

# TREATY BETWEEN AUSTRALIA AND THE REPUBLIC OF INDONESIA ON THE ZONE OF CO-OPERATION IN AN AREA BETWEEN THE INDONESIAN PROVINCE OF EAST TIMOR AND NORTHERN AUSTRALIA

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## INTRODUCTION

The Treaty between Australia and Indonesia on their zone of cooperation, signed in a mid air ceremony during a flight over the "Timore Gap", has been heralded as '*...establishing a long-term stable environment for petroleum exploration and exploitation...*', which '*...would not prejudice the claims of either country to sovereign rights over the continental shelf...*' and would not '*...preclude continuing efforts to reach final agreement on permanent seabed boundary delimitation.*'<sup>1</sup> This article briefly presents background to the Treaty, and then raises certain issues of international law, morality and practicality arising therefrom.

## BACKGROUND

Despite nine rounds of negotiations since 1979 Australia and Indonesia have been unable to agree on the principles of international law pertaining to permanent delimitation of the seabed in the Timore Gap Zone. The Australian position is that under international law, Australian and Indonesian seabed rights extend from their coast lines throughout the natural prolongation of their continental shelves which end in the bathymetric axis (i.e. the deepest part) of the Timor Trough. The Indonesian position is that there is one shared continental shelf between Australia and Indonesia, and that, accordingly, a boundary equidistant between the two coast lines (the median line) would be appropriate. Indonesia also argues that the Exclusive Economic Zone (EEZ) concept with seabed rights up to 200 nautical miles supports the median as the appropriate principle.<sup>2</sup>

## THE TREATY

### A. Part I: The Zone

Without prejudice<sup>3</sup> to the respective positions of the two governments on a permanent shelf delimitation, Article 2 of the Treaty specifically establishes a "Zone of

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1. Joint Ministerial Statement by Senator Gareth Evans, Australian Minister for Foreign Affairs and Trade and Mr Ali Alatas, Indonesian Minister for Foreign Affairs, 11 Dec. 1989. Emphasis added.
2. "Timor Gap Zone of Cooperation Treaty", Background Paper No. 34231 issued by the Australian Department of Foreign Affairs and Trade, 11 Dec. 1989 (hereinafter referred to as "Background Paper I"), p.2.
3. Compare Art.XXVIII of the 1974 Japan/South Korea Agreement. The wording of Art.2(3) of the Treaty is similar to the Institute Draft 4(1) cited in n.18 below. But, unlike the latter's Art.4(3),

Cooperation" in an area between the Indonesian Province of East Timor and Northern Australia, which comprises Areas A, B and C, a total of approximately 61, 000 square kilometres, and sets out the following principles:

1. In Area A, there shall be joint control by the Contracting States of the exploration and exploitation of petroleum resources and equal sharing between them of the benefits of the exploitation of these petroleum resources.
2. In Area B, Australia shall make certain "notifications" and share with the Republic of Indonesia Resource Rent Tax collection arising from petroleum production.
3. In Area C, the Republic of Indonesia shall make certain "notifications" and share with Australia Contractors' Income Tax collections arising from petroleum production.

As detailed in Annex A of the Treaty, the Northern extent of the Zone of Cooperation is delineated by a simplified bathymetric axis line (i.e. the maximum Australian continental shelf claim). The Southern limit is a 200 nautical miles line measured from the Indonesian base lines (i.e. the maximum Indonesian EEZ claim). The East and West sides are delineated by "equidistance lines"; joint Area A's Northern line is along the simplified 1,500 metre isobath, and the Southern boundary of Area A represents the median line between Australia and Indonesia.<sup>4</sup>

#### ***B. Part II: Exploration and Exploitation in the Zone of Cooperation***

This part sets out the rights and responsibilities of the two countries with regard to exploration and exploitation of petroleum resources in Area A, which will be exercised by a Ministerial Council through a Joint Authority, in which the Treaty purports to vest title to Annex A petroleum products exclusively.<sup>5</sup>

