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Australia should meet East Timor halfway on maritime boundary

- [Paul Cleary](#)

Senior writer Sydney [@pgcleary](#)

When Australian commandos landed in the colony of Portuguese Timor in 1941, they immediately noticed that the gum trees, rocks and ochre-coloured earth were strikingly similar to home.

As novelist Nevil Shute observed after the war, the commandos found that much of the Timor landscape consisted of “stony hills covered in thin forest scrub, not unlike many of the outback districts in Australia”. He added: “The men were fighting in a type of country that they understood and were accustomed to.”

There’s a very simple reason why these men, many of them recruited from the outback of Western Australia, felt right at home in Timor even though the topography was rugged rather than flat: the island is part of Australia’s continental shelf.

This fact was first confirmed scientifically in the 1960s when Australian geologist Michael Audley-Charles spent 28 months collecting samples in Timor and then did a further three years of laboratory work, culminating in his book *The Geology of Portuguese Timor*. He found that many of the fossils in the rocks were the same as those found in the Carnarvon Basin in Western Australia. Since then, seismic surveys have shown that Timor is part of the Australian continental shelf.

Despite this evidence, successive Australian governments have asserted that the Australian continental shelf ends about 100km south of Timor, where water depths in the Timor Sea plunge to about 2800m, creating a long trench. As a result, they say the maritime boundary between the two countries should be influenced by the Australian continental shelf, giving Australia about two-thirds of the maritime area.

But Australia's dogged defence of this trench during the past 45 years seems to be unravelling as a result of East Timor's David-and-Goliath-style assault through the Permanent Court of Arbitration in The Hague.

This week, East Timor secured the right to proceed with compulsory conciliation over Australia's refusal to negotiate a maritime boundary in the Timor Sea based on the median line principle.

This week's win also allows East Timor to terminate a 2006 treaty after it demonstrated that Australia had engaged in espionage during the negotiations. It's the third straight win for East Timor since it initiated this action three years ago, leaving Australia looking bloodied and bruised in legal terms.

In taking this action, tiny and poor East Timor is taking an extraordinary gamble. It could end up worse off, but so far the gamble is paying off.

How different things might have been had Australia taken the approach of Britain in the North Sea. When faced with similar geography, Britain reached an agreement with Norway in record time and the results have been spectacular. In both the North Sea and the Timor Sea, the 200-nautical-mile claims of the two sets of countries overlap, which indicates that a median line should be the outcome. And in both cases there is a trench in the seabed near the smaller party.

Norwegian negotiators were expecting the British to push for a boundary influenced by the depression, but Britain's opening position was the median line. Why? Britain wanted to get on with developing the North Sea resources and avoid protracted negotiations. It was successful.

In Australia, foreign affairs officials have pushed Australia's claim to a continental shelf since the early 1970s. Australian official Keith Brennan told the Portuguese ambassador in 1971 that there was no need to negotiate a boundary in the Timor Sea because "nature has already done this for us". In other words, the boundary should follow the Timor Trough. Portugal didn't buy the argument, but Indonesia did when it signed a boundary agreement with Australia in 1972.

As recently as last August, Australia's then solicitor-general Justin Gleeson made this same argument in his opening presentation to the PCA when he described the "very deep" trench.

"What that demonstrates is that the physical continental shelves of Australia to the south and Timor-Leste and Indonesia to the north are entirely separate," he told the court in The Hague.

"They are separated by the Timor Trough, and the Timor Trough is indeed deeper than the highest point on the land mass of either Timor-Leste or the Australian continent."

Gleeson did not cite scientific evidence to back his claim that Australia and Timor are indeed "entirely

separate". In fact, the trench is more like a "crumple zone" caused by the collision between the Australian Plate and the Banda Arc to the north of Timor. Australia's insistence on the doctrine of continental shelf has created an unholy mess in the Timor Sea. But East Timor's wins don't mean the dispute will be resolved soon.

As Foreign Minister Julie Bishop has said repeatedly, the compulsory conciliation initiated by East Timor is not legally binding. However, the Labor Party has broken ranks on this issue and it now supports a resolution based on established legal principles, and the right to seek arbitration if an agreement cannot be reached.

East Timor's resistance here and former prime minister Xanana Gusmao initiated these proceedings after he learned that Australia's spy agency had bugged the prime minister's office during the 2004-05 negotiations for a treaty known as Certain Maritime Arrangements in the Timor Sea, which lifted Timor's share of the Greater Sunrise gas and oilfield from 18 per cent to 50 per cent.

The Sunrise gas and oilfield, in which Woodside has a 33 per cent stake, was discovered back in 1974 but it is undeveloped. With more than a billion barrels of oil, the resource is valued at about \$US50 billion (\$66.7bn), with the government taking more than half that amount. But the result of this bold strategy could well prove to be a pyrrhic victory for a country that relies on one near-exhausted oilfield for more than 90 per cent of its revenue.

Don Rothwell, a professor at the Australian National University's college of law, says the five-member Conciliation Commission will produce a report by September that will prove pivotal to the direction of the negotiations. He believes the likeliest outcome is that the report will underpin progress on negotiating a permanent maritime boundary.

However, he says it is possible Australia may reject the report should it prove to be favourable to East Timor's case. "If any country could take that approach it would be Australia, given its track record in that area," he says.

While much of the media focus has been on the horizontal median line, Rothwell agrees that the PCA's view on the vertical (or lateral) boundaries will decide whether East Timor has taken a wise approach in seeking compulsory conciliation at The Hague.

A strict interpretation of law would deliver to East Timor a smaller share of the Greater Sunrise field than under the CMATS treaty that it wants to abolish. It's a huge gamble on the part of a desperately poor nation.

But were the commission to favour shifting the eastern lateral so that East Timor would get a bigger share of Greater Sunrise, then this would raise the prospect of Indonesia exercising its right under international law to be involved in the negotiations.

This would make things even more complicated.

"It's one of the critical issues," Rothwell says. "The starting point will be the existing area covered by the 2002 treaty (which gives East Timor just 18 per cent of Sunrise). Timor is very keen to expand its

continental shelf entitlements to the east and west of the current boundaries. That will be the most contentious issue for the commission. If the commission does (side with East Timor), then Indonesia could pose a challenge.”

Clive Schofield, a professor at the University of Wollongong and another leading law of the sea expert, says CMATS gives East Timor a very good deal and if East Timor attempts to go beyond 50 per cent it could draw Indonesia into the fray something Australia wants to avoid.

“I think that would involve Indonesia, not just Australia,” Schofield says. “That complicates matters substantially. The fundamental reason why Australia was keen on joint arrangements was for the perceived threat that Indonesia would wish to renegotiate the existing seabed boundary from the early 70s.”

Complex disputes of permanent boundaries can drag on. Can Timor achieve more than 50 per cent of Sunrise? Schofield says: “They have a chance to do so in a negotiation, but it may take a very considerable time. Although Australia is bound to negotiate in good faith, it does not have to agree to a boundary it does not like.”

Meanwhile, East Timor’s main source of revenue, the Bayu-Undan gas field, is nearing the end of its life, and the country could exhaust its much-vaunted petroleum fund within a decade. With its young and fast-growing population, East Timor does not have time on its side.

Paul Cleary was an adviser to the East Timor prime minister during the 2004-05 negotiations. His book on this subject is Shakedown: Australia’s Grab for Timor Oil (Allen & Unwin).