

Timor Sea Treaty
Submission No: ...22:1.....



17 September 2002

The Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2601

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BY: *J. B. Gould*

Dear Sir

TIMOR SEA TREATIES

I forward herewith a further submission, as requested by the Committee of the hearing at which I appeared on 26 August 2002, on the points made in the Lowe Opinion.

Yours sincerely

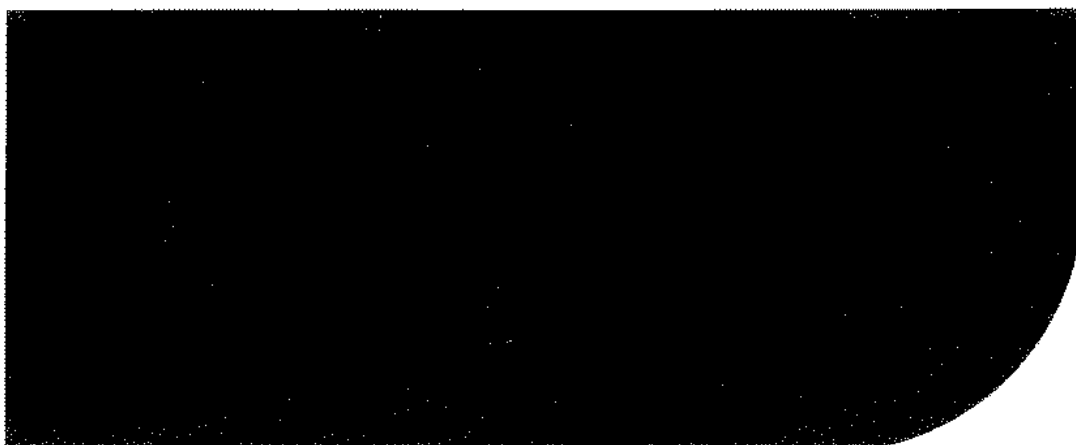
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CRITIQUE OF THE "LOWE OPINION" OF 11 APRIL 2002



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1 Low Opinion

- 1.1 This critique of the Lowe Opinion (the **Opinion**) is provided at the request of the Committee made at its hearing on 26 August 2002. The Opinion is entitled "In the Matter of East Timor's Maritime Boundaries" and is signed by Vaughan Lowe, Chichele Professor of International Law at Oxford University, Christopher Carleton of the UK Marine Hydrographic Office and Christopher Ward of the Australian Bar.
- 1.2 Appended to the Opinion is a diagram prepared by the United Kingdom Hydrographic Office as part of its consultancy services showing the lines discussed in the Opinion, including the lines designating the Zone of Cooperation set up by the 1989 Treaty between Australia and Indonesia in the Timor Sea (**Admiralty Diagram**). A copy is attached hereto as **Attachment 1**.
- 1.3 Attached as **Attachment 2** is a diagram entitled "Timor Sea Overview" which in particular compares the lateral maritime boundaries proposed in the Opinion with median (equidistant) lines that take full account of all features (**Timor Sea Overview Diagram**). Also attached hereto as **Attachment 3** and **Attachment 4** are two diagrams showing similarly based median (equidistant) lines in greater detail in relation to Points A16 and A17 respectively, discussed in the Opinion (**Diagram A16** and **Diagram A17** respectively).
- 1.4 The Opinion comes down to seven main propositions:
- A** **Australia's claims, in what is called the Joint Petroleum Development Area (JPDA) in the Timor Sea Treaty signed by Australia and East Timor on 20 May 2002, are based on "Australia's 1970s claim" to continental shelf over the "natural prolongation" of the Australian shelf up to the Timor Trough, and this claim is said to be inconsistent with current international law (para 36).**
 - B** **The eastern and western lateral lines of the JPDA, which derive from the 1989 Zone of Cooperation with Indonesia, are said to be equally indefensible in modern international law (para 37).**
 - C** **The correct starting point for the western lateral is said to be the thalweg of the Moti Masim (para 38)**
 - D** **The eastern line should be altered giving only half or three-quarters effect to the Indonesian island of Leti to the east of Timor, which would place most or all of the Greater Sunrise field within East Timorese jurisdiction (para 42).**

- E** It is said to be very imprudent, to say the least, for East Timor to accept the Timor Sea Treaty which it has now signed (but not yet ratified) if it wants to preserve a claim to a wider entitlement, particularly to any areas lying beyond the JPDA (para 49).
- F** There would be no assurance that East Timor would be able to obtain a modification of the proposed unitisation agreement over Greater Sunrise even if the eastern lateral were shifted to put all or part of Greater Sunrise within East Timor's maritime zone (para 50).
- G** As to initiating proceedings in the International Court of Justice, it could be argued that a question could be raised in the International Court of Justice that Australia needed to give reasonable notice of its recent modification of its 1975 declaration accepting the jurisdiction of the International Court on maritime delimitation matters (para 59), but that it is not possible to give a definite opinion on whether the argument would succeed (para 61).

