



The Historic 2018 Maritime Boundary Treaty between Timor-Leste and Australia

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Abstract

The historic 2018 Maritime Boundary Treaty between Timor-Leste and Australia was the result of a new and unique conciliation process established under the United Nations Convention on the Law of the Sea (UNCLOS). It demarcated for the first time maritime boundaries between the two nations and increased the revenue sharing ratio of the gas reserves in favour of Timor-Leste. The speedy and efficient UNCLOS conciliation process promises to become a role model for the settlement of other maritime claims and sovereignty issues.

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Analysis

On March 6, 2018, the Foreign Ministers of Australia and Timor-Leste signed a landmark maritime boundaries treaty at the United Nations in New York after a record time of less than two years of negotiations. This Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea was the result of a recent conciliation proceeding under the United Nations Convention on the Law of the Sea that could potentially serve as a worldwide model for other similar disputes.

To understand the unique achievement of this conciliation process, one needs to trace back Timor-Leste's history and the history of the longstanding maritime disputes and treaties in that region (1). I will also analyse the results of the conciliation process (2), the nature of the proceedings (3), and lessons that can be learnt for the resolution of similar disputes (4).

History

Timor-Leste, previously also known as Portuguese Timor and later East Timor, has been a Portuguese colony since the 1600s and became also known as Portuguese Timor. In a 1859 treaty with the Dutch, Portugal formally ceded the western half of Timor island to the Dutch. The Japanese occupied the whole island of Timor during World War II. After Indonesia's proclamation of independence in 1945, Dutch Timor became part of the Indonesian East Nusa Tenggara province; East Timor remained under Portuguese rule. In November 1975 East Timor declared itself independent from Portugal. A few days later, Indonesia invaded East Timor and declared it a province of Indonesia. After 24 years of armed struggle against Indonesia, the majority of East Timoreans in 1999 voted for independence in a UN-supervised referendum. It became independent and was internationally recognized on May 20, 2002 as the Democratic Republic of Timor-Leste.

Even though the Australian government under Prime Minister John Howard early on supported East Timor's independence aspirations, relations between the new nation and Australia remained strained because of long-standing disputes over maritime boundaries. The oil and gas fields in the so-called Timor Gap are estimated to be worth roughly \$ US 65 billion. The Timor Gap had always posed a problem because of its geological complexity and overlapping seabed claims by both Australia and Indonesia.

In 1971 and 1972 Indonesia and Australia had concluded two maritime boundary treaties, which gave Australia considerable advantages in the delineation of the boundaries. There was the 1971 Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain Seabed Boundaries. It was followed by the 1972 Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura seas, supplementary to the Agreement of 18 May 1971.¹ They were based on the "natural prolongation" of the continental shelf thus drawing the boundaries north of the median lines between the shores of Australia and Indonesia.

Portugal as the then colonial power in East Timor was not part of the negotiations. The ambiguity regarding the East Timor maritime boundaries continued. The 1989 Australian-Indonesian "Timor Gap Treaty" dealt with the joint exploration of the oil resources without addressing the respective territorial claims. The treaty, however, became invalid after East Timor's independence from Indonesia. On the day of Timor-Leste's

¹ Anais Kedgley Laidlaw and Hao Duy Phan, Interstate Compulsory Conciliation Procedures and the Maritime Boundary Dispute between Timor-Leste and Australia, 2018, working paper



independence in 2002, the government of the new nation signed the Timor Sea Treaty with Australia. It came into effect in 2003 and established the Joint Petroleum Development Area (JPDA). The treaty outlined the joint exploration of oil and gas resources in the area previously called Timor Gap and divided the revenues in favour of Australia (80%-20%).

The “Treaty on Certain Maritime Arrangements in the Timor Sea” (CMATS) came into force in 2007. The terms for the Joint Petroleum Development Area (JPDA) established under the previous Timor Sea Treaty were similar. But CMATS also demarcated the so called Greater Sunrise gas fields (also known as Sunrise and Troubadour fields, located 150 km southeast of Timor-Leste and 450 km northwest of Darwin, Australia) in a way more favourable to Australia. However, CMATS granted Timor-Leste a higher share of the estimated potential revenues of US \$65 billion (50% instead of 20% under the Timor Sea Treaty). CMATS, again, offered no solutions on the maritime boundaries and on how these fields should be developed; two major shortcomings. In fact a 50-year moratorium was imposed on maritime boundary delineation (Strating). Australia has always claimed that its maritime boundary goes as far as its continental shelf, which far surpasses the equidistant line between the two countries. Timor-Leste, however, has been pushing for a maritime border at the median line between the countries. That would have placed the whole Greater Sunrise fields into Timorese waters and jurisdiction.

