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Liz Buxton, External Relations & Marketing Manager, IBRU,
Department of Geography, Durham University DH1 3LE, UK
Tel: +44 191 334 1965 ◆ Fax: +44 191 334 1962 ◆ Email: e.a.buxton@durham.ac.uk

Thank you.

IBRU

Durham University

Offshore “Disputed-border” and “Cross-border” Hydrocarbon Deposits

Rights, Risks and Remedies

IBRU Training Workshop, New York

2023

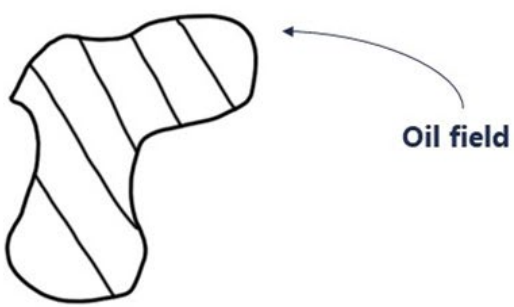
Freshfields Bruckhaus Deringer

Introduction

Two basic offshore scenarios to distinguish:

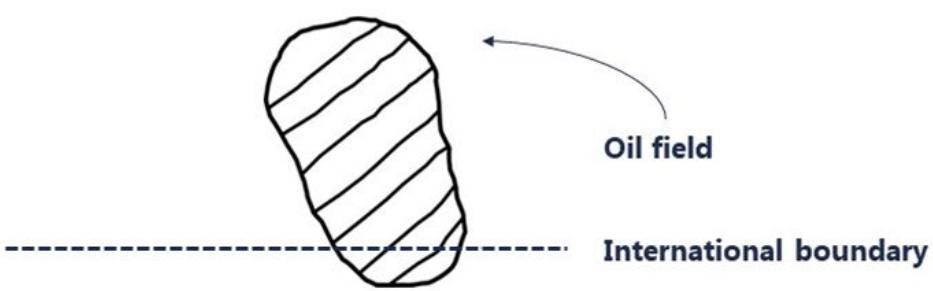
- Oil/gas fields in areas subject to overlapping maritime claims: “disputed-border deposits”
- Oil/gas fields which straddle a delimited maritime boundary: “cross-border deposits”

State “A”



State “B”

State “A“



State “B“

A roadmap for today – for *both* scenarios

- What are the risks of unilateral exploitation?
- What cooperative arrangements exist?
- Are States obliged to enter into cooperative arrangements?
- If not, are unilateral exploratory and exploitative activities permissible?
- Risk mitigation options for parties contemplating unilateral activities?
- Legal remedies for injured parties?

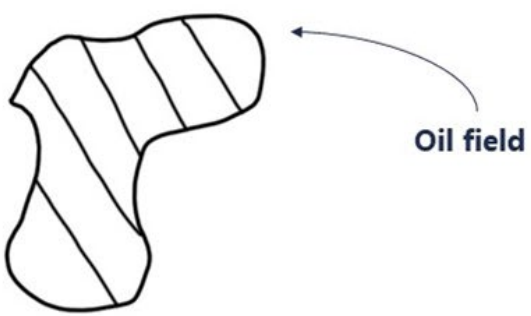
What are the risks of unilateral exploitation of a transboundary resource?

- For both States and licensee IOCs:
  - technical risks: inefficient development
  - financial risks
  - political (or even military?) risks
- Cooperative arrangements can avoid these risks, in both disputed-border and cross-border scenarios

Disputed-Border Deposits

Section 1

State “A“



State “B“

Joint Development Agreements

What are they?

- Arrangements to develop and share, in agreed proportions, resources found within a geographical area where sovereignty is disputed
- Pooling by two or more States of any rights that they may have over a given area, to undertake some form of joint management for purposes of exploring and exploiting offshore minerals
- Ensures each State is able to exercise sovereign rights to its fullest extent without compromising the other State's sovereign rights
- Non-competitive exploitation: *"… [in a JDA] the focus would be placed where it belonged: on a fair division of the resources at stake, rather than on determination of an artificial line, thus … eliminating competition over the ownership of resources … especially where the resources are unknown*".
(E Richardson)

Joint Development Agreement

Where are they?

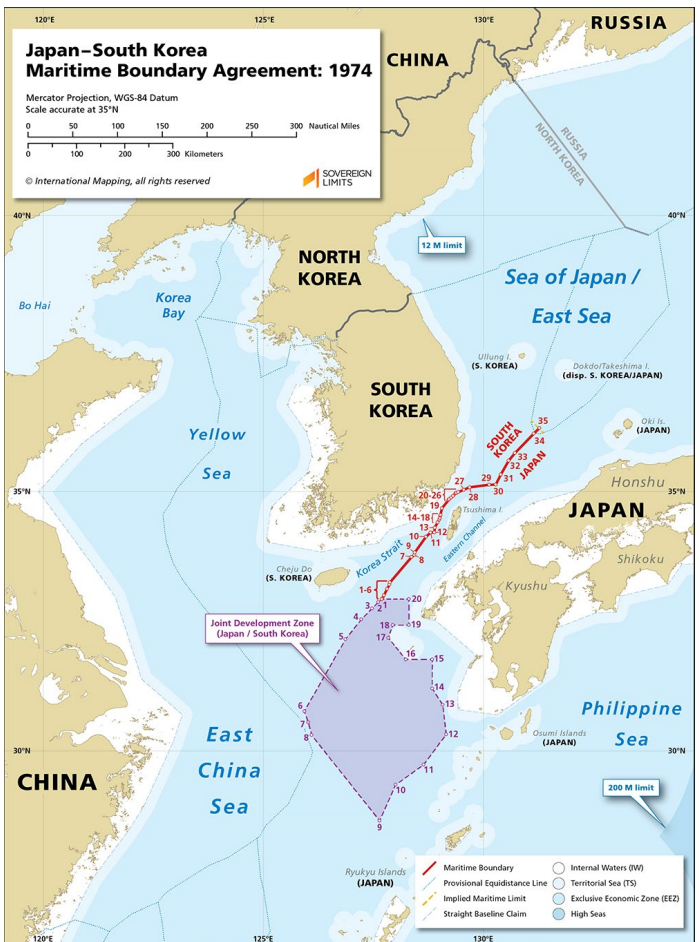
- Over 20 Joint Development Agreements (***JDAs***) around the world
- A wide variety of shapes and sizes – each one is unique
- But certain key issues are common to, and require for, every JDA

Key components of a JDA

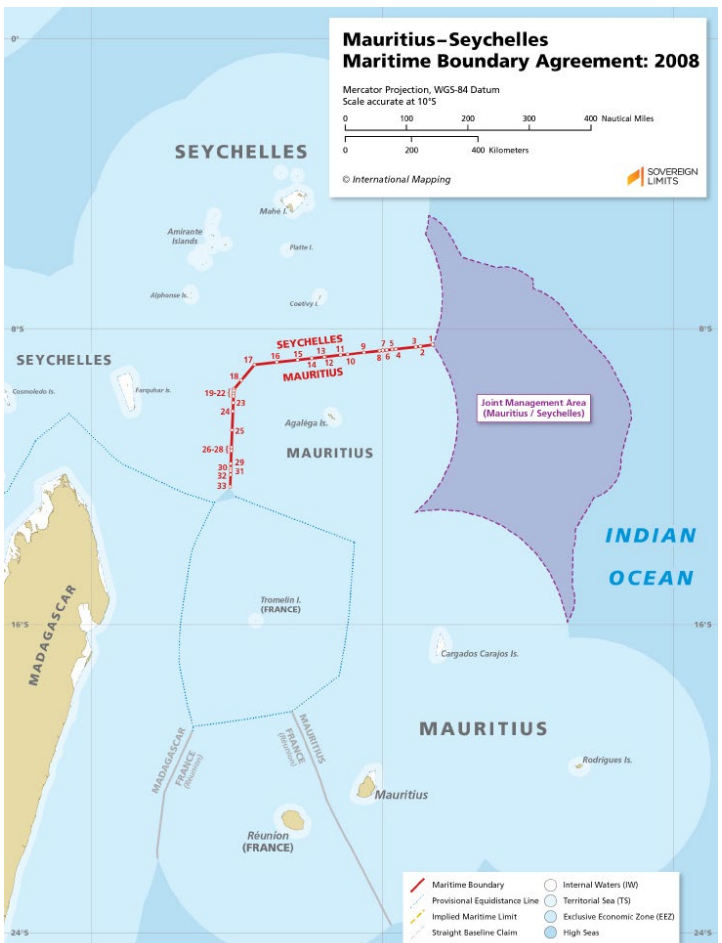
- Area subject to the JDA – “Joint Development Zone” (***JDZ***)
- *What* is being jointly developed?
- Financial split: 50/50 or otherwise?
- Management structure (three basic models: single State, two States, Joint Authority)
- Fiscal regime/Applicable law
- Basis for licensing (and dealing with pre-existing licence holders)
- Dispute resolution
- Term
- Unitisation (what if a field straddles the JDZ?)

