

THE MEDDLING PRIEST

Time to draw the line between Australia and Timor Leste

FRANK BRENNAN | MAY 13, 2013

Australian governments of both political persuasions have continued to reassure the Australian public that they are decent and special when it comes to dealing with the Timorese over disagreements in the Timor Sea. Time for such special pleading is over. For the good of ongoing relations between these two unequal neighbours, it is time for Australia to commit to negotiating final maritime boundaries, especially if the Timorese and the oil companies working in the Timor Sea cannot reach agreement on the mode of gas production.

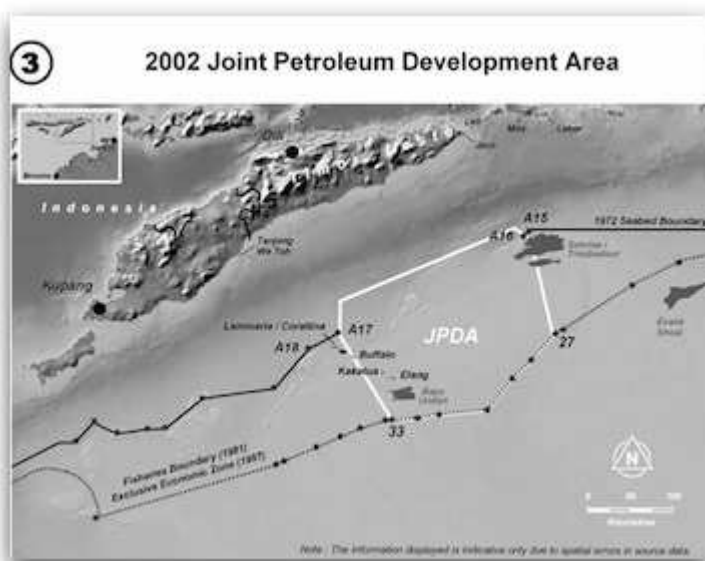
First a little history of a very complex issue. While East Timor was still under Portuguese control, Australia and Indonesia finalised their maritime boundaries in 1972. Indonesia accepted Australia's claim that the Australian continental shelf extended as far as the Timor Trough, resulting in a boundary close to the Indonesian coastline. Portugal never accepted Australia's argument, claiming instead that there were not two separate continental shelves and that the boundary should be a median line between Timor and Australia.

Indonesia invaded East Timor on 7 December 1975. By the time Indonesia and Australia sat down to discuss the unresolved maritime boundary off the coast of East Timor, Indonesia no longer accepted the Australian continental shelf argument. The UN Convention on the Law of the Sea (UNCLOS) had been finalised and it favoured the drawing of a median line. Not wanting to undo the 1972 agreement, Australia and Indonesia agreed to a mutual standoff, sharing any resources off the Timor coastline found between the Timor Trough and the median line.

Once East Timor gained its independence, Australia convinced the new Timorese government to maintain the previous approach of the Indonesians, leaving border negotiations on the long finger. Australia played hardball. On 24 November 2000, Australian officials were so brazen as to warn UN officials who were putting the case for a negotiated Australia-Timor boundary in accordance with recent developments in international law that Australia might opt out of UN judicial processes. The option had already been put to Cabinet and no minister had objected.

The UN officials were warned: 'The more ambitious East Timor's claim, the easier it would be for the Government to pursue this approach in terms of living down domestic controversy.' This was 'Australia's get out of jail card'. On 25 March 2002, Australia did just that. Foreign Minister Alexander Downer said that 'any maritime boundary dispute is best settled by negotiation rather than litigation'.

A joint venture led by Conoco Phillips commenced development of the Bayu Undan natural gas field just north of the median line. Both governments agreed to the joint venturers' proposal that the gas be piped to Darwin for processing. East Timor was to receive 90 per cent of the upstream revenue in taxes and royalties



from any petroleum resources within the Joint Petroleum Development Area (JPDA).

On 20 May 2002, Timor Leste gained its independence. Prime Minister John Howard attended the celebrations. He and Prime Minister Mari Alkitiri had time to step aside and sign the Timor Sea Treaty giving effect to this arrangement.

On the northeast corner of the JPDA lies the Greater Sunrise deposit which lies 20 per cent within the JPDA and 80 per cent within Australian jurisdiction, 150km south-east of Timor-Leste and 450km north-west of Darwin. On 6 March 2003, the two governments signed a unitisation agreement (IUA) settling on the 20:80 split while once again leaving the issue of final boundary determination in abeyance.

