The Australian and Indonesian Maritime Boundary Delimitation Treaty

Vivian L. Forbes

Synopsis

Australia and Indonesia have been negotiating the issue of delimiting seabed and water column boundaries in the waters between their countries since the late 1960s. Although seabed boundaries between the two countries were delimited during the early 1970s a 'gap' was created in the line and two segments remained unresolved. The 'gap' was eventually replaced with the creation of a functional Zone of Cooperation defined in the *Timor Gap Treaty* in 1989. A *de facto* water column boundary is in force.

Between 1993 and 1996 a further eight rounds of negotiations by representatives from the two countries took place before settling on lines that will create two regimes in the Timor Sea and northeastern sector of the Indian Ocean.

The provisions of the March 1997 Treaty are analysed briefly in this paper. The paper summarises the historical aspect of the negotiations, highlights inherent problems associated with the delimitation and concludes that the recent agreement, whilst unusual in many aspects, raises certain questions relating to the alignment of the boundaries which are not explained in the 'package deal' of the document.

Introduction

A *Treaty between the Governments of Australia and the Republic of Indonesia Establishing an Exclusive Economic Zone and Certain Seabed Boundaries* in the seas separating the two countries was signed in Perth on 14 March 1997 ('March 1997 Treaty').

The provisions of the March 1997 Treaty are intended to provide Australia with jurisdiction over the relevant offshore resources south of two delineated boundaries and to eliminate uncertainty with respect to sovereign rights over the prescribed areas, thereby contributing significantly to the security of the broader region.

Negotiating teams, selected from the two countries to determine the boundary, took into account the provisions contained in the 1982 *United Nations Convention on the Law of the Sea* (the 1982 Convention) which entered into force on 16 November 1994. Australia and the Republic of Indonesia are both parties to the 1982 Convention. Indonesia was one of the earliest ratifiers of the 1982 Convention when it deposited its instrument of ratification on 3 February 1986. Australia ratified the Convention on 5 October 1994.

Articles 74 and 83 of the 1982 Convention provide that the delimitation of the Exclusive Economic Zone and continental shelf between states with opposite coasts shall be effected by agreement on the basis of international law in order to achieve an equitable solution.

Earlier agreements between the Governments of the Commonwealth of Australia and the Republic of Indonesia had established certain seabed boundaries. These agreements, signed in Canberra and Jakarta on 18 May 1971 and 9 October 1972 respectively, delimited permanent seabed boundaries in the area of the Arafura and Timor Seas.

A third Treaty between the two parties created a Zone of Cooperation in an area of the Timor Sea between the Indonesian Province of East Timor and Northern Australia. This treaty was signed on board an aircraft as it flew over the designated Zone of Cooperation in the Timor Sea on 11 December 1989. It is referred to as *Timor Gap Treaty: Zone of Cooperation* (Forbes and Auburn, 1991: 1).

The parties to the March 1997 Treaty are of the opinion that the establishment of the comprehensive boundaries in the maritime areas between the two countries will encourage and promote the sustainable development of the marine resources of those areas and enhance the protection and preservation of the marine environment adjacent to the two countries (*Preamble* to the March 1997 Treaty). Furthermore, this document could be presented as a model of bilateral cooperation in the region.

The negotiating teams were mindful of the *Memorandum of Understanding* (MOU) between the Governments of Australia and the Republic of Indonesia regarding the operations of Indonesian fishermen using traditional methods within the areas of the Australian Fishing Zone (AFZ) and continental shelf. A MOU was signed in Jakarta on 7 November 1974 and the Agreed Minutes of meetings between officials of Indonesia and Australia on Fisheries, were signed at Jakarta on 29 April 1989. An additional agreement relating to cooperation in fisheries became effective in 1992.

Thus, Australia and Indonesia were fully committed to maintaining, renewing and further strengthening their mutual respect, friendship and cooperation through existing treaties, agreements, as well as through their policies of promoting constructive neighbourly cooperation.