Bahrain and Saudi Arabia (1958)

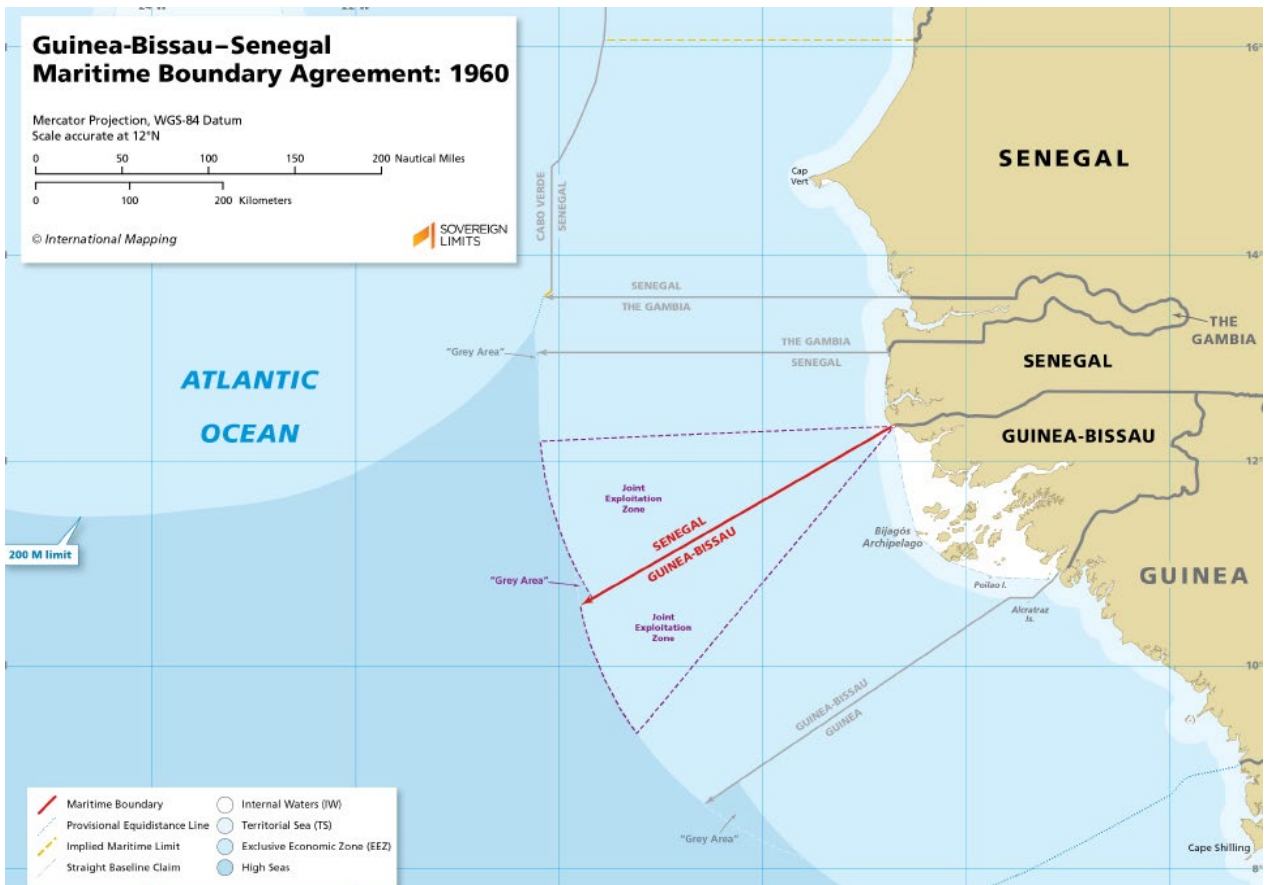
Japan and South Korea (1974)



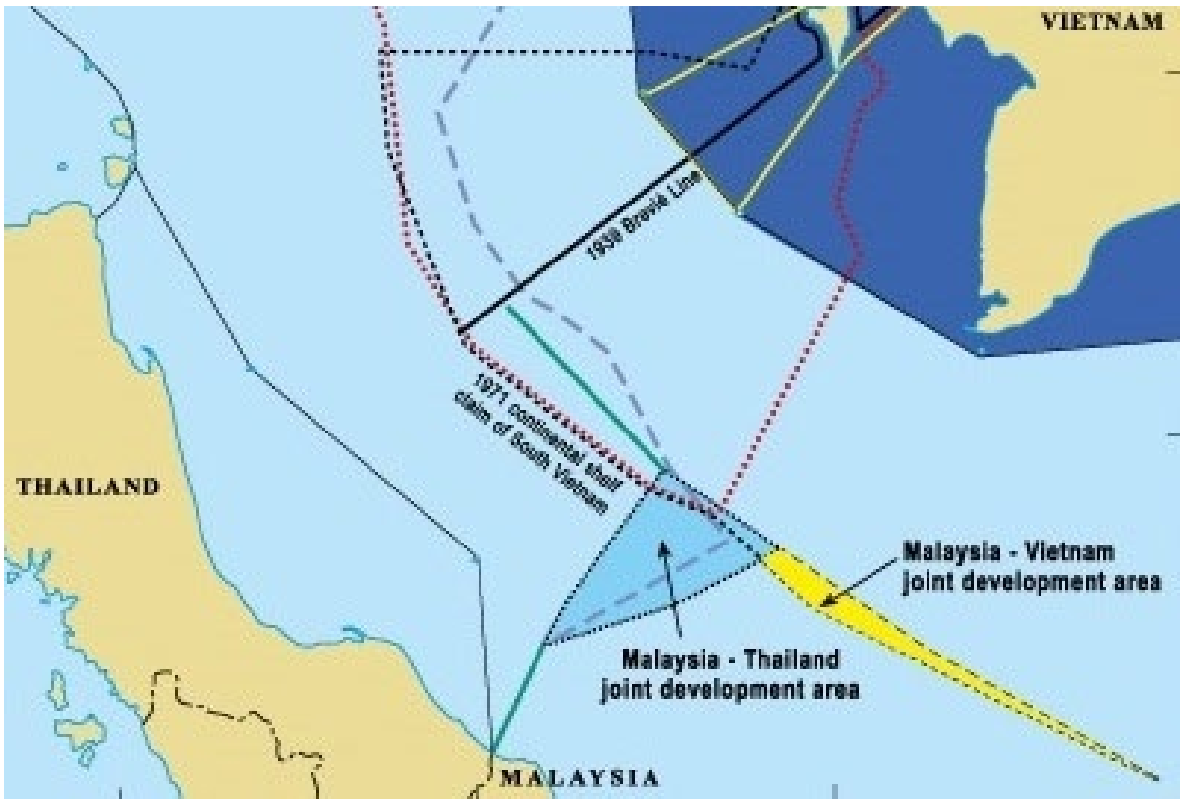
Mauritius and Seychelles (2012)



