

Associate Paper

1 June 2017

Myths, Perceptions and Reality: The Allocation of Marine Resources in the Arafura and Timor Seas – Part One

Professor Vivian Louis Forbes
FDI Associate

Key Points

- Despite generous financial support, there is a perception that Australia has been unfair to Timor-Leste in the allocation of the revenue that may be accrued from the hydrocarbon reserves in the Timor Sea.
- The humanitarian aid and generous assistance given by Australia to Timor-Leste and Indonesia has been mirrored in the provisions of the various maritime boundary agreements reached with those two countries.
- The geographical and legal bases by which Australia claims sovereign rights to the resources on and under its natural continental shelf are clear and unambiguous: no other country has a right to claim sovereignty over the area. The willingness of Australia to forfeit a percentage of the royalties from those areas is a commendable gesture of goodwill.
- Under the 2002 Timor Sea Treaty, Timor-Leste will earn in excess of 90 per cent of all tax revenues from the projects within Joint Petroleum Development Area (JPDA).
- The International Unitisation Agreement for the Greater Sunrise Unit Area reflects the geographical location of the resources. Timor-Leste will receive 18.1 per cent of the Greater Sunrise tax revenues and 81.9 per cent will go to Australia.

Summary

The manner in which the three littoral States of the Arafura and Timor Seas – Australia, Indonesia and Timor-Leste (also referred to as East Timor) – have agreed to manage the maritime space and marine resources in the two regional semi-enclosed seas has been affected by a number of factors.

Indeed, after the 9 January 2017 trilateral statement relating to the case brought against Australia by Timor-Leste at the Permanent Court of Arbitration, it is an opportune time to examine and analyse the facts, assess the implications of fables, expose the fabrications and to highlight the fictional issues that came to the fore in 2002 and that have continued thereafter. It is equally timely to query the provisions in, and the failure, as of May 2017, to enter into force, of the 1997 Agreement between Australia and Indonesia. The 2002 Timor Sea Treaty between Australia and East Timor is also overviewed.

Since 2005, Timor-Leste has sought legal action against Australia. The focus now is on the 2006 Certain Maritime Arrangements in the Timor Sea (the CMATS Treaty), which became effective on 23 February 2007. Legal action is delaying the development of the Greater Sunrise gas field. The effectiveness of these agreements is open to conjecture and is based on three concepts: myth, perception and the realities of geography and international law.

Part One of this analysis explores the issues and problems that have been encountered in managing the resources of the seas to Australia's north and, indeed, the goodwill that Australia has demonstrated when negotiating maritime jurisdiction with its northern neighbours. Part Two will highlight some of the claims that have clouded geographical reality and assess the most recent proceedings at the Permanent Court of Arbitration.

Analysis

A trilateral joint statement was issued on 9 January 2017 relating to the case taken by the Government of Timor-Leste against the Government of Australia at the Permanent Court of Arbitration (PCA), Case No. 2016-10 on conciliation matters. The issue at hand, the process to resolve the differences between the two States over lines of marine resource allocation in the Timor Sea, will be discussed below.

The marine resources contained in the water column, on the seabed and in the substratum of the Arafura and Timor Seas have been a source of contention for the three littoral States for many decades and, since 1982, the focus of academic debate and concerns at the administrative levels of three national Governments. This study acknowledges the neighbourly gestures, financial support and generosity of Australia towards Indonesia and Timor-Leste and the need for Australia, within reason, to continue assistance to enhance the lifestyle of the coastal communities of Timor Island and elsewhere as a gesture of goodwill and good neighbourliness. A plethora of bilateral agreements that were designed to establish the lines of marine resource allocations and the utilisation of maritime space have raised questions and sown doubts about the genuine and sincere manner in which the negotiations were conducted. Indeed, legal action has been taken against the Government of Australia in separate instances by the Governments of Indonesia and Timor-Leste and, in 1995, by the then Government of Portugal at the International Court of Justice.

This discussion centres on the issues and problems and highlights some of the claims that have clouded the geographical reality and, furthermore, the goodwill that Australia has demonstrated when negotiating maritime jurisdiction with its northern neighbours. The

dispute over the lines of resource allocation – maritime boundaries – is locked up in a complicated history of a geopolitically complex region and is not based on legal but, rather, moral, grounds. Australia, it was alleged by the former President of Timor-Leste, had exploited his vulnerable country while negotiating treaties relating to the revenues from potential hydrocarbon exploitation in a disputed maritime territory. The counterargument is that Timor-Leste has, in fact, benefitted from the revenue-sharing treaties generously offered by Australia.

Geographical Reality

The Australian continent covers a surface area of about 7.7 million square kilometres. Although the land surface area of the majority of these islands is small, under the provisions of international law these territories enabled Australia to proclaim marine jurisdiction over large tracts of the ocean and seabed that surround these islands. Australia has the sovereign right to explore and exploit the seabed and water column in its Exclusive Economic Zone (EEZ). Australia has one of the largest EEZs in the world, with the total area being greater than its land surface area. The EEZ generally extends to a 200-nautical mile limit from the coastline of Australia, including the external territories. One nautical mile (M) is equivalent to 1,852 metres – an international standard and unit of measurement used in marine navigation and employed in the Articles of the 1982 UN Law of the Sea Convention.

The natural prolongation (continental margin) of the Australian landmass is extensive: off the north coast there are the Sahul Shelf and Exmouth Plateau; off the south coast is the Tasman Plateau; off the north-east coast is the Queensland Plateau, which covers an extensive area under the Coral Sea; off the central east coast, the width of the continental shelf is relatively narrow, while, off the west coast, the width of the continental margin varies from 100 to nearly 300M. For example, the limiting edges of the Carnarvon Terrace and Naturaliste Plateau are each in excess of 500 km (about 250M) in an east-west extent from the coastline. The continental margin extends generally out to a depth of 2,500 metres.

Maintaining good relations with Indonesia is a cornerstone of Australia's foreign policy and a mutually satisfactory settlement of the entire maritime boundary between Australia and Indonesia was seen as being important to Australia since at least 1971.¹

Indonesia is the largest "archipelagic state" in the world. It consists of five major islands and no less than 35 smaller groups of islands and islets. In total, there are about 17,000 islands and islets, of which about 6,000 are inhabited. With an overall distance of more than 4,800 kilometres from east to west, Indonesia covers an area which is almost as great as that of Europe. Nearly 80 per cent of the area between its geographical extremities consists of seas. The total land area of Indonesia covers about 1,900,000 square kilometres, making it the world's fourteenth-largest territorial entity. (See also Table 1, below.) The main principle underlying Indonesian marine policy is *Wawasan Nusantara*, which implies that 'the seas and the straits must be utilised to bridge the physical separations between the islands,

¹ Chia, L.S. and McAndrews, C., *Environmental Management in South-East Asia: Directions and Current Status*, Singapore: Faculty of Science, National University of Singapore (1981).

Table 1: The Littoral States: Comparative Sizes

Country	Land Area (km²)	Coastline (km)	Cont. Shelf (km²)	EEZ (M²)
Australia	7,686,300	69,650	2,636,000	7,006,500
Indonesia	1,905,000	95,000	2,768,800	5,408,000
East Timor	18,900	760	very narrow	-

regions and manifold ethnic groups.² This principle is seen as being important to maintaining the national unity and security of Indonesia as a state. The concept of the archipelagic state is central to Indonesia's maritime jurisdictional claims and is based on a Dutch-era law, the Royal Territorial Sea Ordinance 1939.³

Timor-Leste includes the eastern half of the island of Timor, the Oecussi (Ambeno) region, an enclave on the north-west portion of the island of Timor, and the islands of Atauro and Jaco. Timor-Leste's potential terrestrial boundary with Indonesia measures about 228 km. The two governments have held a series of talks to determine their terrestrial boundary over several years, but no decision has been forthcoming and, as such, no maritime boundary between the two states has yet been determined. Timor-Leste declared the width of its territorial sea as 12 nautical miles, a contiguous zone of 24M and an exclusive fishing zone of 200M. The continental shelf south of Timor Island is relatively narrow.