By their very act of signing the March 1997 Treaty in Perth, the parties were convinced this document would further enhance and contribute to the strengthening of the relations between their two countries already established in earlier treaties.

Present Status

Australian and Indonesian negotiators have been discussing the issue of determining maritime boundaries, particularly for the purpose of allocating resources between their countries, since the late 1960s.

Three treaties, and an MOU in the form of an agreement were signed and are still in force in January 1998. They are:

1. A seabed (continental shelf) boundary in the Arafura Sea delimited in May 1971. The boundary comprises a series of short lines, collective length of about 478 nautical miles, extending from a Point A1, west of Cape York to the north of Arnhem Land (Point A12);

2. A seabed (continental shelf) boundary was defined from the Point A12 to Point A25 northwest of Ashmore Islands, but leaving a gap in the area of the Timor Sea south of East Timor which was, in October 1972, administered by Portugal. The overall length of this series of short lines comprising the boundary is about 647 nautical miles;

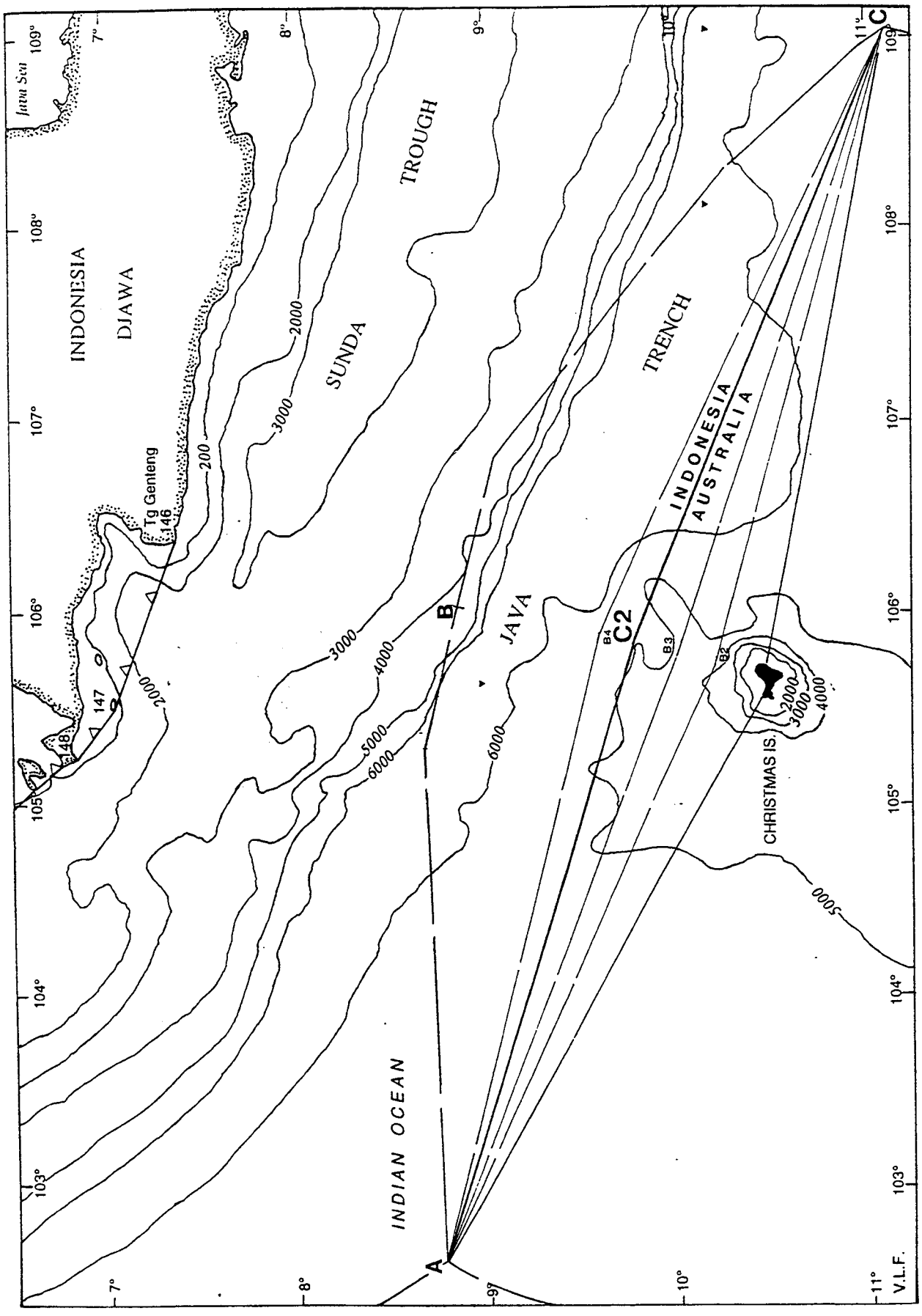
3. The *Timor Gap Treaty* established a Zone of Cooperation (ZOC) in December 1989. It deals provisionally with the 'gap' in the seabed area not covered in the 1972 Treaty. Within that Zone, contracts for the exploration and exploitation of hydrocarbon deposits in the substratum of the seabed would be issued by a Joint Authority, which was created to administer the joint development regime within the ZOC. The overall surface area covered by the ZOC is about 60,500km^2. Three Areas, for administrative purposes, were designated: ZOC'A', ZOC'B', and ZOC'C'; and,

