(Accepted version. Published version available here: https://doi.org/10.1163/26660229-03901016)

DRAWING LINES AT SEA: AUSTRALIA'S FIVE DECADES OF MARITIME BOUNDARY DELIMITATION

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I INTRODUCTION

Boundaries at sea are man-made constructs of importance to everything from oil and gas production, to fisheries and environmental protection. Determining a maritime boundary is inherently a technical process that is usually based on widely accepted legal principles. Because maritime boundaries define the space in which states operate – as do companies and individuals – agreeing on a maritime boundary is also a highly political process with potentially far-reaching consequences.[1] Today, maritime boundary disputes exist on all continents – and almost 40 percent of all maritime boundaries remain unsettled.[2]

In Australia, however, *all* maritime boundaries have been settled, starting with negotiations in the early 1970s and ending in 2018. Getting to this point is not a given; it is the result of continuous efforts by Australia and its neighbours at pursuing finalised maritime zones. This begs the question: how has Australia managed this feat, when so many boundaries remain in dispute across the world's oceans? What have been the main drivers for, and obstacles to, resolving all these boundary disputes?

Australia borders, or has access to, several oceans and seas: the Tasman Sea to the southeast, the Java, Timor, Arafura and Solomon Seas to the north, the Coral Sea to the northeast, as well as more generally the Indian Ocean to the west, the Pacific Ocean to the east, and the Southern Ocean to the south. Australia has in turn entered into maritime boundary treaties with France, Indonesia, New Zealand, Papua New Guinea, Solomon Islands and Timor-Leste, in effect settling all its maritime boundaries with its neighbours.[3]

Different approaches to the settling of maritime boundary disputes entail different conceptions of these processes.[4] The most common way to explain *why* states settle their disputes at sea concerns resources.[5] Boundary-making in the ocean is primarily functionalist: it is done with an eye towards the functional usage of the maritime space itself.[6]

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[1] 'Settled' entails that two states have formally agreed on the exact delineation of a boundary at sea, whether ratified by both countries or as a minimum adhered to as a finalised boundary. When a dispute is 'unsettled', the whole area claimed by both states remains disputed.

[2] Andreas Østhagen, 'Troubled Seas? The Changing Politics of Maritime Boundary Disputes' (2021) 205 (May) *Ocean and Coastal Management* 105535: 1–11.

[3] This does not include the boundaries surrounding Antarctica, which are not dealt with here.

[4] Bernard H Oxman, 'International Maritime Boundaries: Political, Strategic, and Historical Considerations' (1995) 26(2) *University of Miami Inter-American Law Review* 243; Victor Prescott and Clive Schofield, *Maritime Political Boundaries of the World* (Martinus Nijhoff, 2nd ed, 2005); Douglas M Johnston, *The Theory and History of Ocean Boundary-Making* (McGill-Queen's University Press, 1988); Michael Byers and Andreas Østhagen, 'Settling Maritime Boundaries: Why Some Countries Find It Easy, and Others Do Not' in The International Ocean Institute - Canada (ed), *The Future of Ocean Governance and Capacity Development*: *Essays in Honor of Elizabeth Mann Borgese (1918-2002)* (Brill Nijhoff, 2018) 162 ('Settling Maritime Boundaries').

[5] Prescott and Schofield (n 4); Oxman (n 4); Byers and Østhagen, 'Settling Maritime Boundaries' (n 4).

[6] See, eg, Johnston (n 4); Douglas M Johnston and Mark J Valencia, *Pacific Ocean Boundary Problems: Status and Solutions* (Martinus Nijhoff, 1991); Jared Bissinger, 'The Maritime

International lawyers, however, have traditionally taken the view that each boundary dispute (case) is determined by its particular judicial and geographic attributes.[7] In turn, each case becomes too unique to allow generalisation, and we must pay attention to the legal characteristics of each case in order to understand outcomes.[8] Alternatively, in studies of international politics, it is common to argue that security concerns and contextual relations tend to determine the outcome of disputes between states.[9] In other words, functional use and legal characterises might enable or hinder negotiations, but what determines when and why states settle are power-dynamics between states.

Drawing on these simplified conceptions spanning both international law and political science, this article explores various ways of understanding maritime boundary delimitation through a detailed study of each of Australia's maritime boundary agreements, starting with Indonesia in 1971 and ending with Timor-Leste in 2018. It depicts and documents the main drivers and impediments to these agreements in each of the instances Australia has had to negotiate with a third country, in order to say something about Australia's approach to boundary-making at sea more generally.

This article builds on volume 36 (2018) in this journal that examined the Timor Sea Treaty from 2018.[10] Others have examined Australia's maritime boundaries as separate agreements or as a collection.[11] However, no one has looked at both the political and legal dimensions of Australia's complete set of maritime boundaries after 2018, teasing out factors of relevance with a wider view on the concept of boundary-making at sea. This is of importance not only because it adds to our understanding of

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Boundary Dispute between Bangladesh and Myanmar: Motivations, Potential Solutions, and Implications' (2010) 10(1) *Asia Policy* 103; Áslaug Ásgeirsdóttir and Martin C Steinwand, 'Distributive Outcomes in Contested Maritime Areas' (2016) 62(6) *Journal of Conflict Resolution* 1284.

[7] See, eg, Alex G Oude Elferink, Tore Henriksen and Signe Veierud Busch (eds), *Maritime Boundary Delimitation: The Case Law - Is It Consistent and Predictable?* (Cambridge University Press, 2018).

[8] Oxman (n 4); Ted L McDorman, 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World' (2002) 17(3) *International Journal of Marine and Coastal Law* 301; David L VanderZwaag, 'The Gulf of Maine Boundary Dispute and Transboundary Management Challenges: Lessons to Be Learned' (2010) 15(2) *Ocean and Coastal Law Journal* 241.

[9] See, eg, John J Mearsheimer, *The Tragedy of Great Power Politics* (W W Norton, 2001); Paul K Huth, *Standing Your Ground: Territorial Disputes and International Conflict* (University of Michigan Press, 1998); Krista E Wiegand, *Enduring Territorial Disputes:Strategies of Bargaining, Coercive Diplomacy, and Settlement* (University of Georgia Press, 2011).

[10] Ben Huntley, Amelia Telec and Justin Whyatt, 'The Timor Sea Treaty: An Australian Perspective' (2018) 36 *Australian Year Book of International Law* 31; Elizabeth Exposto, 'The Timor Sea Conciliation and Treaty: Timor-Leste's Perspective' (2018) 36 *Australian Year Book of International Law* 43; Rebecca Strating, 'A "New Chapter" in Australia–Timor Bilateral Relations? Assessing the Politics of the Timor Sea Maritime Boundary Treaty' (2018) 36 *Australian Year Book of International Law* 58; Yoshifumi Tanaka, 'Maritime Boundary Delimitation by Conciliation' (2018) 36 *Australian Year Book of International Law* 69.

[11] See, eg, Clive Schofield, 'Australia's Final Frontiers?: Developments in the Delimitation of Australia's International Maritime Boundaries' (2008) 158(January–February) *Maritime Studies* 2 ('Final Frontiers'); Stuart Kaye, *Australia's Maritime Boundaries* (University of Wollongong Centre for Maritime Policy, 2nd ed, 2001) ('*Maritime Boundaries*'); H Burmester, 'The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement' (1982) 76(2) *American Journal of International Law* 321 ('Torres Strait'); Donald R Rothwell, '2018 Timor Sea Treaty: A New Dawn in Relations between Australia and Timor-Leste?' [2018] (44) *Law Society of NSW Journal* 70; Clive Schofield, 'Minding the Gap: The Australia–East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)' (2007) 22(2) *International Journal of Marine and Coastal Law* 189 ('Minding the Gap'). See also chapters dealing with Australia's maritime boundary agreements in *International Maritime Boundaries* (Martinus Nijhoff) vols 1, 2, 4, 5, 6.

that particular country's efforts regarding settling maritime boundaries, but also because it advances our knowledge of boundary-making at sea more generally.

The data used in this article come primarily from original treaties or agreements between the countries in question; official statements by the relevant countries; media articles and a great deal of published scholarly work of relevance to the topic. Furthermore, eight background interviews with Australian officials were conducted during January and February 2019 in Canberra, in order to add additional information where needed or confirm findings. These interviews are not, however, referred to directly in this article, as most of the interviewees requested to remain anonymous.

