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## COMPLETING THE JIGSAW: THE RECENT DEVELOPMENT OF THE MARITIME BOUNDARIES IN THE TIMOR SEA

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### Abstract

*The research argues that recent events, including the independence of Timor-Leste and the positive outcome of the Timor-Leste – Australia compulsory conciliation proceeding have provided Indonesia with political as well as, potentially legal basis to strive for the negotiation of its maritime boundary in the vicinity of Timor Sea with Timor-Leste as well as to pursue for the renegotiation of the 1997 Perth Treaty between Indonesia and Australia (yet to be entered into force) as the area that being delimited by the said treaty currently encompassed the maritime area of Timor-Leste. The research furthermore argues that a similar condition had also occurred for the other coastal states in the vicinity of Timor Sea (Australia, and Timor-Leste). The series of events between the coastal states of Timor Sea have arguably provided those coastal states with a perfect and timely setting to strive for the conclusion of its maritime delimitation dispute and therefore completing the jigsaw of maritime boundaries in the Timor Sea.*

**Keywords:** *Maritime boundary, Maritime Delimitation, Timor Sea, UNCLOS 1982, Compulsory Conciliation*

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### I. INTRODUCTION

In geographical context, the Timor Sea is located between the Southeastern Coasts of the Timor Island as its northern limit, the North Coast of Australia, from Cape Don to Cape Londonderry, as its southern limit and the Indian Ocean and the Arafura Sea as its western and eastern limit respectively.<sup>1</sup>

The Timor Sea covers an area of more than 680.000 km<sup>2</sup> with a maximum depth of 3300 meters in the Timor Trough.<sup>2</sup> Yet, its average depth is only around 200 meters.<sup>3</sup> The Timor trough itself is

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<sup>1</sup> International Hydrographic Organization, *Limits of Oceans and Seas (Special Publication No. 28)*, 3<sup>rd</sup> Edition 1953, Monegasque Monte Carlo, 1953, 28.

<sup>2</sup> [...], *Timor Sea*, available at <https://www.britannica.com/place/Timor-Sea>, accessed on 7 August 2017.

<sup>3</sup> *Ibid.*

a major submerged maritime feature in the Timor Sea.<sup>4</sup> The trough is a continuation of the Sunda Trench, a “deep submarine depression” that located parallel to the “arch of islands” of Sumatera, Java, and the Lesser Sunda Islands of Bali, Lombok, Sumba and Timor.<sup>5</sup> (See Map 1).

In historical perspective, the contemporary history of Timor Island, which gives its name to the Timor Sea, started when Portugal begun its exploration and colonization of the eastern half of the Island in 1520.<sup>6</sup> A century later, the Netherlands started its own colonization of the Western half of the Island.<sup>7</sup> In 1859, both States officially partitioned the Timor Island with the Treaty of Lisbon, which would be the first among a series of treaties that culminated by the 1904 Convention.<sup>8</sup> Across the Timor Sea, Britain had established Fort Dundas, located in Melville Island, offshore from Darwin, in 1824.<sup>9</sup> In 1878, Britain claimed for the Ashmore Reef<sup>10</sup> and later in 1909 for the Cartier Islands. Both maritime features were handed over to the Commonwealth of Australia in 1931.<sup>11</sup> Those three former European colonies would subsequently be evolved into the three Coastal States of the Timor Sea of Indonesia, Australia and Timor-Leste.<sup>12</sup>

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<sup>4</sup> C. Cook, “Filling the Gap – Delimiting the Australia-Indonesia Maritime Boundary”, *Australian Yearbook on International Law*, vol. 10, 2004, 132.

<sup>5</sup> *Ibid.*

<sup>6</sup> Neil Deeley, *The International Boundaries of East Timor, Boundary & Territory Briefing*, Volume 3 Number 5, International Boundary Research Unit Durham, 2001, 2.

<sup>7</sup> C. Cook, See note 5.

<sup>8</sup> Neil Deeley, See note 7. The treaty delimited and demarcated land boundary between the two colonies.

<sup>9</sup> John Harris, “Contact Languages at the Northern Territory British Military Settlements 1824-1829”, *Aboriginal History*, Volume 9, Part 2, 1985.

<sup>10</sup> Robert Aldrich and John Connell, *The Last Colonies*, Cambridge University Press Cambridge, 1998, 52.

<sup>11</sup> *Ibid.*

<sup>12</sup> New South Wales (from where Fort Dundas was controlled) would later joined with the others British Colonies in Australia to form the Commonwealth of Australia in 1901. The Netherlands East Indies gained its independent as Indonesia in 1945. Portugal colonized Timor-Leste until 1975 when it was integrated into Indonesia. After United Nations (UN) transitional period following the 1999 referendum, Timor-Leste gained its independence in 2002.

Notwithstanding the claims over various maritime features in the Timor Sea and several land boundary treaties in the Timor Island, the three European colonials' powers had failed to determine any maritime boundary arrangement between them in the Timor Sea.<sup>13</sup> The Netherlands and Portugal land boundary treaties only concerned with the land boundary in the Timor Island. Britain's claims of ownership for maritime features in the Timor Sea does not supported with claims of ownership over its maritime zones.<sup>14</sup>

The aforementioned conditions continue until 1970s<sup>15</sup> when in 1971<sup>16</sup> and 1972<sup>17</sup>, Indonesia and Australia concluded two treaties that delimited their maritime boundaries, include those in Timor Sea. Both States once again concluded an un-ratified treaty in 1997<sup>18</sup> that hopped to address any unresolved segment of the boundary. Although the treaties between Indonesia and Australia had delimited parts of the Timor Sea, there was a gap in the maritime boundaries, opposites of the present-day land area of Timor-Leste. The gap was caused as when Indonesia and Australia established their maritime boundary agreements, Timor-Leste was under the control of Portugal.<sup>19</sup>

This gap continued during the Indonesian administration in Timor-Leste until Indonesia and Australia established a Joint Development Area for the maritime boundary gap under the 1989 Timor Gap Treaty.<sup>20</sup> After

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<sup>13</sup> Neil Deeley, See note 7, 21.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, signed on 18 May 1971, 974 UNTS 307 (entered into force 8 November 1973).

<sup>17</sup> Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas. Supplementary to the Agreement of 18 May 1971, signed on 9 September 1972, 74 UNTS 307 (entered into force 8 November 1973).

<sup>18</sup> Agreement between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, signed on 14 March 1997, 1997 ATNIF 4, (not yet entered into force).

<sup>19</sup> I Made Andi Arsana, *Batas Maritim Antarnegara Sebuah Tinjauan Teknis dan Yuridis*, Gadjah Mada University Press, Yogyakarta, 2007, 146.

<sup>20</sup> Treaty between Australia and the Republic of Indonesia on the Zone of Coopera-

Timor-Leste gained independence in 2002, Timor-Leste and Australia immediately established new agreement for a Joint Development for the area.<sup>21</sup> The 2002 Treaty was subsequently followed by the 2006 CMATS.<sup>22</sup>

Over the years, there was disaffection among the people and the Government of Timor-Leste over the arrangement with Australia that supposedly were not in favor for an equal division of the resources in the Timor Sea.<sup>23</sup> This disaffection had arguably instigated “political activism” in Timor-Leste.<sup>24</sup> This protest culminated with the mandatory conciliation proceeding under the stipulations of United Nations Convention on the Law of the Sea (UNCLOS) 1982.<sup>25</sup> The compulsory conciliation had resulted for the establishment of the Comprehensive Package Agreement agreed by Timor-Leste and Australia in March 2018.<sup>26</sup>

Regarding the maritime boundary of Indonesia and Timor-Leste, there was never a maritime boundary between both States. After Timor-Leste gained independence in 2002, both States’ efforts were prioritized in demarcating their land boundary.<sup>27</sup> Since currently the land boundary

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tion in an Area between the Indonesian Province of East Timor and Northern Australia, signed on 11 December 1989, 1991 ATS 9 (entered into force 9 February 1991).

<sup>21</sup> Timor Sea Treaty between The Government of East Timor and The Government of Australia, signed 20 May 2002, 2002 ATS 3, (entered into force 2 April 2003).

<sup>22</sup> Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, signed on 12 January 2006, [2006] ATNIF 1, (not yet entered into force).

<sup>23</sup> Max Lane, “Timor Gap Dispute with Australia Inspires Timorese Political Activism”, *Perspective Institute for South East Asian Studies*, No. 31, 2016.

<sup>24</sup> *Ibid.*

<sup>25</sup> Permanent Court of Arbitration, *Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea*, Press Release 9 January 2017, available at <https://pcacases.com/web/sendAttach/2049>, accessed on 25 August 2017.

<sup>26</sup> Permanent Court of Arbitration, *Conciliation between the Democratic Republic of Timor-Leste and Australia*, Press Release, 6 March 2018, available at <https://www.pcacases.com/web/sendAttach/2303>, accessed on 31 March 2018.

<sup>27</sup> Clive H. Schofield, & I Made Andi Arsana, “Delimitation of Maritime Boundaries: A Matter of Life or Death for East Timor?”, D. Kingsbury & M. Leach, eds., *East Timor: Beyond Independence*, Monash University Press, Monash, 2007.

demarcation between Indonesia and Timor-Lest is yet to be concluded, both States only convened for “consultative meeting” prior to the actual maritime delimitation process between them.<sup>28</sup> (See Map 2).

Pursuant to the abovementioned conditions, the research will thus argue that the current conditions have created perfect settings for the Coastal States of Timor Sea to strive for the finalization of the maritime delimitation in Timor Sea and once and for all completing the maritime boundaries jigsaw in the Timor Sea.

## II. THE METHODS FOR MARITIME BOUNDARY DELIMITATION

After briefly discussed the geographical and the historical context of the issue, the research thus examine the methods for maritime boundary delimitation. It starts by analyzing the debate for the establishment of State’s maritime zone and elaborate on the methods for maritime boundary delimitation, as well as for its consideration factors.

