

# Australia Adrift: The Timor Sea Oil & Gas Dispute

---

ALISA NEWMAN HOOD  
Former Petroleum Legal Advisor  
East Timor

---

IN THE LEAD-UP TO THE Australian elections in October 2004, critics of Australian Prime Minister John Howard took to calling him "Bonsai." Why? Because, the joke goes, he's a "little Bush."

Like most jokes, this one draws titters because it contains truth. The Howard government has, to a significant extent, refashioned Australia's foreign policy to parrot that of the United States under the Bush Administration. The current government has bucked the country's once proud internationalist tradition and instead embraced certain isolationist and unilateralist policies, provoking an outcry in progressive political, academic, and media circles.<sup>1</sup>

Australia was one of the 50 countries that met in San Francisco in 1945 to draw up the United Nations Charter.<sup>2</sup> In the decades that followed, Australia signed up to virtually every major international convention.<sup>3</sup> As recently as 1990, then Foreign Minister Gareth Evans proclaimed in a well-known speech that the Australian government "accords a high priority to being, and being seen to be, a good international citizen" and that there is "a direct link between our pursuit of good international citizenship and Australia's long-standing support for multilateralism."<sup>4</sup>

Since assuming his post in 1996, Prime Minister Howard has scaled back Australia's participation in the international system time and again. Recent examples include: Acceptance, as a "coalition-of-the-willing" partner, of the Bush Administration's decision to invade Iraq without authorization from the UN Security Council; introduction of immigration and asylum laws narrowing Australia's interpretation of the 1951 UN Refugee Convention, as a result of the infamous

---

ALISA NEWMAN HOOD served as a petroleum legal adviser to the Prime Minister of East Timor from July 2002 to February 2004, during which time she served as head of the office responsible for oil and gas negotiations with the Australian government and international oil companies. She is currently a practicing attorney in New York.

---

Copyright © 2005 by the *Brown Journal of World Affairs*

2002 *Tampa* incident;<sup>5</sup> begrudging and belated ratification of the Rome Statute establishing the International Criminal Court;<sup>6</sup> and refusal to ratify the Kyoto Protocol on greenhouse gas emissions, which entered into force in February 2005.<sup>7</sup>

But nowhere has the current Australian government's sincerest form of flattery toward the United States been more on display than in its new—most would not say “improved”—approach to the UN Convention on the Law of the Sea (UNCLOS). This international treaty, also known as the Law of the Sea Treaty (or “LOST” to one of its clever U.S. critics<sup>8</sup>), has been joined by more than 145 nations, including every industrialized nation except the United States. Australia signed up to UNCLOS in 1982, but a decade later the Howard government, without warning, repudiated the dispute resolution provisions that give UNCLOS its teeth.

It is undeniable that the Howard government's pullback from UNCLOS dispute resolution has created hardship for East Timor (Timor-Leste), Australia's long-suffering neighbor. That suffering, in turn, has been accompanied by negative publicity that has poked more than a few holes in Australia's reputation as a “good international citizen.” More difficult to quantify, but also undeniable, is the impact of Australia's withdrawal from UNCLOS dispute resolution on the international law of the sea regime. In this age in which UNCLOS is needed more than ever to protect the environment, facilitate national security, and enable offshore oil and gas production, Australia's timing can fairly be described as poor.

## UNCLOS IN BRIEF

As nearly every text ever written on the law of the sea points out in its opening lines, oceans and seas cover at least two-thirds of the Earth's surface.<sup>9</sup> Until the twentieth century, almost all of the “law of the sea” was premised on freedom of the seas—in other words, the oceans and seas “belonged” to no nation but were to be used and enjoyed by all.<sup>10</sup> The prevailing view was based largely on the writings of philosopher Hugo Grotius, who in the early seventeenth century argued that no nation could legitimately exercise sovereignty over the world's seas.<sup>11</sup>

Largely as a result of industrialization and World War II, the issue of sovereignty over the seas shifted from philosophical to economic importance. The war demonstrated to the Allied forces both the importance of having strategic minerals at their disposal and the danger of depending on foreign sources for them (a fear which will sound quite familiar to modern readers).<sup>12</sup> In the post-war era, oil companies began to develop technologies that permitted them to mine the deep seabed (or “continental shelf”) surrounding the United States and other nations, which is

often rich in valuable minerals—namely oil.<sup>13</sup>

Today, oil companies have developed the ability to drill for oil and gas in depths exceeding 8,000 feet below the water's surface.<sup>14</sup> And as onshore reserves continue to plateau and decline, the world has become increasingly dependent on offshore oil and gas. For example, by the end of 2004, U.S. offshore areas supplied 30 percent of domestic oil production and almost 25 percent of domestic natural gas production.<sup>15</sup> It is further estimated that 60 percent of the oil and gas yet to be discovered in the United States is located offshore.<sup>16</sup>

As it became clear that new technologies were outgrowing the old legal regime, U.S. President Harry Truman in 1945 issued the Truman Proclamation, in which he stated that the United States would, and legitimately could, exercise jurisdiction over the natural resources of its continental shelf.<sup>17</sup> Other nations quickly followed suit.<sup>18</sup>