Part II also provides for notifications, and sharing arrangements in relation to Areas B and C. The latter are that, in Area B, Australia will share with Indonesia 10 per cent of its gross Resource Rent Tax and that in Area C, Indonesia will share with Australia 10 per cent of its Contractors' Income Tax.<sup>6</sup> In the event of change in the relevant taxation legislation of either of the Contracting States they shall review the formulation set out in the Treaty and agree on a new formulation ensuring that the relative shares paid by each state to the other in respective revenue collected from corporations producing petroleum in Areas B and C remain the same.<sup>7</sup>

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Art.2(4) of the Treaty envisages continued efforts to reach agreement on permanent shelf delimitation.

4. The Treaty, Art.1(1)(p). See also "Background Paper I", p.4. In this context "Indonesia" is taken to include the "Indonesian Province of East Timor".
5. The Treaty, Art.3(1). The delegation to the Joint Authority goes beyond a "supervisory function" as described in D below.
6. The Treaty, Art.4(1) and (2).
7. *Ibid.* Art.4(3).

Administrative arrangements are to be entered into between the Contracting States to give full effect to the sharing arrangements in areas B and C at the time that production from either area commences.<sup>8</sup>

### C. *Part III: The Ministerial Council*

The Treaty then establishes a Ministerial Council to be made up of an equal number of Australian and Indonesian (usually petroleum) Ministers to meet annually (or by correspondence), to make major decisions by consensus, to direct and delegate certain functions to, and oversee the decisions of, the Joint Authority (Part IV) and to have overall responsibility for 'all matters relating to the exploration for and exploitation of the petroleum resources in Area A'.<sup>9</sup>

Specifically, the functions of the Ministerial Council [detailed in Article 6(1)(a-s)] include any amendment to the Petroleum Mining Code (Annex B of the treaty), modification of the Model Production Sharing Contract (Annex C of the Treaty), approval of production sharing contracts, variation and termination thereof and the distribution of revenues therefrom. The Ministerial Council may also give approval to the Joint Authority to market petroleum products.<sup>10</sup> The Ministerial Council is to exercise its functions ensuring the achievement of the optimum commercial utilisation of the petroleum resources of Area A 'consistent with good oil field and sound environmental practice'<sup>11</sup> and is to authorise the Joint Authority to initiate the steps necessary for exploration and exploitation of Area A forthwith upon the Treaty coming into force.<sup>12</sup> M. Hichens, one of the Australian negotiators, draws the analogy that 'the responsibilities of the Ministerial Council are akin to those of the Joint Authority under our (Australian) Petroleum (Submerged Lands) Act'.<sup>13</sup>

### D. *Part IV: The Joint Authority*

The Joint Authority is established by the Treaty as a separate juridical entity with legal capacity under the laws of Indonesia and Australia generally as required to perform its functions, and specifically, it is given capacity to contract, to acquire and dispose of moveable and immovable property and to institute and be a party to legal proceedings.<sup>14</sup> Its functions, which are to be carried out in accordance with the Petroleum Mining Code, include dividing Area A into contract areas, letting and overseeing production sharing contracts and variations thereof, collecting the proceeds of its share of such contracts and distributing same between the Contracting States, control of entry into, within and out of Area A of vessels structures equipment and personnel employed in oil exploration and

8. *Ibid.* Art.4(4).

9. *Ibid.* Art.5.

10. *Ibid.* Art.6(1)(h).

11. *Ibid.* Art.6(2).

12. *Ibid.* Art.6(3).

13. M. Hichens, 'The Zone of Cooperation Between Australia and Indonesia', paper presented by Petroleum Exploration and Development Branch, (Australian) Commonwealth Department of Primary Industries and Energy, 12 Dec. 1989, p.3.