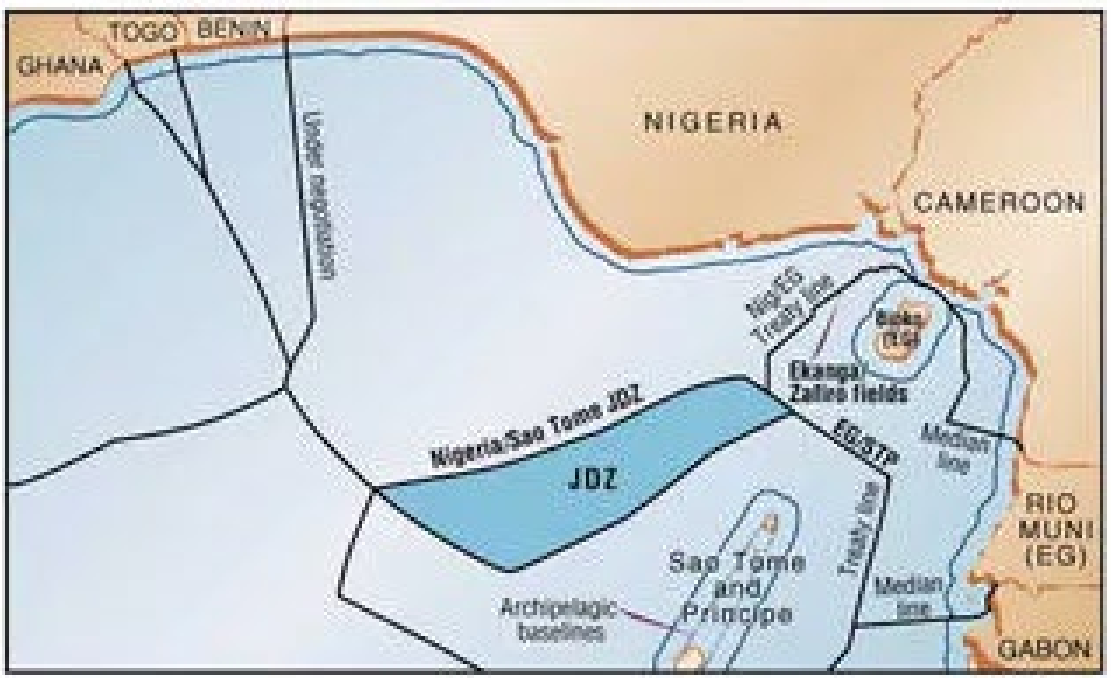
Guinea-Bissau and Senegal (1993)



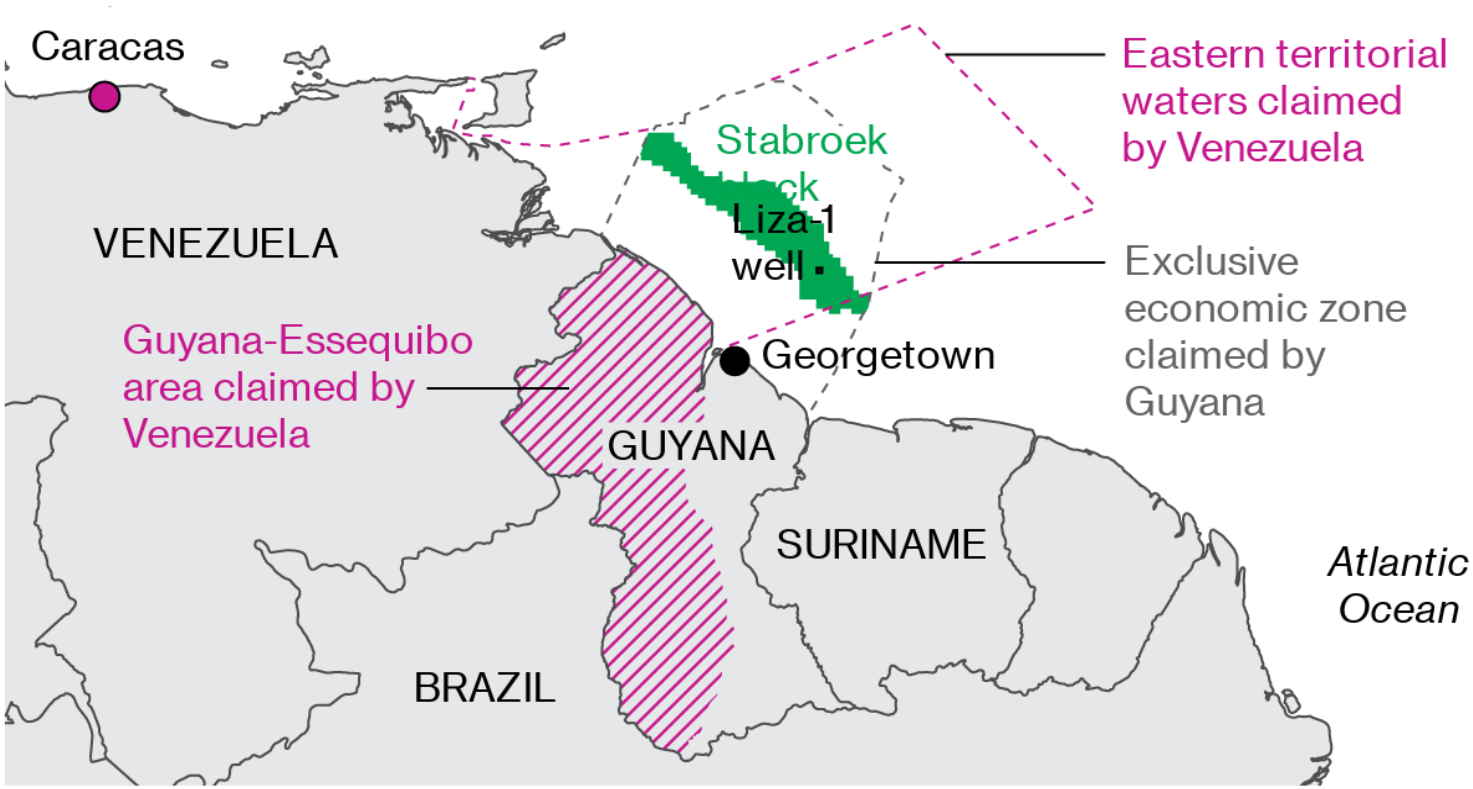
Thailand and Malaysia (1979)



Nigeria and São Tomé and Principe (2001)



Venezuela and Guyana



JDAs: not a universal panacea?

- Don’t underestimate the complexity of negotiating and managing a JDA
- Not necessarily a guaranteed “fast-track” alternative to delimitation
- “*The conclusion of any joint development arrangement, in the absence of the appropriate level of consent between the parties, is merely redrafting the problem and possibly complicating it further*”. (W Stormont and I Townsend-Gault)

Are States obliged to conclude JDAs in contested waters?

Generally accepted that, under customary international law, States:

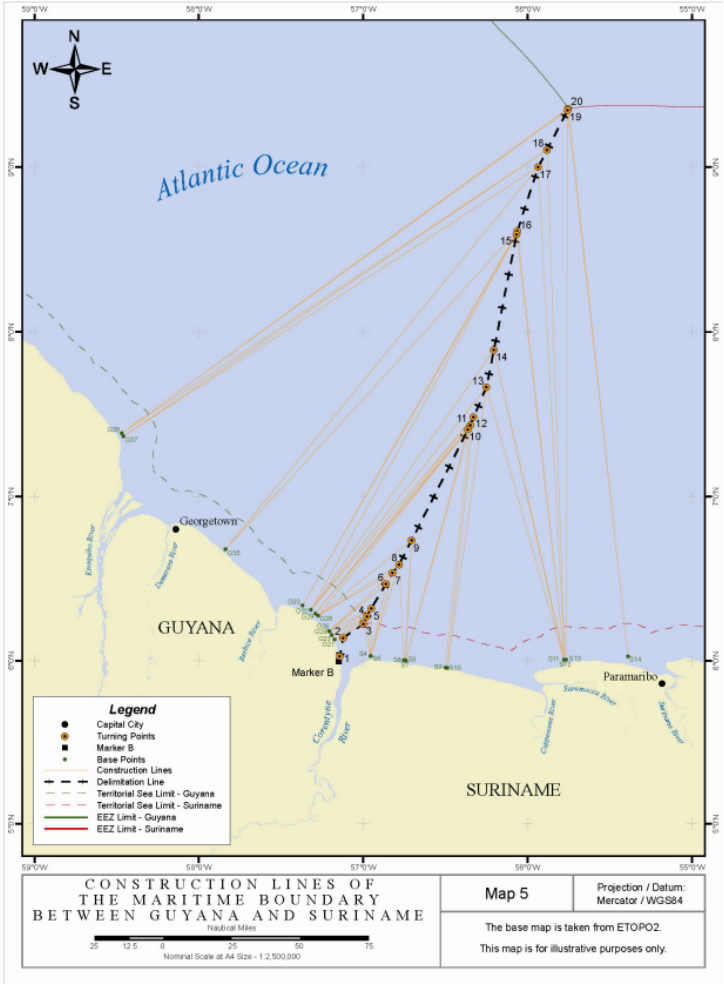
- have an obligation to cooperate in seeking to reach an agreement; and
- in the absence of such agreement, have an obligation to exercise mutual restraint