2 Preliminary Comment

2.1 The Committee needs to note that the Opinion merges two issues, one being the important matter of "East Timor's Maritime Boundaries" (this being the title of the Opinion), and the other being the desirability of entering into provisional arrangements of a practical character that do not prejudice a final determination of the seabed delimitation but do provide a basis for the continued development of the petroleum resources in the area of the seabed between Australia and East Timor as soon as possible for the benefit of both countries - namely the arrangements in the Timor Sea Treaty signed by both countries on 20 May 2002 and being considered now by both Governments.

2.2 Thus Article 2 of the Timor Sea Treaty reads:

"Article 2: Without prejudice

- (a) This treaty gives effect to international law as reflected in the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982 which under Article 83 requires States with opposite or adjacent coasts to make every effort to enter into provisional arrangements of a practical nature pending agreement on the final delimitation of the continental shelf between them in a manner consistent with international law. This Treaty is intended to adhere to such obligation.
- (b) Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting Australia's or East Timor's position on or rights

relating to a seabed delimitation or their respective seabed entitlements."

- 2.3 A further preliminary comment is that the claims in the Opinion about how various lines relating to the JPDA were determined are flawed, because of incorrect assumptions made in paragraphs 15 and 16 of the Opinion:
- 15.a The line marked "A" on the Admiralty Diagram is not the northern edge of the Timor Trough. It is in fact a simplified line of the deepest part (the bathymetric axis) of the Trough, which is the maximum claim by Australia.
 - 15.b The line marked "B" on the Admiralty Diagram is correctly described as the simplified 1500 metre isobath but is incorrectly identified as the deepest part of the Timor Trough. It is in fact on the southern side of the Timor Trough and at the time of the relevant negotiations in 1972 between Australia and Indonesia was identified as the most likely limit for exploitation based on technical limitations of drilling equipment at that time and for a reasonable period into the future.
 - 15.d The line 'D' on the Admiralty Diagram, which derives from negotiations between Australia and Indonesia, was a simplified version of the maximum **continental shelf** claim made by Indonesia. (The issue under discussion was not exclusive economic zone but continental shelf. The issue of exclusive economic zone was dealt with at a later date (1997) between Australia and Indonesia on the basis of a median line.) Also in defining the JPDA between Australia and East Timor, neither lines "A" nor "D" were used.
 - 16 The assertion in paragraph 16 that the location of the lateral lines defining the 1989 Zone of Cooperation was based substantially on the location of the termini of the 1971 and 1972 seabed limits agreed between Australia and Indonesia is an overstatement. Those points were just one of a number of points which had to be considered. Adjustment was made to the lateral lines in order that no hiatus existed between the seabed boundaries agreed in 1971 and 1972 with Indonesia and the Zone of Cooperation.
- 2.4 **Attachment 5** hereto contains a diagram based on the Zone of Cooperation map attached to the Ministerial Statement issued by Australian Ministers on 29 October 1989 and the similar map appearing in the Schedule to the *Petroleum (Australia - Indonesia Zone of Cooperation) Act 1990 (Diagram of Zone of Cooperation)*. It shows that the lateral lines were mainly based on simplified median (equidistant) lines.
- 2.5 As Attachments 2, 4 and 5 show, the assertion in paragraph 17 of the Opinion that a perpendicular was used to determine the western lateral line is not correct. The western lateral line to the south of A17 was based on a median (equidistant) line. The deflection in the line from A17 to the north from the direction to the

south was an adjustment made so that direction of the lateral was not inconsistent with the agreed 1972 seabed boundary. Neither the portion of the western lateral line to the south of A17, nor the portion to the north, were determined by a "perpendicular line from the end of the Timor Trough to the point known as A17". In fact the seabed feature known as the Timor Trough extends over 350 km further west from the area under discussion and terminates to the south of the Indonesian Island of Roti. The assumption asserted in the last sentence of paragraph 17 of the Opinion is also wrong. As indicated above this portion of the line is based on a median (equidistant) line, which takes into account several features on the island of Timor and not the specific location mentioned.

- 2.6 Paragraph 18 asserts that the "southern segment of the eastern lateral line was drawn by taking the perpendicular to the small Indonesia island of Leti". This is wrong. This portion of the lateral line was based around a median (equidistant) line. The degree by which the northern portion of the lateral line deflected from the southern portion was determined by taking the direction based on a turning point on the median (equidistant) line to the south of the 1971 agreed seabed boundary and passing the line through point A16 - see Attachments 2, 3 and 5. Reiterating, this 'turning in' of the lateral lines avoided inconsistency with the agreed seabed boundary (in this case agreed in 1971).
- 2.7 Summing up, median (equidistant) lines were used as the main basis of the lateral lines, not the Points A16 and A17.
- 2.8 The final preliminary comment made is that the description Indonesian "Straight Baseline" shown on the Admiralty Diagram is technically a misnomer. The line is an **archipelagic** baseline and as such has a different character to ordinary straight baselines. It would be inconsistent with the archipelagic concept embodied in the 1982 United Nations Convention on the Law of the Sea (**UNCLOS**) to talk about, say, half effects for the small islands that make up the Indonesian archipelago. As the interesting submission to the Committee by Dean Bialek has pointed out, "Indonesian legislation mandates that where 'no special conditions need to be considered, the boundary line ... shall be the median line or a line that is equidistant' from Indonesian baselines or territorial base points, and those of the other State, unless a provisional arrangement has been reached with the State concerned" (Act No.5 of 1983 on the Indonesian Exclusive Economic Zone, 18 October 1983, article 3(2)). It would be presumptuous to assume that Indonesia would readily agree otherwise. This confirms the observations made below, namely that the Opinion seems to ignore the claims Indonesia can make as a necessary third party in many of the matters canvassed in the Opinion, especially relating to the proposed eastern lateral boundary.