14. The Treaty, Art.7(1) and (2). Art.5 of the Institute Draft (see n 18 below) envisages legal personality for the Joint Commission as necessary to perform its functions, which are not as extensive of those of the Joint Authority under the Treaty.

exploitation, and responsibility for environmental protection, health safety, search and rescue and any action required 'in the event of terrorist threat to vessels and structures engaged in petroleum operations in Area A'.<sup>15</sup>

The Joint Authority is exempted from Australian Federal Income Tax and the Income Tax (Pajak-Penghasilan) imposed under the law of the Republic of Indonesia.<sup>16</sup>

#### E. Part V: Cooperation on Certain Matters in Relation to Area A

This part sets out the terms of cooperation and coordination between the Contracting States as to surveillance, hydrographic and seismic surveys, scientific research, construction of facilities, environmental protection (including liability of contractors for pollution of marine environment), air traffic services, search and rescue and security measures.<sup>17</sup> Further provision is made with regard to unitisation between Area A and areas outside Area A.<sup>18</sup>

#### F. Part VI: Applicable Laws

The applicable laws are as follows:

1. Production Sharing Contracts: The law applicable shall be specified in each contract.<sup>19</sup>
2. Customs, Migration and Quarantine: Each Contracting State may apply its own laws to customs, migration and quarantine as extended to persons equipment and goods entering its territory from, or leaving its territory for, Area A. It is to be noted that contractors are to ensure that, unless otherwise authorised by the Contracting States, persons, equipment and goods do not enter structures in Area A without first entering Australia or Indonesia and that their employees, and employees of their sub-contractors, are authorised by the Joint Authority to enter Area A.<sup>20</sup>
3. Employment: With regard to employment, "Background Paper I" explains as follows:

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15. The Treaty, Art.8. Emphasis added.

16. *Ibid.*, Art. 10(1), Para 2 of this Article extends income tax and customs exemption to the "Executive Directors and other officers of the Joint Authority".

17. *Ibid.* Arts. 12-18.

18. *Ibid.* Art.20. Detailed discussion of unitisation is provided in Fox, McDade, Reid, Strati and Hucy, *Joint Development of Offshore Oil And Gas* (Br. Institute of Int'l. & Comp. Law, 1989) (referred to as the "Institute Draft").

19. The Treaty, Art.22, *Id.* Fox *et al* chapter 10 also addresses questions of applicable law. For descriptive comparison with the Institute Draft see H. Burmester, 'The Zone of Cooperation Between Australia and Indonesia - A Preliminary Outline With Particular Reference to Applicable Law', paper presented at the Conference on Joint Development of Offshore Oil and Gas, 10-12 July 1989, London, in which "petroleum law" is discussed at pp.5-7, and "other" law at pp.7-11. See also E. Willheim, 'Australia - Indonesia Seabed Boundary Negotiations: Proposals for a Joint Development Zone in the Timor Gap' (March-April 1987) 5 *Maritime Studies* 5.

20. The Treaty, Art.23.

In order to ensure equality of opportunity for both Australians and Indonesians and so that one operator is not advantaged over another, terms and conditions will apply which are no less favourable than those which apply in both countries.

Preference is to be given to employment of nationals or permanent residents of both countries and contract operators will be required to employ Australians and Indonesians in equivalent numbers over the term of a contract, but with due regard to efficient operations and to good oilfield practice.

It is envisaged that Australians employed to work in the area will be able to be represented by unions.

For Australian workers, the Industrial Relations Commission will provide conciliation and arbitration.

For Indonesian workers, a tripartite committee of government, employers and employees will provide conciliation and arbitration.<sup>21</sup>

4. Health and Safety for Workers: the Joint Authority is to develop occupational health and safety standards and procedures for persons employed on structures in Area A that are no less effective than those standards of procedures that would apply in relation to persons employed on similar structures in both Australia and Indonesia.<sup>22</sup>

5. Petroleum Industry Vessels - Article 26 provides:

Except as otherwise provide in this Treaty, vessels engaged in petroleum operations shall be subject to the law of the Contracting State whose nationality they possess and, unless they are a vessel with the nationality of the other Contracting State, the law of the Contracting State out of whose ports they operate, in relation to safety and operating standards, and crewing regulations. Such vessels that enter Area A and do not operate out of either Contracting State shall be subject to relevant international safety and operating standards under the law of both Contracting States.