II MARITIME BOUNDARY NEGOTIATIONS AND AGREEMENTS

In Australia's early colonial history, the maritime domain served as a buffer against potential security threats originating in the near Pacific.[12] From the 1950s onwards, new and industrialised ways of fishing, as well as the potential for offshore hydrocarbon resources and minerals, led states – including Australia – to turn their focus seawards. States agreed on a comprehensive legal regime for the use, management and protection of the ocean in 1982: *The United Nations Convention on the Law of the Sea* ('*UNCLOS*').[13] *UNCLOS* provided the legal rationale for states to implement new maritime zones in addition to the 12-n.m. territorial sea, with a 200 n.m. Exclusive Economic Zone ('*EEZ*').[14]

With the implementation of new maritime zones, several maritime boundary disputes arose, across all continents. The starting point in attempts to settle such disputes is often that of 'equidistance': a boundary that corresponds with the median line at an equal distance (equidistance) at every point from each state's shoreline. However, states are free to agree on any shape or type of boundary in bilateral negotiations. Alternatively, they can make use of the International Court of Justice ('*ICJ*') or another international court; or they can use third-party arbitration like the Permanent Court of Arbitration ('*PCA*') to settle the dispute.

A *Australia-Indonesia (seabed: 1971-72-73)*

As the concept of extended maritime zones entered the international agenda in the late 1960s, Indonesia – independent from the Netherlands in 1945 – engaged with its neighbours pre-emptively to settle its maritime boundaries. First, in 1971, Australia and Indonesia agreed on a seabed boundary delineating the shelf between Papua New Guinea (then administered by Australia), Australia and Indonesia.[15] Equidistance was

[12] See David Lowe, 'Security' in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 2, 494.
[13] For scholarly work dealing with the development of *UNCLOS*: see, eg, Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2nd ed, 2016); Prosper Weil, *The Law of Maritime Delimitation: Reflections,* tr Maureen MacGlashan (Grotius Publications, 1989); James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2011); E.D. Brown, 'Delimitation of Offshore Areas: Hard Labour and Bitter Fruits at UNCLOS III' (1981) 5(3) *Marine Policy* 172.
[14] Moreover, under *UNCLOS* it was concluded that states have continental shelf jurisdiction in alignment with the EEZ (up to 200 n.m.), and that a state could also in some cases extend this beyond that limit by proving the prolongation from its land territory: *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) art 76(8*).*
[15] Victor Prescott, 'Australia–Indonesia (Seabed Boundaries)' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff, 1993) vol 2, 1195, 1196.

the principal method utilised for boundary drawing, as referred to in the Treaty itself.[16] The 1971 Agreement specifies a provisional joint regime for equitable exploitation of straddling seabed resources, when needed.[17]

Second, in 1972, Australia and Indonesia agreed on an extension of this continental shelf boundary, stretching eastwards through the Timor Sea from an agreed point in the Arafura Sea. This included a delineation between the various Indonesian islands in the northern part of the Timor Sea, including the island of Timor itself, but it avoided the maritime space belonging to then Portuguese Timor, in effect creating a 'Timor Gap' (returned to in section c).[18]

The Agreement in 1972 was influenced by the outcome in the 1969 ICJ *North Sea Cases*, as Australia leaned on the ICJ verdict to argue for a larger share of the continental shelf up to the point where the shelf drops into the Timor Trough at 3000 m. depth[19] – and not the median line as argued for by Indonesia. The concept of natural prolongation, as applied by the ICJ in 1969, became a key element in persuading Indonesia to accept that Australia would gain a larger share of the seabed than under the principle of equidistance.[20]

When the Agreement was signed in 1972, knowledge about the full extent of the hydrocarbon potential was limited, although it probably played a part in the considerations of both countries.[21] Oil and gas exploratory licenses had already been granted by Australia in what became the Indonesian seabed. The Agreement covered these licenses, and gave companies nine months to apply to the Indonesian authorities to renew them under conditions similar to those held by comparable ventures in Indonesia.[22]

Third, in 1973, Australia (on behalf of Papua New Guinea) and Indonesia concluded an agreement on a small remaining gap between land and where the 1971 seabed boundary started, as there had been some uncertainty as to the point on land from which to delineate the territorial waters.[23]

These agreements – especially the 1972 Agreement – met with negative reactions in Indonesia. Australia was perceived as gaining the most through the negotiations. As a former Indonesian foreign minister put it, Indonesia had been 'taken to the cleaners'.[24] Australia had made use of the immediate legal aftermath of the *North Sea Cases* to reap benefits from the concept of 'natural prolongation' in its negotiations

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[16] *Agreement Establishing Certain Seabed Boundaries*, Australia–Indonesia, signed 18 May 1971, 974 UNTS 307 (entered into force 8 November 1973); Kaye, *Maritime Boundaries* (n 11) 46.
[17] Prescott, 'Australia–Indonesia (Seabed Boundaries)' (n 15) 1196.
[18] Exposto (n 10) 46.
[19] Victor Prescott, 'Region VI: Indian Ocean and South East Asian Maritime Boundaries' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff, 1993) vol 1, 305, 309.
[20] Ibid 307.
[21] Victor Prescott, 'Australia–Indonesia (Timor and Arafura Seas)' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff, 1993) vol 2, 1207, 1209.
[22] *Agreement Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, Supplementary to the Agreement of 18 May 1971*, Australia–Indonesia, signed 9 October 1972, 974 UNTS 319 (entered into force 8 November 1973).
[23] *Agreement Concerning Certain Boundaries between Papua New Guinea and Indonesia*, Australia–Indonesia, signed 12 February 1973, 975 UNTS 3 (entered into force 26 November 1974).
[24] Kaye, *Maritime Boundaries* (n 11) 21 n 97.

with Indonesia.[25] In the year after, also linking this seabed boundary to the outcome of the Timor-Leste negotiations (see below), there have been voices questioning the outcome.[26]

B *Australia-Indonesia (EEZ boundary: 1997)*

Although seabed issues had been settled, fisheries relations remained a separate issue. Indonesian fishers had a history of fishing close to Australia due to their interest in sea cucumbers.[27] In 1979, Australia declared a 200-n.m. fisheries zone that overlapped with the zones of some of its neighbours. In those cases, Australia applied strict equidistance, while Australia also claimed full zonal effect of the uninhabited Ashmore and Cartier islands located close to Timor, to which Indonesia objected.

Already in 1974, the two countries had signed a Memorandum of Understanding ('*MoU*') concerning traditional fisheries in the maritime areas around the Ashmore, Cartier and Browse islands.[28] This Agreement was aimed at allowing Indonesian fishers to fish without motorboats or electric fishing equipment, and to make use of the islands for water supplies.[29] However, during the 1970s and early 1980s, several negative incidents involving overfishing and breaches of the MoU damaged fisheries relations in the area,[30] prompting further negotiations on a maritime boundary.[31]

In 1980–1, Australia and Indonesia agreed, in two rounds of negotiations, on a provisional fisheries surveillance and enforcement line. This Agreement was signed on 29 October 1981 and came into effect on 1 February 1982. Prescott holds that, because there was limited Australian interest in fishing in the area,[32] and the issues concerning traditional access had been dealt with in 1974, no serious barriers existed, and the negotiations could be completed rapidly.[33]

However, the problems around traditional fisheries in the boundary area did not disappear. Occasional forceful behaviour, with the Australian authorities burning Indonesian boats, caused outcry and media headlines.[34] Since the 1981 Agreement set only a provisional line, several attempts were made to revisit and finalise it. There also remained overlapping claims west of the line in the Indian Ocean as well as around Christmas Island – a small Australian island just off the coast of Indonesian Java.

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[25] Ibid 49; see also Victor Prescott, 'The Problems of Completing Maritime Boundary Delimitation between Australia and Indonesia' (1995) 10(3) *International Journal of Marine and Coastal Law* 389.

[26] Kaye, *Maritime Boundaries* (n 11) 58; I Made Andi Arsana, 'Renegotiating the Indonesia-Australia Maritime Boundary Agreement?', *Australian Outlook* (Article, 24 April 2018) <http://www.internationalaffairs.org.au/australianoutlook/renegotiating-the-indonesia-australia-maritime-boundary-agreement/>.

[27] Peter Veth and Sue O'Connor, 'The Past 50,000 Years: An Archaeological View' in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 1, 17, 40.

[28] *Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf*, signed 7 November 1974.

[29] 'Traditional fishers' were defined as those who took fish using traditional fishing methods developed over decades: ibid 1.

[30] Victor Prescott, 'Australia–Indonesia (Fisheries)' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff, 1993) vol 2, 1229, 1234.

[31] Kaye, *Maritime Boundaries* (n 11) 50.