4. A non-treaty status *Provisional Fisheries Surveillance and Enforcement Line* (PFSEL) has been in force since October 1981. The PFSEL is a *de facto* water column/EEZ boundary. It covers jurisdiction over fisheries enforcement matters in the water column (the body of water from the surface of the sea down to, but not including, the seabed on the continental shelf off northern Australia).

The effectiveness of the PFSEL, measuring some 500 nautical miles, and patrols by coastal surveillance personnel, are open to debate, especially given the number of intrusions by alien fishers, in particular those from nearby Indonesian islands, and of illegal entry via the northern ports by persons seeking permanent settlement in Australia. Considerable concern has also been voiced within Australia when foreign fishing boats are apprehended within Australia's territorial sea zone (now a width of twelve-nautical miles) in the waters off the northern coast.

Indeed, questions are often posed on the effectiveness of the maritime boundaries in the Arafura and Timor Seas, the merits of the Zone of Cooperation especially with respect to the East Timor equation, the operations of the Joint Authority and the allocation of concessions and permits to tenement holdings within the Zone since 1991. Furthermore, there is also a pending compensation claim by one mining company seeking redress for loss of permit when the 'clean slate approach' was adopted to negotiate the *Timor Gap Treaty*. National interest was naturally focused when announcements were made relating to the finalisation of the maritime boundary between Australia and Indonesia.

Figure 1: EEZ / Continental Shelf Boundary Between Christmas Island and Java



Finalisation of the Boundaries

The March 1997 Treaty, that finalised the maritime boundary between Australia and Indonesia was signed by the Ministers for Foreign Affairs from Australia and Indonesia in Perth, Western Australia. The agreement, noted Foreign Affairs Minister Alexander Downer was *"...very much in Australia's national interest"* (*The West Australian*, 14 March, 1997: 10).

His counterpart, Mr Alatas observed that *"[w]ith the signing of this treaty, the last remaining issues between our two countries have been resolved equitably in accordance with the 1982 United Nations Convention of the Law of the Sea"* (*The West Australian*, 15 March, 1997: 4).