6. Criminal Jurisdiction: Nationals of Australia will be subject to Australian law; Indonesian nationals will be subject to Indonesia law; nationals of third countries will be subject to the criminal law jurisdiction of both Australia and Indonesia subject to consultation between the two countries and avoidance of double jeopardy; and flag state criminal law shall apply in relation to acts or omissions on board vessels, including seismic or drill vessels in, or aircraft in flight over Area A.<sup>23</sup>

7. Civil actions: Claims for damages may be brought in the Contracting State which has, or whose nationals or permanent residents have, suffered the damage or incurred expenses as a result of activities in Area A, and the

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21. *Ibid.* Art.24 and Background Paper I, p.8; See also Burmester, *op.cit.* 11.

22. The Treaty, Art.25; cf. the Institute Draft, above no.18, Art.20.

23. The Treaty, Art.27. It is to be noted that capital punishment for certain drug offences is apparently still applicable under the laws of Indonesia. See also Burmester, *op.cit.* 11.

court in which the action is brought is to apply the law and regulations of that State.<sup>24</sup>

8. Taxation Law: Both Australia and Indonesia are to apply their taxation legislation to companies carrying out operations in Area A. These companies will be required to lodge tax returns in both countries, and in each country a 50% tax rebate will be given.<sup>25</sup>

Also, Background Paper I explains:

With regard to individuals working in Area A the following shall apply:

1. Persons resident in Australia will be subject to Australian tax.
2. Persons resident in Indonesia will be subject to Indonesian tax.
3. Other persons will be subject to both Australian and Indonesian tax, and each country will give a 50% tax rebate.<sup>26</sup>

#### G. *Part VII: Settlement of Disputes*

Disputes arising between the Contracting States with regard to the interpretation or application of the Treaty are to be resolved by consultation or negotiation between the Contracting States.<sup>27</sup> Each production sharing contract shall also specify a form of binding commercial arbitration with regard to disputes as to the interpretation or application of the contract, and each Contracting State will facilitate the enforcement in its respective courts of such arbitration awards.<sup>28</sup>

#### H. *Part VIII: Final Clauses*

This portion of the Treaty specifies that it will remain in force for 40 years, with successive 20 year term extensions unless there is agreement between Australia and Indonesia on permanent continental shelf delimitations.<sup>29</sup> If such an agreement is concluded between the Contracting States, the Treaty ceases to be in force, and both countries are obliged to offer contractors the same rights available under outstanding production sharing contracts and the Treaty, by virtue of arrangements which shall be made at the time of concluding a permanent delimitation agreement to give effect to such rights.<sup>30</sup>

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24. The Treaty, Art.28.

25. *Ibid.*, Art.29. It is noteworthy that Companies are to be formed specifically for these purposes.

26. Background Paper I, p9. The authors are presently preparing a paper on the tax ramifications of the Treaty.

27. The Treaty, Art.30(1).

28. The Treaty, Art.30(2). Art.23 of the Institute Draft is more specific.

29. The Treaty, Art.33(2). Art.45 of the Institute Draft does not appear to envisage such ultimate agreement.

30. The Treaty, Art.34.

**I. Annex A**

This Annex contains maps, verbal designation, description and co-ordinates of the three areas comprising the Zone of Cooperation.

**J. Annex B: The Petroleum Mining Code<sup>31</sup>**

Most significant are the provisions of Article 4 of the Code as follows:

A production sharing contract entered into by the Joint Authority with the approval of the Ministerial Council shall give to the contractor the exclusive right and responsibility to undertake petroleum operations in a contract area, subject to the provisions of the Treaty, relevant regulations and directions issued by the Joint Authority and the terms and conditions of the contract.