[32] Prescott, 'Australia–Indonesia (Fisheries)' (n 30) 1230.

[33] Prescott, 'Region VI: Indian Ocean and South East Asian Maritime Boundaries' (n 19) 308; Kaye, *Maritime Boundaries* (n 11) 54.

[34] For a detailed account of this, see Natasha Stacey, *Boats To Burn: Bajo Fishing Activity in the Australian Fishing Zone* (ANU Press, 2007).

The final agreement came in 1997, concluding almost 30 years of negotiations between the two neighbours.[35] Economic considerations concerning straddling resources (minerals and hydrocarbons) were obvious factors of relevance prompting an agreement,[36] so was the fact that *UNCLOS* had come into force in 1994.[37] A compromise was reached regarding Christmas Island, and Indonesia gained a larger share of the disputed maritime zone.[38] This was also influenced by the *Norway (Jan Mayen)–Denmark (Greenland)* ICJ (‘*Greenland–Jan Mayen’)* case from 1993, where Greenland’s longer coastline compared to that of Jan Mayen had led to the Court granting Denmark a larger maritime zone. The ratio in the *Greenland–Jan Mayen* case was 9:1, whereas the ratio in this instance between Java (Indonesia) and Christmas Island was 35:1.[39]

As of this time of writing, the Agreement has not been ratified, although both countries act according to it. Independence in East Timor in 2002 superseded the part of the Treaty that covers the Timor Gap (see section c and d), and there have been calls to revisit the Agreement at large.[40]

C *Australia-Indonesia (Timor Gap: 1989)*

In 1975, East Timor was annexed by Indonesia. Motivated by a desire to close the Timor Gap, in 1979 Australia became the first – and only – western state to formally recognise Indonesian sovereignty over East Timor.[41] Negotiations proceeded, but Indonesia was unwilling to accept a continuation of the previously agreed end-points on each side because domestic opposition to the 1971–2 Agreements was strong, and international legal precedent seems to have had shifted in favour of Indonesia.[42] Consequently, the Indonesian and Australian governments signalled their intention to develop a zone of cooperation in the Timor Gap area after 1975, though it was not until 1989 that an actual Agreement was announced.

The Treaty concerning the Zone was signed on 11 December 1989 and entered into force on 9 February 1991.[43] The Zone was divided into three parts: in the northern part, Indonesia would supervise the exploration and production of hydrocarbons and pay 10% of the tax it collected to Australia. The same arrangement applied to the southern part of the zone, here with Australia granting licences and Indonesia

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[35] *Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries*, signed 14 March 1997, [1997] ATNIF 4 (not yet in force).
[36] Max Herriman and Martin Tsamenyi, ‘The 1997 Australia-Indonesia Maritime Boundary Treaty: A Secure Legal Regime for Offshore Resource Development?’ (1998) 29(4) *Ocean Development and International Law*.
[37] Victor Prescott, ‘Australia–Indonesia’ in Jonathan I Charney and Robert W Smith (eds), *International Maritime Boundaries* (Martinus Nijhoff, 2002) vol 4, 2697, 2699–700.
[38] Kaye, *Maritime Boundaries* (n 11) 57.
[39] Prescott, ‘Australia–Indonesia’ (n 37) 2703.
[40] I Made Andi Arsana, ‘Renegotiating the Indonesia-Australia Maritime Boundary Agreement?’, *Australian Outlook* (Article, 24 April 2018) <http://www.internationalaffairs.org.au/australianoutlook/renegotiating-the-indonesia-australia-maritime-boundary-agreement/>.
[41] Helen Davidson, ‘Oil and Gas Had Hidden Role in Australia’s Response to Indonesian Invasion of Timor-Leste’, *The Guardian* (online, 7 May 2018) <https://www.theguardian.com/australia-news/2018/may/07/oil-and-gas-had-hidden-role-in-australias-response-to-indonesian-invasion-of-timor-leste>; Exposto (n 10) 46.
[42] Schofield, ‘Minding the Gap’ (n 11) 193.
[43] *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, Australia–Indonesia, signed 11 December 1989, 1654 UNTS 105 (entered into force 9 February 1991); Vivian Louis Forbes, *The Maritime Boundaries of the Indian Ocean Region* (Singapore University Press, 1995).

receiving 10% of tax revenues. The middle zone was to be administered and licenced jointly through a ministerial council.[44]

Oil and gas resources were the most obvious driver of this Agreement, as specifically mentioned in the preamble to the Treaty.[45] Already in 1974, the Sunrise and Troubadour gas and condensate fields had been discovered. Collectively known as the Greater Sunrise fields, they are located approximately 150 kilometres southeast of Timor-Leste and 450 kilometres northwest of Darwin. Only parts of these fields are within the joint zone developed with the 1989 Treaty, making matters more complex. It has been argued that Australia in particular was eager to pursue this Agreement, as demand for oil and gas was rising whereas production volumes from other fields were declining.[46]

This Agreement solved a problem of boundary delimitation in an area expected to hold large hydrocarbon reserves by not imposing a clear boundary, but instead developing a joint zone. This was achieved by years of negotiations between the parties, as well as eagerness to pursue economic ventures in the area.[47] However, with the unrest in East Timor and the self-determination referendum in 1999, this 1989 Agreement was eventually replaced by a new regime (see section d).

D *Australia-Timor-Leste (2018)*

By the 1990s, the independence movement in East Timor was gaining traction, as the scope of Indonesian atrocities against the local population became clear.[48] In 1999, the UN supervised a popular referendum on independence after an agreement with Portugal and Indonesia. A clear majority (78.5%) favoured independence, although this led to counter-reactions and civil war.[49] On 25 October 1999, the United Nations Transitional Administration in East Timor ('*UNTAET*') was established.[50] By 20 May 2002, a new government of East Timor was in place; in September that year, the country was renamed Timor-Leste.

A new Timor Sea Treaty was negotiated and signed on 20 May 2002.[51] This Treaty did not establish a completely new maritime boundary in the former Timor Gap, but contained a number of important and major differences to the Timor Gap Treaty with Indonesia (from 1989) concerning internal division and revenue sharing.[52] The zone was re-named the Joint Petroleum Development Area ('*JPDA*'), and it was now decided that Australia would get only 10% of the share of production in the JDPA and Timor-Leste 90%.[53]

However, the new government in Timor-Leste rejected the treaty. It argued that the 1972 Agreement and the coordinates of the JPDA were inconsistent with international

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[44] Victor Prescott, 'Australia–Indonesia (Timor Gap)' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff, 1993) vol 2, 1245, 1246.
[45] *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia* (n 43) Preamble.
[46] Prescott, 'Australia–Indonesia (Timor Gap)' (n 44) 1249.
[47] Ibid 1253.
[48] James Dunn, *East Timor: A Rough Passage to Independence* (Longueville Books, 2003).
[49] Exposto (n 10) 44.
[50] Tomoko Akami and Anthony Milner, 'Australia in the Asia-Pacific Region' in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 2, 537, 559.
[51] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003).
[52] Huntley, Telec and Whyatt (n 10).
[53] Schofield, 'Minding the Gap' (n 11) 195.

law,[54] and that the seabed boundary should have been based on equidistance instead of taking into consideration the nature of the continental slope.[55] The motivation for these arguments was seen to be the Greater Sunrise fields, which – according to Timor-Leste's arguments – would lie within Timor-Leste's zones.