In 1982 following a number of less successful attempts, the Third UN Conference on the Law of the Sea, which was comprised of representatives of more than 160 nations including Australia and the United States, adopted UNCLOS—a “constitution for the seas.”<sup>19</sup> Under UNCLOS, coastal states may claim certain rights over defined maritime zones: Full sovereignty over a “territorial sea” of up to twelve nautical miles; sovereignty over the natural resources of an “exclusive economic zone” (essentially, the water column and surface) of up to 200 nautical miles; and sovereignty over the natural resources of a “continental shelf” (the seabed and subsoil) up to 200 nautical miles or the length of the state's geological continental shelf up to a certain limit.<sup>20</sup> Importantly, UNCLOS also establishes principles for delimiting maritime zones between neighboring nations whose claims overlap.<sup>21</sup>

Australia was an original signatory of UNCLOS and ratified it in 1994.<sup>22</sup> Australia thereby submitted to binding arbitration under Article VII of UNCLOS for the resolution of all law of the sea disputes, including those with its neighbors regarding the location of their shared sea boundaries.<sup>23</sup> Australia did not take advantage of UNCLOS provisions, allowing it to opt out of binding dispute settlement on politically sensitive issues such as boundary delimitation.<sup>24</sup>

As mentioned above, the United States stands alone among the industrialized nations of the world in not having ratified UNCLOS to this day. Although UNCLOS is supported in the United States by such unlikely bedfellows as oil companies, environmentalists, and the military. Archconservatives (led for many years by former

**It is further estimated that 60 percent of the oil and gas yet to be discovered in the United States is located offshore.**

U.S. Senate Foreign Relations Committee Chairman Jesse Helms)<sup>25</sup> regard UNCLOS as a threat to U.S. sovereignty and have blocked Senate approval for more than a decade.<sup>26</sup> Finally, in February 2004 the U.S. Senate Foreign Relations Committee, under the leadership of Chairman Richard Lugar, voted unanimously to ratify UNCLOS.<sup>27</sup> Importantly, the draft Senate resolution ratifying UNCLOS contains a declaration opting out of mandatory dispute settlement for certain politically sensitive disputes.<sup>28</sup>

**Australia threatens East Timor with a different kind of subjugation: not political or military, but economic.**

Perhaps taking a cue from the United States, Australia apparently lived to regret its earlier commitment to UNCLOS (or at least to UNCLOS dispute resolution), particularly when its maritime boundary dispute in the petroleum-rich Timor Sea with neighboring East Timor began to heat up. Eight years after ratifying UNCLOS, Australia “rectified” the situation. In March 2002, the Howard government made a surprise declaration in which it withdrew from mandatory dispute resolution under UNCLOS for the settlement of maritime boundary disputes.<sup>29</sup>

Facing domestic and international criticism of its withdrawal, the Australian government scrambled to defend it. Australian Foreign Minister Alexander Downer and Attorney-General Daryl Williams explained in a statement that, “Australia’s strong view is that any maritime boundary dispute is best settled by negotiation rather than litigation.”<sup>30</sup> Noting that Australia shares sea boundaries or potential sea boundaries with no fewer than seven nations—Indonesia, New Zealand, Papua New Guinea, the Solomon Islands, France (New Caledonia, Kerguelen Island and Antarctica), East Timor and Norway (Antarctica)<sup>31</sup>—the officials denied that the Australian government’s decision to withdraw from compulsory arbitration under UNCLOS was in any way precipitated by the impending international recognition of East Timor’s independence.<sup>32</sup> In light of the timing of the withdrawal—less than two months prior to East Timor’s independence—and three previous decades of hardball play by Australia to secure for itself the riches of the Timor Sea, the Australian government’s denial must be viewed with considerable skepticism.

**THE TIMOR SEA DISPUTE**

East Timor, the half-island nation that spent 25 years at the mercy of one large and powerful neighbor, now finds itself at the mercy of another. From 1975 until 1999, East Timor suffered under an often brutal occupation by neighboring Indonesia. But Australia threatens East Timor with a different kind of subjugation: not politi-

cal or military, but economic. Simply put, Australia now denies East Timor—the world's newest, and, upon independence in 2002, Asia's poorest<sup>33</sup> nation—access to offshore oil and gas resources to which East Timor is rightfully entitled under international law. It is Australia's withdrawal from mandatory dispute resolution under UNCLOS, coupled with its vastly superior bargaining position, that has made this possible.

As of this writing, Australia and East Timor remain locked in stalemated negotiations over the location of their shared maritime boundary (and thus over the ownership of upwards of \$30 billion<sup>34</sup> in known offshore petroleum reserves). The impasse comes as little surprise, considering the inauspicious beginnings of maritime boundary delimitation in the Timor Sea. For East Timor, the Timor Sea has been not so much a sea as a swamp—muddied with illegal occupation, illegitimate treaties, and geo-political maneuverings.