3 A – Question of Inconsistency of Australia's Claims with Current International Law

- 3.1 The Opinion notes that the limit of the seabed jurisdiction appurtenant to East Timor has been a contentious and disputed issue since the late 1960's (para 2).

In fact Australia's claim to its adjacent continental shelf was made as early as 1953, in the context that, as earlier claimed by the United States in the 1945 Truman Proclamation, a coastal State's continental shelf extends out at least to a depth of 100 fathoms (approximately 200 metres) – translated in the 1958 Geneva Convention on the Continental Shelf to 200 metres, and beyond to the limit of exploitability. In the Timor Sea Australia's 200 metre shelf extends to near the southern side of the deep Timor Trough. That the Truman Proclamation and the Geneva Convention were based on this **prolongation/depth principle** is referred to in the Opinion (paras 4 and 5), as is the view taken by the International Court of Justice in the *North Sea Continental Shelf Cases*, ICJ Reports 1969 3 that the concept of natural prolongation of the physical continental shelf was fundamental, though subject to considerations of equity and fairness (para 12).

3.2 The Opinion correctly acknowledges that therefore the contentious area has involved four States, Indonesia, Australia, Portugal and now East Timor (para 2). However the fact that Indonesia has been and is still involved, particularly in relation to lateral boundaries, is overlooked in the later parts of the Opinion, an omission which has already been referred to in paragraph 2.8 above.

3.3 At the same time, the Opinion is undoubtedly correct in saying that, since the 1950s and 1960s, emphasis has shifted from depth to distance from the coast (200 nautical miles), particularly with recognition of the right of coastal States to claim exclusive economic zones up to 200 nautical miles that include the seabed resources, making a median (equidistant) line a logical starting point in delimitation negotiations between two opposite States.

3.4 Thus, the definition of "continental shelf" in Article 76.1 of UNCLOS reads:

"The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, **or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured** where the outer edge of the continental margin does not extend up to that distance."

3.5 Accepting then the force of the median line approach on which the Opinion is partly (though only partly) based, the Opinion does not do justice to the arguments that can be put the other way in this case. One observation is that UNCLOS in its delimitation clauses relating to States with opposite or adjacent coasts – Article 74 relating to the exclusive economic zones (EEZs) as well as Article 83 relating to the continental shelf – make no specific reference to a median or equidistant line, but simply refer to States entering into an "equitable solution".

3.6 The Opinion does properly note that the judgment in the *North Sea Continental Shelf Cases* ICJ Report 1969 4, with its emphasis on "natural prolongation" and its rejection of equidistant lines, supports the Australian position but it postulates

that the "fairness" of a median line as between opposite coasts overrides prolongation in this case.

3.7 However the development of this theme in the Opinion is open to criticism:

- (a) There is the delightful, though tentative, *non sequitur* in paragraph 10 that Australia's position "was arguably inconsistent with the **geology** of the Timor Trough, because it is similar to other seabed depressions that have not been treated by international law as constituting a break in a continental shelf." The geological and geomorphic discontinuity of the Trough is a matter of fact.
- (b) The point the paragraph is trying to make is that other deep depressions, of a similar or greater depth than the Timor Trough, have been treated as not breaking a single continental shelf. However all the other features referred to are distinctly shallower than the Timor Trough, which has depths of up to 3500 metres. The uniqueness of the Timor Trough was recognised by Judge Sette Camara in the *Libya/Malta Continental Shelf Case* ICJ Reports 1985 13 at 61-2, where he noted in regard to natural boundaries that "the Timor Trough seems to be the only indisputable example of a geomorphological phenomenon governing a line of delimitation". The best one can say about the Opinion on this point (it relies upon *the Libya/Malta Case*) is that the authors seem to have not read the judgment of Judge Sette Camara. At the risk of labouring the point, I add that for example the Tripolitanian Furrow referred to in the Opinion is 600 metres deep, as compared to the Timor Trough's depth of up to 3500 metres.
- (c) No reference is made in the Opinion to the fact that, as recognised by Professor Brownlie in *Principles of International Law* 5ed at 224, the geological structure of the seabed and its geomorphological features are still relevant circumstances or factors to be taken into account in delimiting a continental shelf boundary. Brownlie cites, as well as the *North Sea Continental Shelf Cases*, the *Tunisia/Libya Continental Shelf Case*, which the Opinion cites to a contrary effect.
- (d) As already noted, textually the relevant provisions of UNCLOS (both as regards continental shelf and exclusive economic zone) simply require an "equitable solution". A median or equidistant line is not mandated.