To many Timorese, this deal seemed on its face unfair. While the deposit was three times as far from Australia as from East Timor, Australia was to receive more than four-fifths of the tax benefits. Most people's offended sense of fairness was not allayed by the claim that 80 per cent of the deposit was arguably closest to Indonesia and that Indonesia had given away its rights to Australia back in 1972. The Timorese government had received advice from highly regarded international lawyer Vaughan Lowe who argued that the boundary was highly contestable.

To be blunt, Timor wanted more money from the deal, and Australia wanted to put final boundary determination on the very long finger knowing that any such determination would involve Indonesia as well as Australia and East Timor. Timor's Foreign Minister Jose Ramos Horta proposed a compromise in an address to the Lowy Institute in Sydney on 29 November 2004. He then quite reasonably suggested that there should be recourse to the International Court of Justice when 'two friends and neighbours are not able to resolve' their dispute.

He contested Downer's claim that the matter could be resolved without any outside involvement: 'Well, it seems that we are not able to. So let's show good faith, faith in the legal multilateral bodies such as the ICJ, and jointly request mediation or arbitration. We are poor and in no hurry to become rich. We can wait. We are patient, proud people. We are not impressed by pressure or bullying tactics. We have self-respect and a sense of dignity.'

Another treaty, thought to be a win-win, was negotiated between the Howard Government and the Fretilin Government of East Timor led by Alkitiri. The Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) signed on 12 January 2006 split the government revenues for Greater Sunrise 50:50 and put boundary negotiations on hold for 50 years provided that the Greater Sunrise project got the go-ahead. If agreement was not reached between the government regulators and joint venturers within six years, either government could call off all bets.

In April-May 2006, there was much instability and violence in Timor Leste culminating in the resignation of Alkitiri. Ramos Horta then took over as prime minister.

The CMATS Treaty was tabled in the Australian Parliament on the first sitting day of the year in 2007. On 22 February 2007, Downer wrote to the Australian Parliament's Joint Standing Committee on Treaties informing them of his decision to invoke the national interest exemption and proceed with binding treaty action for the CMATS Treaty without the usual 20 sitting days being permitted for the Committee to consider the matter:

Given the importance of the treaties to our interests in the Timor Sea as well as those of our close neighbour, East Timor, the Government would not wish to allow an opportunity to pass to finalise our agreed arrangements for the Timor Sea. It is uncertain when an opportunity would arise after the East Timorese elections period. I therefore consider that the CMATS Treaty action needs to be taken before the usual twenty sitting day period following tabling elapses.

The Committee was not pleased, noting:

The Committee's previous endorsement of the Sunrise IUA should not have been used to infer support for CMATS. The CMATS Treaty contains new and important obligations and raises different issues which should have been subject to the usual process of scrutiny and review. In this instance the national interest exemption should not have been invoked before the Committee was given a reasonable opportunity to consider and report on the Treaty within the Government's timeframe.

Both parliaments gave approval of CMATS despite these reservations about process and political upheaval in Dili.

After the 2007 Timor election, Xanana Gusmao became prime minister. He was known to be a passionate

advocate for the development of Sunrise onshore and to be committed to prompt boundary determination, being less conciliatory and forgiving of Australia's stand than was Ramos Horta. He was adamant that the joint venturers should submit a development plan for Sunrise with provision for onshore gas processing in Timor Leste.

The joint venturers, including Woodside and Shell, were unmoved, claiming that Timor processing of the gas was commercially less viable than the use of a floating facility (FLNG) and also less viable than processing in Darwin. On 29 April 2010, Woodside officially informed the Australian Stock Exchange that 'a floating LNG processing facility best satisfies the key development requirements outlined by the IUA'.

On 18 May, Woodside purported to deliver the development plan to the Timorese regulatory authority for approval. The Timorese threw the proposal back into Woodside's car as it sped away from a Dili meeting. All was not well.

Shell was adamant that FLNG was the only way to go with natural gas marine projects in this part of the world. They are now using this new technology for the Abadi project in Indonesian waters and for the Prelude project in Australian waters.

The Timor Government was unhappy with the lack of movement on Sunrise and the placing of border determinations on the ever long finger. On 7 December 2012, the anniversary of Indonesia's 1975 invasion of East Timor, Timorese Foreign Minister Jose Luis Guterres met with Prime Minister Julia Gillard in Canberra and presented a formal letter indicating dissatisfaction with CMATS.

Gillard and Guterres agreed not to engage in megaphone diplomacy. The Timorese had been going to institute the legal processes earlier but decided to wait until Australia secured its seat on the UN Security Council, an appointment strongly supported by Timor Leste which prides itself on being a friend of Australia. Foreign Minister Bob Carr visited Dili on 16 December 2012 but did not raise the issue.