### A. DEBATES FOR COASTAL STATES’ MARITIME ZONE

The first efforts in delimiting the sea started in the 15th century when European States embarked for their maritime exploration of the world.<sup>29</sup> In 1493, Pope Alexander VI issued the Bull *Inter Caetera* that provide the “meridian 100 leagues west of the Azores and Cape Verde, through Brazil” for Spain, whereas Portugal was given ocean to the east.<sup>30</sup> The Treaty of Tordesillas adjusted these delimitations arrangements in 1494.<sup>31</sup>

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<sup>28</sup> Maritime Boundary Office, *Timor-Leste’s Maritime Boundaries*, Maritime Boundary Office, 2016, 53.

<sup>29</sup> I Made Andi Arsana, “Penyelesaian Sengketa Ambalat dengan Delimitasi Maritim: Kajian Geospasial”, *Jurnal Ilmiah Fakultas Ilmu Sosial dan Ilmu*, vol. I, No. 1, 2010, 49.

<sup>30</sup> International Hydrographic Bureau, *A Manual on Technical Aspect of the United Nations Convention on the Law of the Sea, Special Publications No. 51*, Edition 5.0.0, International Hydrographic Bureau, Monaco, 2014.

<sup>31</sup> C. Carleton & Clive Schofield, “Developments in the Technical Determination of Maritime Space: Delimitation, Dispute Resolution, Geographical Information Systems and the Role of the Technical Expert”, *Maritime Briefing*, vol. 3 No. 4, 2002.

During the 17th Century, the competition between the Netherlands and the Portuguese and the English, had compelled scholars of those nations to argue supporting their nations' claim over its maritime zone.<sup>32</sup> The Dutch scholar, Hugo Grotius, argued<sup>33</sup> that the ocean should be free for all nations without being limited by States' ownership of maritime zone because it is impossible for nations to take possession of the ocean by occupation.<sup>34</sup> In contrast, English scholars, Scot Welwood and John Selden, were reasoning for divisions of sea by maritime zone of Coastal States.<sup>35</sup> The opinions of Welwood and Selden often perceived as the first efforts in defining the concept of State's sovereignty over maritime zone.<sup>36</sup>

Over the years, the international community finally accepted the view of the English Scholars.<sup>37</sup> However the specific natures of the state's jurisdictions as well as the breadth of the maritime zones were yet to be determined. These triggered unilateral claims lodged by States that resulted to boundary disputes between the States.

To settle the disputes peacefully, the League of Nations, as the primary international organization of the period, established a "Committee of Experts" in 1924 to codify international legal instruments on the field of the law of the sea.<sup>38</sup> After the WW2, the United Nations (UN) continued the unfinished works of the Committee and tasked, the International Law Commission (ILC) to draft four legal instruments in the field law of the sea.<sup>39</sup> The ILC succeed to convene the United Nations Conference on the Law of the Sea 1958 in Geneva, which agreed four conventions

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<sup>32</sup> I Made Andi Arsana, see note 30.

<sup>33</sup> Hugo Grotius arguments were based on his book, *Mare Liberum (Freedom of the Sea)*.

<sup>34</sup> Clive Schofield, "Parting the Waves: Claims to Maritime Jurisdiction and the Division of Ocean Space", *Penn State Journal of Law and International Affairs*, Vol 1 No. 1, 2012, 41.

<sup>35</sup> Scot Welwood arguments were published in his book *Abridgment of All Sea Lawes*. John Selden's argument was written in his book *Mare Clausum seu Domino Maris (Of the Dominion or Ownership of the Sea)*. Ibid.

<sup>36</sup> Clive Schofield, see note 35.

<sup>37</sup> R. R. Churchill and A. V. Lowe, *The Law of Sea*, Manchester University Press, Manchester, 1999, 4

<sup>38</sup> Ibid, 14.

<sup>39</sup> Ibid, 15.

on territorial sea, high seas, continental shelf and fisheries. However, the conference, along with its subsequent conference in 1960, failed to determine the maximum breadth of the maritime zone of territorial sea.<sup>40</sup>

To rectify this, a third UN Conference on the Law of the Sea was convened, which established the UNCLOS 1982.<sup>41</sup> UNCLOS 1982 determined types of maritime zones to be claimed by Coastal States (territorial sea, contiguous zone, exclusive economic zone and continental shelf) and its respective maximum breadth. (See Map 3).

A Coastal State will be able to claim the territorial sea for a maximum breadth of 12 nautical miles (nm) measured from its baselines.<sup>42</sup> Coastal State will have sovereignty over its territorial sea, including to the airspace above it.<sup>43</sup>

The contiguous zone is a maritime zone adjacent to the territorial sea of the Coastal States with a maximum breadth of 24 nm from the baselines.<sup>44</sup> Although within the contiguous zone, the Coastal States may exercise necessary control over customs, fiscal, immigration and sanitary, yet the coastal States will only have sovereign right in this maritime zone.<sup>45</sup>

The continental shelf is seabed and subsoil that extend beyond the Coastal State's Territorial Sea and comprises the natural prolongation of the land until the limit of the continental margin.<sup>46</sup> It is measured to a distance up to 200 nm from the baselines if the limit of the continental margin does not extend to that distance<sup>47</sup> or if the prolongation exceeds 200 nm, to the distances of 350 nm or 100 nm from 2500 meters isobaths.<sup>48</sup> The continental margin is comprised of the area that 'the submerged prolongation of the land mass of the coastal state,

<sup>40</sup> Ibid.

<sup>41</sup> United Nations Convention on the Law of the Sea, opened for signature on 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>42</sup> Ibid, Article 3.

<sup>43</sup> Ibid, Article 2(1) and (2).

<sup>44</sup> Ibid, Article 33(2).

<sup>45</sup> Ibid, Article 33(1).

<sup>46</sup> Ibid, Article 76(1).

<sup>47</sup> Ibid.

<sup>48</sup> Ibid, art 76(5)



and consists of the shelf, slope and rise.<sup>49</sup> The first legal instrument that predates UNCLOS 1982, and regulate continental shelf, was the Convention on the Continental Shelf,<sup>50</sup> which granted Coastal States with “sovereign rights for the purpose of exploring and exploiting resources in the continental shelf.”<sup>51</sup> The Coastal States jurisdiction over the continental shelf is recognized by the International Court of Justice (ICJ) pursuant to the case of *North Sea Continental Shelf*, which declare the sovereign rights of the Coastal States over continental shelf ‘exist *ipso facto* and *ab initio*’ and an “inherent right.”<sup>52</sup>

Many States believe that the Continental Shelf convention was not sufficient for their interest as the provisions of the Convention allow advanced States claiming greater area of the continental shelf.<sup>53</sup> The dissatisfaction over continental shelf legal regime and the low number of the state parties of the convention came at the same time with propositions a single convention for law of the sea.<sup>54</sup>

The aforementioned developments lead into the adoption of Exclusive Economic Zone (EEZ) in the UNCLOS 1982. The EEZ traced its origin from the Exclusive Fisheries Zone and continental shelf area regime.<sup>55</sup> The EEZ should have the maximum distance of 200 nm from the baselines.<sup>56</sup> The EEZ governed by sovereign right regime,<sup>57</sup> which is mainly focused on the exploration and exploitation as well as the conservation and management of the natural resources in the EEZ.<sup>58</sup>

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<sup>49</sup> Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World*, Second Edition, Martinus Nijhoff Publishers Leiden, 2005, 183.

<sup>50</sup> *Convention on the Continental Shelf* opened for signature 29 April 1958 499UNTS311 (entered into force 10 June 1964).

<sup>51</sup> *Ibid*, Article 2.

<sup>52</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark/ Federal Republic of Germany v Netherlands) (Judgment)*[1969] ICJ Rep 3, 23.

<sup>53</sup> Division for Ocean Affairs and the Law of the Sea *The United Nations Convention on the Law of the Sea (A Historical Perspective)* (1998) Oceans and Law of the Sea, available at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm), accessed 31 August 2017.

<sup>54</sup> *Ibid*.

<sup>55</sup> Donald R. Rothwell & Tim Stephens, *The International Law of the Sea*, Hart Publishing, Oxford, 2010, 83.

<sup>56</sup> United Nation Convention on the Law of the Sea, see note 42, Article 57.

<sup>57</sup> *Ibid*, art 56(1)(a).

<sup>58</sup> *Ibid*.

## B. METHODS FOR DELIMITING MARITIME BOUNDARY

After discussing the historical debate for the establishment of maritime zones, the research will subsequently examine technical methods for the maritime boundary delimitation. There are several methods that most commonly being used for delimiting maritime boundary, among others: equidistant line; parallel and meridian; enclaving; perpendicular; parallel line, natural boundary method and three-stage approach.

### 1. EQUIDISTANT LINE

There are three types of equidistant lines: robust equidistant line, simplified equidistant line and modified (adjusted) equidistant line.<sup>59</sup> Equidistant line is defined as a line of equal distance between points in the base-points (or baselines).<sup>60</sup> The equidistant line method for delimitation was explicitly stipulated in the Geneva Convention on Territorial Sea and Contiguous Zone 1958.<sup>61</sup> It mentioned in the Continental Zone Convention 1958 and the UNCLOS 1982<sup>62</sup> by different terminology: median line.<sup>63</sup> The Manual on Technical Aspect to the UNCLOS 1982 (TALOS) clarify that the term median lines is commonly used for delimitation of opposites States whereas equidistant lines used for adjacent States.<sup>64</sup> Equidistant line is known as the basis of drawing boundary line when the Coastal States failed to establish boundary agreement.<sup>65</sup>

A robust equidistant line prescribes that the lines should have an equal distance from the baselines of the coastal States therefore it requires numerous turning points, which caused difficulties for

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<sup>59</sup> I Made Andi Arsana, see note 20, 49.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> United Nation Convention on the Law of the Sea, see note 42, Article 15, Article 74 and Article 83.

<sup>63</sup> L. Legault & B. Hankey, "Method Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation", in J. I. Charney & L. M. Alexander, eds., *International Maritime Boundaries*, vol. I, Martinus Nijhoff Dordrecht, 1993, 203-241.

<sup>64</sup> International Hydrographic Bureau, see note 31, 106.