3.8 The Opinion recognises that, in the 1972 Agreement with Australia, Indonesia did accept the Australian position in the Timor Sea, but it asserts that it was also agreed that the Australia-Indonesia boundaries might be adjusted by agreement in the event of "an Agreement between Australia and Portugal on delimitation in the Timor Gap" (para 13). Much has been made of this point. All I can say is that as one who participated in the drawing up of the 1972 Treaty, only a limited adjustment was contemplated. The expectation was that if an adjustment were necessary it would be at some point along the lines defined by A15 - A16 and A17 - A18. The adjustment could be either an extension or contraction of the

particular line. The actual words used in Article 3 of the 1972 Agreement reflect this:

"In the event of any further delimitation agreement or agreements being concluded between governments exercising sovereign rights with respect to the exploration of the seabed and the exploitation of its natural resources in the area of the Timor Sea, the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia shall consult each other with a view to agreeing **on such adjustment or adjustments, if any, as may be necessary in those portions of the boundary lines in between Points A15 and A16 and between Points A17 and A18.**" (Emphasis added).

- 3.9 Finally I note that the fact that, when it was first made and exercised, the Australian continental shelf claim out to 200 metres and beyond had the support of international law as it then stood is more or less acknowledged in the Opinion - see paragraphs 4, 5 and 31 of the Opinion. This makes relevant the controversial doctrine of "intertemporal law", which deals with the situation where territorial rights were properly acquired under the law in force at the time, but the relevant international law subsequently changes (Brownlie, *op. cit.* at 126-8). There are arguments that Australia could and should run if it were to become necessary. One is that, if seabed title was lawfully acquired in 1953 or 1958 and had been effectively exercised when permits were let by Australia (thus Woodside was drilling in Sunrise in 1974), it should be upheld. The rule against retroactive laws may be regarded as a general principle of law. It is at least a matter that could be given weight in deciding what is an "equitable solution".

4 B, C and D – Proposed Alteration of the Eastern and Western Lateral Lines of the JPDA

- 4.1 I have already noted that the Opinion, which bases its case against the prolongation/depth principle on median (equidistant) lines, rejects such lines when it comes to lateral boundaries.
- 4.2 The Opinion says that the western lateral of the JPDA proceeds from the wrong starting point in the land mass of Timor and passes through Point A17 in the 1972 Agreement between Australia and Indonesia, and that the correct path is one based on a line drawn from the thalweg of the Moti Masin (para 38). It is obvious from comments made in paragraph 2.5 above that the Opinion is based on wrong assertions and assumptions in relation to the western lateral. Also the use of the term thalweg is interesting, as this is by definition the deepest part of the river (which may also imply the river is navigable). The rivers of East Timor only flow during the wet season. Unless it was specifically used in colonial descriptions of the land borders, it is not appropriate for the situation between East Timor and Indonesia.

- 4.3 To project a line as in the Admiralty Diagram (which one is left to assume is perpendicular to the coastline at the thalweg of the Moti Masin, as the basis of its direction is not explained in the Opinion) to a distance in the order of 250 km from the coast, without taking into consideration changes in the direction of the coast on both sides of the border between Indonesia and East Timor, highlights the contrived basis on which it has been constructed. This approach totally ignores the impact that changes of direction of both the West Timor and East Timor coasts will have on the location of a properly drawn western lateral line in a final delimitation.
- 4.4 Paragraph 39 of the Opinion also makes incorrect assertions about the eastern line being drawn from a point between the Indonesian island of Leti and East Timor, and connecting with Point A16. This is clearly incorrect. As explained in paragraph 2.6 above, no line drawn from a point between East Timor and Leti connects with A16.
- 4.5 In paragraph 40 the Opinion continues to exhibit a contrived view of the "facts" when it comes to the issue of small islands. In citing the Indonesian Island of Leti as a small island and proposing a discounting of its influence on the location of the eastern lateral, it ignores the fact that the East Timorese island of Jaco which is opposite Leti and has been used in constructing the suggested lateral, is almost nine times smaller than Leti. Also Leti is populated while Jaco is not. The other, larger, islands of the Kepulauan Leti group of islands (Moa and Lakor) are not considered at all. Both have an effect on a median (equidistant) line solution.
- 4.6 Having apparently accepted that the eastern lateral should be drawn from a point between East Timor and the small Indonesian island of Leti, the Opinion makes a case for giving only 1/2 or 3/4 value to Leti. The resulting lateral lines, which are described in the Admiralty Diagram as a version of the "median line" (sic), do not take into account other relevant Indonesian islands). This is said to place most or all of the Greater Sunrise Area within East Timorese jurisdiction (para 42), and it certainly seems to have been contrived to produce that result.
- 4.7 As in the case of the proposed western lateral, this eastern lateral as it extends southward becomes increasingly closer to the coastline of Indonesian features than to any East Timorese coastline. For example the last point on the "1/2 effect" lateral on the Admiralty Diagram is much closer to a large populated Indonesian island Moa than to the small uninhabited East Timor Island (Jaco) that constitutes the nearest East Timor Island. The properly drawn median line laterals in Attachment 2 show the extent of the discrepancy.
- 4.8 This analysis also confirms that Indonesia would be a necessary party to any alterations of the lateral boundaries. As indicated above (paragraph 2.8) Indonesia would presumably be very reluctant to contemplate any island making up its archipelagic maritime jurisdiction being given less than full value, unless there was a significant trade-off for it in doing so. This is reinforced by the further consideration that it would be asking Indonesia to hand over to East Timor any claims it might entertain over the parts of Greater Sunrise.