But also generally agreed that there is no obligation under customary international law specifically to enter into a JDA – due to lack of settled State practice and "*opinio juris*"

Articles 74(3) and 83(3) of UNCLOS 1982

Pending agreement…the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Guyana v Suriname, 2007



Guyana v Suriname, 2007

- The first case to examine the meaning of Articles 74(3) and 83(3) of UNCLOS
- Both States found to have breached positive obligation (to make every effort to enter into provisional arrangements) and negative obligation (not to jeopardise/hamper the reaching of a final agreement)
- States encouraged, but not obliged, to enter into JDAs: but obliged to negotiate in good faith
- A "delicate balance" to be struck between not stifling economic development, but also avoiding unilateral activity that might permanently affect a party's rights: thus, what States can and can't do in a disputed-border scenario…

The Rule of Capture

"*A fundamental principle of oil and gas law holding that there is no liability for drainage of oil and gas from under the lands of another so long as there has been no trespass and all relevant statutes and regulations have been observed*".

(Black's Lane Dictionary)

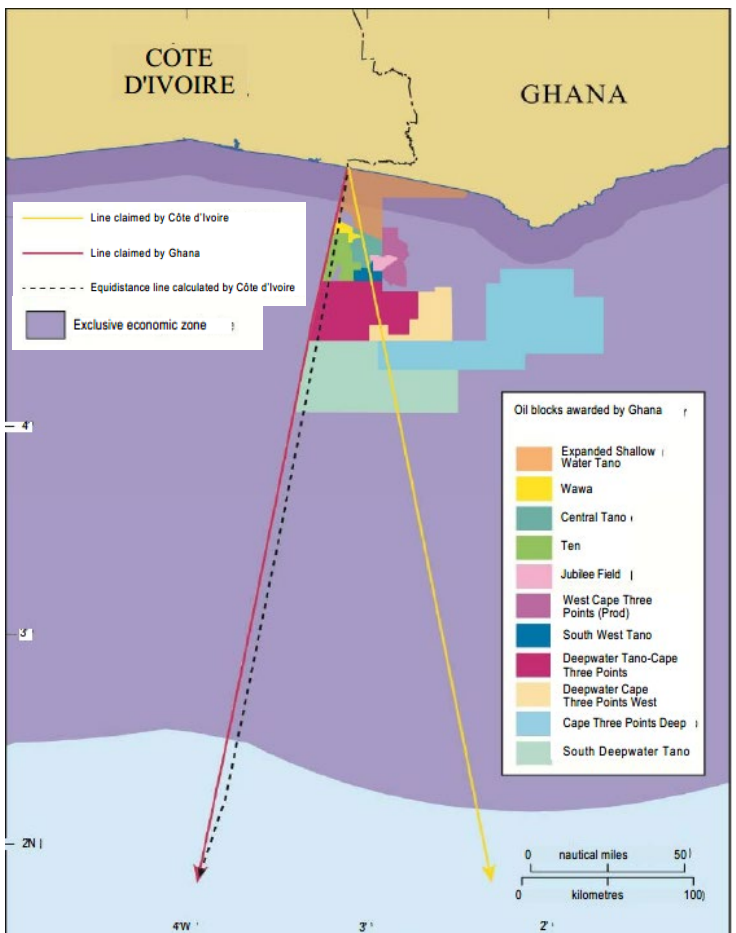
"*The legal rule of non-liability for (a) causing oil or gas to migrate across property lines and (b) producing oil or gas which was originally in place under the land of another, so long as the producing well does not trespass*".

(Williams and Meyers, Manual of Oil and Gas Terms)

No Rule of Capture applicable in contested waters?

- Consensus that Rule of Capture should not apply to disputed-border deposits:
  - Generally precluded by States' obligations under customary international law to cooperate and exercise mutual restraint in the event of a dispute
  - Specifically precluded by UNCLOS obligation not to jeopardize or hamper the reaching of an agreement (see *Guyana v Suriname*, 2007)
  - Confirmed by recent State practice: Montenegro and Croatia (Adriatic); Japan and China (East China Sea)
- Even where one State refuses to negotiate and stifles exploitation?
- Ultimately, no absolute certainty – tread carefully, mitigate risk

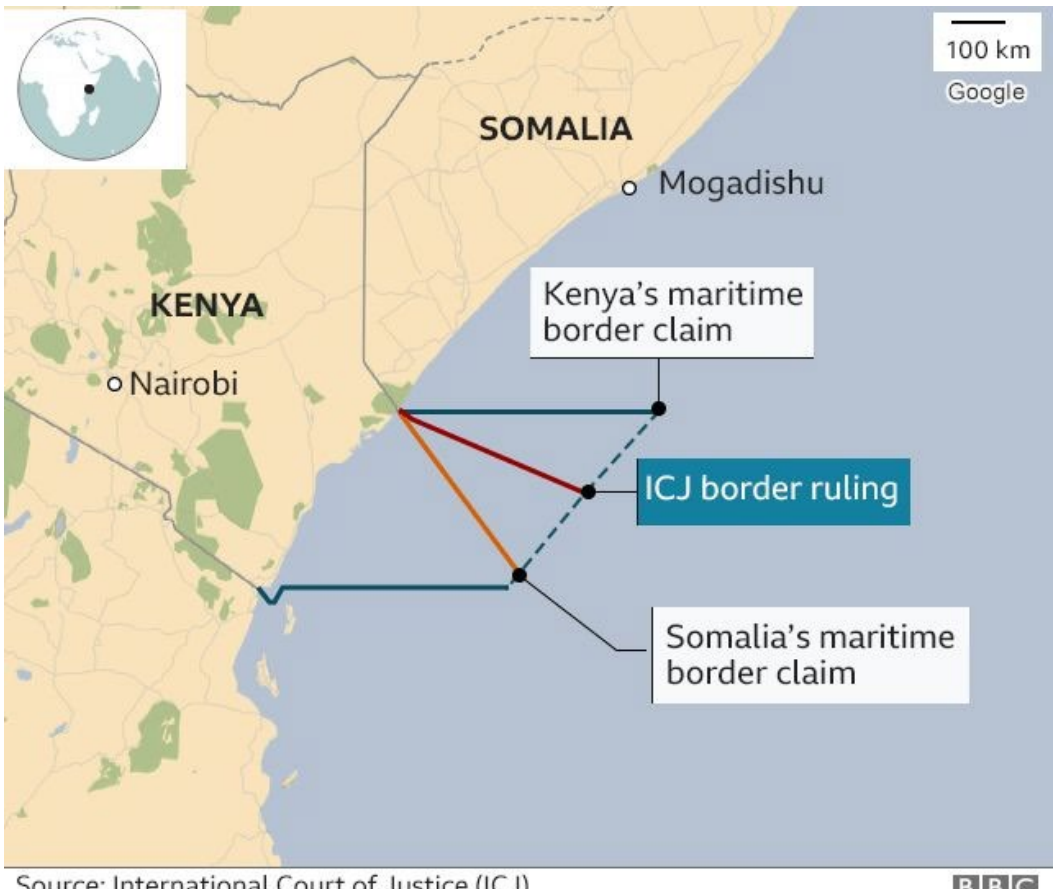
Ghana v Cote d'Ivoire, 2017



Ghana v Cote d'Ivoire, 2017

- Case first arose in the context of Ghana's licensees drilling in disputed waters
- Provisional measures required cessation of new (but not ongoing) exploration
- Final delimitation found to have "*a constitutive nature and cannot be qualified as merely declaratory*": thus no violation of Ivorian sovereign rights found
- UNCLOS obligation to negotiate in good faith: obligation of conduct not result
- No violation of Article 83(3) of UNCLOS: provisional measures respected: also CDI claimed explicitly for a breach in the "*Ivorian maritime area*", whereas Ghana had drilled only in an area ultimately attributed to it (para. 633 of judgment)
- Special Chamber offered no clarification of the meaning and content of Article 83(3) of UNCLOS: see criticism in Separate Opinion of Judge Paik
- Further clarity on meaning and content of Article 83(3) of UNCLOS still needed?