<sup>65</sup> *Maritime Delimitation in the Black Sea, (Romania v Ukraine), Judgment, ICJ GL No 132, [2009] ICJ Rep 61, paragraph 115.*

navigation and management of resources.<sup>66</sup> A simplified equidistant line would reduce turning points on a segment of maritime boundary<sup>67</sup>. When the strict equidistant line needs to be adjusted by the existence of natural geographical feature, a modified equidistant line will be generated.<sup>68</sup> (See Map 4).

## 2. PARALEL & MERIDIAN LINE

The method uses parallel latitude and meridian longitude as boundary line.<sup>69</sup> This method is also known as “arbitrary line” in the TALOS.<sup>70</sup> These methods are useful in the delimitation process of adjacent States with similar general directions of coastline<sup>71</sup> and to elude the cut-off effect when employed the equidistant.<sup>72</sup>

## 3. ENCLAVING

This method provides an island, located between two coastal States, yet closer to its opposite States, with its own maritime zone.<sup>73</sup> There are two types of enclaving method: *Full Enclave* if the island is fully detached from the mainland of its States and closer to the coast of its opposites States.<sup>74</sup> *Semi-Enclave* employed if the island located approximately mid-point from the baselines of its mainland to the coast of its opposites States.<sup>75</sup> (See Map 5).

## 4. PERPENDICULAR

The perpendicular method is being employed for delimitation of adjacent States by drawing a perpendicular line to the general direction of the coastline.<sup>76</sup> The method required the coastline to be generalized to

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<sup>66</sup> I Made Andi Arsana, see note 20, 52.

<sup>67</sup> Ibid, 53.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid, 55.

<sup>70</sup> International Hydrographic Bureau, see note 31,

<sup>71</sup> I Made Andi Arsana, see note 20, 55.

<sup>72</sup> Ibid.

<sup>73</sup> United Nations, *Handbook on the Delimitation of Maritime Boundaries*, United Nations New York, 2000.

<sup>74</sup> I Made Andi Arsana, see note 20, 55.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid, 58.

a straight line. This method is not commonly used due to the difficulty in generalizing the coastline into a straight line.<sup>77</sup>

## 5. PARALLEL LINE

The method is also used for delimitation of two adjacent coastal states. The method is being employed by drawing straight parallel line that consequently forms the Coastal States' maritime zone.<sup>78</sup> This method is one of the rarest methods to be employed in a maritime boundary delimitation process.<sup>79</sup> However, this method had been employed as the bases of Chilean claims in its maritime boundary dispute with Peru. (See Map 6).

## 6. NATURAL BOUNDARY

This method used natural features as maritime boundary.<sup>80</sup> There are several natural maritime features that commonly used as maritime boundary, including *thalweg* and geomorphological features of the seabed.<sup>81</sup> The method was employed for the case of *North Sea Continental Shelf*.<sup>82</sup>

The method was also influential during the establishment of the Indonesia – Australia Seabed boundary treaties in early 1970s when Australia used the natural prolongation of its continental shelf to its advantaged.<sup>83</sup> Indonesia's position worsened by the presence of the Timor Through, off the southern coastline of Timor Island, which caused the Seabed boundary significantly closer to Indonesia.<sup>84</sup>

This method had served as the basis of several maritime boundary delimitations, especially in the period prequel to the UNCLOS 1982. However, there were ICJ cases that undermines its usage as seen in the *Libya - Malta Case 1985*<sup>85</sup> and the *Gulf of Maine Case* where the Court

<sup>77</sup> L. Legault & B. Hankey, see note 64, 212.

<sup>78</sup> I Made Andi Arsana, see note 20, 59.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Victor Prescott and Clive Schofield, See Note 50, 233.

<sup>82</sup> *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (1967-1969)* [1969] ICJ Rep 4 [101].

<sup>83</sup> I Made Andi Arsana, see note 20, 146.

<sup>84</sup> Ibid.

<sup>85</sup> *The Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment)* [1985] ICJ

determined that a boundary should be fix and stable in a relevant marine environment, therefore natural feature did not suitable as a boundary.<sup>86</sup>

## 7. THREE-STAGE APPROACH

This method encapsulated as the UNCLOS 1982 only provide very little explicit guidance in the actual maritime delimitation process.<sup>87</sup> Consequently, the solutions found in several case law of the ICJ that provided factors that need to be considered in the delimitation process of maritime boundary.<sup>88</sup> The usage of the method should commence by drawing an equidistant line.<sup>89</sup> Afterward, the consideration factors should be used to adjust the line.<sup>90</sup> The last phase of this method is to “apply a ‘non-disproportionality’ test to ensure an equitable solution has been reached. This involves checking the ratio between the respective delimited maritime areas and the length of each State’s coastline.”<sup>91</sup>

## C. CONSIDERATION FACTORS FOR MARITIME BOUNDARY DELIMITATION

In employing the three-stage approach for delimitation of maritime boundary, the phase after drawing an equidistant line is to analyze the consideration factors that might be influential for reaching an equitable solution. There are several considerations factors that found in several ICJ cases. The first factor is the “geographical circumstances” of the maritime zones.<sup>92</sup> One of the examples is the “configuration of coasts” which directly adjacent to the negotiated maritime boundary as it would directly related to the shapes of the baselines.<sup>93</sup>

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Rep 18 [66].

<sup>86</sup> J Schneider, “The First ICJ Chamber Experiment: The Gulf of Maine Case: The Nature of an Equitable Result”, *The American Journal of International Law*, Vol 79, 1985, 567.

<sup>87</sup> J G Merrills, “Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Merits, Judgment of 17 December 2002” *International Comparative Law Quarterly* vol. 52 no. 3, 2003, 798.

<sup>88</sup> Nugzar Dundua, *Delimitation of Maritime Boundaries between Adjacent States*, the University of Queensland, Brisbane, 2007, 15.

<sup>89</sup> I Made Andi Arsana, see note 20, 146.

<sup>90</sup> *Ibid.*

<sup>91</sup> Maritime Boundary Office, see note 29, 51

<sup>92</sup> Nugzar Dundua, see note 89.

<sup>93</sup> *Ibid.*

The second consideration factor is the geology and geomorphology features of the maritime boundary area and the immediate area. Those features may be very influential in the delimitation process especially for delimitation of the continental shelf area.<sup>94</sup> The geology and geomorphology means the “physical and geological structure” of the delimited area.<sup>95</sup> This factor should be understood in relation to the geographical factors as well as “the element of a reasonable degree of proportionality.”<sup>96</sup>

The next factor is the socio-economical situation of the disputed boundary area.<sup>97</sup> In the past, there were a number of maritime boundary disputes, which influenced by coastal state’s claims over natural resources, fisheries, hydrocarbon, or other minerals, that being found in the disputed area. States had sought for the ICJ judgment over their delimitation dispute to consider “unity of any deposits” of the natural resources found in the disputed area<sup>98</sup> as well as claims based on the domestic socio-economic conditions.<sup>99</sup> However, the ICJ had also ruled not to put significant consideration on this factor of claim on its judgment.<sup>100</sup>

Another consideration factor is the actions of the States involved in the maritime boundary dispute. If the dispute submitted for judicial settlement, the practice of the state in the disputed area or the failure to react in responding to the practice of the other state will be construed as one of the criteria to be examined by the judicial body.<sup>101</sup>

In several previous case laws, the ICJ had also looks on any third parties interest over the disputed area as well as to the security and political factor in the maritime boundary dispute. This is essential as the area where the maritime boundary dispute being negotiated, in-reality, may not be detached from other interests in the area.<sup>102</sup> The ICJ would

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<sup>94</sup> Ibid, 64.

<sup>95</sup> *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, see note 83.

<sup>96</sup> Nugzar Dundua, See note 89.

<sup>97</sup> Ibid.

<sup>98</sup> *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, see note 83.

<sup>99</sup> *The Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Judgment)* [1982] ICJ Rep 18 [106].

<sup>100</sup> *The Continental Shelf (Libyan Arab Jamahiriya/Malta)*, see note 86.

<sup>101</sup> Nugzar Dundua, See note 89. 74.

<sup>102</sup> Ibid, 77.

analyze each of the third State claims of interest individually as well as analyze the security and political dimensions of the disputed area.<sup>103</sup>

As also conducted in this research, another factor to be considered in the delimitation of boundary between Coastal States is the historical background of the area in-question.<sup>104</sup> The ICJ would analyze and see the historical background of the disputed area to see if any historical title may be employed in the disputed area.

### **III. CURRENT SITUATION ON THE MARITIME BOUNDARIES IN TIMOR SEA**

After analyzing the process for the establishment of Coastal States claim over a maritime zone as well as the type of the maritime zones and the consideration factors that need to be address during delimitation process, the research will subsequently analyze the current situation of the each maritime boundary in Timor Sea.

#### **A. INDONESIA – AUSTRALIA MARITIME BOUNDARY**

Currently, Indonesia and Australia have agreed on several maritime boundaries agreements.<sup>105</sup> In 1971 Indonesia and Australia agreed on Seabed boundary in the Arafura Sea.<sup>106</sup> The agreement focused for delimiting seabed boundary between both countries in the Arafura Sea, south of the Island of Papua. The agreement soon complemented by another agreement signed on 9 September 1972,<sup>107</sup> which continues the delimitation of the seabed boundaries in the Timor Sea.

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<sup>103</sup> Ibid, 77-80.

<sup>104</sup> Ibid, 80.

<sup>105</sup> Arif Havas Oegroseno, “Indonesia’s Maritime Boundaries” in Robert Cribb and Michele Ford, *Indonesia beyond the Water’s Edge Managing an Archipelagic State*, Institute of South East Asian Studies Singapore, 2009, 55.

<sup>106</sup> Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, See note 19.

<sup>107</sup> Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas. Supplementary to the Agreement of 18 May 1971, see note 20.