The March 1997 Treaty delimiting the maritime boundary was negotiated as a 'package deal'. Negotiations to determine this boundary were held between 1993 and December 1996. The boundaries are in the Arafura and Timor Seas and the northeastern sector of the Indian Ocean. The suite of lines comprise:

1. The water column (in essence an EEZ) boundary and a seabed (in reality a continental shelf) boundary between the Australian territory of Christmas Island and the Indonesian Island of Java. The two boundaries are coincident. The shortest distance between the two landmasses is 187.5 nautical miles (or about 347 kilometres) (Figure 1);

2. The complete water column (EEZ) boundary between the Australian mainland and the southern archipelagic islands of Indonesia, a distance of some 1,500 nautical miles (3,000 kilometres); and,

3. The extension of the seabed boundary between the Australian mainland and Indonesia westward of Point A25 which was defined in the 1972 Seabed Boundary Agreement (Figure 2).

The treaty contains a range of provisions that govern the obligations and rights of the two countries in the region where water column jurisdiction of one country overlaps the seabed jurisdiction of the other. However, it is silent on matters that could serve to aggravate the cosy relationship that the Treaty purports to portray. The March 1997 Treaty is innovative. Nevertheless, it is inadequate in many respects and is open to a range of different interpretations and misunderstandings. The text of the treaty is simple. However, implementation of certain aspects of the dual marine jurisdictions is exposed to many problems, especially those of a bureaucratic nature. The March 1997 Treaty will enter into force after certain legislative procedures have been enacted in Australia and Indonesia. A tentative date is May 1998, but it is unlikely that Indonesia will have its amended legislation in place by this date.

In Australia's case, minor legislative amendments to the *Petroleum (Submerged Lands) Act* 1967 and a new EEZ Proclamation under the *Seas and Submerged Lands Act* 1973 will be needed. It must be noted that the geographical coordinates of the points determining the outer limits of Australia's Exclusive Economic Zone (AEEZ) were proclaimed in Gazette No. S290 on 29 July 1994. The limits became effective on 1 August 1994, thus making the concept of the 1979 Australian Fishing Zone (AFZ) redundant.

The March 1997 Treaty was tabled in the Federal Parliament on 26 August 1997. It was later scrutinised by the Joint Standing Committee on Treaties at meetings held in Canberra (on three separate occasions), Perth, Darwin and Christmas Island between September and November 1997. Submissions from interested members of the public as well as Government agencies were presented at these meetings. The proceedings of these meetings appear in Hansard of the Senate. The submissions and the Committee's findings and recommendations were published as separate items in late November 1997.