Kenya v Somalia, 2021



Kenya v Somalia, 2021

- Case arose in the context of Kenya's issuance of three oil concessions south of the "Parallel of Latitude"—for decades considered its de facto boundary with Somalia, including in previous oil concessions. Somalia had previously protested the boundary and subsequently granted licenses in the disputed area.
- ICJ ultimately drew the maritime border further south than the "Parallel of Latitude," reducing Kenya's blocks by 74.7%.
- ICJ found that Kenya had not violated Articles 73(5) or 83(3) of UNCLOS by issuing licenses in the area now attributed to Somalia even though it delayed seeking provisional measures by two years after the dispute arose. No evidence that Kenya's claims were not made in good faith. Kenya's activities did not cause permanent physical damage and therefore did not jeopardize or hamper the reaching of a final agreement between the parties.

Risk mitigation for parties contemplating unilateral activity

For States:

- engage in good faith negotiations first
- apply diplomatic pressure towards such negotiation
- adopt good faith measures set out in *Guyana v Suriname*, 2007

For IOCs:

- due diligence
- carefully assess conduct of host State and scope of licences
- negotiate protective contractual clauses in event of boundary dispute
- contract performance: suspension or frustration of obligations; force majeure: indemnity etc

Remedies for injured parties?

For States faced with unilateral activity from the other side of the “line”:

- international law claim v other State?
- domestic law claim v other State's licensee IOC?

For IOCs faced with unilateral activity from the other side of the “line”:

- domestic law claim v other State's licensee IOC?

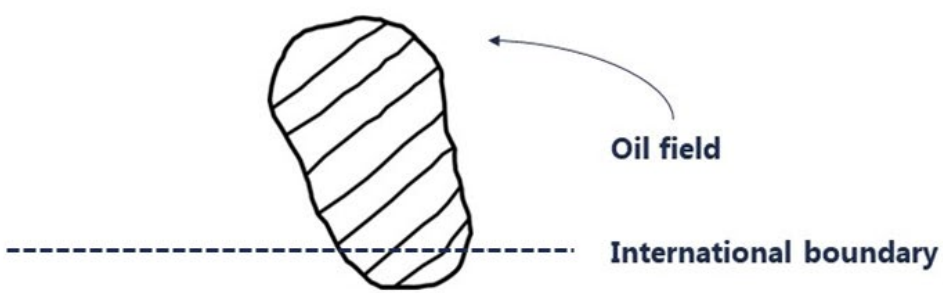
For IOCs on either side of the “line”, ultimately faced with blocked operations:

- claims against host State (under contract or under bilateral investment treaty); as last resort?

Cross-Border Deposits

Section 2

State “A“



State “B“

Unitisations

What are they?

- An agreement between two or more persons, holding exploitation rights in common petroleum reservoirs, by which these reservoirs are exploited as a single unit
- Development proceeds: "*as if the separate leases and licenses are merged into one single lease or license, with a single unit operator appointed to manage the development of the field, within the limits of the authority granted the unit operator by the unit operating agreement and the management committee composed of all the different lessees or licensees with interests in the unit*" (J Weaver and D Manus)
- Common practice in domestic context
- International unitisations are agreements tailored to deposits which straddle an international boundary

Unitisations

Advantages

Key advantage - efficient exploitation:

- "*…independent, non-cooperative exploitation of the separate parts of a straddling reservoir, will lead to costly defensive or competitive drilling…*" (B Taverne)

Unitisations

How do they work?

Two approaches:

- “mineral deposit clauses” in delimitation agreements
- unitisation agreements post-delimitation

For an international transboundary unitisation, the usual approach is preparation of two agreements:

- a cross-border treaty between the relevant States
- a cross-border unitisation agreement between the relevant IOCs