Since both agreements were preceded the UNCLOS 1982, both agreements did not followed the methods used in UNCLOS 1982. Both agreements based its arrangements on the principle of natural prolongation.<sup>108</sup> As consequences the stipulations of both agreements were for the relative advantage of Australia,<sup>109</sup> which able to claim a bigger area of the continental shelf that stretches out to direction of the Timor Through, to a distance of 80 nm from Timor Island.<sup>110</sup> The line that agreed as Seabed boundary was a median line between the Timor Through and the Median line that draw from both States baselines, with consideration to the Northern limit of the Australian Petroleum Concessions permit and the Australia's Continental Shelf natural prolongation.<sup>111</sup>

Since the 1972 maritime boundary treaty between Indonesia and Australia only regulated the seabed boundary, to avoid confusion in practice due to absent of any legal arrangements, especially on fisheries, a separate arrangement was established with focus on the fisheries issue in 1981.<sup>112</sup> The aforementioned arrangement was provisionally delimiting the water column<sup>113</sup> of the area where the Seabed had been delimited by previous agreements (1971 and 1972) as well as for the area where formal boundary arrangement between the Coastal States was absent.<sup>114</sup> The Provisional Fisheries Surveillance and Enforcement Line (PFSEL) was used as *de facto* water column boundary line between the two States in the absent of any final delimitation for the area.<sup>115</sup>

In the process of the establishment of PFSEL, Indonesia and Australia had used the equidistant method with a semi-enclave modification

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<sup>108</sup> I Made Andi Arsana, see note 20, 146.

<sup>109</sup> *Ibid.*

<sup>110</sup> I Made Andi Arsana, *Challenges and Opportunities in the Delimitation of Indonesia's Maritime Boundaries: a Legal and Technical Approach*, Doctor of Philosophy Thesis, Australian National Centre for Ocean Resources and Security, University of Wollongong, 2014, 178.

<sup>111</sup> *Ibid.*

<sup>112</sup> Memorandum of Understanding on a Provisional Fisheries Surveillance and Enforcement Line, signed 29 October 1981 (entered into force 1 February 1982).

<sup>113</sup> Vivian L. Forbes, "The Australian and Indonesian Maritime Boundary Delimitation Treaty", *IBRU Boundary and Security Buletting*, Winter 1997-1998, 72.

<sup>114</sup> I Made Andi Arsana, see note 111, 180

<sup>115</sup> Vivian L. Forbes, see note 114, 72



in the proximity of Ashmore Reef and Cartier Island.<sup>116</sup> The usage of equidistant method was prescribed in the Australian domestic legislation and caused by the Indonesian growing concern over the failure to achieve an equitable solution whilst using the natural prolongation.<sup>117</sup> As consequences, the PFSEL was drawn more Southerly compare to the 1971 Seabed Boundary line and the 1972 Seabed boundary line.<sup>118</sup>

The Indonesian Government had conscious that the boundary arrangements in the agreements of 1971 and 1972 were not in its favor.<sup>119</sup> Thus, for the gap in boundary opposite the current Timor-Leste, Indonesia and Australia resorted to establish Joint Development Agreement for managing the resources, found in the unresolved segment of the Timor Sea without discussing any final delimitation for the area.<sup>120</sup> This treaty would be discussed further in-length whilst analyzing the current condition of the maritime boundary conditions between Timor-Leste and Australia.

To finalize its maritime boundaries, Indonesia and Australia had established another agreement in 1997 (Perth Treaty 1997),<sup>121</sup> which delimited the water column (pursuant to the stipulation of UNCLOS 1982, the legal regime for the water column is the EEZ) between both countries including in the Timor Sea, opposites of the current Timor-Leste as well as the western segment of the boundary of both States in Java Sea.<sup>122</sup> Furthermore the agreement also extended the seabed boundary in westerly direction departing from the point where the 1972 Seabed Treaty ends.<sup>123</sup> Perth Treaty 1997, also established a new Seabed and EEZ boundary between the Indonesian Island of Java and Australia's

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<sup>116</sup> I Made Andi Arsana, see note 111, 180.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, 178-179.

<sup>120</sup> 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, see note 21.

<sup>121</sup> Agreement between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, see note 19.

<sup>122</sup> Vivian L. Forbes, see note 114, 74.

<sup>123</sup> *Ibid.*

Christmas Island in the Indian Ocean.<sup>124</sup> The majority segment of the EEZ boundary between Indonesia and Australia, as stipulated in the 1997 Treaty, was “aligned” the PFSEL 1981.<sup>125</sup>

When the Perth Treaty 1997 concluded, many experts describe it as “creative, complex, confusing, and super” treaty.<sup>126</sup> The nicknames originated from the nature of the treaty that established a separate jurisdiction between the seabed and the water column above it. The numerous experts and commentators had envisaged confusing practices by the Coastal States that potentially would occurred should the 1997 Treaty entered into force.

Until today, the Perth Treaty 1997 is yet to be entered into force as both States is yet to ratified it. Moreover, since some segments of the delimited area are currently opposites the Timor-Leste land territory, the possibility of its ratification is impossible.

From the description above, it can be concluded that the current maritime boundary between Indonesia and Australia are, as follows:

- a. The seabed boundaries, pursuant to the 1971 and 1972 Seabed Boundary Treaty in the Arafura Sea and segment of Timor Sea, until point A25;
- b. Provisional Fisheries Surveillance and Enforcement Line, as stipulated in 1981 Memorandum of Understanding;
- c. EEZ as well as western seabed boundary between Island of Java and Christmas Island pursuant to Perth Treaty 1997, however this treaty is yet to be entered into force, and the possibility for its ratification is impossible. (See Map 7).

## **B. INDONESIA – TIMOR-LESTE MARITIME BOUNDARY**

From geographical perspective, there are three maritime segments where Indonesia shared its maritime boundary with Timor-Leste: in Timor Sea, Ombai Strait and Wetar Strait.<sup>127</sup> However, due to the

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<sup>124</sup> United States Department of State Bureau of Oceans and International and Scientific Affairs, *Limits in the Seas No. 141 Indonesia: Archipelagic and Other Maritime Claims and Boundaries*, Office of Ocean and Polar Affairs 2014, 8.

<sup>125</sup> Vivian L. Forbes, see note 114, 74.

<sup>126</sup> *Ibid.*

<sup>127</sup> I Made Andi Arsana, see note 111, 222.

limited scope of the research, the article will only proceed to discuss the maritime boundary between both States in the Timor Sea. For the boundary segment of Timor Sea, Indonesia and Timor-Leste would need to conclude two lateral boundaries, the western segment, in the terminus of the land boundary with Indonesia in Mota Masin area, and in eastern segment.<sup>128</sup>

There is yet to be maritime boundary between Indonesia and Timor-Leste in Timor Sea.<sup>129</sup> Moreover, Indonesia and Timor-Leste also shared land boundary in Timor Island, which delimited pursuant to the Dutch-Portugal Convention 1904. Pursuant to the principle of *uti possidetis juris*, Indonesia would inherit the Netherlands Indies territory whereas Timor-Leste would inherit Timor-Portugal territory. Consequently, the process for delimitating maritime boundary could only be started after the conclusion of the land boundary delimitation, especially for the western lateral.<sup>130</sup> Although there were discrepancies in the percentage of the concluded segments, all facts have showed an optimistic outlook for the finalization of the process.<sup>131</sup> With that said, both States had met twice in September and October 2015<sup>132</sup> to consult on the Terms of Reference and the work plans of the maritime boundary negotiation.<sup>133</sup> The consultations were tangible result from the Statement of Indonesian President Joko Widodo and Timor-Leste Prime Minister Rui Maria de Araújo, during the Prime Minister's visit to Jakarta on 26 August 2015.<sup>134</sup>

### C. TIMOR LESTE – AUSTRALIA MARITIME BOUNDARY

Australia's interest over hydrocarbon resources in the Timor Sea started in 1905 when Australian company was given concession for oil

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<sup>128</sup> Ibid.

<sup>129</sup> Neil Deeley, See note 7, 21.

<sup>130</sup> I Made Andi Arsana, see note 111, 221.

<sup>131</sup> Ibid.

<sup>132</sup> The first consultation was held in Dili on 18 September 2015. The Second consultation meeting was held in Surabaya on 29-30 October 2015.

<sup>133</sup> Government of Timor-Leste, *Timor-Leste and Indonesia held the second consultation meeting on maritime borders*, available at <http://timor-leste.gov.tl/?p=13850&lang=en&n=1>, accessed on 1 September 2017.

<sup>134</sup> Ibid.

in Timor Sea.<sup>135</sup> Large-scale Australian activities in Timor Sea were started in early 1960s when the Woodside Energy obtained concession in Timor Sea.<sup>136</sup> By issuing the concession, Australia had claimed significant portions of the Timor Sea's Seabed, pursuant to the natural prolongation of its continental shelf, into the direction of Timor Through, 70 km south of Timor Island.<sup>137</sup> Such issuance was not recognized by Portugal, which issued its own oil exploration permit for an American Petroleum Company to operate in the Australian claimed area.<sup>138</sup>

Portugal was first not asked to join the process to establish the Seabed boundaries by Australia and Indonesia.<sup>139</sup> This had resulted for a "gap" (between point A16 to A17 of the 1972 Seabed Boundary Treaty) that bordered by the Indonesia-Australia on its both sides.<sup>140</sup> It was on the interest of Australia and Indonesia that the "gap" should be as narrow as possible.<sup>141</sup> This gap would later provisionally closed by the Indonesia-Australia 1989 Timor Gap Treaty, establishing the Joint Development Area in Timor Sea, and its successors treaties of 2002 Timor Sea Treaty and the 2006 CMATS.<sup>142</sup> These instances were arguably resulted Timor-Leste to be in a *fait accompli* position concerning its maritime boundaries.

Portugal was finally invited by Australia to start the discussions for maritime boundary in 1974, after the 1972 Indonesia-Australia Seabed Boundary Treaty was concluded.<sup>143</sup> However, since Portugal was correctly expecting the demise of the importance of natural prolongation principle in the then negotiated law of the Sea convention (UNCLOS 1982), Portugal turn-down Australia's invitation, whilst hoping a more suitable legal principles would be enacted soon.<sup>144</sup> However, the tide

<sup>135</sup> J. Cotton, ed. *East Timor And Australia*, Australian Defense Studies Centre Canberra, 1990, 1.

<sup>136</sup> David Dixon, "Exploiting the Timor Sea: Oil, Gas, Water, and Blood", *University of New South Wales Law Research Series*, No. 46, 2017, 1.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, 2.