Australia proposed a unitisation agreement with Timor-Leste – the *Sunrise International Unitisation Agreement* ('*Sunrise IUA*') – which would 'validate existing production sharing contracts granted by Australia and enable exploitation to proceed'.[56] This was signed on 6 March 2003 but not ratified until 23 February 2007, due to further controversies over boundaries and ownership. Soon another agreement was in place concerning revenue sharing: '*CMATS'* was signed on 12 January 2006 and ratified on 23 February 2007.[57] This Agreement resolved some outstanding issues concerning the unitisation of Greater Sunrise, setting out an equal sharing agreement (50/50) over the upstream revenue from the fields.[58] This increased Timor-Leste's portion and reduced that of Australia.[59]

However, not everything was settled. In Timor-Leste, opposition to the Agreement increased the following year.[60] The government in Timor-Leste was under domestic pressure to obtain concessions from Australia.[61] It was criticised due to 'continuing perceptions that East Timor should have secured a significantly larger share of the seabed resources at stake'.[62] Such criticism gained further momentum when, in 2012, a former Australian secret service operative revealed espionage by Australia that had allegedly started in 2004, aimed at ensuring a favourable outcome of the negotiations on the Timor Gap and the *CMATS* Agreement.[63]

This prompted Timor-Leste to reject the Timor Sea Treaty altogether and refer the matter of espionage to the ICJ.[64] By early 2017, Timor-Leste had left the *CMATS* Agreement. It had also taken the case concerning maritime boundaries in the Timor Gap to arbitration at the PCA, dropping the case only after the Australian Government agreed to renegotiate.[65] Australia agreed to negotiate under an UNCLOS conciliation committee – the first of its kind to be used for such issues.[66]

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[54] Ibid 198–9.
[55] JRV Prescott and G Triggs, 'Australia–East Timor' in David A Colson and Robert W Smith (eds), *International Maritime Boundaries* (Martinus Nijhoff, 2005) vol 5, 3806, 3809.
[56] Ibid 3810.
[57] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, signed 12 January 2006, 2483 UNTS 359 (entered into force 27 June 2006) ('*CMATS*').
[58] Huntley, Telec and Whyatt (n 10) 32.
[59] Derek C Smith and Ryan K Tyndall, 'Australia–East Timor' in David A Colson and Robert W Smith (eds), *International Maritime Boundaries* (Martinus Nijhoff, 2011) vol 6, 4367, 4369.
[60] Rebecca Strating, 'The Timor Sea Boundary Agreement: An Incomplete Victory', *Asia Maritime Transparency Initiative* (Update Post, 19 April 2018) <https://amti.csis.org/timor-sea-boundary-agreement-incomplete-victory/>.
[61] Exposto (n 10).
[62] Schofield, 'Minding the Gap' (n 11) 209.
[63] Henry Belot and Emily Stewart, 'East Timor Tears Up Oil and Gas Treaty with Australia after Hague Dispute', *ABC News* (online, 9 January 2017) <https://www.abc.net.au/news/2017-01-09/east-timor-tears-up-oil-and-gas-treaty-with-australia/8170476>; Exposto (n 10) 49.
[64] Steve Cannane, 'East Timor-Australia Maritime Border Dispute Set to Be Negotiated at The Hague', *ABC News* (online, 26 August 2016) <https://www.abc.net.au/news/2016-08-28/east-timor-australia-maritime-border-to-be-negotiated-the-hague/7791778>.
[65] Ben Doherty, 'Australia and Timor-Leste to Negotiate Permanent Maritime Boundary', *The Guardian* (online, 9 January 2017) <https://www.theguardian.com/world/2017/jan/09/australia-and-timor-leste-to-negotiate-permanent-maritime-boundary>.
[66] For more on conciliation, see Tanaka (n 10).

After one year of negotiations, the parties signed a new agreement on 6 March 2018.[67] This Treaty sets out a completely new regime in the former Timor Gap, finally instilling an all-purpose maritime boundary for both the water column and the continental shelf.[68] The boundary, which had previously been separated into a seabed and a fisheries boundary, was aligned at the point of the southern boundary of the JDPA. However, the boundary agreements with Indonesia from the early 1970s remain, creating an abrupt rectangle in the boundary line in the Timor Sea. In sum, '[t]he outcome of the delimitation was a product of political compromise rather than the application of legal doctrine'.[69]

The Agreement was hailed as signalling reconciliation between Timor-Leste and Australia after years of troubled relations. Moreover, for Timor-Leste, it was deemed essential for the local economy: up to 90% of the country's revenues derived from petroleum exploitation.[70] Ramos Horta, the former President and Prime Minister of Timor-Leste, declared to the media that the development of Greater Sunrise was 'an absolute necessity for the future wellbeing of this country'.[71]

From the Australian side, there was a strong desire to reach a 'fair' deal with Timor-Leste – partly to ensure the stability of the latter,[72] given its high reliance on revenues from oil and gas extraction, and partly to appease its own domestic public as well as an international audience concerned with the power disparity between the two countries.[73] Speaking to this is the role played by Australian-based NGOs working in favour of Timor-Leste.[74]

However, some issues remained. One point of contention was where the products from the Greater Sunrise fields would be landed with a pipeline from the field. Timor-Leste argued that this pipeline should go northwards, which is the shorter distance.[75] Australia wanted the pipeline to go to Darwin on the Australian mainland, to connect to infrastructure already in place.[76] Despite these issues and challenges, the Treaty was ratified by the two countries in 2019. The Agreement provided a solution to the delimitation of a maritime boundary in the Timor Sea, a process which had started in the early 1970s.

E *Australia-Papua New Guinea (1978)*

When Papua New Guinea gained independence from Australia in 1975, an agreement on a maritime boundary was needed. Negotiations had in fact been initiated in 1972

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[67] Rothwell (n 11).
[68] *Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea*, signed 6 March 2018, [2019] ATS 16 (entered into force 30 August 2019).
[69] Huntley, Telec and Whyatt (n 10) 39.
[70] Strating (n 60).
[71] Helen Davidson and Christopher Knaus, 'Australia and Timor-Leste to Sign Deal on Contentious Gasfield', *The Guardian* (online, 6 March 2018) <https://www.theguardian.com/world/2018/mar/07/australia-and-timor-leste-to-sign-deal-on-contentious-gasfield>.
[72] Huntley, Telec and Whyatt (n 10) 39.
[73] Schofield, 'Minding the Gap' (n 11); Donald R Rothwell, 'Australia and Timor Leste Settle Maritime Boundary after 45 Years of Bickering', *The Conversation* (online, 7 March 2018) <https://theconversation.com/australia-and-timor-leste-settle-maritime-boundary-after-45-years-of-bickering-92834>.
[74] Strating (n 10) 60–1.
[75] Rothwell (n 73).
[76] Belot and Stewart (n 63); Helen Davidson, 'Australia and Timor-Leste Sign Historic Maritime Border Treaty', *The Guardian* (online, 6 March 2018) <https://www.theguardian.com/world/2018/mar/07/australia-and-timor-leste-sign-historic-maritime-border-treaty>; Strating (n 10) 64–5.

and started in 1973, as independence was imminent.[77] However, despite the good will on both sides, it rapidly became clear that Australia was unwilling to draw an all-purpose boundary – which Papua New Guinea preferred – south of the northernmost islands that were part of Australia.[78] Opposition from Queensland, unwilling to 'abandon' its inhabitants on the islands close to Papua New Guinea, was central.[79] Only after national elections in both countries in 1977, did the two countries push the issue forward.[80]

Despite that yielding sovereignty over territory was seen as constitutionally difficult in Australia, Papua New Guinea gained affirmation of its claims over the three small uninhabited islands of Kawa, Mata Kawa, and Kussa off the coast of Papua New Guinea, which Queensland had claimed since 1879.[81] This was important for the country due to what Kaye describes as fears of a 'geographic hegemony to replace the political overlordship from which PNG had only recently been removed'.[82] However, Papua New Guinea conceded that Australia would retain all of its *inhabited* islands, including Boigu, Dauan and Saibai, just off the coast of Papua New Guinea.[83]

The Treaty was signed on 18 December 1978, and entered into force on 15 February 1985, after both the Australian Parliament and the Parliament in Queensland, as well as the Parliament in Papua New Guinea, had examined the Agreement and deliberated it.[84] This package deal involved drawing four different boundaries at various locations: a seabed boundary; a fisheries jurisdiction boundary; a combination of the two; and a Protected Zone.

In the west in the Arafura Sea, a regular maritime boundary is based on equidistance, starting from the point agreed on by Indonesia and Australia in 1971.[85] However, where the boundary line enters the Torres Strait, the two parties agreed on a fisheries boundary that diverges from the continental shelf boundary: it juts northwards to include the northern islands Boigu, Dauan and Saibai lying just off the coast of Papua New Guinea. Simultaneously a seabed boundary was drawn south of these islands. Such separation of the seabed and the fisheries boundary was relatively uncommon at the time[86] and still is today. Then the two lines join again. From there onwards the boundary is an ordinary multipurpose boundary, deviating from the equidistance principle by slightly favouring first Papua New Guinea and then Australia.[87]

In addition, a Protected Zone was created, which includes all the aforementioned fisheries/seabed deviation, as well as a wider area to the west, east and south, in Australian as well as Papua New Guinean waters.[88] The Protected Zone created around the islands off the coast of Papua New Guinea was deemed important to protect