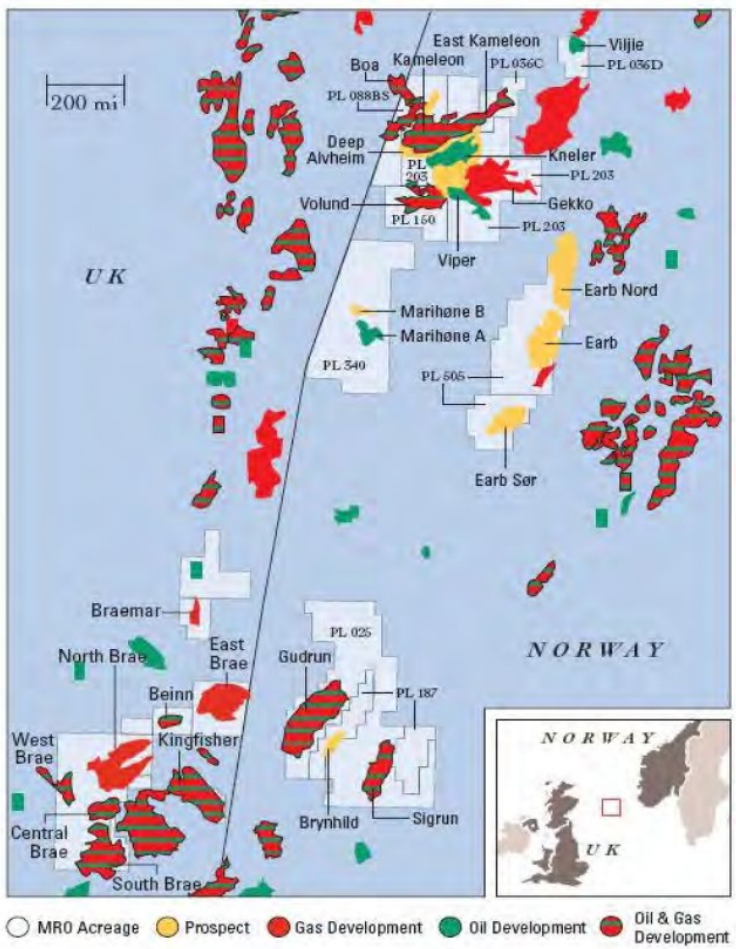
The treaty generally takes precedence

Unitisations

Key components of agreements

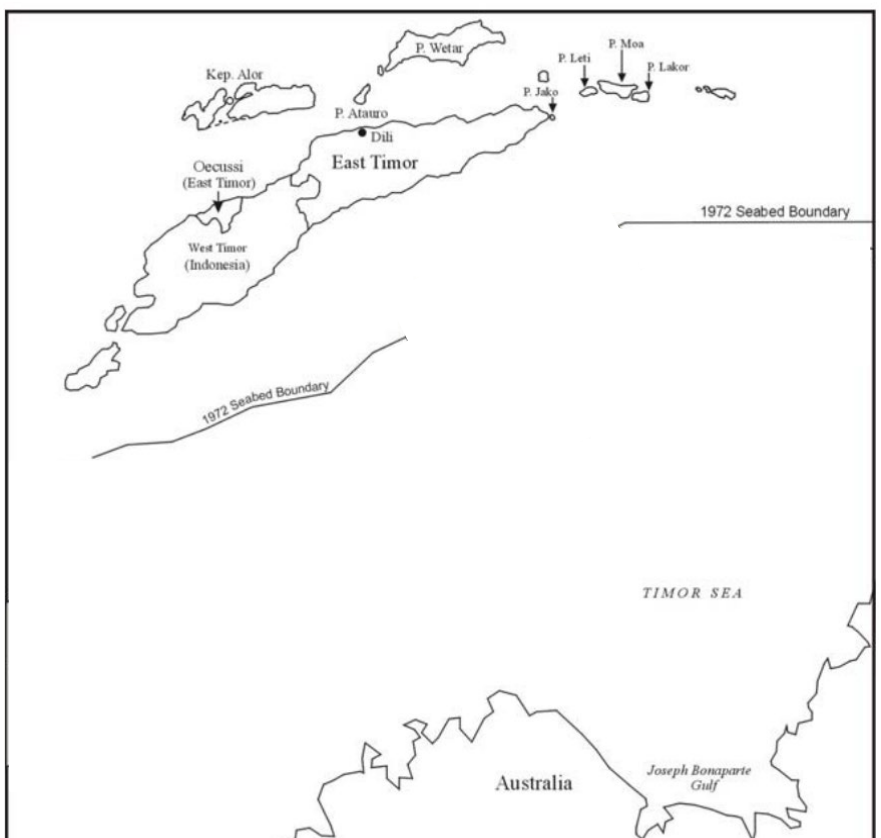
- Agree the relevant straddling field
- Provide that relevant field to be developed as single unit
- Agree location/delimitation of relevant field
- Define and estimate reserves
- Apportionment
- Development plan
- Redeterminations
- Dispute resolution

Norway and the UK (1976)