The contract shall not confer on the contractor ownership of petroleum in the ground but shall provide for the contractor to take a share of petroleum production as payment from the Joint Authority for petroleum operations undertaken by the contract operator pursuant to the contract. Ownership of the Joint Authority's share of petroleum production shall remain with the Joint Authority.<sup>32</sup>

Title to the contractor's portion of petroleum production shall pass to the contractor at the point of tanker loading, and, unless the Joint Authority opts to market the product directly itself, the contractor shall have the right to lift, dispose of and export its share of petroleum and retain abroad the proceeds obtained therefrom.<sup>33</sup>

Under the Code, the Joint Authority is to divide Area A into approximately 10-15 contract areas, of which each might be about 30-40 blocks,<sup>34</sup> for which it will invite applications to enter into contracts using a work programme bidding system which will identify annual exploration work and expenditure commitments to be undertaken in the contract area.<sup>35</sup> As a minimum requirement of the form in which an application shall be prepared a draft contract based on the model Production Sharing Contract shall be completed and lodged.<sup>36</sup> Each contract operator shall establish an office in either Indonesia or Australia.<sup>37</sup>

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31. Hereinafter referred to as the "Code".

32. Paragraph 5 of this Article also provides that, with appropriate Ministerial Council approval, the Joint Authority may market any or all of the petroleum product itself. Contrast Institute Draft, Art.13(2).

33. The Code, Art.4(4). Title and insurable risk apparently remain with the Joint Authority to such point.

34. Background Paper I, p.10.

35. The Code, Art.9.

36. *Ibid.*, Art.10.

37. *Ibid.*, Art.6(3).

**K. Annex C: Model Production Sharing Contract**

Vested by the Treaty with title to petroleum product in Area A the Joint Authority is, pursuant to the Code, authorised to enter into production sharing contracts based upon the model set forth in this Annex, under which the contractors are given the right to explore and produce in return for which they are to receive "a share of the petroleum production" according to a presented formula, such as:

- in the first 5 years of production, 10% of production (known as "First Tranche Petroleum") will be shared between the contractor and the Joint authority according to the production rate sharing formula (on page 6);
- thereafter, First Tranche Petroleum is 20% of production in effect, in years 1 to 5 the contractor will pay to the Joint Authority a 5% to 7% gross royalty, and from year 6 onward a 10% to 14% gross royalty;
- from the remaining production, contractors will be allowed to recover production equal to Investment Credits of 127% for exploration and capital costs;
- in addition, contractors will be able to recover all exploration and operating costs, and depreciation (20% straight line) of capital costs; and
- after recovery of Investment Credits and all costs, the remaining quantity of crude oil production is shared according to the following progressive formula:

Production Rate	Contractor Share
0.50,000 bpd	50%
50,001 - 150,000 bpd	40%
150,001 bpd	30%

- The contractor will receive a 50% share of natural gas production irrespective of production rates, after recovery of Investment Credits and all costs.<sup>38</sup>

**L. Annex D: Taxation Code for Avoidance of Double Taxation in respect of Activities Connected with Area A of the Zone of Co-operation.**

Both Australia and Indonesia are to apply their tax legislation to companies operating in Area A, which will be liable to lodge tax returns in both countries, and in each country a 50% tax rebate is to be given on "business profits".<sup>39</sup>

**II. INTERNATIONAL ISSUES**

In view of the fact that East Timor is regarded by the UN as a non-self governing territory under the administering authority of Portugal there are substantial arguments in international law that question the validity of the Treaty and may threaten any commercial activity in the area. At key points during the Treaty negotiations in 1985, when the JDZ was first proposed between Australia and Indonesia and in September

38. Hichens, *op.cit.* 5 and 6 explains the formula in detail.

39. Taxation Code, Art.4. A detailed analysis of the Taxation Code is being prepared by the authors.



1988 when the interim agreement was announced, Portugal denounced the proposed treaty as a "blatant and serious breach of international law". In November 1988 Portugal's Foreign Minister stated that Portugal would take Australia to the International Court of Justice for violating international law if it went ahead in developing oil reserves in the Timor Gap.

