

# Timor Sea dispute: Timor-Leste is running out of time

Bec Strating



11 October 2016 11:35AM

Earlier this year, Timor-Leste initiated United Nations Compulsory Conciliation (UNCC) proceedings under the United Nations Convention on the Law of the Sea (UNCLOS) to assist in resolving its maritime boundary dispute with Australia. While Australia disputed the jurisdiction of the UNCC, the Conciliation Commission issued a decision last month that it was competent to continue with conciliation proceedings.

This decision was met with commentary that presented this as a win for 'David' (Timor-Leste) against 'Goliath' (Australia).



However, it's not clear that the Conciliation process will help resolve the Timor Sea dispute, as it does not circumvent Timor-Leste's key problem: Australia's exclusion of binding compulsory dispute resolution procedures. Looking ahead, it is important to consider the contribution that the UNCC might make to possible avenues for dispute resolution.

## The UN Conciliation Commission

Many reports in the Australian media tended to conflate the UNCC with the now relatively famous Permanent Court of Arbitration (PCA) (see here, here and here). With the agreement of both parties, the PCA acts as a Registry in the UNCC. However, the UNCC itself is not a court or an arbitral tribunal, a distinction which matters for its prospective role in dispute resolution.

Article 287 of UNCLOS specifies the courts or tribunals that can settle disputes through a binding decision: the International Tribunal for the Law of the Sea (ITLOS); the International Court of Justice (ICJ); or an arbitral tribunal or special arbitral tribunal constituted under UNCLOS. In 2002, Australia excluded compulsory procedures entailing binding decisions in relation to maritime zones, which is permitted under UNCLOS. Consequently, the international courts and tribunals listed in Article 287 do not have jurisdiction to hear seabed boundary delimitation disputes involving Australia.

The UNCC was established under UNCLOS to assist states to reach an amicable settlement of relevant disputes. A Commission of five conciliators will produce a report (due in September 2017) for Australia and Timor-Leste to assist bilateral negotiations. Under UNCLOS, states are obliged to participate in compulsory dispute resolution procedures if parties have failed to reach agreement through peaceful means (for example, bilateral negotiations).

Unlike the decision of courts or tribunals, the UNCC report will not be binding on either party. Future meetings of the UNCC will be conducted

confidentially and most likely not at The Hague. In the short-term, the Timorese government might find it difficult to keep the UNCC on the Australian media agenda.

Under UNCLOS, there is an obligation for Australia to negotiate with Timor-Leste in 'good faith' on maritime boundaries. The UNCC proceedings will compel the Australian government to reverse its current refusal to discuss boundaries with Timor-Leste. However, while Australia has an obligation to negotiate and pursue those negotiations as far as possible, it does not have an obligation to reach an agreement based on the report.