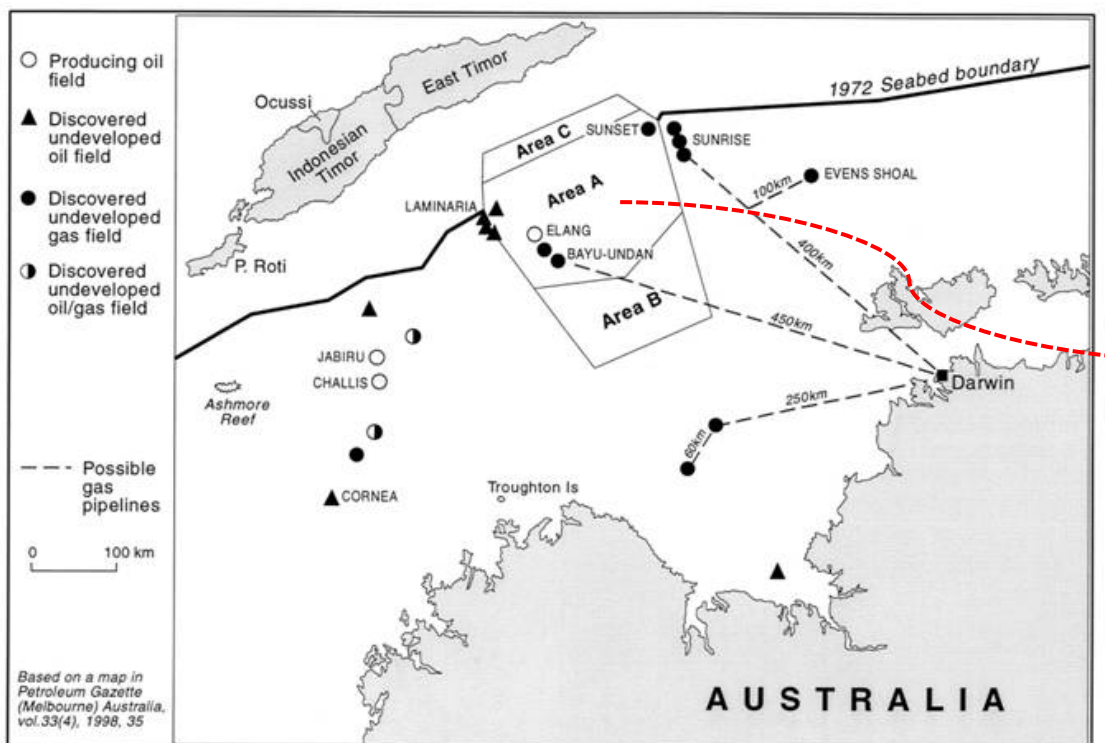
Australia and Timor Leste

1972 seabed boundary



Australia and Timor Leste

Timor Gap Treaty 1989



Zone of cooperation

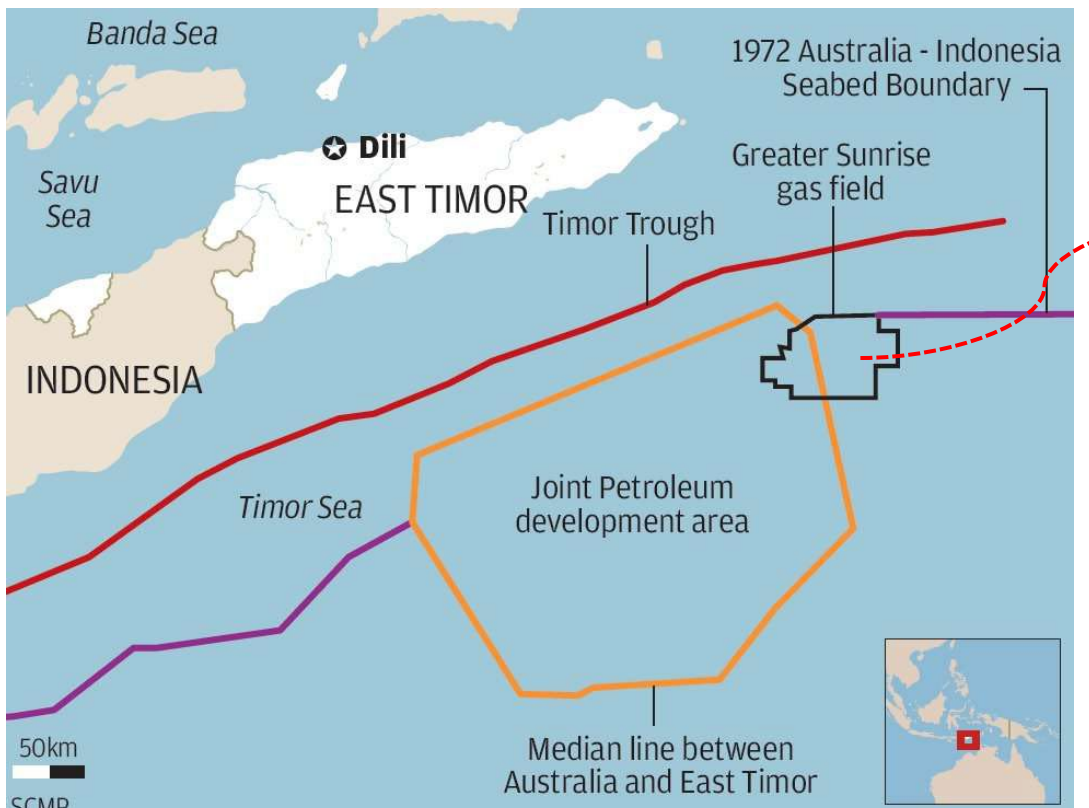
Australia and Timor Leste

Joint development area 90:10 split in favour of Timor-Leste

Timor Sea Treaty 2002

Australia and Timor Leste

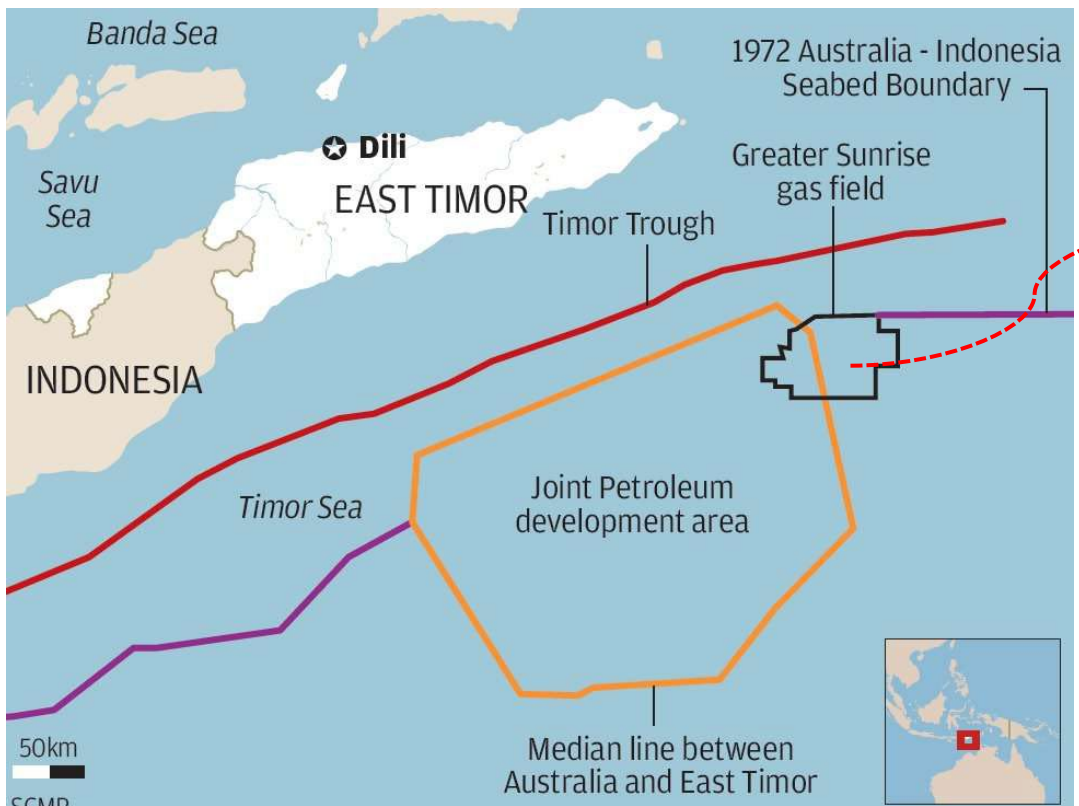
The unitisation of Greater Sunrise (2003)



Agreement relating to unitisation: split 20:80 in Australia's favour

Australia and Timor Leste

Treaty on Certain Maritime Arrangements in the Timor Sea (2006)

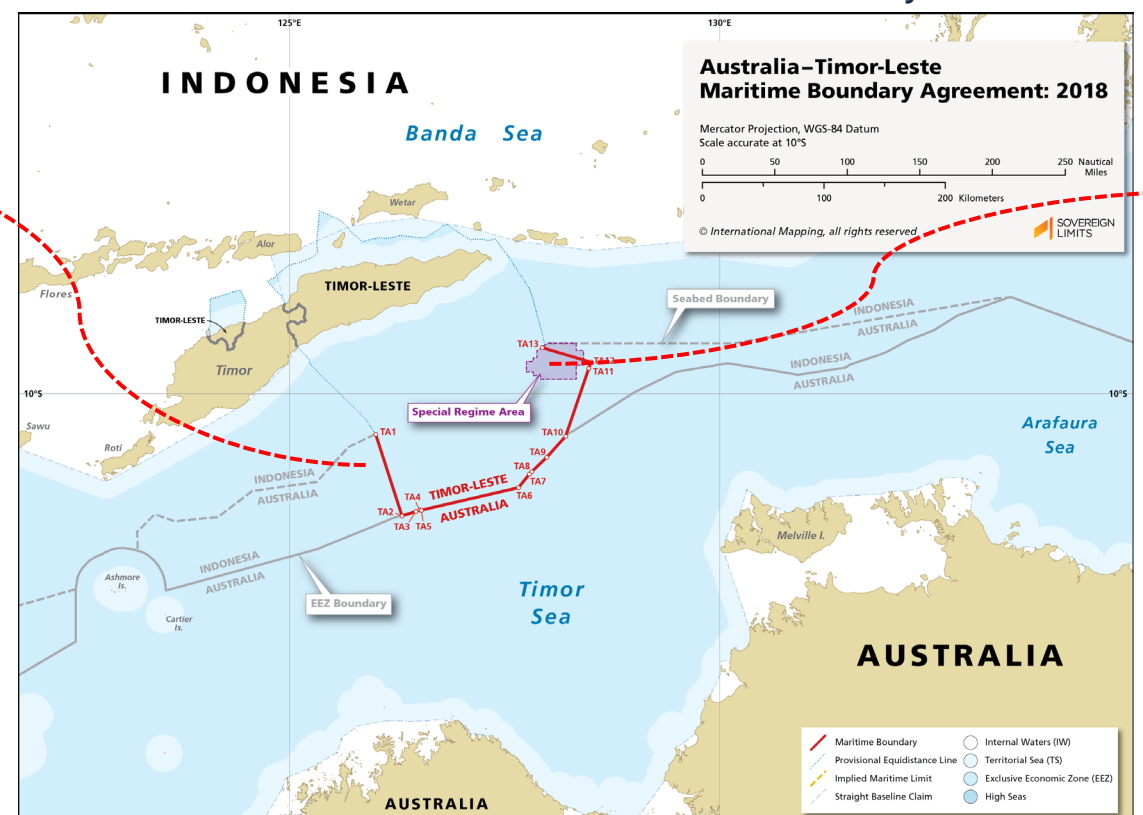


Upstream revenue split 50:50

Australia and Timor Leste

The Timor Leste Maritime Boundaries Treaty (2018)