- 4.9 There is a further problem deriving from the thrust of the Opinion on this point, namely that it could weaken East Timor's position in having full value given to the small East Timor island of Atauro north of East Timor in any delimitation in that area between Indonesia and East Timor.

5 E – Suggested Abandonment of Claims by East Timor to Seabed Delimitation beyond the JPDA if it Ratifies the Timor Sea Treaty (para 49)

- 5.1 This suggestion involves a substantial reading down of Article 2(b) of the Timor Sea Treaty, which is quoted above but is worth repeating:

"Nothing contained in this Treaty and no acts taking place while this Treaty is in force shall be interpreted as prejudicing or affecting Australia's or East Timor's position on or rights relating to a seabed delimitation or their respective seabed entitlements."

- 5.2 The words used are unqualified. If indeed it had been intended to limit the provision to the JPDA area, that needed to be specified. In my view the provision would not be read, and could not be read, as excluding any claim East Timor might make on permanent delimitation. This conclusion is confirmed by the general rule of treaty interpretation in Article 31 of the Vienna Convention on the Law of Treaties, giving primacy to the ordinary meaning of the words used.

6 F – Unitisation of Greater Sunrise Could Continue even if Seabed Boundaries were Changed under a future Delimitation (paragraph 50)

- 6.1 This is a real possibility, once a unitisation agreement is agreed to. As stated in the Opinion such an agreement could survive (as against East Timor) in the event that the seabed boundaries were changed later in East Timor's favour.

7 G – Question of the Jurisdiction of the International Court of Justice (paragraphs 58, 59 and 61)

- 7.1 The Opinion appears to me to be wrong in categorising the 1975 submission by Australia to the International Court as one which is silent as to the manner in which it may be terminated. The submission expressly stated that it may be terminated by giving notice, and this has been done. Brownlie states (op. cit. at 723):

"While a power of termination immediately on notice weakens the system of compulsory jurisdiction, it would seem to be compatible with the Statute of the Court."

- 7.2 Also, the Opinion itself has identified another possible difficulty, namely that at the time of the withdrawal of submission by Australia to maritime delimitation disputes, East Timor had not itself accepted the jurisdiction of the Court.
- 7.3 Summing up, the prospects of East Timor on this point would be distinctly bleak. I note also that Australia's withdrawal of its maritime boundaries from the jurisdiction of the Court places it in the same position as that of the other Timor Sea countries (East Timor and Indonesia), namely that delimitation of boundaries has to be agreed to by the countries concerned.