Neighbourly Gestures

Australia has been one of Timor-Leste's strongest supporters and partners, although recent rhetoric from some Timor-Leste administrators might suggest otherwise. Timor-Leste is confronted by all the challenges relating to the simultaneous establishment of a stable government, economy and society. Achieving long-term development in Timor-Leste is a goal that will take decades rather than a few years to achieve. This is a massive task and a long term endeavour. Between August 1999 and June 2007, Australia provided over \$570 million in Official Development Assistance (ODA) to Timor-Leste. After raising its aid significantly in 2006-07 to meet the needs of the security and humanitarian crisis, AusAID noted that Australia (Table 2, below) invested a further \$72.8 million in 2007-08. During the stated period, Timor-Leste ranked as Australia's ninety-first largest trading partner, with total merchandise trade valued at \$37 million (up from around \$19 million in 2005-06). Australian exports to Timor-Leste were valued at \$33 million and major items included refined petroleum and motor vehicles. Imports were valued at \$4 million, with coffee the major commodity. Two-way goods and services trade during 2014 was valued at \$218 million. Total revenue to flow to Timor-Leste from the joint development arrangements in the Timor Sea was valued at US\$11.75 million.

² Kent, G. and Valencia, M., *Marine Policy in South-East Asia*, University of California, Berkeley (1985).

³ Forbes V.L. and Bachri, S., 'Geographical Analysis and Computational Study of Indonesia's Maritime Space', *Proceedings of the Second GALOS Conference*, Bali (1996).

Table 2: Australia's Overseas Development Aid Programme

Indonesia: Total Australia ODA Estimated Outcome 2015-16: \$379.1 million

Priorities include increasing and sustaining economic management and growth including addressing environment challenges, supporting the transition to democracy, enhancing human security and stability, and increasing the accessibility and quality of basic social services.

The 2016-17 bilateral agreement budget estimate is \$296.0 million and the 2016-17 Australian ODA estimate is \$365.7 million.

Timor-Leste: Total Australian ODA Estimated Outcome 2015-16: \$99.1 million

Building a functional and effective state, strengthening economic development and management, and improving delivery of services.

This value includes an estimated \$68 million in bilateral funding to the Government of Timor-Leste. The 2016-17 total Australian ODA estimate is \$93.7 million.

Source: Department of Foreign Affairs and Trade, 'Australia's Aid Programme'.
<<http://dfat.gov.au/aid/Pages/australias-aid-program.aspx>>

An Australia/Timor-Leste Development Assistance Strategy for 2007-2011 confirmed Canberra's successful partnership with Dili and provided long-term support in important areas of existing co-operation (such as policing, economic management and budget execution, water supply and sanitation) and important newer areas of engagement for Australia (for example, vocational education, system-wide health service delivery, strengthening the courts and justice system, and the development of key infrastructure necessary for growth like roads and electricity transmission). The new strategy and performance framework was finalised in consultation with the Government of Timor-Leste following that country's parliamentary elections of 30 June 2007. Similarly, the Australia/Timor-Leste Country Strategy 2009-2014 mapped out a framework for how Australian ODA will assist Timor-Leste to meet the Millennium Development Goals.

The bilateral trade outcome for 2014/15 was revised to \$75.4 million; the total ODA estimate for 2015/16 was \$95.3 million, which included an estimated \$68 million in bilateral funding that was managed by the Australian Department of Foreign Affairs and Trade (DFAT). A forward aid investment plan by ODA for Timor-Leste for the period 2015 to 2019 was published on the Department's webpages on 30 September 2015, which listed the strategic priorities and rationale. Total Australian Government support for Timor-Leste in the period 2014-15 was \$117.2 million. The document noted that Timor-Leste had made

substantial progress in the 12 years since independence and continues to take ownership of its development agenda. Indeed, the Government of Timor-Leste had implemented its own 20-year “Strategic Development Plan 2011-2030”, which is ambitious, and rightly so. A heavy reliance on the potential riches garnered from perceived hydrocarbon reserves in the substratum of the seabed in the Timor Sea should not, however, be relied on especially when the price of a barrel of crude oil in March 2016 was a mere US\$37.18 and by May 2017 had only risen to around US\$48 per barrel.

Despite these co-operative efforts and relatively generous financial support, there is a perception among some people in Timor-Leste and elsewhere that Australia has been unfair to the citizens of Timor-Leste in the allocation of the revenue that may be accrued from the exploitation of the hydrocarbon reserves that are perceived to exist in the substratum of the Timor Sea in an area between the two countries (or three, if Indonesia perceives it has a share). Timor-Leste has benefitted from the treaties that it negotiated, willingly, with Australia since 2002. Table 2 is indicative of Australia’s generosity via Overseas Development Aid programmes.

The unstinting humanitarian aid and generous assistance given by successive Governments of Australia towards Timor-Leste and Indonesia, which is only natural and an international obligation, is acknowledged at regional and global levels and extensively documented in the electronic and print media and in academic research. To this end, the generosity is evidenced in the series of maritime boundary agreements that Australia is party to with its neighbours in the Arafura and Timor Seas, where geographical reality is overshadowed by political expediency.

Lines of Resource Allocations in the Arafura and Timor Seas

Australia and Indonesia signed seabed boundary agreements in two sections: first, to define Points A1 to A12 within the western limits of Torres Strait and the Arafura Sea in 1971; and second, two additional sections A12 to A16, and A17 to A25 in the Timor Sea in 1972 that defined the seabed boundary between the two states at the edge of the natural continental shelf on the basis of the 1958 Geneva Convention of the Continental Shelf. A gap in the seabed boundary between Points A16 and A17 was created due to the fact that Australian negotiators had taken into account that the administrators of Portuguese Timor refused to participate at the negotiations. Indeed, the tiny colony was neglected over many years by its colonial masters in Lisbon who, in any case, were in the midst of growing economic and political difficulties at the time. The boundary as determined inferred that it was a maritime boundary between Australia and Indonesia although the word “seabed” appeared in the title of the agreement. The edge of the natural continental shelf was generally accepted by the international community as being the 200-metre isobath. The edge of the natural prolongation of the landmass – the continental margin – is the 2,500-metre isobath. In hindsight, if the Government of Portugal had been party to the agreement, the arrangement

of the alignment may have been slightly different. It is likely, however, that the principle of natural prolongation would have applied.⁴

The geographical and legal bases by which Australia claims sovereign rights to the resources on and under its natural continental shelf are clear and unambiguous. No other country has a right to claim sovereignty over this area. It was the 1945 [President] Truman Proclamation that asserted sovereign rights over the resources on and under the natural prolongation of the landmass which, in essence, signalled the extension of coastal states' jurisdiction.⁵ That Australia was willing to forfeit a certain percentage of royalties to Indonesia and Timor-Leste, in separate agreements, is highly commendable and should be seen as a continued friendly gesture and goodwill towards the littoral States.⁶

