted in the memo that the Ministry of Mines and Energy might be interested in this.

In 1979, after international outcry over Indonesia's brutal invasion and occupation of East Timor had subsided, Australia began to negotiate with Indonesia on the Timor Gap area. Unable to agree on permanent maritime boundaries, the two countries decided to create an agreement to jointly develop petroleum in the area between the median line to the south and the 1972 seabed boundary to the north.

Only a few years later, in 1981, Australia and Indonesia agreed on a fishing boundary that ran along the median line. And in 1982, the United Nations Convention on the Law of the Sea (UNCLOS), redefined international maritime law stating that for countries with less than 400 nautical miles of sea between them, the international boundary would be the mid-point.

The United Nations never recognized East Timor as part of Indonesia. However, in 1989, despite ongoing human rights violations, Australia and Indonesia signed the Timor Gap Treaty. This treaty divided the Timor Gap region into three sections in which petroleum production in the largest area, Area A, was to be equally shared by the two countries. In Area C, closest to East Timor, 90% of the production would go to Indonesia and 10% to Australia. In Area B, Indonesia received 10% and Australia 90%.

Under this division, contracts were signed with multinational oil companies including U.S.-based Phillips Petroleum, British and Dutch owned Shell, and Australian-based Woodside and Broken Hill Propriety (BHP). Contracts were signed in December 1991 and first explorations began in 1992. For the Australian government and these companies, the prospect of money from oil was more important than East Timor's human and political rights.

As these explorations in the Timor Gap were beginning, Portugal brought a case against Australia and the Timor Gap Treaty to the International Court of Justice (ICJ), claiming that the Treaty violated the rights of both Portugal and the people of East Timor. In the end, the court was unable to rule on the case due to Indonesia's refusal to recognize the jurisdiction of the ICJ. Still, the case was significant in that it raised international public awareness of the Timor Gap Treaty, and reaffirmed East Timor's legal right to selfdetermination.

In 1998, the National Council of Timorese Resistance (CNRT) announced it would seek a revision of the Timor Gap Treaty. The CNRT was careful to reassure Australia that they wanted to continue joint development and the oil companies that their existing contracts would be respected.

After East Timor voted overwhelmingly for independence in the 1999 referendum, Indonesia was forced to withdraw from the territory. In December 1999, Mari Alkatiri, the CNRT's representative on oil affairs, again announced the CNRT's rejection of simply taking Indonesia's place in the Timor Gap Treaty and their desire to resolve the issue of the maritime boundaries. In February 2000, however, UNTAET agreed upon a temporary "Exchange of Notes" with Australia over the Timor Gap. This "Exchange of Notes" continued the terms of the 1989 Timor Gap Treaty, replacing Indonesia with East Timor to deal with current oil investments until East Timor's independence.

b) A NEW TIMOR SEA TREATY FOR EAST TIMOR?

For more than a year, UNTAET/East Timor and Australia negotiated how the joint development of petroleum would continue after independence, when the "Exchange of Notes" agreement expires. On 5 July 2001, a Memorandum of Understanding was signed by representatives of UNTAET and the Australian government formally proposing that on independence a new agreement, the "Timor Sea Arrangement," be considered for ratification.

East Timorese political leaders repeatedly stated that they expect East Timor's Cabinet and Parliament to approve the Timor Sea Arrangement (below referred to as the Arrangement) on or shortly after 20 May 2002. This may not happen, as East Timor and Australia are still in discussions. Also, many questions have recently been raised about the proposed treaty and whether it is, as its proponents describe it, the best deal East Timor can achieve with Australia.

A key question is whether the Arrangement jeopardizes in any way the settlement of a fair maritime boundary following principles of international law.

UNTAET's negotiating team for the Timor Sea talks included both internationals led by Peter Galbraith, then Cabinet Minister for Political Affairs and the Timor Sea, and East Timorese leaders led by the Economic Minister for the transitional government, Mari Alkatiri. By their own accounting, when the team began negotiations, they were intent on resolving the maritime boundary question first.

Australia, however, refused to discuss boundaries, agreeing only to discussion of how production revenues in Area A of the old treaty (now referred to as the Joint Petroleum Development Area – JPDA) would be shared.

As both Galbraith and Alkatiri explain, East Timor's negotiating team then decided to proceed on two tracks: First, to enter into an interim arrangement regarding joint development of petroleum resources that would in no way decide future maritime boundaries, but would enable East Timor to benefit immediately from petroleum operations. Second, to set out East Timor's maritime claims upon independence and to enter into maritime boundary negotiations with both Indonesia and Australia.

Deciding the maritime boundaries first, they explain, would have taken too long and meant a loss in immediate revenues to East Timor. The Arrangement that emerged is presented as a temporary treaty to facilitate the immediate development of petroleum while working out the issue of maritime boundaries.

A recent Dili seminar (23 March 2002) sponsored by PetroTimor (see page below), presented different information, raising concerns about the proposed Arrangement and what it may cost East Timor in lost revenues. According to the oil industry experts who spoke at the seminar, signing this Arrangement would jeopardize the settlement of East Timor's maritime boundaries under principles of international law.

In the seminar, experts argued that by signing the Arrangement, Australia will have a stronger claim to maintain the boundaries in the treaty as international maritime boundaries, thus ensuring Australian rights to some of the largest and most lucrative oil and gas fields, namely the Greater Sunrise and Laminaria-Corallina fields with a potential revenue of up to US\$38 billion.