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[77] Kaye, *Maritime Boundaries* (n 11) 101–2; Forbes (n 43) 120.
[78] Burmester, 'Torres Strait' (n 11) 327.
[79] Ibid.
[80] Ibid 327–8.
[81] Forbes (n 43) 120.
[82] Kaye, *Maritime Boundaries* (n 11) 102.
[83] Burmester, 'Torres Strait' (n 11) 327.
[84] *Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, And Related Matters*, signed 18 December 1978, 1429 UNTS 207 (entered into force 15 February 1985).
[85] Choon-ho Park, 'Australia–Papua New Guinea' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries*, (Martinus Nijhoff, 1993) vol 1, 929, 931.
[86] Ibid.
[87] Ibid.
[88] Forbes (n 43) 122.

local inhabitants as well as the environment.[89] As Australia had already issued licences for oil and gas exploration in the area, and there were expectations of straddling deposits, the Treaty included explicit provisions to protect economic activity and rights.[90]

Forbes holds that this Treaty illustrates how 'by mutual agreement, countries are able to reconcile their differences when there are benefits to be gained in determining the most appropriate means of sharing the resources of the seabed adjacent to their respective coastlines'.[91] However, despite its innovative solutions, the Torres Strait Treaty has also been criticised for its limited involvement of the local population,[92] and for possible security risks linked to migration.[93]

F *Australia-France: New Caledonia and Kerguelen (1982)*

In the context of the third round of UNCLOS negotiations and the realisation that 200 n.m. was becoming a widely accepted limit, both France and Australia showed interest in concluding maritime boundaries with their neighbours. What appears to be one of the least challenging maritime boundaries for Australia to settle came with France in 1982, when the countries agreed on two boundaries simultaneously. This 'Agreement on Maritime Delimitation', was signed on 4 January 1982, and entered into force on 10 January 1983.[94]

The 1982 Agreement deals first with the maritime boundary between the French overseas territory of New Caledonia and the Australian mainland, as well as the Australian island of Norfolk. The outcome was a partially modified equidistance line. France recognised the baseline starting point of Australia as being Middleton Reef, a tiny reef 125 n.m. off the Australian coast, thereby giving Australia a larger share of the maritime zone.[95]

The second boundary established with the Treaty was between Heard and McDonald Islands (Australia) and Kerguelen Island (France) in the southern Indian Ocean. These islands are located in relatively extreme environments, with little or no human settlement.[96] Again, the boundary was based on equidistance.[97] The boundary was drawn between the Australian fishing zone and the French EEZ, as well as delineating the continental shelf between the two parties. Prescott notes that the Kerguelen-Gaussberg Ridge located in the area in question might be of interest in terms of hydrocarbons,[98] but uncertainty at that time (the 1980s) as to its potential, as well as the remoteness of the area, made this aspect less relevant for the negotiations.

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[89] *Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, And Related Matters* (n 84) art 10.
[90] Ibid art 5.
[91] Forbes (n 43) 122.
[92] Donald M Schug, 'International Maritime Boundaries and Indigenous People: The Case of the Torres Strait' (1996) 20(3) *Marine Policy* 209, 218.
[93] Anthony Bergin and Sam Bateman, 'PNG Border Security a Key Strategic Interest for Australia', *Asia & The Pacific Policy Society* (Forum Post, 16 November 2018) <https://www.policyforum.net/png-border-security-a-key-strategic-interest-for-australia/>.
[94] *Agreement on Maritime Delimitation*, Australia–France, signed 4 January 1982, 1329 UNTS 107 (entered into force 10 January 1983).
[95] Choon-ho Park, 'Australia–France (New Caledonia)' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries,* (Martinus Nijhoff, 1993) vol 1, 905, 906.
[96] Warwick Gullett and Clive Schofield, 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean' (2007) 22(4) *International Journal of Marine and Coastal Law* 545, 547.
[97]Victor Prescott, 'Australia (Heard/McDonald Lslands)–France (Kerguelen Islands)' in Jonathan I Charney and Lewis M Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff, 1993) vol 2, 1189.
[98] Ibid 1185, 1186.

There is no provision for potential mineral or hydrocarbon fields that might straddle the agreed boundary, which adds weight to the argument that economic considerations played only a limited role in shaping the outcomes. Also, given the proximity to Antarctica of the southern islands, their use for research purposes was deemed more important than economic ventures.

Since then, however, fisheries have become more of an issue regarding Heard and McDonald Islands and Kerguelen Island. In particular, the Patagonian Toothfish became a commercially important species from the late 1990s onwards, resulting in several Illegal, Unreported and Unregulated ('IUU') vessels in the area. Arrests were made by both France and Australia, eventually prompting two rather extensive and unique agreements in 2003 and 2007 between the two countries to allow 'hot pursuit' of targeted vessels in each other's territorial waters.[99]

G *Australia-Solomon Islands (1988)*

Negotiations on a maritime boundary between Australia and Solomon Islands started already in 1978, but it took a decade to reach an agreement, because the other countries involved – Papua New Guinea to the north and France (New Caledonia) to the southeast – had an impact on where to draw the exact boundary. The boundary itself is not very long, only 150 n.m.[100]

The Agreement was signed on 13 September 1988 and entered into force on 14 April 1989.[101] Based on equidistance from the basepoints of each state, it serves as an all-purpose boundary delimitating both the EEZ and the continental shelf.[102] Economic interests do not appear to have played a decisive role in the negotiations or the outcome, as there was and still is only limited economic interest in this specific maritime area.[103]

This Agreement, as well as the 1989 Agreement between Papua New Guinea and Solomon Islands, created a 'grey zone' triangle beyond the 200-n.m. zones, open for possible extension of the countries' continental shelves.[104] Only three pages long, the Agreement contains no special provisions, beyond a provision for reaching an agreement on 'equitable sharing' of straddling resources deposits.[105]

Park contends that for Solomon Islands, this Agreement – as the first before tackling more complicated boundaries with Papua New Guinea and France (Vanuatu) – created positive momentum for future negotiations with other neighbours.[106] Moreover, there were concerns at the time regarding IUU fisheries. Kaye argues that part of the motivation behind the Agreement was in fact the desire to hinder such activity through an agreement that indicated jurisdiction – albeit with some lack of clarity – in the Coral Sea.[107]

This – together with the above-mentioned boundaries with France – seems the simplest of Australia's maritime boundaries, as it was settled in the wake of nearby

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[99] Gullett and Schofield (n 97) 561.
[100] Choon-ho Park, 'Australia–Solomon Islands' in Jonathan I Charney and Lewis E Alexander (eds), *International Maritime Boundaries* (Martinus Nijhoff, 1993) vol 1, 977, 977.
[101] *Agreement Between the Government of Australia and the Government of Solomon Islands Establishing Certain Sea and Seabed Boundaries*, signed 13 September 1988, [1989] ATS 12 (entered into force 14 April 1989).
[102] Kaye, *Maritime Boundaries* (n 11) 142.
[103] Park, 'Australia–Solomon Islands' (n 101) 979.
[104] Ibid 977–8.
[105] *Agreement Between the Government of Australia and the Government of Solomon Islands Establishing Certain Sea and Seabed Boundaries* (n 102) art 3.
[106] Park, 'Australia–Solomon Islands' (n 101) 980–1.
[107] Kaye, *Maritime Boundaries* (n 11) 143–4.

agreements with France (New Caledonia) and Papua New Guinea, as well as with more distant Indonesia.

H *Australia-New Zealand (2004)*

The distance between mainland Australia and mainland New Zealand is about 1200 n.m., across the Tasman Sea. However, because of Norfolk and Lord Howe islands (Australia) and Three Kings Island (New Zealand) to the north, and Macquarie Island (Australia) and Auckland and Campbell islands (New Zealand) to the south, there arose a need to delimit EEZs as well as continental shelves.

Negotiations were also seen in conjunction with the two countries' submissions for an extended continental shelf to the UN Commission on the Limits of the Continental Shelf ('UNCLCS'), due within 10 years of *UNCLOS* entering into force in a country (Australia: 1994, New Zealand: 1996). By 1999, as efforts were underway to finalise these submissions, the two countries officially started negotiations and aimed to complete their boundary negotiations by 2003.