#### OFF TO THE CLEANERS

To this day, East Timor remains in a sense haunted by a permanent maritime boundary in the Timor Sea agreed upon between Australia and Indonesia in 1972, even though at the time East Timor was still a colony of Portugal (as it had been since the sixteenth century) and thus was not directly impacted by the agreement.

It bears noting that even Indonesia does not recall the 1972 agreement with any particular fondness. In 1978, Dr. Mochtar Kusumaatmadja, a law of the sea expert and Indonesian foreign minister at the time of the negotiations, said publicly that Australia had "taken Indonesia to the cleaners."<sup>35</sup> Few tears will be shed for Indonesia on this point, however; it negotiated and entered the boundary agreement on its own terms as a fully sovereign nation.

In the negotiations, Australia argued that the boundary line should be drawn very close to West Timor—a territory that was then, and remains now, part of Indonesia. According to Australia, the deep trench known as the Timor Trough, located just south of Timor Island, constituted a separation between the continental shelf of Australia and that of Timor Island; the boundary line, Australia argued, should follow the Timor Trough. Although Australia's argument was questionable as a legal matter, Indonesia then accepted it. Australian historian Robert King has speculated that Indonesia may have been inclined to accept this less than favorable deal due to the imbalance in Australia-Indonesia bilateral relations during that era, with Indonesia as the beneficiary of significant Australian military and foreign aid and an unequal partner in terms of trade and investment.<sup>36</sup>

Moreover, King notes that Indonesia may have lacked information regarding

the hydrocarbon potential of the Timor Sea, and was thus unaware of the massive wealth at stake in the establishment of the sea boundary. In the late 1960s and early 1970s, oil companies—several of which were Australian companies or Australian subsidiaries of multinationals<sup>37</sup>—had carried out extensive exploration operations in the Timor Sea and surrounding areas, including seismic surveys. The exploration revealed the region to be highly prospective for oil and gas. While the Australian government had knowledge of this data, there is doubt as to whether the Indonesian government was so informed.<sup>38</sup>

As negotiations with Indonesia to establish a permanent maritime boundary in Timor Sea neared a successful (from the Australian perspective) conclusion in 1971, Australia began to make overtures to Portugal to agree on a permanent boundary in the area of the Timor Sea located between “Portuguese” (East) Timor and Australia. Unsurprisingly, Australia sought to extract from Portugal the same good deal that it was getting from Indonesia, arguing for a simple straight line linking the two ends of the boundary that it was in the process of agreeing with the Indonesians. Portugal, however, insisted that the boundary line be located halfway between

**244 During the Indonesian occupation, one-third of East Timor’s population of 800,000 was murdered or died from occupation-induced famine or disease.** between East Timor to the north and Australia to the south. Foreseeing an impasse and perhaps surmising (correctly, it turned out) that the UN Law of the Sea Conference, scheduled to open in

1974, would yield an international agreement on maritime delimitation principles more sympathetic to Portugal’s median line position, the Portuguese indicated in 1973 that they wanted to postpone negotiations until after the Conference.<sup>39</sup> In the meantime, the interruption in the 1972 Australia-Indonesia seabed boundary line to the south of the territory of East Timor came to be known as the “Timor Gap.”

But further negotiations between Australia and Portugal to divvy up the spoils of the Timor Sea would never take place. In April 1974, the Carnation Revolution swept the Caetano government (successor to the four decades’ long dictatorship of Antonio Salazar) from power in Portugal.<sup>40</sup> The new government in Lisbon committed to a program of worldwide decolonization—namely in Africa (Mozambique, Angola, Guinea-Bissau) and also in East Timor.<sup>41</sup>

Throughout 1974 and early 1975 as Portugal prepared to disengage from East Timor, thereby setting the stage for independence, Indonesia prepared to move in.<sup>42</sup> It is documented that at a September 1974 meeting in Wonosobo in Central Java, Indonesia, Australian Labor Prime Minister Gough Whitlam signaled to In-

Indonesian President Suharto his preference that East Timor become part of Indonesia and that, rather unrealistically, "this should happen in accordance with the properly expressed wishes of the people" of East Timor.<sup>43</sup>

In December 1975, Indonesia launched a military invasion of East Timor and proceeded to occupy the territory until 1999. It is estimated that during the Indonesian occupation, one-third of East Timor's population of 800,000 was murdered or died from occupation-induced famine or disease.<sup>44</sup>

## MINDING THE GAP

Wasting little time, in 1976, less than one year following the Indonesian invasion, Australia and Indonesia commenced negotiations to "close" the Timor Gap.<sup>45</sup> Following more than a decade of contentious negotiations, in December 1989, Australian Foreign Minister Gareth Evans<sup>46</sup> and Indonesian Foreign Minister Ali Alatas signed the Timor Gap Treaty in an aircraft hovering above the Timor Sea.<sup>47</sup> Several documentary films made in the 1990s to highlight the plight of the East Timorese contain video footage of the signing—which shows the two foreign ministers smiling and clinking champagne glasses—set against ominous background music. The image came to symbolize the blithe signing away of East Timor's patrimony—from one large neighbor who had no authority to give it to another large neighbor who had no authority to receive it. Poignantly, just two months prior to the signing of the Treaty, Pope John Paul II had made his historic visit to East Timor, where he performed mass on the site of a former Indonesian detention center and execution ground.<sup>48</sup>