Agreements and Treaties: Australia and Indonesia

As stated above, portions of the seabed boundary between Australia and Indonesia in the Arafura and Timor Seas were resolved by agreements in 1971 and 1972. After Indonesia occupied East Timor, Australia and Indonesia signed the 1989 Timor Gap Treaty, which delineated the boundary between East Timor and Australia at the edge of the Australian continental shelf, only about 30M from the south coast of East Timor.⁷ Further agreements and treaties established, in 1981, a Provisional Fisheries Surveillance and Enforcement Line (PFS&EL), a Memorandum of Understanding "Box" in 1974 and 1989, a Zone of Co-operation in 1989 to "close the Timor Gap" and a suite of lines of marine resource allocations in a March 1997 Treaty that included a single-purpose maritime boundary to the north of Christmas Island (Figure 1).⁸

An analysis of the 1997 Maritime Boundary Delimitation Treaty suggests that the provisions in the agreement do not support the confident conclusion suggested by the Parties to the Agreement. In essence, the Treaty established a regime under which Indonesia enjoys practically unfettered sovereign rights to explore, exploit, conserve and manage the marine biotic resources in the water column of the zone of overlapping jurisdiction. By May 2017 (20 years having lapsed), the Agreement had not been ratified by the Parties to it, thereby creating an expansive "grey area" of uncertainty for the fishing industry and, indeed, for the oil and gas industry, operating in the Arafura and Timor Seas.⁹ Administrators in both governments would argue that the agreement is 'working well'. In practical terms, however,

⁴ Forbes, V.L. and Auburn, F.M., 'The Timor Gap Zone of Co-operation', *Boundary Briefing*, No 9, Durham, UK: International Boundary Research Unit, (1991).

⁵ Forbes, V.L., *The Maritime Boundaries of the Indian Ocean Region*, Singapore: Singapore University Press, (1995), p. 267.

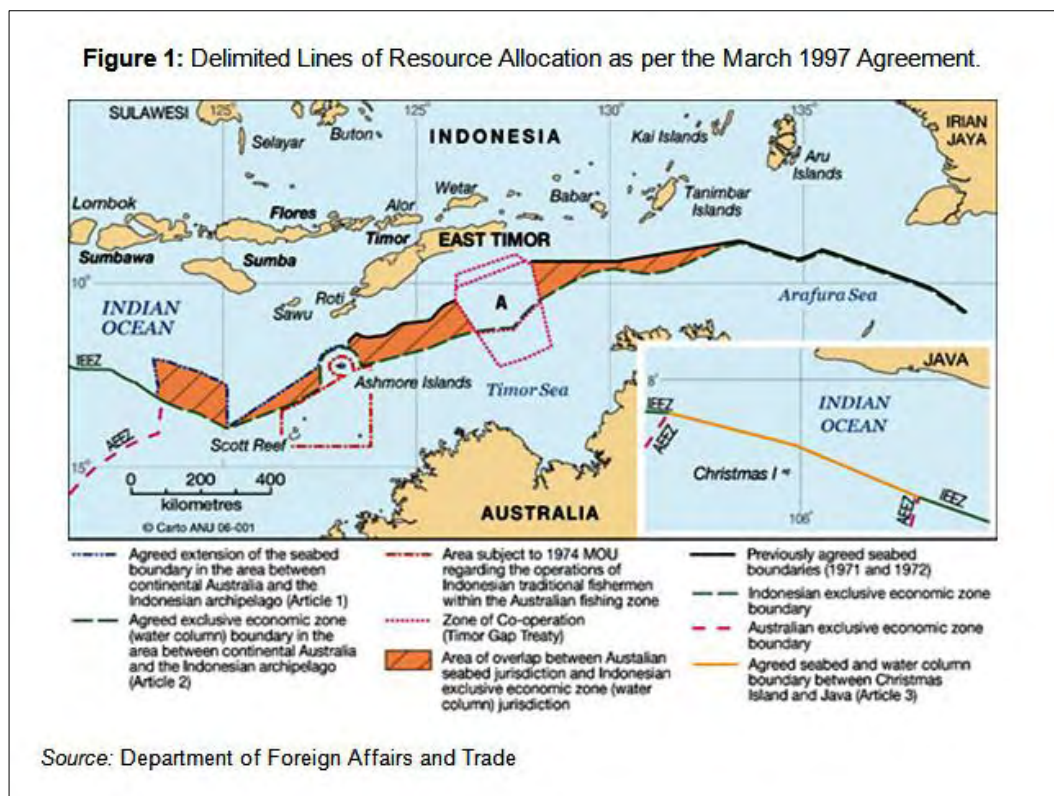
⁶ Triggs, G. and Bialek, D., 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap', *Melbourne Journal of International Law*, Vol. 3, (2002).

⁷ Auburn, F.M. and Forbes, V.L., 'The Timor Gap Treaty and the Law of the Sea Convention', in Mann Borgese, E. and others (Eds), *Ocean Yearbook*, No 10, Chicago: University of Chicago, (1993).

⁸ Forbes, V.L., 'Australia's Maritime Space: Conflict and Cooperation', in Rumley, D., Forbes, V.L. and Griffin, C. (Eds), *Australia's Arc of Instability: The Political and Cultural Dynamics of Regional Security*, Springer: Dordrecht, Netherlands, (2006), pp. 23-48.

⁹ Based on personal communications with staff from Australian embassies and academics throughout 2016.

a different picture emerges, as witnessed by the incidences of human trafficking towards Australia, issues raised by Australian fishers operating in the Timor Sea and problems of delays in oil and gas exploration and exploitation. The rationale employed by Indonesia in failing to ratify the 1997 agreement is open to conjecture.¹⁰



The provisions of the 1997 Treaty would appear to place Australia in a disadvantageous position in that the seabed and substratum rights held by Australia in an area of overlapping jurisdiction might only be enjoyed largely at Indonesia's discretion. On the other hand, the EEZ sovereign rights held by Indonesia would generally be unaffected by any jurisdictional position that Australia may implement consistent with international law with reference to resources on and in the substratum of the natural continental shelf. The provisions of the Treaty that recognise the regimes for ocean management depend on continued goodwill between the governments of the two countries. The Treaty is silent, however, on matters that could be contentious, for example, people smuggling, the apprehension of illegal fishers and other activities that might actively serve to aggravate relationship difficulties through differing interpretations of the Treaty and cultural misunderstandings.¹¹

The Treaty does, however, offer a degree of assurance to those conducting the exploration and exploitation of hydrocarbon resources within the "grey zones". Reservations about certain provisions contained in the treaty relate to the fact that any exploration in the

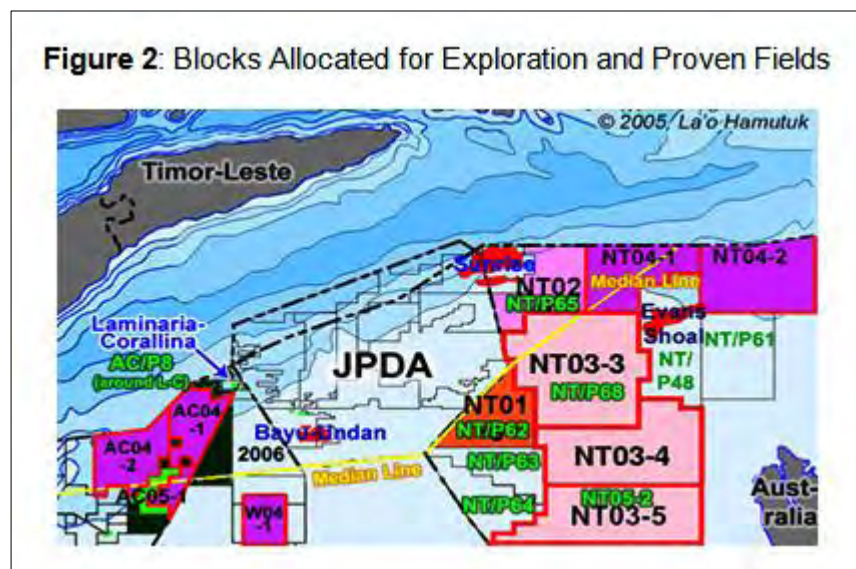
¹⁰ Based on personal correspondence with operators of fishing fleets off the WA north coast and the hydrocarbon industry in the Timor Sea between March 1997 and late 2016.