The prevailing political sentiment within Timor-Leste was that CMATS was an unfair deal and impeded the economic development of the young nation. The main Timorese political parties were convinced that the Greater Sunrise field belonged exclusively to Timor-Leste. The dispute turned into an issue of sovereignty. Timor-Leste argued that the border should sit halfway between Timor-Leste and Australia, which would place most of the Greater Sunrise field in Timor-Leste’s territory. Moreover, the government was (and still is) under time pressure as the Bayu Undan gas field within the JPDA, Timor-Leste’s main source of income since 2004, is expected to run out of gas by 2022. In fact, more than 90 % of Timor-Leste’s budget is derived from oil income from the Bayu Undan field. Revelations about Australia’s alleged bugging of the Timor-Leste government offices in Dili in 2004 in order to gain a negotiation advantage caused political outrage in Timor-Leste. In 2013 Timor-Leste started arbitral proceedings against Australia under the Timor Sea Treaty, which were administered at the International Court of Arbitration to nullify CMATS. One of the grounds was Australia’s alleged 2004 spying operation on Timor-Leste’s negotiators. Timor-Leste terminated the CMATS treaty unilaterally in January 2016.²

It was in this political and historical context that Timor-Leste unexpectedly announced in April 2016 that it was initiating compulsory conciliation proceedings against Australia by invoking Annex V of the 1982 United Nations Convention of the Law of the Sea, UNCLOS. After all these decades of dispute, Timor-Leste wanted its maritime boundaries to be finally and firmly determined. And this was the only avenue open to it. Shortly before Timor-Leste’s independence, Australia had in 2002 declared the exclusion of any UNCLOS arbitral and judicial proceedings concerning its exclusive economic zone and the continental shelf boundaries.³ Conciliation proceedings, however, are compulsory for UNCLOS member countries. As a signatory to UNCLOS, Australia had no choice but to submit to the procedure despite its immediate protestations. It thereby ended its self-proclaimed moratorium on maritime boundaries dispute resolution. Australia also unsuccessfully challenged the competence of the five-member UNCLOS Conciliation Commission (UNCC). In the end Australia, like Timor-

² Rebecca Strating, What’s behind Timor-Leste’s terminating its maritime treaty with Australia?, *The Conversation*, 10.1. 2017

³ Prof. Tommy Koh, Maritime Boundary Conciliation between Timor-Leste and Australia: A Success Story, *News*, Tembusu College, National University of Singapore, 19.9. 2017



Leste before named its own two members for the Commission. These four members then appointed the Chair. During the proceedings, the mandate of the Commission was extended to also include facilitation of an agreement on the development of the Greater Sunrise fields. This meant that the bilateral negotiations had to be broadened to also include the consortium partners of the Greater Sunrise fields, headed by Australian company Woodside (other partners: Conoco Phillips, Shell, Osaka Gas).

Despite the fact that these proceedings were in unchartered territory, the process was fast and efficient.⁴ After only one year, the major boundary issues could be resolved because the two countries accepted a UNCC package deal on the most important points. On that basis, the Australian and Timor-Leste Foreign Ministers, witnessed by the UN Secretary General, signed a bilateral treaty in New York on 9 March 2018. It established maritime boundaries in the Timor Sea and envisaged the development of the Greater Sunrise fields with its estimated 5 trillion cubic feet of gas.

The UNCC came out with its final report with conclusions and recommendations in May 2018.

I am going to analyze the results of the conciliation process, the nature of the proceedings, and lessons that can be learnt for the resolution of similar disputes.

What was the outcome of the compulsory nonbinding conciliation?