The Timor Gap Treaty, unlike the 1972 agreement, did not establish a permanent maritime boundary. Indonesia, burned once, did not accept Australia's proposal to continue the 1972 boundary south of East Timor (i.e., to "close the Gap"). Instead, the two countries agreed to set up a temporary petroleum revenue sharing zone. The most important element of the Treaty was that Australia and Indonesia would split revenues 50-50 from the development of petroleum fields in a petroleum-rich area ("Area A") of the Timor Sea located to the south of East Timor. By its terms, the Timor Gap Treaty was set to expire once Australia and Indonesia agreed a permanent maritime boundary.<sup>49</sup>

Although more favorable to Indonesia than its 1972 boundary agreement with Australia, the Timor Gap Treaty still fell short of Indonesia's (or more aptly, East Timor's) full entitlement under international law. In contemporaneous (and current) practice and jurisprudence, the median (or "equidistance") line overwhelmingly determined the location of the maritime boundary lines between states.<sup>50</sup>

"Area A" of the Timor Gap Treaty was located fully to the north of the median line between East Timor and Australia (i.e., on the East Timor side) and thus should have fully appertained to East Timorese territory. Perhaps this was the price Indonesia was willing to pay in exchange for Australia taking the rather momentous step of recognizing Indonesia's authority in East Timor, which Australian Liberal Prime Minister Malcom Fraser had done in 1978.<sup>51</sup> This was an obvious prerequisite to Australia entering into the Timor Gap Treaty. As noted by Australian Senator Josephine Vallentine in her speech to the Australian Senate during debate on Timor Gap Treaty implementing legislation in 1990:

*East Timor is still seen to be a non-self-governing territory by the United Nations, and Australia is alone among the industrialised countries in recognising the illegal annexation of East Timor.*<sup>52</sup>

Her colleague, Senator Janet Powell continued:

*Both the United Nations General Assembly and the Security Council are on record, numerous times, denouncing the annexation of East Timor as illegal. I am glad that the [Australian] Minister for Foreign Affairs and Trade [Gareth Evans] continues to raise with Indonesia violations of human rights. It is only sad that he then moves on to business as usual while the Indonesians continue with their repressive behaviour towards the people of East Timor.*<sup>53</sup>

246

## THE TIDE TURNS

The year 1991 was a pivotal one for East Timor. Early that year, following approval by the Australian Senate, the Timor Gap Treaty quietly entered into force.<sup>54</sup> Then, on 12 November (a day now marked as a national holiday in East Timor), Indonesian soldiers surrounded and mowed down hundreds of Timorese civilians mourning a murdered student activist in the Santa Cruz cemetery in Dili—an event notable as much for its brutality as for the fact that it was one of the rare instances of Indonesian violence captured on film.<sup>55</sup> Video footage and photos of the "Santa Cruz massacre" taken by two Western journalists were broadcast internationally, bringing the suffering of the East Timorese to the living rooms of the world.<sup>56</sup>

Facing mounting international pressure in May 1999, the new Indonesian government under President B.J. Habibie (Suharto's successor) agreed to allow the United Nations to organize a referendum on independence in East Timor. In Au-

gust 1999, the people of East Timor voted overwhelmingly for independence from Indonesia. Following several weeks of further violence and widespread destruction of property, the Indonesian military pulled out—or, more accurately, was escorted out by an international force led, ironically, by Australia, the only major power to have recognized the Indonesian occupation as legitimate.<sup>57</sup> In order to facilitate East Timor's transition to nationhood, the UN Security Council passed a resolution setting up a transitional administration, empowered with all legislative and executive authority, to administer the territory for a limited period.<sup>58</sup>

Negotiations between Australia and officials of the UN Transitional Administration in East Timor (UNTAET), together with the future leaders of East Timor, to decide a legal regime for the Timor Sea began in early 2000. In the negotiations, the East Timor side pushed for a permanent maritime boundary agreement, while Australia insisted that East Timor simply step into Indonesia's shoes under the Timor Gap Treaty.<sup>59</sup> Following a year of intensive negotiations, East Timor and Australia had laid the groundwork for a new "Timor Sea Treaty." Under the new Treaty, petroleum revenues from the area known as "Area A" under the 1989 Indonesia-Australia Timor Gap Treaty would be split not 50-50, but 90-10 in favor of East Timor.<sup>60</sup> Though the revenue split seemed generous to East Timor, two important factors demonstrate the opposite: (1) the entire Timor Sea Treaty area lay on the East Timor side of the median line and (2) the Treaty gave to Australia an 81 percent take (to East Timor's 19 percent) of a gas field of disputed ownership located partially inside the Treaty area and partially outside of it whose estimated reserves totaled more than three times that of known Treaty area reserves.