¹¹ Forbes, V.L., 'Lines of Allocation for Marine Resources in Australia's Northern Waters', *Indian Ocean Review*, Vol. 10, No 1, (1997), pp. 8-12.

seabed under Australian jurisdiction can only commence when permission is granted by Indonesian authorities. The rationale is that it is a matter of courtesy.¹²

The Timor Sea Treaty: Australia and Timor-Leste

On 3 July 2001, the Australian Government announced that Australia and East Timorese/United Nations Transitional Administration for East Timor (UNTAET) representatives had reached an Agreement on a new Timor Sea Arrangement to replace the 1989 Timor Gap Treaty (TGT). Since that moment, the then East Timorese Prime Minister, despite signing the agreement and the subsequent Timor Sea Treaty (TST), has constantly offered unconstructive comments. The TST, signed on 20 May 2002 and subsequently ratified, was intended to build on the extensive assistance that Australia had already provided to Timor-Leste. Since Dili gained its independence, its government has rejected the delineation, instead calling for the boundary to be set midway between Australia and Timor-Leste, thus giving it full possession of the Greater Sunrise Gas Field, as well as the Laminaria-Corralina and Buffalo hydrocarbon reserves (Figure 2).

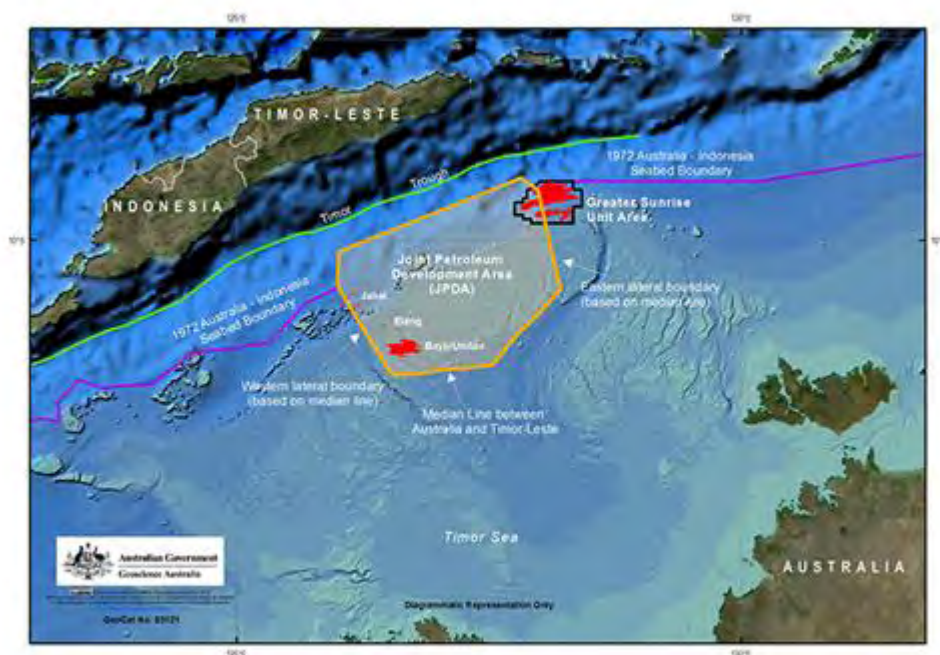


The TST was an interim arrangement allowing for joint petroleum development by Australia and Timor-Leste in the Timor Sea pending a maritime boundary agreement between the two countries. The Timor-Leste Parliament passed the Maritime Zone Act, which proclaimed the country's potential maritime entitlement under international law. Soon after signing the Timor Sea Treaty and the enactment of the Maritime Zone Act, East Timor's then Prime Minister sent diplomatic correspondence to Australia requesting talks on the delimitation of the maritime boundary. The Australian Prime Minister agreed to hold negotiations between the two countries, which resulted in preparatory talks on 12 November 2003 in Darwin followed by twice-yearly talks which began in April 2004. The boundary negotiations were neither a simple process nor an arm-twisting affair.

¹² Schofield, C., 'Minding the Gap: The Australia-East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)', *International Journal of Marine and Coastal Law*, Vol. 22, No 2, (2002), pp. 189-234.

Any discussion of talks with Indonesia relating to the common maritime boundary with Timor-Leste awaits the demarcation of the terrestrial boundary. It is just as important for Timor-Leste to demarcate its terrestrial boundaries and delimit its maritime boundaries with Indonesia. If the lateral maritime boundaries have not been determined between Indonesia and Timor-Leste it would be difficult for the latter to substantiate its claim to the Greater Sunrise deposits which, in any case, is located on the natural prolongation of the Australian continent and well south of the Timor Trough. In a *Note Verbale* available on the UN Division of Oceans and Law of the Sea website, Timor-Leste has objected to Indonesia's claimed archipelagic base points – as revised on many occasions – in the vicinity of two parcels of land: one an enclave and the other an island to the north of Timor Island. Ironically, however, the official Timor-Leste website offers maps that depict the country's Exclusive Economic Zone of 200-nautical mile radius as encompassing many islands under Indonesian sovereignty.

Figure 3: Lines of Resource Allocation: Australia and Timor-Leste



Source: Department of Foreign Affairs and Trade

The Timor Sea Treaty of 2002 between Australia and Timor-Leste established a Joint Petroleum Development Area (JPDA) in the Timor Sea. The designated JPDA replaced "Area A" of the now defunct 1989 Zone of Co-operation. The JPDA is administered jointly by Australia and Timor-Leste. Two major oil and gas fields, the Bayu-Undan, which is being developed by Conoco Phillips and the Greater Sunrise gas project by Shell, along with several minor reserves, are encompassed within the limits of the JPDA and partially outside the polygon, respectively. The Government of Timor-Leste will earn in excess of 90 per cent of all tax revenues from the projects within the JPDA. Indeed, total receipts from the Bayu-

Undan and Kitan fields were in excess of \$591 million, with two production-sharing contracts in production mode and seven other contracts in the exploration stages.

Companies involved in the major projects within the JPDA have been working to ensure effective implementation of the Timor Sea Treaty. The key elements of the Treaty, which is to last for 30 years – that is, until 2032 – are:

- A revenue split of 90 per cent for Timor-Leste and the remainder to Australia from petroleum development activities in the JPDA;
- Deferral of the delimitation of a permanent seabed boundary without prejudice to the rights or entitlements of Australia and Timor-Leste;
- Maintenance of the contractual terms of the existing oil and gas projects;
- Australian jurisdiction over the planned pipeline from the JPDA to Australia;
- Unitisation of the Greater Sunrise Field (which straddles the JPDA and an area under Australian jurisdiction) on the basis that 20 per cent of the field lies within the JPDA and 80 per cent of the field lies within Australian jurisdiction; and
- Twenty per cent of the royalties from Greater Sunrise to go to Timor-Leste. (This figure was subsequently revised upwards to 50 per cent; a generous gesture by Australia).

The Timor Sea Treaty was intended as an interim agreement that is without prejudice to the position of either country on their maritime boundary claims. Development of the oil and gas resources, including the major Bayu-Undan field, is proceeding. Revenues have already started flowing, and it is estimated that Timor-Leste could earn as much as US\$15 billion (\$19.9 billion) in revenues from the Bayu-Undan project alone. The revenue received by Timor-Leste from production in the JPDA and Greater Sunrise is paid into the country's Petroleum Fund, which, as of 2015 (the most recent data available), had a balance of US\$16.218 billion. The Fund balance was expected to fall in 2016 as the petroleum revenues accrued during 2015 were US\$979 million but inflows from hydrocarbon exploitation revenues declined significantly during 2016.