Attesting to their close relationship, a key point here is the fact that, although both countries had previously claimed extensive maritime zones, a 'gentleman's agreement' existed whereby both states respected the median line without a formally declared agreement.[108]

The Treaty was signed on 25 July 2004 and entered into force on 25 January 2006. It sets out a relatively straightforward division of the EEZs derived largely from the above-mentioned islands, albeit slightly favouring New Zealand due to the differences in the islands' distance from their respective mainlands. As put by Schofield: 'the agreement on the application of the median line for EEZ delimitation served to confirm a limit that "has been observed de facto by the two countries for more than two decades."'[109]

The Treaty also divided the extended continental shelves before final submissions were made to the UNCLCS. Indeed, this element served as one rationale for agreement between the two neighbours.[110] Further, the Treaty specifies that any straddling seabed resources should be exploited most effectively and shared in an equitable manner.[111] However, expectations of hydrocarbons were limited, due in part to the distance of the maritime areas in question from the coastline of either party. The sole exception concerned the Lord Howe Rise, though also this area is far removed from both states.[112] Moreover, fisheries in the area were not a significant factor, although it has been noted that this agreement would prevent future disputes over resources.[113]

III THE PROCESS OF COMPLETING AUSTRALIA'S MARITIME MAP

A *Drawing Lines at Sea*

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[108] Kaye, *Maritime Boundaries* (n 11) 159; Nigel Fyfe and Greg French, 'Australia–New Zealand' in David A Colson and Robert W Smith (eds), *International Maritime Boundaries* (Martinus Nijhoff, 2005) vol 5, 3759, 3759.
[109] Schofield, 'Final Frontiers' (n 11) 6.
[110] Ibid 8.
[111] United Nations, *Law of the Sea Bulletin No. 55* (2004) 43 <https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin55e.pdf>.
[112] Kaye, *Maritime Boundaries* (n 11) 168–9.
[113] Fyfe and French (n 109) 3761; Alexander Downer and Philip Ruddock, 'Australia and New Zealand Agree Maritime Boundaries' (Media Release FA112B, Department of Foreign Affairs and Trade, 25 July 2004) archived at <https://webarchive.nla.gov.au/wayback/20190808200438/https://foreignminister.gov.au/releases/2004/fa112b_04.html>; Schofield, 'Final Frontiers' (n 110) 8.

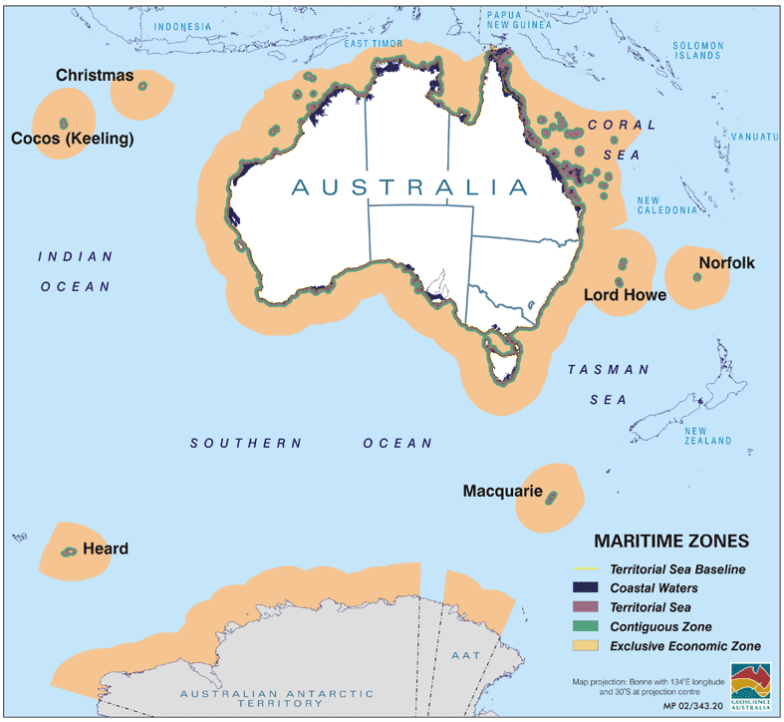
Australia's process of settling its maritime boundaries has alternated between relatively straightforward and obstacle-free agreements, and complex arrangements entailing challenges and re-negotiations. The initial need to clarify maritime boundaries arose when shelf jurisdiction and the 200-n.m. 'resource zone' became widely accepted in the 1960s and 1970s. However, the fact that Australia is an island continent, 'the only nation-state to have a major landmass to itself',[114] removes the need to delineate maritime space where two borders on land meet and a line is extended into sea.

Schofield further describes the Australian approach as 'conservative, cautious and orthodox, largely because of the relatively slow pace at which Australia has adopted extended claims to maritime jurisdiction'.[115] It was not until 1990 that Australia extended its territorial sea to 12 n.m. and announced an intention to establish an EEZ.[116] It only implemented an EEZ in 1994, having preferred until then to refer to it as an 'Australian Fishing Zone'.[117] This fishing zone, based on the same principles as an EEZ, had been established in 1979.[118]

The simplest boundary agreements were made between Australia and small islands in the Pacific and the Indian oceans: with France over New Caledonia and Kerguelen, which lie on opposite sides of Australia (1982); and with the Solomon Islands (1988). These processes were rather uncomplicated, where neither economic interest nor historical relations obstructed a mutually advantageous outcome based predominantly on equidistance delimitation. The same can be said for the 2004 boundary agreement with New Zealand – which also seems to indicate the relevance of close ties and cultural/historic bonds in facilitating processes (as specified in the Treaty itself), prompting the two countries to agree on an extended continental shelf boundary in advance of submissions to the UNCLCS.

[114] Cindy McCreery and Kirsten McKenzie, 'The Australian Colonies in a Maritime World' in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 1, 560, 560.
[115] Schofield, 'Final Frontiers?' (n 11) 4–5.
[116] Henry Burmester, 'Australia and the Law of the Sea' in James Crawford and Donald R Rothwell (eds), *The Law of the Sea in the Asian Pacific Region: Development and Prospects* (Martinus Nijhoff, 1995) 51, 52.
[117] Forbes (n 43) 101.
[118] Kaye, *Maritime Boundaries* (n 11) 11.

Illustration I: Map of Australia's maritime zones



Source: Australian Government, Geoscience Australia.

Otherwise, there have been boundary issues with only three other countries – and Australia has spent considerable time reaching and developing agreements with them. The boundary with Papua New Guinea, a former colony of Britain and then administered by Australia, proved complex both to agree and to manage in practice. Signed in 1978 and in force by 1985, an intricate regime was created by the division between a fisheries zone stretching to the shores of Papua New Guinea (but wherein Papua New Guinean traditional fishermen have rights), and a seabed boundary much further south. Since that time, there have been challenges in upholding this regime, with adverse consequences for local fishermen in Papua New Guinea.[119]

The other complex regime involves Indonesia and Timor-Leste. An agreement with Indonesia in the early 1970s on a seabed boundary was achieved rather quickly, but an agreement on the EEZ was not finalised until 1997, and this agreement is still not ratified. Furthermore, the separation between the shelf and the EEZ, as well as a zone where Indonesian fishers could continue 'traditional fishing', has led to some practical difficulties for both countries.[120]

Moreover, these challenges link up with the Timor Gap created in the negotiations between Indonesia and Australia in the 1970s. The zone of cooperation in that area that came into being in 1989 – after Indonesia had annexed the former Portuguese colony in 1975 – temporarily solved the problem, but in a complex and – some would later argue – unfair manner. By 2002, the newly independent Timor-Leste wanted a better deal than that which had been negotiated with Indonesia. Public resentment in Timor-Leste led to considerable time and resources spent on negotiations and several

[119] Kaye, 'The Torres Strait Islands' (n 85); Mark J Valencia and David VanderZwaag, 'Maritime Claims and Management Rights of Indigenous Peoples: Rising Tides in the Pacific and Northern Waters' (1989) 12(2) *Ocean and Shoreline Management* 125; Schug (n 93); Anthony Bergin and Sam Bateman, 'PNG Border Security a Key Strategic Interest for Australia', *APPS Policy Forum* (Web Page, 16 November 2018) <https://www.policyforum.net/png-border-security-a-key-strategic-interest-for-australia/>.
[120] Stacey (n 34).

different agreements, with the matter being finally solved with an all-purpose boundary in 2018.

B *Why Settle?*

Returning to the conceptions of *why* states settle their maritime boundaries as outlined in the introduction, a few points stand out from Australia's experiences and efforts at completing its maritime map.

Function of maritime space undoubtedly plays a role. Resources seem to have been considered in all of the negotiations. However, it is important to not only consider whether there are resources located in a given area, but also, for these resources to hold considerable relevance in determining the outcome of negotiations, there must be a marked *interest* in resource development.[121] For example, there might be oil and gas resources located on the continental shelf between Australia and New Zealand in the Tasman Sea, where a boundary was drawn in 2004. However, limited knowledge of the seabed in this part of the world, combined with extreme remoteness, depths of more than 5000 metres, and limited infrastructure, made potential oil and gas resources less relevant in those boundary negotiations.