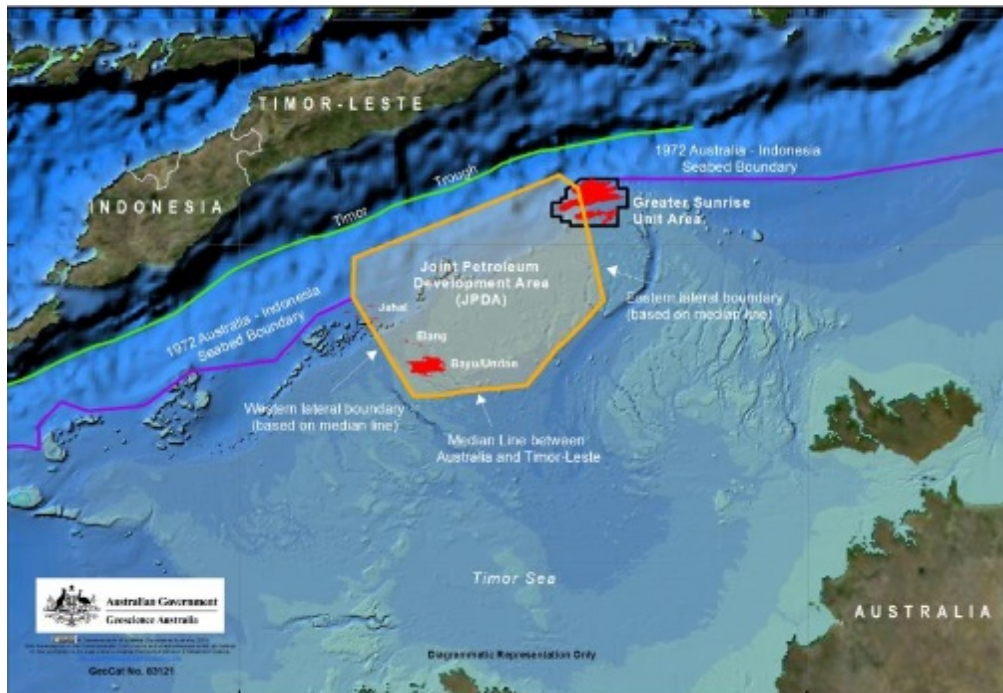
- Both parties agreed on permanent and final maritime boundaries, thus achieving the main aim of the conciliation.⁵

One of the difficulties, which had to be taken into account, had been the previous boundary treaties between Australia and Indonesia. The new 2018 treaty drew a median line between Australia and Timor-Leste with two connecting lateral lines, which run north of the old 1972 Australian-Indonesian continental shelf boundary. "While Australia initially preferred a simplified, strict equidistance line, Timor-Leste advocated a modified equidistance line. Both parties ultimately agreed on modified equidistance lines for both lateral lines, which included a unique "dog leg" configuration for the eastern lateral boundaries"⁶. This configuration placed 70 % of the Greater Sunrise field in Timor-Leste's maritime territory.

⁴ Anais Kedgley Laidlaw and Hao Duy Phan, Interstate Compulsory Conciliation Procedures and the Maritime Boundary Dispute between Timor-Leste and Australia, 2018, working paper, which provides an excellent analysis of the origin and the nature of the UNCLOS conciliation procedure

⁵ Treaty between Australia and the Democratic Republic of Timor-Leste establishing their maritime boundaries in the Timor Sea, Article 2: Continental Shelf Boundary

⁶ Bec Strating and Clive Schofield, A new path to dispute settlement. Lowy Institute, The Interpreter, 12.6. 2018



- The Treaty also included an upstream revenue sharing agreement depending on where the gas pipeline would end. Timor-Leste will receive 70% in the event that the gas is being piped to an LNG plant in Timor-Leste with Australia receiving 30%. Timor-Leste would receive 80% of the revenues in the event of the oil and gas being piped to and processed in Australia with Australia receiving 20%.
- The Treaty addressed the question of the commercial development of the Sunrise gas fields: In article 7.1, the two parties establish the Greater Sunrise Special Regime whereby they jointly exercise their rights as coastal states. “The objective of the Greater Sunrise Special Regime is the joint development, exploitation and management of Petroleum in the Greater Sunrise Fields for the benefit of both Parties.” Woodside, the main consortium partner states on its website: “We look forward to an agreement that allows for the earliest commercialization of the Greater Sunrise fields, which promises great benefits for all parties.”
- Timor-Leste’s negotiators had made clear that they favoured the development of a pipeline and an onshore facility in Timor-Leste to help develop the country’s industrialization and create urgently needed employment. Australia maintained that it was neutral but seemed to have favoured the processing of gas in its Darwin LNG plan. Timor-Leste was barred from claiming compensation from Australia for previous oil and gas revenues Australia had gained in the Timor-Leste territory.

The main achievement of the UNCLOS assisted process was the Treaty between Australia and Timor-Leste establishing for the first time their maritime boundaries in the Timor Sea. The treaty also finalized a new upstream revenue sharing agreement. The treaty did not contain details on the development of the Greater Sunrise.



However, in February 2018 the Commission sent the parties three documents on the development the Greater Sunrise fields.

So far, there has been no agreement among the different parties on those recommendations. There are a number of reasons for this delay. For domestic political and economic reasons, Timor-Leste always insisted on a pipeline and a LNG processing plant on its soil - in spite of the extremely high investment needed. The Tase Mane project of the Timor-Leste government envisaged already in 2013 that the south coast of Timor-Leste should become a sub-regional centre for the oil and gas industry. The four Consortium partner firms are still in the process of weighing the economic viabilities of a pipeline leading to either Timor-Leste or to the existing LNG plant in Darwin, Australia. They have made it rather clear that they found the Timor-Leste option economically not viable and too risky. The oversupply of gas on the world market might be the reason for the present stalemate among the various parties.