<sup>139</sup> *Ibid.*

<sup>140</sup> Maritime Boundary Office, see note 29, 64.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> David Dixon, see note 137, 2.

<sup>144</sup> *Ibid.*

of history had changed and Timor-Leste becomes part of Indonesia between 1975 until 1999.<sup>145</sup>

Subsequent to the 1999 referendum, Timor-Leste was administered by a three years UN Transitional Administration (UNTAET).<sup>146</sup> During this period, Australia and UNTAET concluded a Memorandum of Understanding to continue the operational of the 1989 Timor Gap Treaty pending for the establishment of a new joint development arrangement.<sup>147</sup>

On 20 May 2002, the independence day of Timor-Leste, Australia and Timor-Leste concluded the Timor Sea Treaty for jointly managed the hydrocarbon resources in the area under the Joint Petroleum Development Area (JPDA).<sup>148</sup> Both States also agreed to unitize the hydrocarbon resources located in Greater Sunrise field that stranded on the eastern boundary of the JPDA.<sup>149</sup> The Timor Sea Treaty was closely based to the stipulations of the 1989 Indonesia-Australia Timor Gap Treaty.<sup>150</sup> The treaty also shared the profits of the JPDA 90%-10% for Timor-Leste's benefits.<sup>151</sup> At the present, there are six production-sharing contracts enforced within the JPDA, with the *Bayu Undan* gas Field, which has direct pipeline to Darwin, currently the only petroleum production field in the area.<sup>152</sup>

As the 2002 Timor Sea Treaty unable to agree on the boundary issues, the treaty complemented by the 2006 CMATS.<sup>153</sup> However, the CMATS treaty agreed on distinctive arrangement to equally share

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<sup>145</sup> The process of the integration of Timor-Leste as Indonesia's 27<sup>th</sup> Province fell outside the scope of this research and will not be discussed further in this research.

<sup>146</sup> David Dixon, see note 137, 4.

<sup>147</sup> Ibid.

<sup>148</sup> Timor Sea Treaty between The Government of East Timor and The Government of Australia, see note 24.

<sup>149</sup> Agreement between the Government of the Democratic Republic of Timor-Leste and the Government of Australia relating to the Unitisation of the Sunrise and Troubadour Fields, signed on 6 March 2003, [2007] ATS 11, (entered into force 23 February 2007).

<sup>150</sup> Maritime Boundary Office, see note 29, 55.

<sup>151</sup> David Dixon, see note 137, 4.

<sup>152</sup> Maritime Boundary Office, see note 29, 56.

<sup>153</sup> Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, see note 23.

(50:50) the benefits from the hydrocarbon resources “from areas outside the JPDA” that being unitized under the agreement, including Greater Sunrise field.<sup>154</sup> The agreement furthermore agreed that JPDA should be neutral from any sovereignty yet it established specific jurisdiction over hydrocarbon resources as well as jurisdiction over the water column.<sup>155</sup> It also agreed to waive any discussion for the final maritime delimitation of the area for 50 years.<sup>156</sup> (see Map 8).

The greater sunrise petroleum field is the biggest oil deposit in the Timor Sea,<sup>157</sup> with approximately “5.1 trillion cubic feet of natural gas and 226 million barrels of gas-condensate”.<sup>158</sup> Only 20% of this field located within the JPDA.<sup>159</sup> Under the stipulation of the CMATS, Timor-Leste would only receive 50% of the revenue from this field.<sup>160</sup> Overwhelmingly large opinions in Timor-Leste perceived that the aforementioned CMATS stipulations were unfair.<sup>161</sup>

The uneasiness of the Timor-Leste side worsened in late 2012 when it was known that the Australian Intelligence Service had plant a bugging device to spy the Timor-Leste delegation for the 2006 CMATS.<sup>162</sup> Hence, Timor-Leste started an arbitration proceeding against Australia pursuant to the Article 23 of the Timor Sea Treaty, contesting the legality of the 2006 CMATS, in the Permanent Court of Arbitration (PCA).<sup>163</sup> This PCA arbitration as well as another PCA arbitration regarding the Taxation jurisdiction in the JPDA was revoked by Timor-Leste on 24 January 2017, pursuant to conciliation proceeding.<sup>164</sup>

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<sup>154</sup> Maritime Boundary Office, see note 29, 56.

<sup>155</sup> David Dixon, see note 137, 4.

<sup>156</sup> *Ibid*, 5.

<sup>157</sup> David Dixon, see note 137, 4. 6.

<sup>158</sup> Maritime Boundary Office, see note 29, 56.

<sup>159</sup> David Dixon, see note 137, 4.

<sup>160</sup> Maritime Boundary Office, see note 29, 56.

<sup>161</sup> David Dixon, see note 137, 8.

<sup>162</sup> *Ibid*, 9-10.

<sup>163</sup> Maritime Boundary Office, see note 29, 21.

<sup>164</sup> Permanent Court of Arbitration, *Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of the United Nations Convention on the Law of the Sea*, Press Release 24 January 2017, available at <https://pcacases.com/web/sendAttach/2053>, accessed on 1 September 2017.

In December 2013, the Australian authority raided the office of the Australian lawyer representing Timor-Leste on the PCA arbitration and seized documents relating on the proceeding.<sup>165</sup> This debacle had resulted for Australia to be brought to the ICJ by Timor-Leste.<sup>166</sup> The ICJ proceeding was terminated by the order of the President of the Court at the request of Timor-Leste after Australia returned the seized documents in 2015.<sup>167</sup>

On 11 April 2016, pursuant to the stipulations of Section 2 of the Annex V, UNCLOS 1982, Timor-Leste instigated the Compulsory Conciliation Proceeding under the auspices of the PCA in The Hague.<sup>168</sup> Compulsory conciliation proceeding was selected by Timor-Leste as Australia was considered to be no longer adheres to the compulsory dispute settlement procedures provided by the UNCLOS 1982 and had not provide any response on the invitation to start bilateral negotiation over the maritime boundary by Timor-Leste.<sup>169</sup> In the compulsory conciliation proceeding, a panel of conciliators would support the parties to discuss equitable solutions of the maritime boundary dispute.<sup>170</sup>

After series of procedural meetings and decisions, the opening session of the conciliation was held on 29 – 31 August 2016 in The Hague.<sup>171</sup> On 9 January 2017, after two round of conciliatory meetings, the Timor-Leste, Australia and the PCA issued a Joint Press Release regarding the termination of the 2006 CMATS Treaty in three months after the announcement (10

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<sup>165</sup> David Dixon, see note 137, 9-10.

<sup>166</sup> International Court of Justice, *Timor-Leste institutes proceedings against Australia and requests the Court to indicate provisional measures*, Press Release 18 December 2013, available at <http://www.icj-cij.org/files/case-related/156/17844.pdf>, accessed on 1 September 2017.

<sup>167</sup> International Court of Justice, “Case removed from the Court’s List at the request of Timor-Leste” in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Press Release 12 June 2015, available at <http://www.icj-cij.org/files/case-related/156/18692.pdf>, accessed on 1 September 2017.

<sup>168</sup> Maritime Boundary Office, see note 29, 59.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> Permanent Court of Arbitration, “Timor-Leste and Australia Achieve Breakthrough in Maritime Boundary Conciliation Proceedings” *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Press Release 1 September 2017, available at <https://pcacases.com/web/sendAttach/2230>, accessed on 2 September 2017.

April 2017).<sup>172</sup> The 2002 Timor Sea Treaty on the other hand remained to be in-force.<sup>173</sup>

On 1 September 2017, after the 7th meeting of the conciliation held in Copenhagen on 30 August 2017, the Conciliation Commission issued a Press Release, that both States had agree on key element on the maritime delimitation in the Timor Sea.<sup>174</sup> Both States had also reached an agreement (“30 August Agreement”) to address the legal status of the Greater Sunrise Gas Field, including establishing a special arrangement for its development.<sup>175</sup>

Furthermore on 15 October 2017, the Conciliation Commission again issued another Press Release to announce the completion of the discussion for the draft treaty for the agreement between Timor-Leste and Australia for the maritime Boundary in the Timor Sea.<sup>176</sup> The Treaty was signed in New York on 6 March 2018 as announced by the Conciliation Commission.<sup>177</sup>

The Treaty aimed to be “comprehensive and final” in delimiting maritime boundaries (Continental Shelf as well as Exclusive Economic Zone) between both States.<sup>178</sup> (See Map 9) It provides both states rights to explore and exploit resources in the respective maritime zones (hydrocarbon in the Seabed and Fisheries in EEZ).<sup>179</sup> Furthermore, its also established a “Special Regime for the Greater Sunrise” Gas Fields for further exploitation for the resources of contained in the area.<sup>180</sup> Timor-Leste would gained 70% of the revenue should the gas fields would be exploited using pipeline to Timor-Leste or 80% if the pipeline

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<sup>172</sup> Permanent Court of Arbitration, see note 26.

<sup>173</sup> Ibid.

<sup>174</sup> Permanent Court of Arbitration, see note 172.

<sup>175</sup> Ibid.

<sup>176</sup> Permanent Court of Arbitration, “Timor-Leste and Australia reach agreement on treaty text reflecting 30 August Comprehensive Package Agreement” *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Press Release 15 October 2017, available at <https://pcacases.com/web/sendAttach/2240>, accessed on 18 October 2017.

<sup>177</sup> Permanent Court of Arbitration, see note 27.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.



was connected to Australia.<sup>181</sup>

The Treaty is only one part of the Comprehensive Package Agreement agreed by Timor-Leste and Australia on 30 August 2017 (“30 August Agreement”).<sup>182</sup> Additionally, an action plan for the development of the Greater Sunrise Gas Field.<sup>183</sup> Based on the action plan, the two Governments and the Greater Sunrise Joint Venture, as the licence holder for the exploration and exploitation of the resource in the gas field, have engaged in intensive consultations since September of last year to provide both Governments the most comprehensive information as the basis for deciding the best way forward in the exploitation of resources in the area.<sup>184</sup>

#### **IV. COMPLETING THE JIGSAW OF THE MARITIME BOUNDARIES IN TIMOR SEA**

After analyzing the current condition of each maritime boundary between the Coastal States in Timor Sea, the last part of the research will analyze the options for each Coastal States of the Timor Sea to progress with the maritime boundary delimitation.