International Unitisation Agreement (IUA) for Greater Sunrise

The IUA, signed by Australia and Timor-Leste on 6 March 2003, provides the secure legal and regulatory environment required for the development of the Greater Sunrise gas reservoirs. Under the Timor Sea Treaty, Greater Sunrise is apportioned on the basis that 20.1 per cent of the field falls within the JPDA and the remaining 79.9 per cent lies in an area to the east of the JPDA over which Australia exercises exclusive seabed jurisdiction. This apportionment reflects the geographical location of the resources. The IUA unitises the reservoirs on the same basis. Legislation implementing the IUA is now in place. Due to the agreed resource split in the JPDA, under the IUA, Timor-Leste would receive tax revenues from 18.1 per cent of the Greater Sunrise resource and Australia would receive the remaining 81.9 per cent.

Those values were redefined to the greater benefit of Timor-Leste in the 2006 negotiations. Therein lies a difference of opinion between the countries, which is mainly driven by parties with vested interests external to Timor-Leste. While Australia is committed to the prompt ratification of the IUA, Timor-Leste Prime Minister Mari Alkatiri has reportedly threatened that his country would delay ratification of the Greater Sunrise IUA 'until Australia accepted negotiations over maritime borders.'

CMATS Treaty

Australia and Timor-Leste entered into the landmark Treaty on Certain Maritime Arrangements in the Timor Sea (the CMATS Treaty), on 12 January 2006. The CMATS Treaty is a further interim agreement that is without prejudice to the position of either country on their maritime boundary claims. The Treaty, together with the earlier IUA, established a framework for the exploitation of the Greater Sunrise gas and oil resources and will realise the equal sharing of upstream government revenues flowing from the project.¹³ The CMATS Treaty represents an opportunity to further underpin the income and development of one of Australia's nearest neighbours while, at the same time, putting on hold the two countries' claims to jurisdiction and maritime boundaries in the Timor Sea for fifty years, to 2056. An exchange of notes was held in Dili, on 23 February 2007, at which the government representatives of the two countries formally notified each other that their domestic processes for the entry into force of the Treaty were completed.

The IUA was brought into force concurrently with the CMATS Treaty and, even though they are, therefore, now legally binding, they remain open to some conjecture. The Treaty reflects the agreed creative solution between Australia and Timor-Leste that was designed to allow the exploitation of the Greater Sunrise gas reservoirs to proceed while suspending maritime boundary claims for a significant period and keeping the current treaty arrangements in place.

As part of the solution found through the CMATS Treaty, although the formal apportionment of Greater Sunrise under the IUA remains the same, Australia will share equally (50:50) the upstream tax revenues from the resource. The Greater Sunrise project could result in transfers of revenue to Timor-Leste of as much as US\$10 billion (\$13.3 billion) over the life of the project. The exact benefit to Timor-Leste and Australia will depend on the economics of the project. Exploitation of the Greater Sunrise reservoirs, and the additional revenue provided under the CMATS Treaty, will assist in securing Timor-Leste's development and economic stability, although too much reliance on the flow of oil is, of course, not wise economic policy.

Australia and Timor-Leste are bound by the Treaty to refrain from asserting or pursuing their claims to rights, jurisdiction or maritime boundaries in relation to the other for 50 years. The two countries undertook not to commence any dispute settlement proceedings against the other that would raise the delimitation of maritime boundaries in the Timor Sea. Consistent with the CMATS Treaty and associated side letters, Australia will be able to continue

¹³ Triggs, G. 'Unitisation of the Greater Sunrise Oil and Gas Deposits in the Timor Sea: A Compromise for Australia and East Timor', *International Energy: Law and Taxation Review*, (2003), p. 205.

regulating and authorising petroleum activities outside of the JPDA and south of the 1972 Australia-Indonesia seabed boundary.¹⁴ That mutual gesture, however, has been overturned by the actions of Timor-Leste in seeking the decision of the Permanent Court of Arbitration in a process that began in August 2016 and in which the Court will offer its verdict in October 2017.

Other initiatives established by the CMATS Treaty include: an independent assessment process at the request of either Party to review the reconciliation of the revenue sharing; Timor-Leste being able to exercise water-column (fisheries) jurisdiction within the JPDA; and the establishment of a Maritime Commission to constitute a focal point for bilateral consultations on maritime matters of interest to the Parties, including on maritime security, the protection of the marine environment and management of natural resources. Perhaps at this point the question can be posed: is this not already an equitable solution?

The various myths and fables, and the implications thereof, will be examined in Part Two of this paper. It will also examine and analyse the facts, expose the fabrications and highlight the fictional issues that came to the fore in 2002 and that have since continued.

About the Author: Dr Forbes is an Adjunct Research Professor at the National Institute for South China Sea Studies, Haikou, China and a Distinguished Research Fellow and Guest Professor at the China Institute for Boundary and Ocean Studies, Wuhan University, Wuhan, China. He is affiliated at the professorial level with other institutions in Australia, China and Malaysia.

¹⁴ In the legal “grey area” where a dual regime of seabed rights and water column jurisdiction presently exists, the latter is awarded to Indonesia and the former to Australia.

Any opinions or views expressed in this paper are those of the individual author, unless stated to be those of Future Directions International.

Published by Future Directions International Pty Ltd.
80 Birdwood Parade, Dalkeith WA 6009, Australia.
Tel: +61 8 9389 9831 Fax: +61 8 9389 8803
Web: www.futuredirections.org.au

Associate Paper

6 June 2017

Myths, Perceptions and Reality: The Allocation of Marine Resources in the Arafura and Timor Seas – Part Two

Professor Vivian Louis Forbes
FDI Associate

Key Points

- Australia maintains that the maritime boundary should reflect the extent of Australia's natural continental shelf, not the median line between it and Timor-Leste. Suggestions that Canberra has robbed Dili of its oil revenue and been unfair in the negotiations of at least three boundary agreements are mischievous and opportunistic.
- Much of the blame for the various myths and perceptions can be placed on false stories published in the media, together with a failure to accept geographical reality and a lack of understanding of the provisions of international law.
- A protracted legal battle with Australia over the Greater Sunrise hydrocarbon deposits runs counter to the economic and security interests of Timor-Leste.
- The domestic security and economic development of Timor-Leste would be better served by giving exploration companies the confidence that they are dealing with stable political entities in which taxation rules are applied transparently and impartially and ethical business practices are maintained.

Summary

This paper continues the discussion begun in [Part One](#) of the manner in which the three littoral States of the Arafura and Timor Seas – Australia, Indonesia and Timor-Leste (also referred to as East Timor) – have agreed to manage the maritime space and marine resources in the two regional semi-enclosed seas. That management has been affected by a number of factors and now is an opportune time to assess the implications of fables, expose

fabrications and to highlight the fictional issues that have been encountered in managing the resources of the seas to Australia's north.

The effectiveness of the agreements concluded thus far is open to conjecture and is based on three concepts: myth, perception and the realities of geography and international law. This paper unpacks some of the rhetoric and rumbles that have clouded the geographical reality and, indeed, the goodwill that Australia has demonstrated when negotiating maritime jurisdiction with the neighbours of its northern seas. Also discussed are the potential impacts of the latest developments in the case brought against Australia by Timor-Leste at the Permanent Court of Arbitration.