The Timor Gap joint venture agreement can be seen as an exercise by which Australia and Indonesia divide between themselves part of the potential wealth of East Timor. This raises the issues of economic self-determination and permanent sovereignty over natural resources. The principle of permanent sovereignty over natural resources enshrines the right to economic self-determination as a right not only of nations, but of peoples and has been recognised in a number of UN resolutions, as well as in Article 2 of the Charter of Economic Rights and Duties of States, and the International Covenants on Civil, Political, Economic, Social and Cultural Rights. Article 1(2) of the latter states that "in no case may a people be deprived of its own means of subsistence".

Upholding East Timor's right to permanent sovereignty over its natural resources in the Timor Gap would destroy any argument that as an independent state, East Timor would not be economically viable. The 1982 Law of the Sea Convention, (UNCLOS III), to which Indonesia and Australia are both signatories, also supports the argument. Article 301 of that treaty provides that:

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

To the extent that Indonesia makes claims concerning the resources of the sea and continental shelf areas surrounding East Timor, it can hardly claim to have refrained from the threat or use of force. In denying Timorese self-determination, it has acted in breach of other principles of law contained in the UN Charter [e.g. Article 2 (4)] and the Charter of Economic Rights and Duties. Australia, in condoning those acts, is a party to Indonesia's breaches of the letter and spirit of Article 301.

In November 1988, on the thirteenth anniversary of the Indonesian annexation, Timorese solidarity groups converged on Canberra. A delegation met with Australian Foreign Minister Senator Gareth Evans, and told him that any resources in the Gap belonged to East Timor and that Australia should be negotiating with East Timor. The meeting ended with Senator Evans affirming his personal support for the right of East Timorese self-determination. Nevertheless, national self-interest in the form of potential oil revenue has been sufficient to explain the rejection by three Australian governments, those of Whitlam, Fraser and Hawke, of the East Timorese right to self-determination.

Not surprisingly, Australia has been reluctant to acknowledge that the annexation and its recognition thereof are in breach of the UN Charter and of international law. Merely to uphold, as appears to be the present government's view, that Australia recognises Indonesia as the state in possession, and can therefore choose to negotiate with it on that basis is to ignore both UN resolutions specifically relating to East Timor and those dealing with the annexation of territory by force generally. The cumulative effect of these resolutions is that both the Security Council and the General Assembly have declared that Indonesia engaged in an unlawful act in annexing East Timor and breached several articles of the UN Charter.

Article 2, Paragraph 4 of the UN Charter, states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN.

This principle was reinforced in the 1970 UN Declaration on Principles on International Law Concerning Friendly Nations and Co-operation Among States in Accordance with the Charter of the UN, which states that:

The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.<sup>40</sup>

In 1974, Australia again was a party to the unanimous adoption of a Resolution, No.3314 the Definition of Aggression. Article 5, Paragraph 3, thereof states that: 'No territorial acquisition or special advantage resulting from aggression shall be recognised as lawful.'

Consistent with the 1974 Definition of Aggression is the obligation of states not to deal with Indonesia as though it were the legal government of East Timor. This is a similar obligation to that of states not to recognize the illegal presence of South Africa in Namibia, an obligation which was recognized by the ICJ in its Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*. Much of what the Court said in that case applies by analogy to the present situation and specifically the following:

That States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of or lending support or assistance to such presence and administration.<sup>41</sup>

Concomitantly the Security Council called upon South Africa to withdraw from Namibia [Resolutions 264(1969) March 20 1969 (Dossier item 107) adopted from draft resolution proposed in document S/1990 and 269(1969) August 12 1969 (dossier item 108) draft resolution proposed in document S/9384]. When South Africa failed to do so, the Security Council adopted Resolution 276(1970) which declared that 'the continued presence of the South African authorities in Namibia is illegal' and that consequently all acts taken by the government of South Africa 'on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid'.