Like the Timor Gap Treaty, the new Timor Sea Treaty was to be "without prejudice" to a permanent boundary delimitation and would expire upon the establishment of permanent boundaries between Australia and East Timor.<sup>61</sup> Accordingly, the East Timorese—and as far as the East Timorese were aware, the Australian—viewed the new Treaty as a temporary arrangement. But, as described above, in March 2002, Australia withdrew from mandatory dispute resolution under UNCLOS for maritime boundary disputes. From that point forward, the East Timorese would have no recourse to international tribunals in establishing the location of their maritime boundary with Australia. East Timor would have to face Australia at the negotiating table, with both sides knowing that if negotiations were to fail, the status quo (far more favorable to Australia than a boundary determination under international law was likely to be) would persist in

**The Indonesian military pulled out – or, more accurately, was escorted out by an international force led, ironically, by Australia.**

perpetuity.

East Timor, which upon independence would achieve the dubious distinction of ranking as the poorest country in Asia,<sup>62</sup> did not have the luxury of walking away from the negotiating table once Australia changed the rules of the game. East Timor can expect an estimated \$250 million in annual revenues over a 20-year period from the major gas field in the Treaty area;<sup>63</sup> for a country with an annual budget of less than \$80 million,<sup>64</sup> Timor Sea revenues are no insignificant sum. East Timorese leaders had little choice but to register their disappointment<sup>65</sup> with Australia's action and continue on course.

Accordingly, on 20 May 2002, the international community formally recognized East Timor as a sovereign nation, the United Nations handed over administration of East Timor to its elected leaders, and the new East Timorese Prime Minister, Dr. Mari Alkatiri, and his Australian counterpart John Howard held a signing ceremony for the Timor Sea Treaty in the new capital of Dili, East Timor.

The first round of permanent maritime boundary negotiations between East Timor and Australia took place in November 2003. The Howard government has repeatedly refused to commit to a timetable for agreeing the boundary and has stated that it is willing to meet only twice a year with East Timor to discuss the issue. As of this writing, East Timor is no closer to settling its permanent maritime boundary with Australia than it was on its independence day.

248

### THE WORLD RESPONDS

Just as the international community ultimately came to East Timor's aid to publicize and protest the Indonesian occupation, voices from various quarters have condemned Australia's heavy-handed dealings with East Timor in the Timor Sea and particularly its withdrawal from mandatory dispute resolution under UNCLOS. Such censure has done little to enhance Australia's reputation internationally.

Importantly for East Timor, the dispute has received significant press, particularly in the Australian domestic media, but also internationally, including in *The Economist*, *The Wall Street Journal*, *Time*, *The South China Morning Post*, *The Guardian*, the BBC, *Sydney Morning Herald*, Reuters and the Associated Press. The coverage has been overwhelmingly sympathetic to the East Timorese position. Journalists have drawn analogies to David and Goliath<sup>66</sup> and schoolyard bullying,<sup>67</sup> and have likened Australia's tactics to blackmail<sup>68</sup> and theft.<sup>69</sup> As David Fickling of *The Guardian* wrote to describe Australia's actions vis-à-vis East Timor:

*"The spectacle of someone large and powerful picking on a weak and desperate neighbour passes as bullying in the average playground. International politics, however, has a better name for it: diplomacy."*<sup>60</sup>

In June 2004, *The Wall Street Journal*—not exactly a bastion of bleeding heart liberal sentiment—ran an in-depth, front-page story describing the dispute in a manner that was arguably quite favorable to East Timor.<sup>71</sup> Certainly, the Australian government thought so. In response to the story, Australian Foreign Minister Downer wrote in an angry letter to the editor, "Criticism of Australia's motives in relation to settlement of permanent maritime boundaries with East Timor in your June 10 article. . . is offensive and disingenuous."<sup>72</sup>

Even the U.S. Congress has stepped into the fray, sending polite but pointed messages to the Bush Administration's Antipodean ally. Report language accompanying the Senate Foreign Operations Appropriations bill passed by the Appropriations Committee in July 2003 stated, "The Committee is aware of negotiations between East Timor and Australia over petroleum reserves, which will be of critical importance to the future economic development and security of East Timor. The Committee urges both governments to engage in good faith negotiations to resolve their maritime boundary expeditiously in accordance with international legal principles."<sup>73</sup> And in March 2004, 53 members of the U.S. House of Representatives wrote to Australian Prime Minister Howard to "urge [Australia] to move seriously and expeditiously in negotiations with East Timor to establish a fair, permanent maritime boundary and an equitable sharing of oil and gas resources in the Timor Sea."<sup>74</sup> The European Union has added its voice to the chorus: in September 2004, 37 of its deputies sent petitions to Australian Prime Minister Howard and the Australian Senate, calling for a "rapid and just" resolution to the dispute.<sup>75</sup>

Thanks to the Howard government's approach to the Timor Sea dispute, Australia's reputation as a "good international citizen" is fully under attack.

## UNDERMINING UNCLOS

But Australia's withdrawal from UNCLOS dispute resolution has a potential implication that is far more worrying than damage to Australia's international reputation: namely, undermining of the international law of the sea regime.