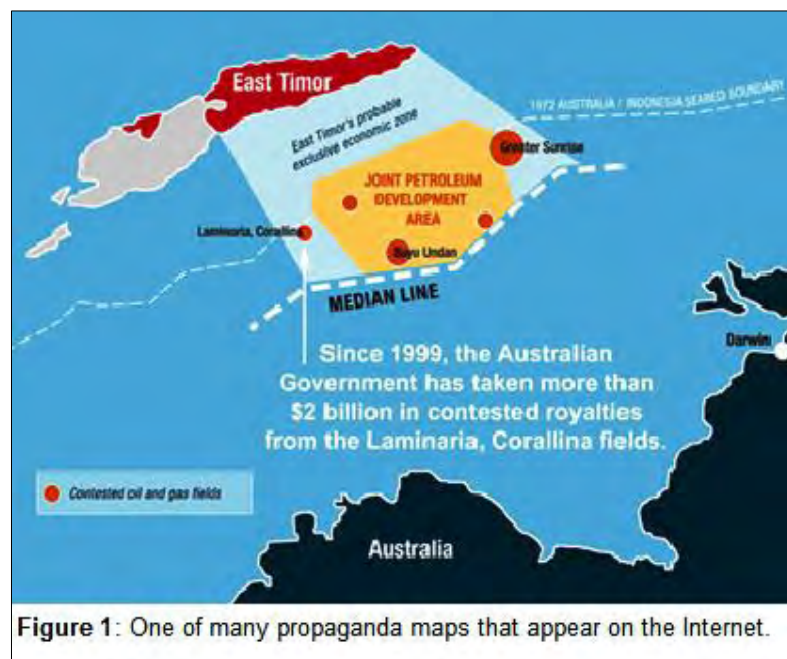
Analysis

Facts, Not Fables

It is well documented that the provisions of the maritime boundary agreements of 1989, 2002 and 2006 were perceived by many as being too generous to both Timor-Leste and Indonesia, indeed, to a degree of fault on the part of the then Government(s) of Australia.¹

In 2006, negotiations between Australian and Timor-Leste created the CMATS Treaty, in accordance with which Timor-Leste agreed to a clause that placed a 50-year hold on negotiating a permanent maritime boundary and to maintain an equal share of the revenues from the Greater Sunrise hydrocarbon deposits. In taking the CMATS Treaty before the Permanent Court of Arbitration (PCA) is the assertion by Timor-Leste that the treaty should be deemed invalid due to allegations of electronic eavesdropping conducted by Australia against the Timor-Leste Cabinet in 2004. It is alleged that the information garnered from this operation gave the then Australian Government an advantage in the negotiations that created the treaty.

The maritime arrangements agreed with Timor-Leste under the CMATS Treaty are in addition to the already generous sharing arrangements within the



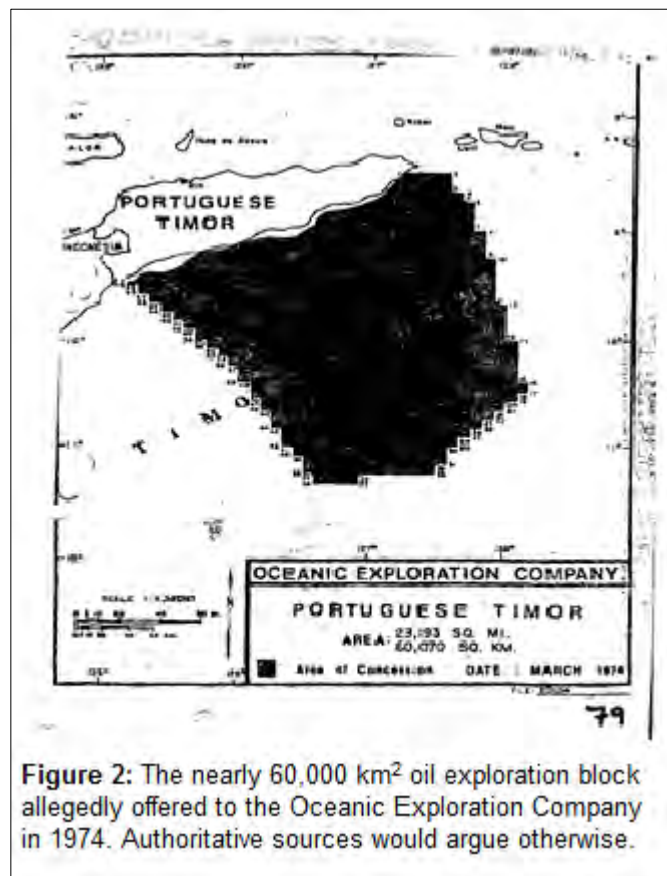
¹ Forbes, V.L., 'Australia's Maritime Space: Conflict and Cooperation', in Rumley, D., Forbes, V.L. and Griffin, C. (Eds), *Australia's Arc of Instability: The Political and Cultural Dynamics of Regional Security*, Springer: Dordrecht, Netherlands, (2006), pp. 23-48.

JPDA under the 2002 Timor Sea Treaty, whereby Timor-Leste receives 90 per cent of revenue from the production of the hydrocarbon resources located therein, which may be worth as much as US\$15 billion (\$19.8 billion). The Timor-Leste Petroleum Fund, set up to receive and administer the revenues it receives from oil and gas sales, now has a balance of over US\$1 billion from the exploitation of the resources in the JPDA alone. The Timor-Leste Government and/or the media report a different version, however, as inferred in Figure 1. Such false reporting offers a warped vision of reality, a distorted view to the international community, false hopes to the citizens of Timor-Leste and is an insult and disregard to Indonesia's sovereign rights.²

Australia has recognised the rights of foreign fishers, in particular, those from the neighbouring Indonesian islands, to operate in the Arafura and Timor Seas provided that they carry out those activities in traditional mode and not as large-scale commercial operations. There are numerous recorded incidences of alien fishers having drifted into Australian territorial waters and abused the regulations and rules that are in place for the sustainable development of the fisheries. Australian law enforcement officers are often hampered in their efforts to enforce the legislation and regulations that are set in place.

Myth

One myth that raised its ugly head following the signing of the CMATS Treaty in 2006 was an allegation that the US-based Oceanic Exploration Company was offered, in 1974, a permit area of nearly 60,700 square kilometres (only slightly smaller than the surface area of Tasmania), that extended from a point near the south coast of Portuguese Timor to the median line with Australia (Figure 2). This myth could be easily challenged and proven to be false. The cartographical records maintained by the authoritative Australian Bureau of Mineral Resources (as it was formerly called) and the American Association of Petroleum Geologists (AAPG) from the 1960s through to 2010 do not depict



² There is resentment towards Australia among many citizens of Timor-Leste based on media reports depicting "rented crowds". Such reporting is repeated in other foreign media, further portraying a false impression.

exploration licence to operate just off the south coast of the then Portuguese Timor and within the relatively narrow natural continental shelf. Any suggestion that Sunrise was discovered in 1974 and that Australian political issues delayed its development, as alleged by the L'ao Hamutuk group, is also misleading, promotes distrust among neighbours and detracts from the reality.

Rhetoric and Rumbles

Some government and NGO officials from Timor-Leste and Australia continue to voice rhetoric for political gains. Unconstructive comments also emanate from groups in Australia, Timor-Leste and the United States, such as the East Timor and Indonesia Action Network (ETAN), Oxfam, La'o Hamutuk and Green Left, and senior members of both the Australian Labor and Democratic Parties, who have accused Australia of blackmail and robbery in attempting to take control of the hydrocarbon reserves in the Timor Sea. Unfortunately, such comments do not accord with the facts. For example, in March 2004, fifty-three US Congress representatives sent a letter to the Australian Government urging it to move fairly and expeditiously in the boundary negotiations with Timor-Leste. This was surprising, especially in the light of the tardiness of the US Government to ratify the 1982 UN Law of the Sea Convention (a step that it was beginning to consider as late as 27 September 2007; as of May 2017, however, it has still not submitted its instrument of ratification to the UN). One cannot, perhaps, but wonder at the motives of those involved, as noted below, for instance.