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17 September 2002

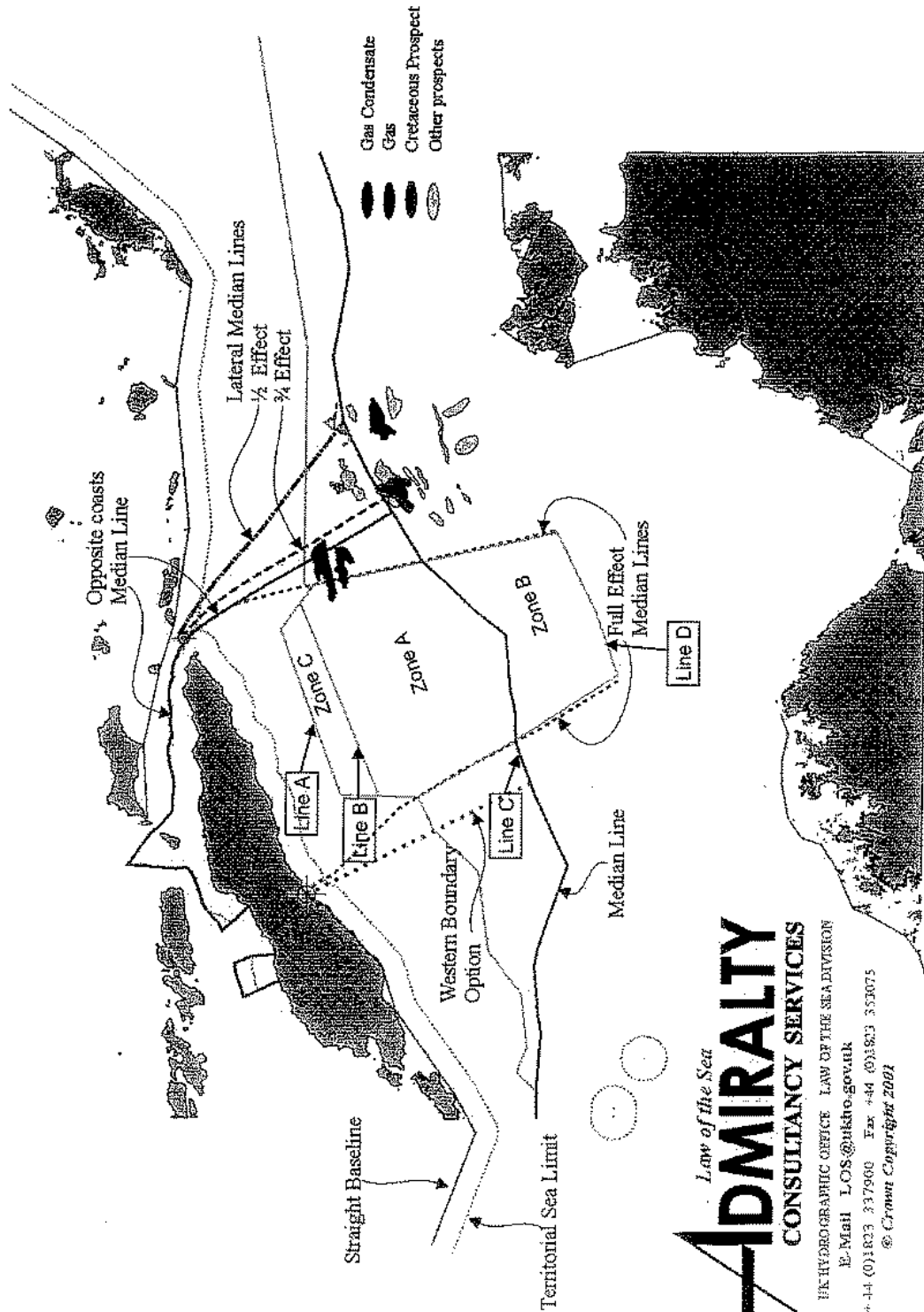
LIST OF ATTACHMENTS

1. **Admiralty Diagram appended to Lowe Opinion**
2. **Diagram entitled "Timor Sea – Overview"**
3. **Diagram entitled "A16 – Australia/Indonesia Agreed Seabed Boundary - Detail"**
4. **Diagram entitled "A17 – Australia/Indonesia Agreed Seabed Boundary - Detail"**
5. **Diagram of Zone of Cooperation**

to LOWE OPINION

APPENDIX

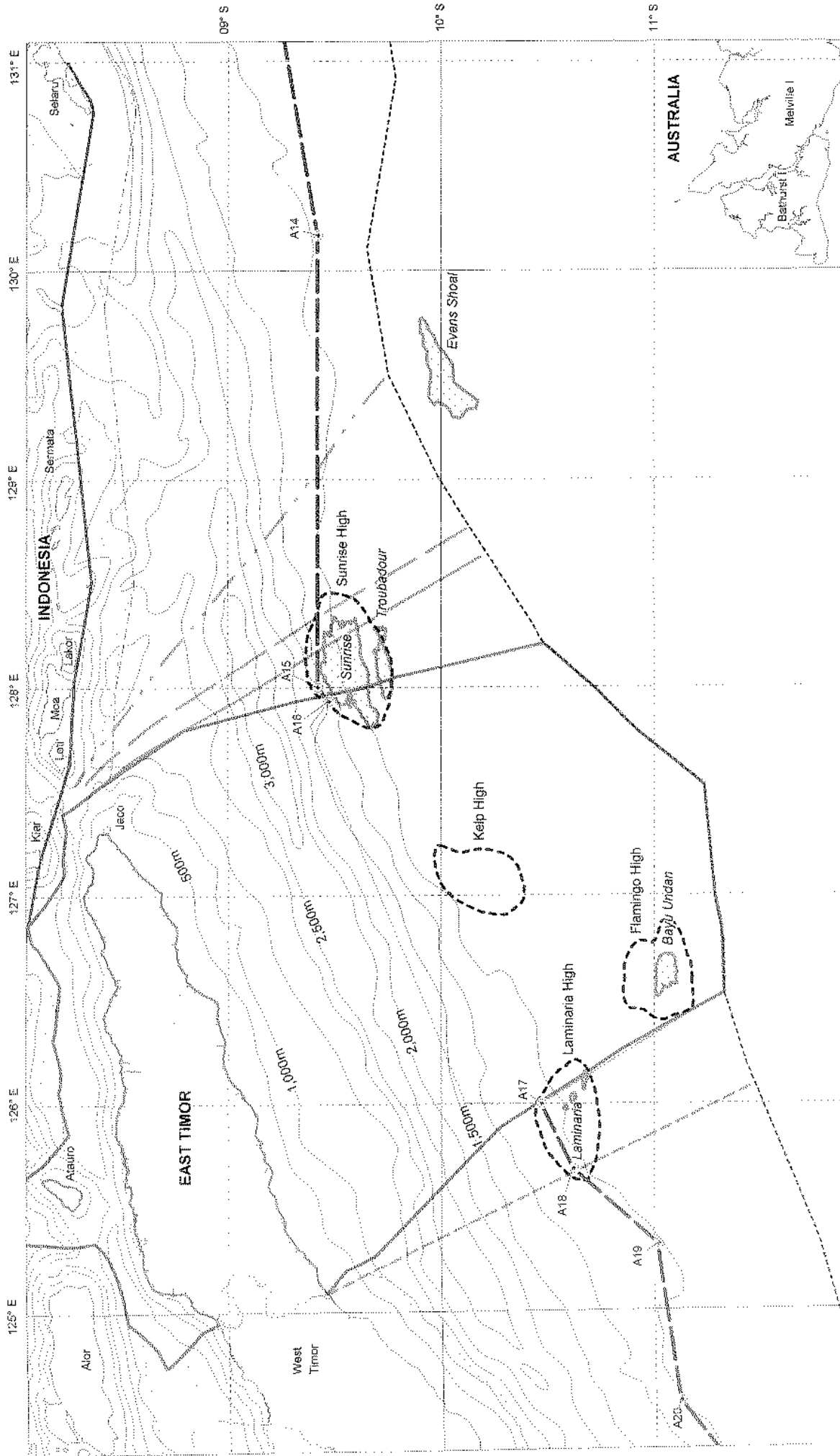
(See Paragraph 15 above)