In cases where there is limited active interest in resource development, agreements to delineate boundaries are made so as to avoid future disputes, should the area in question acquire greater relevance.[122] This was the explicit – as stated in the treaties – rationale for the boundary agreements with France, Solomon Islands, and New Zealand. The former came as a consequence of expanded EEZs, whereas the latter were seen in conjunction with impending submissions concerning extended continental shelves.

In contrast, the potential for offshore resource exploitation was an essential factor in Australia's efforts to find compromise with Indonesia, Papua New Guinea and Timor-Leste. In those cases, the presence of seabed resources prompted negotiations and a desire to reach an agreement; yet it also led to complications in the case of Timor-Leste.

Another functional dimension concerns fisheries. For local fishers in the Arafura and Timor Seas and Torres Strait, these areas are essential in sustaining livelihoods, building on centuries of traditional fishing that has traversed the recently introduced and invisible maritime boundary. Australia, however, has shown limited interest in fisheries in the maritime domains bordering these countries to the north. Consequently, in the agreements with Indonesia and Papua New Guinea, special provisions were made for traditional fishers to be able to access Australian waters. Separating a fisheries boundary from a seabed boundary is in itself an innovative approach to ensure agreement, which must be understood in the context of these fishing interests as well as the legacy of the *North Sea Cases* from 1969.

The ensuing difficulties that Australia has encountered as regards everything from criticism of the Australian Navy's heavy-handed rule enforcement to potential security challenges arising from a fluid border arrangement indicates that matters were not as straightforward as first thought in the 1970s. Nevertheless, the Australian approach with these northern countries when agreeing on a maritime boundary speaks to the relevance of functional needs of local fisheries coupled with a desire to remove this potential source of friction between the states.

Concerning legal traits, it is central to note that Australia has deliberately chosen not to use international bodies to adjudicate maritime disputes. On 21 March 2002, with

[121] Bissinger (n 6).
[122] Oxman (n 4) 250.

an eye towards the Timor Gap dispute,[123] it decided to exclude all disputes related to maritime zones from the compulsory jurisdiction of the ICJ and under *UNCLOS*. In other words, Australia has insisted that all its maritime disputes should be handled by negotiation and not litigation.[124] This is, however, not unique in a global context: more than 90% of all maritime boundaries that have been settled are done so by bilateral negotiations.[125] Keeping negotiations bilateral allows for a flexibility that Australia arguably needed in dealing with its northern neighbours.

The only exception is the case of Timor-Leste where conciliation under the UN was used. This was seen as the only way forward getting both parties to the negotiating table after relations had soured in the 2010s.[126] In line with other studies showcasing how states make use of international legal procedures in order to provide domestic cover,[127] UN conciliation provided a solution to Australia's sensitivity to the public opinion and Timor-Leste's desire 'to hold its larger neighbour to account for its maritime boundary position'.[128]

At the same time, outcomes of bilateral negotiations *are* influenced by judgements on maritime boundary disputes in international tribunals and courts, even if states are free to choose any method they prefer.[129] For Australia, the fact that the Law of the Sea developed and practices changed eventually posed some problems for solutions that – albeit innovative at the time – later became outdated or in dispute (as in the case of Timor-Leste).

At the same time, these rather complex and innovative agreements did help ensure that the issue of delineating maritime boundaries was resolved at the time, a feat which should not be underestimated. Not having a clearly delineated maritime boundary today, in the cases of Indonesia, Papua New Guinea and Timor-Leste, would most likely be more problematic than the current set of arrangements.

This highlights that although states (and their officials) tend to treat maritime boundary delimitation negotiations with third parties as independent from each other, they naturally see these as interlinked. Examples ranging from the USA to Colombia and Norway illustrates this.[130] Australia is no exception, having engaged in various agreements with states in its northern regional complex starting from the 1970s and ending in 2018. The 2018 Agreement with Timor-Leste has further led to questions being asked about re-visiting the still-not-ratified 1997 Agreement with Indonesia,[131] although that might prove more challenging than advantageous for both parties.

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[123] Exposto (n 10) 47–8.
[124] Prescott and Triggs (n 55) 3814.
[125] Østhagen (n 2) 4.
[126] Exposto (n 10) 50; Huntley, Telec and Whyatt (n 10) 32.
[127] Paul R Hensel et al, 'Bones of Contention: Comparing Territorial, Maritime, and River Issues' (2008) 52(1) *Journal of Conflict Resolution* 117; Stephen C Nemeth et al, 'Ruling the Sea: Managing Maritime Conflicts through UNCLOS and Exclusive Economic Zones' (2014) 40(5) *International Interactions* 711.
[128] Exposto (n 10) 50.
[129] Byers and Østhagen, 'Settling Maritime Boundaries' (n 4); Nemeth et al (n 128).
[130] Áslaug Ásgeirsdóttir, 'Settling of the Maritime Boundaries of the United States: Cost of Settlement and the Benefits of Legal Certainty' (2016) 73 *Marine Policy* 187; Ted L McDorman, *Salt Water Neighbors: International Ocean Law Relations between the United States and Canada* (Oxford University Press, 2009); Julio Londoño Paredes, *Colombia En El Laberinto Del Caribe* [Colombia in the Carribean Labyrinth] (Universidad del Rosario, 2015); Michael Byers and Andreas Østhagen, 'Why Does Canada Have So Many Unresolved Maritime Boundary Disputes?' (2017) 54 *Canadian Yearbook of International Law* 1 ('Why Does Canada').
[131] Arsana (n 40); Anne Barker, 'Australia and East Timor Maritime Agreement Could "Unravel" Borders with Indonesia', *ABC News* (online, 7 March 2018) <https://abc.net.au/news/2018-03-06/australia-east-timor-deal-could-unravel-border-with-indonesia/9515874?sf183724991=1>.

Certain legal traits in each dispute also hold particular relevance when unpacking why that dispute was settled when it was. One example is the veto-playing role Queensland held and how it was involved in the process of negotiations between Australia and Papua New Guinea in the mid-1970s. Queensland acted as both as a proponent and as a hurdle, as the regional government had strong interests in preserving the economic interests of its northern inhabitants.[132] In that boundary dispute, the Australian Parliament also played an unusually active role in deliberating the legality of the settlement with reference to the Australian Constitution, as Australia was 'giving away' its northernmost uninhabited islands to Papua New Guinea.[133]

Another example of legal attributes influencing bilateral negotiations is the effect the *North Sea Cases* from 1969 and the concept of 'natural prolongation' had on the negotiations with Indonesia in the early 1970s. The way this legal principle shifted in the same time period directly impacted bilateral relations, in turn setting parameters for possible outcomes of negotiations.

Finally, beyond legal specificities and the functional use of maritime space, we must examine contextual dimensions and related power relations between the parties involved. There does not, however, appear to have been a particularly military or security component in any of the boundary negotiations examined here. Although security matters have been discussed concerning the boundary with Papua New Guinea and to some extent with Indonesia, these issues are concerned more with safety and softer security issues, not traditional military concerns. None of the disputes has played a direct role in armed conflicts or great-power games, although the issue of freedom of navigation through the Torres Strait and the Arafura and Timor Seas holds relevance.

Still, relations between Australia and its neighbours are naturally informed by notions of relative power. Patterns of historical amity or enmity provide the context in which negotiations occur.[134] Australia has arguably been the dominant state in all negotiations – apart from those with France and perhaps Indonesia, although the gap with the latter in the level of economic development and prosperity – as one measure of relative power[135] – was wide in the 1970s and has remained so (Australia USD 53,799 per capita in 2017; Indonesia, USD 3,846). Two of Australia's maritime boundaries were also negotiated with newly independent states – Papua New Guinea and Timor-Leste – where Australia played a crucial role in their independence struggles and subsequent development, as well as providing assistance to these countries through its wider Pacific aid policy.[136]

The question, however, is what *effect* power disparity and contextual relations had on the negotiations over maritime boundaries. Australia's maritime boundary efforts in the 1970s and 1980s seem influenced by a desire to achieve a result as favourable as possible. In the cases of both Indonesia and Papua New Guinea, Australia was criticised for the outcome being *too much* in favour of Australian interests, to the detriment of its developing neighbours.[137] This perfectly illustrates that although