In late 2004 and early 2005, Ian Melrose, a Melbourne businessman funded a television advertisement that accused the Australian Government of stealing oil and gas supplies from Timor-Leste and was determined to “[up the ante](#)”, by ambushing the then Australian Prime Minister at public events’.

‘I’m concentrating on marginal seats because that’s where the Government will be the most sensitive. The Government can stop this campaign tomorrow just by doing a deal with East Timor that’s fair and reasonable and that the East Timorese accept. I think I’m doing the right thing. If it’s successful I will have done the right thing.’

‘John Howard and Alexander Downer — don’t unfairly take East Timor’s oil and gas revenue which it needs to build hospitals, school and to feed their children. You are not being fair to the East Timorese.’

Indeed, the present author has noted in earlier Future Directions International analyses that the Green Left movement and the Australian Democrats Party have voiced similar opinions:

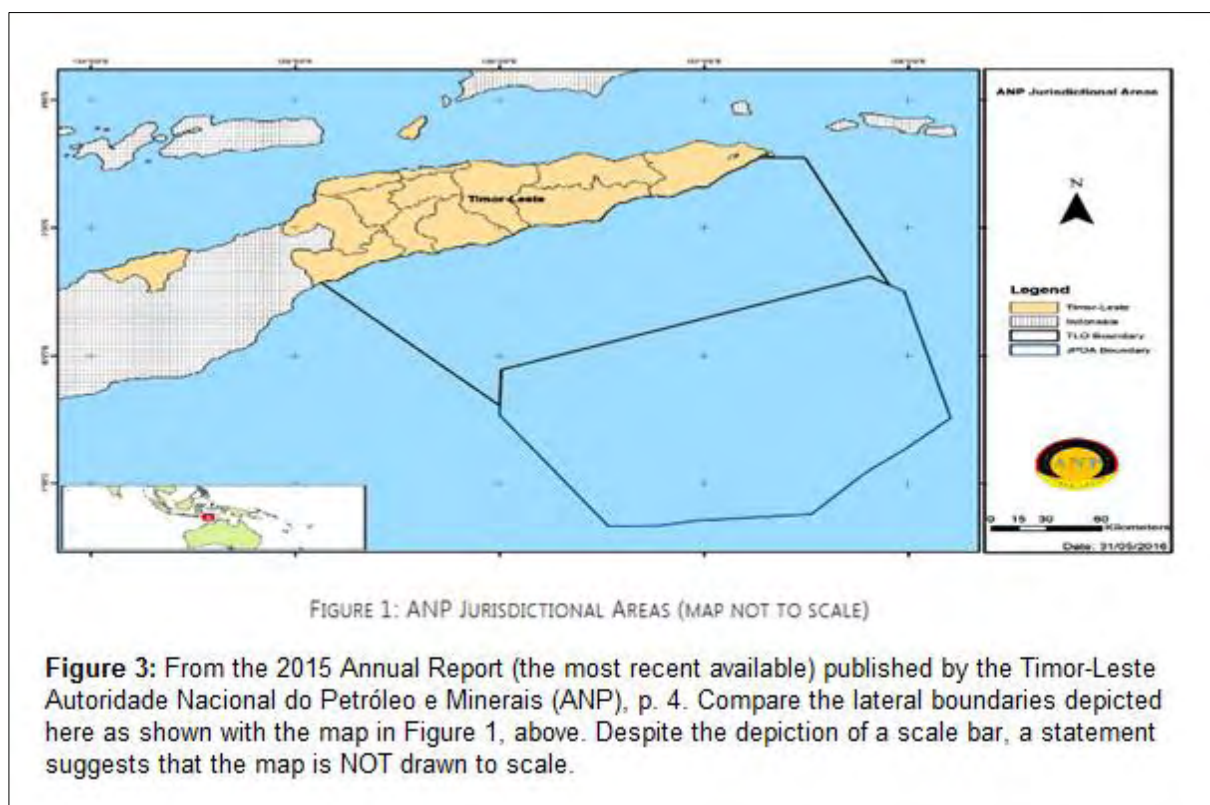
‘Since 1999 ... the Australian Government has been stealing approximately US\$1 million every day from East Timor.’ (Green Left, 26 September 2007)

‘We could have gifted the oil and gas royalties to the Timorese’ (Senator Natasha Stott-Despoja, Australian Democrats Party, 9 April 2007)

Such utterances may have been made in haste, for political gain and without much thought. True, the royalties could have been given; it is, however, the rights to the seabed and water column that are at stake and consideration of the third party lurking in the background. It is alleged that Mr Melrose paid around \$30,000 for a 30-second television commercial, which received maximum exposure during the Australian Open men's quarter-finals tennis match on 26 January 2005. The advertisement alleged that the Federal Government had stolen \$2 billion in revenue from the East Timorese. Speaking to *The Australian*, Melrose noted that he would spend \$2 million in 2005 on advertising campaigns and media stunts aimed at embarrassing the Prime Minister. Such statements, issued by credible publications, can be unhelpful to the Timor-Leste case for compensation, if such were the situation.

Geographical reality has been clouded by economic and social fabrications and fictions of a legal nature in matters relating to a potential maritime boundary in the Timor Sea. The distortions in the legal sense, manipulation of geophysical reality, sprinklings of political ideology and the inputs of many of the self-interest groups have complicated the arguments and brought to the fore the real concerns for the long-term benefits of the citizens of East Timor.

Furthermore, maps and graphics put forward by official and unofficial sources within and outside Timor-Leste to present their case can often be misleading (see, for example, Figure 3).



In the first instance, any set of lateral maritime boundaries projecting southwards from East Timor needs to be negotiated with Indonesia. Indonesia and Timor-Leste have been slow, for

no stated reasons, to resolve their common maritime and terrestrial boundaries. Like many other researchers, the present author has delineated potential lateral boundaries for Timor-Leste through objective interpretations and these do not match the East Timorese versions which, in any case, have been adapted or adopted from external sources (Figure 4, below).



Arbitral Proceedings at the PCA

On 23 April 2013, the Republic of Timor-Leste instituted arbitral proceedings against the Commonwealth of Australia under Paragraph (b) of Annex B to Article 23 of the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002. The Permanent Court of Arbitration acts as Registry in this arbitration. The Government of Timor-Leste argued that the treaties that allocate petroleum revenue in the Timor Sea are invalid because Australia engaged in espionage by bugging the Timorese government offices during talks in 2004 and did not negotiate in good faith.

The arbitration became public in late 2013 after the Australian Security Intelligence Organisation (ASIO) allegedly raided the home of a former Australian Secret Intelligence Service spy, who was identified as Witness K, and the offices of a Canberra-based lawyer. Timor-Leste took action in the International Court of Justice to retrieve the documents and, in March 2014, the court made an interim order that Australia seal the documents and ‘not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending arbitration.’

In September 2014, Timor-Leste agreed to an Australian request to put the proceedings on hold for six months to allow further talks. That period ended in March 2015 and Australia returned the seized information in May, albeit without acknowledging that it had violated Timor’s sovereign rights. Timor-Leste terminated the return of the documents case while reactivating the “espionage” arbitration. Timor-Leste is not able to take its case to the International Court of Justice under the 1982 UN Convention on the Law of the Sea because, in 2002, Australia withdrew from the treaty clause that provides for compulsory dispute resolution.