Law of the Sea
ADMIRALTY
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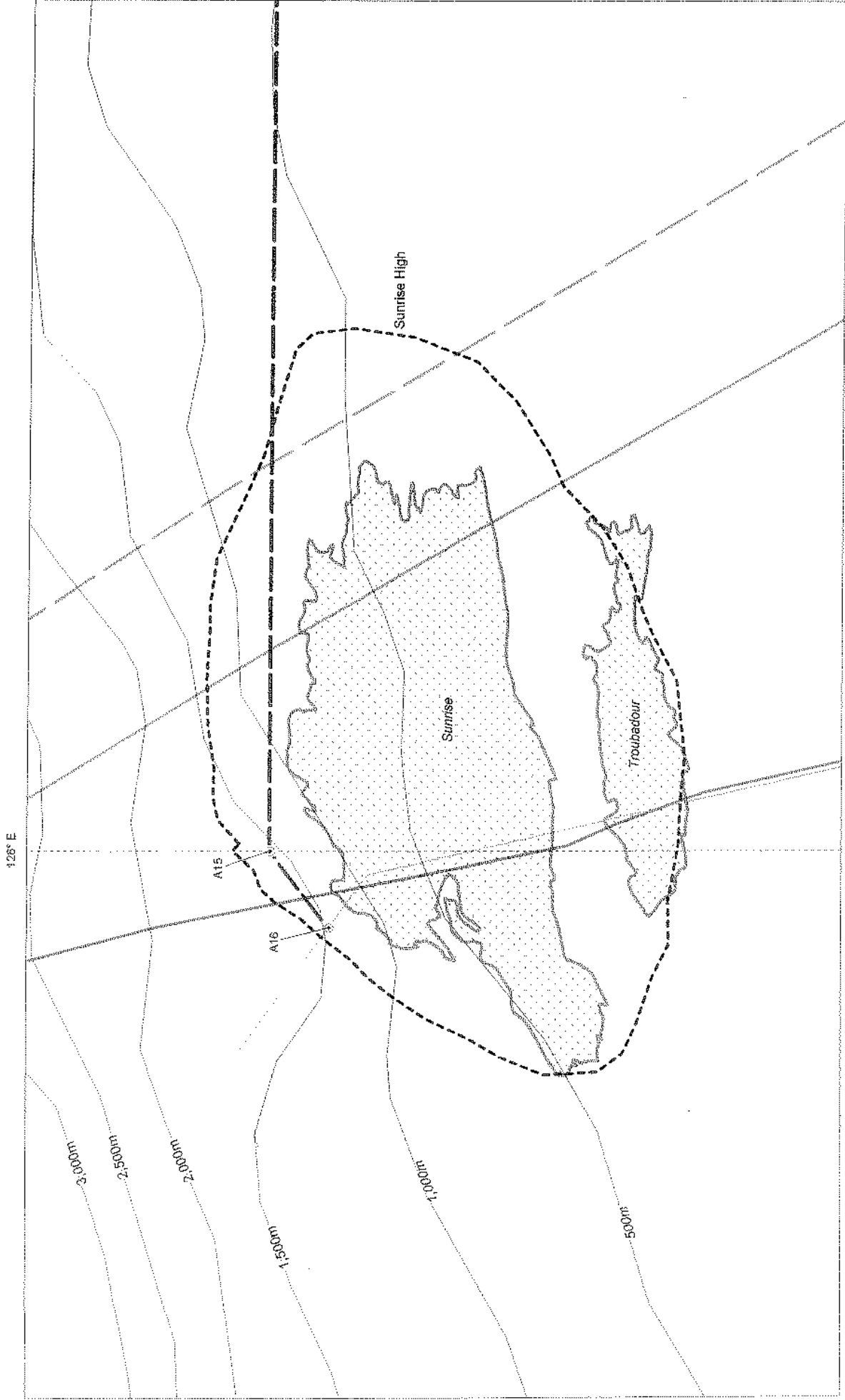
TIMOR SEA - OVERVIEW