Prior to Australia's withdrawal, there had been little precedent for countries accepting, and then later repudiating UNCLOS dispute resolution; only Equatorial Guinea, Slovenia, and Tunisia had done so previously.<sup>76</sup> Australia's withdrawal

may have encouraged other nations to follow suit. In the year following Australia's withdrawal, Mexico, Spain, and the United Kingdom all made similar declarations.

In a world becoming ever more dependent on offshore energy sources, as described above, the law of the sea has taken on an increasingly critical role. To illustrate, one must imagine, for a moment, a world without an international agreement on the law of the sea. Without such an agreement, states would have no clear legal principles to guide the establishment of their maritime boundaries, making bilateral negotiations difficult if not impossible. Without the establishment of maritime boundaries between states (and the legal certainty that such boundaries afford), petroleum companies would be less willing to commit the vast sums required for offshore oil and gas development. For consumer nations such as the United States, less investment would translate into less supply which, if the phenomenon were widespread enough, would mean higher energy prices. In addition, because the advent of offshore production technologies has opened up new areas for exploration and development (namely in Asia and West Africa, and thus outside the Middle East), unresolvable maritime boundary disputes in these new areas would stymie offshore development and the much-coveted goal of diversity of supply would be ever-harder to achieve. For supplying nations, particularly poor ones such as East Timor who now rely on revenues from oil and gas reserves to sustain their economies, obstacles to offshore development would have a crippling impact on national budgets.

The role of UNCLOS dispute settlement procedures in the resolution of maritime boundary disputes is far from theoretical. One of every three "contentious cases" filed in the International Court of Justice between 1990 and 2003 has involved maritime boundary delimitation based on UNCLOS principles.<sup>77</sup> In other words, UNCLOS dispute resolution is the amicable alternative to sending out the warships.

Beyond petroleum, UNCLOS addresses two areas of growing international significance: the environment and national security. As to the former, as the world's burgeoning population takes an increasing toll on the marine environment through pollution and depletion of fishing stocks,<sup>78</sup> UNCLOS encourages international cooperation to protect the world's oceans and seas. As to the latter, in an age of heightened national security concerns worldwide thanks to recent high-profile acts of terrorism, UNCLOS facilitates national security efforts by enabling access and transit rights to ships, aircraft, and submarines. It is not by accident that both the World Wildlife Fund and the U.S. Joint Chiefs of Staff support ratification of UNCLOS by the United States.<sup>79</sup>

At a time when the world should be embracing the international Law of the Sea regime, one hopes that Australia's withdrawal from UNCLOS dispute resolution does not herald the reverse. 

## NOTES

1. See, for example, Spencer Zifcak, "The New Anti-Internationalism: Australia and the United Nations Human Rights Treaty System," The Australia Institute (Canberra: April 2003); Robert Manne, "Understanding Howard's war," *The Age* (Melbourne: 17 March 2003); Greg Barns, "Helen Clark's humanitarian approach to internationalism has fans over here," *On Line Opinion* (25 May 2004), available online at <http://www.onlineopinion.com.au/view.asp?article=2233>.

2. United Nations Charter (San Francisco: 1945), preamble; United Nations, "List of Member States," available at <http://www.un.org/Overview/unmember.html>

3. See the United Nations Treaty Database, available at <http://untreaty.un.org/> (registration required). Australia has fully joined several international conventions which the United States, to this day, has signed but not ratified, including International Covenant on Economic, Social and Cultural Rights (1966) and Convention on the Elimination of All Forms of Discrimination against Women (1979).

4. Evans, "Foreign Policy and International Citizenship," (Canberra: 6 March 1990).

5. Amnesty International, "Australia," *International Report 2002* (New York: Amnesty International, 2002). In August 2002, the crew of the Norwegian freighter *MV Tampa* rescued more than 400 mostly Afghan asylum seekers from their sinking ship off of Australia's Christmas Island. The Australian government refused to allow the asylum seekers to land and instead, after the asylum seekers had languished for more than a week in appalling conditions onboard the *Tampa*, transferred them to a detention center in Nauru.

6. Louise Dodson and Michael Gordon, "Australia to join controversial criminal court," *The Age* (Melbourne: 20 June 2002); Alison Broinowski, "Others won't forget we flouted the laws," *Sydney Morning Herald* (Sydney: 3 January 2005).

7. To date, 144 nations and regional economic organizations, including all but three industrialized nations (Australia, Monaco and the United States), are party to the Kyoto Protocol. United Nations Framework Convention on Climate Change, "Kyoto Protocol – Status of Ratification" (Bonn: 7 March 2005), available at [http://unfccc.int/files/essential\\_background/kyoto\\_protocol/application/pdf/kpstats.pdf](http://unfccc.int/files/essential_background/kyoto_protocol/application/pdf/kpstats.pdf).