The present Minister for Foreign Affairs, Julie Bishop, said that the government was disappointed that Timor-Leste had indicated it would resume the arbitration against Australia, challenging the validity of the CMATS Treaty. ‘Australia negotiated CMATS in good faith, and remains committed to it,’ Bishop told *The Saturday Paper*. ‘The framework established by the Timor Sea treaties, including CMATS, provides an alternative, is the best way to unlock the economic benefits of the Timor Sea for both Timor-Leste and Australia, and is entirely consistent with international law.’ Bishop noted that the existing Timor Sea treaties had enabled Timor-Leste to accrue a national Petroleum Fund worth \$US16.8 billion.

In late August 2016, proceedings commenced at the Permanent Court of Arbitration in The Hague in a case brought by Timor-Leste against Australia relating to the Greater Sunrise hydrocarbon fields in the Timor Sea. The fields are estimated to contain around US\$40 billion worth of hydrocarbon resources. The conciliation proceedings fall under the 1982 Convention. Australia has a preference for bilateral negotiations for maritime boundary delimitation, rather than international conventions. This is evident in the manner in which successive Australian Governments negotiated many of the country’s boundaries with neighbouring States prior to 1982. This is an acceptable practice within international law but, in this instance, the geopolitical fact is that it remains a process between two vastly unequal parties.

Latest Developments at the PCA

From 10 to 13 October 2016, the Governments of Australia and Timor-Leste participated in a series of meetings convened by the Conciliation Commission of the PCA. During the course of those meetings the representatives from the two governments agreed to an integrated package of measures intended to facilitate the conciliation process and, ultimately, to achieve an agreement on permanent boundaries in the Timor Sea.

As part of that package of measures, the Government of Timor-Leste decided to deliver to the Government of Australia a written notification of its wish to terminate the 2006 Treaty

on Certain Maritime Arrangements in the Timor Sea pursuant to Article 12(2) of that treaty. The Government of Australia has noted that wish and recognised that Timor-Leste has the right to initiate the termination of the treaty. Accordingly, the Treaty on Certain Maritime Arrangements in the Timor Sea will cease to be in force as of three months from the date of that notification. On the morning of 9 January 2017, a trilateral statement was issued to that effect.

The Commission and the Parties apparently recognise the importance of providing stability and certainty for petroleum companies with interests in the Timor Sea and of continuing to provide a stable framework for the development of the resources within it. In the interest of avoiding uncertainty, the two governments acknowledged their shared understanding of the legal effects of the termination of the CMATS Treaty as follows:

The Governments of Timor-Leste and Australia agree that, following the termination of the Treaty on Certain Maritime Arrangements in the Timor Sea, the Timor Sea Treaty between the Government of East Timor and the Government of Australia of 20 May 2002 and its supporting regulatory framework shall remain in force between them in its original form, that is, prior to its amendment by the Treaty on Certain Maritime Arrangements in the Timor Sea.

The Governments of Australia and Timor-Leste agree that the termination of the Treaty on Certain Maritime Arrangements in the Timor Sea shall include the termination of the provisions listed in Article 12(4) of that treaty and thus no provision of the Treaty will survive termination. All provisions of the treaty will cease to have effect three months after the delivery of Timor-Leste's notification.

Legal Principles

The Australian Government of 2002 was instrumental in creating the Timor Sea Treaty. It was warned that it was too generous in the provisions of the Timor Sea Treaty offered to Timor-Leste, as it was to Indonesia with the provisions of the Timor Gap Treaty of 1989. While acknowledging that Timor-Leste is reliant on the revenue of the new resources, there are signs that the management of the Timorese economy is not in accord with the geographic, economic and social realities of 2017 and, indeed, the future.

The Australian Government has maintained, with firm conviction, its position that the critical boundary between Australia and Indonesia should reflect the extent of Australia's natural continental shelf. Australia has worked closely with the East Timorese people and the UN in support of that country's transition to independence in 2002 and in the years following, especially in the response to the breakdown in law and order there in April 2006 and early 2007. Australia remains at the forefront of international efforts to provide humanitarian assistance to Timor-Leste and even advocated an expanded UN mission in the country to address its immediate and long-term assistance and development needs.

Thus, any suggestions that Australia has robbed Timor-Leste of its oil revenue and has been unfair in the negotiations of at least three agreements are mischievous and opportunistic. Such suggestions are not acting in the best interests of the East Timorese people. If Australia caved in to the demands of the Government of Timor-Leste – no doubt aided by ill-advice and myths – that the maritime boundary be aligned along the median line, then Canberra would have to contend with similar demands from Indonesia with reference to West Timor (Indonesia's territory on Timor Island), and it would probably face a similar demand from Port Moresby relating to Australian territory – several small islands – that are located just a few nautical miles from the southern coast of Papua New Guinea.

It must be stressed that, on principles of geography, Australia's continental shelf ends at the bathymetric axis of the Timor Trough, a major geological feature, which is about 3,500 metres deep, and just 30M from the coast of Timor-Leste. Geography was not intended to be equal. International law infers that where adjoining States "share" the same natural continental shelf, the maritime boundary may be delimited on the median line principle with due consideration to special circumstances, including the configuration of the coastline and the location of offshore islands that come under the sovereignty of the States that are party to a potential agreement.

There is legal principle involved here, which includes sovereign rights to place, space and resources and the nation's birthright should not be sold or given away. The most important factor is to ensure that any wealth accrued from the development of the marine biotic and mineral resources of the Timor Sea and adjacent waters will be directed towards enhancing the quality of life of the people of Timor-Leste and the people of the neighbouring islands. Under the new agreements, Australia will continue to exercise continental shelf jurisdiction outside the JPDA and south of the 1972 Australia-Indonesia seabed boundary. Timor-Leste will be able to exercise fisheries jurisdiction within the JPDA. A Maritime Commission will also be established to enable high-level dialogue on a range of important issues facing Australia and Timor-Leste in the Timor Sea, including the management of security threats to offshore platforms and co-operation in managing fisheries resources.

Conclusion

This narrative does not support the beliefs that this is a story of the rich robbing the poor, that it is a "David vs. Goliath" game, or that Indonesia and Timor-Leste have been bullied into accepting the terms of the agreements when signing the documents. The negotiators of each of the parties were well aware of what was offered at the time of signing the agreements. Much of the blame for myths and perceptions can be placed on the false stories published in the electronic and print media and, for many, not accepting geographical reality and understanding of the provisions of international law and the niceties of international relations and diplomacy. A protracted legal battle with Australia over the Greater Sunrise hydrocarbon deposits runs counter to Timor-Leste's economic and security interests. It would be far better for enhancing domestic security to encourage development by giving the exploration companies surety that they are dealing with each country as a stable political entity, that taxation rules are applied transparently and impartially and ethical business practices maintained. Both parties suggest that they remain committed to their close

relationship and to continue to work together on their shared economic, development and regional interests. It is hoped that Australia is not bullied into conceding into the demands of the Government of Timor-Leste, which just may be misled by those with a vested interest in extracting extra revenue from a depleted coffer that is built on false expectations of a hydrocarbon bonanza.

About the Author: Dr Forbes is an Adjunct Research Professor at the National Institute for South China Sea Studies, Haikou, China and a Distinguished Research Fellow and Guest Professor at the China Institute for Boundary and Ocean Studies, Wuhan University, Wuhan, China. He is affiliated at the professorial level with other institutions in Australia, China and Malaysia.

Any opinions or views expressed in this paper are those of the individual author, unless stated to be those of Future Directions International.

Published by Future Directions International Pty Ltd.
80 Birdwood Parade, Dalkeith WA 6009, Australia.
Tel: +61 8 9389 9831 Fax: +61 8 9389 8803
Web: www.futuredirections.org.au