Two days after this seminar, the Australian government withdrew from the legal process of resolving maritime boundaries within the International Court of Justice (ICJ) and from dispute settlement under the U.N. Convention on the Law of the Sea (UNCLOS), stating that "Australia's strong view is that any maritime boundary dispute is best settled by negotiation rather than litigation."

c) THE CONTENT OF THE 'TIMOR SEA ARRANGEMENT'

The Arrangement covers petroleum development in an area called the Joint Petroleum Development Area (JPDA), the same area referred to as Area A in the Timor Gap Treaty between Australia and Indonesia.

The proposed treaty would allow East Timor to receive 90% of all oil and gas royalties from the JPDA, a clear improvement to the 50% split in the Timor Gap Treaty. ("Royalties" refers to the percentage of profit different parties receive. Oil companies take approximately 50% of all production profits; the other 50% is divided between East Timor and Australia as specified by the Arrangement.)

Because the Greater Sunrise field straddles the JPDA borderline, a special "unitization" agreement has been devised (unitization means viewing the field as a unit or a whole). Since approximately 20% of the field is within the JPDA, the Arrangement gives East Timor 90% of revenues from 20% of production (i.e. 18%) in Greater Sunrise.

In terms of employment issues, the Arrangement states that there will be "appropriate measures ...to ensure that preference is given in employment in the JPDA to nationals or permanent residents of East Timor." Labor advocates in both East Timor and Australia, however, fear that this is far too general to be implemented effectively.

In terms of contracts with oil companies, which are currently the same as they were under the 1989 Treaty (except that East Timor has replaced Indonesia), the Arrangement would allow East Timor to tax companies for its portion of the oil at East Timor's rates. This gives East Timor the power to gain more through enacting higher taxes, a power that Phillips Petroleum, among others, has strongly protested. Oil companies who begin activities under the terms of this Arrangement would be able to begin work in Timor Sea oil and gas fields with the understanding that the conditions of their activities would not change. Both Alkatiri and Galbraith have noted the need for companies already operating in the Timor Sea to know that their investments are safe, regardless of future changes in boundaries. And while the Arrangement allows commercial aspects to be negotiated after the treaty is signed, there is currently pressure on East Timor from Australia to resolve certain detailed commercial issues before the signing.

In terms of the boundaries question, the proposed treaty states that "Nothing contained in this Arrangement... shall be interpreted as prejudicing or affecting East Timor's or Australia's position on or rights relating to a seabed delimitation or their respective seabed entitlements," and "This Arrangement will be in force until there is a permanent seabed delimitation between East Timor and Australia or for thirty years." Many observers fear that Australia will reject East Timor's broader maritime boundary claims, and block or stall resolving the conflict for 30 years, during which time the gas and oil fields will be exhausted, with Australia getting the revenues from the richest fields.

The Arrangement also refers to a respect for “international law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS).” Australia’s recent rejection of the ICJ and UNCLOS clauses on maritime boundaries contradicts, or at the very least complicates this part of the agreement.

International lawyer Jeff Smith states that with its withdrawal, Australia has “effectively denied the working operation of the Arrangement.”

In a legal opinion commissioned by PetroTimor in April 2002, three internationally recognized legal experts state that despite these provisions, “in practice [the Arrangement] would undoubtedly compromise East Timor’s claims to areas outside the proposed JDPAs.” According to their opinion, if the boundaries delimitation of the treaty “is considered an acceptable arrangement by Australia and East Timor when they enter into the treaty, it is not probable that any tribunal... would regard the boundary as inequitable.”

According to Alkatiri and others on UNTAET/East Timor’s negotiating team, this contradicts the advice of their leading legal experts who state that the Arrangement clearly states that it does not decide or impact where East Timor’s maritime boundaries will be. In an interview with La’o Hamutuk, Alkatiri expressed concern that PetroTimor is distributing disinformation for their own benefit. He explained that the negotiating team is very informed and aware of problems related to resolving the maritime boundaries through an international court process, and has thus prioritized negotiation. Like Indonesia, which never recognized the jurisdiction of the court, Australia has the right to withdraw their recognition of the court.

Australia, he explained, “uses what will best defend their interests and we must use whatever will best defend our rights.”

The Australian government and oil companies operating in the Timor Sea are pushing East Timor to ratify the Arrangement immediately. Many members of East Timor’s future Parliament, however, do not feel that they have enough information to make this important decision. Once this treaty is signed, it can not be easily withdrawn.

Sensitive negotiations require some secrecy, but it is also critical that all information that would not compromise East Timor’s position in the negotiations be made public. Public information, at all stages of the process, must be translated into languages understood by most East Timorese (the text of the proposed Arrangement has been available only in English).

In negotiations, we strongly encourage the East Timorese government to obtain trusted advisors who bring proven expertise in multiple relevant fields. It is also critical for East Timorese to be included as much as possible in all parts of the process to build experience and capacity.

As East Timor celebrates independence, the new nation's leaders must demonstrate their commitment to transparency, public information, dialogue and democratic process. The oil and gas resources in the Timor Sea belong to all East Timorese and are a symbol of East Timor's potential for both self-sustaining and justice.

Source: *RESISTANCE OILWATCH NETWORK BULLETIN Number 31 – August 2002*