UNCLOS III adopted a resolution (Resolution III) that deals with territories whose people have not yet attained self governing status.<sup>42</sup> UNCLOS was concerned that such

40. G.A. Res. 2625(XXV), (1970) 9 *Int'l. Leg. Mat.* 1294. It may be mentioned that the Resolution was adopted unanimously including Australia.

41. [1990] *I.C.J. Rep* 17. The ICJ also states in the Namibia case at paragraph 124: 'the restraints which are implicit in the non-recognition of South Africa's presence in Namibia...impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory'.

42. Official Records of the Third U.N. Conference on the Law of the Sea, Vol.XVII, Document A/Conf./121, Annex I.

territories might not receive the benefits of UNCLOS upon obtaining independence if in the interim their rights were waived by a foreign governing power. The resolution states that in the case of such territories, UNCLOS shall be implemented for the benefit of the people of the territory with a view to promoting their development and any exercise of these rights shall take into account the relevant UN resolutions. Currently the UN policy views East Timor as a non self governing territory administered by Portugal, and the General Assembly has repeatedly opposed Indonesian control over East Timor, and called for an act of self-determination.

Thus it would appear that Resolution III is applicable to East Timor and would operate to preclude Australia and Indonesia from negotiating to divide the resources of the Timor Gap between themselves.

Furthermore there is a broader obligation in Article 2, Paragraph 5 of the Charter, encompassing decisions of the General Assembly as well (with regard to East Timor see Resolution, 34/85), to give the UN 'every assistance in any action it takes in accordance with the present Charter'. Australia's dealings with Indonesia with regard to East Timor do not respect this obligation of assisting the UN in its efforts to obtain self-determination for the East Timorese. Thus the East Timorese have been denied the chance to determine the destiny of their territory.

The principle of self-determination as expounded in the UN Charter, numerous declarations and resolutions is an established part of international law, and arguably part of its highest form *jus cogens* (a peremptory norm). A peremptory norm is one from which absolutely no derogation is permitted. It exists to limit the right of subjects of law to conclude agreements between themselves, so as not to injure the rights or interests of other subjects of law.

Further, Article 53 of the Vienna Convention of 1969 on the Law of Treaties provides that: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.' Thus any agreement (in this case the Treaty) that conflicts with a peremptory norm (in this case self-determination) is void. However there is a serious defect in the procedural articles of the Vienna Convention, Articles 65 and 66, as the right to claim invalidity of a treaty because of an alleged conflict with a peremptory norm is limited to the parties to that treaty.

Were Portugal to bring suit against Australia, to renounce its acceptance of the compulsory jurisdiction of the ICJ might cause Australia embarrassment, having always prided itself on its "good" international profile. If an ICJ decision went contrary to Australia's interests, Australia would have to consider the serious consequences of disobeying the ICJ for its international credibility. However the Timor Gap Treaty has provided a convenient and timely spotlight for international attention to once again focus on the plight of the East Timorese people.

Since its recent joining of the European Economic Community (EEC) on 1 January 1986, Portugal has been successful in obtaining vocal support from the EEC on the East Timor issue. On 10 July 1986 the European Parliament passed a resolution calling on Indonesia to end its occupation of East Timor and create conditions for an act of self-determination. The resolution was adopted by 162 votes to 42 with 30 abstentions. Most recently, in February 1989, a statement in support of East Timor's right to self-determination was made on behalf of the twelve European Foreign Ministers at the UN Commission for Human Rights (UNCHR) in Geneva.

Another significant move for the East Timor issue occurred in August 1989, when by a narrow vote the UNCHR Sub-Commission on Prevention of Discrimination and

Protection of Minorities succeeded in putting the East Timor issue back on the UNCHR agenda for discussion in February 1990, after it had been voted off several years ago. Efforts to adopt a similar resolution in 1988 had failed.