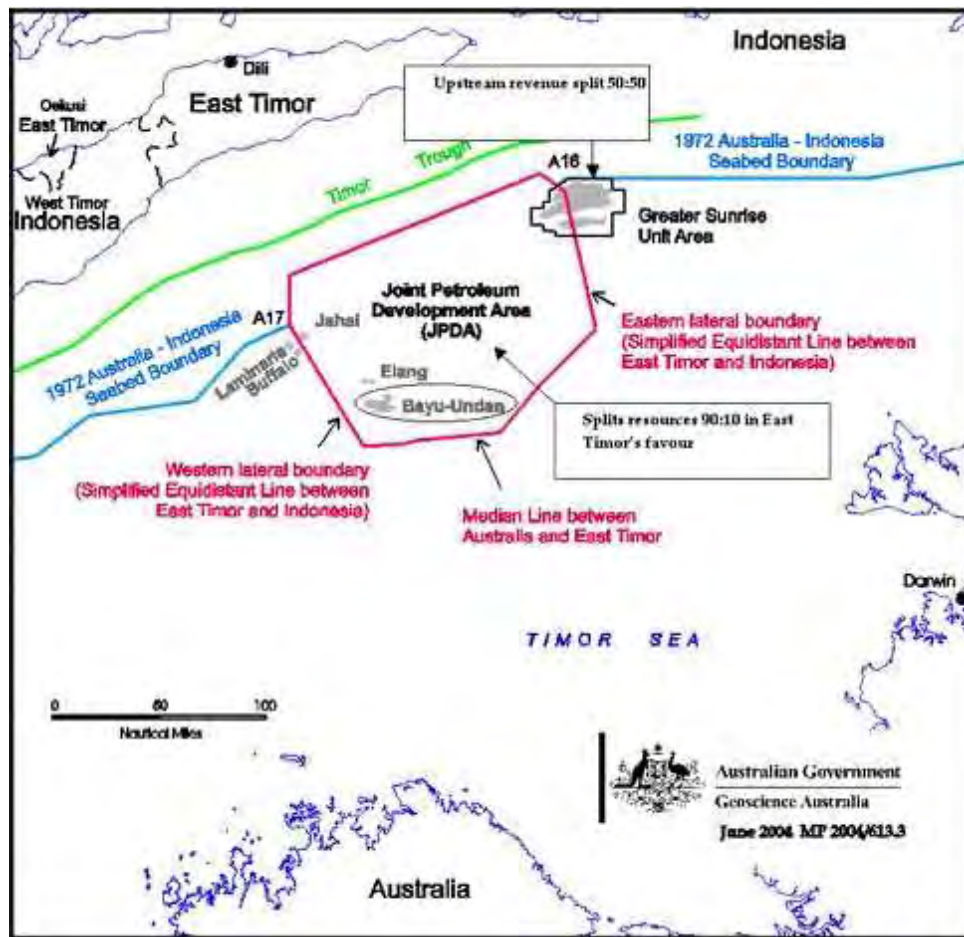
## Pathways to dispute resolution

As the Timor Sea conciliation process is unprecedented, it is difficult to precisely anticipate how it will function. However, we know that the fundamental purpose of UNCC is to conciliate, not arbitrate. It must assist state parties to find a pathway through maritime disputes in order to achieve a negotiated settlement. Arguably, then, the UNCC is obliged to find a 'middle-ground solution' that will best support dispute resolution, making it likely that the report will aim to get both states to compromise.

Inevitably, the dispute will return back to the realm of bilateral diplomacy. The question is whether either state is likely to compromise in the next round of negotiations.

Australia and Timor-Leste are engaged in a dispute that entails different perspectives on points of maritime law. Since 2012, Timorese governments have reinvigorated demands for permanent maritime boundaries. Its public diplomacy campaign has co-opted civil society narratives that boundaries are fundamental for 'full sovereignty'. If permanent boundaries are the goal of the Timorese government, then presumably it would be willing to compromise its territorial claims in order to reach a boundary settlement with Australia.

On the maritime boundary between Australia and Timor-Leste, Australia favours principles of 'natural prolongation', which provides it seabed territory that extends to the edge of a geomorphic continental shelf (to the Timor Trough, see map). In contrast, Timor-Leste favours a 'median' line, which is supported by post-UNCLOS jurisprudence.



Source: DFAT

Hypothetically, the conciliation might recommend that the states take the median line as the basis for its negotiation. In this case, the UNCC report could advance public pressure on Australia, contributing to Timor-Leste's public diplomacy campaign.

But, crucially, the negotiation process would not end there.

Timor-Leste's shift towards permanent maritime boundaries has been motivated by the pursuit of the lucrative Greater Sunrise gas field, in order to build an export pipeline to support the onshore processing plans that are already underway. The Treaty of Certain Maritime Arrangements in the Timor

Sea (CMATS), signed and ratified by Australia and Timor-Leste, was designed to oversee the joint development of the disputed Sunrise field. Timor-Leste now considers this treaty invalid. The contested line that determines Sunrise ownership is the eastern lateral (see map).

Australia justifies its claim to roughly 80% of the field on the basis of 'simple equidistance'. In contrast, Timor-Leste's Sunrise ownership claim is based on a belief that the eastern lateral should be drawn further to the east.

Problematically, UNCLOS provides few substantive rules in seabed boundary delimitation beyond an agreement that provides an 'equitable solution'.

If the report recommends that Sunrise be split 50:50, the real question is whether the Timorese government would be willing to compromise half the field. It runs the risk of domestic political backlash if it gives up half of what has been presented as a sovereign entitlement. Its ambitious economic plans are even less viable if it only attains half of Sunrise.

The problem with the Timorese government's foreign policy strategy is that Timor-Leste is running out of time, and Australia knows it. The Bayu-Undan oil field will stop producing in 2022 and the \$16 billion sovereign wealth fund could be depleted by 2025. From 2010 to 2015, the revenues that flowed from the Joint Petroleum Development Area furnished approximately 90% of Timor-Leste's state budget, and 70% of total GDP.

Timor-Leste's bargaining vulnerabilities means it is likely that Australia will prolong boundary negotiations for as long as possible. There is no precedent for what happens if negotiations fail again. Article 298 of UNCLOS suggests that if the negotiations do not result in an agreement, the parties 'by mutual consent' would submit to the ICJ, ITLOS or a tribunal. But the key here is 'mutual consent': that sovereign states cannot be brought before an international court without its consent is a key principle of international law.

Ultimately, the UNCC does not circumvent Australia's exclusion. Even if Australia did consent, a court could arguably not rule without the involvement of Indonesia. A resolution could take years.

In terms of functional sovereignty, Timor-Leste risks becoming a failed state if a development agreement is not reached soon.

*Photo: Getty Images/Barcroft Media*