##### **A. MAINTAINING INDONESIA’S SOVEREIGNTY: INDONESIA’S OPTIONS**

One of the main priorities of Indonesia’s Foreign Policy during President Joko Widodo’s administration is maintaining Indonesia sovereignty.<sup>185</sup> Consequently the completions of boundaries negotiations with Indonesia’s neighbors have become one of the main concerns of the Government. As the world biggest archipelagic state, Indonesia shared maritime boundary with 10 States.<sup>186</sup> Timor-Leste and Australia are two among those ten States.

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<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Alfurkon Setiawan, *Indonesia’s Foreign Policy Priorities in 5 Years Ahead*, available at <http://setkab.go.id/en/indonesias-foreign-policy-priorities-in-5-years-ahead/>, accessed on 2 September 2017.

<sup>186</sup> Arif Havas Oegroseno, see note 106, 54.

Regarding the maritime boundary with Australia, Indonesia had reacted quite strongly for the result of the Timor-Leste – Australia Conciliation Proceeding. Within two-weeks after the Treaty announced, Indonesia and Australia had agreed “to revisit” the un-ratified Perth Treaty 1997.<sup>187</sup>

In the reviews process, Indonesia should remain for arguing the use of equidistance principle in delimitating its maritime boundary with Australia as already used in Perth Treaty 1997. As a result, a separate legal regime between the seabed and the water column (EEZ) will also remain. This is a common Indonesian position for maritime delimitation especially for segments of maritime boundaries beyond territorial seas that had been delimitated by pre-UNCLOS 1982 agreements, as the majority of those boundaries were for Continental shelf delimitation. Indonesia views that with the enactment of the EEZ, pursuant UNCLOS 1982, thus new maritime boundaries should be negotiated with focus to delimitate the EEZ.<sup>188</sup> It is on Australia and Indonesia’s best interest to keep the *status quo* created by the separation of the jurisdiction of the seabed and the water column. For Australia it will correspond with its basic position to use the natural prolongation principle whereas for Indonesia it to support other Indonesia’s claims on other boundary dispute.

One issue that needs to be carefully discussed by the Indonesia Government is on the compatibility of the Timor-Leste with the existing maritime boundary treaty in the Timor Sea (1972 Seabed Boundary Treaty). Until today, Indonesia is silent on its intention to renegotiate any of the established agreements, including the 1972 Seabed Boundary Treaty.<sup>189</sup> It also arguably the general position of Indonesia to remain bound by the established treaty. However, as the Timor-Leste – Australia maritime boundary is not *in-lieu vis a vis* the “Gap” of the maritime boundary in the Timor Sea as stipulated under the Timor Gap Treaty

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<sup>187</sup> The Jakarta Post, *Indonesia, Australia to Revisit Maritime Border Agreement*, available at <http://www.thejakartapost.com/news/2018/03/16/indonesia-australia-to-revisit-maritime-border-agreement.html> accessed on 31 March 2018.

<sup>188</sup> Damos D. Agusman & Gulardi Nurbintoro, “the Single Line Maritime Boundaries of Malaysia and Indonesia in the Malacca Strait?” *Australian Journal of Maritime and Ocean Affairs*, 2005, 1-2.

<sup>189</sup> David Dixon, see note 137, 7.

1989 and foreseen by the 1972 Seabed Boundary Treaty, Indonesia should be carefully constructed its position in the negotiation process for the maritime delimitation with Australia to gained the maximum opportunity to strive for its interest and not to be *fait accompli* by the Treat between Timor-Leste and Australia.

As for the maritime boundaries with Timor-Leste, among the three maritime boundaries segment between Indonesia and Timor-Leste, the Timor Sea segment is the most complex to be resolved.<sup>190</sup> This is caused by the pre-existing land boundary agreements between both States and the presence of the four small islands close to Timor Island: *Pulau Leti*, *Pulau Moa*, *Pulau Lakor* (Indonesia) and Jaco Island (Timor-Leste).<sup>191</sup>

Indonesia and Timor-Leste would need to draw two lateral lines: the western lateral should start from the land boundary terminus of Mota Masin, at coordinate 09° 27' 41.4" S, 125° 05' 18.1" E and the eastern lateral from a point between Jaco Island and *Pulau Leti*.<sup>192</sup> For the western lateral, Indonesia should suggest that the equidistant line drawn has southerly heading considering Indonesia's archipelagic baselines and Timor-Leste's normal baselines.<sup>193</sup> On the eastern lateral, Indonesia should also proposing the use its archipelagic baselines and Timor-Leste's normal baselines.<sup>194</sup> (see Map 10).

Moreover, both States may need to consider the prevailing maritime boundaries between Indonesia and Australia and the JPDA. They also need to consider, especially for the eastern lateral, the effect of *Pulau Leti* and Jaco Island towards the line.<sup>195</sup> Timor-Leste might argues, that the Leti group of island should not be given full effect for the delimitation process whilst give Jaco Island given full effect (shown as line B in map 10).<sup>196</sup> As a negotiated solution, the half effect may be given to Pulau

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<sup>190</sup> I. Arsana, I., C. Rizos, C. & C. H. Schofield, "Application of GIS in Maritime Boundary Delimitation: a Case Study on the Indonesia-East Timor Maritime Boundary Delimitation", in A. Abdul-Rahman, S. Zlatanova & V. Coors (Eds.), *Innovations in 3D Geo Information Systems*, Springer Berlin, 2006, 9.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> I Made Andi Arsana, see note 111, 223.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*, 224.

<sup>196</sup> Maritime Boundary Office, see note 29, 64.

Leti whereas no effect should be given to Jaco Island (shown as line A in map 11). (see Map 11).

Furthermore, scholars and commentators had also suggested the usage of an adjusted equidistant line to avoid notion that Timor-Leste being enfolded, however, their arguments, which most likely adopted by Timor-Leste, were relatively unsound as the length of the Timor-Leste's coastline is 140 nm and the "each lateral line of equidistance only narrows by around 10 nautical miles where they intersect with a median line" with Australia at "approximately 120 nautical miles apart."<sup>197</sup> (See Map 12).

Since the eastern lateral is not related to the land boundary demarcation process and the negotiation could be potentially contentious, the eastern lateral segment should be considered by both states as the first segment to be discussed.

In addition to the aforementioned options, in the long-run, Indonesia should also viewing for establishment the tri-junction point between the three coastal states in the Timor Sea as soon as all necessary maritime delimitation treaties are established. Indonesia's active effort in completing the jigsaw of maritime boundaries in Timor Sea may secure more ground for the nation's interest in the Timor Sea sphere.

## **B. A MATTER OF LIFE OR DEAD FOR A NATION: TIMOR LESTE'S OPTIONS**

Former Timor-Leste Prime Minister, Mari Alkatiri, was recorded to suggest that the maritime delimitation of Timor-Leste, especially with Australia, as a "matter of life and death" for the States.<sup>198</sup> The abundant unexploited hydrocarbon deposit (around 30 billion US\$) in the Timor Sea has made the delimitation process as an issue of high national value.<sup>199</sup>

To achieve the maximum result, in early 2015, Timor-Leste established new institutions to spearhead the maritime boundary delimitation efforts, the Council for the Final Delimitation of Maritime

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<sup>197</sup> I. Arsana, I., C. Rizos, C. & C. H. Schofield, see note 191, 12.

<sup>198</sup> Clive H. Schofield, & I Made Andi Arsana, see note 28, 67.

<sup>199</sup> *Ibid*, 72.

Boundaries and the Maritime Boundary Office, which functioned as the working branch of the Council. Kay Rala Xanana Gusmão, former President of Timor-Leste was appointed as the Chief Negotiator for the negotiation effort.<sup>200</sup>

Regarding the substances of the delimitation, Timor-Leste should be arguing for the employment of equidistant line (median line) in the delimitation process with Australia. Timor-Leste considers that the median line is the only legally sound method for the delimitation in the area and there is not argument available to differ from it.<sup>201</sup>

Timor-Leste might propose the use of adjusted equidistant lines for the western and eastern lateral lines by considering the concavity of its coastline for the western lateral line and the effect of Jaco Island and *Pulau Leti* for the eastern lateral line.<sup>202</sup> These proposals were made considering the rich resources on the Greater Sunrise Oil Field in the eastern lateral line outskirts and the Buffalo and several smaller oil fields near the western lateral line. However, these claims will be overlapped with the agreed Indonesia-Australia 1972 Seabed Boundary Treaty and will cause the negotiation with Indonesia to be highly contentious.

As for the maritime boundary with Australia, the results of the compulsory conciliation proceeding agreed, in concept on 30 August 2017, and signed on 6 March 2018 had brought arguably very satisfactory results for Timor-Leste. The agreed maritime boundary is relatively more advantageous for Timor-Leste compared to the basic position of the maritime boundary claimed by Timor-Leste (See Map 13). Timor-Leste had also secured arguably beneficial arrangements on the sharing of revenues from the Greater Sunrise by receiving either 70% or 80% of the revenue from the gas field. Timor-Leste and Australia currently involved in discussion with the license holder for the resources in Greater Sunrise gas field to determine the best viable method for its effective and efficient exploitation of the area. Pursuant to these facts, clearly, Timor-Leste had indeed secured more than a mere lifeline but a significant foundation for the progress and development of Timor-Leste in the future.

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<sup>200</sup> Maritime Boundary Office, see note 29, 22.

<sup>201</sup> *Ibid*, 63.

<sup>202</sup> *Ibid*, 64-67.

### C. TO PROVIDE LEGAL CERTAINTY: AUSTRALIA'S NEW POSITION

Australia's main consideration for the maritime delimitation in Timor Sea is the abundant hydrocarbon resources in the area, including in the Greater Sunrise gas field. However, as seen in from the results of the Timor-Leste – Australia compulsory conciliation proceeding, Australia was willing to relinquish an advantageous maritime boundary for Timor-Leste. Australia was also prepared to provide Timor-Leste with a far greater share of revenue resulted from the Greater Sunrise gas field.