Having long investigated their options, the Timorese obtained legal advice from two of the world's leading international lawyers, Sir Elihu Lauterpacht and Vaughan Lowe. On 7 February 2013, Bob Carr assured the Australian Senate: 'We have received no indication from Timor-Leste that would suggest CMATS would be terminated.' This assurance caused some surprise to those in the know in Dili.

Australia's previous Ambassador to Timor, Margaret Twomey, was sent as a special envoy to Dili. Just before he resigned from the ministry, Martin Ferguson who has always worked closely with Alfredo Pires, East Timor's Natural Resources Minister, came to Dili on 22 February 2013 assuring the Timorese about his availability for ongoing discussions about resource development in the Timor Sea. Then came the bombshell announcement — not from the Timorese who had remain silent as agreed, but from the Australians.

On 3 May, Foreign Minister Bob Carr and Attorney General Mark Dreyfus issued a joint press release saying:

Timor-Leste notified Australia on April 23 that it has initiated arbitration under the 2002 Timor Sea Treaty of a dispute related to the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS).

The arbitration relates to the validity of the CMATS treaty. Timor-Leste argues that CMATS is invalid because it alleges Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage.

These allegations are not new and it has been the position of successive Australian Governments not to confirm or deny such allegations.

However, Australia has always conducted itself in a professional manner in diplomatic negotiations and conducted the CMATS treaty negotiations in good faith.

The political leadership in Timor Leste is losing patience with Australian claims to both decency and exceptionalism. On 20 May, Timor Leste will celebrate its 11th anniversary of independence. Their government leaders think it is now time to start the painstaking work of determining their maritime boundaries with Australia.

Australia's game of pleading exemption from UN determination processes while delaying two party negotiations for decades has run its course. Especially if the Sunrise joint venturers have no intention of processing gas onshore in Timor Leste, the Timorese deserve 'permanent certainty' about their maritime boundaries.

Mind you, no lawyer can confidently predict the outcome. But the long finger game is now generating more mistrust than room for negotiation. It's time to draw the line, seeking more legal and commercial certainty lest the gains from the resources under the sea be lost together with the friendship between good neighbours. The Timorese expect nothing more than that we Australians act decently and fairly while they consider the complex options for future resource development.



Fr Frank Brennan SJ is professor of law, director of strategic research projects (social justice and ethics), Australian Catholic University, adjunct professor at the College of Law and the National Centre for Indigenous Studies, Australian National University. He travelled to Timor Leste last week at the invitation of the Government of Timor Leste to learn of their concerns. He wrote The Timor Sea's Oil and Gas: What's Fair (Australian Catholic Social Justice Council, 2004)

SUBMITTED COMMENTS

JIM JONES | 14 MAY 2013

Congratulations ES and Father Frank for this article. What a disappointment Bob Carr has turned out to be.

WILL PETERS | 14 MAY 2013

Finalising the deal might be good, but it is clear that East Timor keeps moving the goal posts and is not sticking to the treaties it has agreed to. Surely East Timor should keep its word.

JOE CASTLEY | 14 MAY 2013

Thanks for a wonderfully informative piece, Frank. It seems to me that Australian governments should die of shame rather than fail in decency and fairness to Timor Leste.

EDWARD F | 14 MAY 2013

As incisive and just as ever, Frank. Good on you. I think we need to be very careful in our dealings with Timor Leste that we don't come across as the national equivalent of the school bully.

CLEMSCHAPER | 14 MAY 2013

The old story, politicians never have enough money. Too much of it is squandered. We as Australians should do the honorable thing and settle with those poor people, the Timorese. The oil companies always manage to get enough to record exorbitant profits. We have become a sad society.

PATRICIA R | 14 MAY 2013

Well and truly said, Fr Brennan. I feel ashamed as an Australian that we have treated one of the poorest nations on earth so shabbily. The need in Timor-Leste is overwhelming and the rates of maternal, infant and child mortality exorbitant. The original treaty was signed with an invading and occupying power! Why would the Timorese not want to move goalposts to ensure that it is their country that benefits to the maximum.

ANDREW (ANDY) ALCOCK | 14 MAY 2013

This article reveals that Australian leaders have not been acting in good faith. Howard withdrew Australia from UNCLOS to get a better deal in relation to the oil and gas in the Timor Sea - thereby shifting the goalposts so that the richest country in the region is ripping off the poorest. I hope Timor-Leste succeeds in its appeal. Australia has sold out the East Timorese on too many occasions.