What was special about the UNCLOS conciliation proceedings?

- Under UNCLOS both parties had to submit to the conciliation process, as it was compulsory for both of them. But the UNCC's final recommendations are nonbinding. The parties are, however, required to consider the recommendations "in good faith".
- A clear and short timeline of only 12 months had been imposed on the proceedings which helped to focus and speed up the discussions. Later this timeline for the commission was extended to help the parties in their discussions on the development of Greater Sunrise.
- After an initial reluctance on the part of Australia, both parties were eager to find solutions and participated in the process in a constructive way.
- The choice of the five members of the UN Commission (conciliators) was excellent as all of them were highly renowned and experienced international experts who stayed neutral throughout the process.
- The Commission held 13 rounds of meetings with the parties, met them separately and visited Timor-Leste and Australia. "The Commission was also skillful in its proposal of confidence-building measures at the initial stage of conciliation, which helped create an environment conducive to negotiation and to the conclusion of the settlement agreement."⁷
- The mechanism of the conciliation process gave each side the possibility to save face and enough space to find viable solutions, which protected their respective national interests. It has been providing the parties with opportunities "for innovative options to be discussed."⁸

What lessons could be learnt for similar disputes?

- The neutrality and the quality of the appointed Commission members is vital to the outcome of any conciliation process.

⁷ Anais Kedgley Laidlaw and Hao Duy Phan, *Interstate Compulsory Conciliation Procedures and the Maritime Boundary Dispute between Timor-Leste and Australia*, 2018

⁸ Rebecca Strating and Clive Schofield, *A new path to dispute settlement*. Lowy Institute, *The Interpreter*, 12.6. 2018



- The success of these “assisted negotiations” under Article V of UNCLOS will depend on the willingness of the parties to consider new approaches to old problems. (the dog leg configuration of the eastern lateral lines).
- Another factor is the capacity of one or both parties to make compromises and to give up core demands or parts of them without losing political face.
- Political timing is essential. In the case of the Australia and Timor-Leste Treaty, Australia seemed to have realized that it needed to appear as a fair party which acknowledges the Timor-Leste claim to sovereignty, especially in view of Australia’s position on the 2016 South China Sea ruling. Australia has been among the most fervent opponents of China’s territorial claims in the South China Sea. Australia’s recent White Paper states: “We encourage China to exercise its power in a way that ... reinforces international law and respects the interests of smaller countries...” In this international context it was important for Australia to set an example. Australia wanted to be seen to be a good international citizen by adhering to international rules-based order and respecting territorial claims of a smaller neighbouring country.
- If high stake commercial interests of private companies are involved, the prospects for a clear-cut outcome become less likely. The Commission had spelt out the various possibilities for the economic development of the gas field. However, uncertainties about the type of development of the Greater Sunrise fields and the financial investments needed continue. The Timor-Leste government urgently needs an early decision by the consortium partners about an onshore LNG plant as its domestic political stakes are strongly bound to such a venture. The venture partners are shying away from this major investment, for now at least.

Conclusion

The 2018 Maritime Boundary Treaty between Timor-Leste and Australia was the result of a unique conciliation process established under the United Nations Convention on the Law of the Sea. It demarcated for the first time maritime boundaries between the two nations and increased the revenue sharing ratio of the gas reserves in favour of Timor-Leste. It will probably take many years for the development of the gas field and for the gas to be extracted and processed. However, the treaty was an important symbolic step and a political victory for Timor-Leste. Because of these achievements, the speedy and efficient UNCLOS conciliation proceeding promises to become a role model for the settlement of other maritime disputes and sovereignty issues.

Remarks: Opinions expressed in this contribution are those of the author.



About the Author of this Issue

Dr. Anne-Marie Schleich has been a German diplomat since 1979. Most recently, she was the German Ambassador to New Zealand and seven Pacific Island States from 2012 to 2016. She was the German Consul-General in Melbourne, Australia from 2008 to 2012.

Dr. Schleich has also served in Singapore, Bangkok, Islamabad and London. From 1998 to 2001 she was the Deputy Head of the Asia Pacific, Africa and Latin America Department, Foreign Affairs Directorate, Office of the German Chancellor, Berlin. In 2001 she was appointed Head of the Department for International Environmental Policies at the German Foreign Office.

She studied Political Science under a Fulbright scholarship from 1972 to 1973 at Mount Holyoke College, Massachusetts. She was later a Research Fellow in Political Science at Harvard University and the University of North Carolina. Dr. Schleich holds a Ph.D. in Political Science from the University of Mannheim.

She retired in 2016 and now lives in Singapore.



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