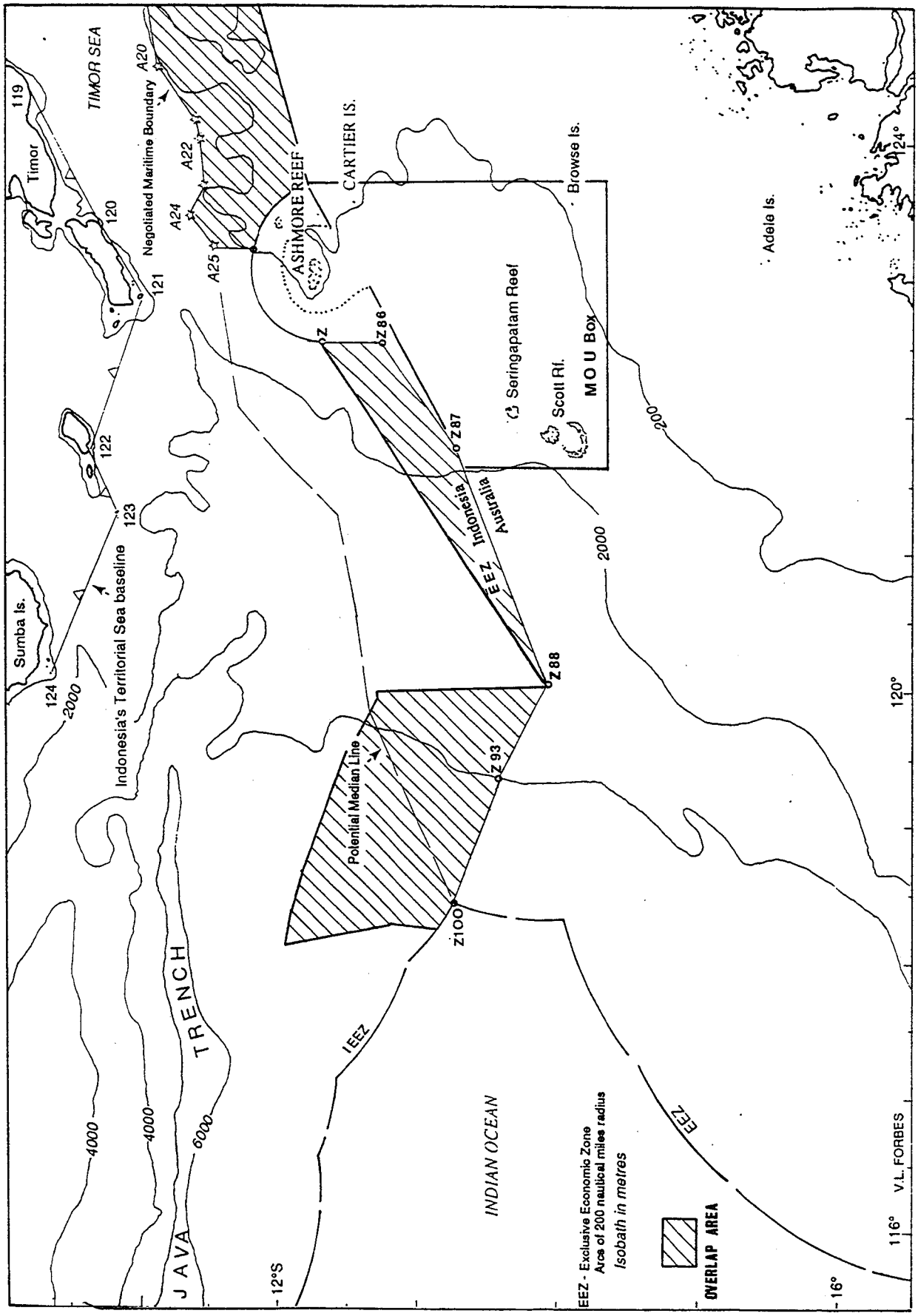
An Analysis of the Treaty

The text of the March 1997 Treaty is brief. It contains eleven Articles and a set of Appendices in the form of colourful maps which portray the lines of jurisdiction.

Whilst some commentators[1] have described the treaty as being *"creative"*, *"complex"*, *"confusing"* and *"super"*; others disagree on specific issues that may result from implementation of the treaty, and in particular, the effectiveness of overlapping regimes of seabed and water column.

Article One defines the geographical coordinates of the terminal and turning points (58 in total) of the western extension of the seabed boundary

Figure 2: The 1972 Seabed Boundary



commencing at Point A25. It also provides for an Australian jurisdictional zone of 24-nautical miles radius to the north and west of the Ashmore Islands (Pulau Pasir). Geodesic lines link the points to form the boundary.

The water column (Exclusive Economic Zone) boundary between the two countries is defined in Article Two. A total of 101 points are nominated by their geographical coordinates. For the most part this boundary is aligned to the PFESL.

Article Three makes provision for the delimitation of a seabed and an EEZ boundary to the north of Christmas Island. Three points are defined by geographical coordinates. Points C1 and C3 (shown as 'A' and 'C', respectively on Figure 1) are located at the intersections of 200-nautical miles arcs from identified points on Christmas and Java Islands.

Point C2 is a negotiated point located 38.75 nautical miles north of Christmas Island on a line of the shortest distance between the island and Java's southern coast. The coordinates are Latitude 9° 46' 49.8" South; Longitude 105° 50' 55.4" East. Geodesics link C1 to C2 and then to C3 to form the boundary. This agreed boundary lies south of the boundary proclaimed by Australia in 1994.

Article Four specifies that the values of the geographical coordinates employed in defining the points are expressed in terms of the World Geodetic System 1984 (WGS 1984). These may be treated as being equivalent to the International Earth Rotation Service Terrestrial Reference Frame (ITRF). This Article also notes that reference to a nautical mile is to be taken as being equivalent to 1,852 metres.