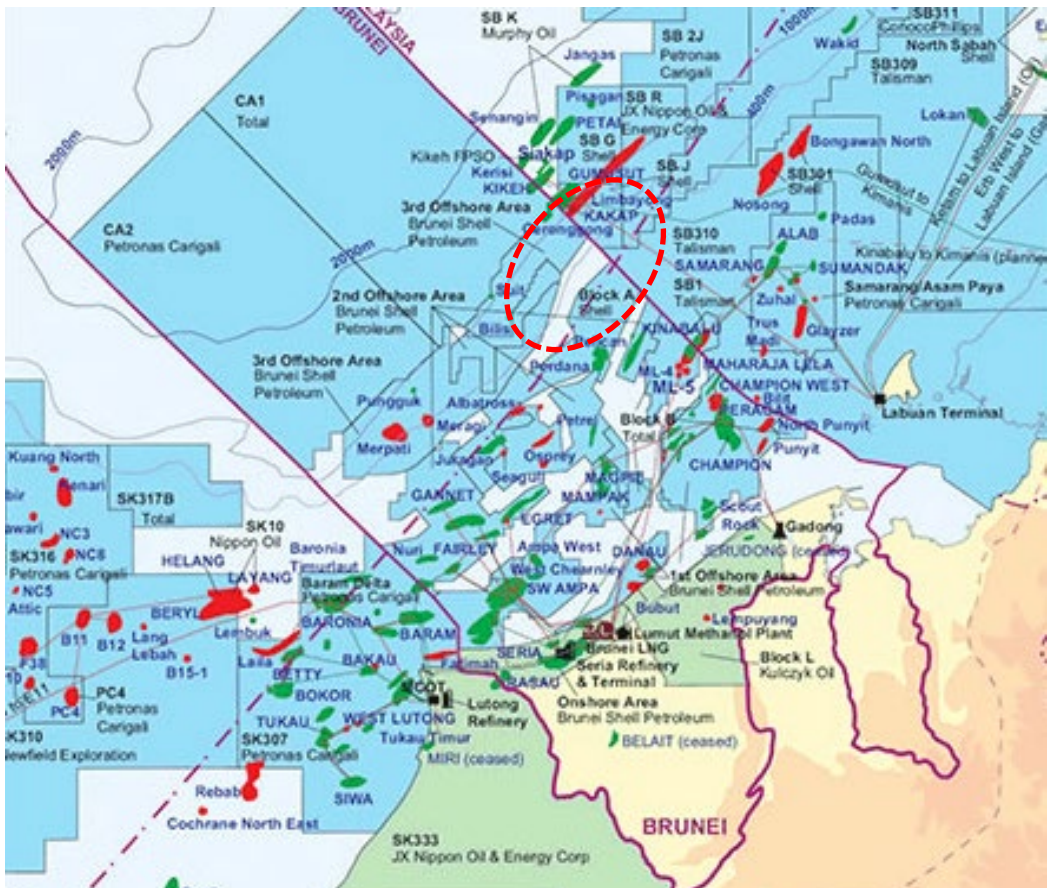
Delimited boundary



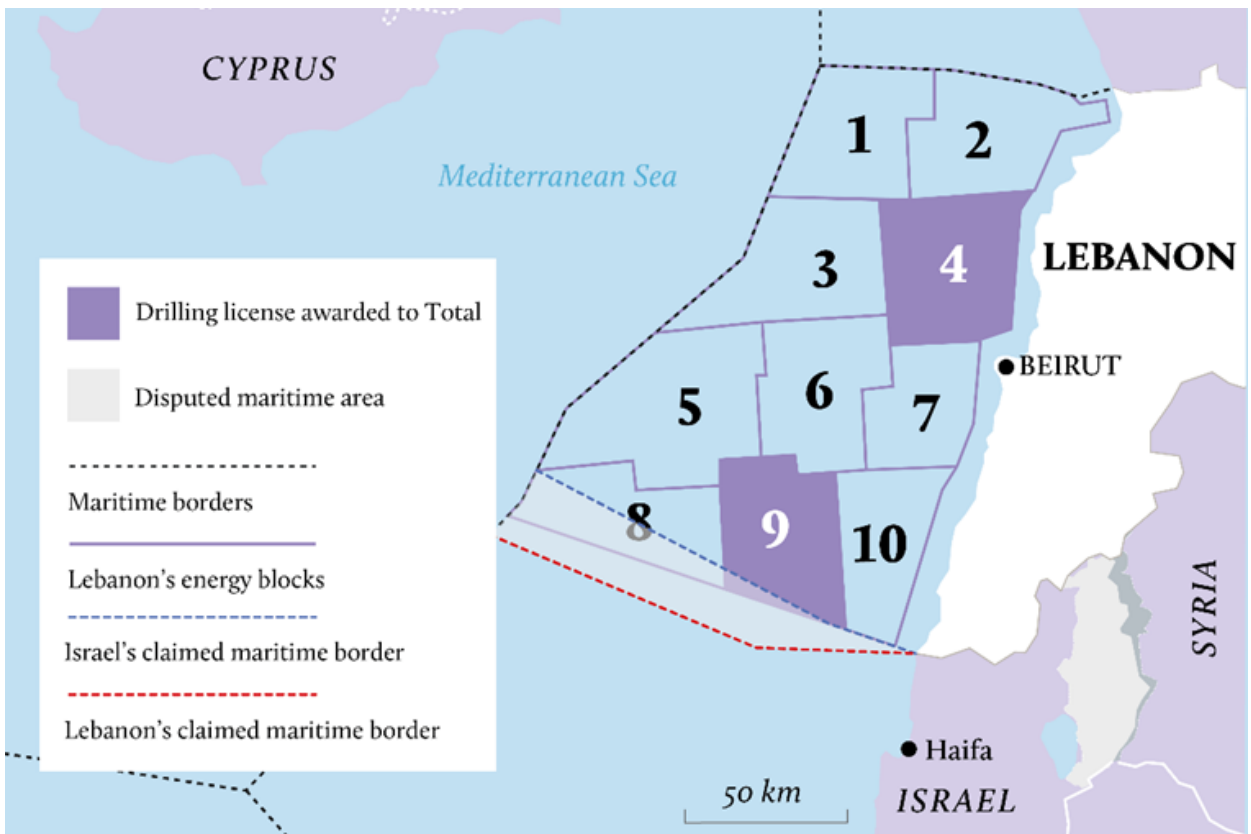
Revenue sharing agreement:

- Timor Leste receives 70% if pipeline → Timor Leste
- Timor Leste receives 20% if pipeline → Australia

Brunei and Malaysia (2021)



Israel and Lebanon (2022)



Is there an obligation to unitise in a cross-border deposit scenario?

- Still generally accepted that States are not presently obliged under international law to enter into unitisation agreements, or other agreements, with respect to cross-border deposits
- Lack of sufficient settled State practice and "*opinio juris*"
- No equivalent for cross-border deposits of Article 83(3) of UNCLOS; but increasing recognition nevertheless of an obligation at least to consult and seek to cooperate in good faith?

What if there is no agreement?

Can a rule capture apply to cross-border fields? Opinions vary, compare:

- "*…any legal distinction between these rights where the deposit straddles a continental shelf boundary and where the deposit is located within an area of overlapping claims is less significant than initially surmised … The applicable international law in both situations remains essentially the same*". (D Ong)
- "*…in the absence of an agreement to the contrary, a State or international oil company is free to maximise production from its side of the boundary line notwithstanding the policies of neighbouring States which share the same field*". (R Bundy)
- "*Where such divergence occurs, it is submitted that States have no obligation to do more than act in a reasonable and responsible manner*". (P Cameron)

What if there is no agreement? (cont.)

- Again, no equivalent of Article 83(3) of UNCLOS, but nevertheless increasingly accepted that States should seek to behave reasonably in cross-border scenario
- Thus, prudent not to assume an automatic and immediate right of capture
- Tread carefully, transparently and in good faith
- But, unilateral exploitation may arguably become justifiable in certain circumstances – e.g. if faced by a recalcitrant neighbour who consistently refuses to engage in good faith negotiation and stymies access to resources?

Risk mitigation for parties contemplating unilateral activity

Possible considerations for States:

- issue notification of discovery of exploitable deposit to other interested State/s
- attempt to negotiate the unitisation agreement in good faith, and leave a paper trail to demonstrate that it undertook unilateral operations only because the other State/s refused to negotiate in good faith
- inform other interested Staters of activities planned and undertaken make available for inspection records of costs and revenue offer to share the financial benefits of exploitation
- continue to engage in consultations with other interested State/s as far as possible
- conduct an initial risk assessment and keep updated

Risk mitigation for parties contemplating unilateral activity (cont.)

Possible considerations for IOCs; same as for disputed-border deposits, with appropriate modifications:

- due diligence
- carefully assess conduct of host State and scope of licences
- negotiate protective contractual clauses: suspension or frustration of obligations: force majeure: indemnity, etc

Remedies for injured parties?

For States faced with unilateral activity from the other side of the line:

- international law claim v other State? But likely weaker than in disputed-border scenario (especially if unilateral activity is preceded by good faith efforts)
- domestic law claim v other State's licensee IOC? But likely weaker than in disputed-border scenario

For IOCs faced with unilateral activity from the other side of the line:

- domestic law claim v other State's licensee IOC? But likely weaker than in disputed-border scenario

For IOCs, on either side of the line, ultimately faced with blocked operations:

- claims against host State (under contract or under bilateral investment treaty): as last resort?

Conclusions

Section 3

Conclusions

- Unilateral exploitation poses numerous risks in both scenarios
- Cooperative arrangements can avoid these risks — most commonly JDAs (for disputed-border) and unitisations (for cross-border)
- But States are not presently obliged to enter such agreements
- Absent a JDA in a disputed-border scenario. parties generally considered as precluded from unilateral exploitation — even if some measure of unilateral exploration may be permissible: but Article 83(3) of UNCLOS still needs clarification
- Absent a unitisation agreement in a cross-border scenario, parties should behave reasonably and in good faith: but there may be circumstances in which, following efforts at cooperation, unilateral exploitation is arguably justifiable
- Various options exist for States/IOCs to gauge and manage risks
- Various legal remedies may exist for injured parties — some remain untested

Contact

Alexandra van der Meulen

Counsel, Paris

T +33 6 12 32 29 73

E alexandra.vandermeulen@freshfields.com

Anika Havaldar

Associate, Washington DC

T +1 202 -33 6-2773

E anika.havaldar@freshfields.com

Thank you