8. William Safire, "LOST at Sea," *International Herald Tribune*, 1 April 1994.

9. Nico Schrijver, *Sovereignty over Natural Resources* (Cambridge: Cambridge University Press, 1997), p. 202.

10. Barry E. Carter and Phillip R. Trimble, *International Law* (New York: Aspen Law & Business, 1999), p. 928.

11. Ibid.

12. Schrijver, p. 208.

13. Ibid.

14. S.L. Newman, J. Sager and H. Valdez, "Deepwater Performance – By the Numbers," *Hart's Ec&P Magazine Deepwater Supplement*, August 2004.

15. United States, Department of Energy/Energy Information Administration, "Monthly Energy Review," October 2004.

16. United States, Department of the Interior, Offshore Minerals Management Website Homepage, found at <http://www.mms.gov/offshore/>.

17. Schrijver, p. 208.

18. Ibid.

19. United Nations, Third Conference on the Law of the Sea, "Statement of Conference President Tommy Koh (Singapore) at the final session of the Conference" (Montego Bay: 6 and 11 December

1982).

20. United Nations Convention on the Law of the Sea (Montego Bay: 10 December 1982), Articles 3, 56, 57, 76 and 77. The provisions of UNCLOS, particularly with regard to the exclusive economic zone and continental shelf, are complex and technical. The above description is a highly simplified summary.

21. UNCLOS, Articles 15, 74 and 83.

22. United Nations, Department of Ocean Affairs and Law of the Sea, "Table recapitulating the status of the Convention and of the related Agreements" found at [http://www.un.org/Depts/los/reference\\_files/status2005.pdf](http://www.un.org/Depts/los/reference_files/status2005.pdf).

23. UNCLOS, Article 287.

24. UNCLOS, Article 298.

25. Carter and Trimble, p. 928.

26. Editorial, "Rescuing the Law of the Sea," *The New York Times*, 22 August 2004.

27. Ibid. However, according to a Committee staff member, because the Senate leadership failed to bring UNCLOS forward in the full Senate for floor debate prior to the end of the congressional term in December 2004, UNCLOS must return to the Committee for a re-vote in the current session of Congress.

28. U.S. Senate Foreign Relations Committee, "United Nations Convention on the Law of the Sea," *Executive Report* 108-10 (Washington: 11 March 2004), p. 8.

29. Australian Department of Foreign Affairs and Trade, "Declaration under articles 287 and 298 of the United Nations Convention on the Law of the Sea" (Canberra: 21 March 2002).

30. Australian Office of the Attorney-General Daryl Williams and the Minister for Foreign Affairs Alexander Downer, "Joint News Release: Changes to International Dispute Resolution;" (Canberra: 25 March 2002).

31. Ibid.

32. Editorial, "Trouble over Timor oil," *Sydney Morning Herald* (Sydney: 17 May 2002).

33. United Nations Development Programme, "East Timor Human Development Report 2002" (Dili: United Nations Development Programme, 2002), p. 1.

34. Based on information known to the author.

35. Dr. Mochtar Kusumaatmadja in Michael Richardson, "Jakarta's Tough Sea Boundary Claim," *Australian Financial Review*, (Sydney: 20 December 1978).

36. Robert J. King, "The Timor Gap, Wonosobo and the Fate of Portuguese Timor," *Journal of the Royal Australian Historical Society* (Sydney: Royal Australian Historical Society, June 2002), volume 88, part 1, p. 5

37. The companies involved included Woodside Petroleum, probably the leading Australian oil company at the time and also today, and Australian subsidiaries Arco Australia Ltd., Australian Aquitaine Pty. Ltd. and Esso Australia Ltd., in addition to the Anglo-Dutch Shell Oil Company (predecessor to Royal Dutch/Shell) and Burmah Oil Company.

38. King, pp.3, 5-6.

39. King, pp. 6-7.

40. Peter Carey, *Generations of Resistance – East Timor* (New York: Cassell, 1995), p. 15.

41. Ibid.

42. Carey, pp. 15-17.

43. King, p. 11. Peter Carey has called Wonosobo "Timor's Munich." Australia was not the only influential power to lend its endorsement to Indonesia's plan to invade East Timor. U.S. President Gerald Ford and his Secretary of State, Henry Kissinger, were in Jakarta on an official visit until the day before Indonesia launched its invasion, on a trip referred to as "the big wink" within the U.S. State Department. John G. Taylor, *East Timor: The Price of Freedom* (New York: Zed Books, 1999), p. 64.

44. Carey, p. 9

45. Australian Senate, Full Committee, "Statement of Senator Janet Powell" (Canberra: 28 May 1990). There is disagreement about the official start date of the negotiations. Australian Minister for Resources Alan Gordon Griffiths has stated that the correct year was 1979. Australian Senate, Full Committee, "Statement of Australian Minister for Resources Alan Gordon Griffiths" (Canberra: 9 May 1990).

46. Gareth Evans is a complex figure in the Timor Sea drama. On one hand, he has been vilified by supporters of East Timor who accuse him of turning a blind eye to human rights violations in exchange for oil rights and better relations with Indonesia. On the other hand, he has been recognized as an internationalist and a humanitarian, particularly for his work in the areas of human rights and arms control. As mentioned above, it was Evans who cited and promoted Australia's "good international citizenship" (Evans, "Foreign Policy and International Citizenship," speech (Canberra: 6 March 1990)). It is the author's view that the signing of the Timor Gap Treaty, while morally reprehensible and certainly not the act of a "good neighbor," was not necessarily anti-internationalist and thus can be distinguished from the unilateralist actions of the current government.