Articles Five and Six stipulate that the exercise of sovereign rights and jurisdiction on and under the seabed and in the area of the EEZ are provided in these two articles respectively.

The rights and obligations of the parties in those regions where the areas of the EEZ adjacent to and appertaining to one party overlap those of the other party are detailed in Article Seven. Such issues as the construction of *"artificial islands"*; the granting of exploration and exploitation licences; the construction of installations and structures; the establishment of fish aggregating devices; notification of marine scientific research in accordance with the 1982 Convention; provisions for effective measures necessary to prevent, reduce and control pollution of the marine environment; and the emergence of an island after the treaty enters into force are covered in this Article.

Article Seven has been the subject of close scrutiny by Herriman and Tsamenyi (1997: Submission to JSCT, page 115). They argue that the 1982 Convention had not anticipated the existence of the area of overlapping jurisdiction, the co-location of the EEZ of one state with the continental shelf of another. In particular, they note that this Article is silent on a number of issues, and question, for example, whether there is any obligation on behalf of Indonesia to allow construction of all Australian proposed installations; and whether Indonesia is compelled to allow all proposed marine scientific research by Australia that is associated with the continental shelf? Artificial installations, for example oil drilling platforms while in contact with the seabed must exist within the water column.

However, it seems clear from UNCLOS that Australia is not actually required to ask Indonesian permission to build installations on its seabed, merely to give notice. UNCLOS also makes it clear that neither side is under any obligation to allow research by the other party in their water column or on their seabed.

Article Eight notes that the rights and obligations of either party as a Contracting State to the *Timor Gap Treaty's* Zone of Cooperation are not affected by this present treaty.

Provision is made available in Article Nine for agreement to be reached in the event of any single accumulation of liquid hydrocarbons or natural gas or any other mineral deposit in the substratum extending across the lines of allocation described in Articles One and Three.

Article Ten states that any dispute between the two parties resulting from the interpretation or implementation of the provisions in this treaty will be *"settled peacefully by consultation or negotiation."*

According to Article Eleven the Treaty will enter into force on the date of exchange of the instruments of ratification. It is likely that before ratification of the Treaty takes place the Australian Government may need to reconsider its position in the light of serious issues raised at various post-signing consultative meetings and the implications of certain matters relevant to the alignment of the

boundaries. The JSCT has nevertheless recommended the ratification of the Treaty but has stipulated that certain procedures be undertaken to rectify issues raised at the meetings.

Issues and Implications of the Treaty's contents

Christmas Island

The delineation of a potential seabed boundary north of Christmas Island in the Indian Ocean was foreshadowed prior to the signing of the March 1997 Treaty (Forbes, 1997:8-12; Forbes and Bachri, 1997: 22-34). A scenario was presented in which Australia would forfeit a vast area of EEZ and seabed north of Christmas Island if the median line principle was not adopted.

A surface area of 50,000km^2 was estimated, based on Indonesia's 1964 baseline data, a hypothetical territorial sea baseline for Christmas Island and computation utilising the Bessel Ellispoid and maps prepared on Mercator Projection. This computation was confirmed in work presented by Sambrook (1997: 152-162) utilising accurate digital baseline data and the geographical coordinates of the three defined points as stated in the March 1997 Treaty.

Australia had defined a median line boundary in the EEZ Proclamation of July 1994. Twenty-eight sets of geographical coordinates were determined. Geodesics linking these turning points delineated a median line boundary which was closely aligned to a hypothetical boundary portrayed on hydrographic charts in 1979 (Figure 1).

In this instance, Indonesia rejected the proposal that the median line between Christmas and Java Islands should be considered as a maritime boundary. Indonesia initially argued that Point C2 should be located a mere 12 nautical miles north of Christmas Island. During the eight rounds of negotiations, in the period 1993 to December 1996, the precise location of Point C2 became the subject of a 'floating point' varying in distance of between 12 and 50 nautical miles north of Christmas Island. The final location of C2 was negotiated in a 'package deal' to be located at 38.75 nautical miles north of Christmas Island. Point C2 is about 59 nautical miles south of the mid-point.