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[132] Burmester, 'Torres Strait' (n 11).
[133] Willheim (n 85); Kaye, 'The Torres Strait Islands' (n 85).
[134] See, eg, Jaroslav Tir and Paul F Diehl, 'Geographic Dimensions of Enduring Rivalries' (2002) 21(2) *Political Geography* 263; Barry Buzan and Ole Wæver, *Regions and Powers: The Structure of International Security* (Cambridge University Press, 2003); Alexander E Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics' (1992) 46(2) *International Organization* 391.
[135] Mearsheimer (n 9) ch 3.
[136] Matt Wade, 'Don't Let Pacific Rivalry Change the Way We Help Our Neighbours', *The Sydney Morning Herald* (online, 18 November 2018) <https://www.smh.com.au/national/don-t-let-pacific-rivalry-change-the-way-we-help-our-neighbours-20181116-p50gj7.html>.
[137] Schug (n 93); Stacey (n 34).

maritime boundary arrangements are inherently a matter of geodetic lines based on principles in international law, public opinion and political notions of equity (i.e. fairness) also come into play in *bilateral* negotiations.[138]

In the case of Timor-Leste some decades later, this is even more apparent, as Australian politicians at times worried about Australia being perceived as too ruthless in negotiations with more vulnerable negotiating partner.[139] As put by Schofield already in 2007: 'Australia's apparently hard-line position on the Timor Sea dispute has resulted in considerable international criticism and negative press, as well as unfavourable comment from pro-East Timorese pressure groups.'[140]

Australia had to balance political considerations of fairness against achieving the best possible outcome in terms of an extended maritime zone/rights to seabed resources. The interactions and the relative power disparity between the Australia and Timor-Leste thus worked in contradiction to what one might generally assume (i.e. a favourable outcome coerced by the dominant actor), as Australian negotiators had to be weary of the public opinion of the outcome.

Taking a wider view on power relations and the geopolitical context of maritime disputes, Australia concern with the stability in near-neighbouring states just across the various seas north of the Australian mainland stands out.[141] As put by one foreign policy expert: 'the leverage of Australia in foreign affairs, or the credibility of Australia in foreign affairs, is substantially diminished if there is a mess in Melanesia'.[142] This comes to the fore in Australia's aid policies for the near-abroad – such as the Pacific Regional aid program, aimed at advancing development in the much poorer neighbouring states.[143] Concerning the Timor-Leste negotiations, Starting explains Australia's willingness to concede as a result of 'the rapid structural shifts re-shaping the regional order and precipitating new strategic concerns'.[144] In that case, Australian wariness of increased Chinese regional influence as well as a newfound commitment to a 'rules-based order' served as motivating factors for settlement.[145] Maritime boundaries are interpreted in a larger (geo)political context beyond legal factors and preferences in individual disputes.

In sum, more factors than just the functional use of the maritime domain in question have come into play in Australia's efforts to complete its maritime map. Decisions to acquiesce in negotiations or re-visit old agreements (in the case of Timor-Leste) are obviously influenced by more than economic interests or legal principles, as politicians weigh different concerns. There is not one rationale for *why* states manage to agree on delimitating their maritime boundaries, although some factors present in all of Australia's efforts – like sensitivity to legal precedent, public opinion and economic interests – loom large.

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[138] Avoiding a lengthy debate on the weighing of these principles in international court rulings concerning maritime boundaries, it is worth noting that there has been a hefty debate on exactly which factors are relevant when evaluating 'equity' in boundary delimitation. For more on this notion, see Thomas M Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995); Carole St-Louis, 'The Notion of Equity in the Determiniation of Maritime Boundaries and Its Application to the Canada–United States Boundary in the Beaufort Sea' (LLD Thesis, University of Ottawa, 2014).
[139] Schofield, 'Minding the Gap' (n 11) 204.
[140] Ibid.
[141] Lowe (n 12).
[142] Akami and Milner (n 50) 553.
[143] Establishing maritime boundaries is even a component of this program: 'Overview of Australia's Pacific Regional Aid Program', *Department of Foreign Affairs and Trade* (Web Page, 2020) <https://www.dfat.gov.au/GEO/PACIFIC/DEVELOPMENT-ASSISTANCE/Pages/development-assistance-in-the-pacific>.
[144] Strating (n 10) 66.
[145] Ibid.

Especially the role of the public seems to be an increasingly relevant factor. The final rounds of negotiations with Timor-Leste before the 2018 Agreement saw considerable public attention devoted to the notion of drawing lines at sea. Previously 'managed' or 'frozen' boundary disputes demand attention, not only in Australia but across the seas. The maritime dispute with Nicaragua was centre stage in Colombia's 2018 Presidential election.[146] And in the summer of 2019, the drilling for oil and gas by Turkish vessels in Cypriot waters propelled the larger dispute over Cyprus, as well as the multiple unresolved boundary disputes in the eastern Mediterranean, onto the international agenda.[147]

It might very well be that the expansion in human utilisation of the oceans due to transportation and resource needs, as well as greater awareness of what is occurring at sea from both an economic and science perspective, have resulted in greater attention and value being given to maritime space.[148] In this context, maritime boundaries and related disputes are likely to continue to appear on the political agenda. This in turn speaks to the value of having settled boundaries at sea *before* disputes potentially escalate, as in the case of Australia.

IV CONCLUSION

Australia's maritime boundaries – all having been settled at various intervals with different degrees of complexity – show the relevance of functional interests, legal characteristics and interstate political relations when engaging in maritime boundary negotiations. Some of these cases highlight that there need not be resources or an active conflict at play for states to find it mutually beneficial to settle their boundaries, as a step in a larger strategy to complete their maritime maps and implement authority and control for the sake of just that.

The fact that no maritime boundary is derived from disputed territory on land – which historically is proven to complicate matters[149] – and that the dispute over islands with Papua New Guinea proved rather limited removed the most common sources of friction between states. Regional relations with the different countries did also not take part in a larger geopolitical conflict, nor did they entail historic patterns of enmity.

The most challenging aspect has thus been the presence of resources, which has led to difficult negotiations and protracted disagreement in Australia's northern waters. However, the resource potential there has also forced the states onwards in their negotiations, knowing that in order to reap any benefits from this potential, an agreement must first be in place. Maritime boundary agreements with more peripheral neighbours – France, New Zealand and Solomon Islands – proved less challenging and in some ways less consequential for both petroleum companies and local fishers. Geographic proximity and the challenges that comes with compounded interaction naturally plays a role when delineating spatial domains, also at sea.

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[146] 'Ties with US, Nicaragua Dominate First Colombia Presidential Debate', *Agencia EFE* (Bogota D.C., 20 April 2018).

[147] Jean-Baptiste Vey, 'France's Macron Sides with Cyprus on Dispute with Turkey', *Reuters* (online, 15 June 2019) <https://www.reuters.com/article/us-eu-france-macron/frances-macron-sides-with-cyprus-on-dispute-with-turkey-idUSKCN1TF2FO>; B Lana Guggenheim, 'Tensions Mount in the Eastern Mediterranean as Turkey Seeks to Drill in Cyprus' EEZ', *SouthEUSummit* (online, 16 May 2019) <https://www.southeusummit.com/europe/cyprus/tensions-mount-in-the-eastern-mediterranean-as-turkey-seeks-to-drill-in-cyprus-eez/>.

[148] For more on this, see Philip E Steinberg, *The Social Construction of the Ocean* (Cambridge University Press, 2001); John Hannigan, 'Toward a Sociology of Oceans' (2017) 54(1) *Canadian Review of Sociology* 8.

[149] Krista E Wiegand, *Enduring Territorial Disputes: Strategies of Bargaining, Coercive Diplomacy, and Settlement* (University of Georgia Press, 2011).

Australian negotiators would probably argue that each maritime boundary agreement on its own is a challenging and resource-consuming task, regardless of how 'straightforward' the outcomes are seen in hindsight. Still, in contrast to other parts of the world, where settled maritime boundaries are less common, Australia has perhaps had an easier task than some. More than half of all maritime boundaries around the world are unresolved; some due to conflictual relations, other due to disinterest or limited government attention devoted to negotiations.[150] Canada – Australia's northern cousin – has settled fewer than half of its boundaries at sea, showcasing that bureaucratic capacity and adept negotiators are not sufficient factors on their own to enable interstate agreements.[151]

What Australia has done, is to dedicate attention and resources to settling its boundary disagreements and completing its maritime zonal map. The end result is that that Australia has agreed *all* its maritime boundaries, with six different countries across a range of maritime domains. With the increasingly apparent effects of climate change on Australian coastal environments and expectations of even further growth in fisheries and petroleum production in its waters, the value of these efforts may well become more apparent in the years to come.

[150] Byers and Østhagen, 'Settling Maritime Boundaries' (n 4); Ásgeirsdóttir and Steinwand (n 6).
[151] Byers and Østhagen, 'Why Does Canada' (n 131) 56–7.