47. "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia" ("Timor Gap Treaty") (Timor Sea: 11 December 1989).

48. Carey, p. 48.

49. Timor Gap Treaty, Article 33.

50. Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries* (The Hague: Kluwer Law International, 1993). International court cases also support this delimitation method, e.g., Continental Shelf (Libyan Arab Jamahiriya/Malta), International Court of Justice (3 June 1985); Land and Maritime Boundary between Cameroon and Nigeria, International Court of Justice (19 October 1992); Eritrea-Yemen Arbitration (Second Stage: Maritime Delimitation), Permanent Court of Arbitration (17 December 1999); Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf; Ad hoc Arbitral Tribunal (30 June 1977).

51. Taylor, p. 75.

52. Australian Senate, Full Committee, "Statement of Senator Josephine Vallentine" (Canberra: 28 May 1990).

53. Australian Senate, Full Committee, "Statement of Senator Janet Powell" (Canberra: 28 May 1990).

54. Timor Gap Treaty, preamble.

55. Carey, p. 48-51.

56. The two journalists, Steve Cox and Max Stahl, have both stated that Australian immigration officials rigorously searched their belongings for film (which they had fortunately entrusted to couriers) when, after having flown to Australia from East Timor after the massacre, they departed Australia for the West. Carey p. 52.

57. Taylor, pp. 225-230.

58. United Nations Security Council, "Resolution 1272" (New York: 25 October 1999).

59. Based on author's conversations with UNTAET negotiators.

60. "Timor Sea Treaty between the Government of East Timor and the Government of Australia" ("Timor Sea Treaty") (Dili: 20 May 2002), Article 4(a).

61. Timor Sea Treaty, Articles 2 and 22.

62. United Nations Development Programme, "East Timor Human Development Report 2002" (Dili: United Nations Development Programme, 2002), p. 1.

63. Timor Sea Office, Office of the Prime Minister, East Timor Government, "Fact Sheet: Bayu-Undan" (Dili, no date), available at <http://www.timorseaoffice.gov.tp/bayufacts.htm>.

64. Ibid.

65. At the time, future Prime Minister Dr. Mari Alkatiri described the withdrawal as an "unfriendly act." Hamish McDonald, "Canberra's 'unfriendly act' over gas field irks Timorese," *Sydney Morning Herald* (Sydney: 13 April 2002).

66. Peter Kammerer, "David and Goliath battle it out over East Timor's sea of riches," *South China Morning Post* (Hong Kong: 1 April 2004).

67. Kalinga Seneviratne, "Canberra slammed for 'bullying' Timor," *Asia Times* (Hong Kong: 11 March 2003); Veronica Brooks, "Australia Labor Blames 'Bullying' Govt For Timor Gas Row," *Dow Jones* (13 April 2004).

68. Cynthia Banham, "Blackmail claims over Timor Sea," *Sydney Morning Herald* (Sydney: 30 Novem-

ber 2004).

69. Sharon Mathieson and Paul Osborne, "Oil, gas treaty 'robs' East Timor," *Herald Sun* (Melbourne: 29 March 2004).

70. David Fickling, "Drawing a line on the Timor Gap," *The Guardian* (London: 27 January 2003).

71. Timothy Mapes and Patrick Barta, "For East Timor, Energy Riches Lie Just Out of Reach," *The Wall Street Journal* (New York: 10 June 2004).

72. Alexander Downer, "Letter to the Editor," *The Wall Street Journal* (New York: 25 June 2004).

73. U.S. Senate Appropriations Committee, "Foreign Operations Appropriations Report" (Washington: 17 July 2003).

74. Rep. Barney Frank et al., "Letter to the Honorable John Howard" (Washington: 5 March 2004).

75. *Agence France-Presse* "EU deputies urge Australia to respect E Timor rights," *ABC* (Australian Broadcasting Corporation) *News Online* (Sydney: 15 September 2004).

76. Ibid.

77. International Court of Justice, "List of Cases brought before the Court since 1946" (The Hague: 2004).

78. By means of example, the Nature Conservancy forecasts the loss of 70 percent of the world's coral reefs by the year 2050. *The Nature Conservancy*, "Transforming Coral Reef Conservation Fact Sheet" available at [http://nature.org/magazine/fall2002/coralreefs/files/coral\\_marine\\_fact.pdf](http://nature.org/magazine/fall2002/coralreefs/files/coral_marine_fact.pdf).

79. U.S. Senate Foreign Relations Committee, "United Nations Convention on the Law of the Sea," Executive Report 108-10 (Washington: 11 March 2004), p. 7, 103.

Copyright of Brown Journal of World Affairs is the property of Brown University. The copyright in an individual article may be maintained by the author in certain cases. Content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.