Indonesia's argument was partially based on the *Jan Mayen* Case and that Christmas Island, a distant island from the Australian mainland, warranted only 'partial effect' in any calculation to determine the boundary. Whilst an adjudicator from a third party may agree with this view it could be argued that such a large island with a substantial population (over 1,200) and a viable economy would have generated a larger effect in the calculation to determine the boundary. Indeed, if Christmas Island were a sovereign state, it surely would have insisted on being given 'full-effect' when negotiating its maritime boundary.

In his submission to the JSCT, Kaye (1997) acknowledges that the boundary favours Indonesia, but notes that it may be viewed from the aspect that Australia gained in the Timor Sea. Prescott suggests that the final boundary would be a compromise. However, it is the opinion of this author and authorities of Christmas Island, that Australia should have sought a common point that was further north of the final point regardless of whether the seabed north of the island was scarce of resources. Seabed morphology obviously did not play a significant role in this equation.

Authorities on Christmas Island also argued that the alignment of the water column and seabed boundaries lying 38.75 nautical miles north of the island will significantly increase the frequency of visits by Indonesian boats, many of whom are not necessarily engaged solely in fishing activities.

Seabed and Fisheries Resources

Prior to the signing of this Treaty, there was uncertainty as to how the resources of the seabed and water column should be divided between the two countries. It has been suggested (DFAT, *Explanatory Notes,* 14 March 1997: 2) that the Treaty *"provides a secure basis"* for the two countries to manage fisheries and the marine environment and access to seabed resources in accordance with international law. A firm jurisdictional basis has been proposed for the granting of prospecting licences for the exploration of the substratum of the seabed.

Herriman and Tsamneyi in their submission to the JSCT cite an example of potential conflict. Namely, that of the possibility of an Australian trawlers not being able to take sedentary species from the seabed without removing at least some free-swimming resources from the water column as by-catch. Will Indonesia take measures to prevent certain activities or demand financial compensation? It is debatable as to whether such issues were discussed when the negotiators were determining the boundary.

Seabed and EEZ Boundaries

Overlapping areas reflecting the fact that different legal principles apply for delimitation of seabed boundaries and water column (EEZ) boundaries have been created. The principal test for delimitation of the EEZ is equidistance adjusted for special circumstances. The same might be said for the delimitation of a seabed boundary.

It has been proposed that areas of seabed north of the EEZ line have given Australia an advantage. Scholars may find this arrangement confusing. According to Article 56:1(a) of the 1982 Convention an EEZ includes not only the water column but also the seabed and its substratum in the context of managing the resources within the EEZ.

In essence, the March 1997 Treaty has created two boundaries. One for fisheries in the water column, and another for seabed resources exploitation. While in theory, this arrangement may be perceived as workable and functional, in reality, there are inherent problems. Such problems were elaborated upon in various submissions made to the JSCT meetings. It should be remembered though that the two countries have been managing the two boundaries for 16 years without any serious friction.

Protection of the Marine Environment

Article Seven of the Treaty reflects the concern of both Parties to ensure that the marine environment is adequately protected. This Article strengthens the *Memorandum of Understanding* between Australia and Indonesia on Oil Pollution Preparedness and Response signed on 3 October 1996.

Concern has been voiced by authorities on Christmas Island that the location of the agreed boundary could have a potentially damaging effect on the local environment and a resultant impact on the island's fragile northern coastline.

Implications for the Timor Gap Treaty

The March 1997 Treaty does not cover the area of the seabed defined in the *Timor Gap Treaty* which entered into force in February 1991 and is not due for review until 2031.

Neither side sought to negotiate a final seabed boundary in the vicinity of the Timor Gap. Australia's position with regard to that boundary is not prejudiced. However, the Treaty establishes an EEZ (water column) boundary in the Timor Gap which is aligned with the existing PFSEL.