Following his June 1988 meeting in Portugal with members of the Portuguese Government and Parliament, it is the view of Mr Tony Lamb, Federal Member for Streeon and co-launcher of *Parliamentarians for East Timor*, that 'after a long period of indecision Portugal is more active with regard to its responsibilities towards East Timor than at any time since 1975'. The other co-launcher, the Chairman of the United Kingdom Parliamentary Human Rights Group Lord Averbury, said in Canberra recently (Jan.4), that the Timor Gap Treaty was "a flagrant violation of international law".

Finally, East Timor lingers on the Portuguese political agenda because the Portuguese Government has been unable to ignore constant reports from refugees still arriving in Portugal alleging large-scale human rights violations by Indonesia. Portugal's next move is expected soon.

### III CONCLUSION

Albeit the result of extensive negotiation, commendable compromise and drafting which demonstrates cognizance of sophisticated evolution in the field of joint development of petroleum resources, subject Treaty unfortunately does not resolve an important overriding issue arising under what Professor Louis Sohn described as "world law", namely the ultimate sovereignty (through self determination) of East Timor, which can still be argued to be "*sub judice*" the UN. For the time being the Contracting Parties have purported to vest title to petroleum product of Area A in the Zone of Cooperation seabed in the Joint Authority. Indonesia's present claim to such title rests largely upon its acquisition and establishment of the Indonesian Province of East Timor. Australia has taken the view that "...whatever the unhappy circumstances and indeed possible illegality surrounding Indonesia's acquisition of East Timor in the mid 1970's, Indonesian sovereignty over that territory should be accepted not only on a *de facto* but on a *de jure* basis'.<sup>43</sup> However, there is a strong view that 'common exploitation does not create common possession of the continental shelf or common sovereign rights in a given area'.<sup>44</sup> This view suggests that third parties may not be obliged to respect the title of the Joint Authority.

Moreover, with regard to the particular issue of East Timor's sovereignty, there is growing awareness of, and increasing opposition to, Indonesia's stance, and it remains to be seen what the ultimate position of the entire international community will be. It may well be that further international legal, moral and commercial pressure will be brought to bear. For example:

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43. *Australia Parliamentary Debates* (Hansard), Sen., Nov.1, 1989. (Pamphlet form supplied by the Department of Foreign Affairs and Trade, Canberra) p.2703. Senator Evans goes on to say.

The last point I want to make is that Australia has consistently supported discussions between Portugal and Indonesia under the auspices of the United Nations Secretary-General to resolve the lingering East Timor issue as it exists between those two countries. That is a matter that related to the dispute between Portugal and Indonesia, to which Australia is not a party, and is quite separate from the Timor Gap negotiations.

44. Posited by Judge Korctsky in his dissenting opinion in the *North Sea Continental Shelf Cases* [1969] *ICJ Rep.*, 169.

- a. Australia, which has accepted compulsory jurisdiction, may be brought before the International Court of Justice by Portugal; the latter may also seek to join Indonesia to such an action.
- b. The General Assembly may request an advisory opinion of the International Court of Justice concerning the status of East Timor and the validity of the Treaty.
- c. Portugal may seek associated status for East Timor with the European Community under Articles 131, 136 or 238 of the Treaty of Rome; and, as a preliminary step under the latter, Portugal may seek a judgement by the Court of Justice of the European Community as to the compatibility of such association (and hence the Courts' view on the status of East Timor).
- d. Oil companies, banks and insurers may seriously question the actual security offered in the Zone of Cooperation in light of East Timorese national resistance activity the force of which should not be underestimated. Rights of existing permit holders also remain to be resolved.
- e. *Pro tem*, Australia may wish to establish a trust on behalf of whatever juridical entity East Timor becomes, into which a portion of the proceeds from Zone A petroleum product would be paid.

As a result of such pressure the Treaty could figuratively "come back to earth" and require negotiation a new between Australia and whatever international juridical entity East Timor ultimately becomes. It is the authors' opinion that this fundamental issue should be noted now and that President de Gaulle's observation may be apt: 'Treaties are like roses and young girls - they last while they last'.