Even though Australia had seems resigned from their original position regarding the maritime delimitation in the Timor Sea and its actual involvement in the compulsory conciliation proceeding as well as the sharing of revenue from the Greater Sunrise gas field, Australia's position should be viewed also positive for its own interest.

From the legal perspective, Australia's willingness to be involved in the compulsory conciliation proceeding was also to proves its commitment to the "rule-based order" for the peaceful dispute settlement for issue of the sea under the UNCLOS 1982.<sup>203</sup> As a state with an extended shoreline and maritime zone, Australia has a great interest to uphold the UNCLOS 1982 as the primary legal instrument for issue of the sea.<sup>204</sup> Australia's position also opens opportunity for future development of the Greater Sunrise gas field as well as to as provide legal certainty for the established projects within the disputed areas.<sup>205</sup> In the long-run it would secure better bargaining chips with Timor-Leste to be used in political context in the future for the sake of their bilateral relations.<sup>206</sup>

As it could be seen, those positions were indeed not necessarily come from legal considerations alone. However, they might potentially originated from the great roar of outcry either from Australia's domestic

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<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Department of Foreign Affairs and Trade, "Australia's Maritime Arrangements with Timor-Leste", available at <http://dfat.gov.au/geo/timor-leste/Pages/australias-maritime-arrangements-with-timor-leste.aspx> accessed on 31 March 2018.

public as well as the international community, with Timor-Leste at the spear-point, that condemn Australia's position in the previous arrangements regarding maritime delimitation as well as resources sharing in the Timor Sea.

Regarding Australia's maritime boundary with Indonesia, it had been announced that Australia was ready to "revisit" the Perth Treaty 1997 with Indonesia.<sup>207</sup> This process should positively be used by Australia to finalize its pending maritime boundary with Indonesia, especially for the Exclusive Economic Zone. One important issue that may need to be focused by Australia is the fact that its agreed maritime boundary with Timor-Leste is not necessarily *in-lieu* with the "Gap" as stipulated by the Timor Gap Treaty 1989 and the 1972 Seabed Treaty. This may consequently cause Indonesia to be feel *fait accompli* and as such may complicate the Perth Treaty review process.

After the completion of the maritime boundary with Indonesia, Australia should also prepare to determine the tri-junction point with Indonesia and Timor-Leste. This may significantly influenced by the negotiation process and the actual agreements reached by both States.

## V. WAY FORWARD

It was very fortunate that this research article was written on time for the signing of the maritime delimitation Treaty between Timor-Leste – Australia resulted from compulsory conciliation proceeding on 6 March 2018. The establishment of this agreement is arguably should be construed as one of the turning point in the final maritime delimitation of the Timor Sea. Its pertinence was essential in breaking the delimitation stalemate between both states.

By completing its portion of the maritime boundary in the Timor Sea, Timor-Leste and Australia had move one step closer in completing the jigsaw of maritime boundaries in the Timor Sea. Both states should also prepare the subsequent step to prepare for he establishment of a tri-junction point in the maritime boundary with Indonesia.

For Indonesia the completion of the maritime boundary between

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<sup>207</sup> The Jakarta Post, see note 188.

Timor-Leste and Australia which not *in-lieu* with the “Gap” as created by the Timor Gap Treaty 1989 and as envisaged by the Seabed Boundary Treat 1972 had arguably caught Indonesia in a rather peculiar position. This has arguably has created an urgency for Indonesia to engage Timor-Leste to discuss its lateral boundaries as well as with Australia by focusing in revisit the Perth Treaty 1997. Furthermore, Indonesia should also prepare to engage Timor-Leste and Australia in establishing a tri-junction point in their maritime boundary in the Timor Sea.

Looking at all the available facts, it is arguably correct to assume that the conditions are set for the Coastal States of the Timor Sea to strive for completion of the delimitation process for the maritime boundaries of the Timor Sea, whilst considering the Coastal States respective considerations and goals.

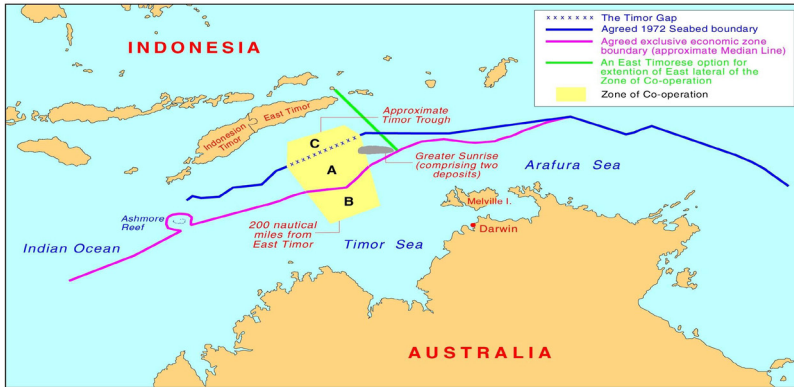
### ANNEX OF MAPS



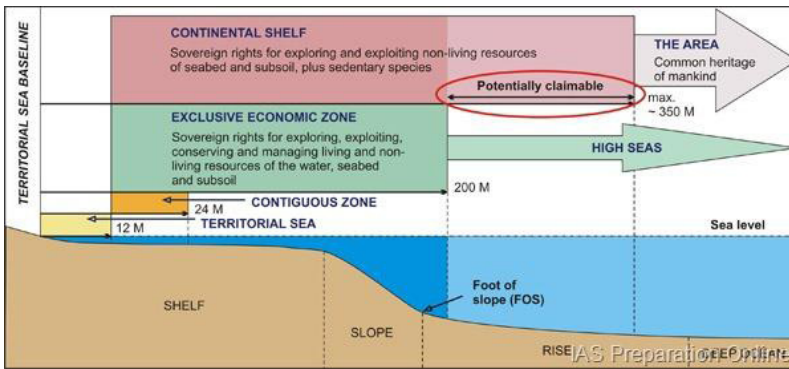
Map. 1. Maritime sphere of Timor Sea<sup>208</sup>

<sup>208</sup> Natasha Stacey, *Boats to Burn: Bajo Fishing Activity in Activity in the Australian Fishing Zone*, ANU Press Canberra, 2007.





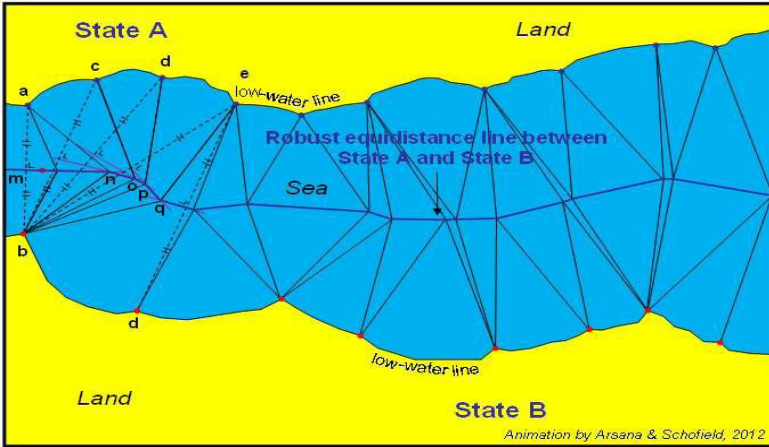
Map. 2. Maritime Boundary in Timor Sea<sup>209</sup>



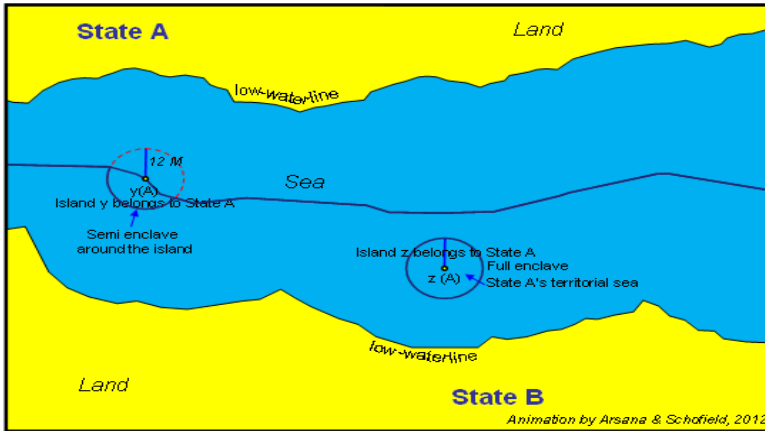
Map. 3. Maritime Zone and its respective jurisdiction under UNCLOS 1982<sup>210</sup>

<sup>209</sup> [...], Maritime Boundary in Timor Sea, available at <http://www.atns.net.au/objects/Timor.JPG>, accessed on 29 August 2017.

<sup>210</sup> Raja Raja Cholan, “United Nations Convention on the Law of the Sea”, available at <https://www.iaspreparationonline.com/united-nations-convention-on-the-law-of-the-sea-unclos/>, accessed on 30 August 2017.