Marine Scientific Research

Agreement was reached that within the areas of overlap, marine scientific research into the water column would be the subject of the jurisdiction of Indonesia and that marine scientific research into the seabed would be the subject of jurisdiction of Australia. Apparently there is no requirement for Australia to obtain the permission of Indonesia to carry out marine scientific research that is associated with the continental shelf. The treaty sets out when notice is required to be given to Indonesia and when the permission of Indonesia is required.

It is surprising to learn that the Treaty was not intended to resolve all marine related concerns in the areas subject to delimitation, and that some of the issues raised on Christmas Island, such as illegal immigration, were not capable of being resolved by a maritime boundary delimitation.

Surely the concept of a boundary is to provide a limiting line for the purposes of enforcing the laws of the state and to regulate movement of persons and goods for reasons best known to the state concerned.

Conclusion

It is generally assumed that such a treaty will reduce potential tension between two nations of different cultural and political bases, will promote a more stable, prosperous Indonesia and present Australia in favourable terms to other nations in the Asia-Pacific region. That the 1982 Convention suggests nations share their under-utilised marine resources is commendable. However, if sufficient research has not been undertaken to determine the full potential of the resources in the waters and on and under the seabed then providing the other party extra maritime space begs serious questioning, especially if the boundary(ies) were determined as a 'package deal'.

The fact that Indonesia was unhappy with the delimitation of the 1971/1972 seabed boundaries and insisted that a water column boundary replace the PFSEL suggests that no boundary is permanent and could be subject to re-negotiation at some later date. Indonesia also insisted on a 'clean-slate' approach in its negotiations to create the Zone of Cooperation. Such an approach will have a direct impact on the Australian taxpayer by way of

payment of compensation to an oil exploration company when the case is settled at the High Court level.

Thus, it remains to be seen just how effective these multifunction lines of resource allocation will be in fostering close working relations between the two countries.

Governments, in negotiating a treaty, will generally do so with some secrecy. This is understandable. Nevertheless, there is a necessity to seek consensus on potentially contraversial issues and consultation on certain matters before a document of national importance and interest is signed. For example, local interests in the utilisation of the marine resources must be considered. Apparently lack of consultation has been a bone of contention in this particular exercise.

References

Forbes, V.L. and Auburn, F.M. (1991) 'The Timor Gap Treaty Zone of Cooperation', *Boundary Briefing,* No. 9, International Boundaries Research Unit, Durham.

Forbes, V.L. (1995) *The Maritime Boundaries of the Indian Ocean Region,* Singapore University Press, Singapore.

Forbes, V.L. and Bachri, Samsul (1997) 'Geographical Analysis and Computational Study of Indonesia's Maritime Space', *Proceedings of the Geodetic Aspects of the Law of the Sea, Second International Conference,* Bali, Indonesia, 22-32.

Forbes, V.L. (1997) 'Lines of Allocation for Marine Resources in Australia's Northern Waters', *Indian Ocean Review,* 10,1, 8-12.

Joint Standing Committee on Treaties (1997) *'Australia-Indonesia Maritime Delimitation Treaty',* 12th Report, The Parliament of the Commonwealth of Australia.

_____ (1997) 'Submissions to the JSCT Meetings', The Parliament of the Commonwealth of Australia.

Kaye, Stuart (1995) 'Australia's Maritime Boundaries', *Wollongong Papers on Maritime Policy* No. 4, University of Wollongong, Wollongong.

Sambrook, John (1997) 'Analysis of an Area of Maritime Space between the Australian Territory of Christmas Island and Indonesia Using Geographic Information Systems', *Proceedings of the 3rd Hydrographic Symposium,* Special Publication No. 38, Australian Hydrographic Society, pp. 152-162

Notes

[1] Papers not for citation.

Vivian L. Forbes is Map Curator at the Geography Library, University of Western Australia, Perth.