LEGEND

- Indonesia Archipelagic Baselines
- Agreed Seabed Boundary (Aust & Indon)
- Australia Exclusive Economic Zone
- East Timor Median Line (all features equal weight)
- Low Opinion (half effect)
- Low Opinion (three-quarters effect)
- Low Opinion (opposite coasts median line)
- Low Opinion (western boundary option)
- Joint Petroleum Development Area
- Indonesia Territorial Sea (archipelagic baseline)
- Indonesia Territorial Sea (normal baseline)

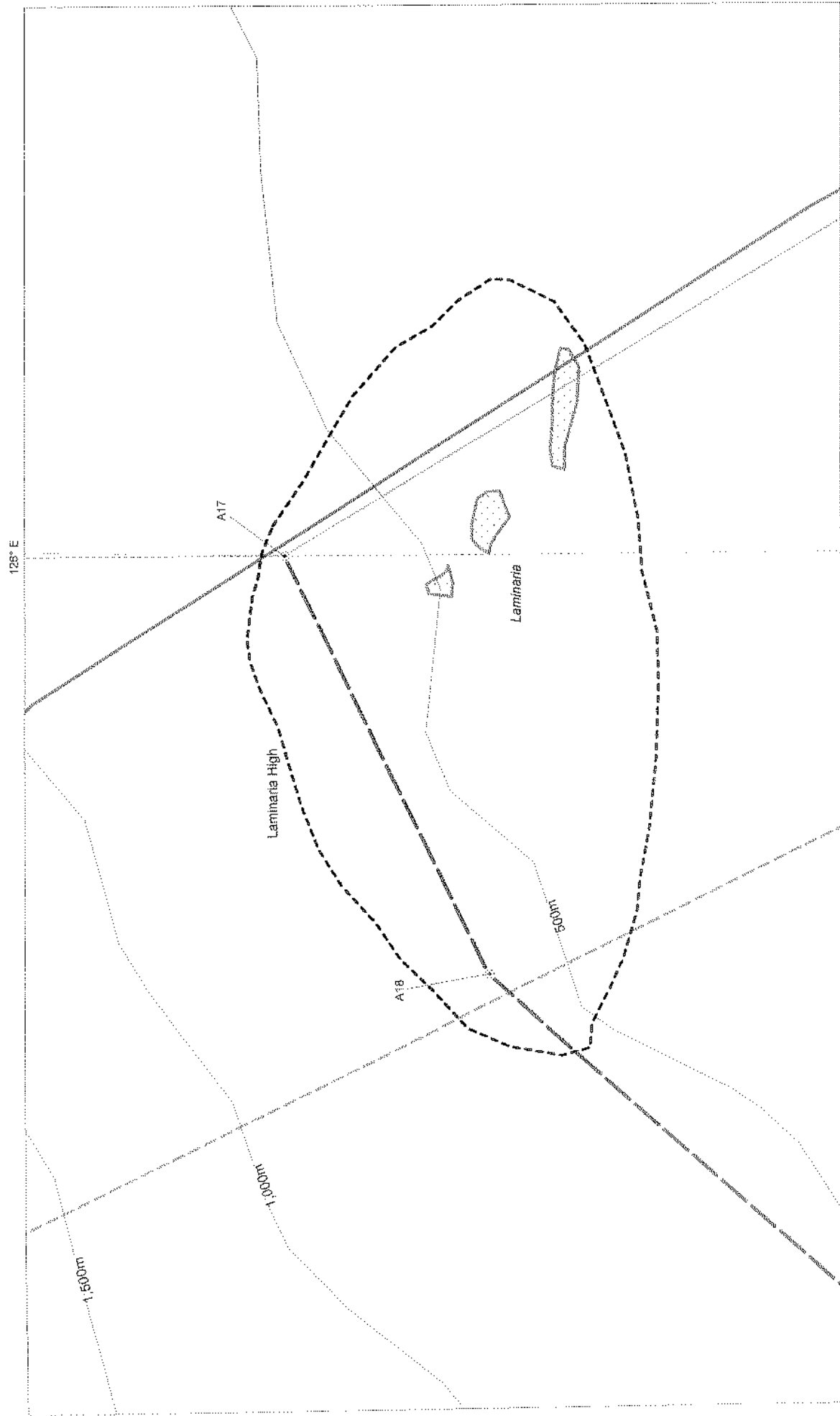
A16 - AUSTRALIA/INDONESIA AGREED SEABED BOUNDARY - DETAIL





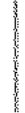
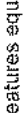
LEGEND

- Joint Petroleum Development Area
- East Timor Median Line (all features equal weight)
- Agreed Seabed Boundary (Aust & Indon)
- Low Opinion (three-quarters effect)
- Low Opinion (half effect)
- Low Opinion (opposite coasts median line)

A17 - AUSTRALIA/INDONESIA AGREED SEABED BOUNDARY - DETAIL



LEGEND

-  Joint Petroleum Development Area
-  East Timor Median Line (all features equal weight)
-  Agreed Seabed Boundary (Aust & Indon)
-  Lowe Opinion (western boundary option)

ZONE OF COOPERATION