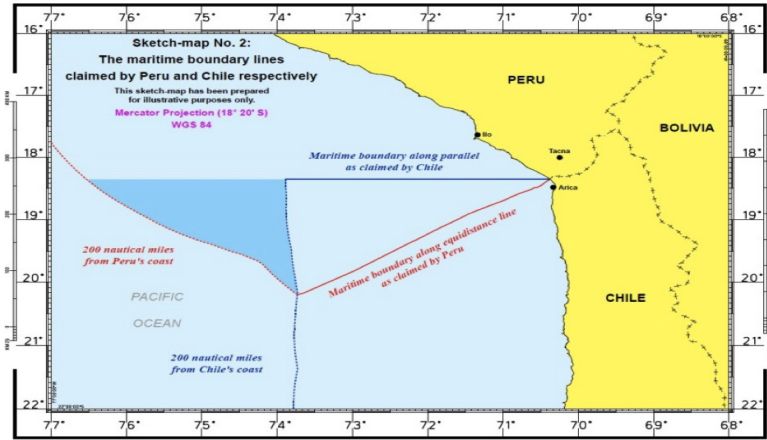
**Map. 4. Depiction of Equidistant Line**<sup>211</sup>



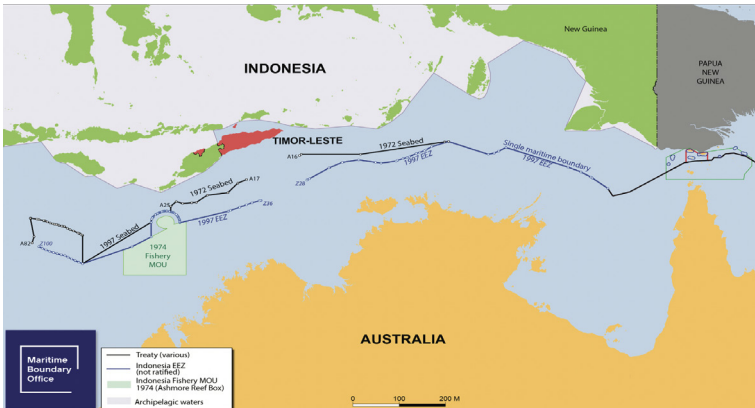
**Map. 5. Depiction of Enclaving Method.**<sup>212</sup>

<sup>211</sup> International Hydrographic Bureau, see note 33, 107.

<sup>212</sup> Ibid, 116.



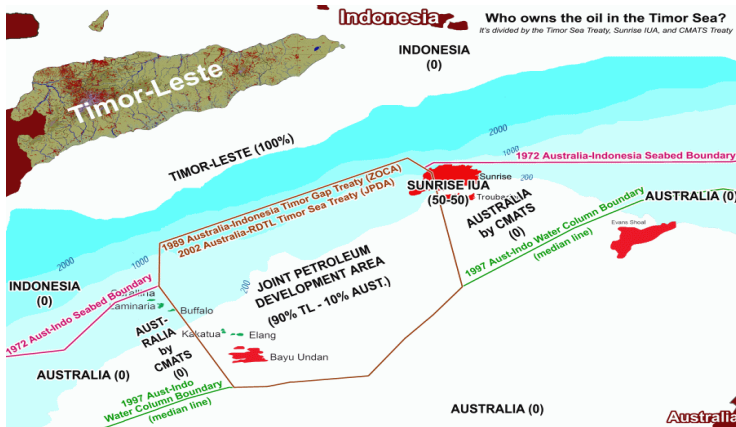
Map. 6. The usage of parallel line method<sup>213</sup>



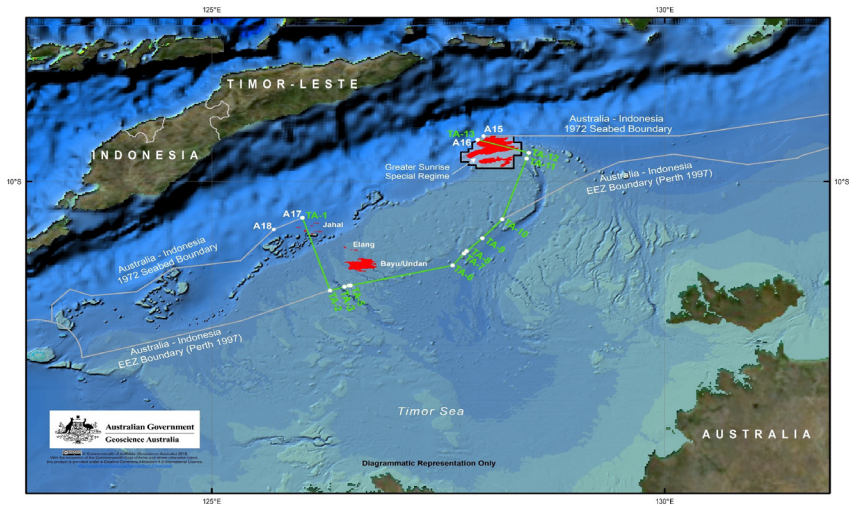
Map. 7. Consolidated Map of 1972 Seabed Boundary Treaty and 1997 Perth Treaty.<sup>214</sup>

<sup>213</sup> Don Anton, *The Maritime Dispute between Peru and Chile*, available at <http://www.e-ir.info/2014/03/18/the-maritime-dispute-between-peru-and-chile/>, accessed on 31 August 2017.

<sup>214</sup> Maritime Boundary Office, see note 29, 51.



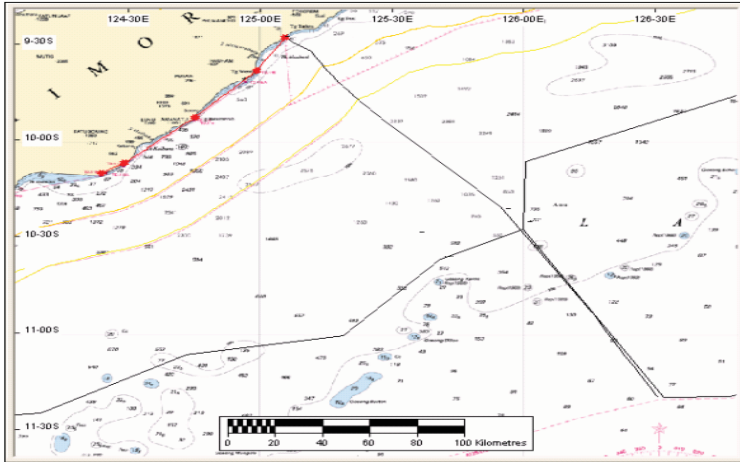
Map. 8. JPDA and the CMATS arrangements<sup>215</sup>



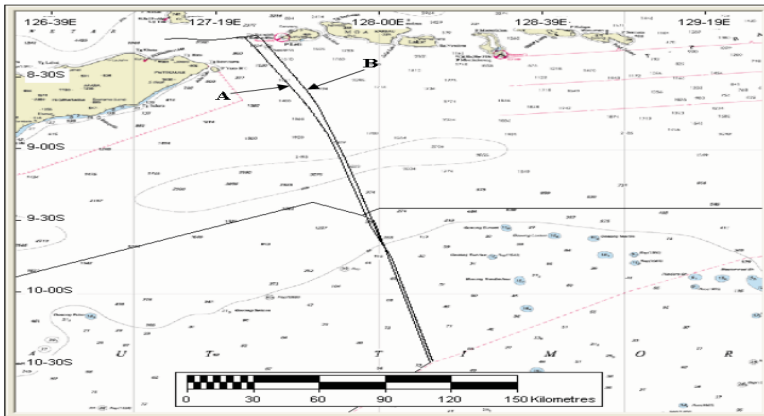
Map. 9. Timor-Leste and Australia Maritime Boundary in the Timor Sea (in green).<sup>216</sup>

<sup>215</sup> [...], *The La'o Hamutuk Buletin*, vol. 7 No. 1 April 2006, available at <https://www.laohamutuk.org/Bulletin/2006/Apr/bulletinv7n1.html#PM>, accessed on 1 September 2017).

<sup>216</sup> Department of Foreign Affairs and Trade, "Australia's Maritime Arrangements with Timor-Leste", available at <http://dfat.gov.au/geo/timor-lest/Pages/australias-maritime-arrangements-with-timor-lest.aspx> accessed on 31 March 2018.



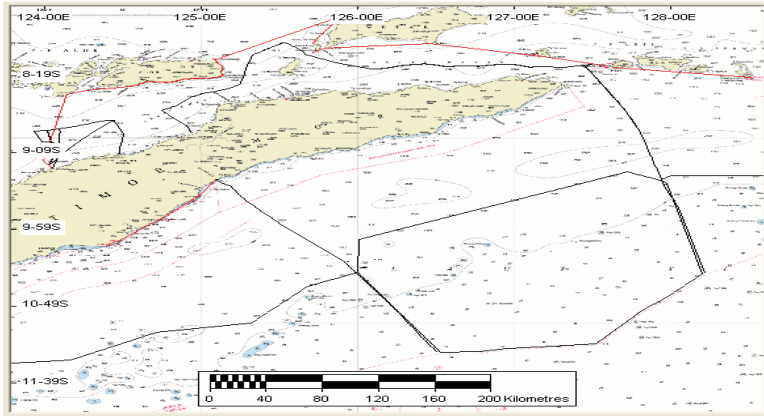
Map. 10. Depiction of Option for Western Lateral.<sup>217</sup>



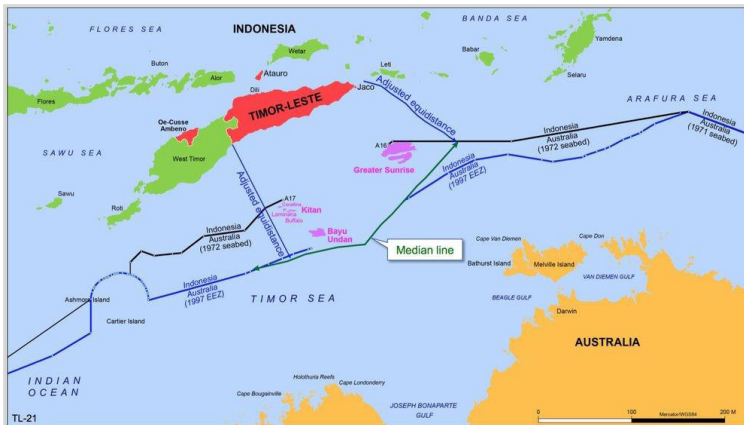
Map. 11. Depiction of Option for Eastern Lateral.<sup>218</sup>

<sup>217</sup> I. Arsana, I., C. Rizos, C. & C. H. Schofield, see note 191, 12.

<sup>218</sup> Ibid.



Map. 12. Consolidated Depiction of Western and Eastern Lateral<sup>219</sup>



Map. 13. Depiction of Timor-Leste's Claims for Maritime Boundaries in Timor Sea<sup>220</sup>

<sup>219</sup> Ibid.

<sup>220</sup> [...], "the area of the Timor Sea claimed by Timor-Leste as subject to its exclusive sovereign rights under international law", available at <http://timfo.org/new-blog-avenue/?offset=1489535743587>, accessed on 2 September 2017.

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